

RIVERSIDE LAWYER

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MAGAZINE

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Safeguarding the Elderly

Elder Abuse

What Happened to Mickey?

When Grandparents Become Parents

Getting Your Client Their Rightful
Inheritance

Elder Bankruptcy Filings: Capacity Issues

LGBT Couples Highlight Issues of a
Growing Elderly Demographic

Safeguarding the Rights and Entitlements
of Older Adults in Riverside County

Decisional Capacity Dilemmas



The official publication of the Riverside County Bar Association

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RIVERSIDE LAWYER

MAGAZINE

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MISSION STATEMENT

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is:
To serve our members, our communities, and our legal system.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), Tel-Law, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Inland Empire Chapter of the Federal Bar Association, Mock Trial, State Bar Conference of Delegates, and Bridging the Gap.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of Riverside Lawyer published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Annual Joint Barristers and Riverside Legal Secretaries dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

MBNA Platinum Plus MasterCard, and optional insurance programs.

Discounted personal disability income and business overhead protection for the attorney and long-term care coverage for the attorney and his or her family.

Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are \$25.00 and single copies are \$3.50.

Submission of articles and photographs to Riverside Lawyer will be deemed to be authorization and license by the author to publish the material in Riverside Lawyer.

The material printed in Riverside Lawyer does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.

CALENDAR

JUNE

- 7 Swearing In Ceremony**
For U.S. District Court, Central District of California
George E. Brown, Jr. Federal Courthouse - 8:00 a.m.
RSVP to Emily Montgomery at 951.328.2245
- Swearing In for New Admittees**
Riverside Historic Courthouse
Dept. 1 – 10:00 a.m.
- 11 CLE Event**
“Legal Research 101: Online Resources at the Riverside County Law Library”
RCBA John Gabbert Gallery - Noon
Speaker: Bret Christensen, Librarian
MCLE
- 12 Civil Litigation Section Meeting**
RCBA – John Gabbert Gallery – Noon
- PSLC Board of Directors Meeting**
RCBA Boardroom – Noon
- RCBA Board of Directors Meeting**
RCBA – 5:00 p.m.
- 15 General Membership Meeting**
RCBA Gabbert Gallery – Noon
Speaker: Ed Rush – “Manage Your Online Presence to Grow Your Practice” – Mr. Rush is the Co-Author of the Amazon #1 best-selling legal marketing book “How to Turn Clicks into Clients” and everyone who RSVPs and attends will receive a free copy of his book.
MCLE
- 19 Family Law Section Meeting**
RCBA – John Gabbert Gallery- Noon
- 20 Estate Planning, Probate & Elder Law Section**
RCBA John Gabbert Gallery – Noon – 1:15 p.m.
“An Hour Talking ‘Court’ ”- A Probate Investigator talks about the job, challenges, and how we can help. And how to avoid PE notes re: PC Secs. 3051 and 13502 (community property) issues. Bonus: learn about new forms and rules.
MCLE
- Barristers Meeting**
June Social & Election
Killarney’s in Riverside – 5:00 – 7:00 p.m.
- 27 Federal Bar Association**
George E. Brown, Jr., Federal Court House, 3rd Floor, Noon
“Getting the Most Out of an Interpreter”
Speakers: Olivia Johnston and Virginia Dicono
MCLE

JULY

- 4 Holiday – Fourth of July**
RCBA Offices Closed

SAVE THE DATE:

Thursday, September 27 – 5:30 p.m.
RCBA Annual Installation of Officers Dinner
Mission Inn, Music Room



by Robyn A. Lewis

As many of you may have already heard, Governor Jerry Brown announced the “May revise” of his proposed budget, and the news is not good for the judicial branch.

When Governor Brown announced the first draft of his budget, which was back in January, the courts were safe from any further cuts. However, the May revise provides for a \$544 million cut in the judicial branch budget. And of that \$544 million in cuts, \$540 million will affect the trial courts. This is on top of the \$653 million in cuts that the judicial branch has already experienced over the last four fiscal years.

The proposed cuts to the judicial branch are being funded in several ways. Approximately \$300 million is to be funded by the reserves that many trial courts across the state, including Riverside County, have accumulated. Approximately \$240 million is coming from freezes on all court construction projects across the state. The remaining \$4 million is coming from personnel cuts in the AOC.

California trial courts, by statute, are permitted to maintain reserves in their individual budgets, if they choose and are able to do so. Many courts, including Riverside County’s, have been fiscally prudent and have maintained reserves so as to minimize any impact that the substantial budget cuts have had on the judicial branch and on the members of the public that they serve. Chief Justice Tani G. Cantil-Sakauye, who commented at a special session of the Judicial Council in the wake of Governor Brown’s announcement of the May revise, noted that “court leaders have been so successful in protecting essential court services that the Governor believes that the trial courts have largely been held harmless from budget reductions.”

I bring this to your attention because this is something that we all need to be aware of, as these budget reductions to the judicial branch, if passed, will have a devastating effect on all practitioners and the citizens of this county. I am sure you have all heard of the budget-related crises in San Francisco and in Los Angeles, where over 50 courtrooms were recently closed. We have been very fortunate here in Riverside, due in large part to the wise leadership of our presiding judge, our assistant presiding judge, and the Executive Officer of the Court, Sherri Carter. Even though Riverside County is one of the most underfunded and under-resourced counties in the state, there has been little disruption of access to justice in this county under their watch. But this will change, despite all of their hard work and efforts, should the May revise or any other form of substantial budget cuts pass in July. Perhaps Justice Douglas Miller said it best when he remarked to the press: “The court’s going to still have to do the business, because business doesn’t go away. But their ability to do that in a manner that provides access in a reasonable amount of time, it’s going to change substantially.”

On May 1, 2012, the Riverside County Bar Association hosted its first legal leadership summit, which was an attempt to bring together leaders from different offices and organizations across the county. Representatives from the Riverside Superior Court, the Court of Appeal, the federal court, the City Attorney’s office, the District Attorney’s office, the Public Defender’s office, and County Counsel’s office, as well as various leaders from bar associations across the county and former RCBA bar presidents, came together to discuss issues that concern Riverside County.

That meeting took place about two weeks before the May revise was announced. The timing of that summit, however, could not have been more perfect. The leaders who attended that summit agreed that it is time for Riverside County to mobilize and to have more of a voice in statewide discussions concerning issues like the budget and the allocation of judicial resources. I am proud to report that a follow-up meeting has been scheduled, and it is the intention of the Executive Board of the Riverside County Bar Association to assist in the organization of such a mobilization. Hopefully I will have more to report in my final President’s Message in the summer issue of the *Riverside Lawyer*, and President-Elect Chris Harmon can continue to keep you informed when he assumes office on September 1.

I also wanted to give a brief update on other news that may be of interest. In a recent monthly conference call with bar association presi-

dents across the state, State Bar President Jon Streeter noted that the State Bar is taking a hard look at bar admissions policies in California. A task force has been formed to look into the imposition of a preadmission practical skills requirement. Another task force has been formed to consider whether the bar exam should be condensed to two days instead of three.

The American Bar Association has also proposed to our state bar that spouses of those in the military, who are licensed attorneys in another state, be admitted to the California State Bar without the need for any examination or any moral fitness screening. President Streeter indicated that the California State Bar does have an accelerated admissions policy for in-house lawyers. For now, however, this issue remains under review by a task force.

President Streeter also brought an interesting case to our attention, which I wanted to share with you, in case you had not yet heard about it. The California Supreme Court has just issued an OSC to the State Bar, in which it is requesting an explanation as to why an illegal immigrant should be given a license to practice law.

The case involves an applicant by the name of Sergio Garcia, who has lived in this country since he was 17 months old. Mr. Garcia passed the written bar exam and a moral examination. He was certified by the State Bar, which sent his certification to the Supreme Court for routine approval, with the notation that Mr. Garcia was

undocumented. In response, the court issued the OSC, inviting both parties to submit briefs on the issue. Amicus briefs are also being solicited by the court. This is the first case in the country raising this issue to be reviewed, and it is expected to receive much attention.

On a final note, I wanted to remind you that if you have a nomination for the E. Aurora Hughes Memorial Award for Service, please submit it to me or to Charlene Nelson. Candidates for the award must demonstrate a commitment to dedicated service to the Riverside County Bar Association. In particular, those to be considered for the award must be (1) lawyers, inactive lawyers, or judicial officers, (2) who are serving or have served in Riverside County, and (3) who, over their lifetime, have accumulated an outstanding record of service or achievement to the Riverside County Bar Association. Please note that current members of the RCBA Board of Directors are ineligible to be nominated.

If you would like to make a nomination, please send me an email at rlawslaw@yahoo.com or contact Charlene Nelson at the Riverside County Bar Association at (951) 682-1015.

*Robyn Lewis, president of the Riverside County Bar Association,
is with the firm of J. Lewis and Associates.*



BARRISTERS PRESIDENT'S MESSAGE

by Scott H. Talkov



Barristers June Social and Election at Killarney's Sponsored by LexisNexis

June marks the end of the Barristers year, with the young attorneys division of the RCBA holding a social and election for the second year in a row. Hopefully we can replicate the sizable turnout we had last year, as this year will again feature a generous sponsor: LexisNexis. Indeed, their local representative, John Misiti, will be

joining us to provide a generous contribution to our evening of appetizers, drinks and networking. The social and election will be held on Wednesday, June 20 from 5 to 7 p.m. at Killarney's Restaurant & Irish Pub in Riverside. The event is open to all attorneys.

Nearly all of the positions on the 2012-13 Barristers Board will be uncontested in this year's election. The unopposed candidates are Amanda Schneider of Gresham Savage for President, Luis Arellano of Gresham Savage for Vice President, Arlene Cordoba of the Law Office of Arlene Cordoba for Treasurer, as well as Reina Canale of the Inland Empire Latino Lawyers Association and Sara Morgan of Heiting & Irwin for the two positions of Member-at-Large. I will continue on the Barristers Board as Past President. An election will be held for the position of Secretary, with L. Alexandra Fong of Riverside County Counsel

and Kelly Moran of Thompson & Colegate as candidates.

The Barristers could not be more appreciative of our May speakers: decorated trial attorney Terry Bridges and RCBA President-Elect Chris Harmon. Mr. Bridges advised young attorneys to avoid escalating a situation by firing off emails they may regret. Instead, lawyers should pick up the phone to discuss issues of concern. Mr. Bridges reminded us that, while parties may be adversaries, attorneys are colleagues.

Criminal defense attorney Chris Harmon encouraged young attorneys to develop their reputation for civility by joining the various RCBA sections and committees to meet fellow attorneys while serving our legal community. The attendees reminded Chris Harmon that doing exactly that is how his father and law partner, Steve Harmon, became known to many as the "Velvet Hammer." Mr. Bridges was quick to point out that some of the best advocates leave their opposing counsel in admiration.

Judge Riemer also joined us at our meeting, reminding young attorneys that judges are working harder and with fewer resources these days. When attorneys become uncivil, they often file unnecessary motions at the expense of their clients while further burdening the judicial system.

One of the best ways to develop your skills in civility is to stay active in your local bar associations and to join the Riverside Barristers, where you will quickly develop a network and a positive reputation among attorneys you called your classmates just a few years back.

Scott Talkov is the 2011-12 President of the Barristers as well as an attorney with Reid and Hellyer, where he practices real estate and business litigation.



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SAFEGUARDING THE ELDERLY

by Mary McCure

A large majority of frail, elderly people living in long-term care facilities do not have any visitors. If they were not being treated adequately or with dignity, they would have nobody to help them, if it weren't for the Long-Term Care Ombudsman Program. Relatives who have concerns about their loved one's treatment in a facility can also obtain help from the Ombudsman Program.

Since 1985, the Ombudsman Program in Riverside County has been a program of Community Connect, a nonprofit organization. Staff and community volunteers are extensively trained and state-certified to objectively investigate and resolve problems of residents in nursing home and board and care homes throughout Riverside County. It is a program based on human kindness and the belief that all individuals have basic human rights and comforts that should be provided. All services are free and confidential.

The program can provide help to resolve concerns about such issues as quality of care, food and nutrition, residents' rights, proper placement costs, meaningful activities, therapy and rehabilitation, financial problems, medical care, and much more.

Adult Protective Services investigates allegations of elder abuse outside facilities, while the Ombudsman Program is responsible for investigating allegations within facilities. In Riverside County, there are 13,594 elderly and disabled people living in 53 skilled nursing facilities and 651 residential care homes for the elderly. Ombudsmen visit the facilities on a regular basis. Without frequent visits, quality of care is difficult to monitor. This is especially true for those residents who have dementia or Alzheimer's, as they cannot normally give adequate historical information on their care, and the quality of their care must be observed. Last year, the Ombudsman Program made nearly 7,600 visits to facilities and responded to 1,440 complaints from residents or family members.

Each September, the Ombudsman Program honors the residents of some facilities on Grandparent's Day by delivering fresh flower bouquets to them. This is not a funded activity but is supported by volunteers and soliciting donations. Community education is also a function of the Ombudsman Program. The program educates facility staff, family members, law enforcement, and other community members about care issues and the role of the Ombudsmen.

Funding for the Ombudsman Program is provided primarily through the Office on Aging, plus grants and donations. In addition to its staff, the program depends heavily on volunteers; it currently utilizes the skills of 30 highly trained and certified volunteers, who work a minimum of 25 hours per month. Many volunteers have been with the program for over 10 years.

Ombudsman services are provided throughout Riverside County. The main Ombudsman office is in Riverside at 2060 University Avenue. Offices are also located in Hemet and Cathedral City. For additional information, please call (951) 329-4704 (during working hours) or (800) 464-1123 (24 hours).

Community Connect is a 501(c)(3) nonprofit organization, formerly known as the Volunteer Center of Riverside County. Since 1966, Community Connect has contributed to creating safe and healthy communities by "[c]onnecting those in need with those who can help." Each year, more than 180,000 men, women and children are assisted through a vast array of services covering all of Riverside County.

Community Connect covers many platforms of social service and community support, working in diverse focus areas such as volunteerism, housing, long-term care resident advocacy, transportation, and more. There are eight major program areas:

- 211 Riverside County
- Alternative Sentencing Program
- HELPLine: Crisis/Suicide Prevention
- Long-Term Care Ombudsman
- Nonprofit Resource Center
- Housing Assistance
- Transportation Assistance Program
- Volunteer Connection

Mary McCure has been the Program Director for the Long-Term Care Ombudsman for Riverside County since 2005 and has over 11 years of social service experience. She has a B.S in Human Services and is currently completing her Master's Degree at the University of Southern California.



ELDER ABUSE

by *Tristan D. Svare*

We read more and more news items about elder abuse. Mickey Rooney testified before Congress about being abused by his caretakers. The son of wealthy socialite Brooke Astor was prosecuted for stealing from her while she suffered from Alzheimer's disease. Every day, papers across the nation carry stories about elders being defrauded or neglected or abused.

The United States government, in a study conducted over years, estimates that between one and two million older Americans are victims of abuse. (Panel to Review Risk and Prevalence of Elder Abuse and Neglect, *Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America* (2003).) Other studies indicate a prevalence of elder abuse of between 2% to 10%. (Mark S. Lachs and Karl Pillemer, *Elder Abuse* (Oct. 2004) 364 *The Lancet* 1192.) The elderly population, those 65 and older, is the fastest growing segment of the population. (AARP Program Resources Department and U.S. Department of Health and Human Services Administration on Aging, *A Profile of Older Americans* (1993).) The elder population in Southern California and the Inland Empire is expected to almost double in size in the next 20 years. ("California's population growth to slow in coming decades," *Los Angeles Times*, Apr. 25, 2012.)

What Is Elder Abuse?

Elder abuse is a problem. It is happening every day. Elder abuse takes many forms. When we first hear the term "elder abuse," we might think of an adult child hitting an older parent or a nursing home attending neglecting the needs of a resident. Elder abuse is these things, and more.

Elder abuse can be striking or hitting or kicking an elder. It can take the form of yelling at or belittling an elder. Placing an elder in a position where their health is endangered is abuse – whether due to the inherent danger of the situation or the elder's vulnerability, such as an existing health condition that can be aggravated by fear, by harmful surroundings, or by lack of medication or medical attention or proper food or diet. Elder abuse can be improper care for a patient or resident or someone who needs assistance. Elder abuse can include improperly restricting or falsely imprisoning an older person. And elder abuse can include stealing from an elder – stealing by use of force or fear, or by fraud or lying or deceit, or by embezzlement, whether by a trusted caregiver or a family member or a stranger or a professional. Elder abuse can take the form of a door-to-door scam artist selling inferior home repairs or a banker improperly accessing a client's account and taking out

funds. Elder abuse can include a family member having a parent who is unaware of their actions or of the repercussions signing over a deed to real property without proper compensation. (Pen. Code, § 368.)

Elder abuse is not limited to the elderly. In California, elders are defined as those age 65 and older. But the crime of elder abuse also includes abuse of persons with a physical or developmental disability, whether from age, accident, injury, or disease, who are not able to look after or protect their rights as a person without a disability might. By California law, those with such disabilities are termed "dependent adults" in the elder abuse statutes.

What Can Be Done About Elder Abuse?

Knowing what constitutes elder abuse is one thing. Being in a position to do something about it is another. Elder abuse, like its cousins domestic violence and child abuse, occurs most often at home and behind closed doors. However, there are certain things to keep an eye out for if you notice or suspect abuse of an elder. First are the more telling signs, such as unexplained bruises or injuries – injuries that do not comport with the offered explanation or that occur after a visit or time spent with one particular person are of concern; a change in weight or appetite; injuries, particularly bed sores, that are not being treated or are getting worse instead of improving; unattended injuries; gangrene or the smell of rotting tissue; bad hygiene that is not addressed or being corrected or cleaned; injuries, marks, or bruises in the shape of form of a weapon, like finger marks or a coiled cord or a belt impression left in the skin.

Warning signs can be as simple as a change in attitude or habits: an elderly neighbor who no longer is seen taking their regular morning walk; a customer who suddenly wants to take out thousands of dollars from their bank account without a legitimate need.

What Attorneys Do About Elder Abuse

Attorneys are often in a position to witness the signs of possible abuse: The family member suddenly back in the elder's life who now insists on a transfer of title to real property, or who wants to make drastic changes to a will or trust; an elderly client in fear of a person in their life; a conservatee whose health is declining in a nursing home and who appears malnourished or who has unexplained injuries.

Attorneys are sometimes reluctant to take action when they suspect abuse. However, safeguards are in place for just this occurrence. By being the holder of a power of attorney, or a trustee, or conservator, the attorney may be a caregiver

pursuant to California law, and a mandated reporter of suspected abuse – not a reporter of confirmed abuse, but abuse that would be reasonably suspected by someone in the caregiver’s position. And, even absent being a mandated reporter, there are no prohibitions on good Samaritans making good-faith reports of suspected abuse. Immunity from civil liability is provided for good-faith reporting of suspected abuse. (Welf. & Inst. Code, §15630 et seq.) If the attorney is concerned about attorney-client confidentiality, many attorneys have addressed this problem by frankly and openly discussing with their clients that the attorney will report any suspected abuse, and such language may be included in the retainer agreement between the attorney and client.

Resources for Addressing Elder Abuse

The first line of addressing elder abuse is reporting. This can be to local law enforcement or Adult Protective Services (APS). In California, all reporting can be confidential, at the discretion of the reporter. Every county has an APS and a 24-hour reporting

hotline for suspected abuse. In San Bernardino County, this number is (877) 565-2020, and in Riverside County, the number is (800) 491-7123. For mandated reporters (health care providers, law enforcement, persons providing care), any suspected abuse must be reported. For everyone else, Good Samaritan reporting should be viewed as a civic responsibility. And if an elder or a dependent adult is suspected of being in physical danger, mandated reporters and anyone making a report of suspected abuse should call 911 immediately and follow up with a call to APS. (hss.sbcounty.gov/daas/programs/APS.aspx; dps.co.riverside.ca.us/AdultServices.aspx.)

Looking Forward

Beyond knowing what to look for and where to report, attorneys can play an additional role in addressing elder abuse. Riverside and San Bernardino Counties have active coordinated community responses to elder abuse. In the form of multidisciplinary teams (based on the model for responding to child abuse) or FASTs (financial abuse specialist teams), local agencies and professionals from social services, law enforcement, health services, and legal services work together to address abuse, recover losses for elders, and make our elders safe from abuse. If you are interested in getting involved, contact the San Bernardino District Attorney’s office at (909) 387-6533 or Riverside County C.A.R.E. (Curtailling Abuse Related to the Elderly) at (800) 476-7506.

Tristan D. Svare is a deputy district attorney for San Bernardino County.



WHAT HAPPENED TO MICKEY?

by George F. Dickerman

Remember Mickey Rooney? His acting career began back in the 20's, and includes some 200+ movies, most recently playing a crusty bad guy in *Night at the Museum* with Ben Stiller. With all that fame and money, he must be doing all right in his golden years ... yet ...

Something bad happened ... something that happens to untold numbers of elderly victims.

In February 2011, Mickey needed to obtain a temporary restraining order against his stepson (Christopher) and his wife (Christina). Mickey alleged that they committed verbal, emotional and financial abuse and denied him such basic necessities as food and medicine, leading to bouts of depression. Essentially, Mickey felt he was made a prisoner in his own home by the use of threats, intimidation and harassment.¹

In September 2011 he, along with his conservator, filed an elder abuse claim against Christopher and Christina, alleging that they blocked access to his mail, obtained exclusive control over Mickey's personal and business accounts, used those monies for their own use, and then transferred Mickey's income to their own personal accounts.²

How could this happen?

In a nutshell, it's called old age vulnerability. It's often exacerbated by one or more varying types and degrees of dementia³. The signs of financial vulnerability are myriad, but often include:

- A weaker state of mind.⁴

1 ABC World News article (February 17, 2011).

2 CBS Los Angeles Times article (September 15, 2011).

3 Christine Kennard, "Tangles, Plaques and Genes" from About.com/Alzheimer's/Dementia (September 18, 2006): Dementia is most often associated with the development of senile plaques. The brains of people with Alzheimer's tend to show that nerve cells have become bunched together and knotted, a feature known simply as tangles. Around these cells tend to be clustered a kind of cellular debris known as plaques. Plaques are made up of dead cells and deposits of protein. Dementia is a progressive disease, meaning that it gets worse over time.

4 California Civil Code §1575: Undue influence consists:

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
2. In taking an unfair advantage of another's weakness of mind; or,
3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

- Being accompanied by a stranger to the bank that encourages them to withdraw large amounts of cash.
- Being accompanied by a family member or other person who seems to coerce them into making transactions.
- Not allowed to speak for themselves or make decisions.
- Implausible explanations about what they are doing with their money.
- Concerned or confused about "missing" funds in their accounts.
- Receiving insufficient home health care given their needs and financial status.
- Isolation from others, especially family members.
- Unable to remember financial transactions or signing paperwork.⁵

Perpetrators exploit this vulnerability in a number of ways, most prominently by the use of financial powers of attorney. These documents give the bad guys complete legal authority to do everything, financially, that the elder victim could do: access bank accounts, obtain a mortgage, or transfer title to a home. Placed into the wrong hands, these powers of attorney become a license to steal.

Through intimidation, manipulation and coercion, sufficient undue influence is often wielded to change the elder's trust or will to substitute improper beneficiaries. Once accomplished, an advance health care directive can then be used to give the perpetrator authority to warehouse and isolate the victim into a "locked down" nursing home with instructions that no outside communication with family or friends is allowed.

What can be done?

The California legislature has recognized this vulnerability and enacted Penal Code §368, which finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able

5 Arizona Elder Abuse Coalition and MO\$AFE, *Missourians Stopping Adult Financial Exploitation*.

to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.

Civily, the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA)⁶ comes to the rescue. Similar to Penal Code §368, EADACPA provides nearly every civil remedy one could ask for, including post-mortem recovery for the elderly victim's pain and suffering as well as the possibility of enhanced attorney fees. Interestingly, the legislature included these enhanced remedies to encourage private attorneys to pursue elder abuse claims that, without these protections, would often be rejected for fear that the elderly victim (and their general damage claim) would die during litigation.

Conservatorships should be a "remedy" of last resort. Financial and health care powers of attorney are sufficient and simple answers to meet the needs of incapacitated adults, so long as they're used solely for the benefit of the elder. When used improperly, a conservator may need to obtain court authority to make financial and medical decisions and, with the concurrent jurisdiction of the probate court⁷, pursue civil remedies to recover what's already been stolen.

6 Welfare & Institution Code §§15600-15766.

7 Welfare & Institutions Code §15657.3.

What happened to Mickey?

On March 2, 2011, Mickey testified before a special committee of Congress on the abuse he suffered, and implored other victims to stand up and tell everyone who will listen.⁸ As a result of Mickey's plea, Senator Herb Kohl, chairman of the aging committee, was reintroducing the "Elder Abuse Victims Act". The bill would establish an Office of Elder Justice within the Department of Justice and strengthen enforcement in cases of abuse.

Mickey overcame his fear and the (unwarranted) shame of keeping silent for so long. With the help of a conservator and the court, he's protecting what monies and assets remain. With his civil lawsuit, he's pursuing recovery of what was allegedly stolen. By exposing his story, he's providing awareness, strength and inspiration to untold numbers of other elderly victims. In his golden years, Mickey's fighting the good fight.

George F. Dickerman practices elder law, particularly elder financial abuse, in Riverside, California. He can be reached at (951) 788-2156.



8 Riverside County assistance:

Riverside County District Attorney's Office: (951) 955-5400

Riverside County Adult Protective Services: (800) 491-7123

Riverside County Office on Aging: (800) 510-2020

WHEN GRANDPARENTS BECOME PARENTS

by Christopher J. Buechler

When considering problems that elderly people face with the law and society, childrearing issues hardly come to mind. But when a court determines that neither mom nor dad is fit to raise their child, grandma and grandpa are usually among the first in line to take on this responsibility. Even without a court order, people in economically tight situations (which could be any parent) typically turn to grandma or grandpa for free child care. Riverside County recognizes this is a serious issue for our elderly population and so has developed resources in its “Grandparents Raising Grandchildren” (GRG) program through the Riverside County Office on Aging.

The Scope of the Problem

GRG has compiled some alarming statistics about grandparents raising grandchildren in Riverside County and throughout the nation:¹

- In Riverside County, it is estimated that one child in five is living with grandparents.
- According to the 2000 U.S. Census, a grandparent was the person primarily responsible for raising grandchildren in nearly 40 percent of the 45,000 Riverside County households where a grandparent is living in the home. (For the non-mathematically inclined, that’s nearly 18,000 homes.)
- The National Center on Grandparents Raising Grandchildren cites the U.S. Census in stating that of the 294,969 grandparents in California who are responsible for their grandchildren, 21.7 percent live in poverty. (Again, that’s approximately 64,000 grandparents statewide.)
- The AARP found that 11 percent of grandparents over 50 are caregivers; specifically, 8 percent are providing day care and 3 percent are raising a grandchild.
- The largest group of children being raised by grandparents (51%) are preschoolers.

Numbers aside (and I suspect these numbers are underreported), there are issues – some common, some unique – that come with grandparents raising grandchildren. Depending on the age of the grandparents, they may have limited incomes that increase the difficulty of childrearing; they may be prone to sharing illness with the other population that is at high risk for illness; they may not be as physically or even mentally capable of caring for a very young child (and the risk of the onset of an incapacitating condition increases every year). And there is still a level of social stigma attached to family breakdown, which causes stress to grandparent, parent and

grandchild. Compounding these problems, the grandparent may also be providing care for the unfit parent or entangled in a legal guardianship battle against one or both parents, which increases the strain on both time and money.

Grandparents Raising Grandchildren Has Resources to Help

The GRG program was developed to provide emotional and practical support to grandparents facing these challenges. Such support includes:

- Advocacy in navigating the judicial and governmental bureaucracies to obtain legal services, counseling, affordable childcare, medical assistance and financial assistance for the household.
- Child care – a portion of the costs of full-time child care for infants and toddlers under the care of working grandparents, or even respite care to give the grandparents a break to take care of their personal needs.
- Case management services to link grandparents and grandchildren to appropriate public or private resources.
- Support groups, consisting of similarly situated peers, for grandparents facing these unique challenges.

Of course, these programs exist only so long as there is funding available. With continuing cuts to state and local governments, it is hard to predict if all, or any, of these services will be available in the years to come.

The Flipside Issue: Youth as Caregivers

GRG is also expanding its attention to the issues that young people face in being the primary caregiver for a disabled adult, be it parent or grandparent. According to GRG, 22% of high school drop-outs reported they left to care for family members. These caregiving youth experience hardships of a magnitude similar to grandparents caring for grandchildren, including loss of childhood, stress and depression, isolation, and absenteeism from work or school.

Having extended family available can be a comfort and a joy, but when the family hits a major crisis, issues can be compounded when dealing simultaneously with issues of aging and childrearing. As much as I like to consider grandparents to be “veteran parents,” I hope our society’s commitment to our veterans extends to this group, who play such an essential role in the lives of too many children in and around our dependency court system.

Christopher J. Buechler, a member of the RCBA Publications Committee, is a family law practitioner in Riverside. He can be reached at christopherjbuechler@gmail.com.



¹ http://www.rcaging.org/opencms/myGallery/pdf/GRG_Brochure_en.pdf.

JUSTICE THOMAS E. HOLLENHORST: CELEBRATING 25 YEARS OF SERVICE ON THE COURT OF APPEAL

by Presiding Justice Manuel Ramirez and Kira L. Klatchko

On May 14, 2012, the longest-serving justice on the Fourth District Court of Appeal, Division Two, Justice Thomas E. Hollenhorst, joined his colleagues on the bench for what he was told was a ceremonial session honoring retired Justice John Gabbert. What Justice Hollenhorst did not know was that the session organized by his colleagues was actually called to recognize him for his 25 years of service on the court of appeal. The early surprise celebration offered Justice Hollenhorst's family, friends, and colleagues an opportunity to thank him for his work both on and off the bench.

Justice Hollenhorst began his legal career as a deputy district attorney in Riverside County after graduating from the University of California, Hastings College of Law in 1971. Hollenhorst loved his work in the DA's office and very quickly rose through the ranks to become an assistant district attorney and eventually acting district attorney. In 1981, he was appointed to the Riverside Municipal Court. Hollenhorst was later elevated to the Riverside Superior Court, and then to the Court of Appeal in 1988.

Justice Hollenhorst's long list of accomplishments was described in detail by Presiding Justice Manuel Ramirez, who praised Hollenhorst for his intelligence, collegiality, character, and passion for his work and family. Ramirez also credited Hollenhorst for his work ethic, recognizing that Hollenhorst has authored more than 3,500 opinions in his career, and that in 1990 alone, with a shortage of justices and staff at the court, Hollenhorst authored 315 opinions, an unmatched record in California. Ramirez also credited Hollenhorst's ingenuity in co-creating the court's tentative opinion program in response to a severe backlog of cases. The program is unique in California, and possibly the nation. It allows the court to "frontload" its decision-making process so that advocates receive a tentative opinion prior to oral argument. Hollenhorst published a study of the tentative opinion program, *Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California* (1995) 36 Santa Clara L. Rev. 1, as his master's thesis in the LL.M. program in jurisprudence at the University of Virginia School of Law.

Justice Hollenhorst was also celebrated for his work as a teacher. As his friend and former colleague on the trial court bench, Judge Dennis McConaghy, said, Hollenhorst, more than almost any other judge, has helped to advance judicial education on scientific subjects by traveling the world teaching judges and lawyers about science, particularly about the role of neuroscience and genetics in decision-making. He is, among other things, an advisory board member of the Center for Neuroeconomics at Claremont Graduate University and was a member of the Judicial Council Advisory Committee on Science and the Law and its Committee on Court Technology.

Hollenhorst has also been an active teacher and lecturer on legal ethics and chaired the CJER Ethics Education Committee. His colleague and one-time law school classmate Justice Art McKinster joked at the ceremony that Hollenhorst was always a gifted legal mind, and he proved that recently when, at a seminar he taught, he gave

McKinster and Ramirez high marks on an ethics quiz. Hollenhorst also serves on the Judicial Advisory Board of the Judicial Education Program at Northwestern University School of Law and is on the Executive Board of the ABA Appellate Judicial Conference, both of which organize educational programs for judges and lawyers across the United States. For all of his work, Hollenhorst received the Jefferson Award from the California Judges Association for his significant contribution to judicial education.

While much was said about Justice Hollenhorst and his success as a lawyer and a judge, equally as



Tim Hollenhorst with Justice Carol Codrington, Justice Betty Richli, Justice Tom Hollenhorst, Presiding Justice Manuel Ramirez, Justice Art McKinster, and Justice Douglas Miller in the background



L-R: Peter Hollenhorst holding Sarah Hollenhorst, Noreen Hollenhorst holding Madison Hollenhorst, Elizabeth Hollenhorst, Justice Tom Hollenhorst, and Tim Hollenhorst holding Jake Hollenhorst



L-R: Les Whittaker, Charlene Geppert, Lisa Visingardi, Anne Bittner, Sandy Simmons



Tim Hollenhorst, Elizabeth Hollenhorst and Peter Hollenhorst



Don Davio and Presiding Justice Manuel Ramirez



Justice Hollenhorst and Justice Carol Codrington



Justice Hollenhorst and Judge Dennis McConaghy (ret.)



Jon and Robyn Lewis

much, if not more, was said about him as an exemplary and compassionate human being. Numerous speakers at the ceremony focused on Hollenhorst's defining personal characteristics, including his deep love and affection for his family, friends, and community. Hollenhorst's wife of 41 years, Elizabeth, was recognized at the ceremony with a bouquet of flowers from the court. She was joined by sons Tim and Peter, Tim's wife Noreen, and several of Hollenhorst's beloved grandchildren. Tim, a deputy district attorney in Riverside, spoke about following in his father's footsteps. He spoke about life lessons that he and his brother learned from Hollenhorst, whom they thought of as a giant, both accomplished and humble. Hollenhorst never missed any family activity and to this day never misses a t-ball game when one of his grandchildren plays. As Tim put it, Hollenhorst was never focused on the traditional trappings of success. His goal was not to make money, drive a nice car, or own a big house, it was to make a difference in the world and to have a positive impact on the people around him. Several other speakers echoed that theme.

John Bailey, of Hall & Bailey, a long-time friend, fellow motorcyclist, Rotarian, and fishing buddy, talked not only about Hollenhorst's passion for his hobbies and his friends, but also about his passion for charity. Bailey was teary-eyed as he spoke about a trip to Mexico, where he and Hollenhorst worked on Rotary service projects at an orphanage. Hollenhorst's friend Billy Doles had the whole courtroom laughing when he talked about his adventures with Hollenhorst and gave him a mild roasting.

Kira Klatchko, of Best Best & Krieger, spoke about working for Justice Hollenhorst as an extern when she was in law school. Hollenhorst's kindness, decency, and passion for his work made him, and continue to make him, an excellent mentor. Klatchko thanked Hollenhorst on her own behalf and on behalf of all of the people Hollenhorst has reached out to and mentored, including more than 75 students who have worked in his chambers, and numerous attorneys and judges who have benefited from his help and advice. Klatchko, along with many of the other speakers, praised and teased Hollenhorst about his ability to deliver a dramatic story, whether it be about a serious legal dilemma or fishing-trip shenanigans. In honor of that talent, and for his long and dedicated service to the bench and bar, RCBA President Robyn Lewis (whom Hollenhorst introduced to her future husband, Jon) presented Hollenhorst with a "hard luck" award, traditionally given to the participant in a fishing tournament who is rewarded, not for catching the biggest fish, but for telling a story about the experience that brings the community together, either through laughter or tears, and leaves everyone with a valuable lesson and something to reflect upon.

Jennifer Guenther, President of the San Bernardino County Bar Association, presented Hollenhorst with a resolution recognizing his service. Creg Datig, Assistant District Attorney, also recognized Hollenhorst for his service to the bench and his past service as a district attorney.

Also in attendance were Justice Hollenhorst's staff, Judicial Assistant Sandy Simmons, Senior Appellate Court Attorneys Lisa Visingardi and Anne Bittner, and Central Staff Attorney Charlene Geppert, all of whom Hollenhorst credited for their tremendous and invaluable contribution to the court. Hollenhorst's former staff attorney, Les Whittaker, was also in attendance, as were Public Defender Gary Windom and Judges Bernard Schwartz, Angel Bermudez, Craig Riemer, and Elisabeth Sichel, among others.

Presiding Justice Manuel A. Ramirez has been the Presiding Justice of the Court of Appeal, Fourth District, Division Two since his appointment in 1990 and Kira L. Klatchko is a certified appellate specialist with Best, Best & Krieger, LLP.



GETTING YOUR CLIENT THEIR RIGHTFUL INHERITANCE

by Scott Grossman

The client comes to you hurt and angry. You are told they only want what's right. You may even hear some righteous indignation in their voice. After your client blurts out the family history, maybe shedding some tears, and insists this is not what mom and dad would ever have wanted, you realize they are telling you they haven't gotten their rightful inheritance.

There is a lot of misinformation, misunderstanding, and ignorance about how wills, trusts, and probate actually work. There may be even more confusion surrounding trust and probate litigation. Understanding why your client has not gotten their inheritance will help you to guide them on what is and is not in their own best interest.

There are a number of reasons a beneficiary or heir may not be getting their inheritance. There are trustees, executors, and administrators who have no idea what they're doing. Literally. They don't get any type of professional help and probably told your client they know what to do because mom or dad told them before they died. There are trustees, executors, and administrators who hide their heads in the sand, doing nothing. They "lock up" and just won't get down to the business of probate or trust administration. Some clients are told nothing is going to happen because all of mom or dad's property was used to care for them before they died. Some clients are told they have been disinherited. There are even more reasons given by trustees and executors for not giving your client their inheritance and, of course, no two cases are identical. However, from your client's perspective, most cases can be broadly but accurately categorized into one of two common situations:

1. An important document got changed before your client's parent's death, and as a result of that change, your client is now disinherited.
2. The document is fine, but your client hasn't gotten their inheritance.

Trust and Will Contests

The first scenario will lead to a will or trust contest. In the author's experience, the two most common reasons for setting aside a will or trust are lack of mental capacity and undue influence. Probate Code section 6100.5 sets forth the standard for testamentary capacity. A person is

not mentally competent to make a will if, at the time of making the will, he or she:

1. Does not have sufficient mental capacity to:
 - understand the nature of the testamentary act,
 - understand or recollect the nature and situation of his or her property, or
 - remember and understand his or her relations to living descendents, spouse, parents, and others whose interests are affected by the will; or
2. Suffers from a mental disorder with symptoms including delusions or hallucinations that results in his or her devising property in a way that, except for the delusions or hallucinations, he or she would not have done.

Capacity to create a trust is governed by Probate Code sections 811 and 812. In order to show mental incapacity of the settlor, your client will need to prove the settlor had a deficit in his or her alertness and attention, information processing, thought processes, or ability to modulate mood and affect. The deficit must correlate with the decision or act in question.

A particularly thorny question is what standard applies when a trust amendment is created. An analysis of this question is beyond the space limitations of this article. The author recommends that an interested reader review *Andersen v. Hunt* (2011) 196 Cal.App.4th 722.

Even if the settlor or testator was mentally competent when the new document was executed, they may have been subject to undue influence. This is almost always worth exploring where there was some cognitive impairment when the new will or trust was created.

California law defines undue influence as conduct that subjugates the testator's will to that of another, causing a disposition different from that which the testator would have made if permitted to follow his or her own inclinations. Undue influence is proven when it is shown that the testator's freedom to choose was overcome by someone exerting undue pressure, arguing with the testator, or using some kind of coercion so the testator could not make their own choice. Rarely will there be direct evidence of this conduct. Expect to rely on circumstantial evidence to prove this allegation.

Your client may be able to shift the burden of proof to the will or trust sponsor. In order to do so, they must prove three elements. First, the person who benefits under the will or trust had a confidential or fiduciary relationship with the testator. Second, the person who benefits was active in procuring the will or trust. Third, the person offering the will or trust unduly benefits from the new document.

When the document hasn't been changed but your client hasn't gotten their inheritance, it is usually because there is a negligent or unresponsive trustee. The remainder of this article focuses on trustees, because executors face certain time limitations imposed on them by the Probate Code. There are two ways to deal with the negligent or unresponsive trustee. First, petition the court for their removal. Second, petition the court to compel them to do what they are supposed to do.

A petition for removal makes the most sense if the trustee is supposed to remain in place for some extended period of time. An example of this would be where the trust does not call for the outright distribution of trust property. This can happen because the trust requires distributions over staggered periods (e.g., one-third of the trust assets at age 35, one-half of the remainder at age 40, and the remainder at age 45), the trustee is managing property for a minor child, or the trustee is managing property for incompetent adults.

Very commonly, people want their trustee removed because they are angry at the trustee. On a pragmatic level, trustee removal may not make sense if the trust calls for an outright distribution and what you are seeking is to have that property immediately distributed. Trustee removal is another cause of action in addition to the distribution. In other words, it is one more thing you have to prove and one more thing for the court to decide. It often increases litigation costs and delays a conclusion

of the case. This is usually an acceptable tradeoff if the trustee is supposed to manage the trust for an extended period of time, is causing losses due to poor investment management, or is taking trust property. If you have proof of truly terrible conduct that endangers the trust property, then you may be able to have the trustee suspended and a temporary trustee appointed while the removal petition is litigated.

Trustee removal may be an unacceptable tradeoff if the goal is to get the trustee to do their job and bring the trust administration to a close. A petition to instruct the trustee to perform a particular task usually makes the most sense when the trust calls for an outright distribution. If your client knows what property the trust holds and wants their share distributed according to the terms of the trust, then this can be the fastest, most effective remedy available.

Scott Grossman is certified by the State Bar of California as a specialist in estate planning, probate and trust law. The Grossman Law Firm's website is grossmanlaw.net.

*This article is excerpted from *Winning the Inheritance Battle* and is used with the author's permission.*



LAW DAY 2012

by *Sophia Choi and Sylvia Choi*

Some may wonder, "What is Law Day?" The first Law Day was established in 1958 by President Dwight D. Eisenhower. In 1961, Congress issued a joint resolution to designate May 1 as the official date for Law Day, which was later codified in 36 United States Code section 113. This year's Law Day theme is "No courts, no justice, no freedom," recognizing the importance of the courts in protecting rights and in ensuring access to justice.

The celebration of Law Day is not necessarily limited to a single day. In fact, it can be celebrated for an entire week in May or even for the entire month of May. When RCBA President Robyn Lewis first contacted us (Sophia Choi and Sylvia Choi) to co-chair the Law Day Committee, we were not as familiar with what Law Day was all about. However, after working with the committee, and with the guidance provided by RCBA Executive Director Charlene Nelson, we realized the importance of Law Day and the need for as many attorneys in Riverside County as possible to be involved in its celebration. As co-chairs of the Law Day Committee, we hope to make this a month-long celebration, to bring greater impact to the Riverside community and to bring greater awareness to the public of the importance of the courts.

On May 5, 2012, a Law Day event was held at the Riverside Plaza, in which extremely talented attorneys from Riverside County volunteered to provide basic legal advice to the public. Members of the public seeking personal representation were referred to the RCBA's Lawyer Referral Service. Additionally, indigent persons requiring assistance in civil and family law matters were referred to the Public Service Law Corporation. As some of the members of the public were in need of interpretation between the attorneys and themselves, we were very fortunate this year to have assistance from Riverside County's court-certified interpreter, Julio Robledo, during the afternoon of this event. In keeping with the theme for this year, "No courts, no justice, no freedom," we asked Presiding Judge Sherrill Ellsworth for assistance. Judge Ellsworth provided a handout summarizing the current status of the Riverside County courts, their caseload data, and their resource needs. Volunteers who were unable to provide legal advice to the public devoted their time to providing the public with information regarding the current situation of the Riverside County courts and the importance of the courts in ensuring access to justice.

Luis Arellano of the Law Day Committee emailed the Latino Network to encourage participation in this event. Eugene Kim of the Law Day Committee also reached out to members of the PICK Group of young professionals. We brought a sign-up sheet for volunteers to the April 2012 Barristers meeting, where several committed members signed up. Additionally, Charlene Nelson sent out a press release to promote the event, and all of us individually spread the word within our community. With all the hard work put in to promote the event, this Law Day event was a huge success.

As we began this effort, the first step was to assemble a talented group of Riverside attorneys to volunteer for this day. Luckily, we had good friends in the legal community who were enthusiastically willing to join us. The public came with questions regarding criminal law, real property law, family law, employment and labor law, and various other legal issues. With our Riverside attorneys practicing in various different areas of law, we had the day covered. We would like to thank Charity Schiller, Curtis Wright, and Andrew Maiorano from Best Best & Krieger; Eugene Kim and Luis Arellano from Gresham Savage Nolan & Tilden; Jean Serrano and Sara Morgan from Heiting & Irwin; solo practitioners Brooke Elia, Stacey Wolcott, Rogelio Morales, Marie Moreno Myers, Christopher Buechler, and Judith Runyon; Maurice Kane from Cummings, McCloy, Davis & Acho; and Ed Dailo. Sylvia Choi and I stayed the full day, from 10 a.m. to 6 p.m., and we were able to see our dedicated friends helping out the Riverside community. We are very grateful for their willingness to spend their Saturday with us celebrating Law Day.

In an effort to extend Law Day to a Law Month, the committee also has plans to have volunteer attorneys go out to Poly High School and Notre Dame High School and speak to students about legal careers and opportunities. Kirsten Shea of the Law Day Committee, having been an effective and diligent mentor to students before, has been very active in preparing the outlines for the presentation and contacting various schools, including Poly High School. At the time this article is being written, it is our intention to reach out to Poly High School on May 21, 2012, during their fourth period (11 a.m. to 12 p.m.). As graduates of Notre Dame High School, we are also hoping to go back to our high school and reach out to the students there.

The Law Day committee is currently comprised of Sophia Choi (Riverside County Counsel's office), Sylvia Choi (Riverside County District Attorney's office), Kirsten Shea (Thompson & Colegate), Luis Arellano and Eugene Kim (Gresham Savage Nolan & Tilden), Brooke Elia (Law Offices of Brooke D. Elia), Charity Schiller and Melissa Cushman (Best Best & Krieger), Charles Mayr (Bonnie R. Moss & Associates), Richard Ackerman (Law Offices of R.D. Ackerman), and Eli Underwood (Redwine & Sherrill), with guidance from RCBA President Robyn Lewis and RCBA Executive Director Charlene Nelson. We thank the committee members for agreeing to join the committee and to contribute their talents to make this year's Law Day/Week/Month a success.

Sophia Choi, a member of the Bar Publications Committee, is a deputy county counsel for the County of Riverside.

Sylvia Choi is a deputy district attorney for the County of Riverside.





Sophia Choi, Curtis Wright, Andrew Maiorano, Ed Dallo



Sophia Choi, Brooke Elia



Rogelio Morales, Sylvia Choi, Jean Serrano



Christopher Buechler, Eugene Kim, Luis Arellano, Sophia Choi, Charity Schiller; and Sara Morgan pictured in the back of the group

JOHN B. STREETER
PRESIDENT



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET
SAN FRANCISCO, CALIFORNIA 94105-1639

April 13, 2012

Re: MCLE auditing compliance

Dear Voluntary Bar Association Leaders:

I am writing to alert you that the State Bar is taking a more aggressive approach to auditing MCLE compliance than it has historically. All California lawyers need to be aware of this change in the Bar's MCLE auditing process.

The result of the State Bar's recent 2011 MCLE audit of one percent or 635 lawyers has confirmed the need for increased auditing. Of the 635 audited attorneys, 539 provided the necessary documentation showing full compliance. Of the remaining 96 attorneys, five have been suspended due to their inability to show any compliance. Most of the remaining 91 attorneys had minor reporting deficiencies and received a cautionary letter from our MCLE compliance group about future compliance. Approximately 25 of the 91 are being referred to the Office to Chief Trial Counsel for disciplinary action. Using simple math, we see that 15% of this reporting group were not in compliance.

This result is troubling and reaffirms the action being taken by the State Bar. In 2012, California attorneys can expect that five percent or roughly 3,000-4,000 lawyers to be audited. In 2013, the goal is to audit 10% which translates to 7,000-8,000 lawyers. Letters requesting proof of compliance for 2012 will be mailed in June.

The message is clear. California lawyers must fulfill and accurately document and report their MCLE requirements. No California attorney should be surprised if their compliance certificate is audited. For more information regarding MCLE requirements and reporting, visit the State Bar's [MCLE web page](#).

If you have any questions, please send an email to Carol Madeja, Managing Director of Bar Relations Outreach at [carol.madeja\(5\)calbar.ca.gov](mailto:carol.madeja(5)calbar.ca.gov).

Thank you for your attention to this issue.

Sincerely yours,

Jon B. Streeter
President
The State Bar of California

ELDER BANKRUPTCY FILINGS: CAPACITY ISSUES

by Peter C. Anderson and Abram S. Feuerstein

Older Americans are filing for bankruptcy at increasing rates.¹ And as the age of the average bankruptcy debtor increases, it appears that there is an increase in the number of debtors filing bankruptcy who have chronic and disabling medical conditions. Some of these individuals may lack the physical capacity to undertake those actions necessary to complete a bankruptcy filing successfully and obtain a bankruptcy discharge of their debts. Others may lack the mental capacity or competency to make financial decisions. Inevitably, there has been a rise in situations involving family members seeking to file bankruptcy cases for incapacitated relatives.

Unfortunately, some aspects of the law in this area are unsettled and not well-developed. All too frequently, well-meaning relatives attempt to file bankruptcy cases for incapacitated, financially distressed family members in a haphazard, improper fashion. Often, they run to the bankruptcy court armed only with a doctor's note attesting to the poor physical health or mental condition of their family member. Other individuals run to a local stationery store or look on the internet for a fill-in-the-blanks power of attorney form to support a bankruptcy filing. At times, family members risk committing bankruptcy crimes by forging documents and making false statements as they attempt to commence a bankruptcy case for a disabled or incompetent relative. Even experienced bankruptcy lawyers lack familiarity with the rules.

Incapacitated Debtors

The first question is whether incapacitated individuals can file bankruptcy. The short answer is, "Yes." The Bankruptcy Code contemplates that incapacitated individuals may be bankruptcy debtors, and courts agree.²

Under Section 301 of the Bankruptcy Code,³ a voluntary bankruptcy case may be commenced only when an individual who may be a debtor files a bankruptcy petition. In turn, Section 109 states who may be a debtor. And that section contains no restrictions on incapacitated or disabled debtors.⁴

1 See generally, J. Golmant and J. Woods, "Aging and Bankruptcy Revisited," American Bankruptcy Institute Journal (Sept. 2010); J. Pottow, The Rise in Elder Bankruptcy Filings and Failure of U.S. Bankruptcy Law, 19 Elder L.J. 119 (2011).

2 *In re Myers*, 350 B.R. 760, 762-3 (Bankr. N.D. Ohio 2006) (collecting cases).

3 Unless otherwise noted, all statutory references are to the Bankruptcy Code, Title 11, United States Code, and rule references are to the Federal Rules of Bankruptcy Procedure.

4 In fact, Section 109 supports the filing of bankruptcy by

Filing Through a Representative or Next Friend

Given that disabled and incapacitated debtors may file bankruptcy, the next question that arises is who, if anyone, has the authority to file a bankruptcy petition on behalf of a debtor who lacks capacity. In answering this question, the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure provide only limited guidance.

Under Rule 1004.1, "[i]f an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a bankruptcy petition on behalf of the infant or incompetent person."

Rule 1004.1 also provides that if an infant or incompetent person does not have a duly appointed representative, the person "may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor."

Hence, to the extent that a bankruptcy petition is filed by a representative on behalf of an infant or an incompetent person, sound practice dictates that counsel should ensure that appropriate documentation is filed with the petition establishing the representative's authority to file the petition. However, if no representative exists, the parties should follow Rule 1004.1 and seek an immediate court order appointing a guardian or a next friend.⁵

incapacitated and/or disabled persons. Most non-bankruptcy lawyers are generally aware that in 2005, Congress enacted substantial measures to reform the nation's bankruptcy laws. As part of these wide-ranging amendments, Congress enacted educational requirements for bankruptcy debtors. These mandate that debtors take a *pre*-bankruptcy credit counseling class, and, as a condition of receiving a bankruptcy discharge, debtors are required to take a financial management course *after* they file bankruptcy.

Under Section 109(h)(4), incapacitated or disabled debtors are specifically exempted from meeting the pre-bankruptcy educational requirement. Similarly, the discharge provisions of the Bankruptcy Code exempt incapacitated debtors from the requirement of completing a post-filing course. These provisions manifest a Congressional awareness that incapacitated persons could indeed be bankruptcy debtors, and Congress went the extra step of excluding such debtors from the newly enacted educational requirements.

5 The representative and/or would-be representative faces another hurdle involving the educational requirements added to the Bankruptcy Code in 2005. The code's educational requirements may be a nondelegable duty. See, e.g., *In re Hammer*, 2008

Powers of Attorney

Other than the procedures outlined in Rule 1004.1 pertaining to “infants” and “incompetent persons,” the Bankruptcy Code is silent as to whether someone can file a bankruptcy case on behalf of another person. Thus, at least one court has taken a very restrictive view and held that, except as allowed by Rule 1004.1, a person may never file a voluntary case on behalf of another individual.⁶

By contrast, there are a range of bankruptcy decisions that authorize bankruptcy filings through the use of powers of attorney. Some of these decisions permit a petition to be filed pursuant to a broad, generic grant of authority contained in a power of attorney.⁷ Other cases prohibit a bankruptcy filing absent a specific, express provision that enumerates a bankruptcy filing as part of the authority conveyed under the power of attorney.⁸ A third group of cases takes a middle approach as to the necessary language in the power of attorney.⁹

Regardless of how a specific court will rule, practitioners must understand that bankruptcy courts are reluctant to permit a party other than the debtor to sign and file a petition under a power of attorney. As one court noted, “[t]he filing of a bankruptcy petition is a serious act which necessarily involves exposing the financial and legal affairs of the petitioner to all interested parties in a public forum.”¹⁰ Given its profound legal consequences, another court has observed, filing bankruptcy “should not be undertaken without careful deliberation.”¹¹

Moreover, the bankruptcy process contemplates complete and accurate disclosure about a debtor’s financial condition – both in written bankruptcy schedules and statements, and in oral testimony at a meeting of creditors.¹² Typically, this information is available only from the debtor personally. And absent extraordinary circumstances, creditors have the right to demand the personal participation of the debtor in bankruptcy proceedings as a condition of the debtor obtaining a discharge.

In sum, filing a bankruptcy case is among the most important financial decisions a person will make during his or her lifetime. In light of the lack of clarity concerning the use of powers of attorney, the heightened importance of financial disclosure in bankruptcy cases, and the legal consequences of filing bankruptcy, attorneys should proceed very cautiously before advising clients to sign a bankruptcy petition for another person using a power of attorney. And in those extremely rare cases when a power of attorney is used, attorneys should check the language of the instrument to ensure that it authorizes a bankruptcy filing.

Peter C. Anderson currently serves as the United States Trustee for the Central District of California, Region 16. Abram S. Feuerstein serves as an Assistant United States Trustee and supervises the Riverside Field Office of the United States Trustee Program. The United States Trustee Program is a component of the Department of Justice that protects the integrity of the bankruptcy system by overseeing the administration of bankruptcy cases.



¹² Section 343 requires a bankruptcy debtor to appear and submit to an examination under oath at a meeting of creditors.

WL 6177312 (Bankr. N.D. Ohio 2008). Instead of taking the class on behalf of a debtor or, worse, pretending that the incompetent debtor took the class and is capable of certifying that the requirement has been completed, the representative may want to consider filing a motion excusing compliance with the pre- and post-bankruptcy filing educational requirements.

⁶ *In re Vitagliano*, 303 B.R. 292, 293 (Bankr. W.D.N.Y. 2003); *see also In re Smith*, 115 B.R. 84 (Bankr. E.D.Va. 1990) (authorizing filing through a court-appointed guardian having specific authorization to file bankruptcy, but not a power of attorney).

⁷ *See, e.g., In re Hurt*, 234 B.R. 1, 3-4 (Bankr. D.N.H. 1999).

⁸ *See, e.g., In re Eicholz*, 310 B.R. 203, 207 (Bankr. W.D.Wash. 2004).

⁹ *See, e.g., In re Curtis*, 262 B.R. 619, 622 (Bankr. D.Vt. 2001).

¹⁰ *In re Brown*, 163 B.R. 596, 597 (Bankr. N.D.Fla. 1993).

¹¹ *Curtis*, *supra*, 262 B.R. at 624.

LGBT COUPLES HIGHLIGHT ISSUES OF A GROWING ELDERLY DEMOGRAPHIC

by Christopher J. Buechler

Lesbian, gay, bisexual, and transgender individuals and couples have made great strides in achieving civil equality since the emergence of the modern gay-rights movement from Stonewall in New York in 1969. I have had the pleasure of reporting on legal victories leading to the repeal of Don't Ask, Don't Tell and major blows to California's Proposition 8, as well as the federal Defense of Marriage Act. I am fortunate to be of the generation where adult adoption of a same-sex partner as a work-around to estate planning issues is history and not reality. And I must admit that my life as an out and partnered gay man is quite easy living in the wake of those pioneering trailblazers who have gone before me. But those trailblazers are at least two generations removed from my partner and me, a typical married couple residing in the bedroom community of Riverside. Most of them were quite content to reject traditional family structures if their families rejected them for who they were and their civil rights were rejected in the name of "family values." They built communities and formed their own "families" in urban enclaves like San Francisco's Castro District, L.A.'s West Hollywood, and even a large swath of our very own Palm Springs.

As LGBT civil rights progressed, and homophobia was replaced with familiarity and tolerance, LGBT individuals took on more traditional family roles as sons and daughters, aunts and uncles, and – increasingly – mothers and fathers. With these traditional family roles came the benefits of traditional family support. But what of that lost generation of the aforementioned trailblazers? For a movement that started 43 years ago, surely some of them must be less concerned with LGBT civil rights and more concerned with elder rights. Some of them are dealing with the hard intersection of LGBT and elder rights issues as their "family" advocates are not given the same legal status as a traditional family advocate, like a spouse or child, to carry out end-of-life planning and estate distribution. Gary Gates, a scholar and demographer at UCLA Law School's Williams Institute, has studied U.S. Census data going back to 1990 (when same-sex parenting couples were first identified), and found that the percentage of same-sex unmarried partner couples with children under the age of 18 in the home has increased from 12.5% in 1990 to a peak of 18.8% in 2006, down to 16.2% in 2009.¹ But that means that 83.8% of unmarried same-sex couples do not have children. They have been referred to flippantly as DINKs (Double Income, No Kids),² but with the economic downturn and a more sophisticated understanding of LGBT demographics, the joke is not

1 williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Budget-NCFR-LGBT-Families-December-2011.pdf.

2 Also TINKs (Two Incomes, No Kids).

as funny; some of them may be OINKs (One Income), LINKs (Low Income) or NINKs (No Income). Some of that may be by choice or circumstance, but some of that is by policy design (i.e., North Carolina's recently passed Amendment 1 and other anti-marriage equality and anti-adoption equality laws).

You may think that passing marriage and adoption equality measures would be an easy fix to this problem. But that fix applies mostly prospectively for select LGBT couples, and it doesn't address the issues highlighted above that affect their similarly situated heterosexual counterparts: childless couples, people estranged from their traditional family, and unmarried cohabitating couples. In her book, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law* (Beacon Press, 2008), Law Professor Nancy Polikoff lays out the argument that structuring social rights and benefits around marriage ignores the reality of an increasing number of couples and individuals who structure their lives around, "diverse kinds of partnerships, households, kinship relationships and families."³

Even a legislative fix is only half the battle for these families. Consider the 2010 case of Clay M. Greene and Harold Scull, a same-sex couple from Sonoma County, CA.⁴ When Mr. Scull, 89, suffered a fall down the stairs in April 2008, the county petitioned the court for conservatorship and then proceeded to dispose of nearly \$500,000 worth of belongings accumulated by the couple over the years. It characterized Mr. Greene, 78, as the "roommate," despite documentation they had prepared in case of the death or incapacitation of either party and the reality of their relationship. It then moved the understandably antagonistic Mr. Greene into a nursing home against his will. On top of the loss of property and dignity, Clay Greene also lost his longtime partner in August 2008.

Fortunately, Mr. Greene was able to recover a substantial sum of money, as well as to force a change in policy at the Sonoma County Public Guardian's office. But this case just highlights the need for our laws and the people charged with enforcing them to treat all elderly couples and individuals, gay and straight, with respect and dignity, regardless of how they choose (or are forced) to structure their family.

Christopher J. Buechler lives in Riverside with his registered domestic partner, William Marin, a Human Resources Analyst for the County of Riverside.



3 "Beyond Same-Sex Marriage: A New Strategic Vision for all our Families & Relationships," available at beyondmarriage.org/full_statement.html.

4 nclrights.org/site/PageServer?pagename=issue_caseDocket_Greene_v_County_of_Sonoma_et_al.

SAFEGUARDING THE RIGHTS AND ENTITLEMENTS OF OLDER ADULTS IN RIVERSIDE COUNTY

by Edna Vallecillo Garcia

The Riverside County Office on Aging, under the federal Older Americans Act and the state Older Californians Act, is charged with providing leadership in developing a consumer-directed, home and community-based system of care services for older persons and adults with disabilities in Riverside County. This system enables older adults to access services that address functional limitations, promote socialization, continue health and independence, and protect elder rights. Together, these services promote older adults' ability to maintain the highest possible levels of function, participation, and dignity in the community.

The Older Americans Act provides funding to support a variety of services. One of the services offered to older individuals in Riverside County is the Legal Assistance Program. The Legal Assistance Program ensures the rights and entitlements of persons 60 years of age or older by providing or securing legal assistance such as information, advice, counseling, administrative representation and judicial representation to an individual or to a group. Legal representation is provided by a member of the California State Bar or a non-attorney under the supervision and control of a member of the California State Bar.

The major types of legal issues handled by the program include housing, family, elder abuse, consumer, benefits, health, and simple wills. In the past four years, as the economy has worsened, there has been an increase in legal problems involving elder abuse, consumer debt, housing, and benefits.

Older adults access the Legal Assistance Program through outreach intake at senior centers, as well as through the telephone. In addition, the program provides a coordinated system of care through linkages with the Long-Term Care Ombudsman program and the Health Insurance Counseling and Advocacy Program (HICAP), two additional programs supported by the agency.

The Ombudsman Program trains volunteers to provide advocacy and support to vulnerable individuals in nursing homes. This includes record review, one-on-one client meetings, follow-up, and investigating and resolving complaints to make sure that seniors are getting the treatment they deserve and the care that they need. The Ombudsman Program assists long-term care (LTC) residents, their friends and families, and the public in the following areas: (1) resolution of LTC quality-of-life and quality-of-care issues; (2) education about laws and regulations related to LTC; and (3) witnessing advance health care directives and certain property transfers for residents of skilled nursing facilities. Paid staff and volunteers visit all licensed LTC facilities and protect residents' rights by providing a regular presence and access to ombudsman services.

The HICAP provides information about and assistance with Medicare, managed care (HMOs), long-term care insurance, and other related health insurance issues. Trained volunteer counselors offer objective information to help seniors and other Medicare beneficiaries make good health care decisions. When problems arise, HICAP counselors can help resolve them. Along with local individual counseling, the HICAP offers community education presentations. All services are free of charge.

The Riverside County Office on Aging also offers Community Elder Abuse Education to safeguard older adults from abuse, neglect, or exploitation by educating the public and training professionals in how to prevent, recognize, and respond to elder abuse.

All of these programs are part of a coordinated effort to protect the legal rights of Riverside County's older adult population. To learn more about these or other programs supported by the Riverside County Office on Aging, please call (800) 510-2020 or visit www.rcaging.org.

Edna Vallecillo Garcia is the Contracts and Services Officer for the Riverside County Office on Aging.



DECISIONAL CAPACITY DILEMMAS

by Frank Randolph, M.D.

The increasing prevalence of dementing illnesses – primarily Alzheimer’s disease and atherosclerotic cerebrovascular disease – is associated with an increase in impairment of decisional capacity. Between age 65 and 70, the prevalence of dementing illness is 5 to 10%, but after age 85, the prevalence is up to 50%. Patients with Alzheimer’s disease and other dementias have high rates of medical decisional incapacity; more than half of patients with mild to moderate dementia may have impairment, and such incapacity is universal among patients with more severe dementia. Roughly 50% of patients hospitalized with an acute episode of schizophrenia have impairment with regard to at least one element of competence, as compared with 20 to 25% of patients admitted with depression. Patients with symptomatic bipolar disorder may have levels of impairment in decision-making that are similar to those of patients with schizophrenia. Surveys indicate that 6 to 11% of elderly patients admitted to hospitals exhibit symptoms of alcoholism, as do 20% of elderly patients in psychiatric wards and 14% of elderly patients in emergency rooms. Decisional capacity may be impaired for short periods during bouts of intoxication. However, chronic alcoholism may cause persistent cognitive impairment or frank dementia.

The negative fall-out for older adults with impaired decisional capacity includes suboptimal health care decision-making, mismanagement of financial affairs, and reduced performance of other important tasks that may affect welfare and safety. This may, in turn, affect families, friends, and society at large. It may create vulnerabilities that increase elder abuse in all forms – financial, fiduciary, physical, and psychological.

California’s Probate Code defines “capacity” as “a person’s ability to understand the nature and consequences of a decision, and to make and communicate a decision, and includes in the case of proposed health care, that ability to understand its significant benefits, risks, and alternatives.” (Prob. Code, § 4609.) The Due Process in Competency Determinations Act (Prob. Code, §§ 810-814) was enacted in 1995 to ensure that all persons who are the subject of judicial capacity proceedings retain their legal decision-making powers unless there is specific evidence that the person is functionally unable to make the type of decision at issue. The law specifically states that a person with a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical deci-

sions, executing wills or trusts, and performing other actions. It further states that a judicial determination that a person lacks the capacity to perform a specific act must be based on specific evidence of a mental function deficit, rather than on a mere diagnosis of a person’s mental or physical disorder. (Prob. Code, § 810.) In addition, the code requires a finding of significant impairment with respect to “the type of act or decision in question,” and the court may take into consideration “the frequency, severity, and duration of periods of impairment.” (Prob. Code, § 811, subs. (b), (c).) The code provides guidance to legal and health professionals in determining: (1) whether mental deficits exist, (2) whether mental deficits significantly affect legal mental capacity, (3) a diagnosis, (4) whether a mental disorder is treatable, and (5) whether the mental deficits may be reversible.

California courts often direct clinical experts to use the California capacity declaration in expressing their clinical opinions about the decisional capacity of an individual subject to judicial capacity proceedings. The purpose of the form is to enable the court to determine (1) whether the individual is able to attend a court hearing to determine whether a conservator should be appointed; (2) whether the individual has the capacity to give informed consent to medical treatment, and (3) whether the individual has dementia and if so, (a) whether he or she needs to be placed in a secured facility for the elderly or a facility that provides dementia treatment and (b) whether he or she needs or would benefit from dementia medications. The form requests specific information about levels of arousal, orientation, ability to attend and concentrate, short-term memory, long-term memory, immediate recall, and the ability to comprehend questions, follow instructions, use words correctly, name objects, recognize familiar objects and persons, understand and appreciate quantities, reason using abstract concepts, plan, organize, and carry out actions in one’s own rational self-interest, and reason logically.

The courts have long looked to the health profession to provide information about the decision-making capacity of a given individual, but the science of capacity assessment is comparatively recent. Health professionals may utilize different clinical methods to assess capacity, including an examination of mental status, psychological or neuropsychological testing, and/or a neurological examination. The reviewer may ask questions about

specific issues, to assess the patient's judgment skills, and include the patient's response in the context of the evaluation (directed clinical interview). A directed clinical interview attempts to determine whether the patient can respond knowingly and intelligently to queries about medical treatment, participate in a treatment decision by means of a rational thought process, and understand the nature and seriousness of his or her condition, the nature of the medical treatment recommended, the probable degree and duration of any benefits and risks, the consequences of lack of treatment, and the nature, risks, and benefits of any reasonable alternatives.

When an explicit competence evaluation is required, physicians should be aware of the relevant criteria and should be encouraged to use a structured approach to assessment. Research in the past decade suggests that physician performance of capacity assessments is often suboptimal. Physicians are frequently unaware of a patient's incapacity for decision-making. When incapacity is suspected, physicians may not know what standard to apply, and, as a result, their evaluations may omit mention of the relevant criteria or may not apply them specifically to decisions about treatment. In the past two years, the California Medical Association, in cooperation with the California Judicial Council, has convened a task force whose purpose is to clarify issues regarding proper completion of the capacity declaration, leading to the development of an educational program for physicians and other health professionals engaged in capacity assessment.

Frank Randolph, M.D. is the Chief of the Geriatric Section at Arrowhead Regional Medical Center.



ATTENTION RCBA MEMBERS

If you are not getting email updates/ notices from the RCBA and would like to be on our mailing list, visit our website at www.riversidecountybar.com to submit your email address.

The website includes bar events calendar, legal research, office tools, and law links. You can register for events, make payments and donations, and much more.



LEO A. DEEGAN INN OF COURT SEEKS MEMBERS



The Leo A. Deegan Inn of Court, established in April of 1992 and based in Riverside, is currently seeking legal professionals interested in participating in the 2012-13 program year. The Inn of Court, based upon the prestigious British Inns of Court, is taking applications for legal professionals practicing in the greater Riverside area, either in private practice or working for the government. Not all cities or regions have their own Inn of Court, but they are divided geographically.

Named after one of the most distinguished jurists in the history of Riverside County, and an individual who personified professionalism, civility, ethics and legal excellence, the Leo A. Deegan Inn of Court held its first meeting in September of 1992. The goal of the Inn is to provide a forum for lawyers and judges to discuss and debate various situations in which legal ethics impact the outcome of a case. Inn members are encouraged to "stretch the legal muscle" and be creative when developing programs that are educational and informative and when it comes to finding ethical solutions.

Inn membership is by invitation only and all lawyers and judicial officers are encouraged to apply. The current Inn's Board of Directors reviews all applications and makes selections based upon referral and what one's legal experience and reputation will bring to the overall program year. All attorney applicants must be current members of the Riverside County Bar Association.

Once selections are made, the Board divides all members into teams of eight; each team is comprised of Associate Members, Barristers, and Judicial Masters, to ensure a balanced blend of legal experience is achieved for team presentations. At the orientation meeting, held in September, teams meet for the first time and begin to plan their strategies for their respective presentations. Teams make an initial selection of months for their presentations and set out to determine topics.

The Inn's program year begins in September and continues through May. Dinner meetings are held from 6 to 8 p.m. once monthly, at a venue to be determined.

There are membership dues and dinner costs associated with membership.

For further information or to obtain an application, please contact the Inn's administrator, Sherri Gomez, at 951-689-1910 or via email to sherri.gomez4@gmail.com.



SOME THOUGHTS ON MECHANICAL RESTRAINTS

by Elyn R. Saks

In 1986, I published my law school note on “The Use of Mechanical Restraints in Psychiatric Hospitals” in the Yale Law Journal. I started with a vignette:

Julia, a newly admitted psychotic patient, suddenly breaks a plastic spoon while she is eating lunch. She appears amused, slightly fearful, and a touch defiant. Staff suggest that she needs to be restrained. When Julia resists, six orderlies converge on her, pin her to her bed, and, despite her struggles, cuff her limbs with thick leather straps. Finally, they immobilize her torso with a body net. Tied spread-eagle to the bed, unable to move, Julia is now in “six-point” restraints.

In time Julia’s physical pain will increase. Her ankles and wrists will bruise; her body will ache from the forced immobility. Although she will beg for release (many patients do), Julia will neither be let go, nor told when staff plan to untie her. Alone, frightened, and in pain, she will begin to struggle again – a signal to the staff that she needs to be restrained longer.

I did not say this at the time, but Julia was actually me. I had brandished that plastic spoon. I believe that the real risk that I would actually hurt anyone was minimal. Still, my chart said “use restraints liberally.” And they did. In a three-week period, I was restrained every day for at least several hours and a couple of times for over 20 hours. I then transferred to another hospital, and although my behavior didn’t change in the least, I stopped being restrained. Indeed, it is a robust finding in the literature that whether you are restrained has less to do with your patient characteristics, the staff/patient ratio, etc., and more to do with the culture of the ward.

Restraints are very consequential. Most horribly, they can lead to death – through asphyxiation, aspirating one’s vomit, a heart attack. A Harvard statistician estimated that one to three people die in restraints each week in this country. It is unclear whether restraints are saving or actually costing lives.

This point came home to me when, a week after presenting to the National Alliance on Mental Illness in San Diego, I was contacted by a woman named Shannon. “I don’t know if you will remember me,” she said. “I came up after your talk and told you about my brother. You talked about restraints when you were here, and just yesterday, he was restrained face-down and died.” Putting a human face on a restraint death was very powerful. Shannon has been a compelling voice advocating against restraints.

Less extreme than death but still problematic, restraints can be greatly traumatizing. For me, they were the most trau-

matic thing that ever happened to me. I say that as someone who has suffered life-threatening illness. Indeed, I experienced years of nightmares about restraints. In restraints, one is scared, helpless, dehumanized and degraded, and – after about ten hours – in great physical pain. Abuse survivors (I am not one) are said to experience even greater trauma.

It needn’t be this way. There have been restraint reduction efforts in a number of places – e.g., Pennsylvania and Massachusetts. These efforts have worked in state hospitals, private hospitals, and even forensic hospitals. Key features of these efforts have been laid out. It has been shown that these efforts do not lead to greater costs or greater injuries. Nor, according to one study, did chemical restraints increase. Efforts in this regard are gaining momentum in the Los Angeles County Department of Mental Health, which has begun collecting data on restraint use.

Indeed, we have the example not just of several states over a short period of time, but of England, which has largely done without severe mechanical restraints for over 200. We should be able to do as well.

When I wrote my first article on restraints, many articles had doctors reporting that restraints were a treatment; they helped patients feel safe. But when you listen to people begging to get out of restraints, and when you look at the literature surveying patients about their preferences for emergency treatment, with restraints usually coming out last, it is hard to credit this view. I think it’s very encouraging that in many places, restraints are now seen not as a treatment, but as a treatment failure.

Tolerance of restraints may involve something deeper: a belief that mental patients don’t react as “regular” people would. A very cherished professor at Yale, a psychiatrist and psychoanalyst himself, had this to say when I talked to him about how degrading and painful restraints must be. He said: “You don’t understand, Elyn. These patients are psychotic; they are different from you and me; they don’t experience restraints as you or I would.” At that moment in my life I didn’t have the courage to tell him, “No, we are not all that different from you.”

So, when you think about whether we should encourage or discourage the use of restraints – whether they are necessary or largely avoidable – put yourself in the shoes of those undergoing restraints. Keep the trauma and pain in mind.

Elyn Saks is the Orrin B. Evans Professor of Law, Psychology, and Psychiatry and the Behavioral Sciences at USC. Her memoir, The Center Cannot Hold: My Journey Through Madness, was published in 2007.



OPPOSING COUNSEL: MELISSA AND JEFF MOORE

by *Sophia Choi*

Balancing the Scales of Justice

Melissa Moore is a deputy district attorney with the Riverside County District Attorney's office, while her husband Jeff Moore is a criminal defense attorney with Blumenthal Law Offices in Riverside. Their different "sides" have actually provided for greater unity and understanding between the couple, together balancing the scales of justice.

Melissa Moore was born and raised in Garland, Texas. Her father was a certified public accountant, and her mother was a nurse. Melissa is an only child. As a child, Melissa dreamed of becoming a teacher and then of becoming a psychologist. In high school, her history teacher suggested that she become a lawyer. After that point, Melissa endeavored to become a lawyer, and specifically, a criminal prosecutor. She graduated from the University of Texas in December 1991, with history and psychology majors. She then received her Juris Doctorate degree from the University of Texas. Having an interest in criminal law, Melissa joined the American Journal of Criminal Law in law school. Although a Texas native, Melissa believed that legal opportunities for women were inadequate in Texas. In search of better legal opportunities, Melissa reached out to California and applied to the Riverside County District Attorney's office and the Ventura County District Attorney's office during spring of her third year in law school. Melissa received an offer from the Riverside office at the same time as the Ventura office called for a second interview, and she accepted the Riverside offer. After taking the California Bar Examination, Melissa moved to California. After starting at the age of 25, in 1995, Melissa is still diligently working at the first and only legal position she has held. From the moment she decided she would pursue a career as an attorney, the sole consideration she had was to become a prosecutor, and, to this day, she continues to work with the same passion for her position.

Melissa is currently assigned to the Sexual Assault Child Abuse ("SACA") Unit as its Trial Team Leader. She started with the District Attorney's office in the Juvenile Division. She has been the Trial Team Leader of the Juvenile Division in both the Riverside and Southwest offices. She liked the Juvenile Division most, as she was able to get a better picture of the entire criminal jus-



Melissa and Jeff Moore

tice system and to gain comprehensive knowledge of the different areas within criminal law. Melissa felt that she was able to reach out to youth and help keep them from reoffending, whereas it would be harder to reach out to adult offenders. Melissa's goal of reaching out to the younger generation in an effort to change their lives is also evident in her participation in the Riverside County Bar Association's Mock Trial program. Melissa has been an attorney coach for La Sierra High School for nine years,

and she is currently a member of the Mock Trial Steering Committee.

Melissa met her husband, Jeff Moore, in the Riverside County District Attorney's office, as she supervised him when he was newly employed by the office. Jeff grew up in Northern California, where his mother was the district attorney of Mendocino County. He went to UCLA for his undergraduate studies and received his Juris Doctorate degree from UC Hastings. Jeff is now a criminal defense attorney with the Blumenthal Law Offices in Riverside. He is very dedicated to advocating diligently and zealously for his clients.

As Melissa is a prosecutor and Jeff is a criminal defense attorney, they are often met with the question, "How can you be married to a lawyer?" However, Melissa eagerly asserted that this is an ideal union, because another attorney understands the stress of trial and the necessity of working late in preparation for cases. Melissa and Jeff also talk to each other about general trial strategies. Although they have disagreements, they address their differences civilly, and they are able to understand each other's positions. Although a prosecutor, Melissa sees the need to protect people's rights and the need for a balance in the system. Melissa noted that her husband's role in the justice system has helped her understand each case's far-reaching impacts on families. She realized that a case is not just another plea, trial, or negotiation. Rather, each case is a person's life, and the disposition of a case has inevitable lasting effects. And being married to a criminal defense attorney has helped Melissa become more sympathetic to the lives that come with each case, as well as more understanding of the duties of a defense attorney.

Melissa and Jeff have two daughters, Katherine and Sarah. The Moore family lives in the Inland Empire. Before

the births of her two daughters, Melissa thought that she might have twins, as her husband has a twin sister and her dad has a twin brother. However, Katherine (age 6) and Sarah (age 4) are singletons. Melissa's weekends are devoted to her daughters; as a full-time mother, she takes them to gymnastics and swimming. Melissa had been active in the district attorney's softball team, playing for the team as well as managing it. However, her time now is devoted to her daughters. Melissa and Jeff enjoy travel and save money to go on exciting trips. For her first sabbatical, she went to Ireland for three weeks and then went to New York and stayed at an artist's loft in Soho. For her second sabbatical, she drove cross-country with Jeff, and they went as far as Nashville, Tennessee. Also enjoying cruises, Melissa and Jeff had their honeymoon on a 14-day Panama Canal cruise. They also went with their daughters on a Disney cruise to the Caribbean. The Moore family takes pleasure in good food and expensive wine and has been to various nice places. Still, Melissa's favorite food is homemade lasagna, made according to her mother's recipe.

Both Melissa and Jeff are fans of college football. However, the "scales" of football are not as well-balanced as the scales of justice. As a Bruin, Jeff roots for UCLA, while Melissa roots for her college team, the University of Texas. Football season is a time of great excitement for the Moore family.

Their youngest daughter enjoys Mother Goose rhymes. Among them, Melissa particularly likes the "A Wise Old Owl," which goes: "A wise old owl sat in an oak. The more he heard, the less he spoke. The less he spoke, the more he heard. Why aren't we all like that wise old bird?" Something valuable can be learned from each Mother Goose rhyme. Melissa said that "A Wise Old Owl" made her realize that many times she would talk more than listen, but that she should try to listen more, as listening more can help one make better decisions.

Melissa Moore's life in California started from a single tie: her offer from the Riverside County District Attorney's office, to which she has stayed committed since 1995. In this office, she also met her lifelong partner, her husband Jeff Moore. And, with Jeff, she has two beautiful daughters. Melissa's choice to seek out a career opportunity in California has had positive results. Together, Melissa and Jeff Moore balance the scales of justice in the criminal justice system.

Sophia Choi, a member of the Bar Publications Committee, is a deputy county counsel for the County of Riverside.



MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective June 30, 2012.

Graham D. Donath – Law Offices of Graham Donath APC, Irvine

Denise Kidner (S) – Law Student, Riverside



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Office in Rancho Mirage

Nice, large, window office w/ optional secretarial space. Partial law library, conference room, lounge, phone system, built-in cabinets, copier/fax privileges, part-time reception, other amenities. Near Palm Springs & Indio Courts. Thomas A. Grossman, PLC (Desert ADR), (760) 324-3800.

Office Space – Downtown Riverside

1 Block from the Court Complex. Full service office space available. Inns of Court Law Building. Contact Vincent P. Nolan (951) 788-1747, Frank Peasley (951) 369-0818 or Maggie Wilkerson (951) 206-0292.

Office Space - Grand Terrace

Halfway between SB Central & Downtown Riverside. 565 to 1130 sq ft., \$1.10/sq ft. No cams, ready to move in. Ask for Barry, 951-689-9644

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4129 Main Street, downtown Riverside. Next to Family Law Court, across the street from Hall of Justice and Historic Courthouse. Contact Sue Burns at the RCBA, (951) 682-1015.

Conference Rooms Available

Conference rooms, small offices and the third floor meeting room at the RCBA building are available for rent on a half-day or full-day basis. Please call for pricing information, and reserve rooms in advance, by contacting Charlene or Lisa at the RCBA office, (951) 682-1015 or rcba@riversidecountybar.com.



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- Minimal waiting time facilitates quicker resolution of issues
- Neutral perspective by an attorney with at least 10 years' experience

DRS benefits attorneys:

- Saving clients' money creates satisfied clients
- Solving problems quickly enhances your reputation
- Innovative solutions can restore faith in lawyers

DRS benefits the courts:

- Prevents nuisance cases from getting to court
- Enables case settlements before going to trial
- Helps alleviate congested court calendars

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