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SPACE COAST COMMUNITY LAW SCHOOL

The Space Coast Community Law School, a project of the Brevard Bar Foundation, offers FREE legal seminars to the public on a variety of topics. Seminars are presented by local judges and attorneys and address general legal concepts. The setting is informal and general questions are welcome. Seminars are hosted centrally in Brevard County at the Viera Courthouse, and are held between 6:00 – 8:00 p.m., allowing those with daytime jobs to attend. Current and relevant topics are presented by local legal professionals to the public.

On behalf of the judges and lawyers, active and retired, who are members of the Vassar B. Carlton American Inn of Court, we hope you find this FAQ booklet informative and of interest in your pursuit of knowledge within the field of law.

FREQUENTLY ASKED QUESTIONS: MENTAL CAPACITY & SUBSTANCE ABUSE

Judges and lawyers who are members of The Vassar B. Carlton American Inn of Court recognize the importance of furthering legal knowledge within their communities. As part of their continuing commitment, the Inn members undertook a special project in 2016 to produce a consumer-friendly booklet of frequently asked questions on legal topics related to mental capacity and substance abuse. This complimentary booklet is presented to the Space Coast Community Law

School to assist them in fulfilling their mission of offering a valuable educational community service to people who have a need, an interest, or just a thirst for knowledge about the law.

THE VASSAR B. CARLTON AMERICAN INN OF COURT

Founded in 1992 by Judge Clarence T. Johnson, Jr., the Vassar B. Carlton American Inn of Court acts as a tribute to Justice Carlton's service to our legal community on a county and statewide basis. The Inn of Court is designed to promote legal excellence, civility, professionalism and ethics in the legal arena.

The Inn members meet monthly and participate in various programs that focus on the practical and ethical aspects of practicing law. Each program is designed to help share insights into the legal and judicial process and all include an element of ethics and professionalism.

The Vassar B. Carlton Inn of Court has received numerous awards. Most recently, the Inn was awarded Platinum Level Distinction in the Achieving Excellence Program for 2010-2011. The Achieving Excellence program is designed to encourage effective practices in the five core competencies; namely Administration, Communications, Programs, Mentoring, and Outreach Activities.

I. GUARDIAN ADVOCACY
Leslie J. Castaldi

What is guardian advocacy?

Guardian advocacy is a process that addresses the needs of persons over 18 years of age with certain developmental disabilities, who are unable to make decisions about some, but not all, of their needs. The guardian advocate has the legal authority to act on behalf of the developmentally disabled person. A guardian advocacy is less restrictive and less expensive than a guardianship.

Does guardian advocacy require a determination of incapacity?

No. The individual (called "the Ward") must have a developmental disability, as defined by statute, manifested before the age of 18 and constitutes a substantial hardship that is expected to last for the person's entire life. Section 393.063(10), Florida Statutes, defines "developmental disability" as at least one of the following: Intellectual disability; Cerebral palsy;Autism;Spina bifida; Prader-Willi Syndrome.

No determination of incapacity is required. Rather, the individual must lack the ability to perform some, but not all, tasks necessary to take care of his or her person, property, or estate. Therefore, a guardian advocacy is not appropriate for a person who is totally incapacitated.

Does a guardian advocate need an attorney?

No, a guardian advocate usually does not need to be represented by an attorney. However, if the guardian advocate is delegated rights that involve property other than the right to be the representative payee for government benefits (for example, Social Security benefits), the guardian advocate must hire an attorney. In addition, the Court may require that the guardian advocate be represented by an attorney.

The Court will appoint an attorney to represent the developmentally disabled person in the guardian advocacy proceedings.

What are the powers and duties of a guardian advocate?

The guardian advocate has the same powers and duties as a guardian under Chapter 744 of Florida Statutes, as well as any powers and duties assigned by the Court.

Who may serve as a guardian advocate?

Any resident of Florida who is 18 years old or older may serve as a guardian advocate.

A nonresident of Florida may serve as a guardian if he or she is:

- Related by lineal consanguinity to the individual;
- A legally adopted child or adoptive parents of the individual;
- A spouse, brother, sister, uncle, aunt, niece, or nephew of the individual, or someone related by lineal consanguinity to such person; or
- The spouse of a person qualified to be a guardian advocate.

Lineal consanguinity is the relationship between blood relatives where one is a direct descendant of the other. For example, a person has consanguinity with their mother, grandmother, and daughter.

Persons who may not be appointed as a guardian ad litem include:

- A person convicted of a felony;
- A person, due to an incapacity or illness, is incapable of discharging the duties of a guardian advocate;
- A person who has been judicially determined to have committed abuse, neglect, or abandonment against a child (as defined in Section 39.01 or Section 984.03(1), (2), and (37), Florida Statutes).
- A person who has been found guilty or entered a plea of nolo contendere or guilty to certain crimes outlined in Section 435.04, Florida Statutes (for example, sexual misconduct with a developmentally disabled person or child, elder abuse, assault on a child, etc.);
- A person who provides substantial services to the developmentally disabled person in a business or professional capacity; and

- A creditor of the developmentally disabled person.

What other requirements might a potential guardian advocate have to satisfy?

A guardian advocate is required to undergo a credit and criminal background investigation. In certain situations, the Court may waive these requirements

In addition, a guardian advocate is required to receive a minimum of 8 hours of instruction and training through a court-approved organization (for example, a community college) within 4 months of being appointed. The Court may waive these requirements on a case-by-case basis, considering the education and experience of the guardian advocate, the duties assigned to the guardian advocate, and the needs of the developmentally disabled person.

Does the guardian advocate have any reporting requirements?

Yes. The guardian advocate must file initial reports within 60 days of being appointed. The guardian advocate must file an initial plan that addresses the following:

- The provision of medical, mental, or personal services for the individual;
- The provision of social and personal services for the individual;
- The place and kind of residential setting best-suited for the needs of the individual;
- The health and accident insurance or any other government benefits that may apply or to which the individual may be entitled;
- Any physical or mental health examinations that may be necessary to determine the individual's medical and mental health needs.

If the Court has delegated any authority to the guardian advocate over the individual's finances, other than being designated as the representative payee for government benefits, the guardian advocate must file an initial inventory of the individual's property.

Each year, the guardian advocate is required to file an annual plan and, if appropriate, an annual accounting of the individual's property.

What effect does a guardian advocacy have on advanced directives and durable powers of attorney?

The Court must determine whether any existing advanced directives or powers of attorney are valid and sufficiently address the needs of the developmentally disabled person. If they do, the Court may not appoint a guardian advocate. The Court may modify or revoke the authority of a health care surrogate to make health care decisions, upon proper notice. However, the Court may not suspend the powers of an agent designated in a durable power of attorney unless the Court finds that the durable power of attorney is invalid or that the agent has abused his or her powers.

II. BAKER ACT
Troy Stephan

Involuntary Examinations

The **Florida Mental Health Act of 1971** (Florida Statute 394.451-394.47891[1] (2009 rev.)), commonly known as the "**Baker Act**," allows the involuntary institutionalization and examination of an individual.

The Baker Act allows for involuntary examination (what some call emergency or involuntary commitment). It can be initiated by judges, law enforcement officials, physicians, or mental health professionals.

What happens if a person refuses to consent to treatment or if the person is not competent to consent to treatment?

The person must be discharged within 24 hours from the receiving facility or three (3) working days from the treatment facility unless a psychiatrist initiates a Petition for Involuntary Inpatient or Outpatient Treatment within 24 hours. A second psychiatrist or psychologist must provide a second opinion and sign the petition. The petition is then filed in circuit court within two (2) days of the request to discharge. A court hearing must be set within five (5) days unless the person requests and is granted a continuance. The person is entitled to an attorney during the hearing.

What evidence is necessary to involuntarily commit a person?

There must be evidence that the person:

- possibly has a mental illness (as defined in the Baker Act).
- is a harm to self, harm to others, or self neglectful (as defined in the Baker Act).

How long do involuntary examinations (commitments) last?

Examinations may last up to 72 hours after a person is deemed medically stable and occur in over 100 Florida Department of Children and Families-designated receiving facilities statewide.

What happens after a person is involuntarily examined?

There are many possible outcomes following examination of the patient. This includes the release of the individual to the community (or other community placement), a petition for involuntary inpatient placement (civil commitment), involuntary outpatient placement (outpatient commitment or assisted treatment

orders), or voluntary treatment (if the person is competent to consent to voluntary treatment and consents to voluntary treatment). The involuntary outpatient placement language in the Baker Act took effect as part of the Baker Act reform in 2005.

Criteria & Eligibility

Does the Florida Mental Health Act prevent a practitioner/provider from Baker Acting an individual who is under the influence of an illicit substance or alcohol at the time of the Baker Act ?

Coexisting thought or mood disorders[1] with addiction is to be expected with large numbers of persons meeting the Involuntary Examination criteria, including the definition of mental illness. As long as the thought or mood disorder is sufficient to justify the need for the voluntary or involuntary examination, it is irrelevant whether there is substance impairment, developmental disability, or antisocial behavior.

Is an Autistic person behaving violently subject to the Baker Act?

To initiate an involuntary examination under the Baker Act, there must be a diagnosis of mental illness consistent with the definition in the law, and refusal or inability to determine whether an exam is needed, and passive or active danger. If any one of these isn't present, an initiation wouldn't be appropriate.

Just being a threat to self or others (active danger) wouldn't be sufficient unless it resulted from a mental illness. Autism is a diagnosis under chapter 393 governing developmental disabilities that is excluded from the legal definition of mental illness: 394.455(18) "Mental illness" means an impairment of the mental or emotional processes that exercise conscious control of one's actions or of the ability to perceive or understand reality, which impairment substantially interferes with a person's ability to meet the ordinary demands of living, regardless of etiology[1]. For the purposes of this part, the term does not include retardation or developmental disability as defined in chapter 393, intoxication, or conditions manifested only by antisocial behavior or substance abuse impairment.

393.063 Definitions. For the purposes of this chapter, the term: (3) "Autism" means a pervasive, neurologically based developmental disability of extended duration which causes severe learning, communication, and behavior disorders with the age of onset during infancy or childhood. Individuals with autism exhibit impairment in reciprocal social interaction, impairment in verbal and nonverbal communication and imaginative ability, and a markedly restricted repertoire of activities and interests.

While a person cannot be "Baker Acted" for dangerous behavior resulting from Autism, a law enforcement officer may "have reason to believe" the person has a mental illness in addition to autism. In such a situation, the initiation of an involuntary examination may be appropriate.

Clinical Records & Confidentiality

Clinical Record

Does a person have a right to see his or her own clinical record?

Yes. The Baker Act requires that persons have reasonable access to their clinical records, unless such access is determined by the person's physician to be harmful to the person. Facilities and mental health professionals should make every possible effort to ensure persons have this access. Facilities should have policies and procedures addressing what is "reasonable access," what is "harmful," who makes the decision to permit access, who is authorized to restrict access, how the record will be reviewed to determine if harmful material is included, how the record's integrity will be protected, and if a copy of the record will be provided to the person, if requested.

Also, does a facility need an individual to sign a release in order to provide the individual with his own records?

There is no prohibition to this practice, assuming it applies to all patients served by the facility. The Baker Act and HIPAA allow a person to access to his/her own records, but the FAC requires facilities to develop its own policies and procedures to carry out this duty, as follows:

394.4615 Clinical records; confidentiality. (10) Patients shall have reasonable access to their clinical records, unless such access is determined by the patient's physician to be harmful to the patient. If the patient's right to inspect his or her clinical record is restricted by the facility, written notice of such restriction shall be given to the patient and the patient's guardian, guardian advocate, attorney, and representative. In addition, the restriction shall be recorded in the clinical record, together with the reasons for it. The restriction of a patient's right to inspect his or her clinical record shall expire after seven (7) days but may be renewed, after review, for subsequent seven (7)-day periods.

65E-5.250 Clinical Records; Confidentiality. (5) Each receiving facility shall develop detailed policies and procedures governing the release of records to each person requesting a release, including criteria for determining what type of information may be harmful to the person, establishing a reasonable time for responding to requests for access, and identifying methods of providing access that ensure clinical support to the person while securing the integrity of the record.

The following summary of a federal appellate case may also be of interest:

Chris DOE, et al v. Dr. Carlos Stincer, et al, Case No. 96-2191-CIV-MORENO. U.S. District Court Judge Frederico Moreno permanently blocked the state from enforcing a Florida statute that exempts certain medical records from disclosure to patients. The court held that those provisions discriminate illegally against persons with mental disabilities in Florida. The case filed by the ACLU and the Advocacy Center for Persons with Disabilities was filed in 1996 after the Florida Legislature enacted a statute that exempted hospitals from the requirement to disclose to patients certain records of treatment for any "mental or emotional condition" at health facilities, restricting patient access to records of their treatment when they had been involuntarily hospitalized under the Baker Act. The U.S. District Court held that the exemption improperly discriminates against the mentally disabled and is prohibited by the ADA.

Alternatives to the Baker Act

What can be done to prevent the unnecessary transfer of frail elders from nursing homes to psychiatric facilities?

These transfers can cause great harm to these individuals. Regarding the discussion of harm to transfer of elders from long-term care facilities to Baker Act facilities, research shows a real danger from this practice. A journal article titled “A Brief Literature Review of the Effects of Relocation on the Elderly” September 23, 2002; has the following highlights:

Relocation can have negative physical and psychological effects on patients in acute care and residents of long-term care. These effects are more pronounced in elderly populations, particularly frail elderly patients and long-term care residents. Acute care patients and long-term care residents are at an elevated mortality risk when they are relocated. Studies examining the effect of transferring (relocating) different patient groups between institutions have found that transferred patients were at an elevated mortality risk between 1.99 and 3.76 times greater than those patients who were not transferred. Contradictory studies that have not found an increased mortality risk for transferred patients often have methodological problems. Some of the methodological concerns include small sample sizes, inadequate statistical power, and a lack of control groups. Based on 40 years of documentation and observation, Relocation Stress Syndrome was recognized as an official Nursing diagnosis in 1992 and was defined as the physiologic and psychosocial disturbances that result from transfer from one environment to another. According to the U.S Government’s Administration on Aging, Transfer Trauma, as a result of sudden and unexpected relocation, is associated with depression, increased irritability, serious illness, and elevated mortality risk for the frail elderly.

The Florida Health Care Association has developed a model policy and procedure titled “Behavior Management/Aggression Control/Baker Act Guidelines”. This document has the basic standards that a good nursing home should follow before a voluntary or involuntary transfer under the Baker Act takes place. It might be the core of what could be promulgated by DOEA or AHCA to better protect our elders. It is included in the state’s Baker Act Handbook in the chapter dealing with long-term care facilities.

Minors

How is a minor defined?

A minor is any person under 18 years old who has not been married and has not had a court remove the disability of nonage[1]. However, most references in the Baker Act are to persons “under the age of 18.” Therefore, one must consider a person age 0-17 as a minor for the purposes of the Baker Act who lacks the legal capacity to provide consent for admission or treatment. A minor must provide assent (agreement) to be voluntary.

Who is a child’s guardian?

A child’s guardian is generally one or both of his or her natural or adoptive parents. After a divorce, guardianship belongs to the parent or parents with custody. The mother of a child born out-of-wedlock is guardian of the child. In the absence of a parent, a guardian must be appointed by a court and can be a relative or other person interested in the welfare of the child. (Florida laws governing dissolution of marriage and parental responsibility have changed some of the language dealing with divorce and custody).

Informed Consent & Consent to Treatment

Does the court have authority to appoint a guardian advocate for a child when the child's guardian is refusing to consent for treatment?

A child's natural guardian has the power to consent or refuse consent to treatment on behalf of the minor, just as does a guardian (plenary or "of person") appointed by the court for an adult.

In the case of an adult, a request can be filed for the court to investigate any complaints against a court-appointed guardian's decision-making. In the case of a minor whose parent's refusal to consent to medically necessary treatments might rise to the level of "medical neglect", a report to the DCF Abuse Registry should be made.

There have been occasions when the natural parents (guardians) of a minor have been unavailable and the child's caretaker isn't authorized to consent to psychotherapeutic medications (chapter 743, FS) in which a guardian advocate was appointed to make such treatment decisions. This is not the case where the parents refuse consent.

Marchman Act
(Florida's Substance Abuse Impairment Act)
General

Can a person under 18 consent to treatment at the ER for detox?

Yes, a person under the age of 18 can consent to voluntary substance abuse services.

397.601 Voluntary admissions. (1) A person who wishes to enter treatment for substance abuse may apply to a service provider for voluntary admission. (2) Within the financial and space capabilities of the service provider, a person must be admitted to treatment when sufficient evidence exists that the person is impaired by substance abuse and the medical and behavioral conditions of the person are not beyond the safe management capabilities of the service provider. (3) The service provider must emphasize admission to the service component that represents the least restrictive setting that is appropriate to the person's treatment needs.

(4)(a) The disability of minority for persons under 18 years of age is removed solely for the purpose of obtaining voluntary substance abuse impairment services from a licensed service provider, and consent to such services by a minor has the same force and effect as if executed by an individual who has reached the age of majority. Such consent is not subject to later disaffirmance based on minority. (b) Except for purposes of law enforcement activities in connection with protective custody, the disability of minority is not removed if there is an involuntary admission for substance abuse services, in which case parental participation may be required as the court finds appropriate.

Such services must be provided by a licensed service provider. This is defined as:

397.311 Definitions. As used in this chapter, except part VIII, the term: (33) "Service provider" or "provider" means a public agency, a private for-profit or not-for-profit agency, a person who is a private practitioner, or a hospital licensed under this chapter or exempt from licensure under this chapter.

397.405 Exemptions from licensure. The following are exempt from the licensing provisions of this chapter: (1) A hospital or hospital-based component licensed under chapter 395. (5) A physician or physician assistant licensed under chapter 458 or chapter 459. (6) A psychologist licensed under chapter 490. (7) A social worker, marriage and family therapist, or mental health counselor licensed under chapter 491. (11) A facility licensed under s. 394.875 as a crisis stabilization unit. The exemptions from licensure in this section do not apply to any service provider that receives an appropriation, grant, or contract from the state to operate as a service provider as defined in this chapter or to any substance abuse program regulated pursuant to s. 397.406. Furthermore, this chapter may not be construed to limit the practice of a physician or physician assistant licensed under chapter 458 or chapter 459, a psychologist licensed under chapter 490, a psychotherapist licensed under chapter 491, or an advanced registered nurse practitioner licensed under part I of chapter 464, who provides substance abuse treatment, so long as the physician, physician assistant, psychologist, psychotherapist, or advanced registered nurse practitioner does not represent to the public that he or she is a licensed service provider and does not provide services to individuals pursuant to part V of this chapter. Failure to comply with any requirement necessary to maintain an exempt status under this section is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Your hospital ER is an authorized service provider exempt from licensure under the Marchman Act for substance abuse services. However, if the service is for medical treatment and not for substance abuse treatment, a minor generally doesn't have any authority to provide consent for his or her own treatment, unless a court has emancipated the minor from the parents. Other laws govern provision examination and treatment of persons with emergency medical conditions and in circumstances in which a minor's legal guardian isn't available. All of these circumstances are covered in Appendix 110 of the 2011 Baker Act Handbook.

Involuntary Admissions – Marchman Act

How is an involuntary admission under the Marchman Act initiated?

The Marchman Act offers four methods of initiating an involuntary admission. These include:

Protective Custody by a law enforcement officer.

An emergency admission with a certificate of a physician. An Alternative involuntary admission for a minor by the minor's guardian.

Court-ordered assessment.

If the assessment conducted in accord with one of the above by a "Qualified Professional" documents that the criteria is indeed met, a petition for involuntary treatment can then be filed with the court.

Protective Custody – Law Enforcement

Where can a law enforcement officer take a person under the involuntary provisions of the Marchman Act?

Under the Marchman Act Protective Custody initiated by law enforcement, the officer is only permitted to take the person to their home, the hospital, or to detox with the person's consent, whichever the officer believes is the most appropriate setting for the person. If the person doesn't give such consent, it is limited to

the hospital or detox, unless the person is taken to jail. Other licensed substance abuse providers that are not licensed as detox facilities, addiction receiving facilities (ARF), or hospitals wouldn't be eligible to accept a person under protective custody.

Any licensed hospital (general or specialty hospital) must accept any person brought to its emergency room and conduct a medical screening. If found to have an "emergency medical condition" even if only related to a psychiatric or substance abuse emergency, the hospital ER must follow rigorous standards established by the federal government under EMTALA before any transfer to another facility can take place.

III. BASIC ESTATE PLANNING - MENTAL CAPACITY
Kim Rezanka

What is incapacity for purposes of creating an estate plan?

Capacity is a relative term that defies set boundaries; a person may be very capable of performing one act but incapable of performing another. For instance, a person may be sufficiently incapacitated in certain areas to require a guardianship, but could be found to have executed a valid will.

What are simple guidelines to evaluating capacity?

The following guidelines, have been suggested for helping to evaluate a person's capacity to undertake a particular course of action:

- Whether the person is capable of making and expressing the life choices in question.
- Whether the person is capable of basing that decision on rational factors.
- Whether the decision is in fact rational.
- Whether the person understands the actual consequences of the decision.

What is guardianship and how can I avoid it?

Guardianship is a court-supervised process in which a guardian is appointed to exercise the legal rights of a minor or an incapacitated person ("ward"). A guardian of the property of the ward shall inventory the property, invest it prudently, use it for the ward's support, and account for it by filing detailed annual reports with the court. In addition, the guardian must obtain court approval for certain financial transactions. The guardian of the ward's person may exercise those rights that have been removed from the ward and delegated to the guardian, such as providing medical, mental and personal care services and determining the place and kind of residential setting best suited for the ward. The guardian of the person must also present to the court every year a detailed plan for the ward's care. Florida law requires the use of less restrictive alternatives to protect persons incapable of caring for themselves and managing their

financial affairs whenever possible. If a person creates an advance health care directive and a durable power of attorney or revocable living trust while competent, he or she may not require a guardian in the event of incapacity.

What if my attorney disagrees with my estate planning decisions?

Unfortunately, determining capacity may not be clear-cut. A person may have capacity in degrees. Just because an attorney disagrees with his or her client's estate planning decision, and may even believe such decisions to be irrational, this does not necessarily mean that the client is incapacitated and needs a guardian. A court can reject the attorney's request for a guardian, even if the attorney believes that a settlement rejected by a client was an offer that no reasonable person would reject.

What is the relationship between a Declaration of Living Will and a Power of Attorney?

A Declaration of Living Will specifies a person's wishes as to the provision or termination of medical procedures when the person is diagnosed with a terminal condition, has an end-stage condition, or is in a persistent vegetative state. A living will and a health care surrogate designation are termed "health care advance directives" because they are made in advance of incapacity and need. If a person is unable to understand or unable to communicate with a doctor, a living will is a legally enforceable method of making sure the person's wishes are honored. Even if a person has a living will, a person's agent may make health care decisions if the Durable Power of Attorney specifically gives this right.

What is a Power of Attorney?

A Power of Attorney is a legal document delegating authority from one person to another. In the document, the maker of the Power of Attorney (the "principal") grants the right to act on the maker's behalf as their agent. What authority is granted depends on the specific language of the Power of Attorney. A person giving Power of Attorney may make it very broad or may limit it to certain specific acts.

What is a Durable Power of Attorney and why would I need it?

A Power of Attorney terminates if the principal becomes incapacitated, unless it is a special kind of power of attorney known as a "Durable Power of Attorney." A Durable Power of Attorney remains effective even if a person becomes incapacitated. However, there are certain exceptions specified in Florida law when a Durable Power of Attorney may not be used for an incapacitated principal. A Durable Power of Attorney must contain special wording that provides the power survives the incapacity of the principal.

What is a Health Care Surrogate Designation and how does it differ from a Power of Attorney?

A Health Care Surrogate Designation is a document in which the principal designates someone else to make health care decisions if the principal is unable to make those decisions. Unlike a Power of Attorney, a health care surrogate decision-maker has no authority to act until such time as the attending physician has

determined the principal lacks the capacity to make informed health care decisions. (In instances where the attending physician has a question as to whether the principal lacks capacity, a second physician must agree with the attending physician's conclusion that the principal lacks the capacity to make medical decisions before the surrogate decision-maker's authority is commenced.) Many medical providers prefer a designation of health care surrogate for health care decisions because the document is limited to health care. However, a Durable Power of Attorney specifically for health care may enable the agent to assist the principal in health care decisions even though the principal may not completely lack capacity.

What is 'testamentary capacity"?

The Florida Supreme Court has defined "testamentary capacity" as the ability to"

- Understand in a general way the nature and extent of the property to be disposed of;
- Understand in a general way the testator's relationship to those who would naturally claim substantial benefit from the will, i.e., the natural objects of the testator's bounty;
- Understand the practical effect of the will as executed; and
- Consider the three foregoing matters and hold them in mind for a sufficient length of time to perceive at least their obvious relationships to each other and to form some rational judgment in relationship to them.

What is a fiduciary and what are their responsibilities?

Serving as a fiduciary (e.g., a personal representative or trustee) is no simple task. A fiduciary is generally required to: (i) hold property; (ii) prudently invest the property; (iii) make distributions of income and/or principal to the beneficiaries, as directed in the trust or other governing instrument; (iv) make tax elections and other administrative decisions; (v) keep records of all transactions; and (vi) issue accountings and other information to the beneficiaries (unless such disclosures are effectively limited by law or the governing instrument). Florida's Probate Code and Trust Code are very complicated and a fiduciary needs to be aware of its obligations and those provisions of the Codes which allow the fiduciary to protect itself.

Who should I appoint as my fiduciary?

If you have a preference for who should be appointed to make decisions on your behalf during incapacity or after death (such as to manage your assets, act as Trustee of trusts created by you, or act as guardian for your minor child), then you should make an effective appointment of your desired fiduciary in your estate planning documents. This includes in your Will, Revocable Trust (if you have one), Durable Power of Attorney, Health Care Surrogate, Living Will and Designation of Pre-Need Guardian. In addition, you will want to consider whether an independent fiduciary is appropriate, whether your fiduciary has the capability to carry out their fiduciary obligations and whether limitations should be included on the fiduciary's right to compensation.

What is "undue influence"?

The basis of such a claim is that the document in question reflects the intentions of someone other than the person who has executed the document. Although the challenge is usually made to wills, it could be raised in any context in which the “influencer” has obtained any form of financial or other benefit from the subject.

IV. SUBSTANCE ABUSE AND MENTAL HEALTH CAPACITY AND THE WORKPLACE

Louis D. Wilson

Do individuals with mental health conditions have any legal protections in the workplace?

Potentially. Individuals with mental or psychological conditions may have qualifying “disabilities” under the federal Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973 (applicable to certain federal government contractors and fund recipients), and/or corresponding state anti-discrimination laws. In Florida, the Florida Civil Rights Act (FCRA) uses slightly different terminology, but primarily follows and mirrors federal anti-discrimination law in application, including in the case of the ADA.

As a result, an individual with a mental health or psychological condition may be protected from discrimination, harassment and retaliation in the workplace by the ADA, the Rehabilitation Act and/or the FCRA.

To be covered by these laws, the individual must satisfy the definition of “disability” (as defined in the statute) and be a “qualified individual with a disability,” meaning the individual must be able to perform the “essential functions” of the job, with or without “reasonable accommodation.”

If the individual is a “qualified individual with a disability,” the employer is generally required to engage in an interactive dialogue with the individual to determine if a reasonable and effective accommodation is available to eliminate barriers in the workplace, subject to certain limitations.

What mental health issues or psychological conditions might affect the workplace and be covered by the ADA?

The U.S. Equal Employment Opportunity Commission (EEOC) (the federal agency responsible for administering the ADA) has a variety of guidance documents relating to the ADA on its website, including guidance that addresses when a psychological or mental health condition might constitute a covered “disability.”

To be considered a covered disability, the condition or impairment has to substantially limit one or more of the major life activities of an individual, which can include a variety of mental or psychological disorders, such as major depression, bipolar disorder, anxiety disorders (such as panic disorders, obsessive compulsive disorder and post-traumatic stress disorder), schizophrenia and personality disorder. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5) (now in its fifth edition) is helpful in identifying mental or psychological disorders, though not always controlling.

An employee's mental or psychological disability may impact and manifest itself in the workplace in a variety of ways. For example, an employee with a relatively mild condition and few restrictions might only need a slight adjustment to his schedule or non-essential job duties. In other cases, the restrictions might

be more serious for the same condition and require a more thorough evaluation of available accommodations. Finally, the restrictions caused by a disability might be so significant that no accommodation exists.

Does the ADA apply to alcoholism and/or substance abuse problems that impact the workplace?

Yes, in certain cases. The ADA may protect a "qualified" individual who is an alcoholic, presuming he or she meets the definition of "disability" under the statute. As noted below, however, this does not mean that the employer has to tolerate or ignore violations of conduct and performance standards if violations are occasioned by abuse of alcohol.

The ADA does not protect an individual who currently engages in the illegal use of drugs, but may protect an individual who is recovering fromdrug addiction, provided he or she is no longer engaging in the illegal use of drugs and he or she can otherwise meet the definition of being a "qualified individual with a disability" under the ADA.

The ADA has specific provisions stating that individuals who are alcoholics or who are currently engaging in the illegal use of drugs may be held to the same performance and conduct standards as all other employees. This means that poor job performance or unsatisfactory behavior – such as absenteeism, tardiness, insubordination, or on-the-job accidents – related to an employee's alcoholism or use of drugs need not be tolerated if similar performance or conduct would not be acceptable for other employees.

What is a "reasonable accommodation"?

Employers may have to provide a **"reasonable accommodation"** under discrimination laws to enable an individual with a disability to meet a qualification standard that is job-related and consistent with business necessity, or to perform the essential functions of his or her position.

A "**reasonable accommodation**" is any reasonable modification to or change in the work environment or in the way things are customarily done that enables an applicant or employee with a disability to enjoy equal employment opportunities. Examples of accommodations may include: making existing facilities accessible; job restructuring; part-time or modified work schedules; leave from work; acquiring or modifying equipment; changing tests, training materials, or policies. Each case is different.

An employee generally has to request an accommodation, but does not have to use the term "reasonable accommodation," or even "accommodation," to put the employer on notice. Rather, an employee only has to say that he or she requires the employer to provide her with an adjustment or change at work due to a health condition.

An employer does <u>not</u> has to remove an "essential function" of the job as an accommodation, nor provide an accommodation that would cause "undue hardship," meaning significant difficulty or expense based on a variety of factors and considerations. Determining whether the accommodation causes an undue hardship is a highly fact-specific inquiry.

A key aspect of the “reasonable accommodation” process is for the employer to make an individualized assessment. Employers and employees are expected to approach each accommodation request with a problem-solving mentality. The analysis involves a particular employee's medical condition, restrictions, job functions, department and employer. An accommodation that is “reasonable” in one situation may not be in another.

Although employers are not obligated to agree to an employee's requested accommodation, they should consider the employee's choice. In some cases, an appropriate accommodation is difficult to identify and may require both the employerand the employees to be open to creative solutions. In some cases, a reasonable accommodation is simply not available, such as where the employee or job applicant with a covered disability is incapable of performing the essential functions of a position, even with accommodation.

Can an employer approach an employee or applicant about their mental health?

Yes, but only under certain circumstances and with caution. The timing and circumstances are important.

When it comes to collecting medical information, before a job offer is made, employers cannot generally ask a job applicant about his medical history or existence of a disability, including a mental disability, or ask questions that are likely to elicit such information. Once an employer has extended an offer, it may require medical examinations or ask certain questions, as long as the same process is used for all employees in that job category. Before doing so, however, it is recommended the employer consult the detailed guidance available on the EEOC’s website relating to making “disability-related inquiries” and requesting “medical examinations,” as such inquiries must generally be “job-related and consistent with business necessity” as explained in the EEOC’s guidance.

In addition, employers can request information through the interactive process when an employee indicates he or she has a need for an accommodation, within certain limits, so they can properly evaluate employee requests for accommodation. The EEOC’s guidance should again be consulted.

To the extent an employer obtains documents or maintains written information with details related to an employee's medical condition, including mental health issues, it should keep that information in a separate, confidential file. Employers should not keep medical information in employee personnel files.

What should employers do if an employee discloses a mental health concern?

If the employer becomes aware that an employee suffers from a mental or psychological condition that is impacting the employee at work, the employer should be aware it may have an obligation to provide that employee with a reasonable accommodation.

If an employee asks for an accommodation, or if an employee is returning from leave as a result of a disability, employers should engage the employee in an interactive dialogue. The interactive process should involve a mutual exchange of information and include all parties necessary to obtain information about restrictions and essential job functions.

May an employer ask an employee for documentation when the employee requests reasonable accommodation for the job?

Yes. When the need for accommodation is not obvious, an employer may ask an employee for reasonable documentation about his/her disability and functional limitations. The employer is entitled to know that the employee has a covered disability for which he or she needs a reasonable accommodation. A variety of health professionals may provide such documentation with regard to psychiatric disabilities

What should an employer do if an employee mentions drug addiction or alcoholism, or requests accommodation, for the first time in response to discipline for unacceptable performance or conduct?

The employer may generally impose the same discipline that it would for any other employee who fails to meet its performance standard or who violates a uniformly-applied conduct rule. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for accommodation.

An employee whose poor performance or conduct is attributable to the **current illegal use of drugs** is not covered under the ADA. Therefore, the employer has no legal obligation to provide a reasonable accommodation and may take whatever disciplinary actions it deems appropriate, although nothing in the ADA would limit an employer's ability to offer leave or other assistance that may enable the employee to receive treatment.

By contrast, an employee whose poor performance or conduct is attributable to **alcoholism** may be entitled to a reasonable accommodation, separate from any disciplinary action the employer chooses to impose and assuming the discipline for the infraction is not termination. If the employee only mentions the alcoholism but makes no request for accommodation, the employer may ask if the employee believes an accommodation would prevent further problems with performance or conduct. If the employee requests an accommodation, the employer should begin an "interactive process" to determine if an accommodation is needed to correct the problem. This discussion may include questions about the connection between the alcoholism and the performance or conduct problem. The employer should seek input from the employee on what accommodations may be needed and also may offer its own suggestions. Possible reasonable accommodations may include a modified work schedule to permit the employee to attend an on-going self-help program. EEOC guidance on this topic should be consulted.

Can an employer explain to other employees that their coworker has an alcohol or mental health issue?

The employer should not disclose an employee's private medical or health-related information to his coworkers. The employer also generally should not indicate that the company has provided the individual with an accommodation, because by doing so the employer might disclose that the individual has a disability.

Instead, employers can respond to such inquiries with assurances that any alterations are being made for legitimate business reasons and in compliance with applicable laws. Employers may also want to include policy language in handbooks, as well as training, so employees understand that the employer is limited in the type of information it can share.

Where can I get more information on this topic?

The federal U.S. Equal Employment Opportunity Commission has a variety of guidance documents relating to the ADA on its website that include, among other things, helpful question and answer sections addressing common issues that come up on this topic. More information can be found here:

http://www.eeoc.gov/laws/guidance/subject.cfm

V. MENTAL CAPACITY & OPERATING A MOTOR VEHICLE

Seth Chipman

As a senior citizen, is there anything that I must do, above and beyond what is normally required for drivers who are not senior citizens, in order to maintain a driver's license?

Yes, Florida law requires that drivers who are (80) years of age or above at the time in which their driver's license expires, renew their license every 6 years (as opposed to 8 years). Florida drivers age 79 or older seeking to renew their license must undergo a basic vision standard of 20/50 as set forth by the Florida Department of Highway Safety & Motor Vehicles (Florida DHS&MV).

If my vision does not meet the basic vision standard of 20/50, does that mean I cannot drive?

Not necessarily. If one or either eye does not meet the basic vision standard, you must see a vision specialist, such as an ophthalmologist or optometrist, to determine if corrective action can be taken, enabling you to safely operate a motor vehicle and obtain a driver's license.

Who determines the mental qualifications and regulations applicable to persons suffering from mental or physical disabilities, such as dementia, Alzheimer's disease, impaired vision etc.?

A "Medical Advisory Board," the Florida DHS&MV, and the Florida Legislature are all involved in regulating driving privileges for persons with disabilities. Under Section 322.125, Florida Statutes, the executive director of the Florida DHS&MV recommends between twelve (12) and twenty-five (25) persons, with experience related to disabilities and driving, to serve on a "Medical Advisory Board." At least one of the members of the Medical Advisory Board must be at least sixty (60) years of age or older. The Medical Advisory Board advises and makes recommendations to the Florida DHS&MV, which is authorized to enact regulations related to persons with disabilities and driving.

What happens to my driver's license and my authority to operate a motor vehicle, if I am diagnosed with a sickness involving mental capacity, such as dementia or Alzheimer's disease?

Nothing, unless: a) you are adjudicated by a court to be afflicted with or suffering from a mental disability, in which case section 322.05(8), *Florida Statute*, prohibits the Florida DHS&MV from issuing you a driver's license; or b) a physician, person, or agency having knowledge of your mental or physical disability reports such knowledge in writing, providing the "full name, date of birth, address, and a description of the alleged disability of any person over 15 years of age having mental or physical disorders that could affect his or her driving ability" to the Florida DHS&MV under section 322.126(2) &(3), Florida Statutes, in which case the Florida DHS&MV will investigate the report.

Do I have any recourse against a physician, person, or agency that I feel is wrongfully reporting that I suffer from a mental or physical disability?

It depends. If the report of alleged mental or physical disability complies with Section 322.126(2), Florida Statute, then the entity making the report is protected from any "civil or criminal action" in response to their report under Section 322.126(3), Florida Statutes. If the report of alleged mental or physical disability does not comply with Section 322.126(2), Florida Statutes (i.e. the person making the report has no knowledge of your alleged disability, or is making defamatory statements), then you could have recourse against that entity.

What can I expect in the event that the Florida DHS&MV opens an investigation against me, in response to a report questioning my ability to safely operate a motor vehicle?

You could be required to take and pass various written and practical examinations, including, but not limited to, actual driving tests.

If my doctor incorrectly does not declare me incapable of operating a motor vehicle due to a mental or physical disability, and I then cause an accident, could my doctor be responsible for damages arising out of that car accident?

It depends. If the cause of the accident resulted from your mental or physical disability, as opposed to a driving error (i.e. over correction), then your doctor could be subject to liability in the civil context.

Can I be criminally prosecuted for taking a medication or drug, such as Ambien, and then driving after taking such a medication or drug?

Yes, under Section 316.193, Florida Statutes, you could be criminally prosecuted, and subject to penalties ranging from monetary fines to imprisonment for being under the influence of Ambien or another medication or drug that is classified as a controlled substance under Section 893, Florida Statutes.

How can my estate planning attorney, financial planner, or care manager, help in dealing with the loss of my ability to operate a motor vehicle?

Your estate planning attorney, financial planner, or care manager can assist by instituting financial and logistical contingencies in care plans accounting for your loss of ability to drive.

How can I arrange for alternative transportation if I am incapable or nor permitted to operate a motor vehicle?

In addition to public transportation, senior citizens who are unable to drive can utilize transportation services, such as Volunteers in Motion, to arrange for specific transportation needs. To schedule a trip or learn more about Volunteers in Motion, persons can call 321-635-7999.

VI. SUBSTANCE ABUSE AND IMMIGRATION
Stephen J. Biggie

How does mental health impact substance abuse?

According to the National Institute on Drug Abuse those who suffer from mental illness are more likely to use and abuse drugs.

Does mental health and substance abuse have an impact on immigration laws?

Yes. Most immigration applicants must establish that they have good moral character to obtain relief. Criminal behavior that may accompany mental illness or substance abuse will make it difficult to navigate the immigration system.

Does immigration law regarding substance abuse impact my life?

That depends. Most commonly you will petition for an immigrant if they are a family member or your employee. If you are petitioning for an immigrant, then substance abuse and mental health will come into play.

When would I ever petition for an immigrant?

Petitioning for an immigrant to enter the United States most commonly occurs in the family context. Examples: (1) the U.S. Soldier who marries abroad; (2) falling in love in college with a foreign exchange student; (3) the widow who meets someone abroad; (4) meeting somebody on the internet; or (5) international business.

I have married a foreigner, now what?

In general terms you must obtain a green card for your spouse so that they may enter the United States to be with you. Does your new spouse have children from a prior relationship? If so, you will probably have to sponsor them as well.

Will a drug conviction prevent my spouse or her children from obtaining a green card?

Yes. If your spouse has a drug conviction then the U.S. Government in a vast majority of circumstances will not give the spouse or their children a green card.

My spouse or stepchild already has a green card, are they safe if they are convicted of a drug crime?

Any and all drug convictions will make a valid green card holder deportable. In most circumstances, law enforcement agencies will forward an immigrant's drug conviction directly to Immigration and Customs Enforcement.

Is it possible to fight the deportation?

Yes. If a green card holder has accrued multiple years of continuous residence and the drug crime is not an aggravated felony then it is possible to cancel the deportation.

What is the safest way to avoid deportation?

Obtain citizenship as soon as you are eligible. An immigration judge can only grant cancellation of removal once in a lifetime. If you get a second conviction and are placed in removal proceedings a second time, you are deported no matter how small the offense may be.

What are some real life examples of substance abuse impacting immigration?

Example 1. Green Card holder applies for citizenship but is denied because of multiple DUIs (Driving under the influence). DUI without an injury is not a deportable offense in most cases, but it shows a lack of moral character in the applicant.

Example 2. Soldier marries abroad and sponsors his wife and her child from another marriage. The family never applies for the child's citizenship because they believe it is expensive. The child, now an adult, is pulled over during a routine traffic stop and agrees to a search of the vehicle. The police find one pill of OxyContin and charge the child with possession. The child pleads guilty and receives one year of probation. At the conclusion of probation, the child is served with removal papers.

VII. HEALTH SURROGATES
Patricia D. Smith

Who is a health care surrogate?

Any competent adult expressly designated by a principal to make health care decisions and to receive health information. "Principal" means a competent adult executing an advance directive and on whose behalf health care decisions are to be made or health care information is to be received, or both.

What legal documentation is required to designate a health care surrogate?

A written document designating a surrogate must be signed by the principal in front of two witnesses, who must also sign the document. If the principal is unable to sign the document, the principal must in the presence of witnesses, direct that another person sign the principal's name. The person designated as surrogate shall not act as witness. At least one of the witnesses must be a person other than the principal's spouse or a blood relative.

When do the health care surrogate's powers go into effect?
The health care surrogate's powers go into effect when the primary or attending physician determine the principal is unable to make health care decisions unless the advanced directive indicates that the health care surrogate's powers go into effect immediately.

How can you change your designation for a health care surrogate?

You may change or revoke your designation through a signed, written and dated document, by physically destroying the document or directing another person to destroy it in your presence, verbally indicating your intent to amend or revoke the designation, or by executing another directive that is materially different from the previous directive.

Are there any medical treatments that a health care surrogate is not authorized to consent to?
Yes, a health care surrogate cannot authorize abortion, sterilization, electroshock therapy, psychosurgery, experimental treatments, or voluntary admission to a mental health facility, unless you provide additional instructions in your designation that specifically authorizes the health care surrogate to consent to those treatments.

What should I do with the executed Florida Advance Directive?
You should make copies and give the copies to the healthcare surrogate and your doctor for inclusion in your medical file. The completed form should be kept in a place where it is easily accessible.

If a medical emergency happens, will medical emergency personnel perform CPR if I have a Florida Advance Directive?
Yes, a Florida Advance Directive will not prevent medical emergency personnel from performing CPR if a medical emergency occurs. If you do not want CPR performed you should complete a Prehospital Do Not Resuscitate Order (DNRO).

Are advanced directives completed in other states valid in Florida?
Yes, so long as the advanced directive is completed pursuant to that state's laws.

What happens if I name my spouse as my health care surrogate and we divorce?
The spouse's authority to act as your health care surrogate will automatically be revoked. If you would like your spouse to be able to continue as your health care surrogate in the event of divorce you need to specifically state in the "Additional Instructions" section that your spouse's authority to act as your health care surrogate shall not be revoked in the event of a divorce.

Who would make decisions for me if I don't designate a health care surrogate or have a court appointed guardian and I am unable to make decisions for myself?

1. Spouse;
2. Adult child or a majority of the adult children reasonably available for consultation;
3. Parent;
4. Sibling or a majority of the siblings reasonably available for consultation;
5. Adult relative that has exhibited care and concern for you, has maintained regular contact and is familiar with your activities, health and religious or moral beliefs; or
6. Adult close personal friend who has exhibited care and concern for you, and who presents an affidavit to the health care facility or to the primary physician stating that he or she is a friend of the patient, is willing and able to become involved in the patient's health care, and has maintained such regular contact with the patient so as to be familiar with the patient's activities, health, and religious or moral beliefs.

VIII. TEMPORARY CUSTODY
Tiffani Bishop & E. Ashley Bonifant

What is the burden of proof necessary to terminate a temporary custody order?

The initial burden of proof is competent, substantial evidence that the parent moving to have the temporary Order terminated is "fit" within the definitions provided in Chapter 39. A parent is deemed "fit" so long as he/she has not abused, abandoned, or neglected the child. Upon the moving party meeting his/her burden of proving fitness the burden then shifts to the party seeking to maintain the temporary custody order to prove that the moving party is "unfit" by clear and convincing evidence.

Additionally, the party with temporary custody can show that terminating the order would be detrimental to the minor child, as in she would be more significantly impacted than if she were reunited with her parent after a long absence.

When does the Court make the determination that a parent is "fit"?

Though statutes and case law on the Court's fitness analysis is vague, other case law has made clear that a moving party does not have to prove a substantial change in circumstances since the entry of the temporary custody order. This suggests the Court has wide discretion in considering evidence of how "fit" a parent is both prior to and after the order is entered.

What evidence of detriment to the child can be considered?

Detriment refers to circumstances that produce or are likely to produce lasting mental, physical, or emotional harm. .It is more significant than the kind of trauma a child experiences when she is taken away from familiar surroundings, as in the case of divorce, adoption, or the death of a parent, and its negative effects exceed the normal adjustment period expected in those kinds of circumstances.

Why is temporary custody so easily terminated?

Ultimately, a parent's right to enjoy the custody of her child must always be considered. "When a custody dispute is between a natural parent and third parties, the test must include consideration of the right of a natural parent to enjoy the custody, fellowship and companionship of his offspring …. This is a rule older than the common law itself."

What is the procedure for obtaining a temporary custody order?

A party that is eligible under the statute may petition the Court for a temporary custody order. Upon a finding that the child or children are in danger of becoming being abused, abandoned or neglected by the biological parents, the Court may enter a temporary custody order. The Court may also enter a temporary custody order with the consent of both biological parents.

Who can file for "Temporary Custody by Extended Family Member", pursuant to Chapter 751.02, Florida Statutes?

Any extended family member who: 1. Obtains a signed, notarized consent of the minor child's legal parents; or 2. Lives with the minor child and provides full-time care.

Who is an "Extended Family Member"?

A relative of a minor child within the third degree[1] by blood or marriage to the parent; OR

The stepparent of a minor child if the stepparent is currently married to the parent of the child and is not a party in a pending dissolution, separate maintenance, domestic violence, or other civil or criminal proceeding in any court of competent jurisdiction involving one or both of the child's parents as an adverse party.

What is the burden of proof?

If you do not have the biological parent(s) signed, notarized consent, then you will need to prove the biological parent(s) is **unfit**. This is a very heavy burden under the Constitution. As long as a biological parent is able to provide shelter and food for their child, he/she will be deemed "fit".

What rights does Temporary Custody by Extended Family Member provide?

Temporary Custody allows the family member to essentially "step into the shoes" of the child's biological parents. If the Court issues an Order granting Temporary Custody, the extended family member can enroll the child in school, take the child to necessary doctor's appointments, make medical decisions for the child, etc. **without** the biological parent's consent.

How long is "Temporary"?

Once Temporary Custody is granted, it will remain in effect until terminated by the Court. Either biological parent would have to formally petition the Court, and receive a Court Order, to terminate the temporary custody.

Who can file for "Concurrent Custody," pursuant to Chapter 751, Florida Statutes?

Concurrent custody occurs when parents want to give a relative custody rights while also retaining the rights for themselves. Like temporary custody, only a relative or stepparent will be granted concurrent custody. Unlike temporary custody, concurrent custody also requires:

A. The child to have lived with the family member for at least 10 days in any 30-day period in the last 12 months.
B. The family member to obtain both parents' consent to the concurrent custody.

If either parent objects, then a judge will not grant a final judgment for concurrent custody. Concurrent custody allows for both parents and the family member to make major decisions and access official documents.