

**Meeting of Elder Law Section of the CBA  
May 17, 2007 (As amended)**

Co-Chairs:	Marcie McMinimee	Denver	303-534-5100
	John Campbell	Denver	303-290-7497
Secretary:	Frank Slaninger	Denver	303-758-5200
Treasurer:	Marco Chayet	Denver	303-355-8500
Council Members:	Bert Myrin	Aspen	970-925-8645
	Michele Lawonn	Denver	303-751-7012
	Elizabeth Tulloch	Denver	303-388-3500
Liaison Coordinator:	John Campbell	Denver	303-290-7497
CBA Liaison:	Gretchen Eoff	Denver	303-860-1115
Representative to CBA Board of Governors	John Campbell	Denver	303-290-7497
Uniform Trust Code Committee	Eric Solem	Englewood	303-761-4900

The Executive Council Meeting of the Colorado Bar Association Elder Law Section was called to order at 8:15 A.M. Several matters were discussed, mostly matters set out on the Agenda. There is a need to make a list of prior co-chairs of the Section and to determine their status at council meetings.

**Call to Order and call for review and approval of April, 2007 Minutes ---** The meeting was called to order by Marcie McMinimee at 9:06 a.m.

Introductions followed, and the sign-in sheet was circulated. Those attending in person or by phone were:

Ellen Alires-Trujillo	Richard Kautt
Susan Bryant	Michael Kirtland
Susan Buchanan	Michele Lawonn
John Campbell	Thomas Linn
Billie Castle	Paul Linton
Marco Chayet	Corinne Magid
Charles Connell	Marcie McMinimee
Terry Conover	William Myers
Valerie Corzine	Stephen Orzynski
W. Dirk Costin	Holly Rebstock
Marvin Dansky	Thomas Rodriguez

Claire Dineen	Catherine Seal
Gretchen Eoff	Catherine Silburn
Aaron Evans	Frank Slaninger
Stewart Fleisher	R. Eric Solem
Nancy Germany	David Steinhoff
M. Carl Glatstein	Carl Stevens
Susan Halloren	D. Wayne Stewart
K. Gabriel Heiser	Elizabeth Tulloch
John Holt	Tamra Waltermath
	Hal Wright

The minutes from the April 19, 2007 meeting with a couple changes were approved later in the meeting. Under “Hot Topics Discussion” below, the price of Gabriel Heiser’s book is \$47.00, and the following book deals with “Medicare” appeals.

2. **Treasurer’s Report**– On behalf of Marco Chayet, Marcie McMinimee reported our Section had a balance of \$7,441.94 on April 30, 2007 with \$2,000 remaining to be paid out.
3. **Old Business**
  - a. Committee Reports (Chairperson of the committee may report any current matters). Our current committees are:
    - i. Civic and Community Affairs Committee: Carl Glatstein – Senior Law Day 2007 is scheduled for June 2, 2007. We are in the home stretch. The Senior Law Handbook is ready to be sent out for review. There are changes in plans. Trust and Estate cut back their donation from \$4,000 to \$2,000. There will be a \$10 fee for parking because D.U. will no longer give us free parking. We can call it a nominal registration fee. Carl asked for volunteers to sign up. Volunteers are allowed to keep the red hats. The brochure is in electronic form, and some have gone out in the mail. We did receive Rose Community funding plus funding from others. The Senior Law Handbook peer review is on line. An ABA brochure follows a Maryland Model “Making Medical Decisions for Someone Else.” Finally, those who signed up in 2006 to be listed in the Handbook will be listed in the Handbook for 2007.
    - ii. Guardianship Standards: Marco Chayet – they need more fine tuning.

- iii. Guardianship Jurisdiction Act Committee: Kate Seal – There was a meeting this weekend. Marco Chayet submitted some good comments. They are on our web page. They were presented to the ABA Real Property Probate & Trust Section meeting in April, 2007. It should pass.
- iv. CLE and Publications Committee: Jennifer Gormley – passed.
- v. Uniform Trust Code Committee – Eric Solem – passed. Marcie McMinimee said PBS suggested a UTC debate, but she feels no one is excited about it, that it is a dead issue at present in Colorado.
- vi. Advance Directives Task Force: Michael Kirtland – a draft was presented, one that kept most of the current statute, §15-18-101 et seq.. They propose removing the sample living will form from the statute. One case currently on appeal says the form is law that conflicts with the statute, and that the present condition must exist for seven (7) days. See cases in annotations to §15-18-104. “Persistent vegetative state” will be defined by medical standards. They will distinguish this term from “terminal injury, illness, or disease.” The current statute is restrictive. The proposed amendment is permissive – “you may do this.” A living will and power of attorney may be combined into one document. It contains HIPAA language. A doctor can discuss end-of-life issues with “named” individuals, but they don’t have decision-making authority. “Blank lines” are added. A person can add other medical directives, for example, things specific to the person’s religion, known conditions, and so forth. Currently, if there is a disagreement, a living will trumps a MedDPOA. The proposal would enable a person to change this in his/her living will. The proposed changes would grandfather existing living wills and uphold other states’ living wills. Nothing requires treatment contrary to medical standards of practice. They will continue working on a sample form in preparation for the 2007 legislative session.
- vii. Public Guardianship – Val Corzine – Alice Kitt and Sharon Thorson are working hard. Much data has been collected by Pat Stannis. They met with judges and weren’t able to put together a survey to send out to probate judges, following a volunteer model from Kansas that was funded with \$4 million. Many adult wards in adult guardianships have developmental disabilities, mental problems, and age problems. The problem is how to fund it.
- viii. Fiduciary Misconduct: Marcie McMinimee – They are inching closer to a version to provide to Judge Stewart to review this summer, then bring it back to our Elder Law Section to review.
- ix. Joint Tenant – Carl Stevens – A group to consider joint tenancy presently consists of Carl Stevens, Dave Steinhoff, and Wayne

Stewart. Others are invited and welcome to join. They will be looking at § 15-15-102, and 38-11-101, CRS.2006, and recent Colorado cases. John DeBruyn will discuss it with Statutory Revisions Committee (SRC) today. He sent Marcie copies of joint tenancy proposal, which she offered to forward to those who were interested. Presently, Carl's group is not willing to accept Real Estate's desire to propose legislation to reinstitute the four (4) unities of joint tenancy the Colorado courts may have recently rejected in *Taylor v. Canterbury*, 92 P.3d 961 (Colo. 2004). (In *Duston v. Duston*, 31 Colo. App. 147, 498 P.2d 1174 (Colo. App. 1972) a father (fearing divorce) and his son conveyed the property by joint tenancy deed to the father, the son, and the son's wife. The court found that the presumption (that grantees under a joint tenancy deed are presumed to hold equal shares) was overcome by the father's intent, the credibility of the witnesses, and the actions of the parties. The court found the father and son each had a ½ interest, that the son's wife held no interest, and it permitted partition of the property between the father and the son.) Carl said joint tenancy was a complex issue under the old common law.

b. Liaison Reports –

- i. Trust and Estate Council Liaison: Billie Castle – she will take a “breather” for the coming summer months. Tempers were high. The Council and our Section disagreed with ways to submit bills. Trust and Estate wants no movement toward legislation until the CBA is united, to avoid future “turf wars.”
- ii. AARP Liaison: Elizabeth Tulloch – “we don't know what we've got.” Many bills were introduced, but the legislature adjourned five (5) days early. Many bills are in the pipeline. She will dig out which ones were passed, funded, and so forth.
- iii. Department of Health Care Policy and Financing Liaison: John Campbell – passed.
- iv. Board of Governor's Meeting – John Campbell – a group is proposing a study on review of judicial performance of appellate judges. A review panel is made up of lawyers and citizens appointed by various groups, including the Chief Justice. The group will meet in August, 2007 to continue the discussion. Prior to the meeting, some members met with Bob Steenrod and also discussed the problem that occurs when lawyers attend meetings of legislative committees and identify themselves as members of a CBA executive council but oppose the position that council is taking. This creates a conflict of interest.
- v. CBA Legislative Policy Committee Liaison: Michele Lawonn – we need sponsors for advance directives legislation. (Last month Marcie McMinimee said she'd received something from Jim Wade, a

“National College of Probate Judges Handbook.” It contains a section on making medical decisions for someone else. She said it looked well put together.)

- c. Audit on oversight of probate cases: Marcie McMinimee said Judge Kolomitz (Otero-La Junta) will call her regarding the CPC forms which were pulled from the State Judicial and Orange Book.

#### 4. New Business and Announcements

- a. Vote – we voted for new officers. See the results in “d” below.

b. TOPICS AND SPEAKERS: Please continue to let the Co-Chairs know your ideas for possible speakers and topics. The names and email addresses for the Co-Chairs are: Marcie McMinimee ([mmcminimee@steenrodllaw.com](mailto:mmcminimee@steenrodllaw.com)) and John Campbell ([jcampbell@jjcelderlaw.com](mailto:jcampbell@jjcelderlaw.com)).

c. CLEs and PROGRAMS

- May 19, 2007 – Jefferson County – Probate and Juvenile Law - \$60, 4 CLE credits, with Judges Munsinger and Rodgers
- June 14-16, 2007 – Annual Estate Planning Retreat – Beaver Creek, CO (Avon)
- June 17-22, 2007 – Estate Planning in Depth – Madison, Wisconsin
- June 21, 2007 – Estate Administration Procedures: Why Each Step Is Important – presented by Claire E. Dineen and David W. Kirch
- July 10, 2007 – Estate Planning and Cohabitation Agreements for Unmarried Couples (ABA – 90 Minutes) - \$85 for section members
- July 27, 2007 – Medical Benefits Eligibility (video replay 08/22/2007) (“CoverColorado” program, Medically Indigent Program, Medicare, Medicaid, and Long Term Care Insurance)
- August 7, 2007 – 21<sup>st</sup> Century Advanced Estate Planning for Wealthy Clients, 11:00 A.M. MST, 90-minute teleconference & audio webcast
- August 8, 2007 - From Paper to PDF: Using Adobe Acrobat to Work with Electronic Documents (video replays August 29, 2007)
- August 24, 2007 – Elderly Financial Exploitation in Colorado - \$30 – 7 CLE (Arapahoe County jury room – contact Cheryl Law at CBA)
- September 26, 2007 – Drafting Effective Wills and Trusts (NBI)

- October 30, 2007 - Ethics for Estate Planning Attorneys (NBI)

- d. NOMINATIONS AND ELECTION OFFICERS– for Co-Chair, Secretary, and At Large Council member. The election results are:

For Co-Chairman:	Susie Germany
For Secretary:	Frank P. Slaninger
For Council Member at Large:	K. Gabriel Heiser
For Treasurer:	Marco Chayet

- e. Legislation action will resume in the fall.

## 5. **Hot Topics Discussion**

- a. One of our members, K. Gabriel Heiser, has written a book, “How to Protect Your Family’s Assets from Devastating Nursing Home Costs -- Medicaid Secrets” (2007) (236 pages, \$47.00).
- b. Daniel A. Cody and Kathleen Scully-Hayes, “A Practical Guide to Medicare Appeals” (2007) (paperback, 6 x 9, 412 pages, \$59.95 ABA Health Law Members, \$79.95 regular price). It describes the steps necessary to successfully resolve appeals of all types of Medicare determinations. Co-authored by a CMS hearing officer and a private practitioner with years of Medicare appeals experience, this book will walk practitioners through every step of the very confusing and sometimes self-contradictory rules so that appeals can be decided on their merits rather than barred for procedural rules violations.

The business meeting ended at 09:57 AM on May 17, 2007.

## **SPEAKERS**

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Our speakers today are Eric Solem and Carl Stevens. Their topic is “Special Needs Trusts.”

Eric Solem will discuss first party trusts. Carl Stevens will discuss third party special needs trusts.

Carl Stevens said special needs trusts (SNT) require knowledge of the mechanics of trust law. For purposes of a SNT, this means knowing the law of Medicaid and Social Security (SS). Handouts included:

1. CRS, 15-18-101 et seq, “Colorado Medical Treatment Decision Act”
2. 8.110.52 – Financial Eligibility Requirements for Individuals Eligible for the Colorado Medicaid Program
3. *Seidenberg v. Weil*, 12/6/1996, *Civil Action 95-WY-2191-WD* district court decision.

Provision should be made in the trust for the ability to review the trustee's actions and fire the trustee. Carl prefers the use of "trust protector" provisions for this purpose. It is best not to give the beneficiary the power to remove and replace trustees because of dominion and control issues. Also give the trust protector the power to amend the trust if in the event the law changes in the future in order to effectuate the intent of the grantor.

Eric referred to the Social Security Administration's Program Operations Manual System (POMS). This is the primary source of information used by Soc. Sec. employees to process claims for Soc. Sec. benefits. See <https://s044a90.ssa.gov/apps10/poms.nsf/aboutpoms>

If there is no Medicaid rule, then look to the Soc. Sec. rules.

For trusts created between 1986 and August 10, 1993 the Medicaid Qualifying Trust provisions apply. OBRA '93 provisions are applicable from August 11, 1993 forward. Colorado regulations implementing OBRA '93 became effective July 1, 1994. And Soc. Sec. did not change their trust rules to extend the OBRA '93 rules to SSI until January 1, 2000.

The basic trust rule for self-settled trusts ( first party trusts) is that if any of the principal can be distributed to or for the benefit of the grantor, then all assets of the trusts are "countable resources" of the grantor. Therefore, the assets of a revocable trust are fully available resources to the grantor because she/he can access them at any time. The discussion is really about irrevocable trusts.

If assets of the grantor are placed into an irrevocable trust that provides that none of the principal can be distributed to or for the benefit of the grantor, this is a transfer without fair consideration and is subject to the five year look back period, and the period of ineligibility provisions if an application for Medicaid or SSI is filed within the five years after the transfer was made into the trust. Be careful not to include a "doomsday provision" in your trust. In other words, if there are any possible circumstances under which any principal can be returned to the grantor, then Soc. Sec. will consider the entire principal a countable resource. For example, if the trust contains a clause that says that if all beneficiaries are deceased, then the principal goes back to the grantor. It is better to put that kind of an ultimate distribution in control of a court, or a trust protector.

A "Disability Trust" is an exception to the general rules regarding self-settled trusts. The assets of an individual can be placed in a Disability Trust and used for the benefit of the individual, and the individual can still qualify for SSI and Medicaid. (You cannot put Social Security benefits, pensions, or Individual Retirement Accounts into the trust. But IRAs can be cashed in, the tax paid, and the remainder put into the trust.) A Disability Trust has the following requirements:

- a. It must be a "special needs trust," also known as a "supplemental needs trust," or SNT. In general, this means that the assets cannot be used for food or shelter for the beneficiary.
- b. It must be "solely for the benefit of the disabled individual."
- c. It must be established for the benefit of an individual under age 65.

- d. It is established for the purpose or with the effect of establishing or maintaining the resource eligibility of the individual for Medicaid or SSI.
- e. The trust must provide that upon the death of the beneficiary, Medicaid shall receive all of the assets remaining in the trust up to the amount of medical assistance paid for the beneficiary.
- f. The trust can only be established by a parent, grandparent, legal guardian, or the court.

Even though the settlor/grantor of a Disability Trust may be a parent, Soc. Sec. has taken the position that the trust must be established by someone who has legal control over the assets of the individual placed into the trust. Consequently, the safe course of action is to obtain court approval for the trust, or to have a guardian/conservator establish the trust.

Colorado has two Medicaid rules of questionable validity. Federal law requires that a Disability Trust terminates upon the death of the beneficiary. Colorado's rule adds to that requirement that the trust will terminate "if the trust is no longer required for Medicaid eligibility in Colorado." 8.110.52.B.5.b.1(e). This could cause the trust assets to be paid to Medicaid for reimbursement if the beneficiary leaves Colorado, or for some other reason becomes ineligible for Medicaid. It is believed that that additional requirement is contrary to federal law. The second questionable rule provides that any statutory lien for medical assistance paid for which a third party or insurer is liable must be satisfied prior the funding of a Disability Trust. This rule may be contrary to the U.S. Supreme Court decision in Arkansas Department of Health and Human Service v. Ahlborn, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006).

The other self-settled trust that can be established with assets of an individual and still allow the assets not to be considered countable resources, thereby allowing the individual to continue to qualify for Medicaid, is a Pooled Trust. If the individual is over age 65, then an actuarially sound spending plan must be established.

Trustees of a Disability Trust must be careful not to make distributions that will reduce the individual's SSI benefits, or disqualify the individual for Medicaid. If the individual is on SSI, any cash she/he receives is considered income and reduces the SSI award dollar for dollar. And if this causes the income of the recipient to exceed the maximum SSI award ( \$623 in 2007), then she is off SSI and may then also lose her Medicaid. And any payments that are made that can be used by the individual for food or shelter can also reduce the SSI award.

Carl Stevens then discussed third party trusts. Carl prefers to use a discretionary trust for third parties, over the more restrictive provisions of a supplemental needs trust. The trustee is given complete discretion in making decisions about whether or not to make distributions to or for the benefit of the beneficiary. Distributions would only be countable income if they go directly to the beneficiary. The discretionary trust is used to protect the trust assets from the beneficiary's problems( for example, alcohol or drug addiction, or spendthrift tendencies). And since the trustee has complete discretion, the assets are not countable assets of the beneficiary for purposes

of qualifying for SSI or Medicaid. See Seidenberg v. Weil, Civil Action No. 95-WY-2191-WD (D. Colorado 11/01/1996) This case followed the rationale of In re Marriage of Jones, 812 P.2d 1152 (Colo. 1991)

The proposed Senate Bill 150 in the Colorado 2007 legislative session attempted to make clear the distinctions between a discretionary trust and a support. This is because some state court decisions have found that trusts that contain discretionary language may still be considered subject to claims from creditors if a support standard language is also used. But S.B. 150 did not pass.

A purely discretionary trust should only be subject to court review if there is an abuse of discretion by the trustee, such as dishonesty or improper motive. Therefore, care must be made in the selection of the trustee.

Carl suggested that in choosing a financial advisor the trustee should ask them several questions: what is their fiduciary responsibility to the client under the Investment Advisors Act of 1940, how are they compensated, and are they a Certified Financial Planner (subject to a standard of ethics)? MetLife and Massachusetts Mutual have SNT divisions that are familiar with SNT issues.

The meeting adjourned at 11:04 A.M.

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## NOTES

**THE PATRIOT ACT IN PROBATE** – One sentence from a Montana probate Motion and Order – “Because of the Patriot Act, the (Colorado resident) Personal Representative must appear in person before a banker in Montana to open an estate checking account.” The bank was Wells Fargo. There are Wells Fargo branches in both states.

**PROBATE FORMS** see the attached 07/25/07 memo from Kelly Cooper – “While there is nothing official statewide, in **Denver** County, both the CPC and JDF forms will be accepted until December 31, 2007. After that time, Denver (and most likely the rest of the counties) will make the official switch to JDF forms and no longer accept the CPC forms.” Same page, 07/20/07 memo from Gene Zuspann – “Notice the probate forms from the Supreme court website now show some new JDF forms. I assume these now need to be used in place of the CPC forms.”

Strunk and White, “Elements of Style”

Paul Marx, “The Modern Rules of Style” - \$29.95 or \$27.95 ABA member price

Donald A. Torrance, “The Modern Rules of Order: A Guide for Conducting Business Meetings (Third Edition),” \$29.95 or \$29.95 – focuses on timely consideration of the substance of the meeting rather than ritualistic procedure; includes one-glance motions chart enabling the chair to easily see options for responding to various motions from the floor; perfect for any size business; includes a quick-reference index, helpful for making quick responses to difficult situations in running a meeting.

Recent ABA book – Louis A. Mezzullo, “An Estate Planner’s Guide to Buy-Sell Agreements for the Closely-Held Business, Second Edition”

Recent ABA book – Jeffrey N. Pennell and Alan Newman, “Estate and Trust Planning”

Recent ABA book – Joan M. Burda, “Estate Planning for Same-Sex Couples”

Recent NBI book – Clinton L. Hooker and Stuart S. Sargent, “Practical Aspects of Trust Administration” (April, 2007)

Recent ABA Book – Jay Soled, “Estate Planning Strategies: A Lawyer’s Guide to Retirement and Lifetime Planning (2007)” – topics include Social Security, Minimum Distribution Requirements, the Simplified Retirement Plan Alternative, the New Individual Retirement account, Lifetime Tax Planning, Estate Planning with Life Insurance Trusts, Family Limited Partnerships, Durable Powers of Attorney and Advance Directives, Wills, Living (Revocable)Z trusts, Joint Accounts: Dangers and Alternative, Jointly Owned Property, Estate Planning Malpractice and Ethical Issues (\$80-\$90).

Rebecca C. Alexander, David W. Kirch and Melissa R. Schwartz, “The Probate Process from Start to Finish” (December, 2006)

Having trouble cancelling commercial mail addressed to the dead? Now there’s help: the Direct Marketing Association’s Deceased Do Not Contact List. Register the deceased person’s information for \$1 online at <https://preference.the-dma.org/egi/ddnc/php>. Or write DMA at P. O. Box 1270, Carmel, NY 10512. Include the name, date of death, your name, relationship and contact information. The list is updated quarterly. DMA says the fee is to discourage fraud or misuse by people cancelling mail for those who are not deceased. AARP Bulletin, May, 2007, page 16.

MEDICARE APPEALS – in July, 2005 Medicare switched from holding face-to-face hearings at 140 locales (typically at Social Security Administration offices) to a system almost exclusively of remote hearings conducted via phone or videoconference in four cities. AARP attorneys are closely watching the new appeal process because older beneficiaries are uncomfortable with technology and have difficulty presenting their cases by unfamiliar means. AARP Bulletin, May, 2007, page 30.

COLORADO 10 PROGRAMS ON SAVINGS that help low-income Coloradans, including reducing utility rates, go to the Benefits Checkup Quicklink at [www.aarp.org/quicklink](http://www.aarp.org/quicklink).

COLORADO – Two measures to reduce prescription drug costs are in the works. Gov. Ritter by executive order established a preferred drug list for the state’s Medicaid program and ordered CDHCPF to negotiate discounts. In addition, the legislature established a Colorado Cares Rx program to provide discount drug prices for about 264,000 uninsured state residents. Beginning January 1, 2008, it will help individuals with income up to \$30,630 a year and couples with income up to \$41,070 per year. Visit [www.aarp.org/co](http://www.aarp.org/co). AARP Bulletin, April, 2007, page 30.

DIAPERS – give new grandchildren what they really need. Check out [www.1800diapers.com](http://www.1800diapers.com) for discounts on name brands for babies – and adults – along with other infant items. Prices are

as much as 40 percent lower than at supermarkets and pharmacies, and are comparable to warehouse clubs. Phone 1-800-342-7377. AARP Bulletin, May, 2007, page 17.

SPOUSAL JOINT TENANCIES - *Patten v. U.S.*, 116 F.3d 1029 (4<sup>th</sup> Cir. 1997) affirmed the taxpayer-friendly view beginning with the landmark decision *Gallenstein v. U. S.*, 975 F.2d 286 (6<sup>th</sup> Cir. 1992). These cases hold that the survivors of spousal joint tenancies created before 1977 are entitled to a full step-up in basis, rather than a step-up in only 50% of the property. This development has significant income tax implications today for surviving spouses desiring to sell greatly appreciated property owned jointly before 1977 and for obtaining refunds of overpaid gains in open tax years. (See example in the attachments from CCH Federal Tax Weekly, July 10, 1997, page 327.)

CONSUMER REPORTS, September, 2007 – includes  
sneakiest scams  
we rate your health plan  
19 ways to protect yourself from ID theft online

PARTNERSHIPS - Sanford Zisman and Darla L. Daniel, “IRC §754 and the Probate Practitioner,” 36 Colo. Law. 45 (June 2007) – discussion and examples, whether the partnership should elect to adjust the deceased partner’s inside basis.

RESIDENT ALIEN - M. Anthony Vaida, “Estate Planning Considerations When One Spouse is a Resident Alien,” 36 Colo. Law. 101 (August 2007)

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