

FORUM 8

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Eighth Judicial Circuit Bar Association, Inc.

December 2009

President's Letter



by *Rebecca O'Neill*

The Bench/Bar Committee (Committee) will reconvene under the direction of Honorable Martha Ann Lott, Chief Judge of the Eighth Judicial Circuit and Chair of the Committee. The Committee was established by Administrative Order 8.470(A). The first meeting of the Committee was held on November 13, 2009 after the EJCBA luncheon.

The Committee's purpose is to review reports of unprofessional conduct of both attorneys and judges before such behaviors rise to the level of a bar grievance or report to the Judicial Qualifications Committee (JQC). Examples of unprofessional behaviors are attorneys who repeatedly miss court hearings or consistently arrive late to hearings and any person who is unable to maintain appropriate demeanor in court. While the Committee's purpose is to take reports of unprofessional conduct, access to the Committee is broad. Administrative Order 8.470(A) states that reports can be made relating to "any other matter which might be of assistance to any lawyer or judge."

Any attorney who practices within, or judge who presides over cases in, the Eighth Judicial Circuit may submit a verbal or written report of unprofessional conduct to any member of the Committee and that Committee member will bring the report to the next Committee meeting. A listing of the Committee members is posted on the Eighth Judicial Circuit of Florida's website (<http://circuit8.org>) under Attorney Information.

The Committee will strive to maintain the anonymity of each person who submits a report. The Committee discussions are confidential, as required under Administrative Order 8.470(A).

The goal of the Committee is to discuss the specific conduct that has been brought to the Committee's attention and, when appropriate, talk to the attorney or judge who is the subject of the report with the hope of preventing a bar grievance or report to the JQC. Of course, if

the reported action is a violation of ethical conduct, as defined by the Florida Bar or JQC, the Committee is obligated to forward the information to the applicable governing board for appropriate action. Currently, the Committee is slated to meet quarterly. Hopefully this form of intervention will succeed in reducing grievances in our Circuit.

On another note and in keeping with the holiday spirit, Cedar Key was a huge success! There were dozens

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Forum 8 is Going Green!

As of January 2010, this newsletter, Forum 8, will automatically be sent electronically to the email address that EJCBA has for you instead of being mailed to your address. If you wish to continue receiving paper copies of the Forum 8, you must opt in by emailing Judy Padgett, Executive Director, at execdir@8jcb.org. EJCBA is helping our planet, one newsletter at a time.

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Contribute to Your Newsletter!

From The Editor

I'd like to encourage all of our members to contribute to the newsletter by sending in an article, a letter to the editor about a topic of interest or current event, an amusing short story, a profile of a favorite judge, attorney or case, a cartoon, or a blurb about the good works that we do in our communities and personal lives. Submissions are due on the 5th of the preceding month and can be made by email to dvallejos-nichols@avera.com.

About This Newsletter

This newsletter is published monthly, except in July and August, by:

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Any and all opinions expressed by the Editor, the President, other officers and members of the Eighth Judicial Circuit Bar Association, and authors of articles are their own and do not necessarily represent the views of the Association.

News, articles, announcements, advertisements and Letters to the Editor should be submitted to the **Editor** or **Executive Director** by Email, or on a CD or CD-R labeled with your name. Also, please send or email a photograph with your name written on the back. Diskettes and photographs will be returned. Files should be saved in any version of MS Word, WordPerfect, or ASCII text.

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Deadline is the 5th of the preceding month

The 2009 Holiday Project Needs You!

By Elizabeth M. Collins and Lua J. Mellman

Money is tight this year for many of us. Can you imagine how these economic times are affecting some of the most underprivileged children in our circuit?

This year, the Holiday Committee plans on taking a different approach to our annual project, which will be designed to serve a greater number of children throughout the Eighth Judicial Circuit (Alachua, Baker, Bradford, Gilchrist, Levy and Union Counties). We hope this approach will allow your donations, in any amount you choose, to spread holiday cheer for less money per student.

Rather than adopting a single school, we will be buying school supplies, art supplies, educational tools, and hygiene items in bulk with your generous monetary donations. Then, we will deliver these gift packages to children in some of the most economically disadvantaged schools within our circuit.

Remember, the Holiday Project is funded only through your generosity. Your membership dues are not used for the Holiday Project, as your dues go only to provide member services. We can only continue the project through the generosity of members like you.

If you wish to make a monetary donation, please mail your checks to the Eighth Judicial Circuit Bar Association, Inc., Holiday Project, P.O. Box 127, Gainesville, FL 32602-0127 and write "Holiday Project" on the memo line.

For those who have enjoyed shopping for gifts in years past, we will enlist your help in shopping for "stocking stuffers" for the gift packages. If you are interested in participating in shopping for stocking stuffers, please email Elizabeth Collins at ecollins@dellgraham.com or to contact the Holiday Committee Chair, Lua Mellman, at mellmanl@sao8.org. A list of small "stocking stuffer" items will be provided to you, which will specify certain categories of items that we wish to put in the gift packages.

Thanks in advance for your holiday spirit and generosity!

Professionalism Seminar:

Inexpensive (CHEAP) CLE Credits

By Ray Brady

Mark your calendars now for the annual Professionalism Seminar. This year the seminar will be held on Friday, March 26, 2010, from 8:30 AM until Noon, at the University of Florida Levin College of Law. The keynote speaker and topic are to be announced.

We expect to be approved, once again, for 3.5 General CLE hours, which includes 2.0 ethics hours and 1.5 professionalism hours.

Watch the newsletter for further information and look in your mail for an EJCBA reservation card in early March. Questions may be directed to the EJCBA Professionalism Committee chairman, Ray Brady, Esq., at 373-4141.

PERRY & VLOEDMAN and RAYMOND F. BRADY, ESQ.

Announce the merger of their firms
to practice law as:

PERRY, VLOEDMAN & BRADY

The firm will continue to focus on
handling personal injury and
wrongful death claims arising from
all types of accidents and injuries

The Meridien Centre
2790 NW 43rd Street, Suite 200
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Cedar Key 2009: Tradition Takes a Leap Forward



By Elizabeth Collins

Thanks to all of you who came out to Frog's Landing on October 15th and made our annual Jimmy Adkins Cedar Key dinner a great success! This year, we honored our long-standing traditions, but changed our venue and menu. We were happy to see so many familiar

faces, as well as some we had not seen in quite a while.

A special thank you to Attorneys' Title Fund Services, LLC, for its generosity in sponsoring a cocktail hour before dinner, as well as to Jimmy "Frog" Stalham for his assistance in expanding and improving our traditional dinner menu.

Our thanks and appreciation also goes out to those who generously donated door prizes for our attendees:

- Amelia's Italian Cuisine
- Benchmark
- Fresco Neighborhood Italian
- Gator Shine
- Harry's Seafood Bar and Grille
- Harvest Thyme
- McAlister's Deli
- Mode Salon
- Monica McDowell (Massage Therapist)
- Ray Aguilar (Personal Trainer at Alter Ego)
- Rip's Cleaners
- Simply Skin
- Starbucks Coffee
- Steve's Cafe American
- The Gelato Company
- The Plant Shoppe
- Tia Griggs Fox (Massage Therapist)
- Wine and Cheese Gallery

Please check your email soon for a survey from the EJCBA on how we can make this event even better in the years to come. Your input is valuable to us, so we hope you will take just a few minutes to respond.

And, don't forget to keep your Thursday nights in June 2010 clear. Details on our annual reception will be announced soon.



Nancy Yenser, Kristine Van Vorst, Jennifer Lester and David Delaney



Lance Avera, Mark Avera, Judge Davis and Todd Hingson



Becky O'Neill and Elizabeth Collins

Alternative Dispute Resolution

The Wisdom Of A Jury Trial



By Chester B. Chance and Charles B. Carter

In a mediation, the goal is to have the parties to a dispute enter into a *mutually* acceptable agreement. The alternative is to perhaps have a jury of one's peers decide the dispute. The website "Swordplay" is a site addressing news, views and insight for the professional

and corporate community of British professionals.

The website recently dealt with several scenarios described as acts of lunacy by jurors. (Hence the mediator warning: Beware of people with only a driver's license).

Three jurors in a 1993 murder trial were unable to make up their minds over the defendant's guilt or innocence. They sought help by using a Ouija board to commune with one of the defendant's victims. The jurors were instructed to "vote guilty tomorrow" via the Ouija board. The defendant was convicted and then re-convicted at the retrial for the material irregularity in the first proceeding. (We believe it's O.K. for jurors to do Sudoku puzzles during trial).

Apparently Ouija boards are not scientific enough for some jurors. During a 1998 trial, one juror told the judge that if he knew the defendant's exact time and date of birth he would be able to draw up an astrological chart to determine his guilt. The juror was promptly discharged. (**NOTE TO SELF:** Add to voir dire inquiry "What's your sign?")

A drug trial lasting more than three months and costing Australian taxpayers over \$1 million dollars was abandoned after a number of jurors were found to have spent most of their time engaged in Sudoku puzzles. The judge determined there was something amiss when he noticed some jurors were writing notes vertically rather than horizontally. One juror explained "some of the evidence is rather drawn out and I find it difficult to maintain my attention the whole time." (Apparently we were wrong.)

Local Assistant State Attorneys beware: Several weeks after the end of one fraud trial the jury forewoman could contain herself no longer. She had been captivated by the prosecuting counsel's blend of erudition and authority and did

what any person would do: she sent a bottle of champagne to the prosecutor with a congratulatory note including a phone number and the words "what's a lady need to do to get your attention?" The lawyer returned the gift and told the judge and defense lawyers with the result that the convicted fraudsters immediately lodged an appeal. (**NOTE TO SELF:** Buy more Rogaine and join a gym.)



In 1991 a juror in London at the Old Bailey constantly interrupted the court proceedings to ask for evidence to be explained, and also sought to argue a variety of legal points from the jury box. When the judge told him a point he raised was irrelevant, the juror argued he found it to be very relevant. The other jury members complained and christened the man "Mr. Busybody." The judge ran out of patience and dismissed the juror. (Apparently Judges in England get one peremptory challenge.)

In another British trial in 1997, a juror informed the defendant "why don't you plead guilty? You are f***ing guilty." The juror explained to the judge that he had spoken out because "it was an insult to my intelligence for him to plead not guilty." (**NOTE TO SELF:** Try to evaluate the patience level of jurors during voir dire.)

Consider passing out cough drops to the jury at trial. Why? Just as the verdict in a trial was about to be announced, a juror coughed and in the process drowned out the word "not". The judge heard only "guilty" and duly jailed the defendant for two years and had him escorted to the cells. Fortunately the blunder was swiftly noted and the defendant was set free. (**NOTE TO SELF:** Determine if the criminal defendant should be cuffed after being coughed-up for sentencing.)

The following anecdote appeared in the book "How the Law Works" by Gary Slapper. A woman witness was giving testimony in a case involving indecency/exposure and was asked what the defendant had said to her. She was too embarrassed to repeat it in open court so the judge asked her to write it down. She did, and

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Big Changes in the Eighth Circuit!



By Chief Judge Martha Ann Lott

Many events are coming together to mark the beginning of a new era for the courts in the 8th circuit. At the end of 2009, Judge Joseph E. Smith will retire as Levy County Court Judge. At the end of January in 2010, immediate past Chief Judge Frederick D. Smith will retire. At the same

time, penultimate Chief Judge Stan R. Morris will retire. The loss of so many years of commitment, service and experience will be felt throughout the circuit. As a result of these retirements, so well deserved, three new judges will be appointed. That is a lot of change on the bench to take place within 30 days.

Our new judges will no doubt continue the legacy left to us by previous judges as great as James C. Adkins, for whom the Inn of Court is named. As a result of these new appointments, there will be changes in assignments and the distribution of cases. The changes will be consistent with the needs of the circuit and with the Supreme Court Rule of Judicial Administration 2.215 requiring "development of the capabilities of the judges such that each judge is qualified to serve in any division", which means there must be rotation from time to time. Change is not always easy or smooth, but I know we will all continue to work together in the interest of justice. As Chief Judge, I join all judges in our commitment to serving you and the public.

There will be other changes as well. Technology will soon make e-filing commonplace. First Appearance will become more centralized for the circuit with new technology implemented to give access from the courtroom in Alachua County to County jails in Alachua, Levy, Gilchrist and Baker counties. We are reinstating the Bench/Bar Committee with quarterly meetings beginning in November to insure open lines of communication and a local option to talk out differences. Court administration's focus is toward greater efficiency and effectiveness with increased training and cross-training of staff. Most of you know our Senior Staff Attorney, Robert Folsom. As part of his duties, he will contribute regularly to the Bar Newsletter.

I want to thank the Eighth Judicial Circuit Bar Association for the warm welcome that I received as the new Chief Judge. For the Bar Association to include judges in such special and fun events as last June's end-of-the-year banquet, and to begin this year

with a tea party and then a great event at Cedar Key is proof enough that the Eighth Judicial Circuit is THE place where professionalism and a sense of fun are the benchmarks of the best!

I look forward to the opportunity to speak at the Bar Luncheon in January and wish all of you safe and happy holidays in between.

New Administrative Orders

Once again there are new administrative orders that may pertain to your practice. Please note the following and review the complete order at www.circuit8.org :

Administrative Order No. 1.110 (n) – Court Reporting Policy. This administrative order was signed by Chief Judge Lott on October 22, 2009.

The Administrative Order changed to reflect the Florida Supreme Court policy that video and audio records of court proceedings are public records and accessible by the public and the media.

Administrative Order No. 1.472(G) – Appointment of the Office of Criminal Conflict and Civil Regional Counsel, Region 1 and **Administrative Order No. 1.470(H)** – Registry of Court-Appointed and Criminal Conflict Attorneys. These orders were signed by Chief Judge Lott on September 25, 2009.

These administrative orders primarily reinforce FS 27.40 and make the Chief Judge responsible for compiling the registry of private attorneys available to act as court appointed counsel.

Corrected Administrative Order 4.010 (c) – Organization and Procedures of the Criminal Divisions of the Circuit Court

The *Corrected* Administrative Order provides for the effective date of the order to be November 1, 2009 (page 8) and adds Baker County Drug Court to the assignments in the Criminal Divisions of the Circuit Court (page 2). This order was signed by Chief Judge Lott on November 5, 2009.

New Year, New Faces

By Peg O'Connor, FBA Secretary

Immediately following the wonderful "View From the Bench" seminar held on October 1st, the North Central Florida Chapter of the Federal Bar Association held a meeting to elect officers and board members for the upcoming year. We are pleased to announce the following results:

President: John Fuller
President-Elect: Judge Gary Jones
Secretary: Peg O'Connor
Treasurer: Rebekah Kurdziel
Membership Chair: Margaret Stack
Law School Liaison: Linda Calvert Hanson
Board of Directors: Neil Chonin, Rob Griscti, Stephanie Marchman, Brett Meltzer, and the following law student representatives: Zane Altman, Sarah Casey, Alexis Cooper, and Harlan McGuire.

Our first meeting was held on November 12, 2009 in Ocala at Felix's Restaurant. We are hoping to increase our reach in Marion County and surrounding communities, so we are especially excited to have John Fuller, a longtime Ocala attorney, at the helm this year. We hope you'll join us for an exciting and productive 2009-2010 year.



Some of the new FBA chapter officers and board members in the jury assembly room of the federal courthouse. From L to R: John Fuller; Peg O'Connor; Linda Calvert Hanson; Zane Altman; Harlan McGuire; Neil Chonin; Rob Griscti; Margaret Stack; Judge Gary Jones; Stephanie Marchman.



*Please join us in celebrating sixteen
and one half years
Of judicial service to the citizens
of Levy County*

In honor of

Joseph E. Smith
Levy County Court Judge

Eighth Judicial Circuit of Florida

*Thursday, December 10, 2009
Reception 4:30 p.m. - 7:00 p.m.
Remarks 5:30 p.m.
Bronson Elementary School
Cafetorium
400 Ishie Avenue Bronson, Florida*

Criminal Law



By William Cervone

I'm sure everyone knows that very soon now two of our Circuit Court Judges, Rick Smith and Stan Morris, as well as Levy County Judge Joe Smith, will leave the bench. While it's probably not unprecedented to have three local judges retire at virtually the same time I certainly don't remember it happening before. In any event, each of these fine jurists leaves a rich legacy to our local and state court system, and each will be remembered by all of us in the coming years for their service and through our individual interactions with them.

My purpose this month is not to repeat the many tributes that will flow to Judges Smith, Morris and Smith, but rather to recall some of their predecessors who have not only left the bench during my career but who have also now left this world. I don't mean to diminish anyone by doing so, only to reflect on others who have served our judicial community since the retirement of these three judges has reminded me of others I had the privilege of working with in the past. Those of you in my age group will remember these men as well; those of you who are newer to our Bar will likely have heard stories of them.

Judge John A. H. Murphee was already on the bench when I started practicing, and had been for quite some time. He served from 1943 to 1978 and although he didn't often handle criminal matters during his tenure, at least in my day, he did occasionally preside there. Certainly, I remember his chambers well because, like him, they were reminiscent of the way things used to be. I recall Judge Murphee as being unfailingly polite and soft spoken. The same could not be said of his hearing room furniture. I don't know where they've gone, but he had a set of chairs that, no matter how you tried, would squeak, groan, and protest no matter how still you tried to sit. Squirming under his penetrating gaze and feeling like you were going to break under his pointed questioning as to your position took on new meaning when your very chair would give away the weakness of your argument.

Judge Benjamin M. Tench was also already on the bench when I started, and if there was ever the personification of a southern gentleman judge it was he. The well waxed handle bar moustache alone told you all you needed to know. Judge Tench presided from 1973 to 1990 and I had the chance to work with

him in both the juvenile and felony courts. There is a classic photo somewhere of him, very dapperly attired, in one of his antique roadsters. He once bragged to me that he didn't need a pass card to the courthouse parking lot because he could easily sneak that car in under the arm of the gate. If you ever wanted to hear about the honor of the South, ask him about UVa, his beloved alma mater.

Another of the judges who was there when I started was John J. Crews, who was on the bench from 1969 to 1986. I remember trying a case before Judge Crews in Union County some time in the 70s. He didn't think I'd sufficiently proven venue and as he left the bench for a recess towards the end of the State's case he stared at me from the corner of his eye and under his glasses, muttering in a stage whisper "Venue! Venue!" I have no idea if I'd left that element out up to that point but I assure you I proved it up about a dozen times afterwards. Judge Crews, reputedly, is responsible for Baker County being a part of the 8th Circuit since he was from there and had served in the legislature at a time when the circuit lines were drawn or re-drawn. If you were a defendant standing in front of him in Baker County there was no use trying to pull the wool over his eyes. He knew you, your mama and daddy, their parents, what part of the county your people were from, and everything you'd ever done.

I received some long lasting lessons from Judge Theron A. Yawn as well. I think Judge Yawn was always a judge despite only being officially designated as such from 1973 to 1988. Also in the 70s, in my second jury trial actually, I was having some trouble with a witness who just wouldn't give the information I'd so carefully planned, probably because of my questioning. Eventually, I just went ahead and asked what I knew was a blatantly leading question. In the blink of an eye the gavel pounded, we were recessed, and I was pulled into chambers where Judge Yawn in no uncertain terms taught me his view of leading questions. When court resumed, somewhat scorched I tried again without leading. Fortunately the witness had gotten the point. Judge Yawn brooked no foolishness in his courtroom.

Nor did Judge Wayne Carlisle, 1974 to 1986. Judge Carlisle had the most amazing set of notebooks on his credenza that I've ever seen. In them was the answer to whatever was being argued. He also took

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To Be or Not to Be (Part 2 – Mediations, Financial Affidavits and Alleged Emergencies)



By Cynthia Stump Swanson

At a recent Family Law Section meeting, there was some discussion among the group about problems with one lawyer unilaterally canceling a scheduled mediation, and causing both parties not to be in compliance with a judge's order to schedule mediation.

One suggestion from some lawyers was for one of the lawyers to prepare a stipulated order regarding the scheduled mediation to have signed by the judge. That way if a lawyer wanted to cancel the mediation, a motion to change the court order would be required. There was also some discussion as to whether the mediator can prepare an order to schedule the mediation and send it to the court for signature. As there was no resolution to the concern, this is something the group may wish to discuss again in the future.

This gives me a small opening for one of my soapbox issues – scheduling mediation before there has been full financial disclosure. In my opinion, for a lawyer to go with a client to mediation before the full financial circumstances are known is malpractice. If you have to go to court to argue for additional time to set mediation, be sure your client is coming in with clean hands – be sure all of your client's disclosure has been done. I understand that trial judges in general want to push through cases on their docket, but it is incumbent upon the lawyers to be sure that financial disclosures have been completed and to resist the mandatory scheduling of mediation before that has happened.

Judge Moseley, who was present at the meeting, told the group that he has an open door in regard to mediation agreements. That is, if parties want him to adopt the mediation agreement right after mediation, he will do it if he has time. Judge Smith, who was also present, said the same thing. Judge Moseley plans to have the family law judges meet and come up with standard mediation and pretrial compliance orders. They will ask for some feedback from lawyers.

Judge Smith also mentioned some of his concerns. He pointed out that parties can't waive financial affidavits and child support guidelines in dissolution of marriage cases that involve children. He is surprised at how many seasoned lawyers try to do this. He mentioned he has a proposed final judgment that has been sitting on his desk for weeks because he is waiting for the lawyers to file financial affidavits. In this regard, I would also point out one of my favorite cases – Salczman v. Joquiell, 776

So.2d. 986 (Fla. 3d DCA 2001). Here, the appellate court held that, where there were no children, and the parties had completely settled all issues and no judicial action was required, no financial discovery - not even financial affidavits - were required to be exchanged.

Judge Smith also suggested that lawyers review the case law on invoking the court's jurisdiction. A motion or petition must be filed for the court to have jurisdiction. He pointed out that lawyers faxing a motion and proposed order to the judge when the motion has not been filed does not allow the Court to act. There was also discussion about too many lawyers crying "Wolf!" where there was no wolf - that is, titling their motions "emergencies" - usually related to custody matters - in order to get a prompt hearing time. This is another complaint I have heard from judges for 25+ years. The general rule is that courts cannot take action to modify custody or visitation without due process (filing and service of a supplemental petition, notice and opportunity to be heard, and so on). Requesting an emergency hearing clearly does not allow for the usual development of discovery, presentation of evidence, and sometimes even notice, which is required for due process. I decided to do some research on what appellate courts have held to be (and not to be) emergencies. Clearly where there are credible (verified) allegations of imminent danger to a child or that a child is being removed from the Court's jurisdiction constitute emergencies which can allow courts to enter temporary orders until full evidentiary hearings can be held. Here are some things that are not emergencies which fail to justify even a temporary suspension of due process:

- The fact that the father desired to enter a child into a particular school was not an emergency. Hayman v. Hayman, 522 So.2d 531 (Fla. 2d DCA 1988).
- Husband's desire for visitation during a particular time period did not constitute an emergency. Somerville v. Reusser, 649 So.2d 339 (Fla. 5th DCA 1995).
- The mother interfering with the father's visitation was not an emergency. Gielchinsky v. Gielchinsky, 662 So.2d 732 (Fla. 4th DCA 1995).
- Mother accepting a job in Louisiana at a salary "far in excess of her present earnings" and needing to leave immediately for the job and thus wanting permission to relocate was not an emergency. Shaw v. Shaw, 696 So.2d 391 (Fla. 4th DCA 1999).

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Probate Section Report



By Larry E. Ciesla

The Probate Section held its regular monthly meeting on October 10, 2009. A new member was introduced, Lula Dawit. She is a member of the Georgia Bar and recent graduate of the LLM program at UF. Lula plans on remaining in Gainesville to practice probate and estate planning. The meeting proceeded with an announcement that long-time section member Jay Donohoe was absent from the meeting due to a recent medical illness. The section sends its best wishes to Jay for a complete and speedy recovery.

Richard White led a discussion regarding current efforts by the RPPTL Section to revise portions of Chapter 765 regarding the health care surrogate laws. As presently worded, Section 765.204 provides that a designation of a health care surrogate does not become effective until a finding of incapacity by the attending physician. Some practitioners avoid this problem by including in their durable power of attorney a provision granting to the agent the power to make medical decisions, including all matters set forth in Chapter 765, as is permitted by Section 709.08(7)(c). This strategy will of course only work where the power of attorney is of the type which is effective upon signing, as opposed to the type whose effectiveness is contingent upon a finding of incapacity by a physician in the future, as is required under Chapter 765. The bottom line is that these statutes are in conflict. The proposed change would bring Ch 765 in line with FS 709.08 in not requiring a finding of incapacity as a precondition to use of a health care surrogate. Another proposal would create a new section in Ch 765 so as to authorize the designation of a health care surrogate for a minor. As we are all aware, there is no specific law which allows a parent or legal guardian to designate another person to make medical decisions on behalf of a child in the absence of the parent or guardian. The new statute would be numbered 765.2035, to be followed by a form for same in 765.2038. Keep your eyes open for these changes in the law during the next legislative session.

Susan Mikolaitis led a discussion highlighting some of the more interesting topics covered during the recent annual FLEA seminar. First up: e-filing is on the way. In fact, non-mandatory e-filing is already in effect commencing July 1, 2009. Probate has been selected to lead the charge, due to its alleged simplicity in types of cases filed. All clerks of court are required to submit

their plans for implementing e-filing by October 1, 2009. Initial reports are that the e-filing program may not be as simple as scanning and sending a pdf to your local clerk. What is being looked at is a statewide plan whereby all filings would be submitted to a central portal, which would likely require practitioners to acquire specialized software. In another area of possible legislative change, there is a movement afoot (led by creditor types?) to change the law in various ways to expand the reach of what is included within the scope of a probate estate (expanded probate), including, but not limited to, pulling the proceeds of pay on death and JTWR0S accounts into the probate estate. This would, in essence, shift the burden to the account beneficiary to initiate litigation to remove the funds out of the probate, based on the clear intent of the decedent that the funds pass to the beneficiary outside of probate. Apparently the current thinking (by the creditor types?) is that personal representatives are not properly fulfilling their fiduciary duties (to creditors), in that they rarely make any effort to challenge pay on death or JTWR0S accounts, thereby allowing estates in many cases to avoid paying what could otherwise be considered legitimate debts of the decedent. This appears to be an issue of great significance as regards the potentially enormous effect this would have on estate planning. For many years now a very large part of the advice we as estate planners have been giving to clients is on how to avoid probate. The simplest way is of course by use of pay on death and JTWR0S accounts. If this proposal gains traction and is passed, it could become famous as the lawyer's relief act of 2010, as there would certainly be thousands of cases that would require probate administration under the proposed law, for which no probate is presently required. In addition, the account beneficiaries would be required to institute litigation against the estate to remove the funds from the estate, thereby providing more opportunities for additional fees for personal representatives and their counsel. Another topic coming up for discussion was the drafting of non-dispositive will clauses. Given the current real estate market, it was suggested that it might not be a bad idea to include some extra language in the powers of the personal representative so as to grant discretion to allow the personal representative to abandon assets having no value, such as the not uncommon situation where the amount owing on a mortgage exceeds the fair market value of the property if sold. Although under

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Probate Section

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FS 733.612(9) this right currently exists for assets considered "valueless", or "of no benefit to the estate", the thinking is that it would be a good idea to bolster the power by broadening the statutory language to make it clear that it applies to a parcel of real estate which could have some "value", but the debt owing exceeds the value, so as to make it "of no benefit to the estate".

Bruce Hoffman proceeded with a discussion regarding the current state of affairs regarding proceedings for determination of incapacity/ appointment of a guardian or appointment of a guardian advocate in cases involving an indigent ward. In such cases, the court, by statute, is required to appoint the newly created office of conflict counsel to represent the indigent ward. The problem is that the conflict counsel's office does not have anyone on its staff with knowledge or experience in handling these cases. Apparently the standard procedure is for the conflict office to then file a motion to withdraw from the case. Once a withdrawal has been entered, the court will then appoint someone from the guardianship rotation list. According to Bruce, it can take up to four months from the time the initial petition is filed to the time a rotation lawyer is appointed. My suggestion would be as follows. Check with the conflict counsel's office in advance and work with them to prepare a motion and proposed order for withdrawal and present that paperwork to the court, along with a proposed order appointing a rotation attorney (leave the name blank or check to see who is up next on the rotation list and check to see whether he or she is able to take the case). Wait until the original petition has been scanned by the clerk and entered into their system. Then hand deliver the additional documents directly to the judge's chambers, with a friendly reminder that prompt entry of an order would be appreciated and is required within five days of the original filing in an incapacity case.

The meeting concluded with a discussion regarding the current status of the procedure whereby some practitioners elect to publish a Notice to Creditors following entry of an Order of Summary Administration. During the meeting I indicated that I thought that this option had been deleted from the probate code. I stand corrected. This provision still exists in FS 735.2063. The statute has been amended a few times in recent years. The old related FLSSI probate forms have been deleted and a new form (2.0355) has been promulgated to conform to the statutory amendments. The statute and the form provide a disclosure as to the

total value of the estate and the names and addresses of the recipients of the assets. Creditors then must file their claims within the time limits set forth in the probate code for formal administration. If not timely filed, the statute provides a bar as to claimants who were not known and not reasonably ascertainable. If a claim is filed, the statute does not say what happens next. There is no procedure for objecting to the claim. One practitioner I contacted stated he recalls an occasion where he published after obtaining an order of summary administration and order of homestead, only to have Florida Medicaid file a claim and request a copy of the probate Inventory. In any event, each practitioner can make his or her own determination as to whether it makes any sense to publish a notice to creditors following an order of summary administration.

The Probate Section continues to meet on the second Wednesday of each month at 4:30 pm in the fourth floor meeting room in the civil courthouse. All interested parties are welcome to attend.

Criminal Law

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such meticulous notes during a trial or hearing that there really was no need for a court reporter. You'd better hope that the evidence you needed made it into his notes because if not it might as well not exist. You'd better also hope you weren't being sentenced by him. Many is the time I felt that I was about to get a few years just because I happened to be in the courtroom with some poor soul who was being consigned to DOC.

It's impossible to keep this article brief but I must finish it now. Each of these men, as well as our currently retiring judges, commanded respect. Each is a part of our rich heritage, whether you knew them or just know of them. All are and will be missed.

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When Does Freedom Really Mean Being Free

By Stephen N. Bernstein



It has been one year since the U.S. Supreme Court decided that detainees at the U.S. Naval Base in Guantanamo Bay had a right to challenge their detention in Federal Courts. Now they are being asked to deal with the new controversies: do federal judges have the power to order detainees released into the United States?

The question is far from academic. In the case of two brothers, Dahtiyar Mahnut and Arkin Mahmud face oppression, intimidation, and often worse treatment in their homeland because of their religion. They are Uighurs, or Chinese Muslims. In 2001 Dahtiyar traveled to Afghanistan, where he bunked down with other Uighurs and received rudimentary arms training. At the request of his mother, Arkin went to Afghanistan in search of his younger brother. Both were then captured during the U.S. invasion of Afghanistan and have been held in Guantanamo since 2002. The Bush Administration years ago conceded that they were not enemy combatants and they should be freed. However, the men can not be returned to China for fear they will be tortured to death.

It has been nearly one year since a federal judge in Washington ordered the release of these brothers and some fifteen other Uighur detainees into the United States citing this country's failure to find third countries willing to take them. An appeals court reversed the ruling and concluded that only the Legislature and an Executive had the power to allow people into the country. Now the U.S. Supreme Court is being asked to take up this case to definitively answer the question.

There has been a lot of success by detainees in challenging their incarceration in federal court. Of the thirty eight *Habeas Corpus* cases adjudicated to date, detainees have won in 30 of them. Yet twenty men who have been ordered released by federal judges remain behind bars because the United States has been unable to find suitable homes for them. The Island nation of Palau recently announced that it would be willing to take twelve of the remaining Chinese Muslims of Guantanamo, all but Arkin Mahmud, who since his detention and prolonged solitary confinement has suffered from serious mental health problems. Dahtiyar Mahnut

has turned down a chance for freedom in Palau so he can stay with his brother. Because Congress has essentially forbidden the men from entering this country, the brothers could face infinite detention if no other country comes forward. This would be unconscionable.

Congress could rectify this injustice by crafting a narrow exception to allow the brothers into this country, where there is a sizable Uighur community where Arkin could get the kind of medical treatment he needs. However, while Congress possesses infinite ability to pass laws, they have displayed very little courage in doing so. In the meantime, the justices should take up the case to determine how much power federal judges have to deliver real and meaningful freedom.

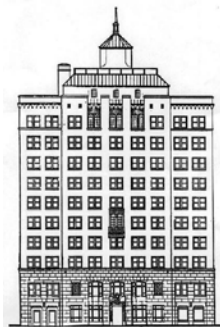
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Family Law

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- The fact that the child had made a number of disclosures to a counselor (about violent actions by her stepfather), that indicated she was quite upset, quite afraid, generally just a miserable child living in the environment with her mother did not justify an emergency transfer of custody to the father. Fee v. Usler, 761 So.2d 361 (Fla 5th DCA 2000).
- Mother hiring a nanny instead of having father be babysitter, withdrawing young child from school, and cancelling child's counseling sessions was not an emergency. Stanley-Baker v. Baker, 789 So.2d 353 (Fla. 4th DCA 2001).
- Father's allegations, among others, that the mother had subjected the minor child to physical violence, that mother had been engaged in physical fights with her daughter, in the house, the car, and in public, and that mother had been seen "rolling on the asphalt, wrestling and struggling with" the child at a soccer match, did not constitute an emergency. Phillips v. Wintter, 835 So.2d 1283 (Fla. 4th DCA 2003).
- Mother's move with the children from Dade County to Palm Beach (where the father lived in Broward County which is between Dade and Palm Beach Counties) was not an emergency. Bon v. Rivera, 10 So. 3d 193 (Fla. 4th DCA 2009).
- Mother's alcohol and drug use were not an emergency because the situation had been going on for years and there was no allegation of any actual danger or actual emergency. Braswell v. Braswell, 935 So.2d 604 (Fla. 3d DCA 2006). As a side note, this case has had 19 appearances in appellate courts. Yikes!

But see,

- Father's allegations that the mother's drug use, deteriorating mental health, and failure to properly care for the child endangered the child might have been an emergency, and an emergency hearing should have been held. Haddix v. Emret, 992 So.2d 883 (Fla. 2d DCA 2008).

The Family Law Section meets on the third Tuesday of each month at 4:00 p.m. in the Chief Judge's Conference Room in the Alachua County Family and Civil Justice Center. If you know anybody who wants to get on or off the family lawyers email list, please email me at cynthia.swanson@acceleration.net. Likewise if you have some ideas for programs, topics or speakers.

President's Letter

Continued from page 1

of door prizes, wonderful food and delightful company. Thanks to all who attended and contributed to the success of this event. And a hearty THANK YOU to Elizabeth Collins for organizing this event and to the people who helped her: Lua Mellman, Evan George, and Gloria Walker. EJCBA also appreciates the generosity of Attorney's Title Fund, who for several years has provided 2 free drink tickets for each attendee.

On a slightly more serious matter, EJCBA could use your help with luncheon reservations. We are delighted that so many members come to the luncheons and welcome each and every one of you. But we encourage you to please reserve for the luncheons as Steve's American Café has run out of food every luncheon this month.

Lastly, for those who will be traveling for the holidays, have a safe journey. To all, have a joyful holiday season - may it be filled with family and friends, love and laughter.

Alternative Dispute

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what she wrote was "Would you care for a screw?" This document was passed around the jury until it reached juror number twelve who was an elderly gentlemen and who was fast asleep. Sitting next to him was a young lady member of the jury. She read the note, nudged juror number twelve and when he was awake handed him the note. He woke with a start, read the note and with apparent satisfaction, folded it and put it away carefully in his wallet. When the judge said, "Let that be handed up to me" juror number twelve shook his head and replied, "it's a purely private matter, my Lord."

Ah, yes, nothing like having a group of individuals with driver's licenses, Ouija boards, astrology charts, bad coughs and a lack of patience decide a dispute after mediation failed.

Sponsorship Opportunities Available!

If you would like to sponsor an EJCBA event and get some great perks, please contact the EJCBA Sponsorship Committee at execdir@8jcba.org to find out more.



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December 2009 Calendar

- 2 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 3 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Ave., 7:45 a.m.
- 4 Deadline for submission to January Forum 8
- 9 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 10 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
- 11 EJCBA Luncheon, Chief Tony Jones, GPD, “Visions and Goals for the future of the Gainesville Police Department, Steve’s Café, 11:45 a.m.
- 11 Bench Bar Committee Meeting, 1:00 p.m., immediately following Bar luncheon
- 15 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center
- 24-25 Christmas Holiday, County Courthouses closed
- 25 Christmas, Federal Courthouse closed

January 2010 Calendar

- 1 New Year’s Day – County & Federal Courthouses closed
- 5 Deadline for submission to February Forum 8
- 6 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
- 7 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Ave., 7:45 a.m.
- 8 EJCBA Luncheon, Chief Judge Martha Ann Lott, Steve’s Café, 11:45 a.m.
- 8 Bench Bar Committee Meeting, 1:00 p.m. immediately following Bar Luncheon
- 13 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
- 14 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
- 18 Martin Luther King, Jr., Birthday Holiday – County & Federal Courthouses closed
- 19 Family Law Section Meeting, 4:00 p.m., Chief Judge’s Conference Room, Alachua County Family & Civil Justice Center

Have an event coming up? Does your section or association hold monthly meetings? If so, please fax or email your meeting schedule let us know the particulars, so we can include it in the monthly calendar. Please let us know (quickly) the name of your group, the date and day (i.e. last Wednesday of the month), time and location of the meeting. Email to Dawn Vallejos-Nichols at dvallejos-nichols@avera.com.