

# The right to bear arms as a removable right in incapacity proceedings

by Enrique Zamora and Stephanie M. Villavicencio



E. ZAMORA



S. VILLAVICENCIO

On Jan. 8, 2011, a terrible tragedy occurred in Tucson, Ariz. A mentally unstable individual opened fire, killing six and injuring 14, outside of a supermarket where U.S. Representative Gabrielle Giffords and a group of her constituents assembled at a meet-and-greet.<sup>1</sup> One of Rep. Giffords' staffers, three retirees, a federal judge and a precious 9-year-old girl were killed at the hands of a mentally unstable individual who carried a gun.<sup>2</sup>

The unfortunate truth is that not much thought is put into the fact that individuals who are incapacitated should not have the right to own, possess or carry a firearm. In fact, several states do not restrict the right to bear arms to persons who have been found incapacitated by the judicial system.<sup>3</sup> Twenty-one states conduct checks for firearm purchases using the National Instant Criminal Background Check System (NICS) required by Congress.<sup>4</sup> NICS was mandated by the Brady Handgun Violence Prevention Act of 1993, which "imposed as an interim measure a waiting period of 5 days before a licensed importer, manufacturer, or a dealer may sell, deliver, or transfer a handgun to an unlicensed individual."<sup>5</sup> This program would apply to any person who has been adjudicated as "mentally defective" or "committed to a mental institution."<sup>6</sup>

The Second Amendment of the United States Constitution reads: "[a] well regulated Militia, being neces-

sary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>7</sup> The Supreme Court recently decided a landmark case, *McDonald v. City of Chicago*, holding that the Second Amendment does not apply only to the federal government, but applies to state and local governments as well.<sup>8</sup> This case illustrated that the right to bear arms is a fundamental right, as are freedom of speech and freedom of religion, among others, and held that this right is one that cannot be infringed upon by state and local governments. Further, *McDonald v. City of Chicago* repeated the longstanding regulatory measure of prohibiting the possession of firearms by felons and mentally ill individuals.<sup>9</sup> Furthermore, Congress may pass legislation to place limits on the right to bear arms for persons who have been involuntarily committed.

Some states have laws regarding the right to bear arms in relation to those individuals who are adjudicated incapacitated. For example in California and Connecticut, health professionals treating inpatients must report a patient's gun possession to law enforcement agencies and judicial bodies.<sup>10</sup> A study was performed in 2004 that designated three categories of statutory restrictions, which included mentally ill individuals who were legally adjudicated as incapacitated.<sup>11</sup> The study discussed how the firearms statutes across the United States are not uniform and vary considerably on the manner in which the "restricted individual" is defined.<sup>12</sup> Of course, federal law provides the restrictions for states that have no restrictions or less-restrictive statutes.

Pursuant to statute, Florida requires the Department of Law Enforcement to review any records available to determine if the potential buyer or transferee has been

adjudicated mentally defective or has been committed to a mental institution by a court and as a result is prohibited by federal law from purchasing a firearm.<sup>13</sup> Section (4) (a) of the statute defines the term "adjudicated mentally defective" as meaning "a determination by a court that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease, is a danger to himself or herself or to others or lacks the mental capacity to contract or manage his or her own affairs." The statute goes on to say "[t]he phrase includes a judicial finding of incapacity under s. 744.331(6)..."<sup>14</sup> Further, Florida Statutes § 790.065(2)(c) states that "Clerks of court shall submit these records to the department within 1 month after the rendition of the adjudication or commitment." The purpose of this section is to ensure that the information is present in the system when the Department of Law Enforcement reviews the record of the purchasing or transferring individual. As a result, it also ensures that firearms are kept out of the hands of mentally unstable individuals.

Meanwhile, Florida Statutes § 744.3215 (3) lists the specific rights that may be removed from persons by an order determining incapacity and may be delegated to the guardian.<sup>15</sup> These rights include the rights to: (a) contract; (b) sue and defend lawsuits; (c) apply for government benefits; (d) manage property or make any gift or disposition of property; (e) determine his or her residence; (f) consent to medical and mental health treatment; and (g) make decisions about his or her social environment or other social aspects of his or her life.<sup>16</sup> This list does not include the right to bear arms as a right that can be removed from a person who is

*continued, next page*

## Right to bear arms

from preceding page

declared incapacitated. Further, the list does not include the requirement of notice of incapacitated individuals to be published. The authors believe that Chapter 744 should list the right to bear arms as a right that can be removed and should require that incapacitated individuals be reported to the Department of Law Enforcement to ensure they will not be able to retain a firearm. Florida Statutes § 744.3215 (1) lists the rights that are retained by the ward.<sup>17</sup> The right to bear arms does not appear in either section of the statutes.

Thus, Section 744.3215 defines which rights are retained or can be removed from an individual; however, it does not include the right to bear arms. This is especially troubling because of the potential harm that can stem from this right. The right to bear arms should be included in the list of rights that can, and should, be removed from a ward. The right to bear arms is one that historically has been highly regulated, and it should be one of the rights removed from certain incapacitated persons. In fact, many states, and even the Veteran's Administration (VA) have already acted on such an idea by reporting incapacitated individuals and veteran

patients to the NICS, required by the Brady Act if a patient has been "adjudicated as a mental defective."<sup>18</sup> The *Navy Times* tells us that "[b]y law, anyone 'adjudicated as a mental defective,' such as people found to be a danger to themselves or others or who lack the mental capacity to manage their affairs, must be registered in the database."<sup>19</sup> When an individual is registered in the database, his or her weapons permit can be revoked, thus consequently removing his or her Second Amendment right. The *Navy Times* article also tells us that the "VA has been turning over the names of veterans who have had someone else appointed to handle their financial affairs."<sup>20</sup> The reason behind these actions is because of the harm that can be done to others or the patients themselves.<sup>21</sup>

An example of potential harm occurred in a Miami-Dade County courthouse several years ago. This incident involved one of the wards under the court's supervision who tried to smuggle a handgun to attend a hearing on his case. Fortunately, the gun was detected when the ward passed through security. Because of this incident, Miami-Dade is the only county in Florida that specifically lists the right to bear arms as a removable right in incapacity proceedings pursuant to local rule. This

is specific to Miami-Dade County's 11<sup>th</sup> Judicial Circuit, and it has not been adopted by other Florida circuits. Consequently, every plenary and some limited guardianships in Miami-Dade County have a stamp placed on the judicial orders and letters that states the ward cannot have access to weapons or firearms. Although this procedure is particular to Miami-Dade County, it is a practice the authors believe should be followed in all jurisdictions.

The incident in the Miami-Dade courthouse, as well as the tragedy that occurred in Tucson, are prime examples of why the right to bear arms should be included as one of the removable rights in Section 744.3215 of the Florida Statutes. Because state and local governments can now regulate the right to keep and bear arms, pursuant to the Supreme Court ruling in *McDonald*, the Florida Legislature has the authority to amend Section 744.3215 of the Florida Statutes to include the right to bear arms in the list of rights that may be removed from wards. This is a very important step in moving forward to protect citizens in our communities, including the wards themselves.

*Enrique Zamora, Esq., is a Florida Bar board certified elder law attorney and partner with the firm Zamora*

## Member news



M. LOCKWOOD

### Lockwood Law Group expands practice areas

Marcia J. Lockwood, Esq., announces that her law office, in Sarasota, Fla., formerly known as The Family Law Clinic, has changed its name and is now doing business as Lockwood Law Group. The change reflects the law firm's growth in the areas of litigation in guardianships, appellate law and elder law, as well as family law and criminal law. The law firm continues to offer free consultations and its unique income-sensitive rates with sliding fee scale. Lockwood can be reached at 941/952-5815.



C. ROBINSON

### Robinson elected to BayCare Alliant's board

Charles F. Robinson, a Florida Bar board certified elder law attorney practicing in Clearwater, Fla., has been elected to the board of directors of BayCare Alliant Hospital. He recently addressed the Suncoast Estate Planning Council at All Children's Hospital Education Center and participated in an Elder Law Forum at Emeritus at Beckett Lake in Clearwater.

& Hillman, with offices in Coconut Grove, Fla. He is chair-elect of the Elder Law Section of The Florida Bar and an adjunct professor at St. Thomas University School of Law, where he teaches a course in elder law. He has acted as special general magistrate, guardian advocate and special public defender in Baker Acts and Marchman Acts in Miami-Dade County. He received his JD degree, cum laude, from the University of Miami in 1985.

**Stephanie M. Villavicencio, Esq.**, is an associate with Zamora & Hillman. She received her JD, cum laude, from St. Thomas University.

#### Endnotes:

1 See "Arizona Shooting," *N.Y. Times*, Jan. 12, 2011, [http://topics.nytimes.com/top/reference/timestopics/subjects/a/arizona\\_shooting\\_2011/index.html?offset=0&s=newest](http://topics.nytimes.com/top/reference/timestopics/subjects/a/arizona_shooting_2011/index.html?offset=0&s=newest).

2 See *Id.* (discussing the six victims who were murdered).

3 See Donna M. Norris, et al., "Firearm Laws, Patients, and the Roles of Psychiatrists," *Am J Psychiatry* 163:8, August 2006, 1393.

4 See *National Instant Criminal Background Check System*, Federal Bureau of Investigation, available at <http://www.fbi.gov/about-us/cjis/nics>; see also 28 C.F.R. § 25.1 (1998).

5 See 63 Fed. Reg. 58272 (Oct. 29, 1998).

6 See *Id.*

7 U.S. Const. Amend. II.

8 See *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) available at <http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf>.

9 See *Id.* at 39.

10 See Cal. Welf. & Inst. Code § 8100-8108 (2008); see also Conn. Gen. Stat. § 29-28 (2010).

11 See Donna M. Norris, et al., "Firearm Laws, Patients, and the Roles of Psychiatrists," *Am J Psychiatry* 163:8, August 2006, 1392.

12 See *Id.* at 1393.

13 See Fla. Stat. § 790.065(2)(a)(4) (2010).

14 See Fla. Stat. § 790.065(2)(a)(4) (a.) (2010).

15 See Fla. Stat. § 744.3215(3) (2010).

16 See *Id.*

17 See Fla. Stat. § 744.3215(1) (2010).

18 See "America's 1st Freedom," *NRA News*, Nov. 2009, at 18 available at <http://motherjones.com/files/NRA-1st-Freedom-Mother-Jones.pdf> (stating that "VA records are reported to the National Instant Criminal Background Check System ("NICS") if a patient has been 'adjudicated as a mental defective ...").

19 See Rick Maze, "Bill aims to protect vets' gun rights," *Navy Times*, Apr. 27, 2009, [http://www.navytimes.com/news/2009/04/military\\_veterans\\_guns\\_042709w/](http://www.navytimes.com/news/2009/04/military_veterans_guns_042709w/).

20 See *Id.* The article goes on to say that under this policy, since 1998, the VA has sent the names of more than 117,000 veterans to the Justice Department.

21 See Deborah Sontag & Lizette Alvarez, "Across America, Deadly Echoes of Foreign Battles," *N.Y. Times*, Jan. 13, 2008, [http://www.nytimes.com/2008/01/13/us/13vets.html?\\_r=1](http://www.nytimes.com/2008/01/13/us/13vets.html?_r=1).

## Have your clients suffered investment losses?

Successfully recovering millions of dollars in customer losses resulting from the mishandling of brokerage and investment accounts since 1985

Cases may be taken on a contingency fee  
~ Minimum loss of \$75,000 required ~  
Referral fees gladly offered

WE FIGHT WALL STREET ON BEHALF OF MAIN STREET

S. DAVID ANTON, ESQUIRE  
ANTON LEGAL GROUP • (813) 443-5249

[www.davidanton.com](http://www.davidanton.com)  
1509 East 9<sup>th</sup> Avenue • Tampa, FL 33605

## Call for papers – Florida Bar Journal

Len Mondschein is the contact person for publications for the Executive Council of the Elder Law Section. Please email Len at [lenlaw1@aol.com](mailto:lenlaw1@aol.com) for information on submitting elder law articles to The Florida Bar Journal for 2010. A summary of the requirements follows:

- Articles submitted for possible publication should be MS Word documents formatted for 8½ x 11 inch paper, double-spaced with one-inch margins. Only completed articles will be considered (no outlines or abstracts).
- Citations should be consistent with the Uniform System of Citation. Endnotes must be concise and placed at the end of the article. Excessive endnotes are discouraged.
- Lead articles may not be longer than 12 pages, including endnotes.
- Review is usually completed in six weeks.