The Florida Bar

The Elder Law Advocate

www.eldersection.org

Vol. XVI, No. 2 "Serving Florida's Elder Law Practitioners" Winter 2008

INSIDE:

Coming Soon!

FUNDAMENTALS OF ELDER LAW II
April 10
Tampa Airport Marriott
see page 19

12TH ANNUAL PUBLIC BENEFITS SEMINAR
April 11 • Tampa Marriott Waterside
see page 21

We are the champions ...

"We are the champions, my friends. And we'll keep on fighting till the end …"

O.K., admit it. You recognize this rock classic. It can't be missed at almost any major sports event as an anthem of sorts. But I find it particularly poignant for my chair's message, given the environment in which we elder law attorneys find ourselves.

Emma S. Hemness

Message from the chair

In our everyday practices, we are advocating on behalf of society's most vulnerable populations—the elderly and persons with disabilities. We are constantly championing the cause of our elderly and disabled clientele against many diverse and varied attacks.

Attack, in this context, is a broad and far-reaching term, including the blatant and the subtle as well as the current and the prospective. The blatant attacks are the easiest for us to identify: the numerous casualties resulting from non-lawyers practicing law, or any occasion that requires us to use statutory provisions to combat an exploiter of a vulnerable elder.

The more subtle or insidious attack involves the ongoing effort to erode our clients' rights. For example, in the recent past, we all

See "We are the champions," page 2

Should vulnerable disabled folks be the subject of failed experiments in financial cost cutting?

by State Representative Elaine Schwartz (D-Hollywood & Pembroke Pines)

The Medicaid Reform Pilot in Broward and Duval counties has been called "a flawed experiment" since its passage in 2005 and implementation in 2006. The state implementing agency, the Agency for Health Care Administration (AHCA), has announced that the program will not be expanded statewide, for the moment. One can only hope that the moment lasts a lifetime. But hopes will be dashed if leadership of the Florida House of Representatives has its wish.

This pilot program is an attempt to place the $16-billion Medicaid budget into the hands of health maintenance organizations for capitated managed care. It is a complex plan that has the underlying purpose of paying administrative fees to contain costs. Seniors were carved out during original negotiations, but last year a program called "Senior Care" was enacted as a pilot in Miami-Dade, Monroe, Orange, Osceola, Seminole and Brevard counties to put all seniors on Medicaid into HMO's.

Studies evaluating the results show the program to cause more harm than good. The statute called for an evaluation by the inspector general of AHCA, which showed

See "Failed experiments," page 23

We are the champions

from page 1

can remember how the right to refuse medical treatment took center stage in Florida. In addition, our clients live in an environment where state agencies engage in ever-undulating applications of their administrative rules, without following those nagging constitutional principles; you know, like due process. Yet, what may be still the worst to come are the subtle attacks looming on the horizon.

To make my point, let's briefly address two of these matters.

A client hires you to prepare her life-planning documents, including a durable power of attorney (POA). A key objective expressed by the client is to stay out of court and to avoid that thing called guardianship; so, if mentally diminished one day, the POA allows the trustworthy agent, whom the client handpicks, to handle her personal and financial affairs. In this case, as in many others, the agent is the beneficiary of the principal's estate. Lo and behold, your elderly client becomes mentally diminished. The agent comes to see you, trying to conclude affairs, such as avoiding probate on the principal's meager estate, predominantly consisting of the homestead. You, as the elder law attorney, are thinking that an enhanced life estate deed should work quite well. After all, you drafted the POA to allow for creation of a disposition effective upon death (the deed), and you allowed for gifting to the agent (the principal's intended beneficiary). Consequently, you draft the deed, it is executed by the agent and all is well, right? Not necessarily. Whether this will be *permitted* or *prohibited* really depends upon the content of the new power of attorney statute after it is presented and then adopted by the Legislature. Although we do not expect to see proposed legislation until the 2009 session, wouldn't your clients be interested in knowing that early drafts, which may be presented as proposed legislation, may include dramatic restrictions on such authorities? Thus far, proposed drafts rewriting the statute require any amendment or modification by the agent to a disposition effective upon death, irrespective of the express authorities granted within the POA, will be required to go through guardianship court, thereby getting the court's permission to make the change, while requiring notice to all persons who might be interested parties. And gifting to the agent? Well, that simply may not be allowed at all.

In the elder law context, we often deal with ill spouses and caregiver spouses. To fully understand the impact of these potential changes, assume your client is a husband and the agent is his wife. Under the proposed changes in these early drafts, an attorney could not prepare an effective deed that transfers ownership in the homestead from the husband to the wife (as is often the case for Medicaid planning purposes) without going to court to get permission, again only after notifying all interested parties, which would include any of the husband's children from previous marriages. From an elder law attorney's perspective, wasn't the idea for the POA to keep one's client *out* of court?

Another attack against our clients' rights falls in the area of enhancing the ability of creditors to attach non-probate assets. Yes, you read that correctly. Non-probate assets. Most clients already think probate is a four-letter word, but consider if probate were *always* required by statute, even if there were only survivorship or pay on death accounts or remainder interests in real property. What if the individual bearing the liability of opening the probate was the recipient of those assets, and not the creditor? For greater detail on this issue, see the story of Sally and Hannah also appearing in this issue of the *Advocate* (see "Elder Law Section opposes enhancing creditors' rights in non-probate property" on page 3).

It goes without saying that not everyone understands the elder law attorney's unique perspective. Even fellow attorneys in other fields of law do not understand our point of view, our relationships with our elderly and disabled clients or the rights we are trying to protect for them.

We need to face these attacks head on. We need to champion our clients' positions. We need our membership to help to educate and work with other sections of The Florida Bar that are undertaking these projects and provide immediate and ongoing input to these proposed statutory changes, so we will achieve the best possible outcome for our elderly and disabled clients. And we need to be champions now!

"… 'cause we are the champions … of the world."

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

Emma S. Hemness, Brandon ..... Chair
Linda R. Chamberlain, Clearwater. ..... Chair-elect
Babette Bach, Sarasota ..... Administrative Law Division Chair
Leonard C. Mondschein, Miami ..... Substantive Law Division Chair
Enrique Zamora, Coconut Grove ..... Secretary
Twyla L. Sketchley, Tallahassee ..... Treasurer
Patricia I. "Tish" Taylor, Stuart ..... Editor
Susan Trainor, Tallahassee ..... Copy Editor
Arlee J. Colman, Tallahassee ..... Section Administrator
Lynn M. Brady, Tallahassee ..... Layout

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 SPRING ISSUE is May 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, or call Arlee Colman at 1-800-342-8060, ext. 5625, for additional information.

Elder Law Section opposes enhancing creditors' rights in non-probate property

A story about your client

Sally, a widow, comes to your office in a wheelchair. She's 69 years old. She's ill with a condition that, while not immediately life threatening, is debilitating, and it will result in her death sooner or later. Her healthy, younger sister, Hannah, age 63, retired early from her job, taking early social security retirement benefits, even though it will substantially reduce her retirement income for the rest of her life. Hannah gave up a job she liked and changed her plans to take care of her sick, older sister, moving Sally into Hannah's house to help Sally with toileting, taking showers, preparing meals and doing household chores. Healthy Hannah did this, rather than have sick Sally go into a nursing home, the idea of which both Hannah and Sally abhor.

Sally's income consists of her monthly social security retirement check of $1,300, and her assets consist of a small checking account with a balance of approximately $2,500. She has medical bills not covered by insurance, including medication copayments and the Medicare Part D hole in the donut. She uses her credit cards, which she has had for more than 25 years, to cover unusual bills, carrying a small balance, but never missing a monthly partial payment, including payment of the 23-percent credit card interest charges.

Sally has no surviving spouse, children or grandchildren, and she wants to make sure that Hannah gets whatever is left, if anything, of Sally's bank account when Sally dies because she wants to try to make up for the lifetime reduction of Hannah's social security retirement payments and because Hannah has given up everything to take care of her, in a really personal sense.

On the advice of her bankers, Sally created a pay-on-death (POD) account, so her sister Hannah will receive whatever balance is left upon Sally's death, without attorneys and without probate. Sally asks you if that is all right. You say yes.

Sally dies. There is no probate. Hannah goes to the bank, produces Sally's death certificate and receives about $2,100 from Sally's checking account.

End of story? Yes, under today's law.

But that won't be the end of the story if the current proposal being actively discussed within the Real Property, Probate and Trust Law Section's Ad Hoc Creditors' Rights Committee becomes new law. As stated, "The goal of this [Ad Hoc] Committee is to propose a procedure for the payment of creditors' claims when a probate estate is insolvent, and the decedent owned an interest in non-exempt, non-probate assets which were subject to the claims of creditors at the time of his death."

Rationale?

Under the current law, any creditor has an existing legal right to expend its own funds to open up a probate. But this proposal seeks enhancement of these rights for the benefit of the creditor. The alleged rationale for this disastrous legislative proposal is to provide unsecured creditors the same opportunity to collect on their loans after death as they would have during the life of the debtor. The legislation would allow creditors to force open a probate and to recapture the POD account funds, up to two years later.

In other words, Hannah, upon receiving a demand letter from the credit card company two years later, would be told by you, her lawyer, that under the new law, even though she had already spent the money she believed she was entitled to based on the POD account relationship, she would have to pay Sally's unsecured creditors, VISA and MasterCard. If she did not, the credit card companies could bring an action in the name of Sally's estate to collect from Hannah, her caretaker-sister.

Since major banks are also the credit card companies, it would be very easy for creditors to identify who died with even small bank accounts. If the personal representative opts not to pursue the claims, the creditor may bring a proceeding in the name of the estate. If there is no estate, there is nothing to prevent a creditor from initiating a probate under the current rules, even though a creditor cannot be the personal representative. Therefore, it is very simple and cost-effective for a highly organized creditor to initiate probate of even small non-probate assets, like Sally's POD account, and to recover the money, up to two years later, under the proposals being considered. Sally's court-appointed personal representative would have to initiate litigation to collect payment from Hannah for deceased Sally's unpaid credit card balance, up to the amount in the POD bank account.

Concerns for our clients

After a lengthy discussion at the January meeting of the Elder Law Section's Executive Council, a sense of the council's resolution to oppose the creditors' rights proposal was adopted unanimously. The Executive Council, consisting of the Executive Board and chairpersons of the section's committees, opposed the measure, expressing several reasons and concerns:

- Who do we represent? The Elder Law Section's members represent, by far, the Sally's and Hannah's of the world, not MasterCard, VISA and American Express. The section is obligated by its charter to promote the interests of elderly and disabled individuals. The proposal will be of significant benefit to major corporate and banking interests that wish to defeat POD or TOD accounts, and perhaps to the Probate Bar employed to chase Hannah, but not to elderly consumers.
- Who is promoting this proposal? There is no indication or identification of the real parties at interest who are promoting this concept. Where is the need? Don't creditors have rights already under current law? Allegedly, the proposal addresses the needs of unsecured creditors. However, creditors choose to be secured or unsecured creditors. One of the reasons, among

continued, next page

others, that our consumer clients pay up to 28-percent interest on their credit card debts is because the creditors are unsecured and don't collect on some debt due to the death of the debtors. That, of course, could be changed by the creditor itself. First of all, creditors get to choose to whom they lend. Second, creditors could require that debtors take out credit life insurance, which has no underwriting elements, to protect against non-payment from the dead customer. Third, if it is argued that credit card interest charges will go down as a result of this proposal, there is no statutory link to make that so.

- Who will bear the brunt of adverse reaction of the public to this proposal? Us! The lawyers! Nothing upsets the general public more than being forced into probate. The mere word probate creates more fear than any other word in the legal lexicon. Norman F. Dacey, the anti-attorney author of *How to Avoid Probate,* sold more than 15 million copies of his book to an American public scared to death of the process (pun intended). This proposal would do more harm to the public's opinion of lawyers and the legal system than anything since Dacey's book, which first saw publication 43 years ago.
- Why isn't it O.K. to discriminate against some creditors? A major argument for the proposal is that it is somehow unfair for a creditor who could collect from a debtor while she is alive to be prevented from collecting on a "legitimate" debt because of the debtor's death when the debtor left a POD account. The argument essentially tries to argue that this is discrimination. Of course, it is. And there's nothing wrong with it. First of all, as noted above, creditors can choose whether to lend, and if so, under what conditions. Second, we already discriminate in life between legitimate creditors—we call them secured and unsecured—and we treat secured creditors much more favorably. Third, there are many instances in law where the timing of death yields different results. If a decedent is age 54 at time of death, there is no Medicaid estate lien. If the decedent lives a week longer and attains age 55, there is. All discrimination is not immoral, illegal or undesirable.
- What about havoc on real property? Although the proposal states that it is not the proponents' intention to affect "the protection from creditors presently afforded to exempt property described in Chapter 222, Florida Statutes, protected homestead, tenancy by the entirety property, or any other property which would be exempt from the claims of creditors during a decedent's life," there is no such limitation on real property transfers by life estate deed, a commonly used method of transferring property after death.
- What about the havoc on the courts? Clearly, unless all the Hannah's in the world would capitulate upon receiving the credit card companies' demand letters, there would be more, not less, probate litigation putting more strain on an already budget-constrained court system. Who benefits? Who pays? Who's upset? And what is the fallout from the voting public?

Now, members of the Elder Law Section are being made aware of these discussions within the Real Property Probate and Trust Law Section's Ad Hoc Creditors' Rights Committee to enhance creditors' rights. Already, a lecture promoting this concept was presented at the October 2007 FLEA Seminar. And our Executive Council has been advised that presentations by the RPPTL's committee are being scheduled with local Bar associations to seek support for the concept. Elder Law Section members are encouraged to advocate the unique perspective of our low to modest wealth clients (the Sally's and Hannah's of the world) at such meetings, thereby opposing any proposal that enhances creditors' rights above and beyond current law as not being good for our clients, for the Bar or for the courts.

If you would like to be involved in these efforts to protect and advance the position of your elderly and disabled clients– and not creditors – contact Arlee Colman, the section's administrator, at *acolman@flabar.org* for more information.

GREAT BLUE
The Educated
Choice In Real Estate

Asset protection for your clients through income producing properties!

An Additional Income Stream for you!
$$$$$$$$$$$$$$$$$$$$$$$$

Ask me how!

Buddy Keene
Cell: 813.727.7110
E-mail: Buddy.Keene@GreatBlue.us

CEO/Managing Broker
Great Blue Real Estate Marketing Systems Inc.

‘But I know where to find it’ and enforcing arbitration clauses

With this column written, I am halfway through my two-year tour of duty as writer of Tips & Tales. This time, my column is more tips with no tales, and it is geared toward the more novice practitioner. The first set of tips I wish to impart to the reader includes: knowing where to find the answer is a higher priority than knowing the answer; and listservs are not the best primary research tool. In addition, I provide a list of legal resources that have been very valuable to me and should also serve you well. Next, I want to make you aware of a recent Second DCA case concerning who can bind a principal with respect to enforcing arbitration clauses.

But I know where to find it

When in law school, it was emphasized that knowing the answer was not as critical as being able to spot an issue and then knowing where to find the answer. That mantra has worked quite well for me, and I have never been afraid to say, “I do not know, but I know where to find it and will get back to you.” When I attended law school, Al Gore had not yet invented the Internet, there were no listservs to use as a research tool and you had to know where to find the answer ... in a book. By the way, that was my best attempt at humor, so I’ll resist the temptation for the rest of this installment.

In the modern era, we have listservs and blogs, among other things, to aid us. In fact, probably the most important things stored on my computer are the links saved as “my favorites.” However, please do not be convinced that a listserv should be the first thing you take from your toolbox. About five years ago, a well respected past chairperson of our section introduced me to the AFELA listserv (the “list”) and in the same breath stated that he was not active on the list because he believed too many people did their primary research by the list. He is not the only individual over the years to voice that opinion. As someone who frequents the list, I, too, have noted that there are questions posted that require nothing more than opening the right book or visiting the right website to easily find an answer to the query, and it is my intent that the information provided below will be helpful to that person. Also noted are the posts where it is obvious the poster has done the basic research and is simply stuck, brainstorming out loud and inviting others to join. Never forgotten is the lister who started her post with, “I am too lazy today to look this up, but …” At least she was honest.

The point in mentioning the foregoing is not to discourage anyone from asking questions on the list, regardless of how basic or complex, but to encourage folks to help themselves … at least a little bit. I love our list and owe a great deal of thanks to the many folks who have helped me through the list. It may be that our list is in danger for several reasons. First is the reason stated in the previous paragraph. Second is the perception that the list is not “secure.” While at Heckerling this year, an accomplished elder lawyer stated her opinion that the list has changed due to many lawyers being worried that there are individuals on the list other than private practitioners; therefore, the best thinking is not coming through. I have not researched it, but it would seem that the list owner can certainly restrict access to the list through setting the eligibility criteria as well as scrubbing the list of current subscribers who are not eligible to participate.

Finally, just because someone on the list says it is so, does not make it so. There have been a few instances when a poster’s answer to a query was just dead wrong. So, you do need to verify, particularly in the situation in which you act on the poster’s information because you will be the one ultimately liable for such action.

Here are my favorite estate planning resources that may prove helpful to you, too. Please forgive the obviousness of some of these.

LISI (www.leimbergservices.com). Steve Leimberg’s LISI service offers seven newsletters, including elder law, but the elder law newsletter is not why you want this service. Additionally, LISI gives you access to the hundreds of cases, rulings and legislation the newsletters report on. The reasons you want to subscribe are: the emails (newsletters) are published a few times per week (not daily) and are written by the most learned lawyers in the field; and any breaking news on estate planning will be heard on LISI first. Further, there are many Florida advisors to the service, and that means you also get Florida-specific content. My “review” does not do the service justice. This is a must-have, particularly if you are not going to subscribe to BNA, RIA or CCH.

ABA-PTL listserv (mail.abanet.org/scripts/wa.exe?A0=aba-ptl). A great national listserv that is heavily populated with Floridians. Therefore, your Florida-specific questions regarding probate and estate planning issues will get a response.

The Grey Books (www.lexisnexis.com//flabar/estate_planning.asp). The Florida Bar publications distributed by LexisNexis entitled *Practice Under the Florida Probate Code*, *Administration of Trusts in Florida* and *Litigation Under the Florida Probate Code* are must-haves. I have yet to come up empty-handed after consulting *Practice Under the Florida Probate Code*. Also contains useful forms.

continued, next page

Tips & Tales

A. Stephen Kotler

Tips & Tales
from preceding page

Florida Probate and Trust Litigation blog (www.flprobatelitigation.com). Juan Atunez's blog is very good at alerting you to new probate decisions. It is not a total substitute for *Florida Law Weekly*, but it is helpful and includes commentary.

Florida Department of Revenue Tax Law Library (http://dor.myflorida.com/dor/law). Got doc stamp questions or any other Florida tax issue? The administrative rules and technical assistance advisements are all here. You can search by type of tax and then within that specific tax by source materials.

The Fund Title Notes (www.thefund.com/portal/publications/publications/fundtitlenotes.jsp). One of the best resources for those pesky, law-school exam, fact-pattern-type real estate questions. Whether or not there has been a reported decision, more often than not, the Fund has an opinion.

Enforcing arbitration clauses
It is not atypical in the elder lawyer's world that the agent under a durable power of attorney performs many tasks on behalf of the principal, including signing residency agreements. Also not atypical is a residency agreement that contains an arbitration provision. On Jan. 18, 2008, the Second DCA issued an opinion that the arbitration provisions contained in the assisted living facility residency agreement signed by the agent under a durable power of attorney was unenforceable against the principal because the power of attorney did not specifically grant the authority to enter into an arbitration agreement. (*In re Estate of Loyette D. McKibbin,* 2008 LW 161322, Case No. 2D06-5452 (Fla. 2d DCA 2008)) There was no evidence that the principal was incapable of making decisions for herself.

Florida law is clear that the agent's authority is limited to the actual text of the power of attorney. F.S. 709.08(7)(a). Further, there appears to be no flat-out prohibition of such clauses in either an ALF or a SNF residency agreement. In fact, arbitration clauses are a frequent source of litigation that clash with the Nursing Home Resident Bill of Rights, and the cases are not uniform in result.

Does this case mean that facilities will more carefully scrutinize the durable power of attorney? Will the facility refuse admittance to someone when the arbitration provision in the residency agreement is unenforceable because the power of attorney is "inadequate" in the facility's view and the potential resident is incompetent? If the facts are as set forth in the immediately preceding sentence, will the facility require a guardian to be appointed who can bind the ward with regard to the arbitration provision? Do we as practitioners want to purposely put or not put the authority to enter into an arbitration agreement in the durable power of attorney?

One practitioner commented to me that when in court seeking contract approval on behalf of a guardian, she points out such clauses to the court, which in her district generally will not grant the authority to the guardian to agree to arbitration clauses. She then strikes through the offending language in the contract, attaches a copy of the court order and submits that to the facility. In her experience, so far, so good. However, as they say, YMMV (your mileage may vary).

Certainly, a more detailed analysis is warranted in a future article.

A. Stephen Kotler *is an AV rated, Florida Bar board certified wills, trusts and estates lawyer with Wollman Gehrke & Solomon PA in Naples, Fla. He maintains a practice in the areas of comprehensive wealth transfer planning, related income tax issues, asset preservation, probate, trust administration, federal transfer tax and long-term care planning. Mr. Kotler received his JD from Emory Law School and has an LLM in estate planning from the University of Miami.*

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.

Randy Bryan
Pamela Burdick
Eric Gurgold
Steve Kotler
David Lillesand
Jana McConnaughhay
Shannon Miller
Ellen Morris
Marjorie Wolasky

Substantive committees keep you current on practice issues

Join one (or more) today!

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* for continued updates and developments.

Medicaid
Jana E. McConnaughhay, Tallahassee
850/425-8182
jana@mclawgroup.com

John S. Clardy III, Crystal River
352/795-2946
clardy@tampabay.rr.com

Newsletter
Patricia Taylor, Stuart
772/286-1700
pit@mcsumm.com

Susan Trainor, Editor
850/878-7760
editor@ctf.nu

Law School Liaison
Jason White, Tallahassee
850/784-2599
jwhite@mcconnaughhay.com

CLE
Jacqueline Schneider, N. Miami Beach
305/919-7730
floridaelderlaw@bellsouth.net

Special Needs Trust
Alice Reiter Feld, Tamarac
954/726-6602
reiterfeld@aol.com

David J. Lillesand, Miami
305/670-6999
lillesand@bellsouth.net

Death Care Industry
Philip M. Weinstein, Tamarac
954/899-1551
pmweinstein@msn.com

Estate Planning
Stephen Kotler, Naples
239/435-1533
skotler@wga-law.com

Marjorie Wolasky, Miami
305/670-7005
mwolasky@wolasky.com

Ethics
Steven Lee Rachin, Tallahassee
850/386-8833
stevenrachinpa@earthlink.net

Abuse, Neglect and Exploitation
Carolyn H. Sawyer, Orlando
407/354-0888
chsawyer1@aol.com

Christopher Vogel, Viera
321/617-7510
cvogel@sa18.state.fl.us

Mentor
Carolyn H. Sawyer, Orlando
407/354-0888
chsawyer1@aol.com

Guardianship
Beth Prather, Ft. Myers
239/939-4888
bethp@osterhoutmckinney.com

Carolyn Landon, West Palm Beach
561/805-9800
c-landon@att.net

Legislative
Ellen S. Morris, Boca Raton
561/750-4069
emorris@elderlawassociates.com

UPL
April Hill, St. Petersburg
727/343-8959
adh@hilllawgroup.com

Website
Jana E. McConnaughhay, Tallahassee
850/425-8182
jana@mclawgroup.com

David J. Lillesand, Miami
305/670-6999
lillesand@bellsouth.net

Council of Sections Representative
Emma Hemness, Brandon
813/689-8725
hemnesselderlaw@aol.com

AFELA Representative
Victoria Heuler, Tallahassee
850/425-8182
victoria@mcconnaughhay.com

NAELA Representative
Howard Krooks, Boca Raton
561/750-3850
hkrooks@elderlawassociates.com

Real Property/Probate Representative
Charles F. Robinson, Clearwater
727/441-4516
charlier@charlie-robinson.com

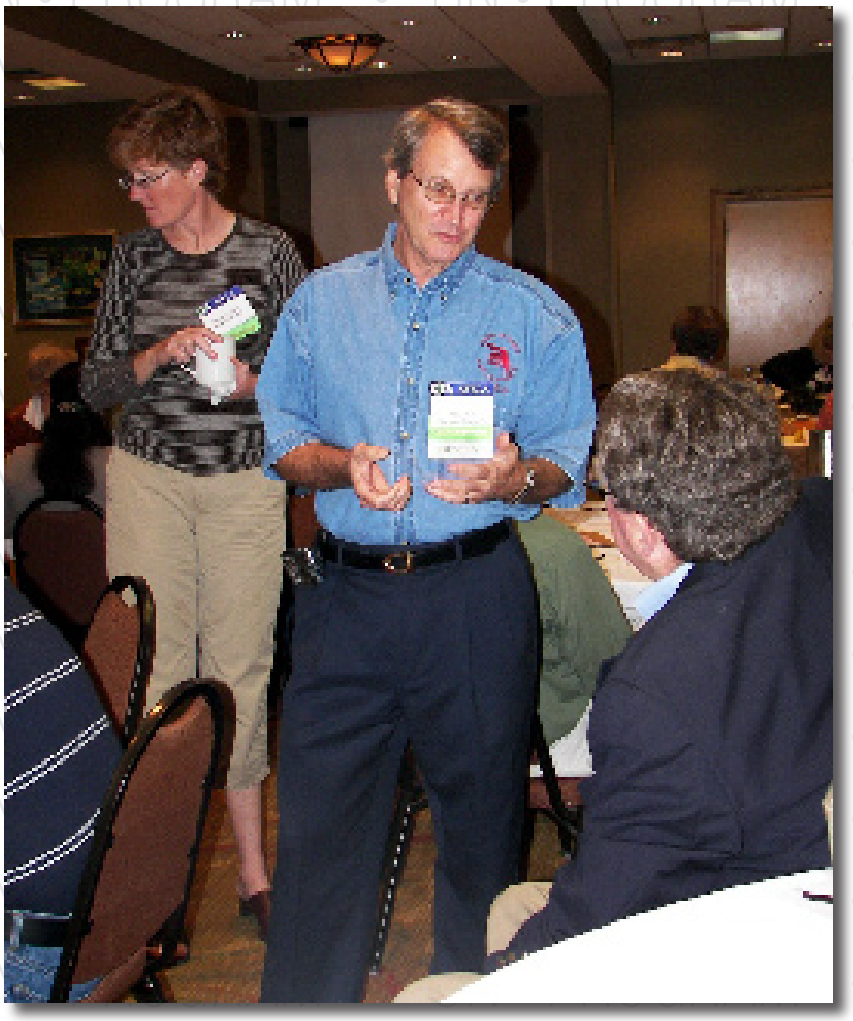
FSGA Liaison
Joan Nelson Hook, New Port Richey
727/842-1001
jnh@elderlawcenter.com

Take a walk on the *un*-side

by Victoria E. Heuler, President
Academy of Florida Elder Law Attorneys

Huh? Oh, yeah—the "**UnProgram!"** That's right, the program that is, well, not actually very programmatic. Takes the "Type A" part right out of being a lawyer! Well, we did it (or "un" did it) again in 2007. What am I talking about? The Academy of Florida Elder Law Attorneys (AFELA) UnProgram, the premier forum every December for creative and informative discussions about many topics spanning elder law and related subjects. The UnProgram has two components: The first day, Friday, is the Advanced Track, in which elder law attorneys get together in a group forum for the day and, often exhaustively, discuss any number of subjects raised by the participants; and the second day is when elder law attorneys get into small groups with experts in various areas of elder law. Combined, these two days make for a very full, time-well-spent experience.

Day 1, Friday. No script, no agenda, just talking, talking and more talking, something lawyers apparently are very good at! Kidding aside, the Advanced Track is always packed, standing-room only, and 2007 was no exception. Predictably, the major basis for much of the discussion emanated from the DRA (Deficit Reduction Act of 2005). By the way, there are no notes, minutes, recordings, transcripts or other recordation of what occurs during the Advanced Track, so you literally have to be there to benefit from the vibrant discussions. After filling up with knowledge, creativity and ideas for dealing with some pretty hairy elder issues, the crowd breaks and then reconvenes on Saturday.



Mike Pyle mingles with program attendees.

Day 2, Saturday. Still no script, less intense than Friday, and the day to "Meet the Experts." Actually, it's really not so much about "meeting" the experts as it is getting to corner the experts in a small room, with only a few people, and then quietly—very quietly—picking the ever-living stuffings from the expert's brains! The Saturday venues are individual hotel rooms at the very accommodating Embassy Suites Orlando Airport, and in those rooms, small group discussions occur on topics like administration of special needs trusts, DRA implementation in various areas, capacity and guardianship, ethical conundrums, alternative dispute resolution, elective share, marketing tips, life care planning and even reverse mortgage issues. These are just a few of the hot topics discussed in the small group forums. Psst—come closer … that's not even the best part … the best part is that you get to leave with something on Saturday—a bound, 1-3/4 inch thick volume of materials from ALL of the experts, even the ones you did not meet, which volume doubles nicely as a child's booster seat. Actually, kidding aside, this volume is really fantastic: its components are perfect to add to your compendium of study materials for the elder law certification exam, it is full of easy reference materials for your future conundrums and

it has a wonderful and ever-so-easy-to-use table of contents! A true "keeper" in your resources cache.

Before I conclude, I need you to know something—it's the intangibles that make the UnProgram so satisfying. What am I talking about? The people. The people shepherding the event (thank you, Valerie Peterson, Twyla Sketchley and Steve Rachin!); the people you meet from around the state that have issues like yours and want to talk about them; the leaders from NAELA that take time to meet with us at every UnProgram (we were delighted to have President-elect Craig Reaves with us this time); and the friends you have made in the past that want to be part of a vibrant program that reminds you that you chose the right practice area! AFELA has the privilege of working arm-in-arm with our friends at the Elder Law Section of The Florida Bar, currently led by Emma Hemness, chair. Emma and I, being women, like saying that AFELA and ELS are "sister" organizations. Awwww! Just be happy we are not asking to have dress-up parties!

In conclusion, if you have not yet attended an UnProgram … well, all I can say is, ya gotta be there to get why it's hard to even contemplate that some people have not yet attended an UnProgram! Ask your friends who have been, and they'll tell you … you have to take a walk on the un-side!

AFELA staff members Tom Burbank and Kari Glisson handle registration.

Mike Pyle, retiring president; Victoria Hueler, incoming president; and Craig Reeves, program keynote speaker and NAELA president-elect

Another well-attended UN-program

COMMITTEE REPORTS

Public Policy Task Force

Task force addresses DRA implementation

by Chris Likens

The Public Policy Task Force had an extremely busy fall and early winter. In addition to weekly conference calls to track legislative and policy changes, much time and effort went into working with the Department of Children and Families in the department's implementation of rules concerning the Deficit Reduction Act of 2005. The final rules, which went into effect Nov. 1, 2007, had been in process for more than a year and had undergone significant changes since the beginning of the rulemaking process in the fall of 2006. The task force worked through the process as a conduit for information about the status of rulemaking to the Elder Law Bar and attended public workshops and offered opinion concerning the various drafts of the proposed rule.

In addition to DRA implementation, the task force has served as a conduit in numerous cases concerning adverse Medicaid cases involving personal service contracts, among others, and through member Ellen Morris helped coordinate the filing of an *amicus* brief in an appeal involving durable powers of attorney and personal service contracts. The task force continues to track legislation of interest to the Elder Bar, and coordinates input or response when necessary. Through our public relations specialist Al Rothstein, we have established a speakers bureau and generated materials to equip members to speak on such issues as the changes to the Medicaid rules and their effect on Florida seniors. Task force notices and information are distributed through the AFELA listserv. You can find out more information, including exclusive benefits available for financial contributors to the AFELA Advocacy Fund, at *www.afela.org*.

The Public Policy Task Force is a joint committee established by the boards of the Elder Law Section and the Academy of Florida Elder Law Attorneys (AFELA). Current members include Lauchlin Waldoch, Charlie Robinson, Sheri Kerney, Emma Hemness, Randy Bryan, Linda Chamberlain, Len Mondschein, Howie Krooks, Ellen Morris, Victoria Heuler and Chris Likens. The task force is also assisted by lobbyist Senator Ken Plante, governmental consultant Tom Bachelor, administrative counsel John Gilroy and public relations specialist Al Rothstein.

Ethics Committee

2008 goals include building committee, addressing guardianship and UPL

by Steven L. Rachin, Chair

As chair of the Elder Law Section's Ethics Committee, I am pleased to provide this report concerning our committee's activities. The Elder Law Section's Ethics Committee met last year at The Florida Bar's annual meeting. The Ethics Committee is a small one, and our goal is to revive the committee and to attract new members. To achieve this goal, I would like to invite those interested to participate in this important endeavor. If you have an interest in getting involved, please let us know. Seasoned elder law attorneys would be an asset in addressing ethical questions that may arise.

Ethics is an integral part of our profession. Our clients often seek direction on how to handle certain situations they may face in upholding their responsibilities. These situations may include multiple family members and financial issues. One aspect the Ethics Committee may address is to review options on how to assist guardians with ethical issues.

Emma Hemness, chair of the Elder Law Section, has suggested that the committee address the ethical concerns when dealing with a client who has diminished capacity. Another area to address is the behavior of attorneys who assist non-attorneys in the unlicensed practice of law, such as Medicaid planners and trust mills. These issues may be considered questionable from an ethics standpoint.

I would like to extend my appreciation to Kurt Weiss for his contribution to the committee. The Ethics Committee looks forward to being an active and integral part of the Elder Law Section in 2008. The Ethics Committee welcomes your input on these important issues.

Guardianship Committee

Three guardianship bills of interest

by Carolyn Landon and Beth Prather, Co-chairs

As we reported in our last publication, Senate Bill 1088 was signed into law by Governor Charlie Crist on May 24, 2007. This law, now known as Ch. 2007-62, Laws of Florida, amended Chapter 744 to provide that representation for alleged incapacitated persons who are indigent be provided by the Office of Criminal Conflict and Civil Regional Counsel or a private attorney effective Oct. 1, 2007.

The implementation of this law is continuing to face some challenges. The Florida Association of Criminal Defense Lawyers Inc. (FACDL) opposed both the House and Senate versions of the bill from the beginning, and on Sept. 20, 2007, the FACDL filed a petition for writ of *quo warranto* on the basis that the legislation was unconstitutional. On Dec. 20, 2007, Judge P. Kevin Davey issued his order granting the petition for *quo warranto* and quashing the appointments of the five regional counsel, enjoining the secretary of state from submitting certificates of appointment and biographical questionnaires to the Senate, enjoining

the Senate from confirming the appointments and enjoining the five regional counsel from performing any duties as criminal conflict and civil regional counsel. A notice of appeal was filed the same day. On Jan. 11, 2008, Judge Davey, finding that the state was not likely to win its appeal, issued an order that the state's five regional counsel offices be closed. On Jan. 17, the Florida Supreme Court vacated in part Judge Davey's order and reinstated the automatic stay. Oral argument is set for Feb. 27. A visit to the FACDL's website at *www.facdl.org* will fill you in on the history and the details of why the group opposes the bill.

The second bill of interest is Senate Bill 688, Developmentally Disabled/Guardian Advocates (HB739, the House companion, was posted on Jan. 24, 2008), which provides that a person being considered or selected to be a guardian advocate for a person with a developmental disability need not be represented by an attorney unless required by the court. It requires the court to give preference to a healthcare surrogate, if one has been designated, when selecting the guardian advocate, and provides a list of persons from which the court *must* select a guardian advocate if the healthcare surrogate has not been previously selected. It also modifies the requirements for who may be appointed counsel to a person with developmental disabilities to include the Office of Criminal Conflict and Civil Regional Counsel (see above paragraph) and revises the powers and duties of the guardian advocate with respect to financial accounting requirements.

The third bill of interest is Senate Bill 1124, which establishes a summary guardianship for persons with mental illness. This bill requires that at the hearing, the court shall receive and consider all reports relevant to the person's mental illness. This bill eliminates the need for the filing of initial and annual plans if the person is receiving mental health services and has a clinical record with a service provider.

Ch. 2007-62, Laws of Florida; Senate Bill 688 (with its House companion, HB739) and Senate Bill 1124 have the potential to significantly impact guardianship practice. The Guardianship Committee has expressed concerns to the Elder Law Section's leadership about these legislative measures, and we will be contacting other sections of the Bar for their input. We appreciate the merit of making the process easier on families, but we are uneasy with any legislation that would potentially reduce the protection afforded the developmentally disabled, which could include the benefit of required legal counsel in guardian advocacy proceedings, and in the case of persons with mental illness, the release of otherwise confidential information. Finally, we are concerned about any legislation that places the burden of oversight on the judiciary, which is already straining under budgetary reductions.

UPL Committee

Elder Law Section's newest committee: UPL

by April D. Hill, Chair

Mention the unlicensed practice of law (UPL) in the presence of a group of elder law attorneys, and you will hear moans, groans and sighs. One of them will begin to tell a story of the latest UPL nightmare he or she has encountered with a client. No surprise, since UPL is a growing problem for our clients. It is expected that with complexity of planning resulting from the passage of the Deficit Reduction Act, UPL issues will become even more problematic. Many times when we learn of the activity, it is too late to stop for that client, but not for other consumers.

The leaders of our section believe this issue is important enough to create a UPL Committee, and they have appointed me chair. As my first order of business, I want to invite any of you who are interested to join the committee. It promises to be an interesting undertaking.

Our tasks at this time are: 1) to develop a database of elder law related UPL complaints; and 2) to provide collective strength to The Florida Bar when such complaints are filed. The Bar, on its website, offers a simple form for filing a complaint. You can find that form at *http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/FDCF085CFF9B805985256D720066A40E/$FILE/UPLComplaintForm.pdf?Open Element.*

We are beginning our database with the same information. If your client has been injured by a non-lawyer, The Florida Bar wants to know. Please complete the Bar's reporting form, file it with the Bar and forward a copy to me. If you do not want to file a complaint, but still want this committee to know about the UPL activity, please note that on your materials. And again, please consider joining me on the UPL Committee. I've set up a specific email address for the committee: *uplfl@yahoo.com*.

Special Needs Trust Committee

Committee begins endgame on DWT

by Alice Reiter Feld and David J. Lillesand Co-Chairs

The first activity of the committee this year was to begin the endgame on the Doctrine of Worthier Title (DWT) issue, which has trapped members of the Elder Law and RPPTL sections who had thought they had drafted "irrevocable" trusts as required by SSA and Medicaid rules, but found out that by dint of ancient law, their trust was "revocable," didn't comply with law and resulted in the client's loss of SSI benefits and SSI-related Medicaid health insurance benefits. The problem was a Social Security Administration Regional POMS on Florida

continued, next page

Special Needs Trust Committee
from preceding page

Trust Property, titled "POMS SI ATL 01120 – Trust Property," which (still) holds that:

> **2. General**
>
> For Alabama, Florida, Georgia, South Carolina and Kentucky, the trust must specify a particular person or entity as the residual beneficiary. In these states, if the trust states that after death the trust will go to a specifically named person or entity, or if it states that the trust is to go "to my children, or issue, or descendants," this is specific enough to identify a person and the trust is irrevocable.
>
> If, on the other hand, the trust language says that after death, the trust will go "to my estate" or "to the heirs" of the primary beneficiary (or some other non-specific general term), this is not sufficient. This trust would be revocable by the grantor because this wording is not specific enough to identify persons who, upon his death, may become his heirs.
>
> For Mississippi and Tennessee, the above general principle is not followed.

As stated by Ken Brown, an SSA policy wonk in the Baltimore National Headquarters of the Social Security Administration:

> In the past, SSA determined that most states followed the general principle of trust law, that even though no power of revocation is reserved, a settlor may revoke a trust where he is the sole beneficiary, with or without the consent of the trust. Generally, the irrevocability of a grantor trust will be recognized if there is named a "residual beneficiary" in the trust document who would, for example, receive the principal upon the grantor's death or the occurrence of some specific event. As a general rule in trust law, "heirs," "heirs at law," "next of kin," "survivors" and similar terms were not residual beneficiaries. (See RESTATEMENT (SECOND) OF TRUSTS, §339. The Restatement (Third) of Trusts was published in April 2003, replacing the Restatement (Second). The new Restatement draws upon court decisions and statutes to provide a more contemporary treatment of trust law. According to the new Restatement, the legal community now assumes, absent evidence to the contrary, that most grantors intended to create a remainder interest when they name heirs, next of kin and the like to receive the remaining assets in the trust upon the grantor's death. Therefore, they are considered to be residual beneficiaries and the trust is considered irrevocable. [BUT] SSA still looks to state law as expressed by statute and court decisions to determine revocability.

The Atlanta Regional POMS provision was upheld in the Eleventh U.S. Circuit Court of Appeals, since there was no clear indication in Florida statutes or caselaw that Florida had, in fact, abandoned the DWT concept as a rule of law or a rule of construction.

With that adverse court decision, it became necessary to change the Florida statutes. Coincidentally, the State of Florida was embarking on a review of the Uniform Trust Code for potential adoption or at least a resulting major revision of the Florida Trust Code. Charlie Robinson and Marjorie Wolasky, members of a two-year study commission of the Florida Trust Code, were instrumental in making sure that the statutory revisions included a clearly worded section eliminating the Doctrine of Worthier Title. The new Florida Trust Code became effective

AFELA congratulates 2008 officers and directors

Victoria E. Heuler, President
Randy Bryan, President-elect
Mark Mazzeo, Secretary
Beth Prather, Treasurer
Mike Pyle, Immediate Past President

Directors

John Clardy	William Johnson	Mark Mazzeo
Beth Prather	John Staunton	Alice Reiter Feld
Sheri Kerney	Jana McConnaughhay	Len Mondschein
Steve Quinnell	Kurt Weiss	Ira Wiesner
Rebecca Berg	Victoria Heuler	Randy Bryan
Valerie Peterson	Mike Pyle	Twyla Sketchley

The mission of the Academy of Florida Elder Law Attorneys is to ensure that its members are the premier providers of legal advocacy, guidance and services to enhance the lives of people as they age and those with special needs.

on July 1, 2007, and contained the following language:

> **689.175 Worthier title doctrine abolished.**--The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs," "heirs at law," "next of kin," "distributees," "relatives" or "family," or language of similar import, does not create or presumptively create a reversionary interest in the transferor.

The next step was for the Special Needs Trust Committee to submit a proposal to the Social Security Administration to revise the Atlanta Regional POMS, to bring the Regional POMS up to date with the Florida statutory changes. The committee drafted a proposal, first submitted to our chair, Emma Hemness, and then to The Florida Bar Board of Governors through staff, for permission to submit the proposal to the Social Security Administration's regional chief counsel in Atlanta. The language suggested by the SNT Committee, in addition to striking the word "Florida" from the general rule, stated that:

> **Section 6**. In Florida, a specific person or entity may be designated. In addition, wording such as "to my heirs" or "to my heirs at law," "to my next of kin," "to my distributees" or "to my relatives" or "to my family" (or language of similar import) is sufficient to name a residual beneficiary.

The Social Security Administration's Atlanta regional chief counsel has acknowledged receipt of the committee's proposal and has assigned a staff attorney to the matter. In the interim, until Atlanta acts, the committee recommends that the Florida trust attorneys include a specific residual beneficiary for a nominal sum, such as $10, to avoid application of the current adverse SSA Regional POMS.

The Special Needs Trust Committee is also pursuing other goals this year, including:

- Following up on Len Mondschein's idea of collecting useful forms and information for members who need to petition for reformation of a trust, and posting it on the section's website, *www.eldersection.org*;
- Monitoring difficulties reported with structured settlement annuities where the monthly payments, even though properly assigned to the SNT trustee, are being counted by Florida Medicaid for ICP share of cost purposes;
- Monitoring the impending spring release of new Social Security POMS on SNT drafting and administration rules; and
- Creating an organic Q&A Special Needs Trust online guide for attorneys, to be posted on the section's website as background and resource information for section members when drafting special needs trust or advising trustees on trust administration.

The Special Needs Trust Committee is co-chaired by Alice Reiter Feld (Tamarac) and David Lillesand (Miami and Gainesville). Membership includes Len Mondschein (Miami), Margrit Bernstein (Coral Gables), Paul Auerbach (Palm Beach Gardens), Mario Cabrera (Lakeland), Mary Ellen Ceely (Deland), Frank DeNike (Kissimmee), Carol Donahue (Winter Park), Travis Finchum (Clearwater) and Anne Desormier-Cartwright (Jupiter).

LRS

JOIN THE FLORIDA BAR'S LAWYER REFERRAL SERVICE

Every year, The Florida Bar Lawyer Referral Staff makes thousands of referrals for people seeking legal assistance. Lawyer Referral Service attorneys annually collect millions of dollars in fees from Lawyer Referral Service clients.

The Florida Bar Lawyer Referral Service:

- Provides statewide advertising
- Provides a toll-free telephone number
- Matches attorneys with prospective clients
- Screens clients by geographical area and legal problem
- Allows the attorney to negotiate fees
- Provides a good source for new clients

IF YOU ARE INTERESTED IN BECOMING A PART OF THE FLORIDA BAR'S LAWYER REFERRAL SERVICE, contact The Florida Bar Lawyer Referral Service (651 E. Jefferson Street, Tallahassee, FL 32399-2300) for more information and an application form.

NOTE: If your office is in Baker, Broward, Clay, Collier, Duval, Escambia, Franklin, Gadsden, Hillsborough, Jefferson, Lee, Leon, Liberty, Miami-Dade, Nassau, Orange, Palm Beach, Pinellas, Santa Rosa, or Wakulla county, please contact your local bar association lawyer referral service for information.

RPPTL committees address issues important to elder law

by Charlie Robinson, Chair, and Marjorie E. Wolasky, Vice Chair

ROBINSON

WOLASKY

The Real Property, Probate and Tax Law Section has numerous committees working on multiple projects that have a tremendous impact on our practice areas. Most Elder Law Section members are also members of the RPPTL Section, yet very few of us participate in the RPPTL Section's committees' work. The RPPTL Section welcomes its members to participate in its committees, and phone participation, rather than personal attendance, is available for most committee meetings.

Here is some information on the projects being worked on by RPPTL committees.

Power of Attorney Committee

This committee is engaging in a complete redraft of Chapter 709.08. Provisions of the Uniform Power of Attorney Act are being analyzed by the committee for inclusion in proposed legislation.

Advanced Directives Committee

This committee's proposed legislation includes a statutorily created agent called *health care representative*, who, unlike the *health care surrogate* under Chapter 765, has the ability, if so designated by the principal, to make medical decisions for the principal, even if the principal still has capacity to make his or her own medical decisions. This legislation also incorporates provisions of HIIPA into Chapter 765.

The committee's next project is to develop laws concerning health situations in which there is no friend or family member able to make healthcare decisions. This committee is also considering developing a statutory form that authorizes a parent or a guardian to allow a third party to make medical decisions for a ward or a minor while the parent or guardian is temporarily unavailable to do so.

Probate Law Committee

This committee is examining potential changes to the homestead descent and devise limitations. Another issue that arose at the Jan. 11, 2008, Probate Law Committee meeting and subsequent Executive Council Committee meeting is whether the RPPTL Section should file an *amicus* opinion in the recent 2nd DCA case of *In re Estate of Magee*. In *Magee*, the appellant is challenging the constitutionality of the elective share statute based upon the 1991 Supreme Court decision in *Shriner's Hospital for Crippled Children vs. Zirrilic*. In that case, the Mortmain statute was found to be unconstitutional. The Florida Supreme Court has agreed to review this case. If this argument prevails in the Florida Supreme Court, it could prevent the enforcement of elective share rights and family allowance rights in the Florida courts.

Ad Hoc Committee on Creditors' Rights to Non-Probate Assets

This committee is seeking to produce legislation that would either direct or authorize the personal representative to marshal non-probate, non-revocable trust assets for the benefit of the estate's creditors. There is already a provision in the Uniform Probate Code that provides for the same.

At the last meeting, which occurred on Jan. 11, 2008, it was reported that this issue is presently under consideration in several states, and it has been a hot topic of discussion at several ACTEC (American College of Trust and Estate Attorneys) meetings.

Jerry Wolf, chair of the Asset Preservation Committee (APC), is a member of the Ad Hoc Committee on Creditors' Rights to Non-Probate Assets, and he has made the APC aware of the ad hoc committee and his intentions of keeping APC members apprised of the ad hoc committee's business. This committee is also working on developing legislation to support self settled asset protection trusts in Florida.

We welcome and encourage Elder Law Section members to participate in the RPPTL Section's committees' work. For more information, contact Charlie Robinson at *charlier@charlie-robinson.com* or Marjorie Wolasky at *mwolasky@bellsouth.net*.

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* 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.

Bar's Elder Law Section serves an often vulnerable clientele

by Theresa E. Davis, The Florida Bar *News*, Assistant Editor

Editor's note: The October 1, 2007, edition of The Florida Bar News *included this feature about the Elder Law Section.*

While Florida has a reputation as a great place for people to live out their golden years in the sun, many seniors face hardships at this stage in their lives. The elderly are often targets for many forms of exploitation, and more sinister problems like abuse or neglect.

Enter The Florida Bar's Elder Law Section, which exists to cultivate and promote professionalism, expertise, and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs.

Section Chair Emma S. Hemness of Brandon puts it more succinctly: "We are talking about our society's most vulnerable persons. Representing them requires the most caring spirit."

"A truly rewarding work, as many well know," added section Chair-elect Linda Chamberlain of Clearwater.

"The Elder Law Section wants to establish itself as the leader in issues affecting the elderly and persons with special needs," Chamberlain said, adding the section aspires to be Bar members' first contact for its core focus areas, including guardianship, government financial assistance benefits, elder abuse/neglect and exploitation, and advance directives.

The Elder Law Section has committees that address all sorts of issues pertinent to some of Florida's most vulnerable persons: health care, Medicaid, and government benefits; the death-care industry — which deals with aspects of funerals and burials — exploitation, abuse, and neglect; guardianship and special needs trust; and estate and financial planning.

Chamberlain said a newly formed abuse, neglect, and exploitation committee is working to connect the various state agencies that deal with these issues to clarify the applicable statutes and promote more active protection and assistance for the elderly.

"This is only the beginning," Hemness said. "Our aging population is expected to swell for years to come."

Hemness said elder law is an ever-changing and highly legislated field and the section advocates to aid in the development of laws benefiting elder citizens and those concerned with the care and needs of the elderly.

"The laws we must understand govern both the living and the dead, and are in a constant state of change," she said.

"The Deficit Reduction Act of 2005 has made the most sweeping changes to Medicaid eligibility in 17 years," Hemness said. "In the post-Schiavo era, upholding health care advance directives can quickly develop into a political quagmire. Fortunately, I believe the Elder Law Section is ready for the tasks that lay ahead."

Chamberlain described an ad hoc committee, led by Hemness, that will analyze the Long-term Care Insurance Partnership implemented via the Deficit Reduction Act of 2005.

"The program will be new to Florida and is based on the concept of giving individuals the assurance of knowing they will receive Medicaid benefits for the payment of their long-term care," Chamberlain said.

"We, as elder law attorneys, are helping raise the marks that history will give our society by holding us all accountable for how these vulnerable individuals are treated," Hemness said. "The results we acquire for our clients are the very measuring stick by which we, as people, will be judged."

Hemness said she remembers a time when a relative summarized the current popular opinion about lawyers in a joke. "You know, the one with 1,000 lawyers being at the bottom of the ocean being a good start?

"However, I take great pride in pointing to our section as proof to the contrary. I believe our section members are the 'good' lawyers," she said.

Hemness said the Elder Law Section is growing and maturing even though section participation has room to improve. The section has about 1,800 members, but Hemness said "only a handful" of elder law attorneys are consistently involved in the section's substantive committees.

As part of its long-range plan, the section will work to increase its diversity and encourage greater involvement. There are plans to follow up with nonrenewing members and seminar attendees, and consistently provide information at seminars and other ELS meetings on how to become involved in the section. The section also has efforts underway to reach out to law school students as a way to increase membership. A Law School Liaison Committee was recently formed with an initial objective of establishing contacts with all of Florida's law schools. The section will also work to build increased interaction with other sections and organizations that represent the interests of older people and people with disabilities.

"I am inviting each and every member of our section to become active in one of the substantive areas in which you have an interest," she said. "The section works hard to support your efforts to be a 'good' lawyer."

Membership in the Elder Law Section is open to any licensed attorney interested in the legal issues of the elderly and the annual dues are $50. Member benefits include subscription to *The Elder Law Advocate* and an opportunity to subscribe to online Medicaid Fair Hearing Reports. For more information about becoming a member, contact Arlee J. Colman, program administrator, at (850) 561-5625 or e-mailing *acolman@flabar.*org. Or visit the section's Web site at *www.eldersection.org.*

Recap:
2008 Elder Law Certification Review Course

by D. "Rep" DeLoach III

The 2008 Elder Law Certification Review Course took place Jan. 24-25 at the Florida Mall hotel in Orlando. The primary focus of the Certification Review Course is, of course, to help the test takers pass a difficult exam. However, due to the broad scope and popularity of past programs, there were more than 100 attendees, many of whom use the program as a great primer course in the field of elder law.

Many prominent elder law attorneys spoke at the review course. Victoria Heuler, Babette Bach, Kara Evans, Scott Solkoff, Travis Finchum, Ellen Morris, Twyla Sketchley and Len Mondschein, among many others, gave great presentations on their particular subjects.

Emma Hemness, chair of the Elder Law Section, presented a history of Medicaid, ending with where the program stands today, now that changes have been implemented under the Deficit Reduction Act of 2005. This alone was a great review for any elder law practitioner.

As always, the section benefited by the appearance of David Lillesand, who discussed social security disability and supplemental security income. His knowledge in this specialized area helps us all. It is said that David is trilingual, speaking English, Spanish and "POMS" (Programs Operations Manual System, the manual used by Social Security Administration employees to administer social security and supplemental security income).

There were also appearances from the RPPTL Section, which included a review of trust law changes and elective share by Sandra Diamond and a special guest appearance by Rohan Kelly. Kelly made an impromptu speech on the rewrite of the durable power of attorney statute on which the RPPTL Section is currently working. The new statute, once adopted, will affect your elder law practice, so you will want to get involved in Elder Law Section committees to provide input now while the changes are still in the drafting stage.

Many in attendance were unaware of AFELA's highly informative listserv, where attorneys ask questions, receive updates and have a good time reading Twyla Sketchley's many strange stories. If you are not a member of the listserv, it is highly advisable to join.

A special thanks to my co-chair, Linda Chamberlain, chair-elect of the Elder Law Section, who did all of the work; to Arlee, section administrator; and especially to the speakers, who put a great amount of time and attention into providing great, practical information to a receptive audience.

If you would like to order the Certification Review Course materials, please go to *www.floridabar.org/cle,* and search by course number 0575R.

Mark your calendars!

FUNDAMENTALS OF ELDER LAW II
April 10, 2008
Tampa - Tampa Airport Marriott

* * *

12TH ANNUAL PUBLIC BENEFITS SEMINAR
April 11, 2008
Tampa - Marriott Waterside

* * *

ELDER LAW SECTION EXECUTIVE COUNCIL MEETING
April 11, 2008
Tampa - Marriott Waterside

* * *

ELDER LAW SECTION ANNUAL RETREAT
July 18-19, 2008
Clearwater Beach - SandPearl Resort and Spa

* * *

Gerotechnology: Information technology for the aged

by Rosemarie Lamm, Ph.D.

Aging populations in the post-industrialized societies have increased from 12 percent to 22 percent during the past 40 years. The population of the United States remains at 13.5 percent because of immigration. These demographics are in the process of change related to the aging baby boomer population. As the elderly age, they are developing many chronic diseases. (Lamm 1997)

The challenge for individuals and caregivers is how to intervene while elders are "aging in place." Age-related changes are often subtle and gradually restrict normal functioning. Normal functioning restrictions occur to elders, challenging activities of daily living. Automated living assistance systems represent a promising approach for the prolonging independent life for elders while enhancing their quality of life. (Nehmer *et al* 2006) Technology will also assist in minimizing the need for institutionalization, the most common option presently available to families and caregivers.

When individuals "age in place," the costs of care giving are reduced, thus reducing the escalation in healthcare costs. How then do we construct living assistance systems that are dependable and adaptive to independent living for elders?

At the November 2007 international conference Assisted Living Systems held in Dagstuhl, Germany, models in architectural and engineering were presented. These models include: monitors that capture voices within a home; video-telecasting monitors that transmit individuals' activities; computer chips in clothing and shoes that monitor barriers; computer devices that monitor blood pressure, heart rate, glucose levels, hydration and other physiological states; and devices on automobiles that assist hearing and visually diminished individuals to accommodate to driving.

Information technology has entered an arena called gerotechnology. This discipline is rapidly adapting computers and high-speed networking into an infrastructure of assisted technologies. (Kearns and Fozard 2007) Hardware is presently available to facilitate integration into communities where seniors reside. It is also available to be adapted by home healthcare providers and healthcare networks. Widespread monitoring and service delivery may be available in health monitoring and provision, communications and evaluations as well as in enhancing individuals' quality of life with telecommunications.

"Tomorrow-land" presented many concepts that are going to assist us in improving the quality of life for patients with dementia. Researchers at The University of Berlin are studying the transplantation of computer chips to assist in cognition for those who have brain injury and/or dementia. This research is very early in development, but it has the promise of assisting with improving brain function.

The seminar in Germany provided many challenges for the scientists. The major issues brought forth were related to questions of individual privacy and confidentiality. Participants represented five continents and many countries. The representatives from the United States presented the most concerns related to the legal aspects of adapting assisted technologies in living areas. The general consensus indicates that this is an individual's choice, and the general good is the major ethical concern. In the past, there have been challenges to "granny cams" in long-term care facilities. These considerations will be a challenge for the healthcare communities in concert with the ethical and legal contributors. The scientists are on the forefront of gerotechnology and the development of systems that support improvement of the quality of life for elderly people.

Rosemarie Santora Lamm, Ph.D., *is an advanced registered nurse practitioner and licensed mental health counselor. She is director of the Rath Senior ConNEXtions and Education Center and on faculty at the University of South Florida Lakeland.*

Elder Law Section

2008 Retreat and Annual Meeting

to Combine in Clearwater!

MARK YOUR CALENDARS!

2008 Elder Law Section Annual Retreat

July 18-20, 2008, Clearwater Beach, Florida
SandPearl Resort and Spa

Featured Speaker – Robert A. Butterworth, Jr.

Receptions
Changing of the Chairs
CLE Presentations
Member of the Year
Charlotte Brayer Award Ceremony

Don't Miss It! Registration Begins Soon.

Sponsorhip Opportunties Available.
Contact: Arlee J. Colman at acolman@flabar.org

Dealing with foreign wards and their investments

by Enrique Zamora

Several issues that arise from the representation of foreign wards in Florida potentially can create problems for the attorney who represents a guardian of these foreign wards.

Where is venue?

The first question that arises when dealing with foreign wards is regarding venue. According to Chapter 744, venue lies in the county of residence of the incapacitated person or where the incapacitated person owns property. However, the issue of what constitutes residence is not clearly addressed in Chapter 744. There is one case that defines legal residence as meaning residence at a particular place, accompanied by positive or presumptive proof of intention to remain there for an indefinite time.[1]

It is not unusual for a foreigner visiting Florida to be involved in an accident that causes incapacity and creates the need to appoint a guardian while the ward is being treated in Florida, thus creating a temporary residence. Also, a guardian of the property is often needed to represent the ward in a potential claim against the tortfeasor. Guardianship of minor dependents is also often required if the claim is successful, even when the minors reside in their country and have never been in Florida.

F.S. §744.384 states that if the need to establish incapacity arises while a nonresident ward is residing temporarily in Florida, then the proceeding is the same as for a resident. Therefore, it is proper for the incapacity of a foreign alleged incapacitated person (AIP) to be determined in Florida while the foreign ward resides here, albeit temporarily, as well as the appointment of a guardian.

What happens when the ward returns to his/her country?

F.S. §744.202 and §744.2025 address changes of residency of the ward to another county or state, but not to another country. However, F.S. §744.529 and Rule 5.670 of the Florida Rules of Probate require that, before a Florida guardian can be discharged, the foreign court must appoint a guardian, and that foreign guardian must post a bond. Then and only then will the Florida guardian be able to file a final report, close the guardianship and transfer the ward's property.

What constitutes a validly appointed guardian in foreign jurisdictions is a question with an elusive answer. However, if a guardian is not appointed in the foreign jurisdiction, the Florida court must retain jurisdiction, and the property of the ward must remain in Florida. In such cases, the guardianship of the property must continue even when the ward has left the jurisdiction. A common concern among judges is the safety of the ward and the protection of the ward's property. In some jurisdictions, if the ward's property is transferred, the ward may be in danger of being kidnapped or even murdered.

Residence and the 'intent to return' syndrome

When has the ward changed residence? What if a ward has the intent to return to Florida? What if the ward returns to Florida every year for a short stay? In a case where the ward has permanently left Florida, it appears that the guardian of the person must be discharged. However, a ward that has the intent to return to Florida might not have changed his or her residence as required by the statute. The question of intent to change residence has been discussed in several Florida cases. It is questionable whether or not a ward is capable of having the requisite intent to change residence.[2,3]

Shifting our attention to the guardian of the property, if the new jurisdiction where the ward resides lacks adequate protection for the ward's property, or no guardian of the property has been appointed, Florida must retain the ward's property. In such cases, the guardian of the property must continue to discharge his or her duties until all of the property of the guardianship has been exhausted. (See F.S. §744.521)

What alternatives to guardianship are available to the foreign ward?

F.S. §744.462 requires the court to determine if there is an alternative to guardianship. In the case where the ward has left the jurisdiction permanently and there is only property in Florida, the court may discharge the guardian of the person and create a trust to handle the property, subject to the jurisdiction of the court. F.S. §744.41(19) allows the creation of such trust for estate planning purposes. However, the issue is whether or not creating a trust for the protection of the property of a foreign ward who has left the jurisdiction constitutes a valid estate planning purpose.

May a guardian be authorized by a Florida court to purchase real property in a foreign country?

The short answer is that it happens fairly often. It appears from a reading of F.S. §744.41(14) that the court may authorize the purchase of real property in this state and nowhere else. However, when the guardianship funds are in an account in a Florida bank or financial institution, they are subject to the jurisdiction of the Florida court under F.S. §744.102(7). Query: if the foreign real property is purchased with guardianship funds, does the court retain the power to administer it? The answer seems to be no, but this has not deterred some judges from exerting jurisdiction over real property located outside of Florida. The author has handled several cases in which a Florida court has authorized the purchase of real estate in foreign countries. The court

has retained jurisdiction over the real property, or at least attempted to retain jurisdiction, by requiring the guardian to report in the annual plan the status of all of the property owned by the ward, wherever located.

What happens when a foreign ward who has moved to his or her country of residence, but has expressed his or her desire to return to Florida, decides to marry in a foreign jurisdiction?

F.S. §744.3215(2)(a) requires that when the ward does not retain the right to enter into a contract, the right to marry is subject to the court's approval. If we agree that the Florida court has retained the jurisdiction over the person of a ward who has moved temporarily to another jurisdiction with the intent of return to Florida, then the right to marry must be authorized by the Florida court, even when the marriage is to be held in a foreign jurisdiction. There is no case law on this issue. However, the author represented a guardian in a limited guardianship in which the ward requested permission to marry in Argentina where he was residing, and it was granted subject to a prenuptial agreement prepared pursuant to Argentinean law.

Enrique Zamora *is a partner with the firm of Zamora & Hillman with offices in Miami, Fla. His practice includes the areas of probate administration, probate litigation, guardianship, estate planning and elder law.*

Endnotes:

[1] *In re: Guardianship of Florence M. Mickler* 152 So.2nd 205 (Fla 1st DCA 1963)

[2] *Mathews v. Mathews* 141 So.2nd 799 (Fla 1st DCA 1962)

[3] *In re: Guardianship of Florence M. Mickler* 152 So.2nd 205 (Fla 1st DCA 1963)

Visit the section's website:

www.eldersection.org

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Elder Law Section present

Fundamentals of Elder Law II

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation: April 10, 2008
Tampa Airport Marriott • Tampa International Airport • (813) 879-5151

Video Replays: (5 Locations): May 8, 2008 - May 21, 2008

Course No. 0602R

SEMINAR TOPICS:

8:00 a.m. – 8:30 a.m.
Late Registration

Welcome and Introduction

Ethics – Who Is the Client and Other Ethical Dilemmas

What Is Elder Law? Overview

Guardianship

Supplemental Security Income and Veterans Administration Benefits

Introduction to Public Benefits

Lunch (on your own)

Medicare/Medicaid and Long Term Care Insurance

Advance Directives

Special Needs Trusts/ Trust Protectors

3:50 p.m. – 4:40 p.m.
Update on Florida Trust Code

CLER PROGRAM
(Max. Credit: 8.0 hours)
General: 8.0 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Max. Credit: 6.0 hours)
Elder Law: 6.0 hours
Wills, Trusts & Estates: 6.0 hours

LOCATIONS / DATES:

Tampa**	**April 10, 2008**	(049)	Tampa Airport Marriott
Ft. Lauderdale*	**May 8, 2008**	(122)	Broward County Bar Assn.
Jacksonville*	**May 8, 2008**	(154)	Omni Hotel
Tallahassee*	**May 15, 2008**	(054)	The Florida Bar
Miami*	**May 21, 2008**	(024)	Hyatt Regency Downtown
West Palm Beach*	**May 21, 2008**	(232)	Palm Beach Co. Bar Assn.

** Videotaping *Video Replay

REGISTRATION FEE (CHECK ONE):

- Member of the Elder Law Section: $145
- Non-section member: $170
- Full-time law college faculty or full-time law student: $85
- Persons attending under the policy of fee waivers: $0
  Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.)

To REGISTER, order audio CD or course material, go to FLORIDABAR.ORG/CLE and search by course number 0602R.

Book Review

by John Voorn

TO SURVIVE CAREGIVING – A Daughter's Experience, a Doctor's Advice on Finding Hope, Help and Health (2007)

by Cheryl E. Woodson, M.D., FACP, AGSF

Serving as a caregiver is a daunting task. As noted in a *Wall Street Journal* article, there are an estimated 45 million people who provide care for a loved one, including those with the most devastating diseases, such as cancer, Alzheimer's and Parkinson's. Studies are increasingly showing that caregiving responsibilities can exact a drastic emotional, physical and financial toll, with caregivers experiencing high rates of depression, stress and other physical and mental health problems. (*More Resources Help Caregivers Help Themselves*, Laura Landro, Nov. 28, 2007)

At a recent office conference, a new client explained in considerable detail the struggles she experiences and the toll it is taking as she cares for her Alzheimer's afflicted husband. I mentioned to her that there is a resource (*To Survive Caregiving*) to assist her in managing the many responsibilities that come with being a caregiver. The author, Dr. Cheryl E. Woodson, is uniquely qualified to write such a book since she is geriatrician. The book is based on her personal experience as a caregiver to her mother during her mother's 10-year struggle with Alzheimer's disease and is supported by the author's more than 20 years of practice in the field of geriatric medicine.

There is no better authority on caregiving than one who has been a caregiver and who advises caregivers in her profession. Woodson knows the stress involved in caring for a loved one while maintaining her marriage, raising two children and operating a medical practice. The book's theme is that the caregiver is the care recipient's most valuable asset, and if the caregiver does not take care of him or herself, he or she will be unable to provide proper care. The book consists of many anecdotes from the author's personal experience (omitting the identifying details). I found the anecdotes to be a valuable complement to the helpful advice interwoven within the pages. The book also contains a list of references and resources, including agencies and organizations that a caregiver can access for information.

The author explores the current crisis in caregiving, which is due to today's caregivers being responsible for an increasing population of elders who are living longer and who are often afflicted with more serious illnesses, all while resources to assist caregivers have been shrinking. We are mindful of the problems caregivers encounter in taking care of care recipients, fulfilling family responsibilities to a spouse and raising children, all while trying to work and plan for retirement. Woodson's book provides guidance and assistance on how to manage those responsibilities.

In the chapter on seeking help from professionals, she addresses the frequent barriers in recognizing that the elder needs help, e.g., denial and ageism. Topics include assistance that a geriatrician can provide, what is involved in a geriatric assessment, the role of geriatric care managers, what constitutes the level of care prescription and how to develop a productive relationship with the elder's physician. An important point made by the author is that to survive caregiving, the caregiver must enlist assistance from professionals and others. The author stresses the importance of getting help early in the caregiving process and how to obtain help from family and friends.

Another chapter addresses protecting the primary resource of the loved one, the caregiver, and advice is provided on what the caregiver needs to do to promote his or her own physical, financial, emotional and spiritual well-being throughout the caregiving process.

The chapter on the burdens of caregiving to the caregiver's marriage and family contains helpful insights, and the author clearly sets forth the priorities that should be maintained.

Her considerable experience in counseling caregivers is evident in her chapter addressing the difficult decisions of how to approach an elder who can no longer drive safely or live independently. In addition, the issue of confronting admission to a nursing home is also discussed. It is not uncommon to hear of loved ones seeking a promise that they will never be placed in a nursing home. The author discusses how the spirit of that promise is for the caregiver to always provide the best care. Nursing home placement may be the fulfillment of that promise. When admission to a nursing home needs to occur, guidance is given on how to manage the many issues that arise.

A good discussion of end-of-life care issues addresses the three fallacies that people tend to believe:

1. Death is optional.
2. Technology is God.
3. Death is failure.

Hospice care receives attention from the perspective "to transform dying into the last act of living well." It is the author's experience that the benefits of hospice are often lost due to belated entry into the program. Failure of the caregiver to provide the benefits of hospice to the care recipient at the appropriate time denies the individual all that hospice can offer. Advice is provided to caregivers on dealing with the grief that often begins long before the ailing loved one passes away.

A final chapter addresses the failure of public policy. The author makes the case that the current healthcare system in this country fails both seniors and their caregivers. Important issues are raised in that chapter about the future of the American

healthcare system as it addresses the needs of our seniors.

To Survive Caregiving is a valuable resource for any caregiver. Elder law attorneys will also find it is helpful to assist in counseling their clients. The book gives advice to the caregiver on the many issues that, if not properly addressed, can overwhelm and exhaust the caregiver. As Woodson states, the caregiver is the "senior's most important asset." (page 153) This book advises the caregiver on how to maintain a healthy and balanced life. In addition, Woodson says, "You cannot give care, supervise care, advocate for anyone when you are physically ill, financially strapped, emotionally exhausted or spiritually bankrupt." (page 154) Attorneys who counsel caregivers will serve their clients well by providing them with a copy of this book. It is an easy read, and the anecdotes alone keep the reader's interest in turning the pages.

John Voorn *practices in Orland Park, Ill. A portion of his practice is in the area of elder law. He is a member of the Elder Law Section of The Florida Bar and serves on the Executive Council of The Florida Bar Out-of-State Division. He can be reached at 708/403-5050 and jcv@hdoml.com.*

***TO SURVIVE CAREGIVING – A Daughter's Experience, a Doctor's Advice on Finding Hope, Help and Health* (2007),** by Cheryl E. Woodson, M.D., FACP, AGSF, Published by Infinity Publishing.Com, 1094 New DeHaven Street, Ste. 100, West Conshohocken, PA 19428-2713, 877/BUY BOOK and 610/941-9999, ISBN:0-7414-3725-2, 168 pages, Price: $18.95

Visit the Florida Bar's website:

www.floridabar.org

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Elder Law Section present

12th Annual Public Benefits Seminar

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: April 11, 2008

Marriott Waterside • 700 South Florida Avenue
Tampa 33602 • (813) 221-4900

Course No. 0609R

SEMINAR TOPICS:

8:15 a.m. – 8:40 a.m.
Late Registration

Welcome and Introductions

SSI, SSDI and Survivor Benefits: Differences and Eligibility Requirements

Medicare and Medicare HMO's

Veterans Benefits

Task Force Update

Lunch (included in registration)

Post Deficit Reduction Act Planning

Medicaid Litigation

Life Care Planning

3:40 p.m. – 4:30 p.m.
Special Needs Trusts

CLER PROGRAM
(Max. Credit: 8.0 hours)
General: 8.0 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 6.0 hours)
Elder Law: 6.0 hours
Wills, Trusts & Estates: 6.0 hours

LOCATION / DATE:

(021) TAMPA* MARRIOTT WATERSIDE (APRIL 11, 2008)**

*** Live Presentation

REGISTRATION FEES:

- Member of the Elder Law Section: $176
- Non-section member: $210
- Full-time law college faculty or full-time law student: $110
- Persons attending under the policy of fee waivers: $35

Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.)

To REGISTER, order audio CD or course material, go to FLORIDABAR.ORG/CLE and search by course number 0609R.

Program update: Long Term Care Insurance Partnership

by Julie Gelbwaks Gewirtz, CLTC

The long-term care insurance industry has seen a multitude of changes over the past decade, but none more exciting than the emergence of LTCi Partnership plans all over the country. With the passing of the Deficit Reduction Act of 2005 (signed into law in February 2006), every state now has the opportunity to offer an added safety net to consumers through long-term care insurance policies. In the early 1990's, four states began what was then considered to be a pilot program to help preserve the Medicaid system and to get more consumers to plan for the future by purchasing long-term care insurance coverage. These projects were considered by many to be very successful. The four states involved, California, Connecticut, New York and Indiana, all were reported to have higher LTCi sales during that time than states without partnership programs.

An LTCi Partnership policy makes the consumer eligible for a possible "asset disregard" when applying for Medicaid. For example, a person purchases a qualified LTCi Partnership plan that has a $500,000 benefit pool. He goes on claim and uses the entire policy benefit. At that point, he still needs care and applies for Medicaid. Because he owns a qualified partnership plan, he will be allowed to protect $500,000 of his assets, plus whatever amount the state allows, and become a Medicaid recipient as long as he meets all of the other criteria that Medicaid requires at the time in that state (income, home equity, medical needs tests, etc.). This is called a "dollar for dollar" approach, meaning that consumers can protect the dollar amount paid to them at claim time. It is a partnership between the policyholder, the insurance carrier and Medicaid, and is a win-win for everyone involved. The insurance company is likely to have more buyers due to this added protection being offered, Medicaid will have a potentially smaller number of recipients because more people will have private coverage for a long-term care need and the consumer will have a comprehensive policy with this added safety net if a catastrophic event occurs. It is important to note that in Florida, as well as in many other states, the insurance policy benefit does not have to be completely exhausted for the policyholder to be eligible for the asset disregard. If the policyholder chooses to apply for Medicaid after only having received a partial amount of the policy benefit available to him (possibly because he did not purchase a high enough benefit amount to begin with, and he is rapidly depleting assets every day he is on claim), he will still be able to protect the dollar amount that the insurance carrier has paid out to him.

There are many differences between the programs in the first four partnership states (California, Connecticut, New York and Indiana) and all of the new partnership programs implemented in other states after the Deficit Reduction Act (DRA) was passed. The terms "original partnership states" and "post-DRA partnership states" are used to make a clear distinction. In the original states, the consumer is purchasing a policy that has a completely different filing than the traditional LTCi plans being sold there. There is a different brochure, application and rate structure. There are minimum benefits and 5 percent compound inflation at most if not all ages (depending on the state) that are required to be purchased on partnership policies. The plans purchased do not have reciprocity with the post-DRA states, meaning that the policyholders can get insurance policy benefits anywhere in the country, but the asset disregard would not be available in those states. In addition, the insurance agents must complete appropriate training programs that will be applicable only when selling an LTCi Partnership policy in that state.

In the post-DRA states, every one of these items is bit more liberal. The consumer would be purchasing the exact same policy filing with the same application and rate structure that would otherwise be offered to him. There are no minimum benefits required, and the type of inflation benefits that must be purchased are based on the age of the applicant at the time he buys. If he is under age 61, he is required to have some form of automatic compound inflation (it can be any percentage amount in Florida as well as in most of the other states). If the applicant is between the ages of 61 and 75, he must have some form of automatic inflation, but it does not need to be compound (so it can be any percentage of simple, compound or even a capped compound that stops inflating when it doubles in approximately 15 years). At ages 76 and above, no inflation is required. When the DRA was passed, the idea of all states having reciprocal agreements to accept policyholders from other post-DRA Partnership states and to allow them to be eligible for the asset disregard was expected. Today, that idea is still being discussed, and most states, Florida included, plan to offer this reciprocity. Also, there will be agent training that is mandatory all around the country, but it can be reciprocal as well, meaning that agents who take the training in Florida should be able to apply that same training in another post-DRA state if they would like to sell there. The National Association of Insurance Commissioners set forth a guideline for this training to be eight hours the first year and four hours every two years thereafter. At this time, most of the post-DRA states, including Florida, have accepted that guideline. There are specific rules for this training that must be followed, including the date it must be completed, the type of training that will qualify and how to make it reciprocal with other states, if needed. Agents should pay close attention to these instructions. Florida insurance agents had to complete this

training prior to December 31, 2007, to continue selling any LTCi policies in the state (partnership or not).

Florida is one of the first states to have a post-DRA operational LTCi Partnership program in place. The effective date of the program was January 1, 2007, and it became operational on August 1, 2007. The operational date is the date when insurance carriers can begin selling these plans with state-approved material to present to the consumer. Policies purchased after the effective date, but before the operational date, are considered to be partnership-qualified, assuming that the insurance company eventually has an approved partnership filing within the state and that the consumer purchased a tax qualified policy with the correct type of inflation based on age as required by the DRA. In addition, most consumers who bought a Florida LTCi policy from March 1, 2003, forward will be offered an exchange to some type of a partnership-qualified plan if the company they bought from is still in business and has an approved partnership filing. It will be up to the carriers to determine whether or not new medical underwriting or new age rates will be required. Most of those decisions will be based on whether or not the policyholder has the appropriate type of inflation, as stated earlier.

Although many questions still remain unanswered in the post-DRA Partnership environment, this is a huge step forward for the long-term care insurance industry. It is certainly not the answer to fixing the Medicaid crisis as we know it, but it is a very good start. Consumers who purchase these policies will be better off than ever before, and more people all across America will learn about this important and meaningful coverage. An enhanced awareness level is truly the key here. It is expected that there could be as many as 30 states up and running with a LongTerm Care Insurance Partnership program by the end of 2008.

***Julie Gelbwaks Gewirtz, CLTC**, is vice president of marketing for Gelbwaks Insurance Services, an LTC Global company in Plantation, Fla. She is a 16-year veteran of the long-term care insurance industry and a nationally recognized speaker on the subject. She trains thousands of insurance agents all across the United States and sits on a number of major insurance carrier advisory boards. Gelbwaks Insurance Services is a founding member of the National LTC Network, which has become the largest long-term care insurance marketing company in the country.*

Failed experiments

from page 1

scathing deficiencies. This report came out in September 2007 and can be found at *www.fdhc.state.fl.us/Executive/Inspector_General/docs/Program_Review_of_Medicaid_Reform_Pilot_Project.pdf*.

In addition, the Jessie Bell Dupont Fund in Duval County commissioned a private evaluation by the Georgetown University's Health Policy Institute[1], which in four briefing papers clearly shows that this program will need too much money to be thrown at it for a fix.

Unfortunately, despite the Agency for Health Care Administration's lack of enthusiasm for the pilot, there is still a push among leadership in the House of Representatives to further expand the failed pilot program. It seems the word "reform" holds such appeal for those in power that they've overlooked the fact that the program does not work for patients or providers.

And it gets worse. It is not even clear whether the State of Florida is saving or losing money in the wake of "reform." AHCA clearly stated that accurate cost data is not available to determine net loss or gain. How, one wonders, could such a thing come about? The answer is simple— ugly, but simple. The hastily conceived plan was rushed into implementation. Example: Fifteen health plans were approved within the first two months when it otherwise would take up to two years to approve a workable plan. Additionally, no mechanism existed to monitor progress or lack thereof in HMO's. Many patients suddenly found themselves in new plans that didn't fit their needs.

The failed pilot hurts those with the greatest needs. Fiscally challenged, ailing, mentally ill, handicapped, often homeless, hearing impaired and blind persons do not need "reform." They need *relief*. In the meantime, what happens when they don't get the medication and care they need? They complain. The pilot does not have a mechanism in place to receive, monitor or address complaints adequately.

So, who do they complain to? ME. Fortunately, when they talk to me, they are not talking to deaf ears. I organized a workshop in December to "shine the light" on the inspector general's report because I was fearful that it would simply be put into a file cabinet with no publicity. Two days later, AHCA announced its intention of "no further expansion" (currently).[2]

We don't need alternative plans that will place scarce Medicaid funds into the hands of private HMO's, no matter what the plan is called. There should be no expansion in such a densely populated county as Miami-Dade. There should be no expansion for limited medical problems such as in "only the mentally ill" as presently proposed.

There *should* be expansion of good plans, like the current MediPass. Although MediPass may cost more now, it will be cheaper in the long run.

Although the push for continuation and expansion will morph and change as the legislative session unfolds, please alert your state representatives and senators of the dangers of this program and the need to halt it.

Endnotes:

1 The Georgetown University reports can be found at
http://dupontfund.org/research/pdf/medicaid_changes.pdf

http://dupontfund.org/research/pdf/waving_flags.pdf

http://dupontfund.org/research/pdf/brief3_final.pdf

http://www.dupontfund.org/research/pdf/brief4_final.pdf

2 The workshop can be seen as streaming video at *http://hollywoodfl.org.* On the right under "OnLine Service," choose "Live Commission Webcast." Choose "High Speed Connection DSL/Cable/Lan." On the left column, choose "Previous Meetings." Under "2007 Regular Commission Meetings" on the right, choose "Special Meetings/Workshops." Click "Select Agenda" and choose "December 4, 2007."

Summary of selected caselaw

by Nicholas J. Weilhammer

Rosenshein v. Florida Department of Children and Families, 32 Fla. L. Weekly D 2534 (Fla. 3d D.C.A. Oct. 24, 2007).

Medicaid ICP beneficiary had more than $814 per month in social security and $1,400 per month from a long-term care insurance policy. DCF determined the insurance payments were income and terminated beneficiary's benefits since income was over the monthly limit of $1,809. Hearing officer determined payment was unearned income and upheld termination of benefits. Beneficiary appeals decision terminating her benefits due to excess income.

The parties agree the proceeds are unearned income, but disagree as to whether the proceeds are countable for determining ICP eligibility. Under DCF's long-term care insurance guidelines, the private long-term care insurance income is not exempt. DCF's internal transmittal document describes the difference between an insurance "reimbursement" for actual medical expenses (which is exempt) and an insurance payment of a flat rate without regard to per diem charges from an institution (which is not). Beneficiary's monthly long-term care insurance benefit is a flat rate payment and thus is not exempt.

The hearing officer could rely on this memorandum (which had not been promulgated as a rule) because it is a valid agency interpretation of the rules regarding unearned income and sets forth what unearned income can be excluded from income calculation. The memo is a clarification of existing policy regarding treatment of cash payments received from a long-term care insurance policy and is a permissible agency interpretation. The hearing officer in the final order relied primarily on regulations and relied on the transmittal only as additional support.

Section 409.9102, Florida Statutes, is not applicable, and only applies to long-term care insurance issued or renewed on or after July 31, 2006, and only then with a "company offering approved long-term care partnership program policies." It was enacted to encourage persons to purchase private long-term care insurance in order to reduce the public financial burden on Medicaid.

The DCF hearing officer correctly concluded that because beneficiary's unearned income does not qualify under any specific exclusion, it must be treated as countable unearned income for purposes of determining Medicaid eligibility. Affirmed.

In re Guardianship of Stephens, 2007 Fla. App. LEXIS 15195 (Fla. 2d D.C.A. Sept. 28, 2007).

Two of the ward's nine adult children argue that the court erred in appointing a professional guardian because it should have appointed a family member as guardian.

The magistrate was presented with evidence that the family was "dysfunctional," that the siblings were unable to get along and cooperate with each other to care for their mother and that there were serious conflicts about how the family business should be run, inclusive of the ward's assets and money in general.

Section 744.312(1), Florida Statutes (2006), provides that the court may appoint *any* person who is fit and proper and qualified to act as guardian, whether or not related to the ward. Section 744.312(2) provides for who has preference for appointment, but does not mandate that a next of kin be appointed guardian. While the wishes of the ward shall be considered in appointing a guardian, they are not controlling. The emphasis was on a guardian's qualifications, which is clearly paramount to the ward's best interests. The appointment of a professional guardian in this case is even more appropriate because such guardians, unlike family members, adhere to objective, national standards under the auspices of the National Guardianship Association.

The ward's estate would likely be jeopardized or, at the very least, suffer financially by family infighting, which would necessitate numerous future hearings on even the most mundane of matters. As recognized by the probate court, appointing a family member guardian would create a "tug-of-war" over the ward and her property. This would not have been in keeping with the ward's best interests— the polestar in any guardianship proceeding.

Held the appointment of a non-relative, professional guardian of the ward was appropriate even though there was at least one family member willing to serve as guardian of the ward. Affirmed.

Woodruff v. TRG-Harbour House, Ltd., 32 Fla. L. Weekly D 2169 (Fla. 3d D.C.A. Sept. 12, 2007).

Appellant was a tenant in a facility recently purchased by appellee. Appellant was given the right to purchase the rental unit in which she lived. Appellant exercised her right to purchase the unit and entered into a purchase agreement, but assigned her rights to another. Appellant then terminated the agreement and agreed to forfeit her deposit.

Appellant cannot maintain a claim for elder abuse under Section 415.1111, Florida Statutes (2005). Appellant failed to set forth facts sufficient to state a claim that appellant was a "vulnerable adult." See Section 415.102, Florida Statutes (2005). Thus, the trial court properly granted TRG's motion to dismiss the cross-claim. Affirmed.

In re: the Adoption of Donald Forrest Holland, 965 So.2d 1213 (Fla. 5th D.C.A. 2007).

A grandfather sought to adopt his adult grandchild, who consented to his adoption. During the hearing, the trial court learned that Holland's reason for adopting his grandson was to confer upon him entitlement to educational financial aid available to the children (but not grandchildren) of disabled veterans. His petition was denied on public policy grounds, though it complied with the statutory requisites, and he sought relief available under Chapter 63, Florida Statutes.

Even assuming that a trial court may deny a legally sufficient petition to adopt an adult on public policy

grounds, no such grounds are present here. The public policy of Florida expressly permits the adoption of adults. If, as a result, the adoptee becomes entitled to a benefit authorized by law, it cannot be said that the adoption is in violation of public policy. Reversed and remanded.

In re: Guardianship of Morrison, 2007 Fla. App. LEXIS 18722 (Fla. 2d D.C.A. Nov. 28, 2007).

Ward's girlfriend filed a petition to be appointed guardian in New Jersey, where ward was living at the time he was rendered incapacitated. Ward's daughter later filed a petition in Florida, where ward had been relocated after becoming incapacitated. Later, the New Jersey court affirmed its jurisdiction because ward was a domiciliary of New Jersey. The Florida court held the New Jersey decision had no impact on the Florida case, and later issued final orders appointing daughter as plenary guardian of the person and property of ward.

Although the principle of priority is discretionary, a trial court should stay proceedings when prior proceedings are pending in a court of another state unless there are special circumstances that would justify a denial of the stay. The Florida court did not make any findings of special circumstances to explain its decision not to apply the principle of priority as a matter of comity. The Florida court abused its discretion in refusing to stay the Florida proceedings based on the principle of comity.

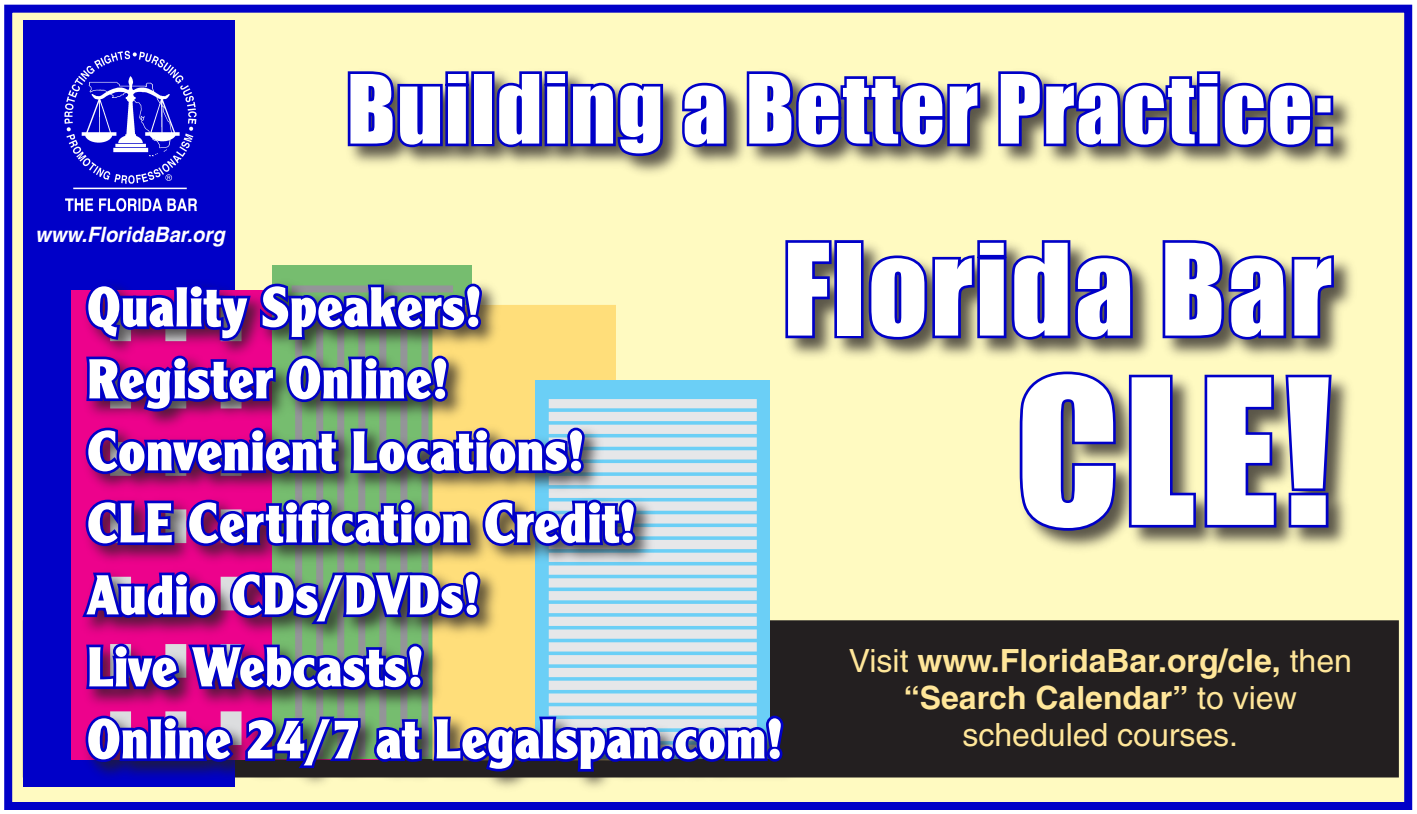
While cases involving competing petitions for guardianship can be contentious, it is important for courts to focus on the incapacitated ward's need for a dispassionate resolution of the jurisdictional issues that could affect the ward's medical care and property. Reversed the orders appointing daughter as the plenary guardian, and remanded for entry of an order granting girlfriend's motion to stay the proceedings pending resolution of the New Jersey proceedings.

Graham v. Florida Department of Children and Families, 2007 Fla. App. LEXIS 19221 (Fla. 4th D.C.A. Dec. 5, 2007).

DCF filed a petition for appointment of plenary guardian, alleging that appellant's mother was incapacitated by mental illness and that appellant was trying to hide his mother and obtain control over her assets. Court appointed appellant's brother as temporary plenary guardian. When the court issued its letters of guardianship, it stated that the guardian's authority existed irrespective of any valid advance directive executed by the ward under Chapter 765, and essentially revoked the mother's directive without expressing which grounds supported revocation and absent evidence of any of the grounds set forth in Section 765.105.

The directive, as it appears in the record, complies with the dictates of Section 765.202, and thus it establishes a rebuttable presumption of clear and convincing evidence of mother's intent to designate appellant as her healthcare surrogate. The healthcare surrogate does not have a burden to come forward with the instrument to prove its validity. Reversed and remanded.

The trial court erred in determining mother's incapacity, doing so without sufficient evidence. Two of the three examining committee reports were filed two months or more before the hearing. Since the appellant submitted evidence that his mother's condition had improved, and the committee member reports were filed two months prior to the hearing, the record evidence failed to establish mother's incapacity by clear and convincing evidence. Reversed and remanded.



Fair hearings reported

by Nicholas J. Weilhammer

Petitioner v. Florida Department of Children & Families, Appeal No. 07F-02727 (Dist. 11 Dade, Unit 66257 June 27, 2007).

Petitioner was a private pay nursing home resident since March 2006. Petitioner filed an application for benefits in December 2006, retroactive to October 2006. Petitioner had spent down her assets in October from $5,000 to less than $2,000 for home improvement. DCF determined that the spend down was improper since it did not occur in the admitting month of her placement in a nursing home.

DCF verbally admitted that the denial was incorrect and stipulated that petitioner would be approved for ICP benefits for October 2006. Hearing officer ordered that DCF provide benefits. Appeal granted.

Petitioner v. Florida Department of Children & Families, Appeal No. 07F-01773 (Dist. 14 Polk, Unit 88581 June 20, 2007).

Petitioner had three sources of income totaling $2,018: a pension ($656), an annuity ($603) and a monthly social security benefit of $759. The $656 monthly pension is received by the petitioner's daughter. The $603 annuity is being held by the Federal Retirement Office pending a determination of petitioner's competency and who will be the legal representative of petitioner's request for ICP benefits for October through December 2006 that was denied since petitioner was over the income limit and did not form and fund the income trust until January 2007.

The funds are not unavailable since they were held in an account for petitioner until the competency and legal representation could be established. There is no reason to believe the funds will not be refunded [sic] once these issues are resolved. Appeal denied.

Petitioner v. Florida Department of Children & Families, Appeal No. 07F-01385 (Dist. 04 Duval, Unit 88369 June 19, 2007).

Petitioner was previously approved for ICP benefits. After husband's death, petitioner's additional income exceeded program limits. DCF asserts that in November 2005, the Medicaid Qualifying Income Trust fact sheets were sent to petitioner's family to inform them how and why a QIT must be established. There were no further entries by DCF until February 2006. DCF continued ICP benefits until November 2006, when it was known that income exceeded the limit and there was no proper QIT funded.

Petitioners do not believe a packet explaining a QIT was ever sent. Petitioner's son found out about the need for a trust through a phone call with a DCF employee after his father's death. Son's probate attorney advised it was useless and did not see the need for it.

DCF's Benefit Recovery Unit determined that from December 2005 through October 2006, petitioner was totally ineligible for ICP Medicaid, resulting in overpayment of more than $35,000. Petitioner's representatives disagreed because they were not informed about the QIT, and petitioner did not receive a benefit since the nursing home retained her entire income except for $35.

It cannot be determined that DCF sent any QIT information to the family. A passive packet is not proof that income trust information was included. DCF also continued the ICP Medicaid for another year with no action. Petitioner complied with information given by DCF related to the trust. It cannot be determined that petitioner was overpaid in accordance with *Forman v. DCF*. Appeal granted, and the overpayment claim is voided.

Petitioner v. Florida Department of Children & Families, Appeal No. 07F-01134 (Dist. 15 St. Lucie, Unit 88508 June 12, 2007).

DCF received a web application for ICP benefits on May 2006. Petitioner was in the hospital in May and July 2006, and was temporarily in a nursing home in July 2006. Petitioner had surgery in March 2007, and needs rehabilitation and physical therapy. No disability determination had been made, petitioner was under 65 DMRT and it was decided that petitioner did not meet the program criteria since the impairment would not last 12 months.

Petitioner met the level of care on July 2006. DCF issued notices (dated November 2006) denying ICP for July 2006 through December 2006. DCF asserts it determined eligibility for nursing home coverage. Petitioner appeals whether DCF completed a Medicaid determination for May and June from petitioner's May 2006 application.

Petitioner is appealing a denial of social security disability benefits. There is no evidence DCF determined any Medicaid eligibility prior to July 2006. DCF's manual shows that applications for disability must be completed within 90 days, which has been exceeded. The months at issue are still in a pending status. The hearing officer does not have information to make a decision concerning the allegation of disability. The record lacks information the SSA considered in rendering a decision of not disabled. Remanded for DCF to issue a notice of the determination, and begin this determination within 10 days of receipt of the order.

Petitioner v. Florida Department of Children & Families, Appeal No. 06F-06700 (Dist. 7 Brevard, Unit 88981 May 31, 2007).

Petitioner, divorced, applied for ICP benefits in August 2005. Assets exceeded program standards. He prepaid alimony until February 2006, which reduced his assets.

Son had power of attorney for mother and father. DCF changed patient responsibility (PR) for father to $1,787 effective October 2006, not allowing for a deduction for future alimony. His PR was calculated by taking his income and subtracting a personal needs allowance and his payments for a Medicare insurance policy.

Son believes DCF ignored a court order by forcing son to choose to not pay his mother's alimony in order to pay father's PR to nursing facility.

Petitioner's son appeals DCF's decision to not include alimony payments as a deduction from his PR, and seeks reimbursement of $6,000 in withheld alimony payments to his mother.

A challenge to DCF's rule is not appropriate for this venue. A rule challenge can be requested from DOAH. DCF allowed both a personal needs allowance and an insurance premium when determining patient responsibility. The ex-wife does not qualify for an income diversion to a community spouse. Alimony is not allowed as a deduction in determining ICP patient responsibility. Income is counted even if it is more than the individual actually receives due to paying a debt or other legal obligation. Appeal denied.

Petitioner v. Florida Department of Children & Families, Appeal No. 07F-00052 (Dist. 23 Pinellas, Unit 88521 May 2, 2007).

Real property was indicated in prior recertifications, completed by the wife, as the homestead and income producing real property. Stepdaughter became authorized representative, who completed recertification form in October 2006. According to the form, the rental property was no longer income producing. After inquiry, DCF discovered the property had been quitclaimed shortly before wife's death in 2004 for $10 to the stepdaughter, and was later sold for $263,000. The transfer was not reported. Stepdaughter advised DCF that petitioner was in the late stages of Alzheimer's disease and could not respond on his own. No evidence or verification was received regarding the transfer or proof that the funds were used for the petitioner or petitioner's wife. DCF cancelled ICP benefits due to an improper transfer of assets and imposed an ineligibility period until October 2013. Stepson submitted the deeds and a handwritten explanation of how the proceeds from the sale were spent. Petitioner appealed and requested an appeal for hardship.

DCF must presume that the disposal of resources was to become Medicaid eligible. No evidence was received to rebut this presumption. Documentation later received did not include evidence of compensation for a transferred asset. Regarding the hardship request, DCF had not received or made a determination on a hardship request; therefore, the request for an appeal was premature. Appeal denied.

Become Board Certified

Florida Bar Board Certification is available in 22 practice areas

Applications and more information:
FloridaBar.org/certification or **850/561-5842**

Filing Periods and Practice Areas

July 1 – Aug. 31
Admiralty & Maritime Law
Appellate Practice
Aviation Law
Civil Trial
Elder Law
Immigration & Nationality
International Law
Labor & Employment Law
Marital & Family Law
Tax Law

Sept. 1 – Oct. 31
Antitrust & Trade Regulation Law
Business Litigation
City, County & Local Gov't Law
Construction Law
Criminal Appellate
Criminal Trial
Health Law
Intellectual Property Law
Real Estate
State and Fed. Gov't. and Admin. Practice
Wills, Trusts & Estates
Workers' Compensation

Minimum Requirements*

• A minimum of five years in the practice of law • Substantial involvement in a practice field • Satisfactory peer review • Completion of the certification area's CLE requirement • Passage of an exam •

** To review the specific standards for each practice area, please refer to Chapter 6, Rules Regulating The Florida Bar or visit **FloridaBar.org/certification***

FAIR HEARINGS REPORTED

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

The reports are mailed on a monthly basis but it takes approximately 30 to 60 days after the month's end to receive the opinions, so mailings will typically be several months behind.

You will not receive previous mailings, so order now!

FULL-YEAR: January 2008 - December 2008: $150

****

Fair Hearings Reported

ORDER FORM

NAME: _____ Bar # _____

ADDRESS: _____

CITY/STATE/ZIP: _____

METHOD OF PAYMENT:

❑ Check (in the amount of $150) payable to: "The Florida Bar Elder Law Section"

❑ Master Card ❑ VISA Card No. _____ Expires: ____/_____

Name of Cardholder: _____ Signature _____

Mail to: The Florida Bar Elder Law Section, 651 East Jefferson Street, Tallahassee, FL 32399-2300, or fax to 850/561-5825

ED007

The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43