Keeping the Principal Healthy: The Future of Medical Decision Making and Who Will Care for Us When We Are 80 Years Old

By Betsy Angevine, Esq.
Health Care Decision Making SIG Co-Chair

Keeping the Principal Healthier

A study was reported by the Associated Press that investigated how long older people remain healthy, not just live. Japan had its older people remaining healthy longer (74.5 years) with Australia hard on its health (73.2). The United States was 24 on the list at age 70, due to the wide diversity of health between the “haves” and the “have nots.” To determine these ages, the study subtracted the time the older person was expected to have substantial medical problems from the person’s longevity. After that time the person might be expected to begin needing medical help regularly.

It is at the end of a person’s “healthy life” that a medical decision making surrogate’s work usually begins. And yet, that is just the beginning of the time that a person may live if the average life span of the person is still another six or seven years. The health care decision making proxy may make decisions and help negotiate acceptance of the help that is not with the tradition of decisions made in hospitals or with medical personnel.

Our society first accepted the role of surrogate medical decision makers (continued on page 2)
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to speak for the sick person to stop “life support” medical care when it was not to the sick person’s benefit. Then, as the concept was accepted by the medical world, the HMO and insurance controversies began. The role of the health care decision maker has moved to making sure the sick person had adequate care and to negotiating with insurance companies for that care.

Many of my clients, though, are acting as surrogates trying to help make their family member healthier after a serious illness before a medical emergency occurs. They work as surrogates trying to find ways to keep their spouse or parent healthier by finding and supervising in-home care. They reasoned if their spouse or parent has regular social contact with a caregiver or helper, has tasty healthy meals, and is encouraged to move to get back muscle strength lost after illness, then the spouse or parent might become healthier, avoid a medical emergency and be able to remain outside of a nursing home longer. At the point described, the surrogate has moved beyond standard medical decision making into the realm of keeping a spouse or parent from needing medical intervention. I predict that a lot of surrogates trying to help make their family member healthier after a serious illness before a medical emergency occurs. They work as surrogates trying to find ways to keep their spouse or parent healthier by finding and supervising in-home care. They reasoned if their spouse or parent has regular social contact with a caregiver or helper, has tasty healthy meals, and is encouraged to move to get back muscle strength lost after illness, then the spouse or parent might become healthier, avoid a medical emergency and be able to remain outside of a nursing home longer. At the point described, the surrogate has moved beyond standard medical decision making into the realm of keeping a spouse or parent from needing medical intervention. I predict that a lot of surrogates trying to help make their family member healthier after a serious illness before a medical emergency occurs. They work as surrogates trying to find ways to keep their spouse or parent healthier by finding and supervising in-home care. They reasoned if their spouse or parent has regular social contact with a caregiver or helper, has tasty healthy meals, and is encouraged to move to get back muscle strength lost after illness, then the spouse or parent might become healthier, avoid a medical emergency and be able to remain outside of a

Who Will Care for the Boomers Once They Need Care?

A client in his mid 40’s asked me recently, “why should I purchase long term care insurance that has good home care benefits if no one will be available to do in-home care when I get to be 80?” This client had been struggling to get in-home care for a parent and had realized that the hotter job market had limited the supply of people willing to work for low wages, with no benefits, who care for difficult, prejudiced and sometimes mildly psychotic elderly. As he said, “It’s not a job I would want to do.” He pointed out that by the time he gets to be 80 there will probably be more 80-year-olds than 30-year-olds willing to do this work.

Nearly all my clients state that they would prefer to stay at home with in-home care giving “when they need it” rather than moving to an assisted housing facility. Many of my younger clients are purchasing long term care insurance that has in-home care benefits. We all know that there is a looming wave of older Americans, as the boomers’ reach “maturity”. (Since a lot of us never became mature after our majority, it is hoped that our retirement will bring forth our maturity, not just our opportunity for discount movie and ski tickets). Where are we going to find caregivers?

Twenty years ago, a caregiver did not get much respect. Slowly, the concept of child caregivers being “babysitters” evolved into the idea that these child caregivers are educators and essential for a child’s development. Studies indicated that children in first rate
President’s Message
By Judith A. Stein, Esq.

I write this message in early June. I am feeling quite achy having spent much of yesterday tending our garden. Early June in northeastern Connecticut requires attention to “gone-by” tulips and daffodils, thriving perennials, and calls from annuals, herbs and tomatoes to get planted before it’s too late. As usual, so much to do and so little time.

Which leads me to my message to you as NAELA’s new president. In response to my worrying over how to make these messages interesting, (does anyone really read them anyway?), my husband suggested that you might enjoy following our garden this year. This would also, he assured me, lend itself to many metaphors about the issues and events facing NAELA and our clients. He’s a pretty wise guy, so I thought I’d give it a shot.

At this time of year NAELA spends a great deal of time encouraging new growth and nurturing those who have lead us so well. As president I have to help strike this balance: saying thank you and goodbye to some former committee chairs, board members, and past presidents, inviting some to shift roles, others to continue, and welcoming some entirely new faces to join the efforts to lead NAELA. This is not always an easy task, and it is one that Frank Johns, Becky Morgan, Laury Adsit Gelardi, and I have taken very seriously.

We must hold onto our history and maintain our foundations. We must also be open to new leaders with new ideas and new energy. It’s the only way to truly grow NAELA—a goal (continued on page 6)
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(continued from page 2)

day care succeeded as well or better in school than children raised in a stay at home environment. The boomers’ production of children out distanced available childcare opportunities. There was competition for good care and a determination to raise the quality of all day care. Colleges started training child care “educators.” Suddenly, 20 years later, a child care provider was considered a real job, sometimes with a real salary and benefits and a real vocation. There were more trained competent care providers and the competition for that kind of care made their price for good care rise. This model has also been followed for the care of the developmentally disabled.

Can this model be translated to the care of the elderly outside a nursing home? There are so many “boomers” graying by the day that we can guarantee that there will be competition for elder caregivers. But, will we be willing to pay a living wage with benefits? “Boomers” are notorious for believing we are worth the money and for paying for what we want, now. Will our children or financial agents, as they are handling our finances, agree that we are worth the money? Probably, because we’ve raised them to think we are worth it.

When the competition for daycare space became a quality of life issue within the whole community, the communities reached out to provide training for both facility child caregivers and in-home child caregivers. When the competition for daycare space became a quality of life issue within the whole community, the communities reached out to provide training for both facility child caregivers and in-home child caregivers. The state had also extended their licensing to anyone who participated in a child care business, requiring some sort of training to keep up with the licensing requirements. This stimulated the availability of training.

Most in-home caregivers of the elderly have next to no training beyond life experience. Their situation is much like the early days of child care workers. They may also be benefited by some sort of required certification. When certification is required, both the status of elder care giving and pay will rise. This will begin the slow creep toward raising the status of caregivers of the elderly sufficiently that people will choose this work as a real vocation and maybe there will be caregivers for the “boomers” when the time comes.

One solution to spread the labor of caring for us all is the assisted living model. With childcare, some parents choose to put children in childcare facilities, not just in hiring home care. Will the boomers accept the easier to provide elder care model of assisted living in sufficient quantities to cope with the large expected numbers? In the daycare facility model the caregivers receive at least some work benefits such as insurance and sick time. They can spread the emotional load of dealing with a difficult child among many workers. This raises both the status of the job and lowers the job stress. If the caregivers of the elderly are better trained, the work force will be more stable and the people living in assisted living may be able to connect better with the staff members. Then these facilities will feel less like going to a senior orphanage and more like going to a summer camp with camp counselors who are with you the entire stay. Once the perception of the “institution” diminishes and the view of a pleasant place to be grows, assisted living facilities are likely to grow in popularity.

When the competition for daycare space became a quality of life issue within the whole community, the communities reached out to provide training for both facility child caregivers and in-home child caregivers.

Calendar of Events

(continued from page 1)

O C T O B E R 2 8 - N O V E M B E R 1 , 2 0 0 0


N O V E M B E R 1 6 - 1 9 , 2 0 0 0

National Academy of Elder Law Attorneys’ 2000 Institute, “Climbing To Prosperity with Professionalism,” The Broadmoor, Colorado Springs, CO. For more information contact Jenifer Mowery at (520) 881-4005, ext. 114 or jmowery@naela.com.

It is in our best interest to work with our communities to prepare for their deluge of older people who need help to stay healthy and active. The long, healthy life is our goal but we need to accept after that period there will be a lot of effort needed not to become truly sick. We need to look at the training and certification of all elder care workers as the next step with making our clients “healthy lives” last longer by getting them healthy again when the first major illnesses occur. And for now, we need to help the children of the elderly to understand that a medial decision making surrogate is becoming more and more a job to help the parent stay healthy as long as possible and to become healthy again after a major illness.
New Editor for the New-Look NAELA News

by Steven H. Stern, Esq.

I am absolutely thrilled to announce that this is my first edition as editor of the NAELA News. As I begin this challenge, I would like to thank past co-editors Alex Moschella and William Brisk, CELA for their outstanding contributions and ensuring the quality of our publication. I would also like to personally thank Howard Atlas, CELA, Laury Adsit Gelardi, and Jihane Rohrbacker for taking the time to assist me with this transition. I promise to do my very best.

One of the many comments I have heard from our NAELA members is that they would like to be kept more up to date with what is going on within the organization. Therefore, in addition to the articles that appear regularly in the News pertaining to substantive legal issues, we will strive to include updates and news items about NAELA. This will be of particular importance in the near future as the NAELA Long-Range Planning Committee begins to incorporate the recommendations of the Leadership Task Force.

We are extremely fortunate to belong to a dynamic and growing Academy, an organization that is well on its way to achieving greatness. However, it is always important to remember from where we came in order to secure our on-going mission. Beginning next issue, I hope to bring the experience and the wisdom of many of our past presidents to the NAELA News. In our new “Past President Speaks” interview feature, some of NAELA’s finest will give us their insights on the organization, and what they believe the future holds. Our first interview is with immediate past-president, A. Frank Johns, CELA. You won’t want to miss what is certain to be a lively discussion.

I hope you all like the new look of the News, and reading the new upcoming features, as much as I’m sure we will enjoy bringing it to you. I look forward to hearing your positive comments (any negative comments on the News can continue to be forwarded to Jihane).

Missed a NAELA Symposium or Institute?

No need to worry…

Audiotapes of most of the sessions are available to NAELA members who were not able to attend the symposium or institute or who missed a particular session.

You may order tapes of NAELA programs by contacting:

ADC Services 69013 River Bend Drive Covington, LA 70433 Phone 504-892-1157 Fax 504-892-9957
President’s Message
(continued from page 3)

to which we are all committed.

In this spirit, I thank once more the many who have served and have now
cycled off the board and committee
chairs. I will give Becky Morgan some
more latitude in her schedule as she is
“replaced” as immediate past president by
Frank Johns. I hope for their con-
tinued guidance and wisdom. And I
look with enthusiasm to working with
the new leadership, including the new
executive committee of Charlie
Sabatino, Bernie Krooks, Bill Brow-
ing, and Lawrence Davidow. We are a
can-do, energetic crew and I know I
speak for all when I encourage you to
be in touch with us and tell us your ideas.

We placed an invitation to volun-
teer on the NAELA members’ Listserv
and I am happy to report that many
members responded positively. I also
received written and oral requests to
work for NAELA. All those who vol-
unteered have been asked to serve on a
committee that meets their interests. I
have also formed a new committee and
asked others to focus on particular tasks
in response to member feedback. These
new activities include the following:

● We have formed a new NAELA
Good and Welfare Committee, which will be chaired by
Lawrence Davidow and John
Wargo. Among other things, I
have asked this committee to
focus on new members—welcom-
ing them when they join, staying
in touch during their first years,
encouraging them to attend
NAELA’s conferences, and
greeting those who do attend.
The good and welfare committee
will also help us keep alive
NAELA’s unique community style
as we grow, by helping us reach
out to members in good times and
bad. If you know of someone who
could use a hand or if you would
like to help this committee, please
contact Lawrence or John.

● I have asked the membership
committee to consider the
formation of a new lawyer’s
committee for NAELA which will
attend to the needs of those who

have recently joined the elder
law field.

● I have asked the NAELA
Program and Technology
Committees to look into the
possibilities of offering our
conference manuals on CD-
ROM, computer disk, or other
“non-traditional” formats.

● I have asked the program
committee to consider concerns
that have been raised about
holding the 2004 Symposium in
South Carolina and have asked
the NAELA Program Committee
Chair, Stu Zimring, to report to
the board at its July meeting.

● I have asked Tom Begley, Jr. to
lead the long-term care sub-
committee of our public policy
committee and to work with
committee co-chairs Alfred
Chiplin and Ron Fatoullah, and
NAELA Public Policy Consult-
ant, Brian Lindberg, to promote
NAELA’s White Paper on Long-
Term Care.

● I have asked president-elect
Charlie Sabatino to work with
the technology committee and
with NAELA Managing Direc-
tor, Debbie Barnett, to insure
that the NAELA website is
enhanced and continues to be a
vital, state-of-the-art resource for
elder law.

● In July the board will meet in
Portland, ME and will decide
upon a long range plan together
with representatives from the
committee which has worked all
year to draft a proposed plan.

In order to allow this new growth
to flourish, we have also made thought-
ful decisions to trim and prune. Most
notably, by consensus of the full NAELA
Board, we have terminated our relation-
ship with the Corporation for Long-
Term Care Certification (CLTCC). We
made this decision after determining
that NAELA and CLTCC could not
agree on the direction of testing and re-
view courses for the certification pro-
gram. We continue, however, to be com-
mitted to excellence in the field of long-
term care insurance. Indeed, it is this
commitment which led our decision to
terminate NAELA’s contract with
CLTCC. We are currently pursuing pos-
sibilities for partnering with others to
help ensure excellence in this field,
which is so important to our clients.

So we have done the work neces-
sary to lay the groundwork for growth
in the year ahead. I hope that my next
message will bring you news of a flour-
ishing summer garden in New England
and a prosperous start to NAELA’s new
year.

Elder Law Certification News

The National Elder Law Foundation is pleased to announce that
the State Bar of Georgia amended its Rules stating that “a lawyer
who is a specialist or is certified in a particular field of law by expe-
rience, specialized training or education, or by certification by a
recognized and verifiable professional entity, may communicate such
specialty or certification so long as the statement is not false or
misleading” (Rule 4-102-Standard 18.)

Previously, Georgia did not allow any such communication un-
less the attorney was certified by an accredited organization.

For more information on how this affects your CELA designa-
tion, contact Brittany Betz at (520) 881-1076 or by e-mail at:
betz@naela.com.
NAELA Members in the News

NAELA was mentioned as a resource in the following publications.

- *Daily Times Chronicle*, in the April 12, 2000, in “Reading Elder Law.”
- *North Adams Transcript*, in April 19, 2000, in “Long-Term Care Insurance Topic of Talk at COA.”

- *Utah Spirit*, in the April 2000 issue, in “Home Care or A Nursing Home?”

*Marilyn Askin, Esq.*, has recently been named AARP New Jersey State President. The state organization is comprised of more than 1.3 million members.

*Donna R. Bashaw, CELA*, was recently presented with the Orange County Bar Association’s Harmon G. Scoville Award, honoring her advocacy for seniors and the underprivileged.

*Thomas D. Begley, Jr., CELA*, wrote an article for the April 2000 issue of the *Florida Bar Journal*, entitled “Total Return Trusts: Why Didn’t We Think of That?”

*Beverly A. Black, Esq.*, was featured in the March 8, 2000 issue of the *Frankford News Gleaner*, in “This Legal Eagle Specializes in Seniors.”

*Paul J. Buser, Esq.*, has been appointed as chair of the Special Needs of the Elderly Committee of the American Academy of Matrimonial lawyers.

*Robert Clofine, CELA*, was quoted in the May 2000 issue of *Kiplinger’s Retirement Report*, in an article on powers of attorney.

*Randall K. Craig, CELA*, addressed the Southwestern Indiana Association of Health Underwriters in Evansville, IN, on May 25, 2000.

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NAELA Members in the News

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on the subject of “Medicaid, Asset Preservation, and Planning for Long-Term Care”.

Lawrence E. Davidow, CELA was featured in the March 2000 issue of Trusts and Estates, in “Elder Law For the Wealthier Client.”

Michael Ettinger, Esq. was featured in the April 11, 2000 issue of The Post-Standard, in “Seniors: Protect Assets While You Still Can.”

Ronald Fatoullah, CELA, was featured in the April 8, 2000 issue of Newsday, in “Care Policies at a Critical Literacy.”

Anthony Giacomini, Esq., wrote an article for the May 8, 2000 issue of Klamath Falls Herald and News, entitled “Money is Thicker than Blood.”

Bob Gorfinkle, Esq., was featured in the April 30, 2000 issue of the Boston Globe, in “Paying for Parent’s Care Doesn’t Have to Bring Financial Ruin.”

Al Hersh, Esq., was featured in the May 15, 2000 issue of Your Money, in “Your IRA and Real Estate? A Poor Combination.”

Michael C. Hodes, Esq., wrote an article for the April 2000 issue of Fifty - Plus, entitled “Retirement Benefit Planning” and for the April 13, 2000 issue of the Baltimore Business Journal, entitled “Elder Law Myths, Realities, and Legalities.”

Andrew Hook, CELA, was featured in the April 25, 2000 issue of the Washington Post, in “When You Can’t Act on Your Own Behalf.”

Frank Johns, CELA, was featured in the Charlotte Observer, in “Yes, You Do Need to Talk About Parents’ Estate.”

John F. Kears, CELA, was featured in the April 22, 2000 issue of the Mobile Beacon and Alabama Citizen, in “Improving Your Financial Literacy.”


George Slater, CELA, wrote an article for the volume 20, number four issue of Bifocal, entitled “Bar Profile: Indiana State Bar Association Elder Law Committee.”

Irving Spitzberg, Esq. was featured in the April 25, 2000 issue of the Reston Connection, in “The Problem with Medicare’s Safety Net.”

Judith A. Stein, Esq. was featured in the April 21, 2000 issue of The New York Times, in “Medicare Spending for Home Care Plunges by 45 Percent as a Result of Cuts.”

Raymond Mason Taylor, Esq., A. Frank Johns, CELA, Sharon Thompson, Esq., and Christine Sylvester, Esq., were featured in the Winter 2000 issue of Senior Living Resource Magazine, in “Elder Law Attorneys Help You Plan Well to Age Well.”

John P. Ternes, Esq., was featured in the March 1, 2000 issue of the Traverse City Record-Eagle, in “Planning can Help Protect Your Savings.” He was also featured in the April 5, 2000 issue of the Daily Legal News, in “Should We Give Our Savings Away,” in the April 6, 2000 issue of the Jackson Heights/Long Island City Journal, in “Improving Your Financial Literacy,” and in the April 13, 2000 issue of the South End Citizen, in “Improving Your Financial Literacy.”

John Wargo, CELA was quoted in the May 21, 2000 issue of the Racine Journal Times in “Handling Your Estate.”

Michael Wytychak III, CELA, wrote an article for the Idaho Law Review volume 36, number two, entitled “Payment of Nursing Home Bills Through the Medicaid Program.”
Interim
Healthcare
Ad
(right-reading, close to front)
HCFA Authorizes Estate Recovery Against Annuities
by Herbert Semmel, Esq.

A recent HCFA letter regarding estate recovery against the surviving beneficiary of an annuity may alter the use of annuities as a common estate planning technique. For Medicaid purposes, the purchase of an annuity for a term certain, with the balance of the policy value going to a designated beneficiary if the policyholder dies before the end of the term, does not constitute a transfer of assets for less than market value if the term certain does not exceed the actuarial life expectancy of the policyholder. Thus, there is no transfer of asset penalty if the policyholder is or becomes a resident of a nursing home. HCFA State Medicaid Manual § 3258.9(B). In situations where the actual life expectancy of the person who expects to enter a nursing home is much less than his/her actuarial life expectancy, an annuity may be a method of protecting assets for surviving family members.

However, it now appears that recovery by a state of Medicaid expenditures against the surviving beneficiary may be possible, thereby defeating the purpose of the annuity in some circumstances. In a letter from HCFA Regional IX to the California Department of Health Services, dated January 24, 2000, HCFA ruled that a state has the option to recover Medicaid expenditures for the annuity policyholder from the surviving beneficiary of the annuity up to the value of the remainder interest. Under the federal Medicaid statute, states must attempt recovery from “estates” for permanently institutionalized individuals and have the option to recover for any other Medicaid services for individuals age 55 and over, 42 U.S.C. § 1396p(b). Implementing instructions on estate recovery are found in the HCFA State Medicaid Manual, Section 3810.

The definition of estate recovery for Medicaid recovery purposes includes any property within an individual’s estate as defined for probate purposes and may include, at the option of the state, any other property “in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir or assign of the deceased individual through joint-tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement,” 42 U.S.C. § 1396p(b)(4).

According to HCFA, annuities are private contracts that pass ownership outside of probate. If a state does not specifically include annuities in its definition of estate, annuities are not a probate asset and would not be subject to Medicaid estate recovery. However, if a state chooses to use a broader definition of estate than “probate estate,” the January 24, 2000 HCFA letter states that “[a]nnuities can be viewed as an ‘other arrangement’ under Medicaid law, and can be treated like trusts, life estate, or joint tenancies, without regard to how much of the remainder interest has been ‘transferred’ by ownership to an heir.”

Estate recoveries against annuities cannot begin immediately. HCFA states that recovery cannot begin until the calendar quarter 90 days after an amendment to its State Medicaid Manual to permit recovery against annuities. In addition, the state’s own Medicaid plan must be amended to include annuities in its definition of estate. HCFA recommends, but does not require, that the inclusion of annuities as part of the estate be adopted by regulation. State administrative procedure acts might require a regulation.

HCFA also cautions that no recovery can be made so long as there is a surviving spouse or minor or disabled adult child alive.

HCFA’s letter does not address the question of what is the value of the “interest” of the Medicaid recipient in an annuity at the time of death. No reported cases on this point have been found and the State Medicaid Manual on estate recovery, § 3810, is silent on the question. Some courts have allowed recovery against the full value property such as a joint tenancy even though the Medicaid recipient only owned a partial interest at the time of his death.

Matter of the Estate of Victoria Jane Thompson, 386 N.W. 2d 847 (N.D. 1998), involved a claim against a widow’s estate for Medicaid benefits paid for her husband, who predeceased her. The amount of the claim exceeded the total value of the estate. The court allowed the full amount of recovery. The court noted that the definition of estate in § 1396p(b)(4) extends to assets in which the recipient had an interest at the time of death, 586 N.W. 2d at 851, n. 3, but ignored the parenthetical qualifier in the statute “to the extent of such interest.” This decision seems to allow recovery against any property in which the Medicaid recipient had an interest at death, regardless of the nature of the interest. Thus, if the Medicaid recipient had an interest as tenant in common, or the property was community property, the court seemingly would allow recovery against the full amount of the widow’s estate, and not just the half that passed to her (continued on page 11)
HCFA Authorizes Estate Recovery Against Annuities
(continued from page 10)

on her husband’s death. In Estate of Wirtz, 607 N.W. 2d 882 (N.D. 2000), the court went one step further and allowed recovery from the widow’s estate of property her predeceased husband had transferred to her prior to his death, despite the statutory provision limiting “estate” to property in which the Medicaid recipient had an interest at the time of death.

The Minnesota Court of Appeals reached the same result in Estate of Alice I. Jobe, 590 N.W. 2d 162 (1999), relying on Thompson, supra. The property in the surviving spouse’s estate passed by joint tenancy. The estate argued that under Minnesota common law, the interest of a joint tenant in property terminates at death and therefore was not available. The court acknowledged the common law rule but rejected its application, stating that the common law had been modified by statute, apparently referring to § 1396p(b)(4)(B). 590 N.W. 2d at 166. It also allowed the claim against the full property value, not just the Medicaid recipient’s half interest. Accord: Estate of Gloria J. Brandt, 1999 WL 319180 (Minn. Ct. App. 1999) (unpublished opinion).

In a case involving interests in community property and tenancy in common, the Ninth Circuit allowed recovery against interests in property held at death, but seemed to limit the recovery only to the interest of the deceased Medicaid recipient, rather than the entire property. Bucholtz v. Belshe, 114 F. 3d 923, 926-28 (9th Cir. 1997).

In the case of annuities, joint tenancies and life estates it could be argued that because the interest is extinguished by death, it has no value at the time of death. The general rule is that the mere filing or docketing of a judgment lien, without levy or execution, does not sever the joint tenancy, so that no recovery is allowed if the debtor dies before execution. Judgment Lien or Levy of Execution on One Joint Tenant’s Share or Interest as Severing Joint Tenancy, 51 A.L.R. 4th 906 (1987). One California elder law practitioner reports that in the case of a life estate, he has obtained appraisals from official probate appraisers that the value of the deceased’s interest at death was nominal and the claim for estate recovery was dropped by the Medicaid agency. A similar argument can be made in the case of an annuity.

On the other hand, it is also the general rule that a holder of an interest in joint tenancy can convert the joint tenancy into tenancy in common by unilateral action. Cunningham, Stoebuck and Whitman, The Law of Property 199 (2d ed. 1993). It can also be argued that treating the interest at death as nominal in value renders the reference to life estates and joint tenancies in § 1396p(b)(4)(B) superfluous, a result which courts seek to avoid. Estate of Alice I. Jobe, 590 N.W. 2d at 166.

A copy of the HCFA letter on annuities is available by sending a self-addressed stamped envelope to National Senior Citizens Law Center, 3435 Wilshire Blvd., Ste. 2860, Los Angeles, CA 90010.

Mr. Semmel is staff attorney at the National Senior Citizens Law Center in Los Angeles, CA. He was assisted in preparation of this article by Prashanthi Rangan, Borchard Fellow at NSCLC.

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Congratulations Certified Elder Law Attorneys

The following individuals have recently completed the requirements to become a Certified Elder Law Attorney by the National Elder Law Foundation. Congratulations!

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Stratford, NJ

For more information on how to become a Certified Elder Law Attorney, contact Brittany Betz at (520) 881-1076, ext. 116, e-mail: bbetz@naela.com.

Golden Latern – ¼ page
Emotional Distress and Elder Abuse

by Rosalie Wolf, Ph.D.

Cited with permission from the National Center on Elder Abuse Newsletter.

Although clinical records and case studies have documented the severe emotional distress experienced by older persons as a result of mistreatment, relatively few studies have dealt with the consequences of elder abuse on the victim. “Consequences” in this context refers to the psychosocial impact of the mistreatment on the victim rather than the physical effects such as bruises, fractures, malnutrition, “bed sores,” etc.

Several early studies comparing abused and non-abused elders receiving care found a larger proportion of the abused elders suffered from depression than the non-abused elders.1,2 Similarly, abused and non-abused elders identified in a random sample community survey also differed with regard to the level of depression, with the victims showing higher levels even when other variables that are known to be related to depression, such as health, age, gender, and marital status,3 were controlled. Using an elderly sub-sample from the National Family Violence Resurvey data, one investigator showed that those respondents reporting violence in their marital relationship had higher levels and percentages reporting depression than those in nonviolent relationships.4 Because of the cross-sectional nature of these research efforts, it cannot be stated with certainty that depression was the result of the mistreatment. Is it possible that the abused elders are individuals who are more likely to be depressed even before the mistreatment?

Some insight into the answer to the question comes from a study in a clinical journal that described the case histories of two women in their 70s who had been admitted to a geropsychiatric unit for treatment of depression.5 Both had been abused by their husbands throughout their marital life (a combined total of 80 years). The reasons for remaining in these abusive relationships were much the same as those identified with younger battered women: low self-esteem, passive interpersonal style, social isolation, limited social skills, but also, reflective of their generation, a strong sense of loyalty and the stigma of divorce. Interestingly, both women became clinically depressed after the abuse had stopped, in one case because the husband became very ill and in the other, because the husband died. The therapists hypothesize that when women were placed in an unfamiliar role or had to assume a new set of responsibilities, they lost their familiar pattern of relating, could no longer cope, and became depressed.

Other symptoms of emotional distress such as fear, shame, guilt, alienation, and posttraumatic stress disorder have been postulated as the sequela of elder mistreatment but have not been the subject of systematic investigation.

The topic of emotional distress was recently addressed in a 1999 study.6 Researchers in the Netherlands examined data from a survey of elders living in Amsterdam to determine risk indicators for elder mistreatment in the community. Depressive symptoms emerged as a risk indicator for physical aggression and financial mistreatment. A year later they re-interviewed the victims and found 77 who had been victimized in the intervening year. The 77 made up the sample for a second analysis along with a comparison group of non-victims.

The main research questions were: (1) Do victims of elder mistreatment suffer from more psychological distress than non-victims? (2) Do certain aspects of social support, coping style, mastery (being in control of one’s life) and perceived self-efficacy (realizing the behavior needed to achieve a goal) directly or indirectly influence psychological distress in victims of elder mistreatment? A 12-item scale that ranged from mild emotional distress to psychiatric disorders, such as depression was selected to measure psychological distress. Examples included “Have you recently had difficulty concentrating?” “Have you been sleeping badly because you have been worrying?”

Compared to non-victims, the victims of elder mistreatment had significantly higher levels of psychological distress and lower scores on social support, mastery, and perceived self-efficacy. Victims who received more social support showed less psychological distress. Social supports had a positive effect on the level of psychological distress in victims but not in non-victims, indicating that victims benefit more from the social supports they receive than non-victims. Low feelings of mastery and a negative perception of self-efficacy were directly related to psychological distress in both the victim and non-victim; that is, these coping styles are independent of mistreatment. A more negative perception of the ability to cope is associated with psychological distress in general.

In spite of limitation of the study (including: did not follow sample over a long period of time, under representation of severely mistreated victims in the sample, measurement issues), the authors have demonstrated that elder mistreatment does effect the psychological health of the victims and that social supports and feelings of mastery and self-efficacy are beneficial to emotional well-being. They suggest that if it is not possible to mitigate the cause of mistreatment, then social supports should be provided to the victim at home or support groups be organized so that victims may be helped to become more competent or self-efficacious in dealing with the mistreatment.

Footnotes
Medicare Advocacy Corner
By Judith A. Stein, Esq. and Ellen Lang, RN, MPH
Center for Medicare Advocacy, Inc.

What Is Hospice Care?
Hospice care includes medical and supportive services intended to provide comfort to individuals who are terminally ill.

- Often referred to as “palliative care,” hospice care aims to manage the patient’s illness and pain, but does not treat the underlying terminal illness.
- Hospice care may include spiritual and emotional services for the patient and respite care for the family.
- Many hospitals and skilled nursing facilities have hospice units, but most hospice care is provided at home.
- Hospice teams will help patients work through their acceptance of a terminal diagnosis, and fulfill their last wishes.

Hospice Care Goals include ensuring that the patient will:
- Be free of pain and infection, and be as comfortable as possible.
- Maintain personal dignity, and be independent for as long as possible.
- Receive care from family and friends.
- Talk about the terminal diagnosis and condition.
- Receive support through the stages of dying.
- Die with dignity.

What Kinds of Care Does Medicare Hospice Care Include?
Generally, hospice care includes services which are reasonable and necessary for the comfort and management of a terminal illness. These services may include:

- Physician services provided by the hospice or the beneficiary’s attending physician.
- Skilled nursing care provided by a hospice nurse.
- Therapy services for purposes of symptom control or to enable the beneficiary to maintain activities of daily living and functional skills.
- Medical social services rendered by a social worker to provide counseling for the beneficiary and family.
- Home health aide services and Homemaker services.
- Medical appliances and supplies, including drugs and biologicals.
- Spiritual counselor, dietician, volunteer coordinator services.
- Respite care in a hospital, skilled nursing facility or home.
- Bereavement care for up to a year following the death of a beneficiary.

When Will Medicare Cover Hospice Care?
- The beneficiary or his/her representative must elect the Medicare hospice benefit by signing and filing a hospice benefit election form with the hospice of choice.
- A physician must certify that the beneficiary is terminally ill (has six months or less to live).
- The beneficiary’s attending physician and the hospice physician must certify the beneficiary for the initial period. For subsequent periods either physician can recertify the beneficiary.
- After having been certified by a physician, the beneficiary may elect the hospice benefit for two 90 day periods and an unlimited number of subsequent 60 day periods.
- The care must be provided pursuant to a specific hospice plan of care signed by the attending physician.
- The care must be provided by, or under arrangements with, a Medicare certified hospice.

How Much Hospice Care Will Medicare Cover?
Hospice Home Care:
- Routine home care: Medicare coverage is available for the level of care which is reasonable and necessary. There is no 35-hour or other specific limitation, and the patient does not have to be “homebound.”
- Continuous home care: During “periods of crisis” Medicare will cover continuous home care, including nursing care, for up to 24 hours a day in order to maintain the patient at home.

Hospice Inpatient Care:
- Inpatient care in a hospital or skilled nursing facility may be covered under certain circumstances.
- Inpatient respite care: Inpatient respite care may be covered for up to five consecutive days. This care must be “intermittent, non-routine, and occasional.”
- General inpatient care: General inpatient care is coverable only for control of pain or acute or chronic symptom management.*

* Generally, the Medicare hospice benefit does not cover room and board for beneficiaries in skilled nursing facilities. Skilled nursing facility residents who elect the Medicare hospice benefit must therefore have another source of payment for these charges.

What Are Some Of The Differences Between The Medicare Hospice Benefit and The Regular Medicare Benefit?
- Hospice coverage is for pain and symptom management and comfort, not for curative treatment of the underlying terminal illness.
- Beneficiaries who elect hospice coverage give up their rights to regular Medicare benefits for services related to their terminal illness during their hospice election period.

(continued on page 14)
Who’s Who on the NAELA Staff?

There are often questions as to who is who on the NAELA staff. As you know, we have a staff of 15 people working for us, and everyone is responsible for very specific things. Our offices are located at 1604 North Country Club Road, Tucson, Arizona 85716 and are open from 8:00am. to 5:00pm., Mountain Time, Monday through Friday, except holidays. The telephone number is (520) 881-4005. The fax number is (520) 325-7925. We also have voice mail and therefore, you may leave messages 24 hours a day, seven days a week! To help you in your endeavor to get through the maze, we are listing who you should contact for what things:

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<thead>
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<th>Name/Telephone Ext.</th>
<th>E-Mail Address</th>
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<td>Chapters .............</td>
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<td>Mailing Questions ....</td>
<td>Jami Morris, ext. 118 .....</td>
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<td>or Terri Anthony, ext. 107 .... <a href="mailto:info@naela.com">info@naela.com</a></td>
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<td>Membership ..........</td>
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<td>Exhibitors ...........</td>
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<td>Terri Anthony, ext. 107 .... <a href="mailto:info@naela.com">info@naela.com</a></td>
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Advocacy Tips:

- The attending physician is always the key to obtaining Medicare coverage. Obtain a statement from the beneficiary’s physician stating that the patient is terminally ill, that the services are reasonable and necessary for the comfort and management of a terminal illness, and that the services were included in the written plan of care.
- The requirement that the hospice patient must be terminally ill is met if the physician certifies that the beneficiary’s life expectancy is six months or less.
- The beneficiary does not have to have cancer to qualify for the Medicare hospice benefit.
- The beneficiary does not have to have a “do not resuscitate order” to qualify for the Medicare hospice benefit.
- The beneficiary does not have to be homebound, and may go out as long as they are able to do so.
- If coverage is sought for inpatient services, in a hospital or skilled nursing facility, the physician should explain why the inpatient care was reasonable and necessary and could not be provided in other than an inpatient setting.
“I had to keep running up and down the field.” the one I call the poet told me. He had done that and won the game. He was a hero, and he described his artful running over and over. The crowds were cheering and his team had won, and it was because of him that this triumph was celebrated.

The caregiver had turned on the t.v., I suspect, and the poet was forced to watch a football game, something I have never seen him do. He has always hated football — sports of all kinds, really. He was no athlete, a small man he topped out, before shrinkage began, at 5’4”. That he wasn’t taller was a constant embarrassment to him, and he equated all sports figures as much taller and larger than he, and perhaps for this reason, he didn’t care for them. Even though he could have participated in athletic activities not requiring height or bulk, he didn’t. He disliked them all.

An “A” student in school notwithstanding that his father would not allow him to read or study at home — his father hated school — he managed and was perhaps stimulated by study being forbidden. He’d received straight A’s in high school, except for one semester. In one class, he’d gotten an “F.” It was, of course, in gym.

Now redeemed, at 93, he’d gotten the ball, the pigskin. For one afternoon, he was a great running back, one on whom his team relied, and he was back in school again, on the team, its featured runner, the class hero, the scholar athlete.

“I had to keep running up and down the field,” he told me again. “They (presumably his classmates) were cheering. I had the ball and we won.”

The poet is the great entertainer of late. With a twinkle in his eye and without concision of speech, he described events unrelated, I believe, to his own history. His imagination is rich and allows no infelicity in expressing indulgent fantasies. I stopped by the poet’s home. It was early evening, and I’d brought freshly baked cheese bread and hot apple tortes. “He won’t keep his pants on,” the caregiver told me as I walked in. He was sitting in his wheelchair in the middle of the living room, center stage, “naked as a jaybird” below his waist, getting ready perhaps for a post-game shower.

“Better put your shorts on, poet. There’s a lady in the house.” So, after coaxing, he stood and one by one slipped his legs into his boxers and I pulled them up. He sat down again so I made no attempt to try this again with his slacks. There was no reason to double cover anyway. “Why do the shorts keep coming off?” I asked. He looked away without answering. It didn’t matter or it was none of my business. “Dumb question,” I surmised.

“Was the poet in the army?” the caregiver asked. “He’s been telling me about his combat flights.” No aide-de-camp he, a pilot, no less! This 93 year old was not in the service and certainly not a flyer. What an imagination he was demonstrating. “Tell me about your army days,” I suggested, but I received no response. The woo was over. The interest in fame for the moment had passed. The poet was busily gnawing on a piece of toasted cheese bread. His whole attention was being given to that. “Like the bread?” I asked, but he didn’t respond, didn’t even look up. Our conversation for the moment was over. The poet was dining, enjoying the hot bread, savoring it along with the Starbucks® special blend his caregiver had just brewed.

Perhaps the heroic anecdotes will be resumed, more description of extravagant daydreams, his imagined personal triumphs related, but no more tonight. Now it’s time for the post-game feast, and all of the poet’s energy and interest are concentrated on this evening’s special gastronomic treat.

“He’s making all of these stories up,” his caregiver uncritically exclaimed. And, of course, he is; but isn’t perception reality? Shouldn’t we encourage the self-esteem his unseen periaipt makes possible? No heroic, the poet’s memory is ambitious, grand, bold. On his stage he plays singular hero, and his memory esteems him. He is a person of importance. His extravagant daydreams of his imagined triumphs makes his end life romanticized, unreal but energizing, visions which he can share with those who care for him.

“I had to keep running up and down the field. I had the ball, and we won, and everyone was cheering!”

Indeed we are! Keep running, poet.... Keep running.

* James Thurber, “The Secret Life of Walter Mitty.”
Communication is essential to any organization. It is a challenge in any marriage and family, it is complicated in an office of 20 and it is challenging (to say the least) in an organization of 3,500. The NAELA Board of Directors recognizes the tremendous leaps that are being made in the area of technology. We also recognize that we have members who love technology and have every gadget and gismo available and we have members who hate technology and are hoping to retire before they are forced to use it.

There is no doubt that listservs and websites allow for instantaneous communication while most printed pieces are usually out of date before they hit the mail. In an effort to serve all our members equally, the NAELA Board of Directors has decided to communicate NAELA actions and happenings on the NAELA Website as well as in our printed communications. That way members can choose how and when they receive their information.

The following press release and fact sheet were placed on the NAELA Website in early June to inform members of the board’s action in relationship to our participation in the certification of long term care insurance agents. If you have any questions or comments, please direct them to Laury Adsit Gelardi at NAELA, 1604 N. Country Club Road, Tucson, AZ 85716, (520) 881-4005 ext. 113 or lgelardi@naela.com.

(continued on page 17)
Fact Sheet on the History of LTCI Program

In July of 1998, the NAELA Board of Directors agreed to subcontract with the Corporation for Long Term Care Certification (CLTCC) to provide a long term care insurance certification program for LTC insurance agents. This program was proposed to us by Harley Gordon, one of NAELA’s founding members and an early board member. The board looked at the program proposal very closely, scrutinized every possible scenario and voted to enter into a contract with CLTCC. Thus, NAELA and the National Elder Law Foundation (NELF) were to create, update and administer a certification examination for LTC agents and provide a mandatory four-hour training course prior to each exam. NAELA felt that the training course was critical to maintaining the integrity of the exam.

CLTCC was to administer the application process, screen applicants, market the program, provide applicants with a training manual, and issue the actual certification.

The board was committed to this program for the following reasons:

● The program would allow NAELA to have positive mutually beneficial contacts with the insurance industry;
● This was an opportunity for NAELA to define the level of training and knowledge needed for LTC agents to appropriately advise clients;
● Multidisciplinary practice is upon us and quality education of all disciplines is key to making this work.

Exams were given in September, October and November of 1999 and in March of 2000. More than 300 insurance agents now have the CLTCC designation.

Unfortunately, following the last exam, NAELA was notified that CLTCC was planning to enter into a contract with Sylvan Centers to administer the exam on a walk-in basis and that the mandatory review course would no longer be required as envisioned by NAELA. CLTCC wanted to renegotiate NAELA’s contract to allow administration of the exam by a third party and to waive the education requirements. The NAELA Board of Directors deliberated about this at great length. Ultimately, the NAELA Board and CLTCC mutually agreed to end the relationship.

NAELA remains committed to working with the insurance industry to assure the best possible choices for our clients. We have contacted other potential providers of certification programs and are currently in discussions with them about partnering on another program. We will continue to educate our members on the newest trends in long-term care insurance and to build our relationship with this industry.

Released by NAELA June 8, 2000
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NOVEMBER 16-19, 2000

HOLD THESE DATES FOR THE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS
2000 ADVANCED ELDER LAW INSTITUTE

“Climbing to Prosperity through Professionalism”

2000 Institute will include tracks on:
Practice Development/Practice Management,
Special Needs Trust (SNT), and Hot Topics!

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Reservations: (800) 634-7711
Guest Fax: (719) 577-5779
Rate: $169.00 per night, single or double occupancy

Be sure to mention that you are with NAELA to receive this special conference rate.

Navigant International can assist you with your travel needs 800-229-8731

For more information, contact Jenifer Mowery at (520) 881-4005, ext. 114 or by e-mail at jmowery@naela.com.
INTRODUCING GCM'S NEWEST PRODUCT

Business of Becoming a Geriatric Care Manager
This detailed workbook will help you find answers to your business start up questions as well as issues dealing with growing your business. Hands-on forms and tables provide information on work habits; what information to obtain from an attorney, an accountant, the city and state; and where to find more help.

GCM Policies and Procedures Manual
Especially designed by care managers, for care managers, this manual addresses issues you need to know in your business such as assessment, inquiry, job descriptions, provision of care, and more.

Public Relations/Marketing Tips for Geriatric Care Managers
This comprehensive booklet includes detailed information on how to use public relations and marketing to promote your services. Sample press releases, ads and valuable information help guide you through the dos and don'ts of marketing and public relations. It also includes a mini-marketing plan worksheet and other forms that help you customize your marketing efforts.

Standards of Practice for Professional Geriatric Care Managers
This invaluable brochure contains the National Association of Professional Geriatric Care Managers’ Standards and Practice guidelines as adopted by the GCM membership.

Dos and Don’ts - Advice from the Pros
Find out what experts in the field of geriatric care managers have to say about the dos and don’ts of starting a care management practice, marketing it, promoting it and growing it. These proven tips are guaranteed to make you think about some crucial issues dealing with your care management practice.

Tapes and Supporting Outline
“The Development of a Case Management Business; the Changing Paradigms,” is a series of four tapes presented by Elizabeth Bodie Gross, RN, CS, MS, MBA, CCM, CMC and Linda Fodrini-Johnson, MA, MFCC. Also included are supporting materials to guide you through the lecture. You’ll find this presentation full of valuable and proven techniques for starting a successful case management business.

Consultation Coupon
So you’ve read all the enclosed material, and you have specific questions on starting and growing a geriatric care management business. You can now purchase half an hour with a seasoned professional for $25. After the initial consultation, you may continue to meet with that individual, on a fee agreed upon between the two parties.

GCM Referral brochure
This informative piece provides an overview of what geriatric care management is. It can be personalized with your address and phone number to use in your marketing efforts.

GCM Membership Brochure & Application
GCM Pledge of Ethics
The GCM Pledge of Ethics is the code adhered to by all members of GCM and can be proudly displayed in your office for your clients and colleagues to read.

Sample letterhead and Business Cards
Timer
Time and ability to manage it is crucial in running a business. Do you ever feel like all you do is spend time on the telephone with colleagues or sales people? Now you can use this timer to time your phone calls, and make sure that you’re only on the phone for a short period of time, thus not disrupting your workday.

NAELA News ● August 2000
Introducing An Eight-Hour, On Site Training Program In Nursing Home Resident Advocacy!

This program is designed for your clients and their families who have loved ones or anticipate the need for having loved ones in long-term care nursing facility.

We will provide your clients and their families with the tools to meet the challenging role of being a nursing home resident advocate which will decrease family stress, improve residents’ quality of care and life, and more!

Topics Include:
- Searching for and selecting a nursing home.
- Identifying good quality of care and danger signals.
- Admission paperwork/Resident Rights.
- Federal and state nursing home regulations.
- Making a new home and life.
- Plans of Care and medical charts.
- Identifying problems and problem resolution.
- Teaching advocates how to partnership with nursing homes.

Don’t Delay! Call Us Today!

For more information contact Joanne Bass of the Elder Law Practice of Timothy L. Takacs at (615) 824-2571 or jbass@tn-elderlaw.com; or visit http://www.tn-elderlaw.com/workshop.html.