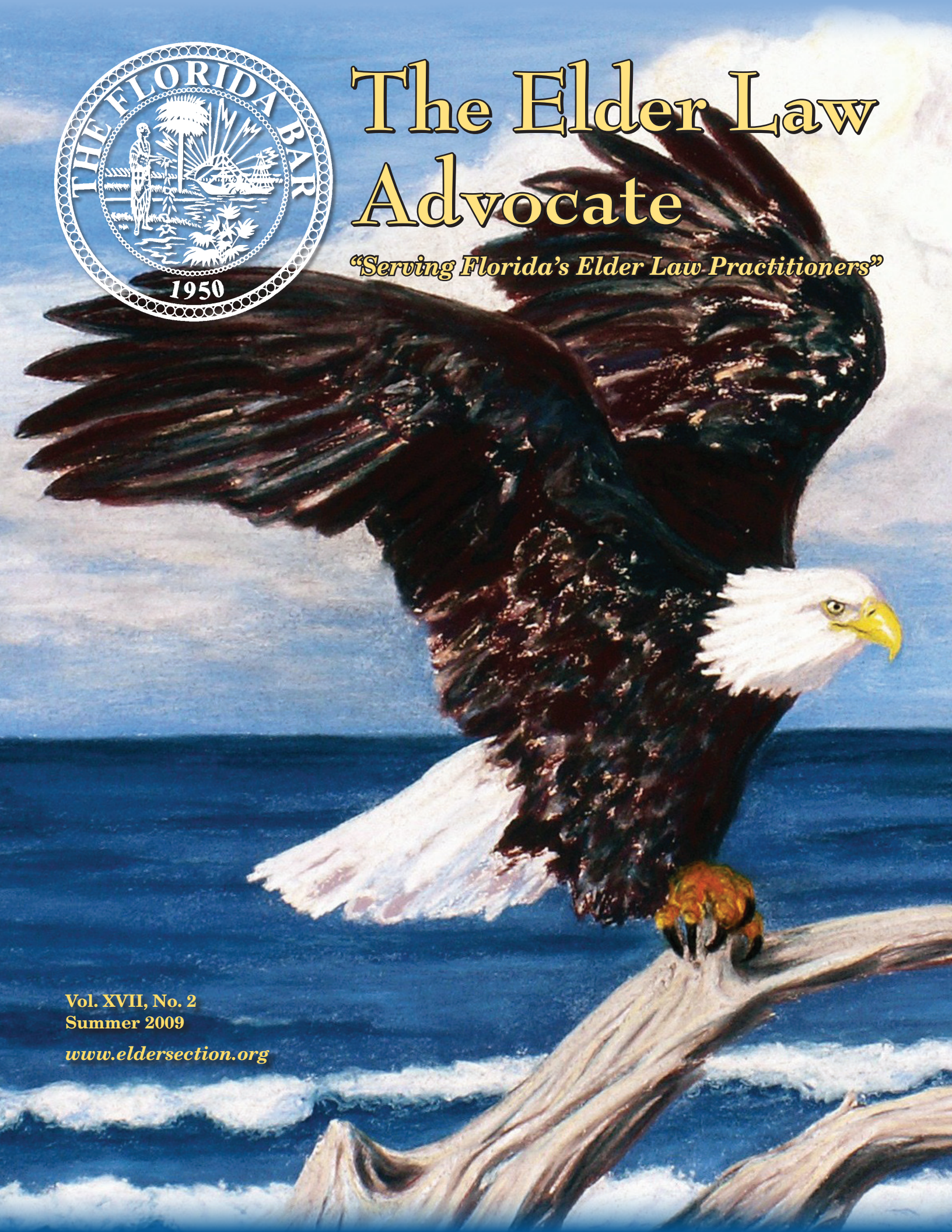


# The Elder Law Advocate

*"Serving Florida's Elder Law Practitioners"*

Vol. XVII, No. 2
Summer 2009

*www.eldersection.org*

# The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar



**The deadline for the FALL ISSUE is October 15, 2009**. 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 1-800-342-8060, ext. 5625, for additional information.

## CONTENTS:



**COVER ART:**

"The Eagle Has Landed," pastels,
artist – Arlee J. Colman.

Private collection of Terry Hill, The Florida Bar.

# Congratulations to new CELAs, ELS award winners

As I come to the end of my tenure as chair of the Elder Law Section, I can think of no nicer way to wrap up my official duties than to congratulate our newest certified elder law attorneys (CELAs). CONGRATULATIONS to **Genny Bernstein**, **Jill Burzynski**, **Sara Caldwell**, **Amy Fanzlaw**, **John Griffin**, **Jana McConnaughhay**, **Leonard Mondschein**, **Stephen Taylor**, **Marjorie Wolasky** and **Enrique Zamora** for earning this important distinction.

To become board certified in elder law, an attorney must have substantial involvement in all aspects of planning for aging, illness and incapacity on a full-time basis for at least five years with 40 percent or more of his or her practice focused on elder law during the two years immediately preceding certification. Each board certified lawyer has passed peer review, completed 60 hours of continuing education within the three years immediately preceding application and has passed a written examination demonstrating knowledge, skills and proficiency in the field of elder law.

Currently there are 81 board certified elder law attorneys in Florida. I encourage all of you meeting the requirements to apply for Elder Law Certification; the filing period is open beginning July 1, 2009, and applications must be filed by Aug. 31, 2009. The application, requirements and exam specifications can be found on The Florida Bar's website, *www.flabar.org*.

Elder Law Certification recognizes competency in the following core areas: Health and Personal Care Planning; Pre-Mortem Legal Planning; Fiduciary Representation; Legal Capacity Counseling; Public Benefits Advice; Probate and Trust Administration; Insurance; Resident Rights Advocacy; Housing Counseling; Employment and Retirement; Income, Estate and Gift Tax; Torts Against Nursing Homes; Age/Disability Discrimination; and Litigation and Administrative Advocacy.

Elder law will continue to be a much needed legal practice area as the number of boomers continues to increase and more and more aging clients will require our assistance. In addition, many of us, as well as others, are concerned caregivers who provide the care our parents desire, and many need the specialized counseling an elder law attorney can provide.

I have been privileged to serve as chair this year and have had the opportunity to work with an amazing Executive Committee. The section is very fortunate to have such a talented group of individuals leading our organization. A very big thank you to our incoming Chair Babette Bach, Chair-

Linda R. Chamberlain

## Message from the chair

elect Len Mondschein, Administrative Chair Enrique Zamora, Substantive Chair Twyla Sketchley, Secretary Jana McConnaughhay and Treasurer Robert Morgan. We appreciate your dedication, expertise and hard work to further the mission of our organization. I am grateful to have served with each of you.

This year we remained focused on our section's mission and long-range action plan developed in 2007. Part of our long-range action plan was to elect officers prior to the end of our existing officers' terms to allow for continuity so our new leaders could act more efficiently from the beginning of their terms. We have implemented this process; the old and new Executive Committees met in March and developed orientation training for all members of the Executive Council. The Executive Council is composed of the section's officers, past chairs for the five preceding years and the chairs/co-chairs of all standing committees and special committees. The training reviewed the annual calendar and required meetings, CLEs, administrative functions, *The Advocate* and the section's website, legislative positions and considerations for the next legislative session.

Your Executive Council is prepared to lead through the coming year. However, one issue became very apparent throughout our training; we need additional section members to get involved. We invite you to join a committee by contacting the committee chairs. All of the committees and their chairs are listed on the elder law website, *www.eldersection.org*.

Many of you have asked during my tenure how to be asked to speak at a CLE, how to get on the Executive Council or how to get more involved in general with the section. Attendance at the Executive Council meetings keeps you up to date and will help you determine which committee(s) you may have an interest in as well as provide the opportunity to get to know your fellow members.

As an Elder Law Section member, you are invited to attend the Executive Council meetings as well as any committee meetings. Many of the committee meetings provide the opportunity to obtain continuing education credit and/or to analyze existing law as well as to advocate for our clients. For those of you with a desire to make a change, join a committee and start preparing for our next legislative session—there are sure to be some hot topics.

As we moved through the legislative session this past year, we ran into several road blocks by not having an elder law legislative position approved by The Florida Bar. A legislative position allows our section to advance or stop/amend legislation through support or opposition, to respond to requests for assistance in writing legislation and proposed rules and to effectively lobby as the Elder Law Section. Our bylaws provide that no legislative position may be taken that is contrary to the legislative position of The Florida Bar and that a legislative position of the section may not be advanced or supported before

*continued, next page*

**Message from the chair**
*from preceding page*

any public body until the Board of Governors has reviewed (and not disapproved of) the position.

Our committee chairs are reviewing potential legislation for this coming year and are developing legislative positions that will allow our section to advocate or oppose as the section decides. We anticipate a very lively legislative session this coming year and will be prepared to act when needed. The Florida Bar's website has a great tool available under the sidebar Legislative Activity to monitor the status of all bills, organized by section.

The task I enjoyed most this year was recognizing our **Member of the Year, Patricia "Tish" Taylor**, and presenting the **Charlotte Brayer Award** to **Twyla Sketchley**.

Tish Taylor has been the editor of *The Elder Law Advocate* for many years, finding volunteers to write articles, encouraging those who have volunteered to complete articles and ensuring that we receive updated information on a regular basis. This year, *The Advocate* made the move from a newsletter to a magazine-style publication, providing great insight to all that is happening within the section as well as a review of legal issues affecting the section and our clients. We appreciate the time Tish willingly has provided and is continuing to provide to promote our section and get the job done. Thank you, Tish, for being an incredible Member of the Year in the Elder Law Section. We appreciate all of your hard work and dedication.

Charlotte Brayer: "She came. She gave. She changed things!" Charlotte was a charter and founding member of The Florida Bar Elder Committee (now our section) and the Academy of Florida Elder Law Attorneys. Governor Lawton Chiles declared Sept. 6, 1996. as Charlotte E. Brayer Day, recognizing her dedication to pro bono service and commitment to seniors. At the age of 64, Charlotte was admitted to The Florida Bar. Twyla Sketchley is mirroring Charlotte's life: they have both received the Second Judicial Circuit Pro Bono Services Award. For those of you who haven't had the opportunity to know Twyla or understand the meaning of "This is a Twyla case," I encourage you to take the time to get to know her. She is a wonderful example of what being an elder law attorney encompasses.

I am grateful to have had the opportunity to serve as your chair this year and look forward to seeing the Elder Law Section continue to grow, advance as an organization and remain committed to its mission. Thank you for allowing me to serve you and for all of your support.

## *The Elder Law Section thanks the 2008 - 2009 CLE program chairs!*

**Leonard E. Mondschein** (right) **& Kara Evans** (left), co-chairs of the **Elder Law Section 2008 Retreat,** held July 17-20, 2008, are pictured here with 2008 - 2009 section chair, Linda Chamberlain.

**Babette B. Bach,** chair of the **Elder Law Certification Review,** January 8-9, 2009

**Twyla L. Sketchley,** chair of the **Litigating for the Elderly Seminar** and the **First Live Webcast,** February 6, 2009

**C. Jason White & Sam W. Boone, Jr.**, co-chairs of the **13th Annual Public Benefits Seminar,** March 20, 2009

**David Hook & Collett P. Small,** co-chairs of the **Fundamentals of Elder Law Seminar,** March 21, 2009

**Susan M. King,** chair of the **Elder Law Update Seminar,** October 3, 2008

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# *Rainmaking 101:* Top 20 influencers

**by Mark Powers and Shawn McNalis**

M. POWERS

In an ideal world, all referral sources would be created equal. They would send you nothing but the best and brightest clients and cases— a steady stream of high-quality work and loyal clients.

Wouldn't life be grand? Unfortunately, in the real world, there is a great deal of difference in the quality of your referral sources, and the sooner you realize the difference, the better. Your existing group of referral sources is far from equal in terms of the amount and quality of work they refer to you. In this lesson, we are going to help you tell the difference by introducing the concept of your "Top 20" influencers.

S. MCNALLIS

## Your Top 20 influencers

Your Top 20 influencers are those referral sources that send you your highest-quality business. They send you the kind of matters you specialize in and the kind of clients you most enjoy. These are the influencers who consistently send quality "A" clients your way.

Most attorneys who have practiced for five or more years will have a small group of referrers that fit into this category— even if they don't yet have 20 of them.

This is an extremely important group of names to identify for yourself. These referral sources have probably kept you in business over the years because their good referrals have resulted in money in your pocket, often very substantial money. Calculated or uncalculated, you have done something to impress this group of people, and they demonstrate their trust and confidence in your abilities by continually sending you new clients.

## Why do they refer to you?

As you work through the attached Top 20 exercise, think about what you have done to cultivate the relationship you have with each referral source. Do they like you because you have a lot in common as people? Do they send you work because of your quick turnaround time? Do you possess a certain expertise that they have come to rely upon? Does your work make them look good to their superiors, their clients or end-users?

This group of referral sources often has the potential to send you even more business than they send you now. As you start studying them and paying attention to their referral habits, it may become clear that they have more work to give out. They could be spreading it around to other attorneys.

## Acknowledgment

Never let this group of people, whether they are business professionals, fellow attorneys or your next door neighbors, wonder whether or not their referrals came to you. Always express your appreciation as quickly as you can— even if the client did not ultimately engage your services. You want to continually reinforce the fact that they thought of you so that the next time they have an opportunity to refer someone, your name is the first one on their minds. Immediately let them know that you appreciate their ongoing faith in you. Send them thank you notes and take them out to lunch every so often to thank them for their trust and confidence in you. Their referrals have added substantially to your income. Never take them for granted.

## Cultivation

Invite your referrers to join you in non-work related activities to further the bonds between you. Have fun with them if it is appropriate for the relationship. Include them in important practice changes and decisions— solicit their feedback. Keep them up-to-date on any new directions or services you incorporate.

## The next step

Make a list of your Top 20 influencers using the chart included with this article. Next to each person's name, list the type of influencer he or she is, such as "attorney" or "CPA" under "type." Then, in the columns marked

**Top 20 Influencers**

| Name | Type | High Rapport | Low Rapport | Annual $ Worth (to your practice) |
|---|---|---|---|---|
| 1. | | | | |
| 2. | | | | |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |
| 7. | | | | |
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| 17. | | | | |
| 18. | | | | |
| 19. | | | | |
| 20. | | | | |

"high rapport" and "low rapport," put a checkmark in the appropriate box. In the far right column, list the amount of money that the referrals amount to on a yearly basis. When this is complete, you will have a matrix that clearly illustrates your most valuable relationships. Upon further study, you might notice you have the basis for a marketing plan. Here's why: Those influencers with whom you have high rapport should be put into a maintenance rotation— that is, you should contact them at a comfortable rate for the relationship. For some relationships, this will be two or three times a month; for others, once or twice a quarter. For those relationships marked "low rapport," cultivate them a little more aggressively, based on their receptivity, their availability and their ability to send you more work. Use this matrix to plan your marketing activities, follow your plan faithfully and you should see a surge of new business.

***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.*

## Kudos Korner

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

- **Public Policy Task Force members**
- **Robert Morgan, John Clardy** and **Shannon Miller** for their work on Medicaid issues

# Age discrimination in Florida is on the rise

**by Commissioner Mario Valle (Naples)**
**Florida Commission on Human Relations**

Unfortunately, older Americans often face discrimination and stereotyping in the workplace. In addition to being viewed as senile, seniors are often thought of as generally incompetent, suffering from physical disabilities, lacking in technological skills and unable (or unwilling) to learn new things.

As the state agency that enforces the state's civil rights laws, we are all too aware of the discriminatory actions that continue to plague our seniors. In fact, the number of age discrimination cases closed by the commission has increased every year since 2004. During the 2007-2008 fiscal year, 20 percent of employment complaints closed by the commission were based on age discrimination. The Equal Employment Opportunity Commission (EEOC) has reported that age-discrimination allegations by employees are at a record high, jumping 29 percent to 24,600 filed in the year ended Sept. 30, 2008, up from 19,103 in 2007.

It is important for businesses to realize that a workforce of individuals from a variety of age groups can be very beneficial. Older workers have years of experience that can be used to teach and mentor younger, less experienced workers.

Managers and business owners should find ways to work with their employees by learning how to communicate across generations, allowing for collaborative decision making, creating a support system that will allow employees to openly talk about issues they may be facing and utilizing teambuilding exercises to create unity among staff members. Most importantly, business owners and managers must stay abreast of Florida's antidiscrimination laws and implement sound workplace policies to ensure fair treatment for all.

Let's work together to ensure that Florida's businesses, and seniors, thrive! For more information on age discrimination, please visit the Florida Commission on Human Relations' website at *http://fchr.state.fl.us*.

# Member News


H. KROOKS

## Krooks appointed NAELA secretary

Howard S. Krooks, JD, CELA, has been appointed to a one-year term as secretary for the National Academy of Elder Law Attorneys (NAELA) board of directors. Howard is a partner of Elder Law Associates PA with main offices in Boca Raton, Fla., and of counsel to Amoruso & Amoruso LLP in Westchester County, N.Y. He is admitted to practice law in Florida and New York. His professional practice is devoted to elder law and trusts and estates matters, including representing seniors and persons with special needs and their families in connection with asset preservation planning, supplemental needs trusts, Medicaid, planning for disability, guardianship, wills, trusts and advance directives.

## Robinson appointed to Elder Affairs Advisory Council


C. ROBINSON

Charles F. Robinson, a Clearwater, Fla., board certified elder law attorney, has been appointed by Governor Crist to serve on the Department of Elder Affairs Advisory Council for a two-year term.


T. SKETCHLEY

## Sketchley receives Distinguished Woman Award

Twyla Sketchley of The Sketchley Law Firm in Tallahassee was honored with a Distinguished Woman Award at the Smith-Williams Culture Day Celebration by the Smith-Williams Service Center Foundation. Congratulations, Twyla!

## Karp admitted to appeals court


J. KARP

Joseph S. Karp, who maintains offices in Palm Beach Gardens, Boynton Beach and Port St. Lucie, has been admitted to practice in the United States Court of Appeals for Veterans Claims.

## Mark your calendar

**Elder Law Section Annual Retreat**
*October 8-10, 2009*
*The Breakers, Palm Beach*

* * *

***"Va-Va-Va-Voom VA"***
**Mastering VA Benefits Planning**

**A Special One-Day Program During the Elder Law Retreat**
*October 9, 2009*
*The Breakers, Palm Beach*

**In-Person Only Attendance!**
This program will not be taped.

***Watch for the brochure!***

**Elder Law Certification Application Deadline**
If you wish to apply for certification, the filing period **opens July 1, 2009,** and applications must be filed by **August 31, 2009**.

**Elder Law Certification Review Course**
*January 21-22, 2010*
*Hilton Walt Disney World, Orlando*

**Fall Issue ELS Advocate Article Deadline:**
October 15, 2009

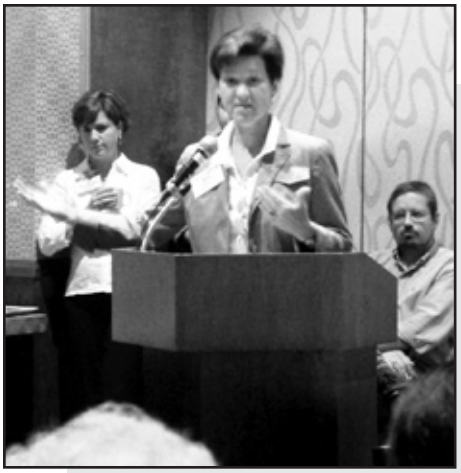
## Congratulations to new CELAs!

*Genny Bernstein, Palm Beach Gardens*
*Jill Burzynski, Naples*
*Sara Caldwell, Daytona Beach*
*Amy Fanzlaw, Boca Raton*
*John Griffin, Sarasota*
*Jana McConnaughhay, Tallahassee*
*Leonard Mondschein, Miami*
*Stephen Taylor, Miami*
*Marjorie Wolasky, Miami*
*Enrique Zamora, Coconut Grove*

# *Annual Meeting Memories*

Left: The Florida Bar Elder Law Section awards Patricia I. Taylor with the Member of the Year award. Chair Linda Chamberlain (right) makes the presentation.

Right: Twyla Sketchley is awarded the Charlotte Brayer award by The Florida Bar Elder Law Section. Chair Linda Chamberlain (right) makes the presentation.



Florida CFO Alex Sink talks to the Elder Law Section Executive Council during The Florida Bar Annual Convention in Orlando, June 26, 2009.

The Elder Law Section thanks Program Administrator Arlee Colman for her administration of the section during the year. She is presented with a set of handmade pastels from France in the hope that she will continue to produce original artwork for the covers of the section's newsletters.

Babette Bach (left) presents outgoing Chair Linda Chamberlain with an original pastel painting by Arlee J. Colman as thanks for a year well run.

The passing of gavel. Linda Chamberlain (left) becomes the section's immediate past chair and passes the helm to Chair Babette Bach.

The Florida Bar Elder Law Section presents an award to Susan Trainor, longtime editor of the section's newsletter, *The Advocate*.

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

**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
904/268-7227
rmorgan@flfirm.com

**Power of Attorney, Subcommittee of Medicaid**
Robert Morgan, Jacksonville
904/268-7227
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**
Greg Glen, Boca Raton
561/347-1071
gglenn_law@yahoo.com

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

Robert Morgan, Jacksonville
904/268-7227
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

**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

**Mentoring Special Committee**
Angela Warren, Pensacola
850/434-7122
awarren@mcelderlaw.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**
Angela Warren, Pensacola
850/434-7122
awarren@mcelderlaw.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**
"Rep" Deloach, Seminole
727/443-7898
rdeloach@dhstc.com

Linda Chamberlain, Clearwater
727/443-7898
linda@floridaelderlawyer.com

### LIAISONS

**AFELA**
Randy C. Bryan, Oviedo
407/977-8080
randy@hoytbryan.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

# COMMITTEE REPORTS

## Legislative Committee

**Ellen S. Morris, chair**
**Tom Batchelor, legislative consultant**

### Budget issues overwhelm 2009 session: Did seniors get lost in the shuffle?

We tracked legislation of interest to the section and lobbied for Chief Financial Officer Alex Sink's annuity bill this past session. However, when you read the new laws below, you will notice that most of the enacted laws are monetary in nature.

### Probate and guardianship

The Administration of Estates bill (SB 1396) will be codified mostly in Chapters 731, 732 and 733 and be effective in July. Some changes worthy of highlighting are the following: It will cost more for new filings, including opening any type of administration or guardianship; the exemption amount for household property was increased to $20,000 and two motor vehicles are exempt; notice must be given to beneficiaries of a trust of a petition for summary administration filed by a petitioner/trustee/beneficiary; changes to procedures to satisfy the elective share, including the court's ability to assess fees and costs against a spouse who makes or pursues an election in bad faith; estate accounting will also be protected against public record disclosure similar to the way inventories are protected; and courts may increase filing fees in any matter to compensate for filings made.

### Health care

Chapter 409 of Florida Statutes was amended pursuant to SB 1658 and became effective in July. Highlights of the legislation are the following: The Medicaid Aged and Disabled and Medically Needs program sunset date is extended to Dec. 31, 2010; home health agencies will be held to stricter prior authorization and reimbursement requirements; vision services will again be limited for Medicaid recipients as of Jan. 1, 2010; and the Department of Elder Affairs instead of AHCA will now be responsible for administrative duties, functions and appropriations for Medicaid waivers and other programs that serve the elderly.

Two yet undesignated statute sections will be created to establish two new pilot projects, a home health agency monitoring pilot project and a comprehensive home health care management pilot project in Miami-Dade County to combat an increase in fraud and abuse in the delivery of home health services, to be implemented by Jan. 1, 2010.

### Persons with disabilities

Chapter 393 via SB 1660 is amended to require that the Agency for Persons with Disabilities assign and provide priority to clients waiting for waiver services based on seven categories for priority; eliminates or consolidates services of in-home support, companion, personal care and supported living coaching; reduces supported employment services; and provides flexibility for expenditures made from trust accounts in developmental disability centers.

### Dementia-related memorial

A senate memorial passed that urges Congress to create a Silver Alert Grant Program for a state notification system that will assist in locating missing persons suffering from dementia-related disorders.

To best track the changes to statutes that govern and affect your individual practices, we urge you to visit *www.flsenate.gov* and take the following steps:

1. Enter the bill number (e.g., 1396) in the "Jump to Bill" section and press "Go";
2. Scroll down to the first subsection entitled "Bills" and click on the web page link of the most recent version at the bottom (e.g., S 1396ER; ER stands for enrolled, which means the bill passed and was signed by the governor);
3. The screen that comes up will have the actual current language of the statute and the strike throughs and changes enacted for your comparison to existing law.

## Unlicensed Practice of Law Committee

**April Hill, chair**

On the facing page, you will find a letter from Bruce D. Lamb, chair of The Florida Bar's Standing Committee on UPL. It outlines The Florida Bar's determination as to what is the unlicensed practice of law by non-attorney Medicaid planners. This letter is a direct result of our UPL Committee's discussions over the past year, including many suggestions from our committee member, attorney John Frazier.

The original purpose for requesting this letter was to share copies with DCF counsel and, possibly, nursing home administrators and staff. We are very pleased that we now have a letter from which to work. The UPL Committee will continue to discuss how the section's membership can make use of it. And you, as a member of this section, should note that The Florida Bar's UPL Committee is looking to us to report instances of UPL. It is through your individual efforts that the ongoing practices of UPL can be addressed.

If any member has an interest in participating in the section's UPL Committee, please contact John Frazier, incoming chair, at 727/586-3306 or *john@attypip.com*.

# THE FLORIDA BAR

UNLICENSED PRACTICE OF LAW COMMITTEE

May 13, 2009

Linda R. Chamberlain, Chair
Elder Law Section
901 Chestnut St., Ste. B
Clearwater, FL 33756

Re: Unlicensed Practice of Law

Dear Ms. Chamberlain:

Several months ago, April Hill had some conversations with Lori Holcomb, UPL Counsel, regarding the unlicensed practice of law and Medicaid planners. As a result, the issue was brought before the Standing Committee on the Unlicensed Practice of Law of which I am chair. Ms. Hill has asked that I send a letter to you outlining the findings of the committee.

The committee reviewed the "typical" activities of Medicaid planners. The committee voted to provide guidance as to which activities would constitute the unlicensed practice of law and which activities need to be examined on a case-by-case basis. The committee voted that based on existing case law, the following activities would constitute the unlicensed practice of law: establishing irrevocable trusts, establishing qualified income trusts, and hiring an attorney to review, prepare, or modify documents for customers if payment to the attorney was through the company. The committee voted that the following activities would have to be determined on a case-by-case basis: restructuring assets, counseling customers on the best way to get Medicaid approval, and advertising as an "elder counselor." The committee voted based on existing case law that the hiring of an attorney to review, prepare, or modify documents for customers if there was a direct relationship with the attorney and payment was made directly to the attorney would not be the unlicensed practice of law.

As you can see, the committee established certain clear UPL violations and some that would be considered on a case by case basis. The unlicensed practice of law is complaint driven. If members of your Section know of Medicaid planners who may be engaging in the unlicensed practice of law, they may file a complaint with The Florida Bar. If members of your Section come into contact with people who have experienced UPL and have been harmed by it, please encourage them to file a complaint.

If you have any questions on the actions of the committee, please feel free to contact me or Lori Holcomb at 850-561-5840.

Sincerely,

Bruce D. Lamb
Chair, Standing Committee on UPL

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# Can you always have your Medicaid cake with VA icing on top?

**by Emma Hemness**

E. HEMNESS

As more elder law attorneys add VA benefits planning to their practices, we begin to see how methods used to secure future Medicaid benefits may be incompatible with future VA needs-based benefits. This makes it necessary to consider how Medicaid eligibility criteria intersect with VA income and net worth rules, particularly as to the Aid and Attendance pension. Unfortunately, there may be circumstances where obtaining both sets of benefits isn't a certainty. Consider the following example:

GI Joe and his wife, Rosie, have been married for 45 years. Joe served in the Army-Air Force during World War II for more than 90 days of active duty with one day served during the war-time period. Rosie has early to mid-stage Alzheimer's disease, and Joe is her sole caregiver in the home. Joe is older than Rosie, has already had a quadruple bypass and suffers from hypertension. Rosie has significantly older siblings, so Rosie is expected to have a long lifespan. Joe's primary goal is to have Rosie's care provided in their marital home if anything happens to him. Joe and Rosie's children are in total agreement.

An asset protection plan for Joe and Rosie likely would include, at a minimum, creating a testamentary qualifying special needs trust in Joe's will with most assets transferred to Joe's name alone. After a year passes, Joe suffers a fatal heart attack, and the ensuing probate funds the assets into the testamentary qualifying special needs trust. After the probate is complete, the children seek your counsel on how to obtain additional financial support for keeping Rosie in her home. The children remember that their father, Joe, was a military wartime veteran, and Rosie may be entitled to benefits from his wartime service– cash assistance to help defray the cost of Rosie's home care.

Common sense dictates that Rosie receive the widow's Aid and Attendance pension because she has minimal assets and a modest income in her sole name. Also, the assets in the testamentary trust are beyond Rosie's direct control, to be used only at the discretion of the child/trustee. However, it is not certain that VA case law favors such a commonsensical result. Let's briefly examine two cases that may be applicable to Joe and Rosie's scenario.

In the opinion VAOPGCPREC 72-90 (July 18, 1990), a veteran became a beneficiary of a third-party testamentary discretionary trust that allowed the trustee to distribute funds for the veteran's comfort but not as a substitute for support and maintenance supplied by other sources. The VA held that the veteran's beneficial interest in the trust was not considered legal title or control over trust assets. However, to the extent– and at the time– the funds were allocated to the veteran's use, they would be considered countable for purposes of income and net worth calculations in awarding improved pension benefits.

In another opinion, VAOPGCPREC 33-97 (August 29, 1997), the veteran's surviving spouse (claimant) established an irrevocable trust where the trustee (a child) was allowed to distribute some or all of the income and principal of the trust for the surviving spouse's special needs. Although the VA recognized it had no specific criteria governing when trust assets are to be considered in net worth determinations, emphasis was placed on the principle of ownership by the veteran/claimant. The VA questioned whether the transfer by the surviving spouse to the irrevocable trust was true divestiture of ownership, and thereby a relinquishment of control, such that the assets could not have the expectation of being used for her care. Language from 38 C.F.R. § 3.276(b) reflected the view that certain gifts and transfers to relatives should not, for VA pension purposes, be considered to reduce the size of an estate, and circumstances surrounding transfer of property may be considered for eligibility determination purposes. The opinion also stated that the surviving spouse was considered as exercising control over the trust assets because she gave the trustee control over the assets while still competent and had provided specific instructions concerning the circumstances under which trust assets would be used for her own benefit. The VA concluded that, although the trust was clearly designed to preserve estate assets by maximizing the use of other available resources, the trust definitively authorized the use of trust assets to benefit the surviving spouse, albeit only for her special needs. The VA held:

> Assets transferred by a legally competent claimant, or by the fiduciary of a legally incompetent one, to an irrevocable "living trust" or an estate-planning vehicle of the same nature designed to preserve estate assets by restricting trust expenditures to the claimant's "special needs," while maximizing the use of governmental resources in the care and maintenance of the claimant, should be considered in calculating the claimant's net worth for improved-pension purposes. VAOPGCPREC 33-97 p. 5.

In comparing these opinions, it appears that the VA focuses on the issue of control of trust assets during two periods of time: 1) prior to the trust's creation, were the assets owned by a third party, a fiduciary or oneself?; and 2) to what extent were the assets available during the lifetime of the beneficiary … only as allocated or always the entire corpus? This raises questions like: "Would Joe be considered a third party, or would he be considered one with Rosie because of their marital relationship?" Or, as a possibility, "Would Joe be considered a fiduciary acting on Rosie's behalf?" Answers to these initial questions shed light on the extent to which the testamentary

*continued, page 17*

# Retaining clients and increasing revenue in a tough economy

**by Teri Yanovitch**

T. YANOVITCH

*As the executor of my mother's estate and the oldest of three siblings, I went to an attorney's office to look for advice and help on how to handle my elderly mother's future care and financial needs. It was a meeting I had long anticipated and worried about since the outcome would determine many delayed decisions. I arrived at the attorney's office a few minutes early and was told to take a seat in the waiting room. Most of the magazines on the coffee table were last year's issues. Thirty minutes after my scheduled appointment, I was summoned into the attorney's office. He cursorily reviewed my folder and acted as if it were the first time he had seen it. I asked a few questions, but felt he should be the one asking the questions to guide me to what would be the best approach for my mother. He got frustrated when I asked for clarification on some of his legalese terms. I left his office more confused than ever and on top of it was given a bill that said all payments must be paid upon services rendered. What services?!*

A truly client-focused organization sees things through the "lens of the client" not the "lens of the organization." Being client-focused will be a key factor in retaining clients that distinguish you from your competition. Everyone wants to feel special and unique. No one likes to feel like just another transaction, no one likes to feel like cattle being herded through a line. And yet how many times in a day do we hear things like:

"First, I need you to fill out the paperwork."

"Next."

"This isn't my department; I'm just taking over while someone is on break."

"The computer won't let me in."

"Have a seat; someone will be with you."

Looking through the lens of the client means that if you understand the client's emotions, then you'll be able to understand his or her needs more fully. A client's emotions are key to delivering personalized service. Making the emotional connection will make your client feel appreciated and comfortable, and that's what will drive referrals and repeat business.

In today's world, there are too many choices for legal advice, and so how do most clients choose to whom and where to go? They ask their friends, family or colleagues. Attorneys whose clients believe they were listened to and cared about as well as competently handled will be the winners of the referral. I know of individuals who went to the most qualified lawyers in terms of degrees, certifications and education, but because these attorneys made the experience so unpleasant for clients, they were never referred to again. In the past, it was said that one unhappy client would tell 9 or 10 people; today with the Internet, blogging and twittering, that number can be in the thousands.

You can't afford *not* to look through the lens of your client. Put on your client's shoes and take a walk through your physical environment. Take a close look at your processes, procedures and service delivery to see if they are just mediocre or if they create a wow, positive feeling. The client's experience must be carefully planned and managed to ensure the best possible experience every time. Some things to consider:

- Does your office, website and collateral materials send the message you wish them to send?
- Is your phone system welcoming and inviting? What does the paperwork and billing processes make the client feel? Lost, confused, frustrated?
- Analyze how you address your clients. Do you first acknowledge their emotions, or do you immediately jump to resolving the need?

It takes only a moment to focus on a client's needs, but it makes a world of difference. Imagine if the attorney in the opening scenario had come into the office and asked the client to tell him about her mother and listened empathetically, asked appropriate questions, actively attended to the answers and *then* got down to business. I can pretty well guarantee there would have been a different outcome in this scenario—because that client was *me*.

***Teri Yanovitch*** *is a speaker and consultant. Her firm T.A. Yanovitch Inc. works with organizations to improve retention and build loyal clients to increase revenues. She is the co-author of* Unleashing Excellence – The Complete Guide to Ultimate Client Service. *Ms. Yanovitch can be reached at 407/788-7765 or* ty@retainloyalclients.com. *Her website is* www.retainloyalclients.com.

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**Medicaid cake, VA icing?**
*from page 15*

trust's corpus may be counted.

Since the body of VA case law is minimal, we do not have answers for Joe and Rosie. But as we delve deeper into VA benefits planning, we may find more situations where we might not be able to reconcile Medicaid planning with VA benefits planning.

***Emma Hemness*** *is past chair of the Elder Law Section (2007-2008). She practices elder law near Tampa in Brandon, Fla. Emma is a certified elder law attorney and Florida board certified in elder law.*

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# Writing for FAQs

**by Jerome Ira Solkoff**

J. SOLKOFF

If you are like me, you receive many daily telephone calls, and you do not have the time to answer them all. Most are from former clients or their family members seeking answers to frequently asked questions (FAQs).

The callers may be irate if you demand charges for your telephone consultation and for the "fast" answers they seek. Little do they realize that the "two-minute" conversation takes 20 or more minutes and that the answers you give may be based on years of experience and expertise.

*"Mom died, and I want to know what I do with regard to her trust."*

*"Aunt Wilma is dying, and I want to know how I will receive my inheritance."*

*"My evil twin brother is stealing from my father, and I want to stop him before my inheritance is gone."*

*"Uncle Alfred died, and the real estate agent says I cannot sell his condominium even though my name is on the title."*

*"How can Dad avoid the need of probate proceedings?"*

*"My dead Aunt Matilda named me as beneficiary on her bank accounts. What do I do to get the money?"*

*"My father has dementia, and I want to be able to make health care decisions for him."*

*"How can I protect Mom's assets and qualify her for Medicaid benefits?"*

*"A man is wining and dining Mom, and I think he is taking money from her."*

*"The State sent an investigator saying that I have not cared for Mom. I saw her two months ago, but I could not stay long in her apartment because it was so bug infested."*

My usual reply (and that of my secretaries, who try to screen my phone calls beforehand) is, "Why don't you schedule an appointment to discuss this? We charge $____ for the consultation."

At that point, the caller is irate or pleads poverty. "You handled all my parents' legal work for years (I did wills five years ago), and now, when they need you, you abandon them." To which I would like to answer, "Well, an attorney's stock in trade is his legal expertise and services. If I don't charge you, I cannot pay for the telephone or my staff (or my children's braces) and help you. I must receive compensation."

Here is an idea that works for me. I reply to some (not all) callers: "Let me send you a memo that will answer your questions. If after you read it you still want more information, call my secretary for an appointment, and you will pay a fee for that consultation."

You want to be of service. Like most elder law attorneys, you wear your heart on your sleeve. Helping others is the reason you got into this business. Still, you must make a comfortable living.

I have numerous FAQ memos that I send out. These may stop multiple phone calls and smooth a client's feathers. After a client receives such a memo, I charge for further questions, and most often, the client will see me to get work done to resolve the issues.

These memos do not give "how to" instructions for creating documents and other legal undertakings. Rather, I present various solutions and ask that the reader see me for further, paid services.

Some memo recipients may go to other lawyers. But for the most part, I have built up good will, and the client or family will ultimately see me and pay to have me perform the necessary legal services.

Many FAQ solutions do not need an attorney's work. Rather, a guide is given. "Since your grandmother died and named you as a beneficiary on her bank account, all you need do is go to the bank, show her death certificate, provide proof of your identity and take the money." My time is not necessary to be spent handling such banking matters. How much could I bill for such non-work? However, because of my "free" service, I will handle the probate proceeding, sale of the real estate, the Florida "non-tax" proceeding and the caller's personal legal matters. The caller also will refer friends and family to my services.

The child concerned about the parent's exploitations may engage me to handle guardianship proceedings, or it is hoped, less-invasive, trust and powers of attorney preparation. Questions about trusts lead me to trust administration work and filing of Notices of Trust with the probate clerk, if not probate proceedings.

We attorneys are taught to speak and write in "legalese." The "remainderman" of a "Lady Bird" deed has only a contingent interest subject to "disfeasment." What did I say? Can the client understand that? All of my FAQ memos are painfully worded in plain, simple English. Give them to your 10-year-old nephew to read. If he understands them, your clients will understand.

I have found that sending out FAQ memos, prepared in advance, saves me time and money. It enriches my relationships with my clients and their families. It brings me more business. I do well by doing good.

*A practicing attorney in Deerfield Beach, Fla.,* ***Jerome Ira Solkoff*** *is the founder and past chair of the Elder Law Section and an inaugural member of the National Academy of Elder Law Attorneys. The main desk references,* Practice Guide to Florida Elder Law *and the* Elder Law Forms Manual*, both published by Thomas West Reuters, are authored by Mr. Solkoff and his son, Scott M. Solkoff.*

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# Building flexibility into a third party SNT when you are not sure you need a SNT

## The tip:

Flexibility is critically important to a trust particularly when there is uncertainty as to what you need.

This installment may prove a bit basic for the board certified elder lawyers and CELAs of the world; however, it should prove useful to those less experienced practitioners or the trusts and estates lawyers who are members of the Elder Law Section (like myself). The special needs trust (SNT) world is comprised of two varieties: first party and third party. The fundamental difference between the two is that a first party SNT is comprised of the disabled person's assets and must contain a payback-to-Medicaid clause while a third party SNT is comprised of assets other than those of the disabled person and there is *no* payback requirement to Medicaid for government assistance rendered to the disabled person.

The topic of how to draft a third party special needs trust with all the various alternatives and options has intrigued me. This analysis, the first of two parts, is not *the* map, but simply *a* map. An article discussing all the possible permutations would not be an article, but a book.

## The tale:

We had the good fortune to have a nice couple engage us to help them with long-term care planning: Mom and Dad. They were two great people with two great kids, and it was the only marriage for both. At our first meeting, Dad told us he had cancer and thought he had about six months to one year to live. Mom had multiple sclerosis and would need a skilled nursing facility (SNF) at some point in time, but we could not be certain when. Without Dad's assistance, however, she would need an assisted living facility (ALF). Two weeks after the first meeting, at about the same time we received a signed engagement letter and retainer, we got the bad news that Dad had a few weeks, maybe a month left. That clarified and simplified the planning from the "who is going to die first perspective," but was of no help from the "what do we do for Mom, who will definitely need a SNF, but who knows when" perspective. These were folks of somewhat modest means, not Medicaid millionaires, and paying for the ALF would be within the budget, but paying for the SNF would break the bank.

It was apparent that Dad would die before Mom; therefore, we recommended they transfer all assets to Dad and have Dad create under his will several testamentary trusts for the benefit of Mom. A testamentary trust from which Mom might receive distributions was an exception to the general rule that a husband and wife cannot create a trust for either of them and have it considered unavailable. Therefore, if drafted properly, the testamentary trust would not be a countable asset for determining Mom's Institutional Care Program (ICP) eligibility *if* she needed a SNF. See 1640.0576.03, .07 and .08 of the ESS Manual.

Tips & Tales

A. Stephen Kotler

The general disposition of Dad's will would have all of Dad's assets pass in trust for the benefit of Mom and her descendants. The trust would be a third party SNT designed to be unavailable to Mom from a Medicaid perspective. However, if Mom made a valid election to take the elective share, as described in Chapter 732, Florida Statutes, notwithstanding the prior disposition of the estate in trust, the disposition to the trust would be reduced by the smallest pecuniary amount, if any, which when held in trust under the provisions of a "qualifying special needs trust," as that term is used in Section 732.2025(8), Florida Statutes (QSNT), would fully satisfy the elective share amount after taking into account all other assets or interests in assets that apply toward satisfaction of the elective share and distributed to a second trust under the will that would qualify as a QSNT.

So far, so good. There was a testamentary QSNT so it could not be said that Mom had not taken all the benefits to which she was entitled or had made a transfer of assets for less than fair value. There was also a testamentary trust for the remaining assets which, as set forth above, could be non-countable for ICP eligibility purposes.

We could make Mom eligible for ICP just as soon as Dad was gone. That single fact relieved Dad, who had literally been keeping himself alive to take care of Mom, of much guilt about his own predicament.

The dilemma was how to draft the testamentary trusts under Dad's will. There were a few options that would result in the testamentary trust not being a countable asset of Mom's: 1) a strict SNT (without or with discretion to make distributions beyond Mom's special needs); 2) a pure discretionary trust; or 3) a trust containing a trigger that flipped to 1) or 2). The QSNT could have only Mom as a beneficiary during Mom's life, while the non-QSNT could have other beneficiaries, such as the children, during Mom's life. Either option 1) or 2) could qualify as a QSNT.

The remainder of this installment concerns the drafting of the non-QSNT, which in Dad's case included his descendants as permissible beneficiaries. The strict SNT versus discretionary language battle is equally present in the QSNT.

In our case, a third party SNT with restrictive language was unnecessary, contrary to Dad's intent (if ICP eligibility was not the current goal) and might never be needed (if Mom never made it to the SNF). The

*continued, next page*

other option, a pure discretionary trust, did not work for Mom and Dad either because that would require a disinterested trustee, as explained below. If Mom were not in a special needs situation, she would have been the outright beneficiary to all of Dad's property, or if a credit shelter trust was created with her as a beneficiary, distributions would most likely be for an ascertainable standard, and Mom would have had a testamentary special power of appointment (SPOA). Ascertainable standard distribution language would work best for Mom and Dad, but of course, such distribution provisions would render the trust countable for ICP. Why couldn't Dad's testamentary trust be that way now and then flip to a SNT when some trigger was hit? Well, it should be able to.

Another reason we wanted a trust with an ascertainable standard was that Dad and Mom wanted a child to be the trustee of the trust, if possible. If the remainder beneficiary, child, as trustee, had discretion to make distributions to the income beneficiary, Mom, not pursuant to an ascertainable standard, we determined the trustee would be making a gift to Mom each time the trustee exercised discretion to make a distribution to Mom because that distribution would reduce the trustee's vested remainder interest. This should be the case in spite of the fact that Mom could exercise her testamentary SPOA (that we also wanted her to have) and disinherit the trustee/beneficiary. Yes, the "gift" would qualify for the annual exclusion, and through gift-splitting, the first $26,000 (if the trustee was married) would be covered by the annual exclusion. However, that was deemed to be too restrictive. Distributions by an interested trustee pursuant to an ascertainable standard set forth in the trust instrument would solve the taxable gift problem. Further, if we had ascertainable standard distributions, rather than pure discretionary, then the trustee/child could also be a permissible beneficiary, and such ability to distribute to one's self would not be considered a general power of appointment causing the trust assets to be includable in the trustee's estate for estate tax purposes should the trustee die before Mom.

Now that the case had been made for ascertainable distribution language until Mom needed ICP, what about giving her the testamentary SPOA? The manual says

> If the individual does not have authority to revoke or direct use of the trust, it is not considered an asset to him (1640.0576.03 of ESS Manual).

The POMS says

> If an individual does not have the legal authority to revoke the trust or direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the individual's resource for SSI purposes. The revocability of a trust and the ability to direct the use of the trust's principal depends on the terms of the trust agreement and/or on state law. If a trust is irrevocable by its terms and under state law and cannot be used by an individual for support and maintenance, it is not a resource (POMS SI 01120.200D).

An SPOA with a class of permissible appointees that could be as broad as "any person or entity other than the powerholder, the powerholder's estate, the creditors of the powerholder or the creditors of the powerholder's estate" would not fall into the language quoted above, "directing the trust's assets for his/her own support and maintenance." See *Spetz*, 737 N.Y.S.2d 524 and *Verdow*, 209 F.R.D. 309 for analogous support.

The non-QSNT was just a garden variety testamentary credit shelter trust for the benefit of Mom and her descendants with a child as trustee. Distributions of income and principal could be made to both Mom and her descendants pursuant to an ascertainable standard, and at Mom's death the remainder would pass pursuant to Mom's testamentary SPOA. In lieu of appointment, the remainder would pass to Mom's descendants, per stirpes, in further trust. Mom's two children were in high liability exposure industries, and a third party spendthrift trust was the perfect vehicle to protect the children's inheritance, if any, from bankruptcy, divorce and further transfer tax. Finally, during any period that Mom was eligible to receive or was receiving any government benefits or assistance, distributions to Mom of income or principal would only be made in accordance with the provisions of the SNT.

But wait, there is more. Part two will tackle the various options for the SNT distribution language, the trustee options available under the various alternatives and why Dad chose the course he took.

***A. Stephen Kotler*** *is a board certified wills, trusts and estates lawyer with Wollman Gehrke & Solomon PA in Naples. 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**

*Wintter & Assoc. v. Kanowsky*, 992 So. 2d 434 (Fla. 4th D.C.A. 2008).
In submitting trustee's final accounting, trustee of a testamentary trust included extraordinary attorney's fees and costs in connection with work to clear title to a parcel of property devised to him through testator's will. Beneficiary objected to the fees. At the close of an evidentiary hearing on the objection, beneficiary requested attorney's fees against trustee and his attorney. The trial court determined that trustee was not entitled to the extraordinary fees and costs and ordered trustee and the law firm to repay them. It also determined that beneficiary was entitled to attorney's fees and costs in pursuing her objection from trustee and the law firm.

In beneficiary's first document filed, she did not request attorney's fees from trustee and his attorney until her written closing argument. She did not request payment from the estate.

A claim for attorney's fees, whether based on statute or contract, must be pled. Failure to do so constitutes a waiver of the claim. Due process and prevention of surprise require notice. Whether fees are requested may play a role in deciding to pursue a claim. The exception to the rule, where a party has notice that an opponent claims entitlement to attorney's fees and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, did not apply. Reversed.

*Brown v. Miller*, 2 So.3d 321 (Fla. 5th D.C.A. 2008).
Wife set up a trust, and her husband was trustee and lifetime beneficiary. Upon wife's death, her trust assets were distributed into, *inter alia*, three separate sub-trusts. Trust A-2 authorized transfers from the trust to "[wife's] husband."

Husband executed his power of appointment in a codicil so that on death the Trust A-2 balance would be distributed to a foundation. Between his wife's death and 2002, husband as trustee transferred sums from Trust A-2 to himself and others. In 2002, husband as trustee transferred the remaining balance (approximately $7 million) to another trust.

Husband died in April 2004. His son then sought to set aside the last trust transfer and invalidate his father's exercise of his power of appointment. If successful, under his mother's trust, the $7 million would be held for the son's benefit. The trial court agreed with the son.

Husband's trust was a revocable trust, and a conveyance to the trust was equivalent to a transfer to husband. Husband maintained 100 percent control over husband's trust assets and had the right to end the trust at any time and regain absolute ownership over the trust property. In construing a trust, the rule is to give effect to the grantor's intent, if possible. In authorizing transfers to her husband, wife intended to permit transfers to an entity over which her husband retained complete control and the right to absolute ownership. The transfer was not prohibited by trust language that "[t]he Trustee shall also pay to my husband such additional amounts of principal from Trust 'A-2' as he may from time to time request." The parties agree that husband made transfers prior to the large transfer. Second, the "from time to time" language was not intended by wife to serve as a limitation on husband's right to withdraw principal. To accept the son's argument would mean that it would have been improper for husband to request payment of all of the Trust A-2 assets at one time, but proper if he had requested payment of all but $10. Reversed.

*Brundage v. Bank of America*, 996 So.2d 877 (Fla. 5th D.C.A. 2008).
Settlor executed a revocable trust in 1992. If her husband predeceased her, the residue went to her niece (appellee) with a specific distribution of stock to other nephews and nieces (appellants) and a godson. The stock split in 1995, and settlor amended her trust to account for the split. The stock split again in 1998, but settlor did not amend her trust.

After husband died in 2001, settlor and her attorney planned to transfer the assets of the trust to a partnership to save taxes. Settlor told the attorney to retain in the trust the specific distributions upon her death. The attorney was unaware of the stock split in 1998. Settlor resigned as trustee. Appellee and a bank became co-trustees, and they transferred the stock to the partnerships, except for the specific distributions. Settlor allegedly joined and consented to the transfers. Settlor died in 2003. The trustees distributed the shares per the trust, and the niece became owner of the partnerships holding the transferred shares.

Appellants requested double the amount of stock in the trust pursuant to the 1998 stock split and alleged a breach of fiduciary duty since the niece was the beneficiary of the stock transfer in violation of the trust.

A doctor who examined settlor in late 2001 found she was not competent to manage her affairs. Within days of the trial, the trustees filed an answer to the complaint with a general denial and affirmatively alleged that settlor consented to the transfers. The appellants filed a reply that settlor was not competent to consent. The trial court excluded evidence of settlor's competency because appellants had not timely raised it.

Where a will devises stock and the stock splits, a beneficiary is entitled to the shares after the split that occurs between the date of execution and demise because the split is a mere change in form and not in substance. Where the stock devise made in the will is no longer in the estate at the time of testator's death, the gift adeems. For securities, Section 737.622, Florida Statutes, controls (repealed and reenacted by Section 736.1107, Florida Statutes): gifts of

securities are limited to securities owned by the trust at death. Appellants cannot claim a greater share of stock since the trust did not own more shares at death. Intent of testator is irrelevant since the statute creates a clear rule of ademption where the trust does not hold the securities at death.

Appellants allege breach of fiduciary duty by self-dealing. As settlor of her own revocable trust of which she was the sole beneficiary until death, she reserved the power to change beneficiaries or revoke her trust at any time. Thus, the trustees did not owe the contingent beneficiaries a duty during settlor's lifetime. However, once the interest of the contingent beneficiary vests upon the death of settlor, beneficiary may sue for breach of a trustee's duty owed to the settlor/beneficiary breached during settlor's life and which affects the interest of the vested beneficiary.

If settlor did not consent to the transactions, then appellants would introduce evidence the trustees may have violated the trust. An incapacitated settlor cannot consent to action regarding the revocable trust. Thus, the issue of settlor's capacity was crucial and was timely filed in appellant's reply. Affirmed in part, reversed in part and remanded.

*Higgs v. Warrick*, 994 So.2d 492 (Fla. 3d D.C.A. 2008).
Homeowner created a trust using his single family residence as the res. Homeowner continued to reside in the home. Homeowner as trustee received a homestead exemption on the property. Thereafter, homeowner transferred the trust to his heirs for a 99-year lease on the property. Property appraiser denied the homestead exemption.

There is a homestead exemption to every person who has the legal or beneficial title in equity to real property and who resides thereon and in good faith makes the same his or her permanent residence. Lessees owning the leasehold interest in a bona fide lease having an original term of 98 years or more in a residential parcel are deemed to have legal or beneficial and equitable title to said property. Thus, a 98-year-plus lessee of a residential parcel permanently occupied as a residence qualifies for a homestead exemption. Affirmed.

# Fair Hearings Reported

**by Nicholas J. Weilhammer**

*Petitioner v. Florida Department of Children & Families,* Appeal No. 08F-01724 (District 23 Hillsborough, Unit 883CF, *Petitioner v. Florida Department of Children & Families,* Appeal No. 08F-01724 (District 23 Hillsborough, Unit 883CF, May 2, 2008).

Petitioner had applied for food stamps in the past. Petitioner's representative applied for ICP eligibility for November 2007. Representative listed the income as Social Security and "Union Funds or Pension Benefits" based on past conversation with DCF. Neither petitioner's representative nor DCF knew of any source of the alleged union or pension funds allegedly received by petitioner. DCF requested petitioner to verify the alleged pension income and alleged bank account. DCF agreed that petitioner may not have had a bank account and eliminated this requirement.

DCF denied petitioner's application based on the failure to provide proof of this alleged pension income. DCF's records did not reflect any report of possible pension, public retirement or union income prior to a Mar. 22, 2006, application for benefits.

The evidence did not establish that petitioner had an actual pension income distinct from the SSDI income. Thus, DCF's request to provide verification of this alleged pension income was not valid. It was not correct to deny the application based on the failure to follow through with this specific request for verification. Appeal partially granted.

*Petitioner v. Florida Department of Children & Families*, Appeal No. 08F-00982 (District 04 Duval, Unit: 88369, May 7, 2008).

Petitioner appealed timely notification of increase in monthly patient responsibility for ICP from $11 to $838 effective June 1, 2007. Petitioner's spouse was admitted to the same nursing home; thus, he was no longer eligible for the community spousal income allowance. Petitioner's spousal diverted income was removed from her budget effective June 2007, increasing her monthly patient responsibility from $11 to $838.

DCF believed that notice was sent to the nursing home, petitioner at the nursing home and to petitioner's daughter. However, the notice intended for the daughter was addressed to a representative of the nursing home who used the daughter's mailing address.

Florida Administrative Code 65-2.046 sets forth 90 days to request a hearing, but this rule does not apply in the absence of a notice informing of hearing rights and the time limits to appeal.

Petitioner's authorized representative is her daughter. Therefore, her daughter should have been the individual to receive the notice. The daughter did not receive the May 2007 notice informing of petitioner's patient responsibility increase effective June 2007. DCF must give advance and adequate notice when the patient responsibility increases. DCF's action of May 2007 to increase petitioner's patient responsibility, without notice, was reversed. The patient responsibility remained $11 through December 2007. Appeal granted.

*Petitioner v. Florida Department of Children & Families*, Appeal No. 08N-00046 (District and Unit information redacted, May 13, 2008).
The facility notified petitioner on Mar. 5, 2008, that he was to be discharged

*continued, next page*

by Apr. 5, 2008. The same day, the facility Baker-acted petitioner to the hospital. Petitioner now lives in an ALF.

An expert witness from the facility testified that the day before the notice, petitioner was inebriated and had acted in a threatening manner toward his roommate. The psychiatrist determined that petitioner was a threat to others at the facility, and petitioner had a history of failed treatment and therapy for alcohol abuse. A resident-witness said she was threatened by petitioner who said he was "going to rip her head off," so she called the police.

Petitioner's representative disputed the way the facility transferred petitioner, arguing the facility misrepresented its intention by first issuing a 30-day notice and then transferring petitioner through the emergency process. Petitioner's representative argued that the hospital was not an appropriate location for discharge.

Petitioner was properly discharged by respondent based on the discharge rules because the "health of individuals in the facility would otherwise be endangered" and "safety of other individuals in the facility is endangered … ."

*Petitioner v. Florida Department of Children & Families*, Appeal No. 08F-01737 (District 23 Pinellas, Unit 88605, May 21, 2008).

DCF increased petitioner's patient responsibility from $336 to $455 effective April 2008. Husband disputed the amount of the patient responsibility and has no resources other than his car. In addition to his shelter costs, husband had expenses of Medicare Part B payments, prescription co-payments, car insurance, gas and personal care. He also paid for petitioner's expenses such as haircuts, television, liquid thickener, wheelchair parts, telephone message service, cosmetics, clothes and entertainment.

Petitioner had additional medical expenses. However, petitioner did not verify any medical expenses paid by her husband. Since the expenses were not verified, no deduction could be given to reduce petitioner's patient responsibility.

Husband's actual shelter costs did not exceed the minimum maintenance income allowance in any year. The income allowance may be increased if the community spouse can establish that he or she has additional needs that are "exceptional circumstances resulting in significant financial duress." First, the expense must be an exceptional circumstance, and second, the expense must create significant financial duress. Black's Law Dictionary defines exceptional circumstance as conditions that are "out of the ordinary course of events; unusual or extraordinary circumstances … ." Expenses that are expected and are incurred in the normal course of everyday living are not exceptional circumstances. Expected everyday expenses of living, such as homeownership and medical expenses, are not necessarily exceptional, extraordinary, uncommon or sudden in nature. Petitioner's husband had normal living expenses and expenses that were incurred for shelter and everyday medical expenses. Husband did not demonstrate any exceptional expenses or circumstances that would indicate any additional deduction from the patient responsibility or additional diversion to him. Appeal denied.

*Petitioner v. Florida Department of Children & Families*, Appeal No. 08F-01424 (District 04 Duval, Unit 88369, May 22, 2008).

On June 4, 2007, the facility applied for ICP benefits for petitioner, whose monthly income was above ICP limits. The first notification from DCF to petitioner's son regarding the need for an income trust was Aug. 22, 2007. Petitioner's income trust was not funded for the months of June 2007, July 2007 and September 2007. DCF denied ICP for these months due to excess income.

DCF did not follow up on the income amount or who the designated representative was until after the 45-day processing time had elapsed. The application was not completed until five months after the application was made. A requirement of eligibility is that the trust be funded for each month that ICP eligibility is needed. It is also a requirement that DCF advise the individual that he or she cannot qualify for ICP for any month in which the income is not placed in an executed income trust account in the same month in which the income is received.

DCF did not advise the son of the need for QIT or the funding requirement until after this time standard had elapsed. Once DCF advised of the need to set up and fund the trust in August 2007, the son funded the trust in August 2007, failed to fund it for September 2007 and funded it ongoing beginning October 2007. DCF erred in not following its policy, and petitioner was considered ICP eligible for June and July 2007. However, because the son was made aware of the funding requirement in August 2007 and failed to fund the trust for September 2007, petitioner was ineligible for ICP Medicaid for September 2007. Appeal granted in part and denied in part.

*Petitioner v. Florida Department of Children & Families*, Appeal No. 08F-01556 (District 3 Alachua, Unit 88325, May 27, 2008).

In February 2007, petitioner was admitted to a skilled nursing facility and was diagnosed with dementia. In November 2007, petitioner filed an application for ICP. In February 2008, CARES withheld petitioner's level of care because of concerns with incidents of aggression involving other patients. DCF denied the application in February 2008 because CARES withheld his level of care, and because of excess assets (later rescinded). However, CARES determined that petitioner met the level of care from at least Dec. 1, 2007. There was no medical evidence or authority presented that established that petitioner did not need skilled nursing care. There was no authority presented that would allow CARES to withhold a level of care when the individual otherwise met the legal requirements of a level of care. Based on these findings, it was determined that the level of care was inappropriately withheld. Appeal granted.

** * * Fair Hearings Reported order form, page 28 * * **

**The Florida Bar**
**651 E. Jefferson Street**
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# FAIR HEARINGS REPORTED

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

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

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## Fair Hearings Reported
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