

# AALS Section on Aging and the Law

## Newsletter--Fall 2006

Marguerite Angelari, Editor

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### **Executive Committee**

Above Officers and:

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### News From the Chair, Susan Gary

I love two things about this section: the intellectual exchanges at the panels and poster presentation at the Annual Meeting and the camaraderie and helpfulness among section members. At this year's Annual Meeting you have the chance to enjoy both.

Our program this year is at 8:30 on Friday, January 5. The topic is Mediation and the Elderly, and we've put together a group of terrific speakers from both our section and the ADR Section.

The section dinner will be that night. When I started attending the AALS meetings, the section dinner was one of the best ways to meet people who do what I do. Now it's great fun to see old friends and meet new ones. More details are elsewhere in this Newsletter.

And don't forget to check out the poster presentations. The posters were a great success last time and this year promises to be just as informative. (I've seen the posters and they're great!). The section will sponsor the following three poster presentations: **Roberta Flowers** and **Rebecca Morgan**, "Access and Justice for ALL," **Alyssa A. DiRusso**, "He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills," and **Nina A. Kohn**, "Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers-of-Attorney.

I hope to see each of you at one or more of these events. The section will hold its business meeting immediately following the program. Here's a description of the panel to whet your appetites:

As a person ages, a variety of difficult disputes are likely to arise. An elder person may have diminished mental capacity or physical ability; she may want to avoid family conflict; or she may be frightened or nervous about the subject of the dispute. Family members involved may carry emotional baggage that makes working with each other difficult. Finances may be a complicating factor.

Disputes may arise in connection with a legal guardianship for an elder person. Children may fight over who is the best person to act as guardian; child and parent may fight about whether a guardianship is needed at all; and family members may fight over whether moving an elder person makes sense. **Mary Radford** will talk about the use of mediation to resolve these issues, and **Kate Mewhinney** will describe experiences with a North Carolina statute enacted just a year ago to promote the use of mediation in guardianship proceedings.

Health care issues raise significant questions. As developments in medical technology enhance the ability to prolong life, patients, families and clinical care-givers may find themselves taking different positions on the question of what is medically viable, financially responsible and ethically appropriate. How a "culture of life" should approach the inevitability of death poses conundrums that are producing ever more fractured responses. Consequently, philosophers, ethicists, law-makers, and medical experts appear to have given up on the possibility of achieving substantive consensus, and have turned to mediation to navigate these dangerously divided shoals. Whether mediation is up to the task, and how mediators might go about "solving" these dilemmas will be among the topics addressed by **Carol Liebman** and **Ellen Waldman**.

An elder person making decisions about how property should be distributed after her death may be concerned about the possibility of family fights over the property. A dispute resolution clause included in the will may assuage the testator's concerns and may also prove beneficial to the beneficiaries after the testator's death. **Lela Love** will describe the potential effects of using dispute resolution clauses in wills.

Susan Gary

### **Dutch Treat Dinner**

Section members and their guests are cordially invited to a Dutch treat dinner the following evening after the Section program: Friday, January 5 at 6:30 p.m. We have reservations at Al Tiramisu, a great Italian restaurant near DuPont Circle. The address is 2014 P St NW, and the phone number is (202)467-4466, or you can visit them on the web at [www.altiramisu.com](http://www.altiramisu.com). Please R.S.V.P with Kate Mewhinney by December 22 if you plan to attend.

### **Member News and Accomplishments**

**Linda S. Whitton** (Valparaiso) reports that the **Uniform Power of Attorney Act (UPOAA) was approved by NCCUSL**. The UPOAA supersedes the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code. Unlike the Uniform Durable Power of Attorney Act, which was very brief and focused primarily on how one creates an agency relationship that survives incapacity, the UPOAA presumes that powers of attorney are durable unless stated otherwise and focuses on the many substantive issues implicated by the use of durable powers. The Act balances two competing policy objectives: 1) preservation of durable powers as a low-cost, flexible, and private form of surrogate decision making, and 2) prevention and redress of financial abuse of incapacitated principals. In furtherance of the first objective, the Act provides clear safe harbors for third persons who accept powers of attorney as well as liability for unreasonable refusals. The Act also recognizes the portability of powers of attorney validly created under the laws of other jurisdictions. With respect to protection of the principal, the Act provides explicit mandatory and default agent fiduciary duties, liability provisions for agent misconduct, a broad standing provision for judicial review of an agent's conduct, and the requirement of express language to grant certain authority that could significantly dissipate the principal's property or alter the principal's estate plan. The Act also contains an optional statutory form. The final Act with Comments is available on the NCCUSL website ([www.nccusl.org](http://www.nccusl.org)). Questions may be addressed to the Reporter, Linda S. Whitton, at [linda.whitton@valpo.edu](mailto:linda.whitton@valpo.edu).

**Joan Krause** (Univ. of Houston) published "A Patient-Centered Approach to Health Care Fraud Recovery," 96 *J. Crim. L. & Criminology* 579 (2006).

**Richard L. Kaplan** (Illinois) reports that Thomson/West has published the 4th edition of *Elder Law in a Nutshell* (co-authored with Lawrence Frolik of Pittsburgh). Dick's article entitled "Means-Testing Medicare: Retiree Pain for Little Governmental Gain" appeared in the *Journal of Retirement Planning* (May-June 2006) at 22 and was reprinted in CCH's *Top Financial and Estate Planning Issues for 2007*. This article examines the operation of the enhanced premiums for Medicare Part B that go into effect in 2007 and is available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=918100](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=918100). In addition, his review of the book *Individual Accounts for Social Security Reform: International Perspectives on the U.S. Debate* by John Turner appeared in *27 Comparative Labor Law & Policy Journal* 297 (2006). Finally, his article entitled "Federal Tax Policy and Family-Provided Care for Older Adults," was selected for reprinting in *The Monthly Digest of Tax Articles* (August 2006), at 39 and was the focus of his presentation at a panel on "Looking a 'Gift' Horse in the Mouth: When a 'Gift' is Not a Gift" held at the American Bar Association's Taxation Section Meeting in October. It can be accessed at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=877491](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=877491)

**Sy Moskowitz** (Valparaiso) published "Protecting the Gold in the Golden Years: Practical Guidance for Professionals on Financial Exploitation," *6 Marquette Elder's Advisor* 1 (2005).

**Tom Gallanis** (Washington and Lee) was appointed the Reporter to a new NCCUSL drafting committee, to prepare a uniform act facilitating the transfer-on-death of real property. He also serves as Assistant Director of the Joint Editorial Board for Uniform Trust and Estate Acts and as Vice-Chair of the ABA Section on Real Property, Probate & Trust's Committee on Uniform Laws. A new edition of *Family Property Law: Cases and Materials on Wills, Trusts, and Future Interests*, co-authored with Larry Waggoner (Michigan), Greg Alexander (Cornell), and Mary Lou Fellows (Minnesota), was published by Foundation Press this fall.

**Jonathon Barry Forman** (Oklahoma) wrote a chapter titled "A Mandatory Universal Pension System" in *New York University Review of Employee Benefits and Compensation*, Chapter 1, pp. 5-1 to 5-34 (Alvin D. Lurie ed., 2006) (with Adam L. Carasso). Also, Jon has recently given three speeches: Making Taxes and Welfare Work Together, speech for a First Tuesday Panel at the Urban Institute, Washington, DC, November 7, 2006; Making Labor Markets Work, speech for a panel on Government Regulation of the Workplace, at the First Annual Colloquium on Current Scholarship in Labor & Employment Law at Marquette University Law School, Milwaukee, Wisconsin, October 27, 2006; Making America Work, Alfred P Murrah Professorship Inaugural Lecture, University of Oklahoma College of Law Coats Hall Endowed Professorship Lecture Series, Norman, Oklahoma, October 24, 2006.

**Kenney F. Hegland** (Arizona) authored an article titled "On Essay Exams," published in the current issue of the *Journal of Legal Education*. In the article, Professor Hegland

posits that essay examinations in law school challenge students to become better writers, and that the objectivity of multiple-choice examinations is overstated.

**Alison Barnes** (Marquette) is completing work on *Elder Law* 4<sup>th</sup> ed. (Lexis Nexis), which will be available in time for fall use. Also, Alison will be visiting at the University of Miami School of Law in spring, 2007.

**Kate Mewhinney** (Wake Forest) recently wrote an article for the *North Carolina State Bar Journal* entitled "Ideals and High Heels: A Look at Wake Forest University's Elder Law Clinic," [http://www.ncbar.com/journal/archive/journal\\_11,3.pdf](http://www.ncbar.com/journal/archive/journal_11,3.pdf). The article was reprinted in the ABA publication *Bifocal* (newsletter of the Commission on Law and Aging). Mewhinney has been appointed to the Ethics Committee of the N.C. State Bar. Her students are handling about 100 cases. Their cases include a restoration of capacity case in guardianship court and a public records request to the State of North Carolina for data on its Medicaid estate recovery program. Lastly, the website of Wake Forest's elder law clinic has been improved, including the addition of more Spanish language links and materials for lawyers. <http://www.law.wfu.edu/eclinic.xml>

**Marguerite Angelari** (Loyola Chicago) completed three chapters of a new Lexis publication, *Illinois Jurisprudence*, Volume 28, Elder Law, Chapter 5 "Planning for Incapacity and Death," Chapter 6 "Guardianship," Chapter 6, and Chapter 17 "Elder Abuse and Other Crimes Victimized the Elderly" that will be published in December, 2006.

Professor Angelari has presented or co-presented at several recent conferences. In November, she co-presented a presentation titled, "Interdisciplinary Approaches in the Evaluation of Persons with Self Neglect," at the annual conference of the Gerontological Society of America in Dallas, Texas. Professor Angelari also co-presented in November on the topic "Forensic Issues Pertaining to Older Adults," at the annual conference of the American Academy of Psychiatry and the Law in Chicago, IL. Also, Professor Angelari presented to the Section on Geriatrics and the University of Chicago's School of Medicine in October, 2006. The title of this presentation was "Surrogate Decision-making in Illinois: The Power of Attorney for Healthcare, Health Care Surrogate Act, and Adult Guardianship." In addition, Professor Angelari was appointed to the Board of Directors of Age Options, an Area Agency on Aging.

\* This newsletter is a forum for the exchange of points of view. Opinions expressed here are not necessarily those of the Section and do not necessarily represent the position of the Association of American Law Schools.

