

The Elder Law Advocate

www.eldersection.org

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"Serving Florida's Elder Law Practitioners"

Fall 2005

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If you don't like the weather ... Some thoughts on Medicaid reform

On a recent trip to Chicago I must have heard the locals say a dozen times, "If you don't like the weather, hang around for a few minutes and it will change."

Perhaps the only things that seem to change faster than the weather are the legislative proposals on Medicaid reform.

We ended the 2005 Florida legislative session with positive results, our section having participated in the legislative process more extensively than at any other time in our history. A plan to convert the entire

state to a managed care or HMO system was defeated, and the Legislature passed a proposal to collect data through two large pilot programs before dismantling the entire state service system on an unproven theory. One of the more interesting facts to come out of last year's political debate is that the state of Florida has absolutely no verifiable data that the Medicaid diversion and waiver programs actually save the state money (thus the pilot programs). It stands to reason that early intervention to delay an elder's entry

See "Medicaid reform," page 2



Christopher Likens

Message from the chair

Make sure the #1 complaint against lawyers doesn't happen to you!

by C. Michael Shalloway



The Florida Bar repeatedly tells us that the biggest complaint clients have about lawyers is that they do not return phone calls.

There are a few tried and true techniques you can use to assure no complaints on this score are made about you.

When I say tried and true, I mean it. I

have been following these practices for many years and have found they work!

I have also preached these strategies to my fellow lawyers and have seen their faces filled with doubt and even fear. My suggestion is to give it a try. If you aren't thrilled with the results you can always stop. You can even change your home phone number if you are dissatisfied with the results.

OK, ready to experiment? Here goes.

1. At the first appointment with potential

See "#1 complaint," page 3

Medicaid reform
from preceding page

into a nursing facility makes good financial sense for that individual, but the stated reason for reform is cost savings throughout the entire program. So the question is does it save money in the big picture? We do not know. Amazingly, we do not know if the waiver programs limit spending or simply open up a new door through which other individuals qualify, therefore expanding the budget. What we do know is that the rate of increase of healthcare costs in the current Medicaid program is lower than in the private marketplace, so the system is doing better than the private sector in cost containment. The budget concerns arise because

the program is expanding as our aging population increases.

We now have new federal and Florida proposals to again restrict eligibility and convert the state system into a managed care/HMO model. Savings may be attained, but at the cost of limiting services to those in critical need or limiting enrollment in the programs. Perhaps a Medicaid HMO can work, unlike our experience with some large-scale healthcare HMOs and Medicare HMOs. But what if we dismantle the current infrastructure, damage our local care providers (who can't meet the minimum cash reserves to contract and therefore stop providing care), cap the federal influx of funds through the Medicaid waiver ... and the private company HMO(s) decides it can't make a sufficient profit and

pulls out? The projected financial crisis of the current system becomes something much more than a monetary crisis as the care of our clients, our families, ourselves is compromised.

Your financial contribution to the advocacy fund and your willingness to participate in the political process are critical. The coming special session on Medicaid will require the commitment of enormous resources, and the stakes have never been higher.

Perhaps all of the federal and Florida proposals will come to pass, and perhaps only some will. Undoubtedly the proposals will shift and change throughout the legislative process. The debate goes on.

As the saying goes, "If you don't like the weather, hang around for a few minutes ..."



The Elder Law Section is going to *ITALY!!*

**Mark your calendars now for
FOUR DAYS IN FLORENCE with
other Elder Law Section members.**

The dates are confirmed: June 3 – 6, 2006.

**You should receive information shortly on
hotel accommodations and the CLE program.**

Don't miss this exciting trip!

Watch your mail for a brochure!

#1 complaint

from page 1

- clients, spend a definite amount of time establishing a personal rapport with them. You don't need to overdo this, but I cannot overemphasize how important this is. *This will put the potential client at ease and humanize you.*
2. Explain in detail how phone contact with you works. *This sets expectations and avoids disappointment.* For example, I tell clients that if they can't reach me when they need to, they don't need me and should get another attorney.
 3. Let your potential clients know that if you are available when they call, you will take the call, but explain that because you are with other clients, in court, on the phone with others, etc., that it is *not likely to happen.*
 4. Suggest that instead of leaving a request for you to call them back, have them set a telephone appointment with you at a time certain. Explain to them that it is not that you are such a big deal that they have to have an appointment to talk with you, but rather, *they are the important one and you don't want them to have to play telephone tag with you.*
 5. Ask them to leave a detailed message about the topic to be discussed when the telephone appointment takes place. Point out that you can review the file and *not waste their time* by having to find out what they need at the phone conference and then have to reset it after you have had a chance to check on the issue about which they have questions.
 6. Once you are retained, give your clients your home phone number. Stress to them that this is something you do only for clients. Tell them since they are entrusting you with their legal affairs *you are entrusting them with your privacy.* Get their assurance that they will not share your phone number with anyone. Tell them you have been relying on clients (in my case, for years) to only call you at home when there is a

genuine emergency, and you are *confident they will use the home number only when there is such an emergency.*

7. Send a confirmation letter to clients no later than the day after the initial office conference during which you were hired, letting them know how pleased you are they have retained you to help them in their troubles. In that letter, reiterate all of the items above.
8. Be sure your support staff is completely familiar with your phone procedures. Authorize them to set telephone appointments. Have them deal graciously with your clients' requests. Nothing is more disheartening than for you to establish a relationship with your clients only to have an uninformed staff member unwittingly destroy it.

Now, about call backs. Usually clients have legitimate questions or are anxious because they are unsure about the progress of their case. Answering legitimate questions is easy. If you need more time for research because a question is complex, tell them so. Always set reasonable expectations as to when you should

have answers and when they should hear from you or your office. That will avoid intervening phone calls and frustration on the part of your clients.

If you find you cannot meet the expectations you have set, call your clients in advance and let them know more time is needed. Don't delay until they call and have to be told more time is needed.

In other words, keep clients' expectations set within a timeframe that you can meet or exceed.

How should you deal with a call at home? I have never experienced a home phone call when there was not a real emergency. Providing help in a real emergency is easy, and it is certainly not time consuming.

If, however, a client does call in a non-emergency situation, my suggestion is that you politely explain that the file is at your office so you will need it to address the issues. You can also direct the client to call your office because you don't have your schedule of appointments at home and you must rely upon your staff to make sure the matter is followed up. Your schedule being as it is, it could create conflicts if you tried to book an appointment from home.

*Submitted on behalf of the
Ethics Committee*

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

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

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

The deadline for the SPRING ISSUE is March 1, 2006. Articles on any topic of interest to the practice of elder law should be submitted via e-mail as an attachment in rich text format (RTF) to Patricia I. "Tish" Taylor, Esquire, pit@mcsomm.com, or call Arlee Colman at 1-800-342-8060, ext. 5625, for additional information.

Report of the Elder Law Section Guardianship Committee

October 7, 2005

The next meeting of the Elder Law Section's Guardianship Committee will be held at The Florida Bar's mid-year meeting in January 2006 in Miami. Specific times and dates are to be announced.

The Guardianship Committee met very briefly at the Elder Law Section Retreat at The Registry in Naples on Saturday, Sept. 17, 2005. The agenda presented by Co-Chair Joan Nelson Hook follows:

Administrative:

- 1) Appointment of secretary
- 2) Next meetings: mid-year in January and at Public Benefits seminar in April
- 3) Status report to ELS newsletter by Oct. 15, 2005
- 4) One substantive article per year for ELS newsletter
 - A) October 15, 2005
 - B) March 1, 2006
- 5) Upcoming National Guardianship (NGA) conference in Cleveland, Ohio, Nov. 6-9, 2005.

Issues to Consider:

- 1) Springing powers of attorney and HIPAA - submitted by Stephanie Schneider

- 2) Guardianship Committee reports considered as hearsay - submitted by Enrique Zamora
- 3) Necessity for guardian of minor in subsequent settlements totaling less than \$15,000 in a minor guardianship proceeding - submitted by Victoria Heuler and listserv
- 4) Requirement of a final hearing in guardianship cases—optional or mandatory? - submitted by Chris Likens
- 5) NAELA Final Wingspan recommendations and the upcoming guardianship bill in Florida Legislature—What does the ELS recommend? - submitted by Joan Nelson Hook
- 6) The creation of an examining committee training manual to be used statewide

The following members expressed an interest in serving on the Guardianship Committee: John J. Von Staden, Jr.; Lee A. Rosenthal; Thomas E. Slaymaker; John C. Moppert; and Naomi Smith.

The following members are listed as members of the Guardianship Committee as of Sept. 7, 2005: Edwin M. Boyer; Michael W. Connors; Carol

E. Donahue; Sheila A. Donohue; David L. Glazer; April D. Hill; Mary Alice Jackson; Roy C. Mercer; Richard C. Milstein; Rebecca C. Morgan; Adrian J. Musial, Jr.; Tara M. O'Connor; David Mangiero; Carolyn H. Sawyer; G. Mark Shalloway; Scott M. Solkoff; Mary Anne Spencer; John W. Staunton; Lauchlin T. Waldoch; and Eileen R. Yasbin.

Because so few members were able to attend the meeting on Sept. 17, it was proposed that members choose one of the six issues to consider on the list mentioned above. Then, each member will contact Joan Hook who will send a copy of the supporting materials (if any) for the area of interest to the committee member. Committee co-chairs Enrique Zamora and Joan Nelson Hook will arrange with the section administrator, Arlee Colman, to meet by telephone conference call. The purpose of the telephonic meetings will be to define the role the ELS Guardianship Committee will play in resolving these issues. With people identifying their areas of interest, groups will be self forming and should be able to produce a report to the whole committee at the next face-to-face meeting in January. Those people who do not request to work with an interest group will not be considered to be members of the Guardianship Committee.

If anyone has a topic of interest to be considered by the Guardianship Committee, please contact one of the co-chairs so that topic may be considered for the next committee meeting in January.

*Respectfully submitted,
Enrique Zamora and
Joan Nelson Hook,
Co-chairs,
Elder Law Section
Guardianship Committee*

The Advocate seeks advertisers

The Elder Law Section is offering advertising in *The Elder Law Advocate*, the section's newsletter.

The section publishes three issues of *The Elder Law Advocate* per year, and all advertisements must be included in all three issues. The advertising rates per issue are full page - \$750, half page - \$400 and quarter page - \$250. *The Elder Law Advocate* is mailed to approximately 1,750 members of the Elder Law Section of The Florida Bar.

Please contact Arlee Colman at 850/561-5625 if you have questions or if you would like to advertise in *The Elder Law Advocate*.

Substantive committees keep you current on practice issues

Join one (or more) today!

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

All section members are invited to join one or more committees. Committee membership varies from experienced practitioners to novices. There is no limitation on membership, and members can join by simply contacting the substantive committee chair or the section chair.

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Stetson College of Law builds model courtroom for the elderly and disabled

National advocates for the rights of seniors and the disabled gathered at Stetson University College of Law on Sept. 16 for the dedication of the nation's first "elder-friendly" courtroom.

"We can only hope that this courtroom inspires the creation of others," said AARP CEO Bill Novelli. "You have created a place of law and justice that is accessible to anyone and everyone."

The courtroom has touch screens, electronic gates that open automatically, hearing amplification devices, flat-panel monitors, refreshable Braille displays, a multi-lingual software speech synthesizer and translator and other features specially designed for people with reduced vision, limited hearing or other physical disabilities.

As U.S. attorney general, Dick Thornburgh shepherded the Americans with Disabilities Act. He reminded the courtroom audience of

landmark Supreme Court case *Lane v. Tennessee*, in which a disabled man was forced to climb out of his wheelchair and crawl up the steps of a courthouse to attend a judicial proceeding. "The Eleazer courtroom doesn't simply accommodate wheelchair access, though that is monumental in its own right. It goes so much further. Its technology will enable people with various sensory impairments to participate fully in our judicial process," Thornburgh said.

Lawrence Davidow, president of the National Academy for Elder Law Attorneys, said construction of the new courtroom is the beginning of a movement to increase access, dignity, respect and involvement of all people with disabilities, regardless of age, in every courtroom in the United States. "This courtroom is all about enhancing the lives of people with special needs as they age. We intimately know what this courtroom means to them; access to justice with

dignity, enhancing their ability to be a part of a process that directly impacts their lives, without barriers, seamlessly allowing their disabilities to be a non-issue," Davidow said.

Stetson professors Rebecca Morgan and Roberta Flowers spearheaded courtroom construction. "This innovative courtroom combines cutting-edge technology while recognizing that our system of justice will always be about people," said Flowers.

The courtroom will be used initially for Consumer Protection Program activities that educate the elderly community about various types of consumer fraud. In the spring, elder law and advocacy students will use the new facility, and Morgan and Flowers are working to make the courtroom available for actual court proceedings in the near future.

Stetson dedicated the courtroom in honor of Distinguished Professor of Law Emeritus William R. Eleazer.



Courtroom facilitators gather for the ribbon-cutting ceremony for the Eleazer Courtroom. Pictured left to right are Fred Schaub (Stetson grad '84), Hon. Dick Thornburgh (keynote speaker and former U.S. attorney general), Hon. David Demers (Stetson grad '72), William D. Novelli (CEO of AARP), William R. Eleazer (professor emeritus and courtroom namesake), Charlie Canerday (architect), Jan Eleazer (William Eleazer's wife), Professor Rebecca Morgan (professor of law and Stetson's Boston Asset Management faculty chair in elder law), Darby Dickerson (dean and vice president, Stetson University College of Law), Roberta Flowers (professor of law and chair, Center for Excellence in Advocacy), Linda Parker (wife of late Judge Jerry Parker, chamber namesake), Ron Marvin (portrait artist) and Shrin Vesely (Stetson grad '94 and SLA president).

NAELA president dedicates new Stetson courtroom

On behalf of the National Academy of Elder Law Attorneys (NAELA) and its 5,000 members, I am thrilled to be here today, together with such distinguished guests as Former U.S. Attorney General Dick Thornburgh, AARP CEO Bill Novelli and Judge David Demers, to help celebrate and dedicate the opening of the WILLIAM R. ELEAZER COURTROOM, this nation's first courtroom to combine state-of-the-art technology and an architectural design which is *barrier free*. Barrier free means improved access to the courts and to justice for seniors and all people with disabilities.

I am here today, representing NAELA, because this is what NAELA is all about. This new courtroom is critical to the people that NAELA members represent everyday, whether in court, in their offices or otherwise. The National Academy of Elder Law Attorneys, established in 1987, is a non-profit association that provides leadership, education, networking and assistance to lawyers, Bar organizations, law schools, government and all others who deal with the many specialized issues involved with legal services to the elderly and people with disabilities. NAELA members are considered the premier providers of legal advocacy, guidance and services to enhance the lives of people with special needs and people as they age. We are all very much on the same page today, because this courtroom is all about enhancing the lives of people with special needs as they age.

We intimately know what this courtroom means to them ... access to justice with dignity, enhancing their ability to be a part of a process that directly impacts their lives ... without barriers ... seamlessly allowing their disabilities to be a non-issue.

Today is not just about the William R. Eleazer Courtroom. Today is about the beginning of a movement to increase access, dignity, respect and involvement of all people with disabilities, regardless of age, in every courtroom in the United States. And the demographics are clear. With the aging of the baby boomers, together with advances in medicine and technology, we are going to have many more seniors ... and thus many more seniors needing barrier-free courtrooms. But why limit our sights on just courtrooms? I hope the lessons learned here will carry forward into every elder law office in the country and everywhere else in society that seniors and people with disabilities attempt to perform on equal terms. I look forward to the published report of your success here so that your good works can begin to make a difference elsewhere.

Today is just the first step and the first step is always the most important. Congratulations to Stetson University ... for not only orchestrating this historic event, but for attaining the reputation, throughout the legal and

Dear NAELA Members:

I just had the privilege, on your behalf, to help dedicate this nation's first elder-friendly courtroom, at Stetson University College of Law. Our past president, Rebecca Morgan, was instrumental in bringing this project to reality. Because this is such an exciting first step, I thought I would share with you my comments at the dedication ceremony on September 16, 2005.

All my best,

Lawrence E. Davidow, CELA
NAELA President

aging communities, for being a leader for and friend of seniors and people with disabilities throughout this country. We are proud of our working relationship with Stetson University, which, by the way, is only strengthened by the fact that one of your most esteemed professors, Rebecca Morgan, is also one of NAELA's most esteemed past presidents. And I am sure you all recognize her fingerprints all over this courtroom today!

Congratulations to President Dr. Douglas Lee and Dean Darby Dickerson. Events like today only happen with strong leadership at the top.

Congratulations to the entire team at Stetson that worked so hard to make the William R. Eleazer Courtroom a reality.

And last but not least, congratulations to William R. Eleazer for the well deserved recognition you are receiving today ... for your years of hard work putting Stetson University's trial program on the map. You are the inspiration for this courtroom, and your name will forever be associated with the good idea that seniors and people with disabilities deserve a barrier-free environment as they seek justice.

Thank you for allowing me to participate in this historic event.

Elder Law Section Activities at The Florida Bar's Midyear Meeting

January 18 - 21, 2006 • Hyatt Regency Miami

Thursday, January 19

8:00 a.m. – 5:30 p.m. Elder Law Section Certification Review

Friday, January 20

8:00 a.m. – 12:00 noon Elder Law Section Certification Review (day 2)

12:30 p.m. – 3:00 p.m. Elder Law Section–Executive Council

See page 9 for
hotel reservation
information!

SSA announces 4.1 percent cost of living allowance increase

The Social Security Administration (SSA) has announced a 4.1 percent cost of living allowance increase for Social Security benefits and for the Supplemental Security Income (SSI) Federal Benefit Rate (FBR) for 2006. This will raise the SSI FBR from \$579 to \$603 per month for an individual and from \$869 to \$904 for an eligible couple. The estimated average monthly individual Social Security retirement benefit will in-

crease from \$963 per month to \$1,002. However, the average retiree will not see the entire \$39 increase in average monthly benefits because \$10.30 of it will go to pay the increase in the Medicare Part B premium.

Other changes for 2006 include an increase in the earnings required for a quarter of coverage from \$920 to \$970 and an increase in the substantial gainful activity (SGA) level from \$830 to \$860 per month for a disabled

person and from \$1,380 to \$1,450 for a blind individual. Also, the ceiling for yearly earnings subject to the Social Security tax will rise from the current \$90,000 cutoff to \$94,200 in 2006. These figures are derived from the increase in average covered wages rather than the increase in cost of living.

Additionally, the amount of annual earnings exempt from the retirement earnings test will increase from the current \$12,000 to \$12,480 for those under full retirement age with one dollar in benefits withheld for every two dollars in earnings over the exempt amount. The exempt amount in the year an individual reaches full retirement age goes from the current \$31,800 to \$33,240 per year, with one dollar in benefits withheld for every three dollars in earnings above the limit. In this connection it should be noted that full retirement age will increase to 65 years and 8 months in the course of 2006. This will affect workers born in 1941.

For further information, contact Gerald McIntyre in the NSCLC's Los Angeles office at 213/639-0930.

(Reprinted from the NSCLC's *Washington Weekly*, Vol. XXXI No. 40, October 14, 2005.)

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2006 Midyear Meeting

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<input type="checkbox"/> Assured with Credit Card (American Express, Diners, Carte Blanche, Visa, Master Charge)		
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Elder Law Section Statement of Operation

2004-05 Revenue	Approved Budget	Year End June 2005 Actuals	2005-06 Approved Budget
Dues	54,000	50,700	54,000
Affiliate Dues	0	510	180
Less Retained by TFB	-27,000	-21,484	-27,120
Total Dues	27,000	29,726	27,060
Course Income	6,000	3,730	6,000
Audio Tape	5,000	10,491	5,000
Course Materials	300	0	300
Sponsorships	2,500	600	2,500
Member Service Program	14,625	1,000	14,625
Directory Sales	2,000	0	500
Fair Hearings Forms	7,000	13,650	10,000
Credit Card Fees	0	-112	50
Newsletter Advertising	3,500	1,650	3,500
Investment Allocation	3,985	4,376	5,618
Total Revenues	57,285	65,400	75,153
Expenses			
Employee Travel	209	394	1,461
Postage	2,500	1,937	2,500
Printing	500	101	500
Officers' Office Expense	150	0	150
Newsletter	5,500	4,145	5,500
Supplies	250	998	250
Photocopying	150	15	150
Chair's Special Project	1,500	1,069	1,500
Officers' Travel Expense	1,500	1,379	1,500
Meeting Travel Expense	3,500	3,500	3,500
Committee Expenses	3,500	4,034	3,500
Public Info & Website	2,000	250	2,000
Board or Council Meeting	4,500	5,122	4,500
Bar Annual Meeting	2,500	2,052	2,500
Midyear Meeting	0	575	0
Section Service Program	0	0	14,625
Speaker Gifts	200	200	200
Section Membership Directory	4,750	0	4,750
Awards	1,500	1,646	1,500
Fair Hearings Forms	3,000	4,031	3,000
Legislative Consultant	15,000	15,000	15,000
Legislative Travel	500	0	500
Council of Sections	300	300	300
Operating Reserve	5,226	0	5,701
Miscellaneous	100	0	100
Course Credit Fees	150	0	150
Total Expenses	57,485	50,800	62,712
Beginning Fund Balance	78,194	90,211	80,252
Net Operations	-200	14,600	12,441
Ending Fund Balance	77,994	104,811	

Article VIII – Section 3. – Compensation and Expenses. No salary or other compensation may be paid to any member of the section for performance of contractual services to the section without the approval of the executive committee, but members of the executive council may be reimbursed for such reasonable and necessary telephone expenses, reproduction expenses that such member incurs in the performance of services for the section and that are specifically authorized by the chair, the treasurer, or by the executive board.

National poll: One in 10 seniors is scam victim

Stetson University College of Law's Elder Consumer Protection Program commissioned a national poll showing nearly 10 percent of elderly Americans, or nearly 3.5 million seniors over the age of 65, have been the victims of consumer scams.

The survey, conducted by the national polling firm InsiderAdvantage and its research affiliate Majority Opinion, sampled 600 Americans aged 65 or older and 300 seniors in Florida. The consumer fraud survey reported that home improvement scams are the most prevalent threat to seniors, with a 29-percent response. In Florida, home improvement scams were a slightly more considerable risk compared to the national average.

Nationally, the survey reported that 18 percent of seniors felt they were the victims of sales schemes, 13 percent lottery or big money scams, 12 percent telemarketing scams, 4 percent work-at-home scams, 21 percent something else and 3 percent were not sure.

"The survey tells us that it is more than safe to state that approximately one in ten senior citizens in this country believes that they have been the victim of some sort of consumer fraud," said Matt Towery, nationally syndicated columnist and CEO of InsiderAdvantage.

The national survey has a 4-percent margin of error, and the Florida survey has a 6-percent margin of error.

"This report confirms prior research showing that consumer fraud is a continuing problem and that Florida seniors, like others throughout the country, continue to be the victims of scams," said Professor Rebecca Morgan, program director and Boston Asset Management faculty chair in elder law.

Stetson is Florida's first law school and a leader in the field of elder law. As part of the Elder Consumer Protection Program, Stetson offers a website and a successful seminar se-

ries to elder consumers that provide tips on how to avoid becoming victims of consumer fraud. Funding for this program was provided in part by the Administration on Aging. Stetson has partnered with the Florida Attorney General's Office, AARP and the legal community to increase public awareness of consumer fraud against elders.

To learn more about the Elder Consumer Protection Program, visit the website at <http://elder.law.stetson.edu> <<http://elder.law.stetson.edu/>>.

Bank gives refunds to elderly buyers of annuities

Bank of America has agreed to offer refunds to thousands of elderly investors who bought variable annuities. The bank reached an accord with Massachusetts regulators to offer refunds to 800 investors in that state, and it will expand the offer nationwide to people who were 78 or older when they bought variable annuities in 2003 and 2004.

The settlement might lead to similar agreements by other banks. In addition to Bank of America, the Secretary of the Commonwealth's Office has issued subpoenas seeking records on annuities sales practices from banks including Sovereign, Citizens, Century, BankNorth, Eastern

and Medford Co-Operative Bank. In June, Hartford Financial Services Group Inc., the number one variable annuities seller in the United States, received a subpoena from New York Attorney General Eliot Spitzer regarding purchases by senior citizens.

Under the agreement with Bank of America, eligible customers will have six months to request a refund, starting in August. In addition, customers aged 75 to 77 when they bought annuities may get an "expedited review" of their purchases.

(Reprinted from *The ElderLaw Report*, Volume XVII, Number 2, September 2005.)

Call for papers — *Florida Bar Journal*

John Staunton is the contact person for publications for the Executive Council of the Elder Law Section. Please e-mail John at jstaunton@earthlink.net for information on submitting elder law articles to *The Florida Bar Journal* for 2005. A summary of the requirements follows:

- Articles submitted for possible publication should be typed on 8 & 1/2 by 11 inch paper, double-spaced with one-inch margins. Only completed articles will be considered (no outlines or abstracts).
- Citations should be consistent with the Uniform System of Citation. Endnotes must be concise and placed at the end of the article. Excessive endnotes are discouraged.
- Lead articles may not be longer than 12 pages, including endnotes.
- Review is usually completed in six weeks.



Medicare handbook gets it wrong

Millions of low-income seniors and disabled persons affected

The Centers for Medicare & Medicaid Services (CMS) has recently acknowledged a major error in the *Medicare & You 2006* handbook now being sent to more than 40 million Medicare beneficiaries nationwide. The handbook is intended to be a key tool in the CMS' information program for implementation of the Medicare Part D prescription drug benefit. The mistakes occur in the list of the standalone prescription drug plans (PDPs) for each region. Every drug plan's premium is listed as fully covered for Low-Income Subsidy (LIS) recipients. The column, headed "If I Qualify for Extra Help, Will My Full Premium Be Covered?" shows "Yes" for every plan in the country. In fact, the CMS now acknowledges that

"No" should have been the answer for approximately 60 percent of the (non-Medicare Advantage) plans. See www.cms.hhs.gov/partnerships/tools/materials/default.asp#rny2006. Medicare Advantage drug plans are not affected.

The danger is that many of the estimated 14 million LIS recipients will rely on the CMS handbook, enrolling in plans they think qualify them for coverage of their full premium, but which in fact do not. These unfortunate LIS recipients may then be required to pay a portion of the premium. All LIS recipients have incomes below 150 percent of the federal poverty level. This premium charge is a cost that Congress recognized they can ill afford and from

which Congress sought to shield them.

Unless action is taken, the handbook is the only comprehensive list of drug plan choices that will be sent to beneficiaries. Information was posted on the www.cros.gov website on Oct. 7, but comprehensive information will not be available by phone.

The estimated 14 million LIS recipients include almost seven million dual eligibles (those on both Medicaid and Medicare), all of whom are automatic recipients of the subsidy and are potentially affected by this error. Dual eligibles will be automati-

cally randomly enrolled in a premium-covered PDP, and there is no guarantee that random enrollment will result in a plan that will meet their needs. Dual eligibles are permitted to select different plans at any time and should consider all options wherever possible. Because plan formularies, in-network pharmacies, availability of mail-order drugs and utilization tools as well as premium costs are all major factors in choosing the right plan for a particular beneficiary, it is likely that many dual eligibles will choose to change plans, and they will need to rely on the CMS handbook in doing so. In making their choices from the handbook, they will be unaware that they may be exposing themselves to unnecessary and unaffordable premium obligations.

LIS recipients, other than dual eligibles, will not be automatically enrolled in plans and will need to affirmatively enroll in a PDP to receive Medicare Part D benefits. If they rely heavily on the handbook to make their choices, as indeed the CMS has hoped they would, many inevitably will be misled as to premium costs and will select plans they would have avoided if not for the erroneous information in the CMS handbook.

The CMS has been forthcoming in acknowledging its mistake. In addition to posting the "Notice of Errata" on its website, the CMS has corrected the version of the handbook being posted on its website and has provided remedial scripts for those who will be responding to calls from potential PDP applicants.

But the remedial steps being taken are quite limited. Individuals who call the 1-800-Medicare number and ask about the LIS and premiums will be given specific information only if they ask about a "certain plan." If they are comparing plans, they will not be given the full breadth of premium-free available choices in the region, but instead

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will be referred to the CMS website or to “personalized counseling in [their] local community,” according to the scripts posted on the CMS website.

Unfortunately, community resources are quite limited, and relatively few low-income Medicare beneficiaries have access to use the Web.

Even more problematic, callers comparing plans will also be told they may call drug organizations offering plans, which have been instructed that they must inform LIS individuals about plans that would incur a premium, and tell them that alternate plans may be available, **but drug organizations may also suggest their own premium-free plans to LIS callers.** Thus, not only will LIS callers not be informed by Medicare operators about the full range of options that should have appeared in the handbook, but callers also may be subjected to sales tactics and marketing ploys as they attempt to gather objective information necessary to make an appropriate choice. For further information, call

NSCLC recommends five-part strategy to fix handbook error

National Senior Citizens Law Center (NSCLC) attorneys were apparently the first to spot the *Medicare & You* handbook error on Thursday, Sept. 29.

The NSCLC is working with other public interest programs, including the Center for Medicare Advocacy, the Medicare Rights Center and the National Health Law Program, to urge the Centers for Medicare & Medicaid (CMS) to take full corrective measures to ensure meaningful choices for low-income Medicare beneficiaries. Advocates are urging that: (1) the CMS send out a full, corrected *Medicare & You 2006* PDP list to ALL Medicare beneficiaries; (2) the CMS include a list of all LIS premium-free plans with the letter it will send to all dual eligibles about their auto-assignment; (3) the Social Security Administration (SSA) include a list of all LIS premium-free plans with the letter it sends to those found eligible for LIS; (4) the CMS produce public service announcements on the error and its corrective measures to the public at large; and (5) the CMS pay premiums required of those LIS recipients who apply to premium-requiring PDPs because of incorrect information in the CMS handbook.

(Reprinted from the NSCLC's *Washington Weekly*, Vol. XXXI No. 39, October 7, 2005.)

Jeanne Finberg, Katharine Hsiao or Marguerita Fa-Kaji in the NSCLC's Oakland office at 570/663-1132.

(Reprinted from the NSCLC's *Washington Weekly*, Vol. XXXI No. 39, October 7, 2005.)

CMS allows Vermont's LTC waiver

The Centers for Medicare & Medicaid (CMS) has granted Vermont permission to implement a long-term care waiver under which all Medicaid beneficiaries requiring long-term care will be given the automatic choice between home and community-based services and nursing facility care. However, Medicaid recipients in Vermont are no longer *entitled*

to long-term care services. Instead, most of the beneficiaries will only receive services if the state has sufficient funding.

This waiver represents a dramatic change in the delivery system of Medicaid long-term care services. The National Senior Citizens Law Center will soon complete an analysis of Vermont's long-term care

waiver. More information on the waiver can be found on the website of Vermont's Department of Disabilities, Aging & Independent Living at www.dad.state.vt.us.

(Reprinted from the NSCLC's *Washington Weekly*, Vol. XXXI No. 41, October 21, 2005.)

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CMS approves Florida's Medicaid waiver

Endorsement occurs in 16 days

The Centers for Medicare & Medicaid Services (CMS) has granted Florida's radical proposal to force its Medicaid population into managed care plans. The next step in this demonstration waiver will be the state Legislature, which has scheduled a special session in December to review it. It is expected that the Legislature will grant similarly fast approval.

Once the Legislature approves, Florida will gradually begin moving its Medicaid population into managed care plans that will have substantial discretion in defining each beneficiary's benefit package. *See NSCLC Washington Weekly*, September 23, 2005. The state will simply pay a premium to the care plans on behalf of each enrolled Medicaid beneficiary. A beneficiary will have to pay for services out of his or her own pocket, or do without, if the costs for medical care exceed the services covered by the premium. This, of course, changes the very

concept of Medicaid. An irony is that those people with the greatest needs are the ones who may be without services under this approach.

Just as startling as the CMS' approval of the waiver is the unprecedented speed with which CMS acted, only 16 days after the request was submitted. Prior to this, CMS' approval of Vermont's block grant waiver within six months of the request had seemed rapid indeed. *See NSCLC Washington Weekly*, October 7, 2005. In contrast, Vermont recently received approval for its long-term care waiver after the CMS took almost *two years* to authorize it.

For more information, please call Gene Coffey in the NSCLC's D.C. office, 202/289-6976.

(Reprinted from the NSCLC's *Washington Weekly*, Vol. XXXI No. 41, October 21, 2005.)

Tennessee court says nursing facility resident's gift to daughters is fraudulent conveyance

Unsuccessful Medicaid planning can place financial liability for nursing home bills on family members who receive gifts from a nursing facility resident. That is the import of a recent decision by the Tennessee Court of Appeals in a collection action brought by the nursing facility. *Beverly Healthcare Brandywood v. Gammon*, 2005 WL 1996626, 2005 Tenn. App. LEXIS 502 (Tenn. Ct. App. 2005).

The nursing facility resident had sold his home to his daughter for the fair market value of \$69,000. The same daughter acted for her father under a power of attorney. (The subsequent court actions did not consider whether the daughter had exceeded her authority under the power of attorney.)

Of the proceeds, a total of \$42,500 was transferred to the resident's three daughters. The daughter/agent received \$15,000 toward payment on her vehicle, and the other two daughters each received gifts of \$6,250. In addition, each of the three daughters received \$5,000 for performance of certain services for their father.

The gifts made the resident ineligible for Medicaid for a period of time, which in turn caused a past due bill to be incurred for the resident's nursing facility care. The daughters covered some but not all of this past due bill;

eventually, approximately \$13,000 was unpaid.

A trial court ordered judgment against the daughters on the theory that they had received fraudulent conveyances from the resident; the Tennessee Court of Appeals affirmed. Although the transfers had not caused the resident to be insolvent immediately, it had been foreseeable at that time that the resident would not have the ability to pay future debts.

The transfer of at least \$27,500 was not supported by consideration. The court had no need to consider whether the personal service agreements were supported by consideration, since \$27,500 exceeded the amount owed to the nursing facility.

This decision is an anomaly; generally transfers related to Medicaid planning have not been considered fraudulent conveyances. *See Eric Carlson, Long-Term Care Advocacy* §7.12(1) n. 7 (Matthew Bender & Co. 2004). It remains to be seen whether the Tennessee Court of Appeals is an outlier or a trendsetter.

Questions regarding nursing facility issues can be directed to Eric Carlson in the NSCLC's Los Angeles office at 213/639-0930.

(Reprinted from the NSCLC's *Washington Weekly*, Vol. XXXI No. 33, August 26, 2005.)

Prudent planning or exploitation?

(or ... Don't consider it your own until the benefactor has passed away!)

A tip ...

Exploitation can present itself in many forms—from the true con artist to the uninformed prospective client accused of wrongdoing before the first consultation to the current planning client facing only theoretical future accusation—but every attorney who has suggested gifting should carefully consider §825.103, F.S. While most elder law attorneys probably don't spend much time considering whether the results of their advice amount to prudent planning or exploitation, a similar number of them would also be surprised that the answer is quite often more a matter of perspective than a bright line distinction of fact. And as our clients get "assistance" from more third party providers, and the government seeks more options for minimizing available benefits, this question will confront the elder bar more often than ever before.

Complicating the issue of exploitation is the fact that most attorneys practicing in the criminal courts are basically ignorant of probate and elder planning issues. Just as most plumbers have no reason to ponder an electrician's complicated wiring plans, most attorneys not directly involved in elder law are lost when it comes to gifting, spend-down and even the most basic requirements for Medicaid eligibility. And though most all of us would agree that anyone who has exploited an elderly person should be prosecuted to the fullest, the well intentioned person who wanders from the strict guidelines we give them, or who didn't have the foresight to seek our counsel ahead of time, should not be left at the mercy of an uninformed criminal defense bar. But how many elder law attorneys have even considered being retained as defense counsel on a criminal charge of exploitation? And with good reason, as you would no more want your electrician fixing your pipes ...

Keeping your client out of trouble doesn't require a dramatic restructuring of your current procedures. A simple concept can stave off most

complications before they arise: "Don't consider it your own until the benefactor has passed away." Stated another way, if you preserve a gift received and are always ready to use the same to benefit the gift giver, you have little to fear from accusations of wrongdoing.

Exploitation of the elderly and disabled is covered by §825.103, F.S. The pertinent sections of the statute read as follows:



Jay L. Hemness, Jr.

Tips and Tales

- (1) "Exploitation of an elderly person or disabled adult" means:

(b) Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person's or disabled adult's funds, assets, or property

... with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, ...

... or to benefit someone other than the elderly person or disabled adult, ...

... by a person who knows or reasonably should know that the elderly person or disabled adult lacks the capacity to consent.

A former prosecutor's simple method to avoid wrongdoing is to just make sure you don't satisfy one (or more) elements of a prohibitive rule. Since some form of reallocation is inherent to gifting and most planning tools, the first and last elements of §825.103(1)(b) are usually givens in

most circumstances. Therefore, the elements that might still be avoided are depriving the elder of the benefit of his or her funds or appropriating the reallocated assets to your own use. By maintaining received funds in an orderly and accountable fashion and forestalling use of the same until the benefactor has passed away, the gift recipient can thwart almost any accusation of wrongdoing. But this is as critical as it is simple, resulting in potential disaster if not thoroughly covered with the recipient of reallocated funds.

A common response to the notion of gifting being painted as exploitation is the presentation of authority to make the gift, usually in the form of a power of attorney or documentation in a letter or memo line of a gift check. Although it is entirely likely an attorney in fact may escape criminal culpability by virtue of apparent authority, it is equally likely the middle-aged, law-abiding client would rather have had a conversation with a lawyer at the onset of gifting, rather than after a visit from the local Adult Protective Services investigator.

And a tale ...

Sonny Boy, an only child, came into our office after things went bad, real bad, regarding a third party provider's Medicaid "plan" for his elderly mother. Mom had been placed in an SNF due to diminished capacity, and all of her assets (\$107,000) except homestead were gifted via Sonny Boy's POA, which included gifting authority. Quite unfortunately, the sage provider never discussed with Sonny Boy the need to budget for maintaining Mom through her Medicaid disqualification period.

Sonny Boy invested the entire gift in a boat. He asserts the boat was an investment, to be refitted and resold for a profit, but while the boat was under repair, he missed a payment to Mom's SNF. The facility was aware of the gifting (Mom had mentioned that Sonny Boy had "taken all her money"), so when the SNF wasn't paid on time, it initiated

continued, next page

Prudent planning?

from preceding page

guardianship and exploitation actions. The truth was, though he loved

Mom dearly, Sonny Boy wasn't capable of handling his mother's money, but he also never intended to wrong her in any way.

Once accused, Sonny Boy's immediate priority became getting the

hangman's noose off his neck. His criminal attorney, also of singular concern and lacking any familiarity with Medicaid, contacted the SAO and negotiated the simplest resolution, the return of all funds in exchange for the dismissal of all charges. Given the passage of time involved and the immediate sale of the boat for a loss, which Sonny Boy would have to cover from his own meager funds, the money would be returned to Mom just short of 13 months from the original gift and just three months short of Medicaid eligibility!

Adding insult to injury, the exploitation accusation dissuaded the probate court from accepting Sonny Boy's power of attorney as a suitable alternative to guardianship and from allowing Sonny Boy to be Mom's guardian. The other proposed guardian was the professional suggested by the SNF who, once appointed, petitioned the court for permission to sell Mom's homestead, her only other significant asset, to satisfy the current indebtedness to the SNF.

While this is certainly something close to a worst-case scenario, it illustrates well the potential landslide of problems that can spring out of an exploitation accusation as well as the wisdom of being aware of both the statute and how with a slight shift of perspective planning can look remarkably like exploitation. Despite Sonny Boy's claim that the boat was an investment tool, had he been following the rule and not considered the funds his own until his mother had passed away, it is hoped he would have appreciated the need to keep the funds intact (and in a somewhat more conventional form). When accused, he could have quickly raised himself high above reproach.

Gerald L. Hemness, Jr., is an associate attorney with the Law Offices of Emma Hemness, P.A., with offices located in Brandon and Lakeland, Fla. He practices exclusively in the area of elder law, particularly focusing on abuse and exploitation of the elderly and contested and uncontested guardianships. He is a member of the National Association of Elder Law Attorneys, the Academy of Florida Elder Law Attorneys, the Elder Law Section of The Florida Bar and the Florida State Guardianship Association.

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Summary of selected caselaw

by Audrey Ehrhardt

Cason v. Hammock, 30 Fla. L. Weekly D1591 (5th Dist. Ct. App. June 24, 2005)

Cason filed a petition on behalf of his minor granddaughter to remove the personal representative, Hammock. The district court found that the trial court erred in denying Cason's aforesaid petition based on lack of standing because Section 731.201(21), Fla. Stat. (2003), specifically required that a beneficiary receive complete distribution, "receive" was defined to mean that the beneficiary had actually taken possession of the devise under the decedent's will and the fact that the estate had sufficient funds to pay the devise in full was not the equivalent of receipt of the devise and the beneficiary remains an interested person who may be reasonably expected to be affected by the outcome of the particular proceeding involved. The district court also found that the service on Cason's granddaughter was ineffective because none of the provisions in Fla. Prob. R. 5.040(a) specified how a minor should be served and Fla. Prob. R. 5.040(a)(3)(A)(iv), specifically, was not intended to apply to minors. To determine how a minor should be served, the court turned to the requirements found in Section 48.041(1)(a), Fla. Stat. (2003), and held that a minor could be served through the service on his or her parent or guardian with a copy of the complaint or petition by leaving it at their place of abode with someone

over 15 years of age and informing the person of its contents.

Wehrheim v. Gold Pond Assisted Living Facility, 30 Fla. L. Weekly D1645 (5th Dist. Ct. App. July 1, 2005)

Unless otherwise determined by the probate court, proceedings to remove a personal representative and for revocation of probate of a will are considered adversary proceedings under Fla. Prob. R. 5.025(a) and, unlike most civil cases, the district court held that it was not necessary to specifically plead standing as an affirmative defense since the petitioners had standing as interested persons under Section 733.109(1) Fla. Stat. (2003). The district court found it was error for the trial court to enter summary judgment because factual issues still remained, such as determining if there was alleged undue influence and if it was pervasive enough to permeate the entire will and whether the decedent intended the revocation clause to be independent of, and not conditioned on, the validity of the other provisions of the challenged will and remanded.

Harbie v. Falk, 30 Fla. L. Weekly D1659 (3d Dist. Ct. App. July, 6, 2005)

The district court affirmed the trial court's summary
continued, next page

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Caselaw

from preceding page

judgment finding that the child who was not named in the decedent's will was not a beneficiary. The testator's will stated that the testator had only one child, although he actually had a second child, which created a latent ambiguity. As a result of the latent ambiguity, parol evidence was admissible to ascertain the testator's intent, and the affidavit of the lawyer who drafted the will was admissible to resolve ambiguity.

Borck v. Borck, 30 Fla. L. Weekly D1731 (4th Dist. Ct. App. July 20, 2005)

In connection with two competing petitions to appoint a guardian for Mr. Borck, the trial court issued an order that required the petitioners to produce private financial information. The district court granted the petitioners' writ of certiorari to quash the trial court order because there had to be a relevant or compelling reason to compel disclosure of non-party petitioners under Article

1, Section 23, Florida Constitution.

Ribera v. C.S., 30 Fla. L. Weekly D1945 (4th Dist. Ct. App. August 17, 2005)


The circuit court issued an order in a guardianship case that required the Department of Children and Families to determine whether the ward was eligible for developmental assistance, to notify counsel and the guardian of all testing and treatment plan meetings, to prepare a report, to appear at a status conference to expedite the process and to make a recommendation as to such services or to state the reasons he was ineligible and the rights of appeal. The department filed a petition for a writ of prohibition challenging the circuit court's jurisdiction to enter an order in a guardianship proceeding because the department was governed by 393.065(1) and 393.065(3), Fla. Stat. (2003), with regard to developmental assistance, which is subject to administrative appeal and contains no requirement to notify the court or any counsel in guardianship proceedings. The district court granted the petition and found that the circuit court had exceeded its authority under the guardianship statute.

Perry v. Agnew, 30 Fla. L. Weekly D1487 (2d Dist. Ct. App. June 15, 2005)

The beneficiaries of a trust sued the trustee in Charlotte County, Fla., and the trustee, who was located in Massachusetts, moved to dismiss for improper venue. The circuit court denied the trustee's motion, but the district court reversed and remanded the case to determine if all the interested parties could be bound by litigation in Massachusetts. The district court held that unless otherwise designated in the trust agreement, the principal place of trust administration is the trustee's usual place of business and where the records are kept under Section 737.101(1), Fla. Stat. (2003). The fact that the trust agreement contained a provision that it was to be governed by Florida law did not take it out of operation under Section 737.203.

McKean v. Warburton, 30 Fla. L. Weekly S613 (SCO 613a September 8, 2005)

The decedent died testate, and, absent the homestead proceeds, the estate assets were insufficient to satisfy any creditors' claims and the specific cash bequests. His nephew argued that the homestead property should be used to fund the specific cash gift to him, while the decedent's half brothers argued that the homestead property should pass through the residuary clause of the will to them. The district court considered the proceeds from the homestead property as part of the general assets of the estate and available to satisfy specific and general devises and that residuary devises abate or fail before specific and general devises under Section 733.805, Fla. Stat. (2004). The Supreme Court quashed and remanded the district court's holding and held that when a decedent is not survived by a spouse or minor children, the decedent's homestead property passes to the residuary devisees, not the general devisees, unless there is a specific testamentary disposition ordering the property to be sold and the proceeds made a part of the general estate.



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Fair hearings reported

by Audrey Ehrhardt

Florida Department of Children and Families; Volusia; District 12; Unit 88210; Appeal No. 05F-0687

The petitioner's representative submitted an application for Institutional Care Program (ICP) Medicaid benefits in the month of February 2004 and was told that this application was denied because the petitioner did not yet have any nursing home expenses, although no written denial was received. In April 2004, the petitioner's representative submitted a second application for ICP Medicaid benefits that was denied in the month of May 2004 due to the petitioner's representative's failure to provide the necessary information. In June 2004, the petitioner's representative submitted a third application for ICP Medicaid benefits that was denied in the month of November 2004 due to the petitioner having excess countable assets. Also in June 2004, the petitioner's representative received notice that the petitioner's application from February 2004 had been denied that month for failure to verify assets. In the fair hearing, the petitioner's representative argued that if the department had acted timely with its denial, the "spend down" process could have been accelerated and the ICP Medicaid eligibility for March 2004 and April 2004 could have been achieved. The petitioner's representative further argued that the department's delay should result in automatic ICP Medicaid eligibility for March 2004 and April 2004. The hearing officer found nothing in the authorities to substantiate a delay in processing an application to result in automatic ICP Medicaid eligibility, and it was determined that as of April 2004 the petitioner was under asset and the appeal was granted for April 2004 eligibility but denied for March 2004.

Florida Department of Children and Families; St. Lucie; District 15; Unit 885010; Appeal No. 05F-0999

The petitioner submitted an application for Institutional Care Program (ICP) Medicaid benefits in July 2004 that was denied because the countable assets exceeded \$2,000. The petitioner owned a life insurance policy with a face value of \$5,000 and a cash value of \$5,100, which was considered an available asset despite the petitioner's representative's attempts to secure a policy loan on the insurance policy at the beginning of August 2004. The policy loan was secured in November 2004. The petitioner submitted a second application in November 2004 that requested ongoing coverage and retroactive ICP Medicaid benefits for the months of August, September and October 2004. In the fair hearing, the hearing officer denied the appeal because there is no exception in the rules to allow the asset or asset limit to be waived even if the delay of the policy loan is due to the insurance company.

Florida Department of Children and Families; Broward; District 10; Unit 88139; Appeal No. 05F-2463; Case. No. 1045511463

The petitioner was denied Institutional Care Program

(ICP) Medicaid benefits for not meeting the level of care criteria in January and February 2005 as determined by the CARES program doctor. The petitioner's representative argued that the petitioner was qualified for the level of care according to the petitioner's personal doctor's opinion stated on February 9, 2005. It was determined by the fair hearing officer that the petitioner's personal doctor's opinion had more weight in this case, and the appeal was granted.

Florida Department of Children and Families; Marion; District 13; Unit 55291; Appeal No. 04F-5626; Case. No. 1203726813

The petitioner requested a hearing to increase the community spouse's resource allowance when the department denied the petitioner's application for Institutional Care Program (ICP) Medicaid benefits due to excess countable assets. The total countable assets were \$326,064.10, of which \$300,496.70 were income producing, and exceeded the community spouse maximum asset allowance of \$92,760. However, the community spouse received gross Social Security benefits of \$688.60, and the income generated from countable assets was \$542 per month, totaling only \$1,230.60 per month. This amount was still less than the Minimum Monthly Maintenance Income Allowance of \$1,562. In dealing with spousal impoverishment, the federal regulations give the state a choice of either an income first or a resource first approach. As discussed in the last issue of *The Elder Law Advocate* in Appeal No. 04F-3495, Appeal No. 04F-4350 and Appeal No. 5105, at this time Florida has not designated whether an income or resource first approach is to be used in predetermination of eligibility, although precedent has set a resource first approach. The resource allowance may be revised through the fair hearing process to an amount adequate to provide such additional income as determined by the hearing officer, and under the state Medicaid Manual, at Section 3262.3, hearing officers are allowed to revise the resource allowance to an amount that would bring the community spouse's income up to the MMMIA. Inherent in the concept is that the asset must be income producing. The state Medicaid Manual does not allow this substitution when the institutionalized spouses do not make available a monthly income to the community spouse. The appeal was granted. Related cases: *Florida Department of Children and Families; Orange; District 07; Unit 8999; Appeal No. 04F-6329; Case. No. 1209920921* (The department granted the appeal when the total countable assets were \$117,241.13 but the community spouse income only totaled \$488.60.)

Florida Department of Children and Families; Sumter; District 13; Unit 88082; Appeal No. 04F-4536, Case No. 1180541804

In May 2004, the petitioner entered a facility. In June 2004, the petitioner submitted an application for Institutional Care Program (ICP) Medicaid benefits that

continued, next page

Fair hearings reported

from preceding page

requested retroactive and ongoing benefits. The petitioner's income was reported as \$597 in Social Security benefits and \$1,375 from a Veterans Administration pension for a total of \$1,972. Pursuant to Program Policy Manual Section 1840.0906.03 and Section 1840.0906.05 in part, Veteran's Administration pensions are included

as unearned income, excluding the amount of aid and attendance, housebound allowance and unreimbursed medical expenses. The petitioner's total Veteran's Administration pension was \$1,375, but \$331 of that pension was for aid and attendance, which cannot be considered in determining income eligibility for ICP Medicaid benefits. The appeal was granted because the petitioner's total monthly income was \$1,641, which is less than the income standard of \$1,692.

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