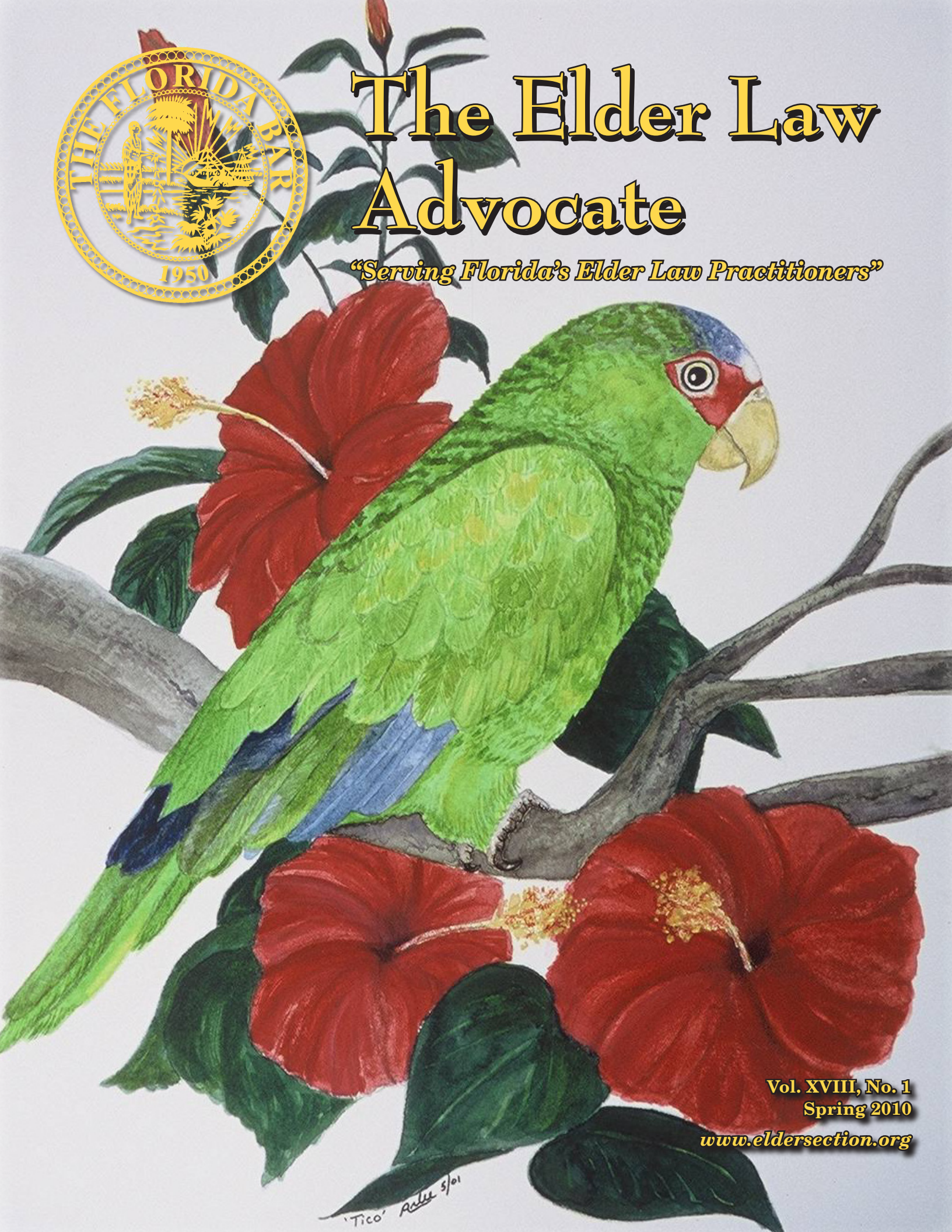
The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"



Vol. XVIII, No. 1
Spring 2010
www.eldersection.org

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

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.

COVER ART

"Tico" original pastel
Private collection of Peggy Sashy
Artist — Arlee J. Colman
See more of Arlee's work at
www.artbyarlee.com

Contents:

The deadline for the SUMMER ISSUE is JULY 1, 2010. Articles on any topic of interest to the practice of elder law should be submitted via email as an attachment in MS Word format to Patricia I. "Tish" Taylor, Esquire, *pit@mcsumm.com*, or call Arlee Colman at 800/342-8060, ext. 5625, for additional information.

Things I have learned ...

Babette B. Bach

Message from the chair

So, you think you know what is going on. Well, that is what I thought, until recently. Now I feel like a wise 18-year-old looking back on age 14 when I knew way more than any adult I'd ever met. What finally made me a "wise 18-year-old" was the panic of making a major life change: picking the perfect college. Now the panic is seeing that my term as chair of the Elder Law Section will be over in June and I will no longer be at the center of the storm.

I didn't seek this position and was pretty intimidated by it. I took it because good friends asked me to do it and they were sharing the responsibilities with me.

Now I know one thing. Being chair is like being in the control room of NASA. Information is coming at you from all angles, and everyone around you is super-smart. Somehow they don't notice that you aren't quite in their league. But you are in the center of it all, and you learn by osmosis. I've been in the right place at the right time, and that counts for a lot. Now I realize that I've become an elder law information junkie. I want to know everything before anyone else. It is as addictive as my iPhone. I crave instant information, and I'm willing to do my public service to get it.

So, if this sounds sexy, consider positioning yourself for future leadership in the ELS. You'll end up smarter despite yourself. Plus, you will make some very cool friends who do know more than you and will keep pretending otherwise.

This is my chance to whet your appetite and let you know what I have learned for the meager price of hours of ELS service.

- The vote was 17-13 to recommend to the Board of Governors that the section change its name to the Elder and Disability Section of The Florida Bar.
- David Lillesand was appointed chair of the name change committee.
- Congratulations to Howie Krooks and the task force for the recent change to the DCF manual on promissory notes. Howie's article is in this *Advocate*.
- The 2010-2011 leadership for the ELS was voted on Mar. 11, and here is the new lineup: Chair Len Mondschein; Chair-elect Enrique Zamora; Administrative Chair Twyla Sketchley; Substantive Chair Jana McConnaughhay; Secretary John Clardy; and Treasurer Robert Morgan.
- Twyla Sketchley is doing a terrific job as the ELS legislative liaison in Tallahassee. We are more active than ever in this legislative session.
- Len Mondschein chaired a super-successful Certification Review two-day CLE in Orlando in January.
- Collette Small and John Griffin co-chaired a wonderful Public Benefits Seminar on Mar. 12 in Tampa.
- Numerous ELS speakers were very active in a recent CLE in Tampa sponsored by the Young Lawyers Division of The Florida Bar.
- We are progressing on indexing the Medicaid Fair Hearings Reported for our subscribers. The project is being sponsored by the Center for Special Needs Trust.
- Membership in the section is now over 1,600!
- The ELS is working with AFELA and the task force to discuss various problems with the Long-Term Care Community Diversion Program. Charlie Robinson is our inspired leader on this project.
- Floyd Faglie has been appointed to the Board of Governors' special committee to study lien resolutions and elder law attorney's fees for special needs trusts in personal injury cases.
- Enrique Zamora and Jennifer Quesada have volunteered to work on a series of pamphlets to be produced by the ELS for elder law attorneys on a wide variety of topics. This will be a free marketing tool for our members.
- We are working on some new locations for CLE, like Montana and Belize! (Unfortunately, our application to go to Cuba was rejected despite Enrique's valiant efforts.)
- Some smart people want us to start an ELS PAC; anyone interested in working on this should contact me.
- The RPPTL's creditors' rights bill, which ELS opposes, did not make it to the 2010 legislative session.
- Our free mentoring calls are a huge success due to Angela Warren's terrific leadership. Thank you, Angela. Her successor, Jason Waddell, has a tough act to follow.
- Most committee meetings now qualify for CLE credits.
- The ELS Guardianship Committee is going to promote an increase in funding for public guardians and is working in cooperation with the DCF toward this goal.
- Law students can now become ELS members for FREE!
- We welcome Mark Mazzeo as the new president of AFELA and sincerely thank Randy Bryan for the amazing job he did last year.
- Len Mondschein is working on our committees' leadership and members as well as the committee training scheduled for June 25. Our next Executive Committee meeting is during the big Bar meeting in Boca Raton at The Breakers on June 25.

Thanks to everyone for dazzling participation and impressive results. All this—and we still practice law!

Do you really know us?
There's a reasonable doubt you do.

Lien Resolution

MSA Allocation

MSA Administration

Life Care Planning

Special Needs Trust Administration

Fiduciary Support Services

Public Benefits Compliance

The Centers provide an extensive range of professional services specifically designed to meet the needs of law firms, including lien resolution, MSA allocation and administration, special needs trust administration and fiduciary support services. The Centers is comprised of The Center for Lien Resolution, The Center for Medicare Set Aside Administration and The Center for Special Needs Trust Administration. From our accounting department to our dedicated call center, we are an organization of professionals with over one-hundred collective years of experience. Call us to learn how we can help you protect your clients' current and future public benefits while increasing your bottom line.

THE CENTERS

www.sntcenter.org

www.sntcenter.org • (877) 766-5331

Leasehold cooperatives – A hidden trap for elder law attorneys

by Jeffrey S. Goethe


J. GOETHE

The unresolved conflict between cooperative rulings

In *Phillips v. Hirshon*, the Third District Court of Appeals reluctantly held that a cooperative apartment was not the decedent's homestead for purposes of the devise restrictions in Article X, § 4(c) of the Florida Constitution. The court found that the decedent could devise his cooperative apartment, even though he was survived by a minor child. The court then certified a conflict between two prior cases construing the same section of the constitution. *Southern Walls, Inc. v. Stilwell Corp*. held that an interest in a leasehold cooperative was eligible for the constitutional protections against creditor claims found in § 4(a), Article X. *In re Estate of Wartels,* a 1979 Florida Supreme Court decision, held that an interest in a leasehold cooperative apartment was not constitutional homestead for purposes of restrictions on the devise of homestead in § 4(c). In *Phillips v. Hirshon*, the Florida Supreme Court reviewed excellent jurisdictional briefs and heard thorough oral arguments in 2008, but declined to accept jurisdiction.

Does a cooperative unit owner 'own' real estate?

Article X, § 4(a)(1) does not clearly define the nature of ownership required for the constitutional homestead protections relating to forced sale by creditors and restrictions on the alienation and devise of homestead. The Florida Supreme Court has held that in interpreting Article X, § 4, "ownership" includes a beneficial interest or any estate in land, as long as the interest grants a right of possession.

The Florida Cooperative Act

In *Phillips v. Hirshon*, the Third District also certified, as a question of great public importance, whether the *Wartels* decision should be applied after the enactment of the Cooperative Act, which became effective after Mr. Wartels' death. The Florida Cooperative Act refers to cooperative units as "real property" conveyed by "a lease or other muniment of title or possession," capable of use as a "homestead residence." Conveyances of cooperative units are subject to documentary stamp taxes and are often insured by title insurance. The underlying legal title may be vested in a cooperative corporation, but the owner of the cooperative unit has a beneficial interest in a specific unit, including a right of possession, often exceeding a term of 99 years.

Homestead protection during the owner's lifetime

Section 222.01 includes a procedure to notify creditors that a debtor's home is "homestead exempt from levy and execution under § 4, Article X of the State Constitution …" Section 225.05 makes this procedure available to the owners of any "dwelling house," including mobile homes and manufactured homes on leased land.

Homestead protection after the owner's death

The homestead status of a home can become an important issue in probate proceedings. Section 731.201(33) defines "protected homestead" as "the property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution …" If the beneficiaries of the estate are within the class who could take an intestate share of the estate, they qualify as "heirs" entitled to the protection from claims against the deceased owner's estate. In 1890, the Florida Supreme Court, in *Miller v. Finnegan,* put it quit simply:

> That property which creditors could not take from the head of the family when he was living they cannot take from his heirs after his death. This is what the constitution plainly said to anyone who might become a creditor … Whatever interest of the ancestor was in the land, it descends to and vests in the heir, whether it be a term of years, a fee simple, or other estate extending beyond the life of the ancestor."

The hidden trap for elder law attorneys

Planning for elderly clients who may ultimately require Medicaid assistance includes an analysis of the client's assets. Often, a client's home is his or her most significant asset. Many retirees live in leasehold cooperative communities. Relying on the rationale in *Southern Walls*, few practitioners would question the cooperative unit's homestead status for Medicaid eligibility purposes. However, the Second District Court of Appeals, in a *per curiam* decision citing *In re Estate of Wartels,* affirmed the trial court's ruling that the exemption from the decedent's creditor claims did not extend to the cooperative unit owner's heirs. *Weber v. Agency for Health Care Administration,* 995 So. 2d 972 (Fla. 2d DCA 2008). As a result, a timely filed probate claim can result in the forced sale of the decedent's home that has been devised to a family member or that descends to a surviving spouse.

Medicaid estate recovery

The Medicaid Estate Recovery Act provides that "[n]o debt under this section shall be enforced against any property that is determined to be exempt from the claims of creditors under the constitution or laws of this state." § 409.9101(7), F.S.. The Medicaid Estate Recovery Act requires the sale of estate assets that

continued, next page

Leasehold cooperatives
from preceding page

are not exempt if needed to satisfy the claim.

Should planners rely on *Wartels* or *Southern Walls*?

As the cases now stand, planners must consider that the language in Article X, § 4(a)(1) will be interpreted one way with regard to devise restrictions or creditor claims in a probate proceeding and another way for creditor protection in a state court civil proceeding. The Third District noted that this is not logical, especially in light of the clearly stated public policy behind Article X, § 4(a). Until Article X, § 4 is amended or the Supreme Court revisits its ruling in *Wartels*, cooperative homeowners, their families and their lawyers will be vulnerable to yet another hidden homestead trap.

Jeffrey S. Goethe *practices with Barnes Walker & Goethe, chartered in Bradenton, Fla., in the areas of wills, trusts, estates and real estate. Mr. Goethe is a member of The Florida Bar Elder Law Section and is an active member of the Real Property Probate and Trust Law Section, serving as co-vice chair of the Probate Law and Procedure Committee and as a member of the Ad Hoc Study Committee on Homestead Life Estate Issues. Mr. Goethe is also co-vice chair of the Florida Probate Rules Committee. Mr. Goethe is a title agent for Attorneys' Title Fund Services LLC and Chicago Title.*

Save the date!

May 6, 2010
12 noon EDT / 11 a.m. CDT

ELS Mentor Committee Presents

TRICKS OF THE TRADE: UNIQUE USES FOR POOLED TRUST

Speakers: John Staunton and Travis Finchum, Clearwater

Instructions will be emailed in April.

SECTION NEWS

Member news


J. KARP

Joseph Karp speaks on elder law at Family Law Section meeting

State and nationally certified elder law attorney Joseph Karp spoke about elder law to 1,000-plus members of the Family Law Section of The Florida Bar at their annual conference in Orlando. This is the first time the topic of elder law has been part of the group's certification curriculum.


G. BERNSTEIN

Karp Law Firm members earn certification, accreditation

Attorney Genny Bernstein has earned Florida Bar certification in elder law. All of the attorneys of The Karp Law Firm—Joseph Karp, Genny Bernstein and Adele Harris—have received accreditation from the Department of Veterans Affairs for the preparation, presentation and prosecution of claims for veterans benefits. In addition, Mr. Karp has been admitted to practice before the U.S. Court of Appeals for Veterans Claims.


A. HARRIS


P. WEINSTEIN

Congratulations to Philip M. Weinstein

Philip M. Weinstein, an honorary life member of the Elder Law Section and chair of the Death Care Industry Committee, was recently elected chairman of the Board of Trustees of University Hospital in Tamarac, Fla.

Mr. Weinstein is the director of community relations of Rubin Memorial Chapel and has been a funeral director in the South Florida area for over 40 years. He is past president of the Elder Service Resource Network and active in the Broward Coalition on Aging. He is on the boards of directors of the Alzheimer's Family Center and the Florida State Guardianship Association. He is also an active member of the Legislative Committee of the Florida Funeral Directors Association.

He can be reached at 877/554-7878 or *phil@rubinmemorialchapel.com.*

Scott Douglas Krasny wins pro bono award


S. KRASNEY

The Elder Law Section congratulates Scott Douglas Krasny for winning The Florida Bar President's Pro Bono Service Award for the 18th Judicial Circuit. Krasny is a Martindale-Hubbell AV-rated partner/shareholder at the law firm of Krasny & Dettmer in Melbourne, Fla. Mr. Krasny's principal areas of practice are wills, trusts, estate planning, estate and trust administration and taxation, corporate and business law and real property transactions.

The majority of Mr. Krasny's pro bono work has been completed through the Brevard County Legal Aid Pro Bono Program. As president of the Brevard County Bar Association in 2002, he initiated projects aimed at mobilizing the unique skills attorneys offer to provide assistance to those in need. In recent years, Mr. Krasny has also provided more than 300 hours of assistance through BCLA'S Pro Bono Program to more than a dozen individual clients in need of help with probate, consumer and housing issues.

Mr. Krasny was presented his award by Florida Bar President Jesse Diner in Tallahassee on Jan. 29, 2010, in a special ceremonial session of the Florida Supreme Court.

Congratulations, 2010-2011 ELS leaders!

The following members will take the helm of the ELS's leadership on July 1, 2010:

Chair	Leonard E. Mondschein
Chair-elect	Enrique Zamora
Administrative Chair	Twyla L. Sketchley
Substantive Chair	Jana McConnaughhay
Treasurer	Robert Morgan
Secretary	John S. Clardy III

MARK YOUR CALENDARS!

2010 Elder Law Section Annual Retreat

Eden Roc Hotel
Miami Beach, Florida
Historic Gateway to South Beach!

October 7-9, 2010

Watch your mail for registration information.

Call for papers – *Florida Bar Journal*

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

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

Discussing Income Properties With Your Medicaid Clients?

"Proud Sponsor of the Elder Law Section"

If real estate is suitable for your Medicaid client, EPIC offers a complete Real Estate Medicaid Solution!

- Selection of appropriate properties for your client
- Asset protection through purchase of ownership in 30 days or less
- All real estate transactional services (deed preparation, title work and closing)
- Steady and Unfluctuating rental income throughout the lease term
- Payment of real estate taxes, repairs and Maintenance, and insurance
- Supporting documentation for the Medicaid application
- Buy-back of the real property interest when no longer needed

EPIC

Elder Planning Income Concepts, LLC

Emma Hemness, Managing Member

(813) 661-5297

309 N. Parson Ave. Brandon, Fl. 33510

E-mail: epicinfo@aol.com

Providing asset protection through a "No-Hassle Real Estate Medicaid Solution" for over 3 years.

"For Elder Law Attorneys by Elder Law Attorneys" • Visit us at *www.epicelderlaw.com*

A tale about a promissory note journey

How the Florida Elder Law Bar successfully resolved a DRA implementation issue

by Howard S. Krooks

H. KROOKS

We've all been there. Waiting to see how our state would implement the DRA. In some cases, implementation was accomplished quickly. In others, this was not the case until very recently. Still other states await implementation, even to this day. In my case, the journey was even more interesting since I practice in two states, New York and Florida. The similarities and differences between New York and Florida mark a poignant contrast in how different states can approach the very same issue, with a federal statute purportedly providing uniformity and a federal agency, CMS, purportedly doing the same. This article details the journey the Florida Elder Law Bar traveled in relation to the treatment of promissory notes in a post-DRA world. The story of Florida's treatment of promissory notes is compelling, not only because it has a happy ending from an advocacy standpoint, but because it could serve as a useful model that we hope will be replicated in other states.

The story begins in December 2004, when the Florida Department of Children and Families (our Medicaid agency) issued a transmittal (Transmittal No. P-04-10-0017), as amended by Transmittal No. 04-12-0020, rendering all promissory notes countable resources, the effective date of which was delayed from Dec. 22, 2004, through Feb. 28, 2005. A statement made in the transmittal made it clear that this was intended to constitute a total prohibition on the use of promissory notes in Florida: "They will be countable assets to the individual (lender) in the amount of their equity value. The liquidity of a promissory note, loan or mortgage will have no effect on the asset's countability." The use of promissory notes came to a screeching halt in Florida long-term care planning on Mar. 1, 2005.

Then along came the federal DRA statute on Feb. 8, 2006. Among many other things (some not so clearly stated), the DRA delineated clear parameters setting forth the requirements for how a promissory note was to be structured in order for the note not to be considered an uncompensated transfer of assets resulting in a penalty period (i.e., level payments, actuarially sound, no deferred payments, no self-canceling notes, etc.). The Florida Elder Law Bar thought at the time that these new parameters would supersede the prior transmittal treating all notes as countable resources. Much to our surprise (or maybe it should have come as no surprise), the Medicaid agency stated in informal discussions that even a so-called DRA compliant note would be considered a countable resource for Medicaid eligibility purposes. Thus, we were left with the possibility of having a DRA compliant note, so no transfer of assets penalty would apply, but the entire value of the note would be considered an available resource. Thus, the use of notes in long-term care planning remained nonexistent in Florida.

While this was going on in Florida, New York had implemented the DRA effective Aug. 1, 2006, and the use of notes was subsequently challenged in numerous fair hearing decisions. A similar issue was raised in at least some of these cases regarding the question of whether a note was a countable resource. The appellants argued that it was not, while the New York State Department of Social Services argued, among other things, that there was a secondary market for the notes and, therefore, the note should be countable as a resource for Medicaid purposes. This argument was struck down in the various published decisions, so DRA compliant notes could be used in New York, and the value of the note would not constitute an available resource for Medicaid purposes. This was of particular importance in New York, where a partial return of funds was not allowed per the administrative directive (06 OMM/ADM-5) issued by the Department of Social Services implementing the DRA.[1]

About a year ago, I was asked to chair the DRA Task Force for NAELA to address some of the implementation issues being experienced around the country and to work with CMS in securing a clarifying pronouncement regarding certain issues that remained unclear post DRA. This work is ongoing, and I am sure you will hear more about the work of the task force since a meeting with CMS is being planned as I write this piece. As part of the work of the DRA Task Force, we looked at the question of how promissory notes should be treated post DRA and the varying experiences of the states on this issue.[2] I was convinced that Florida's treatment of notes was not correct in light of the New York experience, the SSI POMS and the *James v. Richman* line of cases from the Third Circuit.

So, with this backdrop, let's return to Florida and see what happened to cause a change in Medicaid's treatment of notes. The Florida Elder Law Bar comprises primarily the Academy of Florida Elder Law Attorneys (AFELA)[3] and The Florida Bar Elder Law Section.[4] These two groups have worked side by side for about six years through their Joint Public Policy Task Force, a collection of elder law attorneys from both

continued, next page

Promissory note journey
from preceding page

groups that work toward achieving positive change regarding a broad range of policy issues throughout the state.[5] The task force also works with a lobbyist, an administrative law attorney, a governmental consultant and a public relations specialist, all of whom are paid individuals through funding that is contributed by AFELA and Elder Law Section members. Needless to say, DRA implementation is one of many issues the task force has been working on since Feb. 8, 2006. There is a phone call of task force members every Thursday to discuss progress and strategy. Florida implemented the DRA through formal adoption of two rules (Nov. 1, 2007, and Dec. 24, 2009), the publication of one transmittal (Oct. 31, 2007) and through various changes to its Medicaid Manual (April 2009, July 2009, October 2009 and January 2010). Many issues were addressed in these various rules, transmittals, etc. But one issue remained unresolved, and that is the way Florida Medicaid treated DRA compliant promissory notes. Although Florida allows for a partial return of funds to reduce a penalty period, the question about the countability of DRA compliant notes continued to weigh on the minds of the task force members since it did not seem consistent with federal SSI law, which provides for a rebuttable presumption that the note could be sold.

There were other issues as well that required our attention. For example, we were working on a variety of challenges to Medicaid's implementation of the DRA outside of the promissory note issue. In particular, Florida's attempted retroactive implementation of a 60-month lookback period was the cause of great concern. Through discussions with the assistant general counsel at the Department of Children and Families and others, the task force was successful in having the 60-month lookback period applied prospectively only, and this was one of the major changes contained in the recently adopted Dec. 24, 2009, rule. We are also challenging Medicaid's casual approach to effectuating change through Medicaid Manual revisions, none of which followed basic principles of administrative law (i.e., publication, public comment, hearing, etc.) before being implemented. In fact, our administrative law attorney has submitted to Medicaid a draft of a petition challenging the Medicaid Manual revisions as a violation of the state's Administrative Procedure Act. The task force is waiting to hear back from Medicaid as to whether it will publish such changes as a rule, allowing a comment period and conducting a hearing, or if we will need to proceed with litigation over these issues.

Meanwhile, I was asked to join some informal discussions with Medicaid policymakers that were initially designed to address customer service issues for the consumer in dealing with Medicaid.[6] This began about nine months ago. Once all of the customer service issues were addressed, I suggested that we tackle some of the more substantive issues that remained post DRA, and the Medicaid policymakers were receptive to this. All they asked was that I outline in memo format the nature of the issue, the law and our interpretation of the law. There were a number of sub-issues that the task force identified as being appropriate for discussion in this forum, and one of them was the promissory note issue. The task force appointed a sub-committee consisting of Lauchlin Waldoch, Esq., Ellen Morris, Esq., and me to work on various memoranda outlining our position on promissory notes and certain other issues. The promissory note memo outlined federal law and Florida law on the treatment of promissory notes, and I had previously forwarded *James v. Richman*, the Third Circuit case holding that no secondary market existed for a non-assignable, non-transferable annuity income stream. I submitted the promissory note memo in August 2009 and was told that Medicaid would review our position and let us know what action, if any, would be taken in response. Several months passed, and in October 2009, I was told that Medicaid had considered our position and that a policy statement would be forthcoming in the near future. I was told that a final decision had not yet been made as to whether this change would occur in the form of a rule, a transmittal or a Medicaid Manual change. From September through December 2009, no action was taken, and I began to wonder if this would end up in the agency black hole where so many things land, never to be heard from again.

The Florida Bar Certification Review Course was scheduled for Jan. 14-15, 2010 (a course designed to prepare Elder Law Section members to become board certified in elder law), and I was scheduled to cover the topic of Planning After the DRA. I thought it prudent to check to see if there were any revisions to the Medicaid Manual before giving the presentation since these changes are never announced to us, and if anything had changed I should know about it so that I could pass it along to the attendees. Up until this point in time, the Medicaid Manual had a provision stating:

> If the note, loan or mortgage is not bona fide or not negotiable, the instrument cannot be converted to cash (sold) and is not an asset but is a potential transfer.

This is confusing language to deal with because Medicaid's position in our discussions was always that a DRA compliant note would not result in a penalty, but would be considered an available resource, yet the language of the manual suggests it would be considered a potential transfer. One could only imagine that the manual should have read "… is not an asset but is a countable resource."

In any event, when I looked at the January 2010 changes to the Medicaid Manual, the table of contents referred to a change in the treatment of promissory notes. So, I looked at the new provision, which read as follows:

> If the note, loan or mortgage is not bona fide or not negotiable, the instrument cannot be converted to cash (sold) and is not an asset.

Could it be? The elimination of five words in the Medicaid Manual seemed to reflect our understanding that a DRA compliant note would neither be a transfer nor a countable asset. I spoke the next day with my contact at Medicaid, and he confirmed that indeed the department was satisfied that our reading of federal law on this issue was correct! Thus, effective with the January 2010 Medicaid Manual change referenced above, DRA compliant promissory notes can now be used in Florida as part of long-term care planning, and such notes will not be considered countable assets.

The moral of the story is, of course, at least in our experience, it is worthwhile to pursue an ongoing relationship with Medicaid, one that spans the test of time and not just an occasional contact. It may not resolve every issue, and litigation will remain an option for some issues that cannot be resolved in this way. Having said that, ongoing communication could provide an extremely useful and powerful way to effectuate change in Medicaid policy and, at a minimum, will reveal to the Elder Law Bar (and vice versa) the thinking of the Medicaid agency on important policy issues.

***Howard S. Krooks, JD, CELA, CAP**, is a partner with Elder Law Associates PA, with offices located in Boca Raton, Aventura (N. Miami), Weston (Fort Lauderdale) and West Palm Beach, Fla. Mr. Krooks is of counsel to Amoruso & Amoruso LLP, located in Westchester, N.Y. He serves on the Executive Council of The Florida Bar Elder Law Section and the Joint Public Policy Task Force of The Florida Bar Elder Law Section and the Academy of Florida Elder Law Attorneys, and he is a former chair of the New York State Bar Association Elder Law Section, where he continues to serve on its Executive Committee. He is a member of the board of directors and is an officer of the National Academy of Elder Law Attorneys, where he serves as secretary. Mr. Krooks is a founding principal of ElderCounsel LLP, the premier document drafting solution for elder law and special needs planning attorneys.*

Endnotes:

1. Partial return of funds has been allowed in various counties throughout the state due to an ambiguity in the directive.

2. New Jersey has vacillated between allowing them and then not allowing them several times. New York allows the use of DRA compliant notes, and they will neither be considered an uncompensated transfer of assets nor be counted as an available resource. Ohio considers notes to be a transfer of assets, even so-called DRA compliant notes. NAELA Past President Bill Browning is presently arguing a case in the Sixth Circuit challenging Ohio's treatment of notes, but this case is presently hung up on some procedural issues, so it may be some time before the Ohio position is resolved. The use of notes has been upheld in Massachusetts as well.

3. Randy Bryan, Esq., of Oviedo, Fla., is the current president of AFELA.

4. Babette Bach, Esq., of Sarasota, Fla., is the current chair of the Elder Law Section.

5. Task force members include: Randy Bryan and Steve Kotler, co-chairs; Mark Mazzeo, AFELA president-elect; Steve Quinnell, AFELA treasurer; Babette Bach, ELS chair; Len Mondschein, ELS chair-elect; Twyla Sketchly, ELS substantive chair; Enrique Zamora, ELS administrative chair; Ellen S. Morris, legislative chair; Lauchlin Waldoch, at large member; Howard S. Krooks, at large member; Beth Prather, at large member; and Jack Rosenkranz, at large member.

6. Many thanks to Elder Law Section member Scott Selis for arranging these informal calls.

the Guardian POOLED TRUST

Shielding the Financial Future of the Disabled

Looking for Medicaid options?

WE CAN HELP.

The Guardian Pooled Trust can protect the assets of a disabled person, helping them financially qualify for **SSI** and **Medicaid**.

- Immediate response to distribution requests via mail, e-mail or fax.
- Timely accountings.
- Direct payment to caregivers or to third parties.
- Conservative investment strategy.
- Board Certified Elder Law Attorney as Co-Trustee.

Guardian Pooled Trust
901 Chestnut Street, Suite B
Clearwater, FL 33756

(727) 443-7898
Toll Free (800) 669-2499
www.guardianpooledtrust.org

National Non-profit for Americans with Disabilities, Inc.
A 501(c)(3) Non-Profit Corporation

Legislative Committee

Ellen S. Morris, chair

Tom Batchelor, legislative consultant

Florida's legislative session began on Tuesday, Mar. 2, and the Elder Law Section is tracking legislation of interest with the help of our legislative consultant, Tom Batchelor. Twyla Sketchley is our new legislative liaison, and we hope to have an impact on legislation we support or oppose with her help and the help of our section members' efforts through emails, phone calls and personal visits to legislators. Please be alert to our requests for help in passing or opposing certain legislation during the session.

* * * * *

Exploitation & Abuse Committee

Carolyn Sawyer, chair

Attorney General's Office: Building resources against elder crime

As elder law attorneys, we often see elderly clients who have been exploited by family members and caregivers. Too often, adult protective investigators cease their investigations if the victim is frail, would make a poor witness, is unwilling to disclose information or can't remember what has happened. When legal documents have been executed that appear to give the perpetrator authorization for the exploitation, the investigation may be cut short inappropriately. Most law enforcement officials have not been trained on specific legal documents, which makes them reluctant to intervene when such a document is "waved" before them by the exploiter. Moreover, when the few "elder" cases manage to advance to the State Attorney's Office, often, although not always, they are met with a lack of interest, if not resistance.

A program that can help improve this situation is a series of Florida Elder Crime Practitioner Training sessions offered by the Florida Attorney General's Office, through the Florida Crime Prevention Training Institute. The original program consisted of a 40-hour course designed to increase understanding of elderly criminal victimization. Building on this course, the Florida Attorney General's Office has developed a series of three-day courses that provide training in understanding elder crimes and the investigative techniques and development of prosecutorial cases to combat them. This training is open to law enforcement, attorneys, victim advocates, investigators, medical personnel, volunteers and professionals working with the elderly. For those individuals who want an extensive background in elder issues, a series of three classes offers the Florida Elder Crime Practitioner designation.

The most recently designed course, which this author attended, is a three-day session entitled "Elder Case Management—Investigation to Prosecution." I attended the first one in September 2009. Most of the attendees were investigators from sheriff's offices and police departments from around the state who wanted to learn how to be more successful in resolving elder crimes. Discussion centered on case studies and practical applications to teach participants interview techniques, recognition and identification of evidence and the legal aspects of these cases. At the end of the session, participants asked for additional information on guardianship and durable powers of attorneys.

At the next session, in November, Twyla Sketchley presented excellent information and insights on the use of guardianship to pursue perpetrators in civil court. Also, Jay Hemness conducted a lively and highly interactive session on durable powers of attorney, encouraging investigators to go beyond the mere existence of the document and educating them as to the real fiduciary duty of the attorney in fact.

In January, at a Crimes Against the Elderly session, Tom Moss' two-hour presentation on guardianship law was viewed with great interest by 32 participants, two of whom were prosecutors with two different State Attorney's Offices and others who are in law enforcement from around the state.

Future sessions include:

April 14 - 16, 2010:
Florida Elder Crime Practitioner Designation Update

May 3 - 5, 2010
Law Enforcement's Role in Elder Crime

Preston Mighdoll, a prosecutor in the State Attorney's Office in West Palm Beach, will be one of the presenters.

The collaboration of our members with the attorney general's training sessions gives us the opportunity to interact with law enforcement on the local and state levels, both in providing them with knowledge of the law with respect to exploitation of the elderly and in learning what challenges their investigators face. These sessions also offer an opportunity to interact with prosecutors from State Attorney's Offices from around the state, which is the next step in putting together an effective network for helping our clients who have been exploited.

* * * * *

Mentoring Special Committee

Jason A. Waddell, chair

Not 'Who's your daddy?' but rather 'Who's your client?'

Going through law school, one area always seemed like common sense … ethics. You do the right thing, assist your client and know you ethically helped someone. However, we graduate and quickly realize that without focus, we can slip into a murky area of not knowing to whom we owe a duty.

continued, next page

To keep you focused this quarter, the Mentoring Committee is taking a look into this often overlooked area. We have sought out Lois Lepp, who formerly worked for The Florida Bar as an attorney in the Ethics Licensure Prosecution Division (now an elder law attorney), to assist us.

The first and foremost area of concern for any elder law attorney is a clear understanding of who your client is. Lois says it is important to avoid the appearance of a conflict. For example, she says if an insurance company wishes for you to represent a client, she has the client call her to avoid the appearance that she is an arm of the insurance company. We both agree that having a document such as a fee agreement or a retainer is a good way for the family and the attorney to understand who represents whom.

Another area of concern is competency. We have all experienced the situation where the family brings Mom in and tells us what she wants (which typically cuts someone out). What do you do? Lois recommends that "you not be afraid to ask for a letter from the doctor." If they don't have anything to hide, they will understand you are trying to help make the document stronger, not cause the family trouble. How do you handle a client with diminished capacity? Lois recommends reviewing the rules often, specifically Florida Rules of Professional Conduct 4-1.4; 4-1.14. She says one should respect the client's circumstances and try to honor his or her wishes as much as reasonably possible. Don't assume that because of an examining committee report, you can ignore your client's wishes.

If someone hires you with a power of attorney, do not assume it is valid. You need to read the power of attorney to make sure it is still valid and that it does what the client wants it to do. Does it allow you to draft an irrevocable trust or allow for self dealing?

If you are meeting with a family that is, well, out of the ordinary, and there are red flags going up in your head, you should slow down the process. Think of how to protect your client. If you don't feel comfortable, don't be afraid to turn away the client. Lois recommends documenting what you believe happened at the meeting. Keep good records because it could be years before you are asked to recount the encounter.

In the end, good ethics may be as simple as we once believed. Do right by your client (you just need to know who that person is first), help him or her accomplish his or her goal (you can only obtain what the person has a right to) and sleep well at night (well … ethically you have the right to).

I hope you will join us for our next Tricks of the Trade teleconference where we will continue our conversation with Lois Lepp. One hour of CLE credits will be available. Watch for an email giving you additional information.

* * * * *

Resident/Facility Rights Special Committee

John Griffin, chair

SB 1102 & HB 817: A first step toward protecting ALF residents

by Aubrey Posey

Imagine being asked to leave your home for arguing with a neighbor, organizing a group of neighbors to advocate for change or complaining to state agencies about your landlord's actions. What if you were asked to leave because you did not "mesh" with the community? Sadly, being asked to leave one's home under these circumstances is a reality for many assisted living facility (ALF) residents.

Current law requires that residents be given 45-days' notice of a relocation from an ALF and that reasons for the relocation be written; it does not specify the terms in which a resident will be notified. It provides no guidance as to when a resident can be relocated, other than those provided under emergency circumstances.[1] While many facilities provide written notice directly to the resident, many do not.

The Long-Term Care Ombudsman Program has advocated for several years for legislative change to address the issue, specifically for requirements that would provide notice specifically to ALF residents and their legal representatives and the opportunity to challenge a relocation or termination.

This year, Mike Fasano (S-11) and Rep. Tom Anderson (H-45) filed SB 1102 and HB 817 to address these concerns. The bills require the Department of Elder Affairs to draft a standard form for the relocation or termination of a resident. The form will include the grounds for relocation or termination and specific facts related to the resident supporting those grounds. Only six specified reasons will permit relocation or termination. Even though broadly worded, the list of reasons provides assurance to residents that they cannot be discharged for arbitrary and discriminatory reasons.

The form will list the effective date of relocation and the right to request the local ombudsman to review the notice. This form will be provided to the resident and/or his or her legal representative 45 days in advance. The legislation only reinforces the resident's right to contact the program and does not include a full appeals process, which the Elder Law Section supports. The potential to resolve an issue and to allow the resident to continue to reside in his or her home is important.

ALF residents typically rent a unit, often referred to as an "apartment"; however, they have none of the protections or recourse available under Chapter 83, part II, F.S.[2] Although many have care needs similar to nursing home residents due to the increasing use of waivers and participation in the diversion program, they have none of the protections available under state and federal laws to quickly challenge inappropriate or discriminatory discharges.[3] This makes no sense. SB 1102 and HB 817 present a first

step toward achieving some protection for these vulnerable residents.

Aubrey Posey *is the legal advocate for Florida's Long-Term Care Ombudsman Program, which identifies, investigates and resolves complaints made by or on behalf of long-term care residents. She is a member of the Resident/Facility Rights Special Committee.*

Endnotes:

1. § 429.28(1)(k), F.S. (2009).
2. § 83.42(1), F.S. (2009).
3. 42 U.S.C. §1395i-3(c)(2) (2006); § 400.0255, F.S. (2009)

* * * * *

Unlicensed Practice of Law Committee

John R. Frazier, chair

The UPL Committee holds a monthly teleconference on the third Tuesday of each month at 4 p.m.

Since the last report, our committee finalized an alert that was published in the Fall 2009 edition of *The Elder Law Advocate.* The alert summarized some of the basic activities that constitute UPL and encouraged attorneys as well as their clients to report alleged instances of UPL to The Florida Bar. I have also been in recent communication with Al Rothstein, who is working with the Academy of Florida Elder Law Attorneys on a UPL project. The AFELA project includes a slideshow that provides information to nursing facilities and to the public to increase awareness regarding the unlicenced practice of law in Florida. I provided Mr. Rothstein with a copy of an unpublished article I previously had written regarding UPL, which outlines the UPL problem and the risks to the public associated with using non-attorneys for Medicaid planning. Mr. Rothstein will use some of the information in the article to supplement the UPL project he is working on.

A primary goal of the UPL Committee is to increase and maintain awareness of the UPL problem, both to attorneys and the public. Since the Florida Bar UPL investigative process is "complaint driven," it is critical for attorneys and their clients to be willing to file UPL complaints when alleged instances of UPL are encountered. Therefore, it is a primary goal of the UPL Committee to encourage and facilitate the filing of UPL complaints with The Florida Bar.

* * * * *

Death Care Industry Committee

Philip M. Weinstein, chair

The Death Care Industry Committee is alive and well. Please find below a summary of the legislation that will affect the industry. All of the major funeral and cemetery organizations have supported this legislation.

continued, next page

The Florida Bar's Haiti relief efforts

The people of Haiti need our help. The recent earthquake killed an estimated 70,000 people and left the country's infrastructure in ruins. Many survivors do not have access to food, water, medicine and the basic necessities that we often take for granted.

As Florida's legal community, we have an opportunity to assist the people of Haiti in their recovery and rebuilding efforts. The American Red Cross has set up an account to receive donations from all members of The Florida Bar directed to relief and development efforts in Haiti. Assistance provided by the American Red Cross may include sending relief supplies, mobilizing relief workers and providing financial resources.

The Florida Bar International Law Section is leading this effort and is seeking the help and support of every Florida Bar member, section and voluntary bar association.

To donate, please visit: *http://american.redcross.org/floridabaremp.*

Any donation amount will help make a difference. The International Law Section is encouraging members to donate the equivalent of one billable hour. Given our numbers, this effort by Florida's legal profession can raise millions of dollars. Together, we have that power.

If you know of others who are willing to assist us, please forward this information to them. For more information about the Red Cross, please visit *www.redcross.org.* Thank you.

Jesse Diner
President, The Florida Bar

Francisco A. Corrales
Chair, The Florida Bar
International Law Section

COMMITTEE REPORTS

527 - Florida Funeral, Cemetery, and Consumer Services Act

HOUSE BILL 527 - GENERAL BILL by Roberson, K.
(Co-sponsors Chestnut, Horner, Plakon, Workman)

Florida Funeral, Cemetery, and Consumer Services Act: Prohibits issuance or renewal of license to applicant with certain criminal records; revises Board of Funeral, Cemetery & Consumer Services; authorizes fees for certain inspections; authorizes requirements for online submission of applications; authorizes fees for paper applications; requires applicants to disclose certain criminal records and pleas; authorizes limited licenses for out-of-state licensees; revises requirements for limited license; revises continuing education credit for board meeting attendance; authorizes discipline of license for certain criminal pleas; authorizes temporary waivers during state of emergency; revises which nonlicensed personnel must complete communicable diseases course; authorizes cemetery company to charge fee; exempts charges from trust deposit requirements; authorizes cemetery company to require proof of certain insurance coverage; prohibits cemetery company from setting certain insurance coverage limits; revises licensing requirements for funeral directors, funeral director interns, and direct disposers; revises supervision requirements for provisional licensees and funeral director interns; provides duties of funeral director in charge; requires funeral director in charge to have embalmer license and provides exceptions; requires certain licensees to display licenses in funeral and direct disposal establishments; authorizes preneed licensees to charge fee; revises trust deposit requirements; revises licensing requirements for direct disposers; requires direct disposal establishment to have licensed funeral director in charge; repeals course on HIV and AIDS for funeral directors and embalmers. Effective Date: July 1, 2010

Welcome, new members!

Stephanie Marie Villavicencio
St. Thomas University School of Law
6880 Maynada Street
Coral Gables, FL 33146
305/322-0689
svillavicencio@stu.edu

John Robert Dixon
Dixon & Associates
3335 West Bearss Avenue
Tampa, FL 33618
813/968-2404
john.dixon@jurisdixon.com

Martha Frances Barrera
Advocacy Center
2728 Centerview Drive, Ste. 102
Tallahassee, FL 32399-6559
850/488-9071
marthab@advocacycenter.org

Nick Guerra
5701 NW 88th Avenue, Ste. 250
Tamarac, FL 33321

Pedro Pablo Mendez
Peter P. Mendez PA
1622 Hillcrest Street
Orlando, FL 32803
407/895-2480
pmendez@mendezlaw.com

Matthew David Branz
Paul & Elkind PA
142 East New York Avenue
Deland, FL 32724
386/734-3020
mbranz@paulandelkind.com

Brandon Arkin
St. Thomas University of Law
157 Esperanza Way
Palm Beach Gardens, FL 33418
305/206-8810
info4brandon@gmail.com

Jessica Johanne Dunn
2428 San Jose Boulevard, Ste. 1
Jacksonville, FL 32223
904/854-0410
jdunn@robertmorganlaw.com

Horacio A. Sosa
Horacio Sosa PA
8551 West Sunrise Boulevard, Ste. 208
Plantation, FL 33322
954/370-2222
hsosa@lawbgr.com

Ana M. Veliz
Katz Barron Squitero Faust
2699 South Bayshore Drive, Floor 7
Miami, FL 33133
305/856-2444
amv@katzbarron.com

Max Worrel McCord III
McCord PA
105 West 5th Street
Panama City, FL 32401
850/640-1131
mwm@mccordpa.com

David F. Sterling
4488 Ascot Circle South
Sarasota, FL 34235
941/228-2706
dfsterling@verizon.net

P. Ause Brown, Jr.
4001 NW 9th Court
Gainesville, FL 32605
352/376-4494
brownpa@cox.net

Francis S. Leontitsis
230 Bal Harbor Boulevard, Ste. 113
Punta Gorda, FL 33950
941/833-9262
fleontitsis@byrskilaw.com

James Edvin Johnson II
Greene Hamrick Perrey Quinlan & Schermer PA
601 12th Street West
Bradenton, FL 34205
941/747-1871
jjohnson@manateelegal.com

Barbara Smilack Buxton
Law Offices of Barbara Buxton
20801 Biscayne Boulevard, Ste. 400
Aventura, FL 33180
305/932-2293
barbara@buxtonlaw.com

Howard Lewis Sosnik
Karol Hausman & Sosnik PC
600 Old Country Road, Room 505
Garden City, NY 11530
516/745-0066

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 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 committee chair or the section chair. Be sure to check the section's website at *www.eldersection.org* for continued updates and developments.

SUBSTANTIVE COMMITTEES

EXPLOITATION & ABUSE
Carolyn H. Sawyer, Orlando
407/354-0888
chsawyer1@aol.com

Erika Dine, Sarasota
941/365-2304
edine@boyerjackson.com

ESTATE PLANNING & ADVANCE DIRECTIVES
Marjorie Wolasky, Miami
305/670-7005
mwolasky@wolasky.com

Jacqueline Schneider, N. Miami Beach
305/919-7730
jacqschneider@aol.com

CREDITORS' RIGHTS, SUBCOMMITTEE OF ESTATE PLANNING
Kara Evans, Tampa
813/926-6517
evanskeene@aol.com

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

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

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

ETHICS
Rebecca Morgan, St. Petersburg
727/562-7872
morgan@law.stetson.edu

Roberta Flowers, St. Petersburg
727/562-7800
flowers@law.stetson.edu

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

Chris Likens, Sarasota
941/365-7838
cal@calikens.com

LITIGATION
Gerald L. Hemness, Jr., Brandon
813/661-5297
geraldhemness@tampabay.rr.com

DEATH CARE INDUSTRY
Philip M. Weinstein, Tamarac
954/899-1551
pmweinstein@msn.com

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

Robert Morgan, Jacksonville
904/854-0410
rmorgan@flfirm.com

POWER OF ATTORNEY, SUBCOMMITTEE OF MEDICAID
Robert Morgan, Jacksonville
904/854-0410
rmorgan@flfirm.com

LONG TERM CARE INSURANCE (PARTNERSHIP) SUBCOMMITTEE
Emma Hemness, Brandon
813/661-5297
hemnesselderlaw@aol.com

VETERANS' BENEFITS SUBCOMMITTEE
Jack Rosenkranz, Tampa
813/223-4195

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

Travis Finchum, Clearwater
727/443-7898
travis@khsfllp.com

DEVELOPMENTAL DISABILITIES SUBCOMMITTEE
Gregory G. Glenn, Boca Raton
561/347-1071
gglenn_law@yahoo.com

MEMBERSHIP
Travis Finchum, Clearwater
727/443-7898
travis@khsfllp.com

Robert Morgan, Jacksonville
904/854-0410
rmorgan@flfirm.com

UNLICENSED PRACTICE OF LAW
John Frazier, Largo
727/586-3306
john@attypip.com

FINANCIAL PRODUCTS SPECIAL COMMITTEE
Joe Karp, Palm Beach Gardens
561/625-1100
klf@karplaw.com

PROBATE SPECIAL COMMITTEE
Kara Evans, Tampa
813/926-6517
evanskeene@aol.com

Sam Boone, Gainesville
352/374-8308
sboone@boonelaw.com

RESIDENT/FACILITY RIGHTS SPECIAL COMMITTEE
John Griffin, Sarasota
941/966-2700
john@griffinelderlaw.com

TAX SPECIAL COMMITTEE
Ira Wiesner, Sarasota
941/365-9900
wiesner@wiesnerlaw.com

ADMINISTRATIVE COMMITTEES

CLE
David Hook, New Port Richey
727/842-1001
dhookesq@elderlawcenter.com

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

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

MENTOR
Jason Waddell, Pensacola
850/434-8500
jason@ourfamilyattorney.com

COUNCIL OF SECTIONS REPRESENTATIVE
Leonard Mondschein, Miami
305/274-0955
lenlaw1@aol.com

ELS CERTIFICATION REPRESENTATIVE
Beth Prather, Ft. Myers
239/939-4888
bethp@osterhoutmckinney.com

LAW SCHOOL LIAISON
Jason White, Tallahassee
850/784-2599
jwhite@mcconnaughhay.com

WEBSITE
Amy Mason Collins, Tallahassee
850/222-4000
acollins@stuartgoldbergpl.com

LIAISONS

AFELA
Mark Mazzeo, Venice
941/408-8555
mmazzeo@veniceelderlaw.com

TFB – YLD
Adam Miller, Venice
941/488-9641
adam.miller@daystar.net

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

RPPTL
Charles F. Robinson, Clearwater
727/441-4516
charlier@charlie-robinson.com

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

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

TFB Board of Governors
Andrew Blaise Sasso, Clearwater
727/725-4829
lexsb@aol.com

Join an Elder Law Section committee today

The Elder Law Section's substantive and administrative committees need your brilliance, knowledge and experience.

Benefits of joining an Elder Law Section committee

- Free CLE for many committee activities
- Opportunities to showcase your expertise and talents
- CLE presentations and *Advocat*e articles
- Committee leadership opportunities
- Pathway to and training for Elder Law Section leadership positions
- Statewide recognition for your committee work
- Updates on changes in the law, proposed legislation and rule changes
- Support for the aging network and special needs citizens in your community and throughout Florida
- Providing technical support to the state Legislature on aging issues
- Opportunity to shape elder law in Florida
- Network of colleagues available to answer questions or provide advice

Email or fax the completed form to Arlee Colman at The Florida Bar at *acolman@flabar.org* or 850/561-5825 or to Twyla Sketchley at *twyla@sketchleylaw.com* or 850/297-2884.

Name:_____

Email Address: _____

Telephone Number: _____

Mailing Address:_____

City, State & ZIP: _____

Practice Area:_____

Please check the committee(s) on which you are interested in serving. Most committees also have subcommittees dedicated to specific issues and projects.

___ Medicaid & Government Benefits
___ Membership
___ Newsletter
___ Law School Liaison
___ Ethics
___ CLE Committee
___ Special Needs Trust
Sponsored by Aging Wisely, Linda Chamberlain
___ Litigation
___ Guardianship
___ Legislative
___ Abuse, Neglect & Exploitation
___ Estate Planning & Advance Directives
___ Death Care Industry
___ Mentoring
___ Tax
___ Sponsorship & Development
___ Financial Products
___ Unlicensed Practice of Law (UPL)
___ Resident Rights
___ Probate
___ Disability Law
___ Other _____

Rainmaking 101
Listening & speaking

by Mark Powers and Shawn McNalis

M. POWERS

S. MCNALIS

Listening and speaking—actions we normally think of as automatic and commonplace—take on new dimensions when we realize they are the very essence of "word-of-mouth" marketing. Whether the conversation is work related, involves another professional or happens in a social situation, what you say and how you say it help others see you as trustworthy. And being considered trustworthy is key to your professional success. Fortunately, there are various techniques to turn everyday conversations into conversations that will build trust, deepen rapport and communicate key messages.

If you've been following these columns and are taking the recommended actions, you've already determined not only who your prospective clients are, but also who influences them. This completes the "whom to talk to" part of the process. But now that you know whom to talk to, what do you say? How do you take ordinary conversation and make it work for you in the context of marketing? And how do you do it without sounding like you are reciting something from a script?

The conversational strategies we teach are simple: each serves a specific purpose and has a desired outcome. Conversation left to chance yields unpredictable results; words in specific combinations have power. Just like shouting, "Help, the building is burning!" will elicit a predictable response, so can words used for marketing purposes. These conversational strategies have been road tested by hundreds of attorneys, and they work.

Over the years, we've put together the following list of the most important conversational strategies for marketing: the art of asking questions; the interview; storytelling (the stealth bomber of marketing); the laser talk; the active use of acknowledgment; educating and upgrading conversations; and powerful introductions. For now, we'll start with the easiest strategy, one that is adaptable to almost any setting, be it a new client meeting or a party down the street. It is the art of asking questions, and your conversation won't sound canned because you improvise the script as you go.

Trust is key

For clients to hire you and to refer other clients to your firm, they must trust you. Trust is developed and earned over time, but the process starts with the way you communicate. Let's take the initial client interview. Clients will decide whether or not to trust you based largely on how you communicate with them. Most clients have no real ability to judge the quality of your legal work—all but the most sophisticated clients have no experience in this area. But most clients are very experienced in interacting with other human beings and will bring all of that experience to bear in deciding whether or not you are trustworthy. The old adage "They don't care how much *you know*, until they know how much *you care.*" addresses this issue. For clients to feel cared for, they have to tell their stories, and they have to feel you are interested in them. If you care and are interested, you'll ask a lot of questions about them—and their legal matters.

How does the art of asking questions apply to social situations and, for that matter, marketing in general? As a general rule, no matter whom you meet or where you are, people love to talk about themselves. Make it a point to ask questions of a personal nature, but don't be overly intrusive. According to studies focused on the length of time it takes to develop rapport, it takes about 12 minutes of conversation for a person to warm up to you and begin to trust you. Engaging someone in a conversation about themselves is an easy way to begin building trust. Avoid cross-examining them, and try to remember that almost everyone has an interesting story beneath whatever exterior façade they present to the world.

Acceptable questions include those about peoples' lives: what is important to them and why. Find out if they are married, whether they have children and what their children's names and ages are. Find out about their hobbies or interests. Are they into sports? Where did they go to college? What type of work do they do? Do they own their own business—and if so, what inspired them to be an entrepreneur? Be curious without overstepping the bounds of good manners. You will be able to judge how open they are by the amount of self-disclosure they allow. If they give grudging, one-word answers to your questions, they probably aren't immediately trusting, and it will take longer to get to know them. If they give you long, detailed answers, it's an indication that they are beginning to feel trust for you. As you ask these questions and listen to the answers, try to do only 20 to 30 percent of the talking. Allow the people you are getting to know to dominate the conversation. Focus your attention on them exclusively.

The simplest technique for turning a normal conversation into a strategic one is to ask questions. Questions are a powerful tool for building rapport and trust. They help you learn about and form relationships with others. The information you receive and the commonalities you discover will form the foundation for the relationship that is built, one conversation at a time, over a long period. Work on

finding out what you have in common with each individual and remember the Rule of Seven: After about seven encounters with people, they begin to accept you as part of their world. Engaging people by asking questions can help you bridge the gap in the early stages of a relationship so that it can grow into something more substantial.

Use the art of asking questions when you take a referral source out to lunch, talk to a colleague in the courthouse or meet a prospective influencer at a social function. It is a no-fail technique for building what we call "know, like and trust."

Mark Powers *is president of Atticus Inc. and co-authored with* ***Shawn McNalis*** The Making of a Rainmaker: An Ethical Approach to Marketing for Solo and Small Firm Practitioners. *Both are featured marketing writers for Lawyers, USA. Powers founded Rainmakers™, a simple process for attorneys at all levels to stay focused on marketing, creating fresh ideas and on-going accountability to marketing. To learn more about Atticus or Rainmakers™, visit the Atticus website at www.atticusonline.com or call the Atticus office at 352/383-0490.*

The road well traveled: Driving impairment and aging

by Shannon Martin

S. MARTIN

Statistics from the National Highway Traffic Safety Administration show that senior drivers are the only age group in recent years to experience an increase in road fatalities. Although seniors as a group are generally safe drivers, factors such as physical changes, illness, medication and cognitive impairment may significantly impair a driver. Motor vehicle accidents are the leading cause of death for 65- to 74-year-olds, and crash rates for cognitively impaired/dementia drivers are 7.6 times higher than normal.

Many times family members seek advice on what to do when they have concerns about their loved one's driving, or you may encounter this issue personally or have your own concerns for a client. (One professional shared with me her story of a longtime client who always insisted on picking her up for lunch, which was a very scary ordeal.) As you advise clients and their family members on legal options, here are some other things to consider:

- One shouldn't assume a person is safe driving because he or she "only drives locally and follows the same routine." If he or she suffers memory loss, this can change in an instant. Many accidents happen close to home.
- A professional assessment/evaluation can be helpful. Seek a driver evaluation for questionable cases or to confirm your concerns about an individual (check with your local Area Agency on Aging, hospitals or a geriatric care manager). AARP offers safe driving program for seniors, and driving programs may offer "driving rehab" or programs that help drivers compensate for certain physical losses as well as suggest adaptive equipment or modifications.
- As a trusted professional, you may be in a position to help talk to the person. Sometimes talking with a doctor, clergy, a professional care manager or other outside source can help the family. Knowing the person's values and personality may help tailor the approach. Is he or she very law abiding and respectful of authority? Is Dad conservative and wouldn't want to risk harming someone? (Traditional approaches may not work with someone with dementia/compromised capacity.)
- Anyone can make an anonymous report to the DMV. In Florida, call 850/488-8982 or visit *www.hsmv.state.fl.us* to request a "report a driver" form. See also *www.floridagranddriver.com*. Section 322.126 (2), (3), F.S., provides that "Any physician, person, or agency having knowledge of any licensed driver's or applicant's mental or physical disability to drive ... is authorized to report such knowledge to the Department of Highway Safety and Motor Vehicles ... The reports authorized by this section shall be confidential ... No civil or criminal action may be brought against any physician, person, or agency who provides the information required herein." All complaints are evaluated, and if validated, re-exam at the driver's license office or a medical report is required (must be submitted within 30 days). If not substantiated, no further action is taken. If further review is needed, the medical advisory board reviews the case to make a determination.
- Referring clients/families to resources will help them plan for alternative transportation. Knowing what the alternatives are makes the transition easier. Though there are still gaps in this area, there are a number of options for transportation. A good starting point in Florida is the Elder Helpline (800-96ELDER), and a local geriatric care manager can help create an individualized care plan and assess what will work best for the person (often a combination of resources).

Shannon Martin, *MSW, CMC, is director of community relations for Aging Wisely LLC (this year's sponsor of the ELS Special Needs Trust Committee). Aging Wisely provides professional care management (geriatric and disability), including family consultations, assessments, care plans and resource recommendations. Aging Wisely is often called upon to help families facing the "driving issue." Ms. Martin can be contacted at 727/447-5845 or* shannonmartin@agingwisely.com.

Q: When is an IRA not an IRA?
A: When it is an inherited IRA, of course!

by A. Stephen Kotler


S. KOTLER

In *Robertson v. Deeb,* 16 So.3d 936 (Fla. 2d DCA 2009), the Second DCA upheld the trial court's creation of a judicial exception for inherited IRAs under Section 222.21, F.S. The decision rendered inherited IRAs subject to the creditors of the beneficiary because the statutory protection is limited to the original "fund or account." This article will touch on *Robertson*, what the ruling means to planners and what to do for your clients in light of the *Robertson* holding.

Robertson could turn out to be the son of *Bosonetto* ... only worse. Unlike the now infamous *In re Bosonetto,* 271 B.R. 403 (Bankr.M.D.Fla.2001), a wayward bankruptcy court opinion regarding the nonexempt status of homestead owned by the trustee of a revocable trust that kept us in the realm of uncertainty for a few years until finally dying, *Robertson* is a Second DCA case. It is not a bankruptcy judge's opinion of Florida law. That means that bankruptcy court judges in Florida can follow their brethren in several other states in denying exempt status to inherited IRAs and, unlike *Bosonetto*, have the benefit of a Florida appellate court decision behind the bankruptcy court's opinion. That means those of us in the Second DCA, if in state court, are stuck with the decision until the "Supremes" rule otherwise or the Second DCA reverses itself, and from a practical perspective (though, not technically), the same is true in bankruptcy court. A hoped-for change of mind may not be likely in the current and foreseeable political and economic climate.

Deeb obtained a judgment against Robertson on a promissory note and served a writ of garnishment on RBC seeking the funds in an account titled: "Richard A. Robertson Beneficiary, Harold Robertson Decedent RBC Capital Markets Custodial IRA." The trial court concluded, "It is not an IRA. It is not like an IRA in terms of taxing and penalty for early withdrawal and things of that nature, so I don't think that's what [the legislature] meant."

On appeal, Robertson argued the literal wording of the statute. He was a "beneficiary" of a "fund or account." The appellate court concluded Section 222.21 "does not apply to inherited IRAs because the plain language of that section references only the original 'fund or account' and the tax consequences of inherited IRAs render them completely separate funds or accounts." The DCA further opined that the tax exempt status of an IRA is totally different from that of an inherited IRA. Inherited IRAs have required minimum distributions and cannot be rolled over. The court did recognize both were exempt from income tax, but nevertheless concluded, "the tax exempt status of inherited IRAs is inconsistent with that of original IRAs."

Floridians enjoy great protection from creditors when it comes to qualified plans and IRAs. Section 222.21, F.S., provides that except for a QDRO or elective share order, "any money or other assets payable to an owner, a participant, or a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account is exempt from all claims of creditors of the owner, beneficiary, or participant if the fund or account is exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Code."

The Bankruptcy Code (BR Code) provides an exemption for "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986." The BR Code places a further limitation of $1 million on IRAs and Roth IRAs. However, SEPs under Section 408(k) and Simple IRAs under Section 408(p) are excluded from such limitation. Likewise, all other plans (other than IRAs or Roth IRAs) and rollovers from such plans are excluded from the cap.

In Florida state court, the exemption for all qualified plans, including IRAs and Roth IRAs, is unlimited. However, inherited IRAs no longer enjoy such protection. In Florida state court, 222.21 should offer unlimited protection to retirement accounts from the creditors of owners, participants and beneficiaries; however, *Robertson* has put on the brakes for beneficiaries until further notice.

In other states, inherited IRAs may not be protected from the beneficiary's creditors in all situations. This was the subject of LISI Employee Benefits and Retirement Planning Newsletter #427 (September 4, 2007) at *www.leimbergservices.com*. There have been reported cases in Alabama, California, Illinois, Oklahoma, Texas and Wisconsin where a creditor was allowed to reach an inherited IRA. Only in Idaho has a bankruptcy court held that an inherited IRA was exempt from a non-spousal beneficiary's creditors. *See In re McClelland,* No. 07-40300, 2008 WL 89901 (Bankr. D. Idaho 2008). IRAs of which a spouse is the beneficiary are generally eligible for rollover by the spouse and become the spouse's IRA of which the spouse is considered the owner/participant rather than a mere beneficiary.

A careful comparison of the state statutes in question to Section 222.21 reveals that none of the states other than Florida specifically exempt payments and interests of beneficiaries from creditors of beneficiaries. However, the other states' statutes are broad and could be read to include beneficiaries in the protected class. Unfortunately, bankruptcy judges have not relied on the plain words of the statute. Instead, a judicial exception was created that distinguishes inherited IRAs from non inherited IRAs so that a creditor could reach the inherited IRA.

So, what to do now?

If "the stretch" is important to the plan's participant, then whether the IRA is protected from the beneficiary's creditors should also be a critical issue. If the plan is off limits to the beneficiary's creditors, the beneficiary designation of an individual outright rather than a trust will accomplish the donor's and the beneficiary's objectives of income tax deferral and creditor protection in a no cost, simple way.

If an inherited IRA is not protected from the beneficiary's creditors, then more complex planning (read more cost) will be needed to accomplish the objectives stated above. The offered solution is a standalone IRA trust, which combines the asset protection benefits of a third party spendthrift trust with the income tax deferral achievable with the stretch.

Although the beneficiary trust to receive the IRA could be testamentary or a sub trust created under a revocable trust (after the grantor's death), LISI authors Merric and Keebler advocate a standalone trust to ensure that provisions needed for IRA purposes do not conflict with everyday credit shelter trust provisions despite firewall protection language in the document. The IRA trust does not depend upon the state exemption that no longer exists, and spendthrift protection against the beneficiary's creditors is based on trust law. The IRA trust described in the LISI article is designed as a conduit trust for ease of drafting and making sure the drafter's choice for the designated beneficiary is really the designated beneficiary for distribution purposes.

There is no reason an accumulations trust would not work. Be aware, as a conduit trust, the required minimum distribution (RMD) that must be distributed can be problematic vis a vis creditors under most states' trust laws. Florida law provides that a creditor of the beneficiary of a spendthrift trust cannot reach the assets of the trust prior to the beneficiary's receipt. Section 736.0502(3), F.S. Of course, the beneficiary's judgment creditor would be entitled to the RMDs as paid, and although possibly small at first, the RMDs grow larger (as a percentage of the IRA assets) in each succeeding year.

Unfortunately, *Robertson* came out of left field with no opportunity to appeal by the time the case was known to those in our Bar leadership who could do something about it. The issue is what is the original intent of the statute with regard to beneficiaries? Section 222.21 is plain on its face and actually includes beneficiaries as a member of the protected class. The opinion appears to follow the several bankruptcy court cases mentioned above, in particular one from Oklahoma, which was cited several times in the opinion, rather than relying on our law as written. Further, although the legislative history of the statute reveals nothing, the court stated its reliance on such intent. Though there is admittedly little that can be done at this point, since the decision has been released, leaders in the Tax (the originators of the statute) and RPPTL Sections have been attentive to the matter, and it is hoped we have not heard the last of *Robertson*.

A. Stephen Kotler *is a board certified wills, trusts and estates lawyer 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 is AV rated, received his JD from Emory Law School and has an LLM in estate planning from the University of Miami.*

Summary of selected caselaw

by Nicholas J. Weilhammer

***Jaylene, Inc. v. Steuer*, 2009 Fla. App. LEXIS 16884 (Fla. 2d D.C.A. Nov. 13, 2009).**

Pursuant to a durable power of attorney (DPOA), the agent admitted the decedent to a convalescent center. The admissions contract contained a provision requiring the parties to submit disputes to binding arbitration. Suit was brought against the center for negligence, violation of resident's rights and wrongful death. The nursing home moved to compel arbitration, and it now appeals the non-final order denying same. The circuit court ruled that the DPOA did not grant the agent authority to agree to arbitration, and the arbitration agreement was void as against public policy because liability limitations contained in the arbitrator's rules prohibited remedies that otherwise are available to nursing home residents in Florida.

The durable power of attorney was sufficiently broad to confer authority to bind the decedent to the arbitration provision in the admissions contract. Although the court shared the circuit court's concern over the limits of liability, it disagreed it was void as against public policy. The arbitrator should decide this question in the first instance, though this is in conflict with decisions by the First, Fourth and Fifth Districts holding that the trial court initially must determine whether an arbitration agreement's limitation on statutory remedies renders the agreement unenforceable on public policy grounds. Reversed and remanded.

***Candansk, L.L.C. v. Estate of Hicks*, 2009 Fla. App. LEXIS 16861 (Fla. 2d D.C.A. Nov. 13, 2009).**

Estate sued the appellant nursing home alleging torts and violations of decedent's rights as a resident. The appellants moved to dismiss and to compel arbitration, seeking to enforce the arbitration clause in the agreement to admit the decedent to the nursing home. The agreement had been signed by the daughter and agent by means of a general power of attorney form. The estate opposed the motion to compel arbitration, arguing that the power of attorney did not give the daughter the specific authority to agree to arbitration on the decedent's behalf.

The power of attorney was a form containing a list of specific powers that the principal could choose to confer on the attorney-in-fact, including the ability to act in the decedent's name "in any way which [the decedent herself] could do." Because the decedent could have agreed to arbitration had she been able to act on her own behalf, her attorney-in-fact was likewise authorized to do so. The estate argued the broad grant of authority should exclude the power to agree to arbitration because the power of attorney only grants the attorney-in-fact the power to act in matters concerning the decedent's property rights, not her personal constitutional rights. The estate's argument showed a fundamental misunderstanding of what constitutes property, and it overlooks the fact that the language used in this power of attorney is widely used and commonly understood to include the power to submit to arbitration. The claim against the nursing home is property, as is access to the courts. While Florida does not have a statutory form power of attorney, many states do, and the form the decedent used in this case is typical of forms used throughout the country, which include the power to act with respect to "claims and litigation." Reversed and remanded.

***Morgenthau v. Estate of Andzel*, 2009 Fla. App. LEXIS 20569 (Fla. 1st D.C.A. Dec. 31, 2009).**

Appellant asserts the trial court erred in striking his claim against an estate based on a finding the claim was untimely filed. A petition for administration was filed, and a notice to creditors was published. Outside the three-month period, the appellant filed a statement of claim alleging he was a holder of an outstanding note executed by the decedent and the personal representative was aware of the amount due to the appellant. The personal representative asserted the appellant was not a known or easily ascertainable creditor of the estate. No hearing was held. No motion for rehearing was filed.

Any claim not timely filed is barred unless the court extends the time in which the claim may be filed upon grounds of fraud, estoppel or insufficient notice of the claims period. Here, the claim was untimely because the appellant did not receive actual notice of the claim and was a creditor who fell in the three-month filing window following publication. The appellant did not file a motion for extension of time to file the claim or otherwise seek an extension. All Florida cases dealing with the forgiveness of a timeliness issue as to a creditor's claim where the creditor asserts he or she was an ascertainable creditor subject to actual notice reach the issue through review of the creditor's request for an extension, not through the creditor's filing of a statement of claim. While the statement of claim listed facts upon which a probate court could grant an extension, the statement of claim did not request an extension. At no point in either brief does the appellant argue his statement of claim should be converted or modified to be read as a motion requesting an extension of time. The proper procedural course for untimely claims is the filing of an extension request prior to the filing of a statement of claim. Affirmed.

***Russell v. AHCA*, 2010 Fla. App. LEXIS 38 (Fla. 2d D.C.A. Jan. 6, 2010).**

Plaintiff/appellant appeal the trial court's ruling ordering full satisfaction of a Medicaid lien from the proceeds of a tort settlement between the appellant and the defendants in the malpractice action. The tort

action was settled for $3 million, and the lien asserted by AHCA was for $221,434.24. The appellant contends that *Ahlborn* supports her claim that because the value of the medical malpractice case as asserted in expert testimony was $30 million and the $3 million settlement constituted a recovery of only one-tenth of the actual damages suffered by the Medicaid recipient, AHCA was entitled to recover only one-tenth of its Medicaid lien.

Central to the *Ahlborn* court's reasoning was the state's stipulation concerning the portion of the settlement attributable to medical expenses. On the basis of that stipulation, the court reached its conclusion that the state's lien claim exceeded "that portion of a settlement that represent[ed] payments for medical care." Here, there was no such stipulation and no similar basis for determining an allocation of the settlement proceeds. The *Ahlborn* decision does not establish as a rule of law the formula used by the state of Arkansas to determine the portion of the settlement attributable to medical expenses. In Florida, a Medicaid recipient entering into a settlement of a tort claim with a third party does so against the backdrop of the 50 percent allocation rule set forth in Section 409.910(11)(f). The appellant failed to establish any basis for concluding that the lien asserted by AHCA extends to a portion of the settlement meant to compensate the recipient for damages distinct from medical costs. Accordingly, Florida's statutory allocation rule prevails. The court did not suggest that an allocation in the settlement agreement—entered without the agreement of AHCA—would be dispositive. Affirmed.

***Estate of Smith v. Southland Suites of Ormond Beach, L.L.C.*, 2010 Fla. App. LEXIS 40 (Fla. 5th D.C.A. Jan. 8, 2010).**

Estate brought claim against the nursing home for abuse of the decedent, which was associated with her death. The circuit court entered an order compelling arbitration of its claims against the nursing home. The estate appealed, arguing the durable power of attorney (DPOA) the agent acted under in executing the decedent's nursing home admission contract did not authorize her to consent to arbitrate claims arising from the decedent's nursing home care. The DPOA did not specifically reference arbitration agreements, but gave the agent broad authority to effectuate the decedent's legal rights. The document granted Smith's daughter the power to perform all matters and to execute all contracts.

The court held that under applicable statutes and cases, this provision included the power to consent to arbitration. The court distinguished *McKibbin v. Alterra Health Care Corp*. The seemingly broad grant of authority in the *McKibbin* DPOA was limited to the areas that preceded it. The *McKibbin* DPOA also contained an "Appointment of Health Care Surrogate" clause, which granted authority to "authorize my admission to … a health care facility" and "provide … consent on my behalf." These powers took effect only in the event that the donor was "determined to be incapacitated." The decedent's DPOA contains no similar limiting phrases and applies regardless of capacity.

Fair Hearings Reported

by Nicholas J. Weilhammer

***Petitioner v. Respondent*, Appeal No. 09N-00067 (June 11, 2009).**

Petitioner appeals transfer and discharge from nursing home for the stated reason that the petitioner's "needs cannot be met in this facility." The petitioner has multiple sclerosis with an associated cognitive disorder. When not in his bed, he is confined to his motorized wheelchair. Because the petitioner has cognitive deficits, he will go through the facility's front door in his chair. The facility has had a staff member providing one-on-one care, eight hours per day. This has been effective but costly. The petitioner has a monitor both on his person and his wheelchair that will set an alarm if he goes through a set of doors prior to the doors that lead to the outside. The respondent is concerned that because the petitioner is "exit seeking," his needs can no longer be met.

Petitioner's movements are monitored electronically. Seeking to discharge or transfer a resident in anticipation of his leaving the facility on his own and not having documented multiple instances does not comply with the intent of the discharge notice. The petitioner's personal physician has indicated that in the best interest of the petitioner, he should remain at the facility. The respondent should keep records as to when and if the petitioner actually leaves the facility, which is the proper indication that his needs can no longer be met. Appeal granted.

***Petitioner v. Respondent*, Appeal No. 09N-00023 (April 29, 2009).**

Petitioner appeals discharge action, which was based on non-payment by the petitioner. Petitioner was admitted to nursing home based on pending Medicaid eligibility. The petitioner's only income was Social Security early retirement income of approximately $507 monthly. The petitioner applied for ICP on Dec. 10, 2008. DCF denied ICP benefits on Jan. 7, 2009, based on not meeting disability criteria. There was no evidence that the petitioner had any insurance or other payor source for her stay at the facility. On Jan. 21, 2009, the petitioner was given a nursing home transfer and discharge notice based on non-payment. The petitioner owed $32,949.27 to the facility. On Jan. 31, 2009, the petitioner received her first billing notice that she owed $16,816 to the respondent facility. The petitioner did not understand the amount of accumulated charges prior to this notice. The petitioner needs assistance walking and walks only a very short distance. The petitioner understands that she cannot be discharged to the discharge location because she cannot walk independently.

A resident of a nursing home that participates in Title 18 and Title 19 federal funding must be provided an opportunity to challenge a discharge action in a fair hearing. The petitioner argues that the discharge action should not be upheld because the respondent failed to conduct appropriate discharge planning pursuant to federal regulations irrespective of whether the grounds for discharge are valid under the authorities. Failure to complete discharge planning is not listed as one of the six reasons to permit the resident to stay in the facility. The authorities further limit the matters to be considered at the hearing to the decision by a skilled nursing facility or nursing facility to transfer or discharge a resident. The notice sufficiently meets the requirements of adequate notice under *Goldberg v. Kelly*, 397 U.S. 254 (1970).

However, the petitioner did not receive any billing statements on charges during her stay at the facility until the day after the discharge notice on Jan. 30, 2009. In view of the lack of these billing notices prior to the discharge notice, it cannot be concluded that the petitioner received "reasonable and appropriate" notice to pay for her stay at the facility, as required by federal regulation. Regarding attorney's fees, although in accordance with federal requirements, a resident of a nursing facility being discharged is entitled to a fair hearing, that hearing is not conducted under F.S. 120.569 because the substantial interests of the petitioner have not been determined by a state agency but rather by the private party, the nursing facility. The hearings are rather conducted under Section 400.0255, F.S., which does not include language providing for attorney's fees. Appeal granted, though the decision is not binding on any possible future discharge actions.

***Petitioner v. Florida Department of Children & Families*, Appeal No. 09F-00274 (District 04 Clay; Unit 88369, April 10, 2009).**

Petitioner appeals denial of ICP benefits for October-December 2008 due to excess income. Petitioner was admitted into the nursing home on Oct. 6, 2008. Petitioner's combined total monthly income for 2008 was $2,047, exceeding the income standard for ICP benefits of $1,911. On Oct. 13, 2008, DCF sent the petitioner's niece a pending notice which reads in part: "A qtit (sic) needs to be set up and funded properly." The information due date contained on the notice was Oct. 23, 3008. The petitioner's niece does not recall receiving that notice. An income trust was established for the petitioner in 2006, when she resided in another nursing facility and received Medicaid. She later moved into an ALF. The petitioner's niece asserted that she was waiting for DCF to provide the specific amount required to properly fund the trust. On Jan. 14, 2009, DCF completed the ICP application. ICP Medicaid was approved for January 2009 forward; however, the petitioner was denied for October-December 2008. Copies of the niece's contacts to DCF inquiring about the application's status were submitted to prove the contact attempts. The DCF representative could not find any evidence that DCF followed its policy to notify the applicant regarding the income limit and that all income above that limit must

be deposited into an income trust.

The web application date was Sept. 26, 2008. In January 2009, DCF advised the niece of the funding required for the income trust; this was long after the 45-day processing time had elapsed. Once the department advised of the need to fund the trust in January 2009, the niece funded the trust immediately. DCF erred in not following its policy, and the petitioner is to be considered to have met the ICP income standard for October 2008, November 2008 and December 2008. Appeal granted.

***Petitioner v. Florida Department of Children & Families*, Appeal No. 08F-08686 (Circuit 18 Brevard; Unit 88981, Mar. 23, 2009).**

Petitioner appeals denial of ICP benefits for October and November 2008 due to excess income. Petitioner submitted an ICP application on Oct. 15, 2008. On Nov. 25, 2008, DCF sent a request for information, giving the petitioner until Dec. 5, 2008, to return the requested information. The petitioner was told he was over income and needed an income trust. An explanation of trusts was included, showing the petitioner's income and the limit for ICP and what the requirements were to execute the trust. On Dec. 2, 2008, the income trust was set up and funded. On Dec. 18, 2008, the department mailed a notice of case action to the petitioner to inform him that ICP benefits were denied for October and November 2008. Petitioner's wife does not believe she was given ample time to set up the trust.

The date of application was Oct. 15, 2008. The income was verified by its sources on Nov. 21, 2008. According to DCF's policy manual, it had an affirmative duty to advise the petitioner in October 2008 of the federal benefit rate to be eligible for ICP benefits. Not informing the petitioner until a letter was mailed on Nov. 25, 2008, is not consistent with *Forman v. DCF*. Petitioner complied with the income trust requirements as soon as she was informed, which by this time delayed eligibility until December 2008. Since the petitioner was not informed timely of the expeditious requirement to set up and fund the income trust, the denial of ICP benefits for October 2008 and November 2008 is reversed. Appeal granted.

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

FAIR HEARINGS REPORTED

The Florida Bar Elder Law Section is proud to announce a new project – **Indexing of the Fair Hearing Reports online.** This project is sponsored by The Centers, *www.sntcenter.org*, 877/766-5331. Indexing will begin to appear online as the project proceeds until completion.

The reports are posted on the section's website at *www.eldersection.org* and are available to subscribers.

ANNUAL SUBSCRIPTION: $150

****

Fair Hearings Reported
ORDER FORM

NAME: _____ Bar #: _____

ADDRESS: _____

CITY/STATE/ZIP: _____

EMAIL ADDRESS: _____

PHONE: (_____) _____

METHOD OF PAYMENT:

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

❑ Master Card ❑ VISA ❑ American Express

Card No.: _____ Expires:____/_____

Name of Cardholder: _____

Signature: _____

FAX TO: 850/561-5825.

MAIL TO: The Florida Bar Elder Law Section, 651 East Jefferson Street, Tallahassee, FL 32399-2300

8060011