

# The Elder Law Advocate

[www.eldersection.org](http://www.eldersection.org)

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## Coming Soon!

### Elder Law Update

October 3, 2008

Florida Grande Hotel and Yacht Club  
Fort Lauderdale, FL

## Reminiscence and Reminders

Because this is the last message from me as your chair of the section, this is my opportunity to reminisce about the past 11 to 12 months' activities, and also to remind you of the opportunities that lie ahead for the section.

### Reminiscence

Even the best intentions often fall short of expectations for one reason or another. Yet I'm happy to state that the section's officers and active, dedicated members serving on substantive committees did not fail to meet the challenges faced this past year.



Emma S. Hemness

### Message from the chair

In the Fall, we had an opportunity to showcase the Elder Law Section on the front page of *The Florida Bar News*, educating the 80,000-plus attorneys in Florida on what it means to be an elder law attorney. In October, we made an in-person report to The Florida Bar's Board of Governors emphasizing that while our section may be young and small, we are profitable, increasing in size and maturing in activities.

The Board of Governors also heard that as we strengthen our committees, the section should be the point of first contact

See "Reminiscence," page 2

## Preparing for the 2009 legislative session

by Twyla Sketchley

The 2008 legislative session is over, and Florida's citizens are beginning to feel the impact. During the 2008 legislative session, the Elder Law Section and its members advocated formally and informally for the benefit of Florida's special needs citizens. The section formally adopted the following legislative positions:

1. Opposes the adoption of summary guardianship proceedings outside the protections of Chapter 744, Florida Statutes.
2. Supports the development and implementation of a public education program stressing the need for screenings for memory impairment and the impor-

tance of early diagnosis and treatment of Alzheimer's disease and related disorders; and supports the mandate that the Department of Elder Affairs conduct, or provide support for, a study on the benefits of memory screenings and the scientific evidence on the techniques for memory screening.

These positions led the section to successfully oppose a Senate bill that would have created a new proceeding under Chapter 394 called a summary guardianship that would have removed all of the hard-fought and much-needed guardianship protections

See "Preparing for session," page 21

for those 80,000 attorneys when they need information about our core focus areas, including guardianship, advance directives, elder exploitation, Medicaid public assistance planning and special needs trusts—and rightly so, given our clientele comprised of seniors and persons with special needs.

Although in November we saw Florida's implementation of the Deficit Reduction Act of 2005, the section's membership did not suffer from any surprises. In fact, as a result of the efforts of the Task Force and our sister organization, AFELA, the section's membership benefited long in advance of the DRA's adoption date by having foreknowledge of its content. Following the date of adoption, the section offered extensive legal education on the DRA at both the Certification Review Course in January and the 12<sup>th</sup> Annual Public Benefits Seminar in April.

In December, the section forwarded language drafted by our Special Needs Trust Committee to the Atlanta Regional Office of the Social Security Administration. The proposed language called for the abrogation of the Doctrine of Worthier Title in the SSA's POMS to coincide with current Florida law. We have been rewarded in the past few weeks with information that this change has occurred at our behest.

Around the first of the calendar year, we became aware of growing activity by the Real Property Probate and Trust Law Section in two substantive areas: 1) the redrafting of the Durable Power of Attorney statute in Florida; and 2) the drafting of statutory changes to the Probate Code codifying creditors' rights in non-probate assets. After examination of these early proposals for substantive changes, the section's leadership believed that our membership as well as our clientele could be adversely affected. At its January meeting, the council took a position to oppose any enhancement of creditors' rights in non-probate assets, which may include shifting the burden to open a probate from the creditor to

the recipient of the non-probate asset (see article in Winter 2008 issue). In the months since, members from our Estate Planning Committee, Abuse Neglect & Exploitation Committee and Medicaid Committee as well as our RPPTL liaisons have been actively participating in these efforts, offering input to the RPPTL from the unique perspective of the elder law attorney in both areas. As the months go by, our membership will be kept apprised as developments occur, and if proposed legislation is eventually introduced, the section may call on members to oppose these substantive changes due to the impact on the seniors we represent.

For the legislative session, the section formulated three separate legislative positions on sponsored legislation, two of which were developed by the Guardianship Committee. These were submitted to and approved by the Board of Governors, which authorized us to advocate openly as a section on those bills. Although three seems like a small number, the section looks forward to more proactive involvement, proposing its own legislation through the work of our Legislative Committee and offering greater input on legislation under consideration.

In the Spring, amidst reports from members who had personal service contracts denied when there had been no known change in Medicaid policy, the section's leadership contacted Secretary Bob Butterworth. Within a few short days, an open dialogue with the secretary's staff members occurred. Shortly thereafter, most, if not all, of the controversies on the usage of legitimate personal care contracts were resolved favorably, including one appellate case. Although there are additional issues on which the section's leadership continues to work, we are greatly appreciative of this open communication and the immediacy of the response from Secretary Butterworth and his staff to many of our concerns. We welcome his attendance at our retreat in mid-July.

Finally, in recent weeks, we have begun to capitalize on our new relationship with the Unauthorized Practice of Law Department of The Florida Bar. The membership has long complained, sometimes vehemently, about non-lawyer Medicaid

planners, with seemingly no response. Our section's newly established UPL Committee recently provided input to the Bar to better explain how UPL is committed by these various entities. It's encouraging to see a welcome receipt of this information as well as the beginnings of investigative activity.

## **Reminders**

In the way of a reminder, I ask that you take a look at each of last year's events reported above and ask yourself whether further work needs to be done in a particular area. If the answer is "yes," then offer your assistance for the betterment of the section and the seniors and persons with disabilities we serve.

Let's remember that despite the remarkable growth and progress the section has seen on so many issues, the opportunities are still abundant for more active participation, continued growth and a greater impact within our area of practice and the entire Florida Bar.

Also, I'd like you to remind yourself that, as an elder law attorney, you are a good lawyer (see Fall 2007 issue). In addition, you are also a champion for our most vulnerable citizens, sharing the unique perspective we have as elder law attorneys with others (see Winter 2008 issue). Finally, a society is judged by the quality of life it is able to assure for its weakest members ... for better or for worse.

Currently, I see the section as having inertia. Remember this law of physics? While a body at rest tends to stay at rest, **a body in motion also tends to stay in motion**, so inertia is a good thing for the section. Let's continue to build upon past years of effort and keep the momentum going—and growing.

We are certain to be rewarded under the leadership of the section's incoming officers: Linda Chamberlain (chair), Babette Bach (chair-elect), Len Mondschein (administrative chair), Enrique Zamora (substantive chair), Twyla Sketchley (secretary) and Jana McConnaughay (treasurer). And I want to say thank you to all of you who are not officers of the section but have worked so hard on so many tasks, like those you see named in the Kudos Korner for EXTRA-ordinary effort.

# Elder Law Month showcases our services

by Kara Evans

The Academy of Elder Law Attorneys (AFELA) has declared the month of May to be Elder Law Month. During this month, we try to highlight the various issues confronting the elderly that we as elder lawyers strive to address with our clients. So, how do we go about publicizing these issues? Well, we start with a dedicated core group of elder law attorneys who volunteer to be representatives for their areas. There are currently 28 representatives from around the state. They may represent one county or several. Their job is to organize and encourage the elder law attorneys in their areas to celebrate Elder Law Month by offering will review days, public seminars, elder law clinics and other activities to educate the public.

To start us off, Governor Charlie Crist issued a proclamation declaring May as Elder Law Month. This is a great beginning because it gives our cause statewide recognition and publicity. This recognition enables us to operate on a larger stage and increases our visibility with other groups who serve the elderly. This year, for the first time, we were able to team up with a national organization to offer services to the public. AARP and AFELA worked together to offer free healthcare surrogate forms and living wills to seniors throughout Florida. AARP publicized the events in its regional publications and through its volunteer leaders. Al Rothstein, AFELA's media consultant, helped to organize and publicize the event as well. AFELA had 14 attorneys offer services by scheduling time either at an AARP location, the attorney's office or another public location. While being emphatic that the practice of law is not a simple matter of filling out a form, we were still able to assist the public in obtaining necessary documents in a responsible manner.

Another excellent way to reach our audience is through educational seminars and speeches. Several of our area representatives held seminars

that attracted more than 100 participants. We were also able to schedule 26 speakers during the month of May. Although we try to focus our events during the month of May, many times the efforts to place speakers in front of various public organizations lead to additional speaker requests throughout the year. So far, we have three speakers scheduled for other dates. We would love to schedule more, so let us know if you would like to get involved.

Each year, we try to publish editorials or letters to the editor in the local newspapers. We target certain issues that seem ripe for public attention and post sample letters for our representatives to use as a starting point. Area representatives are encouraged to write their own letters, modify the posted samples or use a sample letter as is. Websites for the various local papers are posted, and

the entire process is streamlined for ease of use. This year, five letters were sent in by AFELA members. We even had an interview on WCTV Tallahassee's noon news show, starring our own Victoria Hueler!

Elder law is such an important practice area, especially in our state, which actively recruits retirees to settle here. It is imperative that we share our expertise and passion with as many of our seniors as possible. Participating in Elder Law Month is a terrific way to reach out to the people in your locality. If you would like to volunteer to be an area representative for Elder Law Month 2009, or if you would just like to be on the list for a speaking opportunity, be sure to let us know.

To volunteer for Elder Law Month, please email Al Rothstein at [elderissues@rothsteinmedia.com](mailto:elderissues@rothsteinmedia.com) or Kara Evans at [evanskeene@aol.com](mailto:evanskeene@aol.com).

## The Elder Law Advocate

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Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the section.

The Elder Law Advocate will be glad to run corrections the issue following the error.

The deadline for the FALL ISSUE is September 15, 2008. Articles on any topic of interest to the practice of elder law should be submitted via email as an attachment in rich text format (RTF) to Patricia I. "Tish" Taylor, Esquire, [pit@mcsumm.com](mailto:pit@mcsumm.com), or call Arlee Colman at 1-800-342-8060, ext. 5625, for additional information.



# COMMITTEE REPORTS

## What happened in the Florida Legislature of interest to us?

by Ellen S. Morris,  
Legislative Chair

Thanks to our legislative consultant, Tom Batchelor, we are able to provide you with a summary of bills of interest to elder law attorneys that are expected to be or have been signed by the governor. Below are the highlights. The full details of these laws and others of interest as well as Tom's summary of the appropriations implementing bill will be posted on the Web.

### **SB 366/HB 233 - Elderly Persons & Disabled Adults/Abuse & Neglect**

This bill reclassifies the offense of aggravated abuse of an elderly or disabled person from a second degree felony to a first degree felony. This will have the effect of increasing the maximum sentence for the offense from 15 years in prison to 30 years in prison. The bill also requires certified law enforcement personnel to receive training in the identification and investigation of elder abuse and neglect. Subject to the governor's veto powers, the effective date of this bill is July 1, 2008.

### **SM 2662/HM 1045 - Alzheimer's Disease Research/Federal Funding**

Senate Memorial 2662 urges the United States Congress to increase federal funding for Alzheimer's disease research by \$360 million during fiscal year 2008-2009. This legislation directs that copies of this memorial are to be sent to the president of the United States, the president of the United States Senate, the speaker of the United States House of Representatives and to each member of the Florida delegation to the United States Congress.

### **SB 1092/HB 7047 - Alzheimer's Disease/Medicaid Waiver Program**

This bill extends the repeal date

for the Medicaid Home and Community-Based Waiver Program for Persons with Alzheimer's disease. The bill directs the Office of Program Policy Analysis and Government Accountability to conduct an evaluation of comparable Medicaid waivers to determine their comparative cost effectiveness and ability to delay or prevent institutionalization of Medicaid recipients, with findings and recommendations due to the Legislature prior to the 2010 regular session. Subject to the governor's veto powers, the effective date of this bill is upon becoming a law.

### **CS/HB 739/SB 688 - Guardian Advocates for Persons With Developmental Disabilities**

CS/HB 739 amends the process for the appointment of guardian advocates for persons with developmental disabilities. The bill provides that guardian advocates are not required to be represented by counsel unless required by the court or if they are delegated rights to oversee property other than being the representative payee for government benefits. The petition to the court for appointment of a guardian advocate must detail the relationship of the proposed guardian advocate to service providers of healthcare, residential or other services to the person with a developmental disability. In addition, the notice of hearing on the petition to the person with a developmental disability must be delivered to the next of kin, any surrogate resulting from an advance directive or agent under a durable power of attorney.

The court must appoint an attorney for the person with a developmental disability within three days of receiving the petition for a guardian advocate. The court shall initially appoint a private attorney selected from the attorney registry in accordance with s. 27.40, F.S. Attorneys may not represent both the individual with a developmental disability and the guardian advocate or the person who files the petition. Court-appointed attorneys must complete eight hours of education in guardianship unless

waived by the court.

The court must determine if a valid advance directive or a durable power of attorney exists for the person who is the subject of a petition to appoint a guardian advocate. The court must also determine the sufficiency of these instruments for the person with a developmental disability. If a guardian advocate is appointed, the court must include in the letter of appointment how the advance directive or the durable power of attorney is affected by the guardian advocacy.

A person may file a petition with the court for suggestion of restoration of rights for the person with a developmental disability. The bill provides the process for considering a suggestion for restoration of rights. The bill clarifies that the right of an individual with a developmental disability to consent to or refuse treatment is subject to the powers given to the guardian advocate or guardian. Subject to the governor's veto powers, the effective date of this bill is July 1, 2008.

### **CS/CS/SB 2012/HB 1431 - Insurance Policies**

This bill requires insurers to notify long-term care insurance policyholders annually, rather than every two years as under current law, of the right to designate a secondary addressee to receive notice of possible lapse in coverage or termination due to nonpayment of premium. It permits reinstatement of long-term care policies that have been canceled for nonpayment of premium when the failure to pay the premium was due to the policyholder's continuous confinement in a hospital, skilled nursing facility or assisted living facility for more than 60 days. The bill also requires that notice of possible lapse in coverage of a long-term care policy for nonpayment of premium be sent to the policyholder and secondary addressee. It extends the statute of limitations for claims on Holocaust-era insurance policies until July 1, 2018. It permits the Office of Insurance Regulation to waive the requirement that a multiple employer welfare arrangement maintain its principal

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place of business in Florida under specified conditions. It clarifies that physician reimbursement for purposes of motor vehicle personal injury protection (PIP) insurance for specified medical services is based on 200 percent of the "participating physicians" schedule of Medicare Part B.

In addition, the bill permits hospitals to form alliances to obtain self-insurance coverage for its members and provides that contracts of reinsurance issued to such alliances are to receive the same tax treatment as reinsurance contracts issued to insurance companies.

It makes underwriting files of Citizens Property Insurance Corporation available to the policyholder and his or her attorney to the same extent that the files would be available from a private insurer in litigation under the Florida Rules of Civil Procedure. It permits Citizens to release confidential and exempt underwriting file records to government agencies upon written request and demonstration of need.

The bill has several other provisions: It specifies criteria that public housing authorities must meet to form self-insurance funds. The bill amends various provisions relating to public adjusters, including prohibition of certain solicitation practices, limiting fees that can be charged, providing licensure qualifications and establishing a public adjuster apprenticeship program and license. It authorizes title insurers to petition the Office of Insurance Regulation for a rate deviation for personal property title insurance, a Uniform Commercial Code insurance product. It extends for an additional year the offer of availability of excess coverage under the Florida Hurricane Catastrophe Fund to certain limited apportionment companies, insurers approved to participate in the Insurance Capital Build-Up Program and insurers that purchased such coverage from the fund in 2007. It provides an exemption from the customer representative licensing examination for applicants with an associate's or bachelor's degree who have completed at least nine academic hours in property and

casualty insurance. It prohibits insurers, including Citizens Property Insurance Corporation, from requiring insurance agents as a condition of appointment or continuation of appointment to take a course or educational program that offers continuing education credits. It authorizes independent study programs offering continuing education credits through correspondence to allow students to take a final closed book examination without being monitored under specified conditions. It requires Citizens Property Insurance Corporation to electronically report certain claims data and histories to a consumer reporting agency upon request. Subject to the governor's veto powers, the effective date of this bill is July 1, 2008, except as otherwise provided.

## **CS/CS/SB 2082/HB 1003 – Insurance**

The John and Patricia Seibel Act creates enhanced consumer protections related to annuity and insurance transactions. For senior consumers, 65 and older, the bill requires that the insurer or insurance agent have an objectively reasonable basis for believing that a recommendation to a senior consumer is suitable, and it requires insurance agents, prior to recommending an annuity to a senior consumer, to obtain specified personal and financial information from the consumer relevant to the suitability of the recommendation, on a form adopted by the Department of Financial Services. It provides that a consumer who refuses to provide information requested by an agent or insurer before execution of the sale to sign a verification of the refusal from the senior consumer on a form adopted by Department of Financial Services. It requires the insurer or agent to provide the consumer with specified information on a form adopted by the Department of Financial Services concerning differences between the annuity product being recommended for purchase and an existing annuity that would be exchanged. It requires an agent to disclose to the applicant that purchase

or exchange of an annuity contract may have tax consequences and that the applicant should contact a tax advisor for additional advice. It increases the "free look" period for a consumer to obtain a refund from 10 days to 14 days after purchase of a life insurance or annuity. It authorizes the Office of Insurance Regulation to order an insurer to rescind an annuity and provide a full refund of the premiums paid or the accumulation value, whichever is greater, when a consumer is harmed by a violation of the suitability statute. It provides criminal and civil liability protection to insurers for the acts of independent individuals not affiliated with the insurer for selling its products, when it involves an unauthorized sale. It expands the scope of record keeping requirements to entities responsible for the maintenance of records.

## **Provisions related to criminal penalties:**

- The bill imposes increased fines and penalties for the unfair and deceptive insurance practices known as "twisting" and "churning." Twisting is defined as knowingly making any misleading representations or incomplete or fraudulent comparisons or fraudulent material omissions of or with respect to any insurance policies or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, pledge, assign, borrow on or convert any insurance policy or to take out a policy of insurance in another insurer. Churning in general means the practice whereby policy values in an existing life insurance policy or annuity contract, including but not limited to cash, loan values or dividend values, and in any riders to that policy or contract, are used to purchase another insurance policy or annuity contract with that same insurer for the purpose of earning additional premiums, fees, commissions or other compensation.

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## In the Florida Legislature from preceding page

- The bill's penalties for "twisting" or "churning" are a first degree misdemeanor and an administrative fine not greater than \$5,000 for each nonwillful violation or an administrative fine not greater than \$30,000 for each willful violation. However, to impose the criminal penalties, the practice must involve fraudulent conduct.
- The bill also establishes penalties for willfully submitting to an insurer on behalf of a consumer documents bearing a false signature. A person commits a third degree felony for this act with an administrative fine not greater than \$5,000 for each nonwillful violation or an administrative fine not greater than \$30,000 for each willful violation.
- Administrative fines may not exceed an aggregate amount of \$50,000 for all nonwillful violations arising out of the same ac-

tion or an aggregate amount of \$250,000 for all willful violations.

- The bill prohibits an agent from using designations or titles that falsely imply that he or she has special financial knowledge or training.

### Additional measures in the legislation:

- Requires all licensees to complete three hours of Department of Financial Services-approved continuing education on the subject of suitability in annuity and life insurance transactions, with certain exceptions.
- Clarifies the regulatory jurisdiction of the agencies under the Department of Financial Services regarding the sale of annuities and grants rulemaking authority.

Section 9 related to annuity investments by seniors shall take effect 60 days after the date on which the final rule is adopted or Jan. 1, 2009, whichever is later. Subject to the governor's veto powers, the effective date of this

bill is Jan. 1, 2009.

### HB 5085/SB 1854 – Healthcare

This is a conforming bill to the General Appropriations Act and contains various statutory revisions to conform to budget adjustments in the area of healthcare. The bill amends s. 400.179, F.S., to authorize the transfer of leasehold licensee fees from the Health Care Trust Fund to the Grants and Donations Trust Fund; amends s. 409.017, F.S., authorizing the procurement of a vendor to maximize federal revenues through administrative claims for federal matching funds for state provided educational services; amends s. 409.904, F.S., repealing obsolete language related to the Meds AD program; repeals the Meds AD program effective June 30, 2009; repeals the Medically Needy program, except for coverage for pregnant women and children, effective June 30, 2009; and creates s. 409.906(26), F.S., allowing Medicaid payment for services provided to a Medicaid recipient by an anesthesiologist assistant.

The bill amends s. 409.908, F.S., to eliminate the requirement that Medicaid will not pay coinsurance and deductibles for services not provided by Medicaid; limits Medicaid payments for hospital Medicare Part A coinsurance to the Medicaid per diem rate less amounts paid by Medicare, but only up to the Medicare coinsurance amount; requires Medicaid payment for deductibles and coinsurance for portable X-ray Medicare Part B services provided in nursing homes; reduces the average wholesale price (AWP) component in the pharmacy reimbursement methodology from AWP minus 15.4 percent to AWP minus 16.4 percent; and reduces the wholesale acquisition cost (WAC) pricing component from WAC plus 5.75 percent to WAC plus 4.75 percent; requires the Medicaid rates for hospitals, nursing homes, community intermediate care facilities for the developmentally disabled, county health departments and prepaid health plans to be set in a manner that results in no automatic cost-

## Kudos Korner

The following members of the Elder Law Section deserve special recognition for their EXTRAordinary efforts and advocacy on behalf of the section, its members or our clients during the past few months.

*Sam Boone  
Andrew Boyer  
Linda Chamberlain  
John Clardy  
Kara Evans  
April Hill  
Steve Kotler  
Carolyn Landon  
Jana McConnaughay*

*Shannon Miller  
Robert Morgan  
Beth Prather  
Steve Quinnell  
Charlie Robinson  
Carolyn Sawyer  
Twyla Sketchley  
Chris Vogel  
Marjorie Wolasky*



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based expenditure increase for two fiscal years beginning July 1, 2009; and requires establishment of a workgroup to evaluate alternate payment methods and provide a report to the Legislature by Nov. 1, 2009.

The bill amends ss. 409.911, 409.9112, 409.9113 and 409.9117, F.S., to revise the method for calculating disproportionate share payments to hospitals; amends s. 409.912 (4) (b), F.S., to allow Medicaid-eligible children in Hillsborough County receiving child welfare services to receive behavioral healthcare services through the community-based lead agency specialty prepaid plan; and amends s. 409.912 (39) (a), F.S., to modify the pharmacy reimbursement methodology as described above.

The bill creates s. 409.912(53), F.S., to require legislative notification before implementing programs authorized under the federal Deficit Reduction Act of 2005; creates s. 409.91206, F.S., to allow the governor, the president of the Senate and the speaker of the House of Representatives to convene workgroups to propose alternatives for cost-effective health and long-term care reforms, including reforms for Medicaid; and amends s. 409.9122, F.S., to require recipients in the MediPass program, in counties with two or more managed care plans, to be assigned to a managed care plan if they fail to make a choice during the annual choice period.

The bill amends s. 409.9124, F.S., eliminating the provision that managed care per-member per-month rate averages do not exceed the amount in the General Appropriations Act for the fiscal year in which the rates are in effect and amends s. 409.913, F.S., to exclude independent laboratory services and school-based services from the Medicaid explanation of benefits.

The bill repeals s. 409.9061, F.S., to eliminate the authorization of a statewide laboratory services contract for Medicaid recipients and repeals s. 430.83, F.S., to eliminate the Sunshine for Seniors program. Subject to the governor's veto powers, the effective date of this bill is July 1, 2008.

## Estate Planning Committee Subcommittees tackle issues

by A. Stephen Kotler

The Estate Planning Committee last met on March 31. Our agenda is currently focused on three main categories, and a subcommittee has been formed to tackle the issues in each area:

- Committee on Creditors' Rights whose focus is to develop an Elder Law Section's response to the Real Property, Probate and Trust Law Section's (RPPTL) Ad Hoc Committee on Creditors' Rights to Non-Probate Assets;
- Power of Attorney Committee whose focus is to advocate the ELS's perspective to the RPPTL Power of Attorney Committee; and
- Trust Planning Committee whose focus is to explore uses of trusts in long-term care planning in the post Deficit Reduction Act environment.

The Creditors' Rights subcommittee is chaired by Kara Evans. The section was well represented by three

members at the RPPTL committee meeting in Bonita Springs on May 23.

The Power of Attorney subcommittee has been merged with the ELS's Medicaid Committee's POA subcommittee. John Clardy and Jana McConaughay are the chairs heading up the effort. Again, the section was well represented at the RPPTL committee's May 23 meeting. It appears that the RPPTL's effort has further slowed, and the group is now planning for the 2010 session. Professor David Powell has been hired to be the "scrivener" for the RPPTL committee.

The Trust subcommittee is chaired by Martin Cohen.

The Estate Planning Committee now has 40 members. We will be meeting in person at the retreat in July and by phone prior to that in mid to late June. If you wish to join the committee at large or a subcommittee, please send an email to skotler@wga-law.com.

## Medicaid Committee The drafting of Florida's Uniform Power of Attorney Act

by Amy Mason and Laurie Ohall

The Real Property, Probate and Trust Law (RPPTL) Section of The Florida Bar is drafting legislation to adopt the Uniform Power of Attorney Act (UPOAA). The Elder Law Section recently formed a committee to review and participate in the discussion and drafting of Florida's version of the UPOAA (FLPOA). This article provides a brief overview of the UPOAA and the current draft of the FLPOA, and reviews how certain aspects of the current draft may affect an elder law practice.

The UPOAA was developed by the Uniform Law Commission with the goal being to clarify and modernize the former Durable Power of Attorney Act. The commission has outlined the goals and benefits of the UPOAA, which can be viewed at [www.nccusl.org/Update/uniformact\\_why/uniformacts-why-upoaa.asp](http://www.nccusl.org/Update/uniformact_why/uniformacts-why-upoaa.asp).

The UPOAA consists of four articles: Article 1 includes general provisions governing the creation, use and applicability of a power of attorney;

*continued, next page*

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## Medicaid committee from preceding page

Article 2 provides default rules related to an agent's authority under a power of attorney; Article 3 offers an optional statutory form power of attorney and sample agent certification form; and Article 4 includes miscellaneous provisions regarding how the UPOAA relates to other law and pre-existing POAs.

Since its approval by the Uniform Laws Commission in 2006, two states have adopted the UPOAA, and seven states have introduced bills to

their legislatures. Nearly all of the states have embraced the concept of uniformity, keeping the language in the UPOAA largely intact, including the language limiting an agent's gift-making authority (which will be discussed in more depth below). A full copy of the UPOAA may be viewed at [www.nccusl.org/Update/ActSearchResults.aspx](http://www.nccusl.org/Update/ActSearchResults.aspx).

The UPOAA incorporates some significant changes to the Durable Power of Attorney Act. First, the UPOAA updates certain terminology used in the act. For example, the term "incapacity" replaces the term "disability," recognizing that a

disability does not necessarily make someone unable to manage or make decisions regarding their financial affairs. The term "agent" replaces the term "attorney-in-fact" to address public confusion between the terms "attorney-in-fact" and "attorney at law." Second, the default for the durability of a power of attorney (POA) has been reversed, providing now that a POA is durable unless the document expressly provides that it becomes invalid upon the principal's incapacity. Third, the UPOAA provides a broad protection for good faith acceptance of any acknowledged power of attorney without imposing a corresponding duty to independently verify that the POA is valid. Additionally, it includes safe harbors for the legitimate refusal of a POA. For example, the UPOAA provides a procedure for a third party to request from the appointed agent a confirmation of validity for the POA. Finally, the UPOAA creates a cause of action for costs and damages when a third party unreasonably refuses to accept a POA. Although these protections are new to many states, Florida law already includes similar provisions for the good faith acceptance and unreasonable refusal of a POA by a third party.

## Current draft of the Florida Uniform Power of Attorney Act

In its approach to drafting the FLPOA, the Florida RPPTL committee adopted the principle that any powers delegated to an agent must be *specifically* granted in the instrument creating the POA, i.e., the mere execution of a POA should not create any powers, implied or otherwise. The committee expressed a concern that the principal should have *actual* notice of the scope of powers granted to an agent and believed that this goal would be accomplished only by requiring specificity in the grant of powers to the agent rather than a reliance on incorporation by reference of statutory powers or "form" documents widely available on the Internet or from other sources. The committee concluded that these formats often grant much broader authority to an

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# COMMITTEE REPORTS

agent than the principal realizes.

As a result of these concerns, the committee omitted most of Article 2, which includes powers that may be incorporated either by reference or included using a general grant of authority to an agent. The committee also omitted all of Article 3, which provided a statutory form POA and a sample agent certification form. The committee specifically rejected the concept of a statutory or "check the box" POA, citing *Krevata v. Wright*, 518 So.2d 435 (Fla. 1<sup>st</sup> DCA, 1988) to indicate that current law would not be changed as a result of the draft of the FLPOA.

Both the UPOAA and the FLPOA require that certain powers be expressly granted to an agent in the POA. The specific powers include the agent's power to:

1. Create, amend, revoke or terminate an *inter vivos* trust;
2. Make a gift;
3. Create or change rights of survivorship;
4. Create or change a beneficiary designation;
5. Delegate authority granted to the agent under the power of attorney in accordance with the act and applicable Florida law;
6. Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; and
7. Disclaim property and a power of appointment.

The goal of the commission and the committee in requiring the express grant of authority of these powers is to limit those powers most frequently abused or misused. These proposed changes would require lawyers to review their POA forms and consider whether they need to include more specifically enumerated powers in their documents. Otherwise, in the event of an unplanned or unanticipated situation (which, let's be honest, most of them are), a trip to the courthouse may be required to get approval for those transactions not

specifically set forth in the client's POA.

## The power to make a gift under the FLPOA

The current draft of the FLPOA adopts changes in the treatment of the gift-making power as set forth in the UPOAA. The FLPOA provides that an agent may make a gift on behalf of the principal only if the POA expressly grants the agent this specific authority and if the exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject. Unless the POA otherwise provides, an agent who is not an ancestor, spouse or descendant of the principal may not give to themselves an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer or otherwise. Furthermore, unless the POA otherwise provides, language in a POA granting general authority with respect to gifts authorizes the agent only to:

1. make a gift in an amount per donee

not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code Section 2503(b); and

2. consent to gift splitting with the principal's spouse.

Finally, an agent's gift-making authority must be consistent with the principal's objectives, if actually known by the agent; otherwise, where the agent is unsure of the principal's objectives, the authority is further limited by a non-exclusive list of considerations an agent must address prior to making a gift. These factors include:

1. the value and nature of the principal's property;
2. the principal's foreseeable obligations and need for maintenance;
3. minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes;
4. eligibility for a benefit, a program or assistance under a statute or

*continued, next page*

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## Medicaid committee *from preceding page*

regulation; and

5. the principal's personal history of making or joining in making gifts.

Under current law, subject to an agent's fiduciary obligation to the principal, an unlimited gift could be made under a general grant of authority to make gifts. Unless the POA specifically states otherwise, the proposed language under the FLPOA would require a court to approve any gift that exceeds the annual gift exclusion amount.

## Potential changes to the elder law practice

The elimination of a "broad" or "general" grant of authority through a POA could greatly alter the practice of an elder attorney when it comes to post-incapacity planning. For ex-

ample, the agents of many clients who are now incapacitated come to us with copies of "bare bones" POAs. These POAs typically provide only that the agent has the authority to do anything the principal legally could do him or herself. If the current draft of the FLPOA is adopted, any such simple POA would be rendered useless in many situations, and our practitioners would be required to use the court system to obtain authority to do many of the simple things that our clients are able to do now to protect their principals. Specific areas of concern for Elder Law Section members intimately involved with the process include potential restrictions to access to safe deposit boxes, unwieldy restrictions on gifting and very narrow language defining the "financial transactions" banks will be required to allow agents to perform on behalf of their principals.

Unfortunately, the more paternalistic language currently being consid-

ered by the committee may have the unwanted effect of bringing lawyers and their fees into situations that the principals never intended when signing what they thought were broad grants of power. The more restrictive language will add complexity to the lives of those who are taking responsibility for their incapacitated principals— and who are doing so with integrity in the great majority of situations. Both the Medicaid and Estate Planning committees of the Elder Law Section are involved in the development of Florida's version of the UPOAA. Members who are interested in these issues are urged to contact the chairs of either of these committees to become involved in the process. (For contact information, see page 11.) Proposed statutory changes may reach members of the Legislature in 2010, and there is much work to be done in the interim. Because collaborations between the Elder Law Section and the RPPTL Section have produced good results for our mutual clients and each section's members, specifically in the guardianship arena, there is great hope that by working together, a final product can be produced that will be beneficial to both our practices and those whose interests we represent.

*Amy Mason is an associate attorney with Goldberg & Olive in Tallahassee. She earned her undergraduate degree from Colby College in Waterville, Maine, and her JD and master's degree in public health from Emory University. Ms. Mason focuses her practice solely in estate planning, estate and trust administration, elder law, guardianship and special needs planning, and is licensed in Florida, Georgia and Tennessee.*

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Monitoring new developments in the practice of elder law is one of the section's primary functions. The section communicates these developments through the newsletter and roundtable discussions, which generally are held prior to board meetings. Each substantive committee makes a presentation at these roundtable discussions, and members then join in an informal discussion of practice tips and concerns.

All section members are invited to join one or more committees. Committee membership varies from experienced practitioners to novices. There is no limitation on membership, and members can join simply by contacting the substantive committee chair or the section chair. Be sure to check the section's website at [www.eldersection.org](http://www.eldersection.org) for continued updates and developments.

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# NAELA update

by Howard S. Krooks



As NAELA liaison to the Elder Law Section, I have been asked to write this report regarding what is happening within NAELA and what we can expect over the coming year. I attended a NAELA board of directors meeting on May 14 in Maui, Hawaii, and much of the information I report to you now was obtained from this meeting as well as numerous other board meetings over the last several years.

## Focus on special needs law

As some of you may know, NAELA changed its tagline in 2006 to "Leading the Way in Special Needs and Elder Law." The addition of "Special Needs Law" to NAELA's tag line portended NAELA's desire to meet the needs of the special needs planning attorney and to focus greater attention on this area of the law for NAELA's membership. NAELA's goal is to do for special needs law attorneys that which NAELA has accomplished for elder law attorneys. This focus will be seen in many ways, particularly in NAELA's future programming, with perhaps one program devoted each year solely to special needs law.

## NAELA's strategic plan

Key result no. 7 of the strategic plan adopted by the NAELA board for the years 2008-2011 deals with market analysis. Where is NAELA, where are the members, where is elder law, what is going on in elder law and what are the trends? Members keep NAELA alive, and we need to assess what they want and how we can deal with members' concerns.

## Grass-roots advocacy

NAELA, as part of its recently adopted strategic plan, is just beginning to implement a grass-roots advocacy campaign. Brian Lindberg, public policy consultant to NAELA, recently hired two individuals to assist in the grass-roots advocacy effort. The goal

of this effort is to have a network in place to communicate up and down the stream as events occur.

## Chapters

NAELA is looking at ways to help chapters become financially sound so they can hire staff, begin to grow and accomplish even more. NAELA is focusing its efforts on 1) encouraging and providing means to chapter presidents to communicate more frequently, and 2) enhancing chapter websites. A Chapter Development Committee has been created to make chapters become more financially sound. A "boot camp" is being planned for chapters to help jump-start this effort.

## New educational programs

NAELA has spent several years designing new educational programming that will be rolled out in 2009 and 2010. Gone are the Symposium and Institute (after this year's Institute), and new to the scene are the Winter Program, the Annual Program, the Public Benefits Institute and a Special Needs UnProgram. The following is a schedule of planned educational programs beginning in 2009:

- **UnProgram** (End of January)
- **Winter Conference** (Last week of February or early March. This will be a subject-specific conference.)
- **Annual Meeting** (Early part of May. The first program will be held in April 2009 since the location is Washington, D.C., and we will be attempting to schedule the program while Congress is still in session.)
- **Basics Program** (Early August)
- **Special Needs UnProgram** (First to second week in August - trial basis)
- **CAP Program** (End of August or early September)
- **Public Benefits Institute** (Late October/early November. This program will focus on public benefits, such as Medicaid, SSI, Veterans Benefits, etc.)

## NAELA Symposium in Maui, Hawaii, May 15-18, 2008

### ***Ka'Ohana NAELA*** ***("The NAELA Family")***

There were 221 attendees at the Maui Symposium, which was titled "Celebrating Our Past, Visioning Our Future" in recognition of NAELA's 20<sup>th</sup> anniversary. The programming included sessions covering a wide range of topics:

- Long-Term Care: The Future Role and Challenges for Medicaid
- 2008 Elder Law Update, which reviewed all of the cases pertaining to elder law that were decided around the country in the last year
- Ten Easy Steps to Grow and Market Your Elder Law Practice
- Which SNT, When and Why?
- Why You Can't Ignore Estate and Capital Gains Tax Exposure in Any Estate Plan – Drafting for Tax Flexibility
- The Top Worst Mistakes Attorneys and Trustees Make When Planning, Drafting or Administering Special Needs Trust
- DRA Implementation – The Practitioner's Response
- The DRA Volcano: What's Important Now
- Bomb Proofing the Estate Plan to Anticipate and Avoid Litigation
- Emerging Trends in Guardianship Case Law & Capacity Planning
- Estate & Tax Planning With Annuities
- Web 2.0 for Lawyers: How to Improve Your Online Identity, Communication Skills and Collaboration Results

At the business meeting luncheon held on May 15, Mark Shalloway passed the gavel to Craig Reaves, who introduced himself as the new NAELA president as of June 1 and presented his goals for NAELA in the coming year. Congratulations to Mark on completing his tenure as president of NAELA. In addition, new NAELA

board members were inducted, and I was pleased to present our own Emma Hemness with the NAEALA Award for Outstanding Achievement in the Florida Chapter.

On the fun side, there was a full-blown luau on Thursday evening, and a good time was had by all. A NAEALA video is being produced that commemorates the 20<sup>th</sup> anniversary of NAEALA. Members had an opportunity to make comments about their NAEALA experiences, and this will be compiled into one cohesive video. On a personal note, my wife and I did some snorkeling, caught two mahi mahi fish and went to the top of Haliakalah, a dormant volcano 10,000 feet above sea level, to see the sunrise. We then rode mountain bikes on the way down. The food was excellent throughout the island of Maui, and I can highly recommend spending an afternoon sitting on the outdoor deck of My Tai's in the town

of Lahaina, sipping on whatever kind of drink makes you happy!

### **Advanced Elder Law Institute**

The Institute this year will be held at the InterContinental Kansas City at the Plaza Hotel in Kansas City, Mo., Oct. 23-26, 2008.

### **Public Policy Issues**

One-third of the U.S. Senate is up for re-election, and we will have a new president in 2009. In the House of Representatives, it is anticipated that the Democrats will pick up one to two dozen seats. The key to healthcare issues could be the possible change in the Senate, which could become controlled by the Democrats and avoid a lot of filibuster issues that have permeated the current Congress. All of these changes in the legislative and executive branches of our government will impact directly on NAEALA's efforts for the next four years as well

as NAEALA members' practices. NAEALA is well positioned to monitor these changes, and it is the reason why the annual meeting in 2009 will be held in Washington, D.C., so that NAEALA can remain on the cutting edge of changes as they occur.

**Howard S. Krooks, JD, CELA**, is a partner of Elder Law Associates PA with offices in Boca Raton, Aventura, Weston and West Palm Beach. He is admitted to practice law in Florida and New York. His professional practice is devoted to elder law and trusts and estates matters, including representing seniors and persons with special needs and their families in connection with asset preservation planning, supplemental needs trusts, Medicaid, planning for disability, guardianship, wills and trusts. Mr. Krooks is a founding principal of ElderCounsel LLC, the premier document drafting solution for elder law attorneys.

## **Off-label use of Seroquel questioned**

by William A. Johnson



In the course of representing families who have loved ones suffering from Alzheimer's disease or dementia, I have repeatedly heard of the drug Seroquel. Seroquel has been used by nursing homes to

treat agitated or aggressive dementia patients. This practice is an off-label use of the drug because Seroquel was not designed for dementia patients, but instead for schizophrenic and bipolar disorder patients.

Now, several studies have shown that the use of Seroquel on dementia patients may actually speed up the progression of the dementia as well as shorten life expectancy. Other studies show that there are dangers when using the drug on patients with diabetes or hypoglycemia. These studies were conducted in the United States as well as in Canada and Great Britain.

In October 2005, the Journal of the American Medical Association reported that in 15 separate studies of the use of Seroquel on more than

5,000 dementia patients, Seroquel was found to shorten life expectancy. This confirmed an earlier study by the Canadian counterpart to the AMA. Yet, Seroquel sales topped \$3.4 billion in 2006. Trust me, there aren't enough schizophrenics and bipolar disorder patients in the United States to justify those figures. So, where do those sales numbers come from? They come from the use of Seroquel on dementia patients in nursing homes, despite the JAMA report.

Seroquel is a low-cost means for nursing homes to deal with dementia patients who display aggression or agitation. Basically, they dope them into submission. I am fairly sure that most nursing home facilities are not even aware of the dangers associated with Seroquel's use on dementia patients.

At a congressional drug safety hearing, Dr. David Graham, an FDA drug safety expert, was asked about concerns he had about drugs currently available today. Graham testified, "I would pay careful attention to antipsychotic medications. ... The problem with these drugs is that we know they are being used extensively off label in nursing homes to sedate

elderly patients with dementia and other types of disorders. ... But the fact is, it increases mortality perhaps by 100 percent. It doubles mortality. So I did a back-of-the-envelope calculation on this, and you have probably got 15,000 elderly people in nursing homes dying each year from the off-label use of antipsychotic medications. ... With every pill that gets dispensed in a nursing home, the drug company is laughing all the way to the bank."

On Jan. 4, 2008, *The New York Times* reported that this off-label use of Seroquel and other anti-psychotic medications is highly overrated. Families need to know these facts before allowing the use of Seroquel on their loved ones suffering from Alzheimer's disease or other dementias.

**William A. Johnson** is the owner of William A. Johnson PA in Melbourne, Fla. He is board certified in the area of elder law and practices predominantly in the fields of estate planning, Medicaid planning, long-term care planning, guardianship, incapacity planning, Medicare, retirement benefits, will and trust litigation, and probate.

# Class action seeks community living options for disabled persons

by Jodi Siegel, Southern Legal Counsel Inc.



More than 8,500 nursing home residents who receive Medicaid say they want to live in the community. However, without the provision in the community of personal care and other services that they need, they are forced to remain unnecessarily isolated from family, friends and community activities. The Supreme Court in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) held that unjustified segregation violates the Americans With Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (504). The ADA and 504 require states to provide services in the most integrated setting appropriate for the individual. Dissimilar treatment exists for disabled people. To receive needed medical services, persons with disabilities must, because of their disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without disabilities can receive the medical services they need without similar sacrifice.

A statewide class action was filed in January 2008 on behalf of persons with disabilities who receive Medicaid, reside in a nursing home and would like to live in the community with appropriate services. *Long, et al. v. Benson (AHCA), Beach (Elder Affairs)*, Case No. 4:08-cv-26-RH-WCS (N.D. Fla., J. Hinkle) Plaintiffs are represented by attorneys from Southern Legal Counsel Inc., a public interest law firm located in Gainesville, Fla.; Steve Gold, a nationally recognized disability discrimination expert; the AARP Foundation Litiga-

tion; and the National Health Law Program. The plaintiffs allege that their unjustified segregation is due to the defendants' failure to assess, inform and offer appropriate community-based services. The defendants' policy choices and methods of administration prevent the plaintiffs from receiving community-based services. We are seeking injunctive relief so nursing home residents are assessed to determine what services they need to live in the community and so sufficient Medicaid-funded services are available in the community for long-term care. While this primarily impacts the elderly, there are many younger people with disabilities who are forced to live in nursing homes to obtain needed services.

An example of unnecessary confinement is a named plaintiff who is a 60-year-old man living in a nursing facility in Plant City, Fla. He wishes to live in the community with appropriate healthcare and personal care services. In 2003, he became paralyzed on one side as a result of suffering two strokes. From the hospital, he was discharged directly to a nursing home without being offered to live in the community with appropriate services. He uses a manual wheelchair for mobility. Despite his disabilities, he does not require extensive nursing care or oversight. He requires assistance transferring from bed, dressing, toileting and showering, but brushes his own teeth and draws with his right hand. Medicaid covers these services in the nursing facility. His treating physician agrees that he can reside in the community with appropriate community-based services. He has several adult children, who visit him on weekends. At the nursing facility, he must share a room with another adult and accord-

ingly has little privacy or any space to call his own. He draws and takes para-transit services once a week to swim with a friend in a community pool. Other than swimming at a community pool, he rarely leaves the nursing facility. He can shower only when the staff provides for it, and he is offered a shower only once or twice a week. He has requested community-based long-term care services and has applied for these services. He and his family have been told that he was placed on a waiting list for community-based Medicaid services. The state has offered Medicaid-funded personal care and healthcare services only in a nursing facility setting. Residing in the community in his own apartment or house is the most integrated setting appropriate to his needs.

The case is in the beginning stage of discovery. The defendants moved to dismiss the complaint on several grounds, including that the ADA and 504 regulations that mandate integration are not valid or enforceable. Judge Hinkle notified the Department of Justice, which issued the regulations, that the regulations were being challenged. The DOJ filed a Statement of Interest on behalf of the United States and defended the regulations. At oral argument on May 29, 2008, Judge Hinkle denied the motion to dismiss. He also gave the state 60 days to conduct discovery on whether the named plaintiffs are adequate class representatives.

*Jodi Siegel has been an attorney with Southern Legal Counsel Inc., a not-for-profit public interest law firm, since 1985, and became its executive director in July 2004. She primarily represents children and adults with disabilities in administrative proceedings and in the federal courts.*

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# Ambassadors for Aging Day

by Twyla Sketchley



On Feb. 20, 2008, Florida's Department of Elder Affairs (DOEA) sponsored the annual Ambassadors for Aging Day at the state Capitol in Tallahassee, Fla. According to the DOEA, "Ambassa-

dors for Aging Day unites elders and elder advocates throughout the state to showcase the special contributions of older adults." It provides an opportunity for Florida's older adults to visit the Capitol, learn what resources are available and focus on the needs of the elderly in our state. This year, The Florida Bar's Elder Law Section provided an exhibitor booth at the event to show the difference that elder law attorneys make in the lives of citizens in the state of Florida.

Ambassadors for Aging Day provides an excellent opportunity for the Elder Law Section to explain how elder law attorneys help not only Florida's older adults, but also their families, service providers and communities. As this year's Elder Law Section ambassador, I had the opportunity to speak with citizens, service providers, government employees, legislators and even a couple of clowns who stopped by the Elder Law Section's booth for information and shared stories of their trials and tribulations in the long-term care system. Several legislative staffers stopped to ask what the Elder Law Section does for its clients, and again, while providing membership directories, I suggested that our Legislative Committee and our individual elder law attorneys are excellent resources and can answer questions regarding the impact of proposed legislation on Florida's elderly and disabled citizens. The most difficult challenge of the day was explaining the significance of Elder Law Board Certifica-

tion to two clowns without laughing.

Three floors of the Capitol building were lined with exhibitors. I had the opportunity to talk with representatives from the state agencies, not-for-profits, citizen advocate groups and service providers who provide support for our clients. I introduced the Elder Law Section to Department of Children & Families' Adult Protective Services (APS) program office representatives, explaining how elder law attorneys are involved in APS cases and what the Elder Law Section's Abuse, Neglect and Exploitation and Guardianship committees do regarding abuse and exploitation issues. I spoke with the Public Service Commission representative, who provided an explanation of the services the Public Service Commission can provide to our clients and asked me to remind all elder law attorneys that Medicaid recipients may also be eligible for the discounted phone rate

through their local telephone service. From the Fish & Wildlife Conservation Commission, I also learned about the many accommodations Florida can make to allow our disabled clients to enjoy its state parks and beaches.

Throughout the day, participants shared stories of how elder law attorneys had helped their families or their community organizations in times of need. Members Rebecca Berg, Emma Hemness, April Hill, John Kendron, Rebecca Morgan, Robert Morgan, Steve Quinnell and Jack Rosencranz were mentioned by name. In just a few hours, it became clear that our small section and its dedicated attorneys can and do have a dramatic impact on the citizens of Florida.

*Twyla Sketchley is the managing attorney of The Sketchley Law Firm PA in Tallahassee. Among many things, she is treasurer of the Elder Law Section.*

## Elder Law Section Slate of Officers for 2008-2009

Elections will take place during the July 18, 2008, Executive Council meeting.

Chair:	Linda Chamberlain
Chair-elect:	Babette Bach
Administrative Chair:	Len Mondschein
Substantive Chair:	Enrique Zamora
Secretary:	Twyla Sketchley
Treasurer:	Jana McConnaughay
Immediate Past Chair:	Emma Hemness

## Stetson University College of Law names suite housing elder law center for Govoni, Staunton

Stetson University College of Law named the suite housing its elder law center the Govoni-Staunton Suite for the Center for Excellence in Elder Law in a special dedication ceremony on the Gulfport campus on April 26.

The elder law center is located adjacent to Stetson's Eleazer Courtroom, a model elder-friendly, barrier-free courtroom. The Govoni-Staunton Suite is named in honor of the work of Leo Govoni and John Staunton, cofound-

ers of the Center for Special Needs Trust Administration Inc., a nonprofit dedicated to providing solutions for the elderly and the disabled.

"This is a milestone for the Center for Excellence in Elder Law," says Rebecca Morgan, the Boston Asset Management Faculty Chair in Elder Law and director of the Center for Excellence in Elder Law at Stetson. "We at Stetson are extremely grateful for the continuing support that they

have given us."

Professor Morgan holds the first chair in elder law in the nation. The Center for Excellence in Elder Law was established at Stetson in 1995 to meet the increasing need for legal education and research in the interdisciplinary field of law and aging.

For more information about Stetson's Center for Excellence in Elder Law, visit [www.law.stetson.edu/excellence/elderlaw](http://www.law.stetson.edu/excellence/elderlaw).

## M E M B E R N E W S

### Meet the 'Super Lawyers!'

Congratulations to the following elder law attorneys selected as 2008 Florida Super Lawyers ([www.superlawyers.com](http://www.superlawyers.com)): **Rebecca L. Berg, Vicki J. Bowers, Edwin M. Boyer, Norma H. Brill, Emma Hemness, Mary Alice Jackson, Sheri Lund Kerney, Christopher A. Likens, Beth A. Prather, Charles F. Robinson, Candis D. Trusty, Lauchlin Tench Waldoch and Edward A. White.**

\*\*\*

### Hemness receives NAELA chapter award



14-18, 2008.

**Emma Hemness** received the National Academy of Elder Law Attorneys award for Outstanding Achievement in the Florida Chapter, presented at its 20th anniversary conference in Maui, Hawaii, May

\*\*\*

### Jason Penrod named partner

The Law Office of Weaver, McClen- don, Penrod LLP, formerly Weaver & McClendon PA, is pleased to announce that **Jason A. Penrod** is a partner with the firm.

Jason A. Penrod  
240 East Park Avenue  
Lake Wales, FL 33859-0466  
863/676-6000  
[www.lakewaleslaw.net](http://www.lakewaleslaw.net)

\*\*\*

### The Sketchley Law Firm has moved

Twyla Sketchley  
Nicholas (Nick) Weillhammer  
The Sketchley Law Firm PA  
The Professional Center at  
Southwood  
3689 Coolidge Court, Suite 8  
Tallahassee, FL 32311  
Telephone: 850/894-0152  
Facsimile: 850/894-0634

Twyla says, "We love our new office. I live about six blocks from my office and walk to work most mornings.

We even have a little park behind the office where we can have lunch."

The Sketchley Law Firm is also proud to announce that **Tracy Rouse** has become a Florida registered paralegal. Congratulations, Tracy!

\*\*\*

### Nicola Melby opens firm in North Carolina



**Nicola "Nikki" (Boone) Melby** has recently been sworn into the North Carolina Bar. She remains of counsel to the law firm of McCarthy, Summers, Bobko, Wood, Sawyer & Perry, P.A., in Stu-

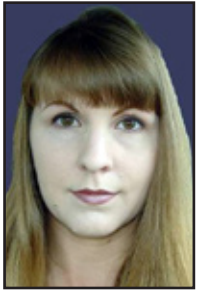
art, and in North Carolina has opened The Law Office of Nicola Jaye Melby PLLC located in Brevard, N.C. Nikki will concentrate her efforts in the areas of education law, elder law, family and child advocacy for disability planning and nonprofit representation. She can be reached at [nikkimelby@earthlink.net](mailto:nikkimelby@earthlink.net).

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# The increased incidence of seniors as violent offenders:

## Suspected correlates and options for intervention

by Kim Kroflich



Elder law issues are most often presumed to arise in civil law. However, criminal law practitioners in Florida will tell you that they confront age-related situations as well. A concerning trend both casually

observed and confirmed by longitudinal research is a rise in arrests of seniors for violent crimes. Equally concerning is that these crimes are often perpetrated against family members in the home.

The question arises, to what is this trend attributable? Americans are living longer than ever before, and the related increased incidence of both prescription drug intake and age-related dementia may in part help explain this phenomenon. Although there are undoubtedly other factors as well, given that certain prescription drugs and drug interactions as well as certain dementia disorders are both known correlates with uncharacteristic incidents of violent behavior, these two factors will be examined further.

### Prescription drug-related violence

Certain prescription drugs as well as drug interactions have been linked to aggressive behavior. Moreover, the incidence of diverse diseases increases exponentially with advancing age. Since seniors typically take more medications than younger persons, it is not surprising that aggressive behaviors are visible at a significant rate in the aging population.

"Paradoxical aggressive outbursts" are a recognized adverse effect of diazepam as well as other depressant drugs. In one notable case, a 60-year-old woman with no history of violent behavior who was prescribed diazepam for anxiety stabbed her husband to death with a kitchen knife.

Counterintuitively, antidepressant medications have also been linked to aggressive behavior in controlled studies. Dosage is the most important parameter in the process by which such drugs produce behavioral side effects, and not surprisingly, reports show that the elderly do frequently mis-dose.

Seniors are also routinely instructed to reduce cholesterol levels, sometimes with the assistance of prescription medication. Although unexpected, it has been empirically demonstrated that lower cholesterol levels strongly correlate with violence. High blood pressure is another condition commonly suffered by seniors. However, methyldopa, a medication often used to treat high blood pressure, has negative interactions with *many* other medications, including antidepressants. Even something seemingly as safe as citrus juice can interfere with enzymes that metabolize medications for all three of the previously mentioned conditions (high cholesterol, high blood pressure and depression), resulting in even higher levels of these drugs in the bloodstream. Common medications for age-related ailments may not be as harmless as once thought.

### Dementia-related violence

More than 4 million people in this country have Alzheimer's disease or other age-related forms of dementia. Aggression and atypically violent behavior are commonly accepted symptoms of dementia. In 1999, an 88-year-old Florida man suffering from dementia, but with no prior criminal record, stabbed a medical assistant looking at the man's treatment chart. Unfortunately, the benefits of many prescription drugs used to treat Alzheimer's disease are often offset by intolerability to the associated side effects. As such, medications are often discontinued and symptoms resurface.

There are likely also a significant

number of undiagnosed seniors suffering dementia. Such an individual's contact with the criminal justice system, resulting from an unexpected violent outburst, may in some cases serve as the first opportunity to address the problem.

### The Elder Justice Center, Palm Beach County

In 2006, Florida Senate Bill 288 proposed to create a statewide, multidisciplinary workgroup to study adults over age 60 in the criminal justice system, to identify those experiencing deteriorated conditions such as dementia and to determine what services are needed. However, the bill was ultimately withdrawn and was not reintroduced in the subsequent legislative session. Does the withdrawal of this legislation mean that effective systems were found to already be in place addressing the particular problems associated with the increased number of seniors in the criminal justice system? By and large, the answer is no.

In most judicial circuits, the post-arrest process is very routine and efficient, with all arrestees treated largely the same. For violent offenses classified as "domestic," the defendant will be held without bond until first appearance, pursuant to Florida law. First appearances are a rapid-fire process with the presiding judge sometimes not even looking up to make eye contact with each defendant, and even less often checking the defendant's date of birth to consider how age- or health-related issues should affect an appropriate bond decision. The bond determination generally permits the defendant's release with little or no immediate supervision or referrals. Often the only real option for assistance is for the prosecutor to formally file a criminal charge against the elderly defendant and to seek evaluation

*continued, next page*



and/or treatment at sentencing. That, however, may take months and is feasible in only those cases where the facts and evidence are sufficient for trial *and* the victim is willing and able to testify.

In contrast, Palm Beach County's Elder Justice Center (EJC) provides a unique example of one commendable alternative. The EJC's mission is "to identify and remove barriers within the court system and to develop and enhance linkages between

older adults, the legal system, medical and social services to ensure that the elderly ... are provided a fair and reasonable voice in, and access to, the courts." Many of the EJC's cases involve seniors as criminal defendants. Leading up to the establishment of the EJC, one clue that such defendants were not the typical defendants, but rather often had special needs to be addressed, was that professionals who routinely work with seniors were identifying multiple cases of arrest and incarceration of persons with dementia. It was believed that there were many seniors in the courthouse whose legal problems were not the real underlying reasons that caused

them to be there.

The EJC is managed by a social worker and employs a small number of staff members with criminal justice educational backgrounds. In *all* arrest cases in Palm Beach County where the defendant is over 60 years of age, an EJC staff member interviews each defendant and reviews the arrest paperwork prior to first appearance for the purpose of making recommendations regarding possible alternatives to incarceration. During these interviews, staff members look for signs of dementia; medical, mental health or substance abuse issues; financial problems; or any other indications that the underlying reason for the elder defendant's predicament may be something other than a newly surfacing and inexplicable criminal propensity. Thereafter, the EJC staff member speaks to the prosecutor on duty and often to the judge as well. Both the prosecutor and defense counsel have the opportunity to challenge the EJC's recommendations so as not to disturb the fundamental adversarial function of the justice system.

Often a supervised form of ROR is recommended, whereby the defendant must regularly check in with both the pretrial release department and the EJC. Through those meetings, the EJC will make service referrals, remind defendants of their court dates and often even appear with the elderly defendants for most if not all of their court dates. The EJC has found that these defendants tend to most frequently be referred for Alzheimer's or dementia evaluation and treatment and/or mental health or substance abuse evaluation and treatment. Specifically in domestic violence cases, defendants are regularly referred for counseling as well. There is no other entity in Florida that serves seniors involved in the criminal justice system in the precise ways that the EJC does.

Despite that there are hundreds of different criminal offenses in the Florida Statutes, approximately 25 percent of the defendants served by the EJC are arrested for violent offenses such as assault and/or battery, often involving a family member or loved one. In addition, a 2003 evaluation of the EJC by the Center on Aging at Florida International University concluded that domestic violence

## Kick back at the FSGA annual conference in St. Augustine

Lennie Burke, executive director of the Florida State Guardianship Association (FSGA), announces the annual Florida State Guardianship Conference to be held at the Renaissance Resort at the World of Golf Village in St. Augustine, Fla. The event will be held Thursday, August 7, through Saturday, August 9, 2008.

The theme for this year's event is "Knights at the Renaissance," and it will be chaired by guardian Michael Messer. There is still time to volunteer, sponsor or make a pitch to present at this heralded event. Contact Lennie Burke at the FSGA's website, [www.floridaguardians.com](http://www.floridaguardians.com), or by phone at 800/718-0207.

The FSGA will publish a directory that will be available at the conference and is planned to be a helpful resource to all who work with guardians. It will be the ultimate guardian resource book in Florida. Think about a Yellow Pages for guardians and you get the idea. If you provide any service or resource for guardians or wards, you will want to be included in this resource book. Contact Lennie Burke at the FSGA to make sure you are included. There is a nominal fee to cover the costs of printing and distribution. You'll be helping yourself and the FSGA when you participate.

Traditionally, FSGA conference time is when the association elects new officers. Currently, Karen Campbell, Esq., serves as FSGA president and guardian Jetta Getty is incoming president. More information will be available at the conference.

***See you there!***

specifically was “an area of increasing significance” among criminal behaviors by persons over age 60.

## Conclusion

The Elder Justice Center bypasses the systemic restraints on early and informed intervention for older defendants that exist in most judicial circuits. The EJC has no prosecuting or defense attorneys, nor attorneys of any kind on staff, and as such, the staff do not run into problems of prosecutorial misconduct or attorney-client privilege. EJC staff members are in essence first responders with the sole purpose of promptly assessing newly arrested seniors for age-related issues that may have contributed to their incarcerations. Because they specialize in working only with defendants over age 60, they have over the past several years amassed a wealth of information about age-related dementia and other conditions often involved with older defendants, and have been actively involved in making community contacts with professionals and programs designed to assist with these specific problems that seniors face.

The EJC represents an important effort to respond to the needs of seniors involved in the criminal justice system. It builds upon the tradition of many jurisdictions of creating specialized offices that enhance the system's responsiveness to its citizenry. The quality and fairness of decisions affecting older defendants that are made in the criminal justice system are contingent upon an understanding of how the aging process affects human behavior. The EJC represents a potential model for other circuits for providing seniors with meaningful access to the criminal justice system as well as with much needed health and other special services to address the unique age-related issues that are visibly increasing in our communities.

**Kim Kroflich** has been an assistant state attorney with the 18th Circuit for eight years, specializing in domestic violence cases the majority of that time. She also serves as an adjunct instructor for the University of Central Florida and Kaplan University. For source information or questions regarding this article, contact the author at [kkroflich@cfl.rr.com](mailto:kkroflich@cfl.rr.com).

# Elder Law Section 2008-2009 calendar

## ELS Executive Committee Meetings

*2nd Tuesday of each month at 4 p.m.*

**Fall Issue *ELS Advocate* Article Deadline: September 15, 2008**

## Elder Law Update

*Friday, October 3, 2008*

8:30 a.m. – 1 p.m. (lunch included)

Fort Lauderdale Grande Hotel & Yacht Club  
1881 SE 17<sup>th</sup> St., Fort Lauderdale, FL 33316  
888/554-2131

## Elder Law Section Committee Meetings

*Friday, October 3, 2008, 1:30 p.m. – 3 p.m.*

## Elder Law Section Executive Council Meeting

*Friday, October 3, 2008, 3 p.m. – 5:30 p.m.*

## Elder Law Certification Review Course

*January 8-9, 2009, 8:30 a.m. – 4:30 p.m. (both full days)*

*Caribe Royale, Orlando*

8101 World Center Drive, Orlando, FL 32821  
407/238-8036

## Member Reception

*January 8, 2009, 4:30 p.m. – 5:30 p.m.*

## Elder Law Executive Council Meeting

*January 8, 2009, 5:30 p.m. – 7:30 p.m. (dinner included)*

**Winter Issue *ELS Advocate* Article Deadline: January 15, 2009**

## Elder Law Committee Meetings

*Thursday, March 19, 2009, 4 p.m. – 6 p.m.*

*Renaissance International Plaza*

4200 W. Columbus Drive, Tampa, FL 33607  
813/877-9200

## Public Benefits

*Friday, March 20, 2009, 8:30 a.m. – 4:30 p.m.*

*Renaissance International Plaza*

## Member Reception

*Friday, March 20, 2009, 4:30 p.m. – 5:30 p.m.*

*Renaissance International Plaza*

## Elder Law Executive Council Meeting

*Friday, March 20, 2009, 5:30 p.m. – 7:30 p.m. (dinner included)*

*Renaissance International Plaza*

## Fundamentals of Elder Law II

*Saturday, March 21, 2009, 8:30 a.m. – 4:30 p.m.*

*Renaissance International Plaza*

**Spring Issue *ELS Advocate* Article Deadline: May 15, 2009**

# Do you really know what ‘protected homestead’ means?

by Ailish O'Connor



In many of our elder law practices, we encounter the elective share as another fence to clear in logical Medicaid planning. The augmented estate elective share law of 1999 was principally designed to make sure that a wealthy spouse could not impoverish a poor spouse through grantor-type trusts or pay on death/survivorship accounts. The statute's effect on spouses receiving Medicaid was something of an afterthought that the Elder Law Section worked hard to remedy.

Quick, off the top of your head, what does *protected homestead* mean? Protected from creditors' claims during lifetime and after death? Protected against devise? All of the above?

Suppose you are helping a couple make a long-term care plan. As part of the plan, it is clear that one spouse will imminently apply for Medicaid, and the “well/community” spouse, upon your advice, has transferred the couple's countable assets to himself or herself in order to meet the Medicaid eligibility criteria.

It doesn't matter whether the couple is using spousal refusal or conventional Medicaid—the *well* spouse needs to execute a new will in which “the minimum amount needed to satisfy the elective share laws of the State of Florida” is devised to a qualifying special needs trust for the incapacitated spouse—*just in case the “well” spouse dies first*. It happens.

Until 2001 (when the 1999 statute took effect), the elective share applied only to assets going through probate. Since October 2001, the law mandates that all surviving spouses (unless waived in a nuptial agreement) can demand 30 percent of almost everything owned by the first spouse to die. And, of course, there are definitions, inclusions and exclusions of what constitutes the elective

estate. The point of this article is to demonstrate that some words do not mean what you may think they mean.

Florida Statute §732.2045 lists the things that are excluded from the elective estate. Obviously, assets that are *excluded* from the elective estate do not need to be set aside for the surviving spouse. As a teaser, §732.2045(i) *excludes* from the elective share “property which constitutes the *protected homestead* of the decedent whether held by the decedent or by a trust at the decedent's death.” (Emphasis added.) Nothing in Chapter 732 defines “protected homestead.”

Do you know what “protected homestead” is? You might think it means our Medicaid-based, hard-won tenet that protected homestead is “property constitutionally protected from creditor's claims,” including Medicaid's claims. If you try to apply that understanding to the elective share, you will be wrong. You will think that protected homestead is not part of the elective estate. But that's not what the statute says!

Florida Statute §731.204 (32) defines protected homestead as “the property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. *For purposes of the code, real property owned as tenants by the entirety is not protected homestead.*” (Emphasis added.) So, protected homestead applies only to property owned by an *individual* decedent (or trust) where the surviving spouse or minor children have constitutionally protected interests against transfer or devise.

The definition in Chapter 731 carries over to the elective share statute. Tenancy by the entirety homestead *is included* in the elective share at one-half value.

Therefore, if you have a husband and wife who own a larger amount of house as tenants by the entire-

ties, and a smaller amount of cash is owned by the well spouse, you will probably find that there is NO elective share obligation to satisfy if the well spouse dies first.

The one-half of the homestead owned by the first spouse to die is *not excluded* from the elective estate. The surviving institutional spouse automatically gets the one-half interest of the first spouse to die, and it counts against the 30-percent elective estate.

Suppose a husband and wife own homestead as tenants by the entirety. The house is worth \$250,000. The wife/community spouse owns \$100,000 in CDs in her sole name (which used to represent their combined life savings until you told the wife to transfer the accounts to her sole name for Medicaid eligibility). The wife dies leaving all CDs to her kids as pay on death beneficiaries. The husband inherits the house because it's tenancy by the entirety. What can the husband claim from the wife's heirs? If the husband claims elective share, the elective “augmented” estate is \$125,000 + \$100,000 = \$225,000. The husband's elective share is 30 percent, which equals \$67,500. The elective share of \$67,500 is much less than the \$125,000 that the husband gets in the wife's share of the tenancy-by-entireties homestead property. So, in this scenario, the husband can claim nothing from the wife's estate or heirs.

“Protected homestead” may be ill-named. It's too easy to confuse it with “constitutionally creditor-protected homestead.” Maybe calling it “devise-protected homestead” would be clearer. The vast majority of Florida homesteads are owned as tenants by the entirety. The vast majority of our clients have a paid-for house held as husband and wife, and a smaller amount of savings. And worst of all, unless you do some good planning, the one-half interest in the house that passes to the husband in the above

*continued, next page*



example does *not* go in the elective share trust in the will because title to the homestead passes by law to him outright. So, the husband owns a house he can't live in and can't realis-

tically sell, and the kids probably have to carry the house until the husband's death, which consumes capital they could have otherwise used to supplement the husband's care.

**Ailish O'Connor** received her JD and LLM from the University of Florida. She is board certified in elder law by The Florida Bar.

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## Preparing for session

from page 1

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in Florida's guardianship law. The section also supported a bill, cosponsored by the section's own Elaine Schwartz, directing the Department of Elder Affairs to develop a public education program and to conduct or support a study relating to screening for Alzheimer's disease.

To help develop and monitor its legislative agenda, the section has contracted for the past five years with Tom Batchelor, Ph.D., as its legislative consultant. Prior to retirement in 2003, Batchelor was staff director of the House Elder and Long Term Care Committee for many years. In addition to answering the elementary questions posed by section members like this author, Batchelor assists the section with a variety of legislative support tasks. He monitors and reports on bills that impact the section's members and their clients and the section's legislative agenda; participates in section legislative conference calls; gives guidance to section leadership and its members regarding the legislative process, the various legislative committees and their roles; provides information and support to section members as they prepare articles, speeches and conferences; attends section conferences and meetings at the request of the section's chair; and provides a legislative wrap-up at the close of the session.

Batchelor recommends that "[the section] should begin working on its legislative agenda for the 2009 session immediately, recognizing that legislative issues may arise throughout the year." To synchronize with the legislative session, he recommends that the section have its legislative agenda drafted by November and finalized by January so that it can be submitted for Bar approval and distributed to section members, legislative committees, other Bar sections

and statewide advocacy organizations.

Although The Florida Bar can only take limited legislative positions (See: *The Florida Bar re Schwarz*, 552 So.2d 1094 (Fla. 1989), *cert. denied* 498 U.S. 951, (1990)—reconfirmed

in *The Florida Bar re Frankel*, 581 So.2d 1294 (Fla. 1991)), The Florida Bar's various voluntary sections can adopt legislative positions and support or oppose legislation in compliance with the Rules Regulating The

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Florida Bar. Bar sections get support in furthering their various legislative agendas from The Florida Bar's Governmental Relations staff. The staff "reviews all proposed legislation and attempts to identify every Bar committee or section that may be interested in any bill. Summaries of those bills are arranged by committee or section name, also noting (by way of a three-character acronym) any other committees or sections that may be interested in the bill."

The section has several committees, each addressing different issues within elder law. These substantive committees include: Abuse, Neglect and Exploitation; Estate Planning; Guardianship; Ethics; Legislative; Death Care Industry; Medicaid; and Special Needs Trust. These committees follow policy developments, current issues and legislation. These committees advocate for changes in public policy, advise members and the public about the impact of changes in the law, develop programming for practitioners and work to build bridges between the section's membership and the service community. These committees also work with other Bar sections in joint advocacy. The section's committees are an integral part of the development of the section's legislative agenda.

In addition to committee work, section members provide technical sup-

port and research necessary in the development of the legislative agenda and attend many legislative hearings. Members attend local legislative days and public hearings. They meet with their state senators and representatives. When called on, members also provide technical assistance to legislative staff when questions arise regarding the impact of legislation on Florida's elders. Batchelor recommends that section members meet and become friends with their local legislators and legislative staff and offer to be available to them as experts on elder issues.

As the section sets its 2009 legislative agenda, members' participation is vital. Members are encouraged to participate in committee work, stay in touch with the section's legislative consultant, get involved in the section's legislative advocacy and introduce themselves to their local legislators.

The Florida Bar's Office of Government Affairs publishes "Tips for Effective Communication With Legislators," a part of the Voluntary Bar Leaders Handbook. These tips include information on developing legislative presentations, effective communication with legislators and the importance of advance materials. The Florida Bar's website also provides information on grass-roots advocacy, including a list of attorney legislators, a glossary of legislative terms and links to legislative information.

The Florida Legislature also provides legislative advocacy informa-

tion, including an explanation of the committee process, a glossary of terms and tips for communicating with your local legislators. The site recommends the following tips to facilitate meaningful contact with legislators:

1. Know who your representative and senator are and how to contact them. Local and Capitol contact information can be found at [www.flsenate.gov](http://www.flsenate.gov) and [www.myflorida-house.gov](http://www.myflorida-house.gov).
2. Contact your legislators before the Legislature takes action.
3. Use concise, single issue communication about a bill's effects on your life, business and clients.
4. Suggest a course of action and offer technical assistance.
5. Prepare a one page fact sheet on the particular issue.
6. Send personalized letters instead of form letters.

Now that the 2008 legislative session is over, the section's work on the 2009 legislative agenda and advocacy has begun. In a time when budget cuts and policy changes can so dramatically affect elder law attorneys' clients, it is vital for section members to get involved. Join a committee, meet the local legislative delegation, be familiar with the section's legislative agenda and advocacy, stay in touch with Dr. Tom Batchelor and bring concerns to the section's leadership.

*Special thanks to Dr. Tom Batchelor for his help with this article.*

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## **Call for papers — *Florida Bar Journal***

Babette Bach is the contact person for publications for the Executive Council of the Elder Law Section. Please email Babette at [bsbette@sarasotaelder.com](mailto:bsbette@sarasotaelder.com) for information on submitting elder law articles to *The Florida Bar Journal* for 2008. A summary of the requirements follows:

- Articles submitted for possible publication should be typed on 8 & 1/2 by 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.

# Eloise's day in court

by Michael A. Pyle



Eloise Tolbert sat at an empty table staring at a plastic flower in a small white vase. She couldn't remember when she'd sat down or what was coming next. A trim, impeccably dressed young woman approached, smiling and carrying papers.

"Mrs. Tolbert, I'm Peyton Wagner. I'm your court-appointed lawyer. A petition to determine your mental capacity has been filed by your daughter, Karen."

Eloise couldn't decide what to say. The lawyer started reading aloud, spouting words like "incapacitated" and "guardian." Eloise's tummy tightened and soured.

The lawyer said, "The petition says you're a widow."

Hearing the word "widow" momentarily shocked Eloise, as it did every time.

The lawyer peered at her. "Do you understand, Mrs. Tolbert?"

Eloise chose not to answer. Black and white photographs of family members shuffled through her mind. She tried to picture a family tree. But the branches were tangled. The lawyer continued. Tears streamed down Eloise's cheeks.

The lawyer smiled. Eloise glared at her. The lawyer stood and shoved a business card into her hand. Eloise wished her husband, Frank, could be here to straighten this out. She studied the petals of the plastic flower.

\*\*\*

Eloise kissed Frank lightly on the lips, trying to discern the details of his face as it faded in and out. Looking deeper into his dear face, she started to understand that this was a dream and that Frank had died long ago.

She looked around the large, open room where other residents milled about or sat, some restrained in wheelchairs. The smell of cleaning fluid obscured unpleasant odors. Shouts

and disconcerting noises echoed in the bare room.

Eloise was startled by a voice.

"Mom."

She looked up at the spitting image of Frank.

"I can't believe she stuck you here," he whimpered.

It was sinking in. This wasn't her strong, manly husband, Frank. This was her weak, whiny son, Frankie.

Her daughter, Karen, strutted up, shot a hard glance at Frankie and said, "Mom, how are you?"

Eloise was feeling a little more on the ball. "Where are you living, Karen?"

Karen stopped, looking apprehensive. "You know, in your house, keeping it up till you come home."

"It's my house."

Karen's mouth dropped. She looked at Frankie. "What're you starting?"

"What?" shrieked Frankie. "I was taking care of her. Every single day." He was on the verge of tears.

Eloise looked at her daughter. "You get out of my house. Drop this hateful whatever you call it. And you," she said pointing at Frankie, "Be a man."

She turned away, looked at the plastic flower and closed down.

\*\*\*

The following day, the lawyer returned. "Hello, Mrs. Tolbert. Remember me?"

Eloise had been struggling to maintain her concentration. She said, "I remember."

The lawyer looked stunned. "Do you recall what we talked about?"

Eloise nodded. "I don't like it. Is there a way to stop it?"

"No, ma'am, but I can defend you."

Eloise shook her head. "That Karen is always butting in." Eloise felt her memory slipping and fought to keep hold. Trying to look like you were on top of the present was like trying to appear sober when you were tipsy.

"Tell me about meeting with the examining committee."

"Pardon?" Eloise tried to reconnect lost synapses.

"The people who interviewed you."

"Oh, them. I'm afraid I didn't behave too well."

"You didn't behave?"

"I didn't answer their questions. One would show up out of the blue and say they were so and so. For all I knew, they could've been crooks. I have the right to remain silent, don't I?"

The lawyer laughed. "I guess you have a point there. Do you remember Dr. Ahmed?"

"There was a gruff man. He spun into the room like a top and talked fast. I don't know if it was English. Then he spun out again." She twirled a finger like a spinning top.

After a few more questions, the lawyer said, "You've asked me to represent you, and you've given me some ammunition."

When the lawyer left, Eloise gave up the struggle. She could be herself now, floating in and out of dreams and reality, the present and many shades of the past.

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The judge cleared his throat and looked around the courtroom. He identified Eloise, her children and the two lawyers.

The judge eyed Eloise's lawyer. "This is a 10-minute hearing. Miss Wagner, go ahead."

Her lawyer rose. "Your honor, we request a formal hearing to take testimony. Anyway, counsel for the petitioner has the burden of proving incapacity."

"Miss Wagner, the examining committee's reports say your client doesn't communicate."

Her lawyer said, "Your honor, my client has the right to remain silent. The committee cannot base a determination

*continued, next page*



## Eloise's day in court

from preceding page

solely on her silence."

The judge rested his large jaw on his fist. "Would she like to speak now?"

Her lawyer glanced at Eloise and said, "Your honor, she doesn't have to speak."

Eloise pulled herself up. She was prepared. "My name is Eloise Tolbert. I'm a widow. My two children are sitting there." She turned and pointed at them. "My daughter moved into my house and stuck me in a home." She stopped and glared at her daughter. "I

did not speak to those strangers who came to see me. How would you feel if strangers popped in to see you while you were kept against your will in a nut ward, and began quizzing you on silly things like 'who is the president,' making you count backward and so on?" Her voice steadied. "I may not be as spry as I once was, and I forget things, but I know what's going on. I have rights. I'm not crazy. I can take care of myself." She sat down.

The judge looked perplexed. He said, "Seems we need an evidentiary hearing. At this moment, I cannot find Ms. Tolbert incapacitated."

Eloise had relaxed. She was study-

ing the short row of law books peeking over the top of the judge's bench. They reminded her of a dusty, wooden-floored library long ago, where she'd sat across a pencil-etched table from a young man named Frank Tolbert, whom she was growing to love.

**Michael A. Pyle** is a partner of Pyle & Dellinger PL in Daytona Beach. He earned a B.A. (English), M.A. (linguistics) and J.D., with honors from the University of Florida. His practice is devoted to estate planning and administration, elder law and real estate. He has written three published English grammar books. Fiction writing is his avocation.

## Rep. Schwartz introduces Alzheimer's screening bill



Rep. Elaine Schwartz (center) is joined by advocates for the elderly as she introduces legislation to provide for early screening for Alzheimer's disease.



Jana McConnaughay, ELS executive council member, expresses the Elder Law Section's support for the Alzheimer's screening bill.



Victoria Heuler, president of the Academy of Florida Elder Law Attorneys, speaks in support of the Alzheimer's screening bill.

# Summary of selected caselaw

by Nicholas J. Weilhammer

*Fla. Dept. of Veteran's Affairs v. Cleary*, 971 So.2d 253 (Fla. 2d D.C.A. 2008).

Management of the nursing home concluded that it was necessary to discharge appellee resident because of his continuing pattern of inappropriate sexual conduct toward other residents and the staff. Hearing officer held that the discharge of appellee resident from a nursing home was unlawful because it occurred without giving a 30-day notice.

There was no dispute regarding resident's behavior or that it presented a safety issue to the other residents. Hearing officer cited an inapposite section of the C.F.R. Section 483.352 that pertains to the use of "restraint" as an "emergency safety intervention" deemed necessary due to "unanticipated resident behavior." Section 483.12 governs "admission, transfer and discharge rights." Subsection 12(a)(2)(iii) and (iv) provide authority to "transfer or discharge" a resident when safety or health of "individuals in the facility" would be endangered. Subsection 12(a)(5)(ii)(A) and (B) provide that in such circumstances, notice may be made "as soon as practicable before transfer or discharge." *Reversed*.

*McKibbin v. Alterra Health Care Corp.*, 977 So.2d 612 (Fla. 2d D.C.A. 2008).

Personal representative of decedent appeals the trial court's order granting a motion to compel binding arbitration.

The motion to compel arbitration was granted based on a residency agreement that provided for decedent at assisted living facility, and contained an arbitration agreement. The estate is not bound to arbitrate because decedent did not sign the residency agreement that contained the arbitration agreement, and her son, who signed the residency agreement, did not have the authority to bind her to arbitrate. No incapacity proceeding had been commenced, and there was no evidence decedent was mentally or physically incapacitated to make decisions for herself. Decedent's son presented a durable power of attorney to ALF to demon-

strate he had the legal authority to enter into the residency agreement on behalf of his mother, but nothing in that power of attorney gave son the legal authority to enter into an arbitration agreement on behalf of his mother. Furthermore, there was no other basis upon which to bind decedent to the arbitration agreement. *Reversed and remanded*.

*Wheeler v. Powers*, 972 So.2d 285 (Fla. 5th D.C.A. 2008).

Alternate personal representative under a prior will had standing to file probate revocation petition under the circumstances, since he may reasonably be expected to be affected by the outcome of the instant proceeding and the non-probate of the subsequent will. However, not every personal representative from every prior will should be granted standing. Here, decedent was of sound mind when she prepared her will and placed appellant in fiduciary positions. Appellant allegedly lost standing under decedent's subsequent will due to undue influence. *Reversed*.

*Slusser v. Life Care Centers of America Inc.*, 977 So.2d 662 (Fla. 4th D.C.A. 2008).

Resident checked herself into a nursing home. During the admission process, she executed an agreement to arbitrate all disputes and claims between the parties. While at the nursing home, she was injured and sued nursing home. Resident appeals the order compelling arbitration in action brought against nursing home.

An agreement that provides for arbitration of claims brought under the Nursing Home Residents Act is not unconscionable simply because it waives access to the courts to resolve claims arising under the act. A court does not have the power to decline to enforce an arbitration agreement simply because it waives access to the courts to resolve claims arising under the act. Had the Legislature intended to stop parties from arbitrating their claims under the act, it would have created an express prohibition. Since it did not, the court held that a voluntary waiver of access to the courts

to resolve claims arising under the Nursing Home Residents Act is valid. *Affirmed*.

*Woebse v. Health Care and Retirement Corp. of America*, 977 So.2d 630 (Fla. 2d D.C.A. 2008).

Personal representative appeals the order granting a motion to compel arbitration.

Attorney-in-fact demonstrated that the arbitration agreement in the present case is unconscionable as there was a showing of both procedural and substantive unconscionability. There was no attempt to inform the attorney-in-fact of the existence of the arbitration agreement, much less to explain the document to her and the rights she would be waiving on behalf of her father. The arbitration agreement was included as pages 33 through 37 of the 37-page sequentially numbered document. The attorney-in-fact was not given the opportunity to read the 37-page document prior to signing, but was merely directed where to sign, and was never provided with a copy of the agreement. The agreement also would not vindicate a nursing home resident's statutory rights in any manner because it specifically deprives the resident of those rights. *Reversed and remanded*.

*Lutheran Services Florida Inc. v. McCoskey*, 2008 Fla. App. LEXIS 5738 (Fla. 2d D.C.A. Apr. 18, 2008).

Guardian sought fees for services performed for the ward. Elder Justice Center (EJC), a court-appointed guardian *ad litem*, appeared on behalf of the ward. The EJC is a court-created program that reviewed guardian's fee petitions under the probate court's direction and supervision, and recommended reductions in the amounts of the guardian's fee requests, some of which the trial court followed. The probate court developed and published specific guidelines for the content and format of fee petitions from guardians, and it published detailed guidelines concerning how guardian's fee petitions will be reviewed by the EJC and what fees are subject to

*continued, next page*

review and possible reduction. These guidelines include specific limits on the time that will be allowed for certain common or routine tasks, with the guardian being able to obtain a higher fee for those tasks only if the guardian provides a detailed explanation of why the higher fee is warranted.

The guardian filed an objection, challenging the fee reduction and seeking to enjoin the EJC from making arbitrary reductions in its fee requests. At the evidentiary hearing, the EJC's program manager testified that the EJC reviewed each petition for guardian's fees in light of the probate court's guidelines, and it made recommendations for reductions based on those guidelines.

The guardian failed to meet its burden of proof to establish that the challenged fee amounts were reasonable, and the trial court properly reduced the claimed fee amounts in light of its experience and common sense. The guardian's request for an injunction against the EJC was denied since the EJC was not made a party, and there were no substantive grounds for granting an injunction. Affirmed.

*Killinger v. Guardianship of Grable*, 2008 Fla. App. LEXIS 5918 (Fla. 5th D.C.A. Apr. 25, 2008).

Sister of appellant petitioned for appointment as guardian and alleged self-dealing by appellant, who sought appointment as guardian because their mother had indicated in a pre-need document her desire that she be appointed guardian in the event of incapacity.

Sister sought to establish that the best interests of the ward would be served by her appointment, and requested from appellant confidential financial records, some relating to the treatment of the guardian's minor son, telephone records and correspondence.

Guardian sought a protective order, which the trial court denied.

The trial court determined the financial information was relevant to assess whether Killinger would be an appropriate plenary guardian. Telephone statements are not subject to any recognized privilege, nor can they be viewed as material that could cause irreparable harm to a non-party. The requested correspondence does not involve disclosure of personal information about any of the third parties and does not appear to impinge on any constitutional rights to privacy. Petition denied.

## Fair hearings reported

by Nicholas J. Weilhammer

*Petitioner v. Florida Department of Children & Families*, Appeal No. 07F-02913 (Dist. 2 Washington, Unit 88115, Jul. 5, 2007).

DCF denied ICP benefits for January and February 2007 because asset value exceeded program eligibility limits.

Petitioner's income was being deposited to her bank account, but no patient responsibility was paid to the nursing facility. DCF did not present evidence to show the value of the pre-need burial contract or whether or not it was irrevocable. DCF counted the balances shown on the bank account statements without first subtracting direct deposited income; therefore, the balances used did not accurately reflect assets. Asset value for February 2007 was over \$2,000, but DCF did not indicate whether any of the excess resources were designated for burial. Petitioner may designate up to \$2,500 of his or her resources for burial funds for any month, including the three months prior to application regardless of whether the exclusion is needed to allow eligibility. The \$2,500 is not reduced by the value of excluded life insurance policies or irrevocable

burial contracts. Appeal granted.

*Petitioner v. Florida Department of Children & Families*, Appeal No. 07F-02506 (Dist. 1 Okaloosa, Unit 88172, Jul. 17, 2007).

Petitioner was listed as owner of real property. There was no homestead exemption on the property. Petitioner lived with her son and paid him rent after she purchased the property. Petitioner moved in permanently with her son in February 2006 and entered the nursing home from the hospital in March 2006. DCF denied ICP benefits based upon asset value of real property exceeding program eligibility limits.

Petitioner is the owner of the land, and it was not her principal residence. If an individual moves out of his or her home without the intent to return, the home becomes a countable resource, and the value of the property exceeds the ICP asset limits. While the request for hearing was not submitted to the office of appeals hearings until 194 days after the request, the failure to act within the 90-day limit is characterized as harmless error and does not result

in impairment of either fairness of proceeding or correctness of action or prejudice to party. Appeal denied.

*Petitioner v. Florida Department of Children & Families*, Appeal No. 07F-03114 (Dist. 1 Escambia, Unit 88637, Jul. 18, 2007).

DCF recalculated patient responsibility retroactive to January 2007, adding his VA, SSA and interest income to arrive at gross unearned income. Petitioner appeals the amount of the patient responsibility.

Petitioner had health insurance premiums, and there was no indication DCF allowed the cost of medical insurance as a deduction from patient responsibility. DCF did not notify petitioner until April 18, 2007, of the increased responsibility. During this period, petitioner purchased a pre-need burial contract to spend down resources. DCF did not give the petitioner the requisite 10-day advance notice; therefore, the effective date of the increased patient responsibility should be May 2007. DCF also incorrectly calculated the patient responsibility when it failed to deduct the cost of health insurance. Appeal granted.



*Petitioner v. Florida Department of Children & Families*, Appeal No. 07F-03538 (Dist. 7 Orange, Unit 88999, Aug. 30, 2007).

Petitioner submitted an application for ICP benefits and submitted all requested information. Petitioner was denied ICP for failure to follow through. Petitioner made several contacts with DCF, but received no response. DCF told petitioner he would have to submit a new application regardless of whether the information was previously submitted. Petitioner submitted a written hearing request, but it was never forwarded to the office of appeal hearings. Petitioner filed another application. DCF was awaiting disability approval by the District Medical Review Team. Petitioner filed another hearing request.

DCF had a duty to act on the application immediately, made errors in the handling and processing of petitioner's application and improperly denied the application. DCF must approve or deny an application by the 90<sup>th</sup> day from date of application. Appeal granted, and the DMRT is ordered to issue a decision within 10 days.

*Petitioner v. Florida Department of Children & Families*, Appeal No. 07F-02831 (Dist. 2 Jefferson, Unit 88511, Sept. 4, 2007).

Petitioner (institutional spouse) and his wife resided in an ALF. Petitioner seeks an increase in the community spouse diversion amount, alleging it is not enough to cover her expenses because her rent exceeds her income, which includes the community spouse income allowance.

Adjustments can be made to the budgeting methodology if proof is presented of exceptional circumstances that result in financial duress. The spouse's basic rent is \$1,650. Her expenses for personal care are \$300, and she has a Medicare premium of \$70.50 and a \$99.35 premium for third party medical insurance. There is an exceptional circumstance based on the blindness and medical condition of the community spouse (incurred expense by community spouses for medical, remedial and other support services that contribute to the ability of such spouses to maintain themselves in the community). Therefore, the additional expenses should be considered medical or remedial support services not already recognized

for the community spouse's maintenance needs, including her medical coverage premiums. The basic rent of the spouse is considered as the shelter cost for the community spouse since she cannot live alone in the community and the facility cannot determine which portion is for rent only. The resulting community spouse income allowance is the institutional spouse's remaining income, causing the patient's responsibility to be \$0. Appeal granted.

*Petitioner v. Florida Department of Children & Families*, Appeal No. 07F-04170 (Dist. 12 Volusia, Unit 88211 Sept. 7, 2007).

Petitioner was denied eligibility for certain months due to excess amounts in petitioner's bank account.

It is proper to reduce the asset by the amount of checks outstanding on an account and written during a month, and it is also proper to use the lowest value existing during a month. When the application was submitted and crucial information was omitted, it would have been appropriate for DCF to inform the petitioner and afford further verification opportunity. Appeal granted.

*Petitioner v. Florida Department of Children & Families*, Appeal No. 07F-03858 (Dist. 14 Polk, Unit 88119 Sept. 20, 2007).

Petitioner failed to return verification of the community spouse's income and assets owned singly or with the petitioner. Petitioner has dementia, and community spouse had a lack of interest in his care. She would not agree to provide his care in their home and was uncooperative in providing necessary information for his application for Medicaid. Petitioner was unable to obtain cooperation with his wife regarding shared resources. Petitioner's son was his attorney-in-fact and documented the community spouse's refusal to cooperate. Petitioner was denied ICP benefits due to his failure to follow through in establishing eligibility.

The estranged community spouse has not taken responsibility for petitioner's care, and she has not cooperated in any efforts to obtain Medicaid to pay for his care. The spouse could be considered separated from the petitioner. Any assets owned by the community spouse can be consid-

ered unavailable due to the failure of the community spouse to cooperate in establishing eligibility; therefore, the respondent can disregard any assets owned by the petitioner but controlled by the community spouse. Appeal granted.

*Petitioner v. Florida Department of Children & Families*, Appeal No. 07F-04378 (Dist. 23 Hillsborough, Unit 88333 Oct. 15, 2007).

Petitioner resides in a nursing home, and his spouse resides in an ALF and has dementia. Petitioner deposits monthly amount into income trust. DCF determined the patient responsibility to be \$382.31 monthly.

Adjustments to the budgeting methodology and spousal diversion amount are permitted if proof is presented of exceptional circumstances. The spouse had additional nursing and pharmacy medical expenses that are not included in the budgeting methodology in determining spousal income diversion allowance and resulting patient responsibility. The spouse's medical condition and residence in an ALF are an exceptional circumstance for a community spouse. Since the nursing expenses were not considered in the patient's responsibility calculation, and this amount exceeds the patient's responsibility, it should be eliminated. Appeal granted.

*Petitioner v. Florida Department of Children & Families*, Appeal No. 07F-05278 (Dist. 23 Pinellas, Unit 88521, Oct. 17, 2007).

Petitioner was receiving ICP. Nursing home designates itself as the petitioner-authorized representative. Petitioner had moved into new facility, but facility representative informed DCF it did not know where petitioner lived even though it had assisted in petitioner's move. DCF denied petitioner ICP benefits for February, April and June 2007, when petitioner's wife did not fund the income trust account. DCF closed petitioner's case without notifying the family.

Petitioner had to report changing facilities within 10 days. The income trust account was not intended to ensure that there are sufficient funds in the account to pay the facility. Petitioner's gross income exceeded eligibility limits. Appeal denied.

# FAIR HEARINGS REPORTED

The Elder Law Section is making available by subscription copies of the reported fair hearings regarding ICP Medicaid. Also included in the packet are policy clarification correspondence copied to the Elder Law Section from the Department of Children and Families.

The reports are emailed on a monthly basis and posted on the section's website at *eldersection.org*. It takes approximately 30 to 60 days after the month's end to receive the opinions, so mailings will typically be several months behind.

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