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FOREWORD

THE ABA AND WAKE FOREST LAW REVIEW: PARTNERS IN SCHOLARSHIP

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"Liberty and justice for all" is more than a hollow quote to the American Bar Association (ABA). Whether fighting for the survival of the Legal Services Corporation or addressing the needs of moderate-income Americans, the ABA has long been the leader in seeking access to legal services for all citizens.

Recognizing that America is aging and many older adults have limited incomes, in 1996 the leadership of the ABA turned its attention to the needs of this growing demographic segment.[1] Under the auspices of its Coalition for Justice, ably chaired by Philip S. Anderson of Arkansas, a national gathering of state and local bar leaders was convened.[2]

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1. Of course, this is not the first time the ABA has worked on issues of senior citizens. For example, in 1978, the ABA established the Commission of the Legal Problems of the Elderly which serves as a resource center on a full range of elder law issues.

2. The ABA's Coalition for Justice helps to coordinate the Justice Initiatives Programs, encouraging access, raising public awareness, and developing public/bar partnerships with national organizations and federal agencies on justice system issues. Coalition members include not only bar leaders, but also officials from public interest, business, media, and senior citizens organizations. The Coalition's goal is to help restore

The Fifth Annual ABA Leadership Forum, held in Atlanta, included representatives from forty-three states. Conference Chair Doreen D. Dodson of St. Louis presented an extraordinarily diverse series of panels and workshops. They covered everything from group and prepaid legal services, to hotlines, and even electronic kiosks available in large courthouses to answer questions from the public. Speakers described a variety of programs using mediation, consumer education, and law school clinics to provide legal services.

Participating in the ABA's efforts was the American Association of Retired Persons (AARP). General Counsel Wayne Moore described a program being launched by the AARP to provide low-cost legal services to the elderly. Horace B. Deets, the AARP's Executive Director provided a glimpse into the future in an eloquent address on "The Changing Legal Needs of the Next Generation of Elderly."

In planning this conference, Philip Anderson envisioned more than a series of nuts-and-bolts workshops.[3] He wanted the Leadership Forum to serve as the spark for scholarship. We are pleased that he decided to leverage this "think tank" for bar leaders, by inviting our law review to participate. Along with our Dean Robert K. Walsh, the decision was made early on in planning the conference to solicit a broad range of articles on legal issues of the elderly.[4]

Working with the staff of the ABA Justice Initiatives Program, we issued a call for papers to academics and practitioners. We received a number of excellent proposals from the United States and Canada and selected half of them. Prior to the Leadership Forum, speakers were provided final drafts of those papers that had been selected. We are pleased to share these with you.

One of the biggest players in addressing the legal needs of the elderly in the coming years is likely to be the American Association of Retired Persons. The AARP has launched an innovative program described in Wayne Moore and Monica Kolasa's article, *AARP's Legal Services Network: Expanding Legal Service to the Middle Class*. Moore, the general counsel for the AARP, describes an ambitious project to increase the availability of legal services to AARP members.

Attorneys who join the AARP Legal Services Network agree to provide discounted legal services. Free half-hour phone consultations and flat-fee, low-cost wills and advance planning documents are available to the AARP members. For an annual fee, the attorneys are included in Yellow Page listings under the AARP's name and logo. They also receive training materials and have access to on-line legal re-

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public confidence in the justice system by developing a broad-based network of national improvements at the state and local level.

3. Philip Anderson is also the President-Elect Nominee of the ABA, and will become President Elect in August 1997.

4. Readers interested in elder law scholarship are referred to the *NAELA Quarterly: The Journal of the National Academy of Elder Law Attorneys*, and *The Elder Law Journal*, from the College of Law of the University of Illinois at Urbana-Champaign.

sources and a network of other participating attorneys. Thus far, the AARP Legal Services Network has only begun operating in four states.[5]

When an organization with almost 32 million members enters a market, especially a competitive one such as the practice of law, it has clout. One of the premises of the AARP program is that it will channel numbers of AARP members to attorneys. Whether this translates into more and better legal services for the elderly remains to be seen. Wayne Moore and Monica Kolasa suggest in this article that the AARP plan will not dominate legal markets and cut into the practices of non-participating attorneys.

Not every attorney will see the AARP program as a golden opportunity. Well-established, experienced attorneys may not need to develop the business and can probably continue to demand higher fees than the plan allows. Other attorneys may find that the increase in business does not offset the annual cost to join the network. Another cost factor is the "loss leaders" the attorneys must offer, such as free phone consultations, $50 simple wills, and $35 durable powers of attorney. With payment set this low, some attorneys may be tempted to do a less than thorough job for the client in order to reduce their losses. The obligation to reduce hourly rates by 20% for AARP members will create another tension, and may cause participating attorneys to artificially inflate their hourly rates to make up for the loss.

Attorney membership in the AARP Network is likely to indicate to the public AARP endorsement of the attorney, despite the fact that the standards for participating are fairly minimal. State certification of specialists and the only ABA-approved elder law certification, by the National Elder Law Foundation, offer more assurances that an attorney has expertise in an area of the law. However, the AARP plan does provide for client feedback to screen out inadequate attorneys, and attorneys must remain in good standing with their state bar.

Phone consultations may increase the risk of malpractice because, frequently, inadequate information may be conveyed when people are not face-to-face. Mental capacity may not be accurately assessed over the phone. Another concern is the likelihood of undue influence by family members where the attorney cannot meet privately with the older person. However, these concerns may be outweighed by the convenience of phone consultations for the elderly who have mobility problems due to ill health or lack of transportation.

As it is being implemented, the AARP Legal Services Network has been open to suggestions from the National Academy of Elder Law Attorneys, the largest organization of attorneys who serve the elderly.[6]

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5. Parts of New York, Michigan, Illinois and Wisconsin. Mark Hansen, *The Legal World According to AARP*, A.B.A. J., Mar. 1997, at 34.

6. NAELA has over 3,000 members, mostly private practitioners, in all 50 states. In 1996, NAELA established a committee under the leadership of Allan D. Bogutz, founder and former president of NAELA. A limited poll of NAELA members elicited

Undoubtedly, during the next few years many people will be watching the evolution of the AARP program. The Wake Forest Law Review is pleased to include this article by Wayne Moore and Monica Kolasa about it.

Professor Mary Helen McNeal's article expresses some concerns about the "unbundling" of legal services, one aspect of plans such as the AARP Legal Services Network. As legal tasks are broken down, or unbundled into discrete parts, what are the ethical and practical problems for the attorney? Is the duty to zealously and competently represent a client compromised when the attorney is only permitted to handle a portion of the problem?

Often the legal issues of the elderly are very complex, involving medical issues, government programs, and subtle problems of capacity and conflicts of interest. Elder lawyers, like family law attorneys, must deal with their clients in a holistic fashion. To expect them to adequately represent their clients, by teasing loose just a piece of the problem to address, may not serve the best interests of elderly clients. Professor McNeal examines, however, whether attorneys are being self-serving and paternalistic when they refuse to handle just a portion of a legal problem.

Professor McNeal, who is the Clinical Director and an Assistant Professor at the University of Montana School of Law, offers a meticulous analysis of the ethical issues against the backdrop of a hypothetical elderly client's case. Bridging the worlds of practitioners and academics, the article is a must-read for bar leaders seeking to improve access to legal services for moderate-income individuals.

Increasing use of paralegals and technology is another strategy to provide legal services to the elderly. *Wisconsin's ElderLinks Initiative: Using Technology to Provide Legal Services to Older Persons* describes one such effort. Mark E. Doremus, Ph.D., is a law student who has worked closely with this resourceful program in Wisconsin. Readers may not be aware that Madison, Wisconsin has long had some of the most effective and well-established elder law programs in the country. Thus, it is no surprise that Wisconsin should spawn such a creative undertaking, using the Internet to improve access to services.

ElderLinks is still in the pilot stage. Wisconsin anticipates that it will include a web site containing resource materials.[7] Benefit specialist paralegals will have access to back-up attorneys on-line. Electronic mail will allow the specialists to discuss issues among themselves. Computers will be available at public sites, such as schools and county aging centers.

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some concerns about the AARP Legal Services Network. As the public relations chair and a member of NAELA's Board of Directors, Mr. Bogutz has communicated these concerns about the development of AARP's program to Wayne Moore. Some of these comments are from the correspondence between the AARP and NAELA.

7. Currently, the largest on-line elder law resource is the Kansas Elder Law Network, at http://www.ink.org/public/keln/.

Professors Edward J. Larson and Thomas A. Eaton take a critical look at another approach to the provision of legal information: a federal statute mandating that businesses provide legal information to customers. In *The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act*, they examine the effectiveness of a law requiring most health care providers to give patients written information about state laws on health care directives. The Patient Self-Determination Act (PSDA) assumes that if people learn about their right to refuse life-sustaining medical treatment, they will take the next step and execute these advance directive documents.

Though most people favor the use of advance medical directives such as living wills, the majority of people do not sign them. Larson and Eaton conclude that the PSDA has not been very effective in getting people to execute advance medical directives. Like many elder law issues, this topic bridges the medical and legal worlds. Larson and Eaton present extensive research from the medical literature, examining why the PSDA is not accomplishing what it was intended to accomplish and how states can amend their laws to address this problem.

The authors cite studies finding that advance directives are only honored when the attending physicians are in agreement with the patients' expressed wishes. Larson and Eaton suggest that states adopt statutory penalties and allow punitive damages for the knowing or reckless disregard of an advance directive. They further recommend that providers not be permitted to recover the cost of care from the patient or the patient's estate where there was an advance directive.[8]

The admission of a relative into a nursing home is often the catalyst for people to consult an elder law attorney. Decisions must be made about medical care, the elderly person's finances, insurance coverage, and a range of other legal matters. Not the least of these concerns is how to pay for the nursing home care, which can range from $40,000 to $80,000 per year. Families are shocked at how quickly their relative's savings are depleted by privately paying for nursing home care. Sharing the costs between the adult children is not a long-term solution. This is especially true when adult children have the expenses of their own children and are saving for retirement and children's college educations. Many families turn to elder law attorneys for advice on "Medicaid planning," similar to tax planning and estate planning.[9]

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8. The only reported decision is to the contrary, unfortunately. In 1996, the North Carolina Supreme Court allowed a nursing home to recover for life-prolonging treatment provided despite the patient having a living will and despite the objections of his wife and adult children. This decision—*First Healthcare Corp. v. Rettinger*, 342 N.C. 886, 467 S.E.2d 243 (1996)—has caused concern among elder law attorneys. It is covered in a student piece in this issue.

9. Much has been written about the propriety of "planning to be poor" to obtain Medicaid assistance. Two resources are particularly helpful on this issue: Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J.L. & POL. 195 (1996), and an excellent collection of articles in the Fall 1996 issue of *Gener-*

Should an incompetent person, whose rights are exercised by a guardian, have the same right to conduct Medicaid planning as a competent individual? Or, applying the theme of the ABA's Annual Leadership Conference, does an incompetent elderly person have the same access to justice if he or she is denied the right to handle her assets as freely as a competent person?

Hal Fliegelman and Debora C. Fliegelman examine whether guardians should be permitted to do Medicaid planning for their wards, to preserve the ward's assets and obtain government coverage for long-term care costs.[10] Some Medicaid planning techniques—like tax planning techniques—involve the gifting or transfer of assets, usually to family members. Since the Fliegelmans' article was proposed, an important development has occurred which fundamentally changes the ability of an individual, whether or not competent, to transfer assets to become Medicaid eligible. Signed into law in August of 1996 and effective on January 1, 1997, federal law makes certain asset transfers a federal crime.[11] Known to elder law attorneys as "Section 217" this law is a confusing provision that could chill even those family gifts that are unrelated to Medicaid planning.[12]

As we go to press, a bill is pending in Congress to repeal this criminal provision. House Bill 216 was introduced January 7, 1997 by U.S. Representative Steven C. LaTourette (R-OH). About fifty cosponsors in the House and Senate have signed on to the bill.[13] Thus, it is important that practitioners monitor developments in Congress before proceeding with asset transfers for competent clients or by the guardians of incompetent persons.

A. Frank Johns' article will be an eye-opener for many attorneys. An expert in the field of guardianship law, Johns combines his experience serving as a fiduciary and representing fiduciaries with an exhaustive examination of ethical rules. In *Fickett's Thicket: The Lawyer's Expanding Fiduciary and Ethical Boundaries When Serving Older Americans of Moderate Wealth*, he meticulously lays out the development of standards for attorney liability to individuals *not* in privity with the attorney. His article will serve as a resource to attorneys han-

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ations: Journal of the American Society on Aging, Legacy and Aging: Personal and Societal Choices.

10. The Fliegelmans, who are father and daughter, offer the combined perspectives of a practitioner (Hal Fliegelman) and an academic (Debora C. Fliegelman), especially useful in a rapidly evolving field like elder law.

11. 42 U.S.C.S. § 1320a-7b(a) (Law. Co-op. 1993 & Supp. 1996).

12. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 217, 110 Stat. 1936, 2008-09.

13. Among the organizations urging repeal of the criminalization provision are the American Bar Association, the National Academy of Elder Law Attorneys (NAELA), the AARP, the Alzheimer's Association, the National Senior Citizens' Law Center, the Leadership Council of Aging Organizations, Consumers Union, Families USA, the National Citizen's Coalition for Nursing Home Reform, the American Public Welfare Association, the Gray Panthers, the American Association of Home Care Providers, and the National Association of Area Agencies on Aging.

dling elder law matters, where family interests are sometimes conflicting, often concurrent, and usually complex.

When an attorney drafts a will which mistakenly omits a bequest, does the intended beneficiary have a claim against that attorney? The trend in the law is to allow such a claim. What is an attorney's duty if the attorney knows or should know that her client/trustee is acting against the interests of the trust beneficiaries? If the attorney fails to counsel the client about Medicaid estate planning options, will heirs have a claim against the attorney after the client's assets are depleted by long-term care costs? Frank Johns studies these issues and others from several angles.

The picture of disgruntled heirs is the perfect segue to another thought-provoking article, this one by Professor Susan Gary of the University of Oregon. *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance* starts with the proposition that mediation is uniquely suited for many elder law disputes, which often involve family relationships. The article describes experiments in several jurisdictions to use mediation in these cases, which will be helpful information to the estate planning and elder law bar. Access to legal services must include access to appropriate dispute resolution mechanisms.

Professor Gary carefully reviews the underlying causes of most litigation in the guardianship and probate contexts, such as resentment by caregiver children, tension between children and an elder's new spouse, suspicions of undue influence (especially if mental capacity is at issue), eccentric behaviors, sibling rivalry, and, of course, greed.[14] As between the elderly and their children, usually the children honestly believe they are doing what is "best for" their parents.[15] Gary concludes that mediation has been underutilized in these cases, but that certain cautions are in order.

After the ABA's call for papers was issued and these papers selected, the law review editor accepted two student comments for inclusion in this issue. Since one of them involves a case that I worked on, I offer these remarks in counterpoint to Jon Spargur's piece, First Healthcare Corp. v. Rettinger: *Are Living Wills Dead in North Carolina*?[16] My comments also touch on some of the issues addressed by

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14. *See* Lawrence A. Frolik, *The Biological Roots of the Undue Influence Doctrine: What's Love Got to Do With It?*, 57 U. PITT. L. REV. 841 (1996), for a novel perspective on this area of the law.

15. In the Clinic for the Elderly, we have filed suits on behalf of clients whose adult children had taken control over our clients' property or income. When the parties agreed to mediation, there were tearful and emotional moments during the mediation. There is no doubt that the process was more humane than continued litigation would have been. However, it did not always lead immediately to a restored relationship.

16. The National Academy of Elder Law Attorneys (NAELA) filed an amicus curiae brief, of which I was the primary author, with the North Carolina Supreme Court in the *Rettinger* case. Also on the brief were A. Frank Johns of Greensboro and B. Bailey Liipfert, III, of Winston-Salem.

Professors Larson and Eaton as to the effectiveness of advance medical directives.

Spargur tries to make sense out of the North Carolina Supreme Court's opinion.[17] The opinion consists of one sentence adopting a brief dissent from the court of appeals. Essentially, it holds that since the formalities of the living will statute had not been complied with, the nursing home patient's widow was liable for the costs of care provided against her wishes and contrary to her husband's living will. The lack of compliance had been in not obtaining the signature of two physicians to withhold treatment. The attending physician was unwilling to terminate life support without first getting a court order, although at one point he did sign an order to terminate the treatment and did not communicate this to the nursing home.[18]

Rettinger was a case of first impression in the country. It would answer, to a large degree, whether statutory living wills were of any value in disputing a bill for unwanted medical treatment.[19] Could families, grieving over the lingering death of a relative, be forced to go to court for "permission" to end the treatment? And after this expense and publicity, if they won, would they be forced to pay for the damages that accrued while the patient's rights had been ignored? Because of the importance of this issue, two national organizations filed amicus curiae briefs with the Court: Choice in Dying, Inc. (which pioneered the development of living wills) and the National Academy of Elder Law Attorneys.[20]

What happened to Rettinger was not, as the Comment indicates, "erring on the side of life." In my opinion it was an error—an error in terms of legal rules and medical ethics that were well-established by 1991.[21] Not one of the indicia for court involvement was present; there was no ambiguity about Mr. Rettinger's wishes,[22] his family was in agreement with his wishes, and it was undisputed that he was terminally ill.[23] The nursing home, under the supreme court decision, has

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17. 342 N.C. 886, 467 S.E.2d 243 (1996).

18. *See* Record on Appeal at 17, Order of District Court Judge William Reingold, Finding of Fact No. 17.

19. See *infra* the article by Professors Larson and Eaton regarding the pervasive failure by physicians to honor advance directives.

20. NAELA, 1604 Country Club Rd., Tucson, AZ 85716; Choice in Dying, Inc., 200 Varick St., N.Y., N.Y. 10014-4810.

21. *See, e.g.*, National Ctr. for State Courts, *Guidelines for State Court Decision Making in Authorizing or Withholding Life-Sustaining Medical Treatment* (1991), and The Hastings Ctr., *Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying* (1987).

22. By any standard, there was sufficient evidence of Mr. Rettinger's wishes. He had done the most he could do by executing a statutory living will. Learning that he had Parkinson's disease, he had told his wife he did not want to die a lingering death. Record on Appeal at 17. In the *Elbaum* case, by contrast, Mrs. Elbaum had no living will or medical directive.

23. Although, as Spargur points out, the facility would not agree to a No-Code-Blue form that called for removal of tube-feeding, there was a No-Code-Blue form for all other

been financially rewarded for taking an unreasonable position, and Mr. Rettinger's family had to pay for their error.

Lawrence Rettinger, an 80-year-old retired engineer, spent the last months of his life incontinent, incompetent, and in a fetal position. When he pulled the tube from his nose, his hands were placed in restraints. Why did this occur, when he had a clear constitutional right, established in the *Cruzan* decision to refuse tube feeding? Unfortunately, our appellate courts chose not to address the "more glamorous constitutional issues," as the Comment refers to them. Constitutional rights cannot be so easily dismissed.[24] "The court's magnifying glass was focused squarely on the narrower issues," is the explanation offered in the Comment. Using that logic, why not use an even smaller magnifying glass and just look at the contract? Why bother to even look at the living will statute? Mrs. Rettinger signed her husband into the nursing home, so she owed on the contract.

We expect our courts to use glasses that detect important constitutional rights. As difficult as it might have been to figure out what should properly be sent back for trial, this is exactly what our supreme court should have done in the *Rettinger* case.

In my opinion, the Comment misstates the fundamental issue facing the Rettingers. They were not, as Spargur puts it, seeking "to hasten death." Mr. Rettinger wanted to allow death to occur, to accept it. Prevailing bio-ethical, religious, and legal standards allow a person to refuse medical treatment even if that leads to his death.[25] There is an important distinction between a refusal of treatment and assisted suicide.

Finally, the Comment concludes that the case might have turned out differently if Mr. Rettinger had not executed a living will. Because he did, he was "locked into" following the requirements of the living will statute. By this analysis, the thousands of elderly clients who come to attorneys to execute living wills have *fewer rights* than the elderly who have not. Obviously, that cannot be correct. Mr. Rettinger did not leave his constitutional rights outside the nursing home doors when he came in with a living will.

The *Rettinger* decision may not be the death of living wills. But their value has been seriously undermined. The decision is also a blow to families, recognized by other courts as the appropriate deci-

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life-sustaining medical treatment. Dr. Romm had entered this as early as November 1990, eight months before the family went to court to remove the tube feeding.

24. The living will statute is not the exclusive method for a person or his representative to exercise his right to die a natural death. N.C. GEN. STAT. § 90-320(a) (1993).

25. The case law and the positions of medical organizations were set forth in the Brief Amicus Curiae of the National Academy of Elder Law Attorneys. For the positions of religious organizations, see ALAN D. LIEBERSON, ADVANCE MEDICAL DIRECTIVES ch. 22 (1992).

sionmakers in life-sustaining medical treatment cases.[26] Providers are encouraged to seek judicial approval, when it should not be required, and then will be financially rewarded for dragging the matter through the courts.[27]

The law review is indebted to the attorneys with the ABA Commission on Legal Problems of the Elderly for their thoughtful comments on drafts of many of these articles. Under the leadership of Director Nancy M. Coleman and Assistant Director Charles P. Sabatino, the Commission is an extraordinary resource on legal issues of the elderly. Wake Forest thanks the ABA Commission for sharing their time and expertise.

Our thanks to the authors for their hard work. And congratulations to the entire staff of the law review for doing a superb job. Editor Ken Maready deserves a lot of credit for his calm and thorough leadership. He has kept us all on our deadlines and has even kept a sense of humor. Thanks especially to Philip S. Anderson who conceived of this dedicated issue.

This is an exciting time to be in the field of elder law. The American Bar Association and Wake Forest Law Review are proud to present you with this special edition on legal issues of the elderly and access to justice.

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26. National Ctr. for State Courts, *Guidelines for State Court Decision Making in Life-Sustaining Medical Treatment Cases* Guideline 11 (2d ed. 1993) (applicable where there is no evidence of the patient's wishes).

27. There is a possibility of a tort action for malpractice and negligence where an advance directive is ignored. *See, e.g., Ignored Living Will Gets $16.5 Million Jury Verdict*, MICH. LAW. WKLY., Dec. 2, 1996.