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## Elder Law

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# Elder Law: 1991 Survey of Florida Law

**John Sanchez\***

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### I. INTRODUCTION

This survey will treat recent decisions by Florida courts which impact the elderly. The cases chart statutory measures which punish crimes against the elderly, issues bearing on vital medical decisions over the elderly's right to proper care and treatment, and in some cases, to die. It covers as well matters dealing with the right of support and pension benefits sounding in the elderly setting and those issues unfolding in adult communities. It wraps up with a look at the state of legal representation for the elderly.

### II. MEDICAL ISSUES

In *In re Guardianship of Browning*,<sup>1</sup> a landmark ruling, the Florida Supreme Court delivered a sweeping declaration on a competent or incompetent person's right to say no to all forms of medical treatment. It was a ringing endorsement of privacy, personal autonomy, and self-determination.

In 1985, Estelle Browning drew up a living will, a document containing instructions on whether aggressive medical care is to be applied

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1. 568 So. 2d 4 (Fla. 1990).

at life's twilight. Beyond refusing the customary life supports, like respirators, Mrs. Browning also recorded her steadfast opposition to forced feeding.

The following year, Mrs. Browning suffered a stroke which left her unable to swallow. Overriding her written directive, the hospital inserted a feeding tube directly into her stomach, where it remained for eighteen uncomfortable months before giving way to a nasogastric tube. In the meantime, Doris Herbert, Mrs. Browning's court-appointed guardian, citing the living will, asked the trial court for permission to cut off the unwanted life line.

In the course of an evidentiary hearing, an earlier living will bearing identical language offered striking proof that Mrs. Browning's intentions were more than casual chatter. Neighbors also testified that, time and again, Mrs. Browning voiced horror at the prospect of a protracted death. Grim medical evidence indicated that while not comatose, Mrs. Browning had lapsed into a persistent vegetative state. Without the feeding tubes, she would die within ten days. With them, she could linger in limbo for a year or longer.

The trial court refused to order the tube removed because Mrs. Browning's death was not imminent. In support of its conclusion, the court relied on Florida law which at the time flatly ruled out sustenance from its definition of "life-prolonging procedure."<sup>2</sup> Reaching out beyond statutory law, however, the appellate court backed Mrs. Browning's decision to turn down aggressive intervention,<sup>3</sup> citing the right to privacy embedded in the Florida Constitution as authority.<sup>4</sup> The Florida Supreme Court agreed.<sup>5</sup>

In sizing up the sweep of Florida's constitutional privacy guarantee, the supreme court opened its analysis with the premise that each individual holds, as an article of faith, "sole control of his or her person."<sup>6</sup> One measure of self-determination, the supreme court noted, "is the right to make choices pertaining to one's health, including the right to refuse unwanted medical treatment."<sup>7</sup> Citing dicta contained in the United States Supreme Court ruling in *Cruzan v. Director, Missouri*

2. 1990 Fla. Laws ch. 90-223. Since October 1, 1990, a patient may authorize the withholding or withdrawal of nutrition or hydration under certain circumstances.

3. *In re Guardianship of Browning*, 543 So. 2d 258, 267 (Fla. 2d Dist. Ct. App. 1989).

4. FLA. CONST. art. I, § 23.

5. *Browning*, 568 So. 2d at 4.

6. *Id.* at 10.

7. *Id.*

*Department of Health*,<sup>8</sup> the Florida Supreme Court emphasized that a competent person has a constitutional right to refuse extraordinary medical intervention without regard to medical condition.<sup>9</sup> In support of this principle, the Florida Supreme Court applauded the result reached in *Bouvia v. Superior Court*, a California case sustaining a competent patient's prerogative to refuse *any* medical treatment.<sup>10</sup>

The supreme court also relied on its earlier decision in *Public Health Trust v. Wons*, which recognized the right of a competent and middle-aged Jehovah's Witness to turn down an emergency blood transfusion, even though it meant certain death.<sup>11</sup> In *Wons*, the supreme court expanded their previous holding by ruling an incompetent person<sup>12</sup> is equally entitled to refuse medical treatment, if such intent was communicated while the individual was competent.<sup>13</sup>

Throughout the balance of the opinion, the supreme court measured the countervailing interests advanced by the state, against an individual's bid to refuse medical treatment.<sup>14</sup> It rejected outright the suggestion that Mrs. Browning may have had a change of heart since drawing up her living will.<sup>15</sup> As for the state's interest in preserving life, a potent argument in the proper setting, the supreme court concluded that this interest is weakened when the question is "not whether, but when, for how long and at what cost to the individual . . . life may be briefly extended."<sup>16</sup>

Moreover, the supreme court reasoned that the state's interest in preventing suicide bears little heft when removing life support merely lets nature take its course.<sup>17</sup> Finally, it roundly dismissed the idea that honoring a person's right to halt all life-saving measures somehow compromises the integrity of the medical profession.<sup>18</sup>

8. 110 S. Ct. 2841, 2852 (1990).

9. *Browning*, 568 So. 2d at 10.

10. *Id.* at 10-11 (citing *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1142-43 (1986)).

11. 541 So. 2d 96 (Fla. 1989).

12. Reform legislation has since replaced the "incompetency" concept with "incapacity."

13. *Browning*, 568 So. 2d at 12 (citing *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So. 2d 921, 923 (Fla. 1984)).

14. *Id.* at 13-14.

15. *Id.* at 13.

16. *Id.* at 14.

17. *Id.*

18. *Browning*, 568 So. 2d at 14.

In what is likely to be its signature feature, the supreme court firmly cast aside all argument that the judiciary should serve as a watchdog upon the decision to pull life supports.<sup>19</sup> In a bold stroke, it held that a court order was not necessary to halt medical treatment, if “do not resuscitate” instructions are contained either in a living will, or in oral declarations; or if the decision is arrived at by a proxy authorized in writing to make all health care decisions for the patient.<sup>20</sup> Furthermore, life supports may be removed upon evidence of the patient’s intent, without a court order, without regard to whether a surrogate has been named to carry out the instructions.<sup>21</sup>

When a patient leaves oral or written “end of life” directions and designates a proxy to carry out these instructions, common sense safeguards are in order. For example, the proxy, with written authority, must support the patient’s decision to remove life supports by clear and convincing evidence.<sup>22</sup> The surrogate also must be satisfied that the patient drew up the plans knowingly, willingly, and without undue influence; and, that the evidence of the patient’s oral declarations is reliable.<sup>23</sup> Beyond this, there must be a medical finding that the patient’s prognosis is hopeless.<sup>24</sup> Finally, the surrogate must ensure that the patient’s instructions have been carefully weighed and satisfied.<sup>25</sup>

When a patient leaves no instructions, except to name someone to act on her behalf, a couple of conditions must first be met before life support may be removed. For example, the surrogate must certify that the proxy authorization was made knowingly, willingly, and without undue influence.<sup>26</sup> Furthermore, the proxy must obtain the statements of three physicians that the patient is unlikely to recover.<sup>27</sup>

When ambiguity clouds the patient’s instructions, or challenges to the proxy’s decision emerge, courts will unavoidably end up breaking the deadlock.<sup>28</sup> Any proceeding, however, will be streamlined and the court will only look at conflicting testimony bearing on the patient’s

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19. *Id.* at 15.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Browning*, 568 So. 2d at 15.

24. *Id.* at 16.

25. *Id.* at 15.

26. *Id.* at 15-16.

27. *Id.* at 16.

28. *Browning*, 568 So. 2d at 16.

intent.<sup>29</sup> To move matters along, written proxy authorizations carry a rebuttable presumption as clear and convincing evidence of the patient's wishes.<sup>30</sup> Likewise, physicians' medical findings draw a rebuttable presumption that the conditions for removal of life support have been met.<sup>31</sup>

Not surprisingly, courts note that penned instructions of the patient's wishes are more reliable evidence, and thus, the written word draws broader judicial deference.<sup>32</sup> Accordingly, while a patient's written statements can stand on their own, the surrogate must bear the burden of proof when her decision to discontinue life support rests on oral evidence alone, and is challenged.<sup>33</sup>

In Mrs. Browning's case, the only question which called for judicial resolution was whether her condition was terminal. Reviewing the medical evidence, the supreme court was satisfied her prognosis was dim.<sup>34</sup> Accordingly, it found that the guardian's request to remove the feeding tube should have been honored.<sup>35</sup>

Justice Overton, in dissent, would require court approval whenever oral declarations by the patient represent the only evidence cited by a surrogate in the bid to terminate the patient's life supports.<sup>36</sup> Justice Overton voiced concern over the possibility that proxies may profit financially from an early death of the incompetent.<sup>37</sup>

### III. COMMUNITY AGE RESTRICTIONS

*Brookridge Community Property Owners v. Brookridge, Inc.*<sup>38</sup> concerned a dispute over whether age restrictions burdening a retirement community in Hernando County were binding on the owners of undeveloped lots in the development. The defendant homeowners association recorded age restrictions six years after the plaintiff, the community's developer, assigned management powers to the defendant. Before the age restrictions were recorded, however, lots were sold with-

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Browning*, 568 So. 2d at 16.

34. *Id.* at 17.

35. *Id.*

36. *Id.* at 18 (Overton, J., dissenting).

37. *Id.*

38. 573 So. 2d 972 (Fla. 5th Dist. Ct. App. 1991).

out regard to the buyer's age.

Under the disputed restrictions, at least one permanent occupant had to be at least fifty-five years of age and all permanent occupants were required to be at least eighteen years of age. While the restriction only covered about 140 of the 2,856 platted lots that remained undeveloped when the covenant was recorded, nearly eighty percent of the occupied homes already contained at least one person fifty-five years or older.

The plaintiff developer, who owned the bulk of the undeveloped lots, sought declaratory and injunctive relief against the homeowners association, claiming that the age rule was unreasonable. Plaintiff's successful motion for summary judgment persuaded the trial court that the line drawn by the age rule between improved and unimproved lots, and the series of exemptions for improved homes, were arbitrary.

In siding with the developer, the trial court reasoned that a rule which exempts from sixty to ninety-five percent of the lots in question was not crafted to serve the goal of building an older adult community.<sup>39</sup> The court pointed out that it was flatly arbitrary to prohibit current owners of unimproved lots from building a residence in which grandchildren might reside.<sup>40</sup> Accordingly, the homeowners association was permanently enjoined from enforcing the age rule.<sup>41</sup>

While the Fifth District Court of Appeal agreed with the result, it took issue with the trial court's reasoning.<sup>42</sup> Even if the rule was reasonable, the appellate court found that the homeowners association lacked the authority to enact such a rule in the first place.<sup>43</sup> The power to enact age restrictions could not have been assigned by the developer, the court concluded, because it lacked the authority "to assign as against owners who purchased lots without notice of age restrictions . . . ."<sup>44</sup>

#### IV. ADULT CONGREGATE LIVING FACILITIES

*Mang v. Country Comfort Inn*,<sup>45</sup> addressed whether an administrator of a retirement community could be sued for violating a resi-

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39. *Id.* at 975.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Brookridge*, 573 So. 2d at 975.

44. *Id.*

45. 559 So. 2d 672 (Fla. 3d Dist. Ct. App. 1990).

dent's right, under the Florida Adult Congregate Living Facilities Act,<sup>46</sup> to receive proper medical attention.

Mang suffered injuries after falling in a pool of urine on the floor of a bathroom at the Country Comfort Inn, an adult congregare living facility. Not only had Mang lain in the urine unattended overnight, a full day passed before he was seen by a doctor. The trial court dismissed Mang's charge that Perez, the facility's administrator, violated Mang's statutory rights.

After reviewing Florida's Adult Congregate Living Facilities Act, the appellate court reinstated Mang's claim against Perez.<sup>47</sup> The Act accords residents of adult congregare living facilities the right to live in a safe and decent living environment, free from abuse and neglect. The Act also gives residents the right to receive proper health care.<sup>48</sup> Finally, it assigns to the administrators of such facilities a continuing duty to assess whether a resident is "incontinent of bladder and bowel

... ."<sup>49</sup>

Under the Act, residents are expressly entitled to press claims against administrators who fail in their duties as caretakers.<sup>50</sup> The appellate court concluded Mang's second drafting effort stated an adequate case to survive pre-trial challenge.<sup>51</sup> The claim against Perez was accordingly remanded to the trial court for further proceedings.<sup>52</sup>

The negligent administration of an adult congregare living facility drew judicial notice in *B.B.A. v. Department of Health and Rehabilitative Services*.<sup>53</sup> The defendant, B.B.A., and his wife were the owners, and the wife was the administrator, of an adult congregare living facility in which the plaintiff, C.C., a mentally disabled person with a history of seizures, had resided for several years.<sup>54</sup> While the plaintiff was hospitalized, a defendant physician prescribed dilantin to control the seizures.<sup>55</sup> The defendant failed to check plaintiff's dilantin blood level for seventeen months after the plaintiff left the hospital to return once

46. FLA. STAT. § 400.401 (1987).

47. *Mang*, 559 So. 2d at 673-75.

48. FLA. STAT. § 400.28 (1987).

49. FLA. ADMIN. CODE ANN. r.10A-5.0181(3)(e) (1986) (Adult Congregate Living Facilities).

50. FLA. STAT. § 400.29 (1987).

51. *Mang*, 559 So. 2d at 675.

52. *Id.*

53. 581 So. 2d 955 (Fla. 1st Dist. Ct. App. 1991).

54. *Id.*

55. *Id.*

again to the defendant's care.<sup>56</sup> Subsequently, the plaintiff was re-hospitalized and lapsed into seizures.<sup>57</sup>

An HRS investigator, suspecting neglect, poured over the plaintiff's medical files and interviewed medical personnel. The HRS investigator concluded that the plaintiff was, indeed, a victim of neglect.<sup>58</sup> HRS approved the investigator's findings and entered the defendant's name on its central abuse registry.<sup>59</sup> The defendant challenged this move and requested that HRS expunge the record of neglect.<sup>60</sup>

In the course of an administrative hearing conducted by HRS, a neurology specialist testified that a seizure patient's dilantin level should be checked annually.<sup>61</sup> Furthermore, the specialist noted that a caregiver must be acutely alert when handling a mentally disabled individual who may not wholly appreciate the importance of taking his medication regularly.<sup>62</sup>

After finding, under Florida law, that the plaintiff was a "disabled adult"<sup>63</sup> and that the defendant was a "caregiver,"<sup>64</sup> the hearing officer ratified the finding of neglect and recommended that HRS deny the defendant's request to wipe out the registry entry of his neglect.<sup>65</sup> HRS adopted the hearing officer's recommendations and an appeal followed.<sup>66</sup>

The court of appeal addressed the question of whether competent, substantial evidence supported HRS' finding of neglect.<sup>67</sup> Citing the neurologist's un rebutted testimony and the defendant's admission that he had not measured the plaintiff's dilantin blood level for seventeen months, the court affirmed the finding of neglect.<sup>68</sup>

In his defense, the defendant also claimed that HRS failed to connect the defendant's level of care with the plaintiff's subsequent

56. *Id.*

57. *Id.* at 957 (Zehmer, J., dissenting).

58. *B.B.A.*, 581 So. 2d at 956.

59. FLA. STAT. § 415.103(3)(c) (1989) (the statute requires that HRS maintain a central registry and tracking system where all reports of abuse are logged, including the HRS final disposition indicating the results of its investigation).

60. *B.B.A.*, 581 So. 2d at 956.

61. *Id.*

62. *Id.*

63. FLA. STAT. § 514.102(8) (1989).

64. FLA. STAT. § 415.102(4) (1989).

65. *B.B.A.*, 581 So. 2d at 956.

66. *Id.*

67. *Id.*

68. *Id.* at 957.

seizures.<sup>69</sup> Unlike tort claims, where doctrines like proximate cause and contributory negligence must be weighed, the court concluded that once it was established that the defendant did not take the steps a prudent caregiver would follow, the statutory definition of neglect had been met.<sup>70</sup>

The court's opinion was not unanimous, however. Judge Zehmer, in dissent, disputed whether competent, substantial evidence proved that the plaintiff's injury was the outcome of the defendant's failure to act; in other words, the plaintiff had failed to prove that the defendant's acts were the proximate cause of the plaintiff's injury.<sup>71</sup> Judge Zehmer pointed out that each time the plaintiff entered the hospital, his dilantin level was satisfactory.<sup>72</sup> Given that, the judge noted it was altogether possible that the plaintiff's dilantin level was normal over the course of those seventeen months between hospital stays.<sup>73</sup> Moreover, the judge pointed out that the plaintiff's seizures may not even be traced to a low dilantin level; the seizures could be credited to a cerebral vascular accident.<sup>74</sup>

Finally, no statute or HRS guideline called for an annual check of dilantin blood level in this type of setting.<sup>75</sup> Indeed, the expert did not testify to a minimum standard of care, but said, "I think an optimum standard of care is to do it at least once a year."<sup>76</sup> Accordingly, the judge concluded that since the statute does not define "neglect" as failure to extend optimum care, no competent or substantial evidence laid out a minimum statutory standard.<sup>77</sup> Therefore, without notice of the prevailing benchmarks of professional care, the defendant's right to due process had been violated.<sup>78</sup>

## V. PENSION AND SUPPORT ISSUES

The question of whether a husband's disability pension may be

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69. *Id.*

70. *Id.*

71. *B.B.A.*, 581 So. 2d at 957 (Zehmer, J., dissenting).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 958.

76. *B.B.A.*, 581 So. 2d at 958.

77. *Id.*

78. *Id.*

cast as a marital asset was at the heart of *Hoffner v. Hoffner*.<sup>79</sup> The lower court had awarded the wife part of her ex-husband's disability pension as permanent periodic alimony, treating these regular payments as a marital asset which survived the wife's remarriage.<sup>80</sup>

While the court of appeal acknowledged that there would be times when a future-vesting pension would hold all the earmarks of marital property, it is not so when the spouse is presently drawing benefits.<sup>81</sup> Under these circumstances, the pension acts as a proxy for future lost income, and that lies beyond the reach of a former spouse.<sup>82</sup> Although the pension was not marital property, subject to equitable distribution, it could continue to be a source of alimony.<sup>83</sup> Accordingly, the lower court was free to count pension distributions as income in arriving at the proper amount of alimony.<sup>84</sup> However, unlike marital property, the wife's claim to a share of the pension is terminated by her re-marriage or the death of either spouse.<sup>85</sup>

In contrast, the court of appeal in *Lovelady v. Lovelady*, concluded that a husband's pension plan should be treated as a marital asset in calculating the proper amount of alimony.<sup>86</sup>

In *Town of Davie Police Pension Fund v. Cummings*, the Fourth District Court of Appeal held that a public pension fund was immune to a garnishment claim by a creditor of a police officer over an outstanding debt.<sup>87</sup>

Nowadays, and with regard to support, grandparents are thrust more and more into the role of surrogate parents to their grandchildren. In *Wilson v. Department of Health and Rehabilitative Services*, a court had placed two children in their wayward mother's custody as long as she lived under the watchful eye of the children's grandmother.<sup>88</sup> Although the children's mother was drawing food stamps, the grandmother suspected the children were being shortchanged.<sup>89</sup> For this reason, the grandmother applied separately for food stamps for the

79. 577 So. 2d 703 (Fla. 4th Dist. Ct. App. 1991).

80. *Id.* at 704.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Hoffner*, 577 So. 2d at 704.

85. *Id.*

86. 576 So. 2d 946 (Fla. 2d Dist. Ct. App. 1991).

87. 576 So. 2d 1331 (Fla. 4th Dist. Ct. App. 1991).

88. 561 So. 2d 660, 661 (Fla. 1st Dist. Ct. App. 1990).

89. *Id.*

children, averring their status as one of an independent food stamp household, apart from their mother and grandparents.<sup>90</sup>

In the course of administrative hearings, HRS ruled that the grandmother was acting as a “custodial parent,” that she and her husband were a part of the children’s food stamp household, and because the household income exceeded the cap on eligibility, the application was denied.<sup>91</sup>

In a reversal of fortunes, the First District Court of Appeal judged the agency’s definition of a “food stamp household” tightfisted and, moreover, at odds with federal eligibility standards.<sup>92</sup> Indeed, federal law carves out an exception to the definition of a parent-child household when “one of the parents . . . is an elderly or disabled member.”<sup>93</sup> As it turned out, appellant Wilson’s 82-year-old husband handily met the federal definition of elderly.<sup>94</sup>

The only other roadblock bearing on food stamp eligibility—whether the putative food stamp household routinely buys food and prepares meals together—was not addressed by the administrative hearing officer and the court remanded for further attention on this matter.<sup>95</sup>

## VI. CRIMES AGAINST THE ELDERLY

Florida lawmakers recently stiffened penalties for assault and battery when the victim is sixty-five years of age or older.<sup>96</sup> The measure’s language, however, is unclear about whether the “knowingly” element of the offense refers to the assault and battery or whether it means that the aggressor must know that his victim is elderly.

In *State v. Nelson*, the trial court ruled that “knowingly” cannot bear on the assault and battery offense because intent is already part of its definition.<sup>97</sup> The Fourth District Court of Appeal reluctantly agreed, but at the same time cast doubt on whether the lawmakers seriously intended that the state would have to prove the criminal *knew* the victim was sixty-five years or older before the stepped-up sanction could

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90. *Id.*

91. *Id.*

92. *Id.* (citing 7 U.S.C. § 2012(i) (1988)).

93. 7 U.S.C. § 2012(i) (1988).

94. *Wilson*, 561 So. 2d at 663 (citing 7 U.S.C. § 2012(r)(1) (1988)).

95. *Id.*

96. FLA. STAT. § 784.08(2) (1989).

97. 577 So. 2d 971 (Fla. 4th Dist. Ct. App. 1991).

be applied.<sup>98</sup> After all, the court wryly noted, the law was adopted to protect the elderly, not the criminal.<sup>99</sup>

In support of its reading of the law, the court assayed identical wording in another penal code provision that sharpens penalties when the victim of assault and battery is a law enforcement officer or firefighter. The Florida Supreme Court interpreted the word "knowingly" to mean "that the accused *know* that his victim is a law enforcement officer or firefighter."<sup>100</sup> But, the "knowingly" element makes more sense in the situation where off-duty police officers or fire fighters are not identifiable as such. By contrast, calling on the state to prove that the defendant knew his victim was elderly is an intolerable burden.

While the Eleventh Circuit reached the opposite conclusion recently on a similar matter,<sup>101</sup> the Fourth District Court of Appeal prudently aligned itself with Florida Supreme Court precedent for the time being.

## VII. ATTORNEY'S FEES AND ISSUES OF REPRESENTATION

Availability of attorney's fees earned from efforts to force HRS to hand over its report on nursing home abuse was taken up by the Third District Court of Appeal in *Department of Health & Rehabilitative Services v. Martin*.<sup>102</sup> After Idora Smith died in a nursing home at the end of 1988, HRS conducted an investigation under chapter 415 of Florida law<sup>103</sup> in response to grapevine reports of elder abuse. Smith's personal representative, appellee Harriet J. Roberts Martin, enlisted Herman M. Klemick as counsel to assess the odds of pressing a successful wrongful death action against the nursing home.<sup>104</sup> HRS steadfastly refused to hand over to Klemick the fruits of its chapter 415 investigation under the mistaken belief that access was blocked by chapter 415.<sup>105</sup> Striking a balance between accommodating Klemick

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98. *Id.*

99. *Id.*

100. *Street v. State*, 383 So. 2d 900, 901 (Fla. 1980) (emphasis added).

101. *See United States v. Williams*, 922 F.2d 737 (11th Cir. 1991) (holding that the government need only prove that a person was under age eighteen when employed in the commission of a drug offense, not that defendant knew the person was under eighteen).

102. 574 So. 2d 1223 (Fla. 3d Dist. Ct. App. 1991).

103. *See Adult Protective Service Act*, FLA. STAT. §§ 415.101-608 (1987).

104. *Martin*, 574 So. 2d at 1223.

105. *Id.* at 1224 (citing FLA. STAT. § 415.107(2)(d) (1987)).

and covering its own hide, HRS suggested Klemick invite the probate court to order the agency to turn over its findings, but the probate court would not go along.<sup>106</sup> Finally, Klemick got his hands on the chapter 415 file by suing for access under chapters 119 and 415.<sup>107</sup> After an *in camera* inspection, the trial court released the report to appellee Martin.<sup>108</sup>

Seeking his just desserts, Klemick moved for an award of attorney's fees under chapter 119.<sup>109</sup> The trial court awarded not only attorney's fees, but costs as well and HRS appealed.<sup>110</sup> The Third District Court of Appeal upended the award of attorney's fees upon a close reading of chapter 119. Under this chapter, fees are recoverable "[i]f a civil action is filed against an agency to enforce the provisions of *this chapter*. . . ."<sup>111</sup> Disclosure of HRS' report was ordered under chapter 415, not chapter 119 which squarely shields from public scrutiny records of abuse investigations.<sup>112</sup> Unhappily for Klemick, attorney's fees are not authorized under chapter 415.<sup>113</sup>

In the case of *In re Skinner*,<sup>114</sup> Indian River County and HRS squared off over which one should shoulder attorney's fees incurred on behalf of Lloyd H. Skinner, a disabled 82-year-old caught in the cross-fire. HRS had gone to court seeking protective services under Chapter 415<sup>115</sup> for the elderly man who had been victimized by his caretaker, Julia Brinson.<sup>116</sup> At the same time the court authorized the protective services, it appointed attorney Martin E. Wall to serve as Skinner's counsel and later charged the county for Wall's fees.<sup>117</sup>

Finding no guidance on this matter under Chapter 415, the trial court cast about in state law until it hit upon section 43.28 which prescribes "[t]he counties shall provide appropriate courtrooms, facilities, equipment, and, unless provided by the state, *personnel necessary*

106. *Id.*

107. *Id.*; see also FLA. STAT. §§ 119.01-.14 (1987).

108. *Martin*, 574 So. 2d at 1224.

109. *Id.*; see also FLA. STAT. § 119.12 (1987).

110. *Martin*, 574 So. 2d at 1224.

111. FLA. STAT. § 119.12(1) (1987) (emphasis added).

112. *Martin*, 574 So. 2d at 1224.

113. *Id.*

114. 541 So. 2d 781 (Fla. 4th Dist. Ct. App. 1989).

115. See FLA. STAT. § 415.105(3) (Supp. 1986).

116. *Skinner*, 541 So. 2d at 781.

117. *Id.*

to operate the circuit and country courts."<sup>118</sup>

The district court of appeal agreed that neither Chapter 415 nor its legislative history shed light on which public body should pay the tab for appointed counsel.<sup>119</sup> Turning to case law, the court reviewed *In the Interest of D.B. & D.S.*<sup>120</sup> where the Florida Supreme Court had pinned appointed counsel fees on the county citing section 43.28 in a case involving juvenile dependency proceedings. Drawing upon the kinship between juvenile dependency proceedings and protective services proceedings, the District Court concluded the county must pay Mr. Wall's fees, glossing over the fact that appointed counsel in juvenile proceedings is constitutionally founded while appointed counsel in proceedings for the elderly rests on statute.<sup>121</sup>

In a footnote, the court distinguished decisions burdening HRS with appointed counsel fees because in those cases counsel was not legally required.<sup>122</sup> Finally, the court of appeal supported its assessment of fees against the county on policy grounds as well. Conflicting loyalties are likely to emerge whenever HRS seeks protective services at the same time that it must pay for counsel to resist the agency's efforts in such proceedings. To be sure, HRS may well think twice before triggering protective services if it knows it must pay counsel fees.

In an unusual advisory opinion, *Florida Bar re Advisory Opinion—Nonlawyer Preparation of Pension Plans*,<sup>123</sup> the Florida Supreme Court tackled the sensitive subject of nonlawyer preparation of employee pension plans. Federal law, the Employee Retirement Income Security Act of 1974 (ERISA)<sup>124</sup> regulates the preparation of pension plans and authorizes such nonlawyers as certified public accountants—to prepare pension plans for Internal Revenue Service approval. Crafting pension plans also calls for tax, actuarial, accounting, economics, insurance and investment advice.

The opinion, with Solomonic wisdom, sorted out those things only lawyers can do and those things nonlawyers can do. Nonlawyers can gather information and digest it to arrive at plan options for clients.<sup>125</sup> What is more, nonlawyers can explain alternatives to employers, pre-

118. *Id.* (citing FLA. STAT. § 43.28 (1987) (emphasis added)).

119. *Skinner*, 541 So. 2d at 782.

120. 385 So. 2d 83, 86 (Fla. 1980).

121. *Skinner*, 541 So. 2d at 782.

122. *Id.* at 782 n.1.

123. 571 So. 2d 430 (Fla. 1990).

124. 29 U.S.C. §§ 1001-1461 (1988).

125. *Advisory Opinion*, 571 So. 2d at 437-38.

pare annual returns and reports incident to pension plan administration, administer the plan day-to-day, and market and sell pension plans.<sup>126</sup>

On the other hand, only lawyers may analyze client information and counsel clients on the best plan, draft plan documents, qualify plans before the IRC, and terminate a pension plan.<sup>127</sup> Moreover, the nonlawyer professionals may not select the attorney for the employer.<sup>128</sup> Even a lawyer working in a nonlawyer company cannot draft pension plans or select plan options for a customer of the company.<sup>129</sup>

The Court acknowledged that pension planning draws on several overlapping professional disciplines. A similar issue was addressed by the Florida Supreme Court in *Florida Bar v. Turner*.<sup>130</sup> Like the decision at bar, *Turner* ruled that some work connected with structuring pension plans could legitimately be performed by nonlawyers, but that other components could only be rendered by attorneys.<sup>131</sup> Unfortunately, the lines drawn by *Turner* were fuzzy, spawning confusion, with lawyers reading the decision narrowly and nonlawyer professionals resolving doubts in their favor. This confusion prompted the Standing Committee to issue an opinion. The State Bar introduced evidence that the public was being harmed because nonlawyer practitioners were more concerned with the sale of a product or service other than the plan itself. At the same time, nonlawyers are unable to gauge the impact of the plan on other legal areas such as estate tax or probate planning. Ideally, the client is best served when all the experts, legal and nonlegal, have a say in the shape of the plan.

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126. *Id.*

127. *Id.* at 438.

128. *Id.* at 440.

129. *Id.* at 441.

130. 355 So. 2d 766 (Fla. 1978).

131. *Id.*