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Still Part of the Clan: Representing Elders in the Family Law Practice

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Still Part of the Clan: Representing Elders in the Family Law Practice

SY MOSKOWITZ*

*Cast me not off in the time of old age;
Forsake me not when my strength faileth.*

Psalms 71:9

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I. Introduction

The most significant demographic trends in the United States reflect the “greying” of our population. In 1900, 3.1 million Americans (4% of the population) were over the age of sixty-five.¹ By 1998, that figure had increased to 34.4 million,² and by 2010, the over-sixty-five population will be 40.1 million, 13.3 percent of the nation.³ More than 70 million Americans will join the ranks of the elderly in the next twenty years.⁴ Moreover, the “old-old,” those over eighty-five, are increasing even faster than seniors as a whole.⁵

Family law practice includes many points of intersection between traditional doctrine and the elderly. The practitioner often confronts the same issues when representing older and younger clients, but the former present special needs. This article surveys some of the challenges presented by this increasing representation of the elderly and their families. The law in these subject areas is conceptually complex and changes frequently. Often expertise in allied topics—bankruptcy, disability law, insurance, etc.—is required. The task is formidable, but legal services well performed bring the incalculable reward of helping clients with disparate needs.

II. Economic Issues

A. Spousal Liability for Health & Institutional Care Costs

Today, more elderly persons are living long enough to experience chronic illnesses and conditions, such as arthritis, heart disease, and senile dementia.⁶ Large amounts of family resources are consumed by health and long-term care costs in the last years of life.⁷ Despite the popular view

1. U.S. DEP'T HEALTH HUMAN SERVS., ADMINISTRATION ON AGING, *Profile of Older Americans*, available at <http://www.aoa.gov/prof/Statistics/profile/profiles2002.asp> [hereinafter ADMINISTRATION ON AGING].

2. *Id.*

3. Susan Levine, *Aging Baby Boomers Pose Challenge: Preparations Needed for Coming Strain on Services, Census Reports Says*, WASH. POST, May 21, 1996, at A09.

4. Donna Jackel, TV Show, *Call-in Offer Caregivers Help*, DEMOC. & CHRON (Rochester N.Y.), Oct. 9, 2002, at 4B, available at 2002 WL100997674.

5. See ADMINISTRATION ON AGING, *supra* note 1 (stating that population sixty-five years and older projected to grow from 34.4 million to 70.1 million, while population eighty-five years and older projected to grow from 4 million to 8.9 million).

6. “Older people accounted for 40% of all hospital stays and 49% of all days of care in hospitals in 1995.” KIMBERLEY DAYTON, ET AL., *ELDER LAW: READINGS, CASES AND MATERIALS* 12 (2d ed. 2003). In that year “[e]lder persons averaged more contacts with doctors . . . than did persons under 65 (11.1 contacts vs. 5 contacts).” *Id.*

7. *Id.* at 7. Although 1.4 million or 4% “of the 65+ population lived in nursing homes in 1995, the percentage increased dramatically with age, ranging from 1 percent for persons 65–74 years to 5 percent for persons 75–84 years and 15 percent for persons 85+.” ADMINISTRATION ON AGING, *supra* note 1.

that seniors' medical needs are provided by Medicare, it is estimated that when expenses are totaled, Medicare pays less than 50%.⁸ A major financial issue for older clients is payment of these health-care costs.

English common law obligated husbands to support their wives financially in return for "services."⁹ Modern statutes and decisions have rewritten this obligation in gender-neutral terms so that today both spouses have reciprocal support obligations.¹⁰ Under the venerable doctrine of "necessaries," if one spouse fails to supply the other with articles or services reasonably appropriate for support, and a third party supplies these necessities, the nonpurchasing spouse is liable for their cost.¹¹ The doctrine is applied to both husbands and wives.¹²

Often the spouse treated or served by providers—doctors, hospitals, nursing homes, etc.—has insufficient resources to meet the debts incurred. Delinquent accounts are turned over to collection agencies and when payment is not made, legal proceedings ensue against the nontreated spouse. In this situation, statutes and court decisions in many states impose financial liability on the nontreated spouse under the necessities doctrine. Whether termed "family expense" laws¹³ or given some other title, this legislation often makes spouses jointly and severally liable.¹⁴ Arizona goes so far as to make it a crime for a married person with means not to provide for his or her spouse's necessities.¹⁵

Many state courts also have provided relief for medical and institutional providers of services under this doctrine.¹⁶ The debtor spouse is commonly

8. Lynn Etheredge, *Three Streams, One River: A Coordinated Approach to Financing Retirement*, 18 HEALTH AFFAIRS 80, 82 (Jan.–Feb. 1999).

9. See *Manby v. Scott*, 86 Eng. Rep. 781, 784 (1659) (husbands are bound by the common law to provide for and maintain their wives).

10. See, e.g., N.Y. JUD. LAW § 412 (McKinney 1999) ("A married person is chargeable with the support of his or her spouse. . . ."); VA. CODE ANN. § 55-37 (1999) ("The doctrine of necessities as it existed in common law shall apply equally to both spouses. . . .").

11. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, § 7.3 at 444-45 (2d ed. 1987).

12. *Cheshire Med. Ctr. v. Holbrook*, 663 A.2d 1344, 1347 (N.H. 1995) (finding equal protection violation and extending the doctrine to both sexes); *St. Francis Reg'l Med. Ctr., Inc. v. Bowles*, 836 P.2d 1123, 1125 (Kan. 1992) (holding that both spouses are liable for the necessary expenses incurred by either spouse and medical services are considered necessities).

13. See, e.g., 750 ILL. COMP. STAT. 65/15(a)(1) (2003).

14. See, e.g., D.C. CODE ANN. § 46-601 (1998); HAW. REV. STAT. § 572-24 (2003); LA. CIV. CODE ANN. art. 2372 (West 2003); ME. REV. STAT. ANN. tit. 19A, § 1652 (West 2003); MASS. GEN. LAWS ch. 209, § 1 (2003); MINN. STAT. § 519.05 (2003); NEV. REV. STAT. 123.090 (2003); N.Y. JUD. CT. ACTS LAW § 412 (2003); OHIO REV. CODE ANN. § 3103.02 (West 2003); TEX. FAM. CODE ANN. § 2.501 (Vernon 2003).

15. ARIZ. REV. STAT. § 13-3610 1(2003).

16. See, e.g., *St. Joseph Hosp. of Nashua v. Rizzo*, 676 A.2d 98 (N.H. 1996) (applying the doctrine and allowing the provider to collect); *Bethany Med. Ctr. v. N'yazi*, 890 P.2d 349 (Kan. Ct. App. 1995); *St. Frances Reg'l Med. Ctr., Inc. v. Bowles*, 836 P.2d 123 (Kan. Ct. App. 1995). See generally *Husband & Wife* § 196, 41 AM. JUR. 2d (2002).

primarily liable and the nondebtor spouse secondarily liable.¹⁷ In California, if the debtor spouse has died, the living spouse is liable to the extent of his/her share of the community property and the deceased spouse's property that passes through intestacy or by will.¹⁸ The obligation to pay health-care costs may exist, even though spouses are separated,¹⁹ if divorce papers were filed at the time of treatment or the parties were later divorced.²⁰ Some states allow specific defenses.²¹

A crushing economic burden may thus be placed upon the nontreated or noninstitutionalized spouse. Almost half of American workers have no pension coverage beyond Social Security, so assets are often few.²² Many of these seniors lived through the Great Depression and times of great hardships. Bankruptcy and large debt is often foreign and frightening to them. Nevertheless, their health-related expenses force them to confront unpleasant choices.

17. *See, e.g.*, *Porter Meml. Hosp. v. Wozniak*, 680 N.E.2d 13, 16 (Ind. App. 1997) (holding that husband is potentially secondarily liable for the medical expenses of wife under doctrine of necessities); *Cheshire Med. Ctr. v. Holbrook*, 663 A.2d 1344, 1347 (N.H. 1995) (holding that husband is secondarily liable for the necessary medical services provided to his wife under doctrine of necessities, but only to extent that resources of wife are insufficient to satisfy debt); *N.C. Baptist Hosps. v. Harris*, 354 S.E.2d 471, 473 (N.C. 1987) (holding that doctrine of necessities is applicable to medical services provided to either spouse); *Landmark Med. Ctr. v. Gauthier*, 635 A.2d 1145, 1150 (R.I. 1994) (finding that medical expenses are characterized as "necessaries" within the spirit of the doctrine of necessities); *Marshfield Clinic v. Discher*, 314 N.W.2d 326, 327 (Wis. 1982) (discussing that wife shares with her husband a limited legal duty of support of the family, this includes liability for necessary medical expenses incurred by either spouse).

18. CAL. FAM. CODE ANN. § 721 (West Supp. 2004).

19. *See generally* VA. CODE ANN. § 55-37 (Michie 2003); *Forsyth Mem'l Hosp., Inc. v. Chisolm*, 467 S.E.2d 88 (N.C. 1996); *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1 (Ind. 1993) (disallowing the separation defense); *Mem'l Hosp. of Alamance County, Inc. v. Brown*, 274 S.E.2d 277 (N.C. Ct. App. 1981).

20. *See* *Mercy Health Sys. Corp. v. Gauss*, 639 N.W.2d 803 (Wis. Ct. App. 2001) (following the doctrine when the spouses were still married at the time services were provided, but subsequently divorced); *Trident Reg'l Med. Ctr. v. Evans*, 454 S.E.2d 343 (S.C. Ct. App. 1995) (court found spouse liable for debts since the couple was married at the time of the services); *Aker v. Fort Wayne Urology Corp.*, 562 N.E.2d 751 (Ind. Ct. App. 1990) (holding that the death of the husband did not excuse the wife from liability); *St. Mary's Med. Ctr. v. Brody*, 519 N.W.2d 326 (Wis. 1982) (disallowing defense of separation and holding former wife liable for services rendered to husband during marriage); *Marshfield Clinic v. Discher*, 314 N.W.2d 326 (Wis. 1982) (following the doctrine that a wife is still liable for husband's debts even after he dies).

21. Montana, for example, provides an abandonment defense to its statutory duty. MONT. CODE ANN. § 50-9-106 (1997); *Balyeat Collection Prof'l v. Garland*, 51 P.3d 1127, 1129 (Mont. 2002). In Mississippi a nondebtor spouse is not liable unless there was an express agreement to pay. *Govan v. Med. Credit Serv.*, 621 S.2d 928 (Miss. 1993).

22. *See* JOINT COMM. ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO EMPLOYER-SPONSORED DEFINED BENEFIT PLANS (JCX-71-02, 2002), at 28 (stating that 56% of full-time private-sector employees have an employer-sponsored pension plan). There are significant variations in pension plan coverage among racial groups. *See* Yung-Ping Chen & Thomas D. Leavitt, *The Widening Gap Between White and Minority Pension Coverage*, PUBLIC POLICY & AGING 82 (2001).

A 1999 study revealed that nearly half of bankruptcy filings listed medical costs as the reason for the filing. Elderly and female-headed households were more likely to have health-related bankruptcies than the rest of the population.²³ The same study found that 80% of those filing bankruptcies for health reasons were unable to meet obligations even though they had some form of medical insurance prior to the filing. Family law practitioners representing spouses in this situation should consider bankruptcy proceedings under appropriate circumstances.²⁴ Under chapter 7, nonexempt assets are sold or used to repay all or a portion of the debts owed, and the debtor retains rights to future income substantially clear of past debts.²⁵ Under chapter 13, the debtor is required to make continuing payments, generally for three to five years, but is allowed to keep most of the assets held at the time of filing.²⁶

A common bankruptcy problem for these clients, whether their debts are related to medical costs or not, is that they often have substantial equity in their home and risk losing it. Often seniors' mortgage payments are low or their house may be completely paid for. In addition to providing economical shelter, the home is a source of comfort and security. When both spouses are liable for the debt and there is equity beyond the statutory exemptions in chapter 7, the trustee will sell the house.

In such situations, a chapter 13 bankruptcy can provide some relief, but may also create problems. Assume, for example, the debtors have \$70,000 of equity in their home because they have been paying on their mortgage for a long time. In states such as Indiana, where debtors can protect only \$15,000 of equity, they must file a plan that ensures the creditors at least the lesser of the nonexempt equity or 100% of the debt.²⁷ Furthermore, these debtors may not have sufficient total income to meet the bankruptcy obligation. To save their homes, seniors may use Social Security or other pensions exempt in bankruptcy, but income for normal living expenses may now be insufficient. A chapter 13 plan can continue for no more than five years.

Some creative solutions are worth considering for elderly clients in these circumstances. First, debtors may remortgage their properties during the

23. Melissa B. Jacoby et al., *Rethinking the Debates Over Health Care Financing: Evidence From the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 377 (2001).

24. 11 U.S.C. § 1-1330. Since only one bankruptcy may be filed in six years, this should be used when other options are unavailable. Careful consideration must be given to how the existing assets are held, e.g., as tenancy by entirety, joint tenants with right of survivorship, etc. *Id.*

25. 11 U.S.C. § 727 *et seq.* See generally Robyn L. Meadows, *Bankruptcy Reform and the Elderly: The Effect of Means-Testing on Older Debtors*, 36 IDAHO L. REV. 227, 232 (2000).

26. 11 U.S.C. § 1322 (contents of plan); 11 U.S.C. § 1322(d) (duration of plan).

27. 11 U.S.C. § 1325(a)(4). This is known as the "Best Interest of Creditors" test. See, e.g., *In re Jones*, 301 B.R. 840 (Bankr. E.D. Mich. 2003); *In re Dewey*, 237 B.R. 783 (B.A.P. 10th Cir. 1999); *In re Dorman*, 103 B.R. 61 (Bankr. N.D.N.Y. 1989); *In re Chapman*, 51 B.R. 663 (Bankr. D. Colo. 1985).

chapter 13 bankruptcy, using that equity to produce a lower overall payment and meeting the minimum dividend required by law for creditors. Second, “reverse” mortgages enable debtors to borrow a lump sum from the home’s equity without the obligation to repay it. Creditors thus receive their required dividend, and the debtors end up with either an existing mortgage payment or no payment at all if their properties are paid up. The reverse mortgage accumulates interest that is due upon the death of the debtor.

B. Intergenerational Support Duties

1. ADULT CHILD-PARENT

Although some elderly persons are wealthy, many others are not. In 1997, one out of every six people over sixty-five, or 17%, was poor or near poor.²⁸ In 1999, thirty-two million, representing 34% of all older persons, reported an income of less than \$10,000; only 23% earned \$25,000 or more.²⁹ The median income reported was \$14,425. Despite income deprivation, older households are less likely than younger households to receive public assistance, food stamps, or have members covered by Medicaid.³⁰

The duty of parents in every state to support minor children financially is well-known to family law practitioners. Far less known are statutes in thirty states, which impose a duty on adult children to provide financial assistance to their indigent parent.³¹ The financial need of the elderly parent, which triggers the duty, is usually phrased in general terms, *e.g.*, “unable to maintain” self.³² The obligation of the adult child is described in various ways: to provide “necessary food, clothing, shelter or medical attention,”³³ “necessaries,”³⁴ “medical expenses,”³⁵ or “burial expenses.”³⁶ In some states, this duty is

28. U.S. BUREAU OF CENSUS, CURRENT POPULATION REPORTS, CONSUMER INCOME 60-200 (Sept. 1998).

29. About 3.4 million seniors, representing 10.5% of the population, were below official definitions of poverty in 1997. Another 2.1 million, or 6.4% of the elderly, were classified as “near-poor.” ADMINISTRATION ON AGING, DEP’T OF HEALTH AND HUMAN SERVICES, A PROFILE OF OLDER AMERICANS (2000), available at <http://www.aoa.gov/aoa/-stats/profile/profile2000.html> [hereinafter PROFILE OF OLDER AMERICANS].

30. One-third or 31% of older renter households lived in publicly owned or subsidized housing in 1994, as compared to 14% for younger renters, additional indicia of poverty. PROFILE OF OLDER AMERICANS, *supra* note 29.

31. See Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 10 BRKLN. J. LAW & POL’Y 709 (1999) (Appendix A, listing all statutes).

32. State statutes utilizing such “unable to maintain” language include Alaska, Connecticut, Delaware, Idaho, Indiana, Iowa, Mississippi, Montana, North Dakota, Ohio, Oregon, Pennsylvania, and South Dakota.

33. States with this language include Indiana, Montana, and South Dakota.

34. States with “necessaries” language include California, Connecticut, Maryland, Mississippi, and Ohio.

35. States with “medical expenses” language include Nevada and Tennessee.

36. States with “burial expenses” language include Alaska, Indiana, Montana, and West Virginia.

even extended to grandchildren.³⁷ Because relatively few cases invoking these statutes are reported in appellate court decisions³⁸ and trial court cases are rarely published, enforcement of these state statutes is difficult to gauge.

Economic support of the elderly is both a private and a public matter, however. Less punitive and likely more successful policies would be federal and state laws and programs that encourage family members to support elderly parents when feasible and reward them for doing so. Public subsidies for a variety of needs—day care, respite care, caretaking tasks, housing to enable multigenerational families to live together, promoting “teleworking” by family caretakers—would foster recognition that family and society share responsibility for the aged.

2. GRANDPARENT SUPPORT DUTIES

The Elizabethan poor laws required grandparents to support grandchildren. These laws were transported to the colonies,³⁹ but American common law developed the opposite principle.⁴⁰ Generally, grandparents were not financially responsible for grandchildren. Child support proceedings were to be undertaken against parents, but not grandparents.⁴¹ An exception was typically made when the grandparent acted in place of parents on behalf of the grandchild.⁴²

In 1996, the federal Aid to Families with Dependent Children (AFDC) program was abolished and replaced by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).⁴³ The

37. These states include Alaska, Arkansas, Iowa, Louisiana, and Utah.

38. These cases are collected in Seymour Moskowitz, *Adult Children and Indigent Parents*, 86 MARQ. L. REV. 401, 422 n.117 (2002).

39. Laura W. Morgan, *Family Law at 2000: Private and Public Support of the Family: From Welfare State to Poor Law*, 33 FAM. L.Q. 705, 706-07 (1999). See generally Richard Mandelker, *Family Responsibility Under American Poor Laws*, 54 MICH. L. REV. 497 (part I), 54 MICH. L. REV. 607 (part II) (1956).

40. See, e.g., *In re Gollahon*, 707 N.E.2d 735, 737 (Ill. App. Ct. 1999) (“Parent, not grandparents, are responsible for the children’s custody, care, education, nurture, and support.”); *Blaloch v. Blaloch*, 559 S.W.2d 442, 443 (Tex. Civ. App. 1977) (holding that there is no common law requirement that grandparents provide support for their grandchildren).

41. See, e.g., *Connecticut v. Miranda*, 715 A.2d 680, 687 (Conn. 1998) (“general obligations of parenthood entail the duty to supply necessary food, clothing and medical care.”); *Dubroc v. Dubroc*, 388 So. 2d 377, 380 (La. 1980) (explaining that child support duty is imposed by fact of maternity or paternity); *Wilsey v. Wilsey*, 831 P.2d 590, 592 (Mont. 1992) (stating that child support is a social and moral obligation of parents).

42. E.g., *Ex parte Lipscomb*, 660 So. 2d 986, 988 (Ala. 1994) (stating that a nonparent who stands in loco parentis to a child may be held responsible for the child’s support); *Bennett v. Bennett*, 390 S.E.2d 276, 278 (Ga. Ct. App. 1990) (holding that grandparents stood in loco parentis to grandchild when mother relinquished, in writing and before a notary, all claims, right of custody, and parental control over her child, and expressly consented to the appointment of child’s grandmother as guardian).

43. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105.

PRWORA amended 42 U.S.C. § 666(a) by adding paragraph 18:

Enforcement of orders against paternal or maternal grandparents—procedures under which, at the state's option, any child support order enforced under this part with respect to a child of minor parents, if the custodial parent of such child is receiving assistance under the state program under part A of this subchapter, shall be enforceable, jointly and severally, against the parents of the non-custodial parent of such child.⁴⁴

Congress thus encouraged states receiving federal funds for child support enforcement efforts to enact statutes making grandparents fiscally liable for their grandchildren. Minors who have children have a duty to support the child financially. Since these adolescents are often in school or otherwise unable to meet that obligation, the state may enforce the court order, jointly and severally, against the grandparents.⁴⁵ At least thirteen states have enacted statutes providing for grandparent liability for child support.⁴⁶ Legislation holding grandparents financially responsible for the support of their grandchildren in theory should motivate parents to teach their teens about birth control, abstinence, and the dangers of pregnancy.⁴⁷ Grandparents may sue their grandchild's parents for reimbursement.⁴⁸

3. LONG-TERM CAREGIVING

Most older clients desire to remain at home or at least outside a nursing home.⁴⁹ Family support enables most of them to remain in the community

44. *Id.* at § 373.

45. *See, e.g.*, *Whitman v. Kiger*, 533 S.E.2d 807 (N.C. Ct. App. 2000) (discussing that primary responsibility for an infant born to unemancipated minors is placed on the minors' parents, even if minors' parents do not assume such responsibility in writing); N.C. GEN. STAT. § 50-13.4(b) (1999).

46. ARIZ. REV. STAT. ANN. § 25-810(A) (West 2000); IDAHO CODE § 32-706(4) (Michie 1996 & Supp. 2000); 305 ILL. COMP. STAT. ANN. 5/10-10 (West 1993 & Supp. 2000); MD. CODE ANN. FAM. LAW § 5-203(c) (Michie 1999); MO. ANN. STAT. § 454.400(2)(16) (West Supp. 2000); N.H. REV. STAT. ANN. § 167:3-a (1994); N.C. GEN. STAT. § 50-13.4(b) (1999); OHIO REV. CODE ANN. § 3109.19(B)(1) (West Supp. 2000); R.I. GEN. LAWS 15-5-16.2(g) (1996 & Supp. 1999); S.C. CODE ANN. § 20-7-936 (West Supp. 1999); S.D. CODIFIED LAWS § 25-5-18.2 (Michie 1999); WIS. STAT. ANN. § 49.90(1)(a)(2) (West 1997 & Supp. 1999); WYO. STAT. ANN. § 42-2-103(e) (Michie 1999). *See generally* Laura W. Morgan, *Fork It Over, Granny: The Child Support Obligations of Grandparents*, 11 (7) *DIVORCE LITIG.* 129 (July 1999).

47. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), *supra* note 43, at §§ 101(3) ("Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children") & 101(10). Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 ("... it is the sense of Congress that prevention of out-of-wedlock pregnancy and reductions in out-of-wedlock birth are very important Government interests . . .").

48. *See, e.g.*, *Stiefelmeyer v. Stiefelmeyer*, 485 So. 2d 729, 730 (Ala. Civ. App. 1986) (holding that grandmother who sought child support modification against father of child prevailed by showing significant change in circumstances that affect the welfare of the child).

49. A survey done by the American Association of Retired Persons reports that 85% of the respondents prefer to remain in their own homes if the need for care arises. JOHN MIGLIACCIO &

rather than being institutionalized.⁵⁰ An estimated twenty-two million households currently provide care for an older or disabled relative;⁵¹ approximately two-thirds of those providing care for elders are employed.⁵² More than 80% of all care provided to older persons⁵³ is provided by family members or other volunteer caregivers in the home, a fact that has important implications regarding gender-related roles in American society.⁵⁴ Typically women find themselves bearing the multiple responsibilities of rearing children, working for income outside the home, and providing care for aging family members.⁵⁵ This often results in devastating consequences for the female caregiver, including lost employment opportunities, financial strain, and emotional stress.⁵⁶ Indeed, one of the reasons elderly women are more likely to be in poverty than are their male cohorts is that their pension benefits and assets from employment have been decreased by years out of the workforce caring for family members.

Working caregivers incur “significant losses in career development, salary, and retirement income, and substantial out-of-pocket expenses as a result of their caregiving obligations.”⁵⁷ The average lifetime loss of wealth—wages, private pension, and Social Security benefits—experienced

NEAL E. CUTLER, CARING TODAY, PLANNING FOR TOMORROW 14 (1999) available at <http://www.caregiving.org/nacguide.pdf>.

50. MARLA BERG-WEGER, CARING FOR ELDERLY PARENTS: THE RELATIONSHIP BETWEEN STRESS AND CHOICE 10 (Stuart Bruchey ed. 1996).

51. Mary Beth Franklin, *On-The-Job Aid for Caregivers*, KIPLINGER'S PERSONAL FIN. MAG., August 1, 2001, available at http://www.findarticles.com/cf_dls/m1318/8_55/76577547/p1/article.jhtml.

52. Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEM. 1, 6 (2002) (citing U.S. Dep't of Labor, *Futurework: Trends & Challenges for Work in the 21st Century* 28, 33 (1999)).

53. Although the care needed is, of course, individualized, the vast majority is assistance with activities of daily living such as bathing, dressing, housecleaning, cooking, transportation, and the like.

54. BERG-WEGER, *supra* note 50, at 3.

55. WOMEN AND AGING: BEARING THE BURDEN OF LONG-TERM CARE: JOINT HEARING BEFORE THE SPECIAL COMM. ON AGING & THE SUBCOMM. ON AGING OF THE COMM. ON HEALTH, EDUCATION, LABOR, AND PENSIONS IN THE U.S., 107TH CONG. 22 (2002), available at <http://www.access.gpo.gov/congress/senate/senate22sh107.html>. See, e.g., ELAINE M. BRODY, WOMEN IN THE MIDDLE: THEIR PARENT-CARE YEARS 29 (2003). See also ARLIE HOCHSCHILD, THE SECOND SHIFT (1989).

56. As one commentator explains: “The most severe impact of caring for a dependent adult appears to be that it is totally monopolizing and without rest, twenty-four hours a day, seven days a week, 365 days a year . . . There is gradually isolation . . . of the main care giver.” Nancy Guberman, *The Family, Women and Caring: Who Cares for the Caregivers?*, 17 RESOURCES FOR FEMINISTS RES. 37, 39 (1988). See also THE METLIFE JUGGLING ACT STUDY: BALANCING CAREGIVING WITH WORK AND THE COSTS INVOLVED (November 1999) at <http://www.caregiving.org/JugglingStudy.pdf> (estimating 10% of all family caregivers left the paid workforce entirely) [hereinafter JUGGLING STUDY]. See generally BERG-WEGER, *supra* note 50.

57. JUGGLING STUDY, *supra* note 56, at 3.

by caregivers is estimated to be \$659,139.⁵⁸ Ten percent of caregivers report leaving the workforce completely, 11% take leaves of absence from their employment, and 7% reduce their hours from full-time to part-time or take a less demanding job.⁵⁹ The economic value of the services provided by these family members would be \$200 billion per year if provided by professionals.⁶⁰ The average duration of caregiving is four and a half years;⁶¹ 10% provided care for ten years or more. Moreover, these caregivers often spend their own money providing assistance to elderly relatives.⁶²

Family support enables 95% of seniors to remain in the community instead of an institutional placement.⁶³ Another advantage of such informal caregiving is the increased autonomy of the aging family member. Empirical evidence demonstrates that the perception of personal control plays a critical role in an individual's long-term physical and emotional health.⁶⁴ Even relatively simple decision making, such as choice of food and activity, leads to improved quality of life.⁶⁵

Given the prevalence and importance of this nonprofessional care, family members often require information and counseling from lawyers regarding legal rights available to them. The federal Family and Medical Leave Act (FMLA) provides many employees with up to twelve weeks of unpaid, job-protected leave per year to care for a newborn child or immediate family member (spouse, child, or parent) with a serious health condition.⁶⁶ Employees taking an FMLA leave are entitled to be restored to their original position or to a similar position with equivalent "benefits, pay and other terms and conditions of employment."⁶⁷ The Act helps employees balance work and family responsibilities but its provisions are quite restrictive. Numerous exceptions leave many employees uncovered.⁶⁸ Leave from the job for care of nondesignated relatives, *e.g.*, grandparent, parent-in-law, etc.,

58. *Id.* at 6.

59. THE METLIFE STUDY OF EMPLOYER COSTS FOR WORKING CAREGIVERS 1 (1997) available at <http://www.caregiving.org/metlife.pdf>.

60. THE METLIFE STUDY OF EMPLOYED CAREGIVERS: DOES LONG TERM CARE INSURANCE MAKE A DIFFERENCE? 1 (2001) available at <http://www.caregiving.org/LTC%20study%20final.pdf>.

61. The study also found that 21% have provided care for five to nine years, and 10% have provided care for 10 years or more. FAMILY CAREGIVING IN THE U.S.: FINDINGS FROM A NATIONAL SURVEY 12 (1997) available at <http://www.caregiving.org/finalreport.pdf>.

62. Those who actually record expenses estimate that they spend \$171.00 per month on such caregiving. *Id.* at 24.

63. BERG-WEGER, *supra* note 50, at 10.

64. Brian F. Hofland, *Autonomy in Long-Term Care: Background Issues and a Programmatic Response*, 28 GERONTOLOGIST 3, 5-6 (1988); Judith Rodin, *Aging and Health: Effects of the Sense of Control*, 233 SCIENCE 1271 (1986).

65. *Id.*

66. 29 U.S.C. § 2601 *et seq.* (2000).

67. *Id.* at § 2614(a)(1)(A)(B).

68. 29 U.S.C. § 2611(4)(A)(1) (FMLA applies only to employers with fifty or more employees).

is not protected. Since a maximum of only twelve workweeks is allowed, the leave usually cannot meet the long-term care needs of most elderly and/or disabled persons.

The critical deficiency of the FMLA, however, is that even middle-class caregivers cannot survive or maintain their standards of living without pay. A Department of Labor survey in 2000 indicated about three quarters of those who needed to take leave to provide care for relatives were unable to do so because they could not afford to go without pay.⁶⁹ Many were also afraid a leave would have a negative impact on their careers.⁷⁰ An alternative to the FMLA is employer-provided assistance to family caregivers, including employer-paid consultation and referral programs, and employee-paid long-term-care-insurance plans.⁷¹ Only a minority of employers are this family-friendly.

Because the FMLA does not preempt state laws that provide better family leave benefits, practitioners should investigate rights under individual state statutes, which provide more realistic assistance to caregivers and the elderly. Hawaii, for example, at the discretion of the employee, allows the use of accumulated sick leave in addition to unpaid leave to care for family members.⁷² Washington has recently adopted a new statute allowing workers to use paid sick leave, personal days, and vacation time to care for family members.⁷³ The most progressive step, effective July 2004, was taken by California in expanding the state disability insurance program to allow employees to receive half their salary for up to six weeks in order to take time off to care for a child or sick relative.⁷⁴ But even these state initiatives are minor in comparison to the problem.

Very few public sources of monetary compensation are available to family caregivers. Federal Medicare programs make almost no provision for the long-term custodial care needed by the elderly and reimburse few services in the home, both glaring deficiencies.⁷⁵ Our clients fare no better under

69. See DAVID CANTOR ET AL., U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: THE FAMILY AND MEDICAL LEAVE SURVEYS 2000, UPDATE 2-16, TABLE 2.17: REASONS FOR NOT TAKING LEAVE 1995 & 2000 SURVEYS (2001) available at <http://www.dol.gov/asp/fmla/chapter2.pdf>. [hereinafter, FMLA SURVEYS 2000 UPDATE] (77.6% of leave-needers could not afford to take leave).

70. *Id.* (42.8% of leave-needers thought job advancement might be hurt, 27.8% did not want to lose seniority, 31.9% thought their job might be lost).

71. Robert E. O'Toole, *Integrating Contributory Elder-Care Benefits with Voluntary Long-Term Care Insurance Programs*, EMPLOYEE BENEFITS J., Dec. 1, 2002, available at 2002 WL 15846972.

72. HAW. REV. STAT. ANN § 398-4 (2002). See also 2003 CONN. ACTS 213 (REG. SESS.).

73. WASH. REV. CODE ANN. § 49.12.270 (West 2003).

74. S.B. 1661, 2002 LEG., 2001-02 SESS. (Cal. 2002). The maximum payout is \$728.00 per week.

75. Medicare will finance skilled licensed nursing and therapy services, but these are typically not provided by relatives. MIGLIACCO & CUTLER, *supra* note 49, at 14. NATHAN L LINSK,

state-administered Medicaid. First, there are stringent financial eligibility guidelines; state funding is thus unavailable for many middle-class clients, at least without considerable time for drafting and executing a sophisticated Medicaid planning strategy. Second, like Medicare, Medicaid provides little support for home healthcare. Payment to relatives is almost impossible because of the very restrictive definition of “personal care services”⁷⁶ and the bias toward funding institutional care.⁷⁷ A few states have initiated programs to compensate caregivers providing services to the elderly or disabled in their homes. Florida and Minnesota provide direct funding to such caregivers.⁷⁸ Arizona allows taxpayers who provide in-home care for an elderly parent a \$10,000 exemption on the caregiver’s state income tax.⁷⁹

An alternative to public funding is private long-term-care insurance, although the cost of premiums often deters purchase. Long-term-care insurance policies require intense study and analysis by the lawyer who must be able to communicate complex provisions to the lay client. Important choices must be made regarding benefits per day, benefit period, home-care coverage, and many other topics. Often, the cost of insuring both the husband and wife is not feasible.

Another alternative is for the dependent senior to compensate the family caregiver. In most situations there will be a natural disinclination by the caregiver to ask for compensation directly. Moreover, the dependent senior

ET AL., COMPENSATION OF FAMILY CARE FOR THE ELDERLY, FAMILY CAREGIVING IN AN AGING SOCIETY 64, 74 (Rosalie Kane & Joan D. Penrod, eds, 1995).

76. Medicaid regulations provide that “personal care services” are:

[S]ervices furnished to an individual who is not an inpatient or resident of a hospital, nursing facility, intermediate care facility for the mentally retarded, or institution for mental disease that are: (1) Authorized for the individual by a physician in accordance with a plan of treatment or (at the option of the State) otherwise authorized for the individual in accordance with a service plan approved by the State; (2) Provided by an individual who is qualified to provide such services and *who is not a member of the individual’s family*; and (3) Furnished in a home, and at the State’s option, in another location.

42 C.F.R. § 440.167(a) (2001) (emphasis added).

77. Craig S. Meuser, *Symposium: Long-Term Care for the Elderly: Why Government and Business Should Take a Closer Look at Adult Day Care*, 1 QUINNIPIAC HEALTH L.J. 219, 239-41 (1997) (discussing the disconnect between health care needs and Medicaid funding rules).

The nature of illness in the U.S. has now shifted from a preponderance of acute care illnesses to a preponderance of chronic ailments and conditions. In fact, treatment of chronic conditions is the fastest growing and highest cost segment of the health care system. Nevertheless, the Medicaid program funds nursing home care much more than community alternatives like adult day care. . . .

See also William G. Weissert et al., *Cost Savings from Home and Community-Based Services: Arizona’s Capitated Medicaid Long-Term Care Program*, 22 J. HEALTH POL’Y & LAW 1329 (1997) (detailing substantial Medicaid savings achieved by promoting extensive home and community-based care services as an alternative to institutional care).

78. FLA. STAT. ANN. § 215.5601 (2003). Home Care for the Elderly Act, and implementing regulations, 58 FLA. ADMIN. CODE. 58 H-1.002-04; MINN. STAT. S 256B.51(1-3) (2003).

79. ARIZ. REV. STAT. § 43-1023(c) (2003).

may not have disposable income available to pay the relative. An option is to allocate a share of the senior's estate to the caregiver. Although contracts to will property in exchange for services are valid, probate codes often require express reference in the will to the contract and extrinsic evidence proving its terms.⁸⁰ Typically, services are provided without written contract, which may leave the caregiver without remedy after death of the senior.⁸¹ The family law practitioner may play an important role in this situation. The attorney must ensure there is no overreaching, which in some cases may amount to financial exploitation.

Careful legal counseling and drafting is required because a minefield of precedent and interrelated doctrines confront the caregiver. Courts in most states presume that services provided by family members have been rendered without expectation of payment⁸² if there is no express contract.⁸³ Even worse, the values that motivate caregiving family members and others—love, intimacy, nurturing—may actually disadvantage them later. “Courts frequently translate acts of care into evidence that the one-caring unduly influenced the cared-for, or, worse yet, courts use caring acts to support a presumption of undue influence.”⁸⁴

In addition, procedural stumbling blocks abound. Often an estate claimant must demonstrate by “clear, convincing, and satisfactory evidence” that an express or implied agreement existed to compensate the caregiver for services rendered.⁸⁵ Failure to assert a claim until after the

80. UNIF. PROBATE CODE § 2-514 (amended 1997).

81. See, e.g., *Kohler v. Armstrong*, 758 P.2d 407 (Or. Ct. App. 1988); *In re Estate of Jesmer v. Rohlev*, 609 N.E.2d 816 (Ill. App. Ct. 1993); *In re Estate of Rollins*, 645 N.E.2d 1026 (Ill. App. Ct. 1995); *In re Estate of Lutz*, 620 N.W.2d 589 (N.D. 2000); *Smith v. Milligan*, 43 Pa. 107 (1862); *Hall v. Finch*, 29 Wis. 278 (1871).

82. See, e.g., *Matter of Estate of Wilson*, 579 N.Y.S.2d 779, 780 (App. Div. 1991) (citing *In re Adams Estate*, 149 N.Y.S.2d 849 (App. Div. 1956); *In re Schultz' Estate*, 188 N.Y.S.2d 144 (Sur. Ct. 1959); *In re Basten's Estate*, 126 N.Y.S.2d 459 (Sur. Ct. 1953).

83. See, e.g., *In re Clark's Estate*, 267 NW. 273, 275 (Wis. 1936) “settled presumption that services rendered by “near” relatives by blood or marriage [who] reside together as one common family . . . [are] intended as mutual acts of kindness done or furnished gratuitously.” *Id.* (quoting *In re Estate of Goltz*, 238 N.W. 374, 376 (Wis. 1931)). See generally Jonathan S. Henes, *Compensating Caregiving Relatives: Abandoning the Family Member Rule in Contracts*, 17 CARDOZO L. REV. 715 (1996). See also *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 17, 18-20 (Ct. App. 1993) (rejecting the contractual claim of a spouse who, in exchange for her husband's oral promise to devise property to her, provided round-the-clock nursing care for her husband who wanted to live at home rather than in a nursing home after his stroke).

84. Trent J. Thumley, Note, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 IND. L. J. 513, 514 (1996). See, e.g., *52 Estate of Beal*, 796 P.2d 150, 152 (Okla. 1989) (provision of services was “irresistible evidence . . . [of] undue influence”).

85. *Fahringer v. Estate of Strine*, 216 A.2d 82, 85 (Pa. 1966) (“[T]raditionally the courts have been reluctant to give recognition to such contracts and have viewed claims based on such contracts with misgivings and suspicion.”). See also *Eggers v. Rittscher*, 529 N.W.2d 741, 744 (Neb. 1995) (“We regard with grave suspicion any claim of an oral contract to convey property

decedent has died often weighs against the family caregiver. Theoretically, cohabiting but unmarried couples would have a better chance for compensation since the presumption that services provided by family members were rendered gratuitously would not be applicable. But courts have blocked “family-like” cohabitants from recovering as well.⁸⁶

At least one state has enacted a statute that specifically allows a family member to make a claim against the estate of the decedent without an express contract if statutory requirements are met. In Illinois, a specified family member—spouse, parent, brother, sister, or child—of a disabled person who “dedicates himself . . . to the care of the disabled person by living [with] and personally caring for [him/her] for at least three years . . . [is] entitled to a claim against the estate.”⁸⁷ Claims may be made on the basis of lost employment or lifestyle opportunities, and emotional distress experienced as a result of personally caring for the disabled person. The claim is based on the nature and extent of the person’s disability.⁸⁸ The statute has limitations; by explicitly naming specific close relatives as potential claimants, others, *e.g.*, nieces, nephews, grandchildren, etc., are excluded. Nor is there any statutory definition of “disability,” which would trigger eligibility for compensation. Despite these limitations, the statute is a positive response to the all-too-common situation of relatives sacrificing portions of their lives in caregiving roles without an express contract for compensation.

In the absence of a will, state intestate succession laws provide for property to pass to a hierarchy of relatives, usually defined by blood, marriage or adoption.⁸⁹ These relatives inherit regardless of their conduct or their actual relationship to the decedent. This remains true even if the relative refused to care for, or even mistreated, the decedent.⁹⁰ This extreme situation

at death.”); *Thompson v. Henderson*, 591 P.2d 784, 786 (Wash. Ct. App. 1979) (stating that oral contracts to devise “are regarded with suspicion” and that “[t]he standard of proof in such cases is not ‘a preponderance of the evidence’ but rather, one of ‘high probability’ ”) (citation omitted). Dead man’s statutes have posed particular problems for contracts to devise. *See, e.g.*, *Farah v. Stout*, 684 A.2d 471, 474-77 (Md. Ct. Spec. App. 1996).

86. *See Estate of Dodson*, 878 S.W.2d 513 (Mo. Ct. App. 1994). Women have not been allowed to recover for the value of services rendered where there had been no provision in the deceased’s will, which provided for her. “[U]nlawful sexual intercourse is not considered consideration, and a contract based upon such a relationship will not be enforced.” JOHN T. GAUBATZ ET AL., *ESTATES AND TRUSTS: CASES, PROBLEMS AND MATERIALS* 207 (1993). *But see Estate of Zent*, 459 N.W.2d 795 (N.D. 1990) (surviving cohabiter had claim in quantum meruit against estate for value of services rendered in expectation of compensation). For an extended discussion of the family services presumption and its applicability to nonrelated cohabitants as well as relatives, *see In re Estate of Steffes*, 290 N.W.2d 697, 704-05 (Wis. 1980).

87. 755 ILL. COMP. STAT. ANN. 5/18-1.1.

88. *E.g.*, 100% disability allows a \$100,000 claim, down to 25% disability, \$25,000. *Id.*

89. *See WILLIAM M. MCGOVERN, JR., & SHELDON F. KURTZ, WILLS, TRUSTS & ESTATES* § 2.1 at 42 (2d ed. 2001).

90. Some jurisdictions disqualify spouses who abandoned the decedent, however. *See, e.g.*,

presents practitioners opportunities for law reform. The law should deny benefits to those whose behavior makes them “unworthy heirs” and should encourage caregiving within the family and society at large.⁹¹ Most of the abuse of the elderly is perpetrated by close relatives; 90% of abusers are family members, and two-thirds are the victim’s adult children or spouses of those children.⁹² Where relatives have not provided support and care or have abused their parents, inheritance rights should be denied because of their conduct.⁹³ Moreover, those who have assumed and carried out care responsibilities should be rewarded. This would add a financial incentive encouraging care of the elderly.

California has moved in this direction, barring persons found guilty of elder abuse and neglect by clear and convincing evidence from inheriting from their deceased victims.⁹⁴ The abuser is deemed to have died before the victim and thus unable to inherit.⁹⁵ The statute also bars persons from inheriting who have falsely imprisoned, endangered health, stolen property or caused pain or mental suffering to the testator.⁹⁶

4. PRENUPTIAL & COHABITANT AGREEMENTS

A variety of legal and nonlegal issues are presented when a client, whose previous marriage has ended in death or divorce, establishes a new relationship. Often these clients are considering marriage to the new partner, and the lawyer is asked to create a prenuptial agreement. The enforceability of these contracts varies from state to state.⁹⁷ The Uniform Premarital

MO. ANN. STAT. § 474.140 (West 1992 & Supp. 2001) (excluding a spouse who “voluntarily leaves his or her spouse”). A few states also bar parents who abandoned or refused to support their children. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 1998) (disqualifying a parent who failed or refused to provide for a minor child). *See also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5(5) (1999) (barring a “parent who has refused to acknowledge or has abandoned his or her child, or a person whose parental rights have been terminated”).

91. *See, e.g.*, Paula A. Monopoli, “Deadbeat Dads”: *Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 259-61, 265-73 (1994) (criticizing statutes that allow “deadbeat dads” to inherit from their children); Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform*, 13 LAW & INEQUALITY 401, 439 (1995) (proposing a family violence statute “to deny abusers any [inheritance] benefits from those they abused”); Anne-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go*, 27 IND. L. REV. 517, 524-41 (1994) (discussing reform of intestate succession laws to prevent inheritance by parents who abandoned or failed to support their children).

92. *See* National Center on Elder Abuse, *The National Elder Abuse Incidence Study, Pt 5, Conclusions*, available at http://www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse/ABuseReport_Full.pdf (September 1998).

93. *See generally* Seymour Moskowitz, *Golden Age in the Golden State, Contemporary Legal Developments in Elder Abuse and Neglect*, 36 LOY. (LA) L. REV. 589, 652-56 (2003).

94. CAL. PROB. CODE § 259 (West 1999 & Supp. 2002). *See also* Moskowitz, *supra* note 93.

95. *Id.*

96. *Id.* *See also* CAL. PENAL CODE § 236, 368 (WEST 1999 & SUPP. 2002).

97. *See generally* AMERICAN BAR ASSOC. ATTACKING AND DEFENDING MARITAL AGREEMENTS

Agreement⁹⁸ has been adopted in more than half of the states and almost all of the remainder have rules governing these contracts.

The needs of older clients contemplating marriage may differ dramatically from those of younger clients.⁹⁹ Hostility and suspicion, for example, may be present between the elderly future stepparent and the adult stepchildren due to fears concerning the statutorily mandated division of the estate after the death of the parent. If the parent(s) wishes to ensure that property passes to later generations, the prenuptial agreement must list and characterize this property and provide that these assets shall pass as provided in the will or the agreement itself. Children from previous marriages should be specifically acknowledged, and the agreement should provide that the spouse may transfer all or part of these separate assets to those children.

Other legal issues of elderly clients planning to marry need to be addressed; *e.g.*, domicile, waiver of rights to retirement benefits, obligations to children of prior marriages, tax considerations, and the marital residence.¹⁰⁰ The family home may be a particularly sensitive issue because children or grandchildren may have anticipated living in it or selling it once the parent dies. The premarital agreement in these cases should specify whether the surviving spouse may continue to live in the home or dispose of it. Additionally, if one spouse is forfeiting rights as a result of the marriage, the loss can be recognized in the contract and the spouse compensated. Remarriage of a senior citizen might result in a number of negative financial consequences, *e.g.*, loss of alimony from a former spouse or a prior prenuptial agreement,¹⁰¹ termination of benefits from a trust or will,¹⁰² or loss of Social Security benefits drawn on the record of a prior spouse.¹⁰³ A well-drafted premarital agreement should resolve these matters.

Cohabitation has emerged as an important and rapidly increasing new family form in the United States. Approximately 7% of the nation's couples are in now-unmarried committed relationships.¹⁰⁴ These relationships live in the "shadow of the law" and often have more legal needs than traditional ones. State-granted benefits and rules available to married couples in the areas of taxation, inheritance, divorce, employment and privacy rights,

8.02 (2001); Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994).

98. UNIFORM PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987 & Supp. 1999).

99. *See generally* Randall Gingiss, *Second Marriage Considerations for the Elderly*, 45 S.D.L. REV. 469 (2000).

100. *Id.* at 469-90 (dealing with these issues in depth).

101. *Id.* at 490.

102. *Id.* at 477-78.

103. *Id.* at 469.

104. *See* ARLENE F. SALUTER, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES, P. 20-484, MARITAL STATUS AND LIVING ARRANGEMENTS, March 1994 Xiii (1996).

etc., must be established for unmarried elder couples through the use of advance planning documents and contracts. Decisions may include whether to combine or to keep property separate, treatment of pre-existing or later-acquired debt, daily living issues such as division of household expenses or housework, plans for children, and who will take care of pets. The attorney may encounter complex situations involving elders who do not have a life-partner but who want to treat friends as family in their legal plans.

III. Health-Care Decision Making

A substantial body of case law has been developed over the past three decades involving medical decision making concerning denial or termination of life-sustaining medical treatment. Competent patients are almost universally given the right to make end-of-life decisions.¹⁰⁵ Both the U.S. Supreme Court and state courts have held this right does not end if the patient is no longer competent.¹⁰⁶ A frequent source of conflict, however, is the dilemma posed by patients without current decision-making capacity who have not expressed their intent in advance or who have provided conflicting or ambiguous directions. This difficulty would be obviated in many cases by adherence to statutes that permit individuals, while they are competent, to execute an advance directive regarding their future treatment wishes.¹⁰⁷

Despite education campaigns¹⁰⁸ and a federal statute requiring health-care facilities to advise patients of their right to execute advance directives,¹⁰⁹ studies consistently report that the number of individuals executing such documents is between 5% and 25% of the adult population.¹¹⁰ The reasons include procrastination, discomfort at confronting death, fear that such

105. *Washington v. Glucksberg*, 521 U.S. 720, 722-23 (1997).

106. *See, e.g.*, *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 280 (1990); *Rasmussen v. Fleming*, 741 P.2d 674, 685-86 (Ariz. 1987); *Conservatorship of Drabick*, 245 Cal. Rptr. 840, 852 (Ct. App. 1988); *In re Tavel*, 661 A.2d 1061, 1068 (Del. 1995); *In re Guardianship of Browning*, 568 So. 2d 4, 12 (Fla. 1990); *DeGrella v. Elston*, 858 S.W.2d 698, 709-10 (Ky. 1993); *Mack v. Mack*, 618 A.2d 744, 756 (Md. 1992); *Guardianship of Doe*, 583 N.E.2d 1263, 1267 (Mass. 1992); *In re Martin*, 538 N.W.2d 399, 409 (Mich. 1995); *In re Jobes*, 529 A.2d 434, 451 (N.J. 1987); *In re Quinlan*, 355 A.2d 647, 664 (N.J. 1976); *In re Fiori*, 673 A.2d 905, 910 (Pa. 1996); *In re Guardianship of Grant*, 747 P.2d 445, 449 (Wash. 1987); *In re Guardianship of L.W.*, 482 N.W.2d 60, 67 (Wis. 1992).

107. *Vacco v. Quill*, 521 U.S. 793, 895 n. 9 (1997) (listing advance directive statutes of states).

108. *See, e.g.*, Letter from Compassion in Dying Federation to Health Care Financing Administration (Dec. 16, 1995) available at <http://www.compassionindying.org/pain/HCFALetter.html>.

109. *Patients Self-Determination Act*, 42 U.S.C. § 1395cc(a)(1)(Q).

110. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE RANKING MINORITY MEMBER, SUBCOMMITTEE ON HEALTH, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, PATIENT SELF-DETERMINATION ACT: PROVIDERS OFFER INFORMATION ON ADVANCE DIRECTIVES BUT EFFECTIVENESS UNCERTAIN, GAO/HEHS-95-135, AT 9 (Aug. 1995) [hereinafter GAO REPORT].

decisions may allow others to harm them, concern over legal costs, etc.¹¹¹ Family law practitioners may assume they need not discuss such a document(s) with clients because physicians will talk to their patients—elderly or not—about the appropriateness and efficacy of advance directives. Available evidence indicates most doctors do not have these conversations.¹¹²

When the patient has no advance directive, most states have statutes that provide for surrogate decision making for the patient. Most of these statutes are hierarchic in form, providing for successive levels of decision makers. Typical is the Florida statute that defines the hierarchy as a judicially appointed guardian, spouse, majority of adult children, parents, majority of adult siblings, etc.¹¹³ Nonrelated persons are rarely granted a voice in this process. Cohabitants—whether heterosexual, gay or lesbian—are often affected. Patients in these circumstances may well find medical decisions made by persons with whom they have had little recent contact or with whom they have had strong disagreements. Cohabitation agreements for elderly couples should be supplemented with springing durable-power-of-attorney and health-care-power-of-attorney documents, allowing partners to make medical decisions for one another when and if needed.

Another dilemma arising from the lack of an advance directive emerges when relatives are in conflict over the appropriate decision. The resulting bitterness may produce litigation precisely at the time when family members are psychologically, emotionally, and fiscally least able to deal with the pressures of court proceedings. A cautionary tale is contained in the recent much-publicized *Schiavo* case. On February 25, 1990, Theresa Schiavo suffered a cardiac arrest. She has been in a persistent vegetative state for the past fourteen years. In 1998, her husband/guardian, petitioned a Florida court to withdraw artificial life support. Mrs. Schiavo's parents objected to the discontinuation, contesting what Mrs. Schiavo's medical condition was and what her wishes would have been. By now, the sixth year of litigation, there have been several trials, thirteen applications for appellate review, countless hearings on motions and petitions, three federal

111. David Doukas, *Advance Directives in Patient Care: If You Ask, They Will Tell You*, 59 AM. FAM. PHYS. 530, 530 (1999); Linda L. Emanuel et al., *Advance Directives for Medical Care—A Case for Greater Use*, 324 NEW ENG. J. MED. 889, 891 (1991); Greg A. Sachs et al., *Empowerment of the Older Patient? A Randomized, Controlled Trial to Increase Discussion and Use of Advance Directives*, 40 J. AM. GERIATRIC SOC'Y 269, 272 (1992).

112. Even where advance directives have been created, however, studies report a large percentage of validly executed documents are not honored by physicians. See R. Sean Morrison et al., *Physician Reluctance to Discuss Advance Directives: An Empiric Investigation of Potential Barriers*, 154 ARCHIVES OF INTERNAL MED. 2311, 2315 (1994). See also Jo-Anne Herina Jeffreys, *Advance Directives: Are They Worth the Paper They're Written On?*, 190 N.J. LAW 17, 17 (Apr. 1998).

113. FLA. STAT. ANN. ch. 765.401 (2003).

district court suits, several appellate court decisions, a state statute and executive order, and the issuance of a gubernatorial stay to prevent the withholding of nutrition and hydration from Ms. Schiavo.¹¹⁴ The recitation of this extraordinary litigation history should convince every family law practitioner to ensure that clients make their wishes known in a legally binding way and that such decisions are promptly carried out. Schiavo is just one of the reported cases reflecting disagreement between family members about end-of-life decision making.¹¹⁵

Although as yet adopted by only a few states, the Uniform Health Care Decisions Act¹¹⁶ has the potential to improve the legal situation. The act simplifies and facilitates the completion of advance directives but also provides default procedures in the absence of an advance directive.¹¹⁷ It allows individuals to name a surrogate decision maker in a variety of ways¹¹⁸ and recognizes oral, as well as written, instructions.¹¹⁹ A legal framework for decision making on behalf of patients who have not executed documents or made their wishes known orally is provided; a hierarchical list, similar to many existing states statutes, is provided but an orally designated surrogate appears first in priority.¹²⁰ Physicians are obligated to comply with patients' advance directives unless they assert a conscience exception or the advance directive requires medically ineffective health care.¹²¹

IV. Institutionalization

A. *Damage Suits Against Nursing Homes*

More than 1.7 million Americans reside in nursing homes.¹²² The quality of the care they receive is the subject of extensive administrative regulation

114. The reported appellate decisions are: *Schindler v. Schiavo*, 78 So. 2d 176 (Fla. Dist. Ct. App. 2001); *Schindler v. Schiavo*, 792 So. 2d 551 (Fla. Dist. Ct. App. 2001); *Schindler v. Schiavo*, 800 So. 2d 551 (Fla. Dist. Ct. App. 2001); and *Schindler v. Schiavo*, 851 So. 2d 182 (Fla. Dist. Ct. App. 2003).

115. See, e.g., *Gilmore v. Finn*, 527 S.E.2d 426 (Va. 2000) (conflict between husband and patient's brother; Governor of Virginia petitions court to continue nutrition and hydration); *In re Schmidt*, 699 N.E.2d 1123 (Ill. App. Ct. 1998) (conflict between husband and patient's siblings); *Conservatorship of Wendland*, 28 P.3d 151 (Cal. 2001) (conservator may not withhold artificial nutrition and hydration from a conscious but severely impaired patient absent clear and convincing evidence the conservator's decision is in accordance with the patient's own wishes or best interest).

116. UNIF. HEALTH-CARE DECISIONS ACT § 1-19, UNIF. L. ANN. (2001) (hereinafter UHCDA).

117. UHCDA § 5, 6.

118. UHCDA § 4.

119. *Id.* § 2(a).

120. UHCDA § 2.

121. *Id.* § 7(e)(f).

122. See, e.g., Paul Emrath, *Seniors' Housing: Supply & Demand*, HOUSING ECON., April 1999, at 9.

and enforcement,¹²³ and private civil litigation. To operate, nursing homes must be licensed by their states; almost all participate in the Medicare and Medicaid programs.¹²⁴ Whether administrative regulation is effective in ensuring quality of care in these institutions is hotly debated. Despite thousands of rules and survey inspections, conditions in many nursing homes are deplorable.¹²⁵

The residential nature of nursing homes and the extraordinary levels of disability of their populations combine to create great needs of highly vulnerable residents in institutional settings. In many instances, the placement of an individual in a nursing home is functionally involuntary; no alternative in the community exists. The public interest in the operation of this industry is readily apparent. Aside from the vulnerability of the residents, in 1995 Medicare and Medicaid paid for 57% of all nursing-home care.¹²⁶ With the rapid increase in the number of the elderly, it is foreseeable that the number of residents and the amount spent on long-term-care facilities will increase dramatically over the coming decades.¹²⁷ If the nursing home obtains payments from Medicare or Medicaid, it must also comply with federal regulations.¹²⁸ These regulations impose a minimum duty of care for the residents and can be used as jury instructions to establish the duty of care.¹²⁹

Independent of administrative enforcement, civil litigation brought by, or on behalf of, a resident against a nursing home has increased dramatically during the past two decades. The potential for this type of litigation has always been present, but such suits were previously rare. Now they have multiplied as have recoveries.¹³⁰ Juries increasingly return large

123. The HHS has identified nursing homes as an area "of great concern." DEP'T OF HEALTH & HUMAN SERV., FISCAL YEAR 2003 BUDGET REQUEST: HEARING BEFORE THE HOUSE APPROPRIATIONS COMM. ON LABOR, HEALTH & HUMAN SERVICES, 107TH CONG. (2002) (testimony of Janet Rehnquist, Inspector General) *available at* 2002 WL 373620.

124. To participate, nursing homes must be certified by and must enter into provider agreements with the federal government. *See* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 STAT. 1330 (codified as amended at 42 U.S.C. §§ 1395i-3, 1396(r) (2000)).

125. In recent years, state surveys conducted in the nation's 17,000-plus nursing homes identified deficiencies that harmed residents or placed them at risk of death or serious injury in more than one-fourth of nursing homes nationwide. *See* 1999 U.S. GENERAL ACCOUNTING OFFICE, NURSING HOMES: ADDITIONAL STEPS NEEDED TO STRENGTHEN ENFORCEMENT OF FEDERAL QUALITY STANDARDS, GAO/HEHS-99-46 (Mar. 18, 1999).

126. *See* Katherine Levit et al., *National Health Expenditures*, 18 HEALTH CARE FINANCING REV. 17 (1996).

127. *See* AHCA, *Facts & Trends: The Nursing Facility Sourcebook 2001* vii, *available at* <http://www.ahca.org/research/nfs/nfs2001-execsum.pdf>.

128. *See* 42 C.F.R. §§ 483.1- 483.480 (2001).

129. *See* *Conservatorship of Gregory*, 95 Cal. Rptr. 2d 336 (Ct. App. 2000).

130. The average award in nursing home negligence cases nearly doubled between 1987 and 1994, from \$238,285 to \$525,853. *See* Thomas D. Begley, Jr., *Nursing Home Law and Litigation*, 156 N.J.L.J. 120 (1999).

awards against the owners and operators of nursing homes. In 2000, the top verdict against a nursing home was \$20 million. In 2001, by contrast, five verdicts were higher than that, including one for \$312.7 million in Texas.¹³¹ Punitive damages obviously increase the size of many of these awards and are clustered in certain states, especially Florida, California, Mississippi, and Texas.¹³²

These cases attract great public attention. The growing number of nursing-home cases reflects numerous factors—statutory causes of action and attorney fees in many states, a growing elderly population, and heightened awareness of the plight of the elderly, particularly in institutional settings. Many cases revolve around dramatic incidents—a single error or omission which produces grave injury or death. These often include patients who are unsupervised, resulting in burns, drowning, suffocation, or strangulation. In contrast, habitual neglect situations, *e.g.*, malnutrition, dehydration, and skin ulcers, reflect lack of care on an ongoing basis.¹³³ When consulted on these issues, the family law practitioner will have to decide whether to file suit or refer the case to a more specialized tort or elder abuse litigator.

B. “Granny Cams” in Nursing Homes

Given the condition of many nursing homes¹³⁴ and studies reporting large and increasing amounts of elder abuse and neglect in these institutions,¹³⁵ it is not surprising that many persons have advocated the deployment of video cameras to protect residents. Proponents of taping argue many workplaces use cameras to record events.¹³⁶ Videotaping can aid in prevention and detection of elder abuse, a crime that is seriously underreported.¹³⁷

131. See *NLJ Verdicts: 100 Top Verdicts of the Year*, N.L.J. Litigation Services Network, Feb. 4, 2002, available at http://www.verdictsearch.com/news/specials/0204verdicts_charts.jsp.

132. *Id.*

133. See, *e.g.*, *Sauer v. Advocate, Inc.*, No. CIV 2000-5 (Ark. Cir. Ct. July 27, 2001) (awarding \$78.43 million jury verdict against nursing home chain to family of ninety-three-year-old Alzheimer’s resident who died of dehydration at one of its facilities). See also *Fuqua v. Horizon/CMS Healthcare Corp.*, No. 98-CV-1087 (N.D. Tex. Feb. 23, 2001) (awarding federal jury verdict of \$312.7 million to estate of nursing home resident who developed numerous pressure sores and suffered from malnutrition at nursing home).

134. See *supra* notes 128-33 and accompanying text.

135. In a July 2001 report on nursing homes nationwide, the House Committee on Government Reform drew this conclusion:

Abuse of nursing home residents is a widespread and significant problem. In the last two years, nearly one out of every three nursing homes in the United States has been cited for violating federal standards established to prevent abuse. In over 1600 of the nursing homes cited, the violations caused actual harm to residents or placed residents in immediate jeopardy of death or serious injury.

Tom Zucco, *The Sleepless Eye*, ST. PETERSBURG TIMES, Apr. 18, 2002, at 1D.

136. Notably banks, convenience stores, airports, and many others. *Id.*

137. A California legislative committee hearing recently noted that as much as 80% of all

Moreover, only residents who request or consent to monitoring will have such devices in their rooms.

Opponents of video cameras and other electronic monitoring in nursing homes warn that the presence of these devices will disturb the trusting relationship between nursing staff and residents.¹³⁸ Nursing home administrators claim neither residents nor employees want to be continuously filmed.¹³⁹ Insurers fear additional liability risks and lawsuits.¹⁴⁰

Lawyers are increasingly consulted about the legality and propriety of taping. It is unclear whether legislation is needed to operate such cameras, at least where the resident is not sharing a room with another person. Texas recently passed a law requiring nursing homes and related facilities to allow residents to install electronic monitoring devices in their rooms.¹⁴¹ Though not the only state to consider such a measure, Texas is the first to enact one. The use of such cameras should be discussed with the nursing home resident, the family, and the institution.

C. Americans with Disabilities Act Claims

Among the bodies of law the family practitioner must be conversant with today is the Americans with Disabilities Act¹⁴² (ADA). This is particularly relevant to elderly clients, many of whom have disabilities. The ADA has provided access for disabled persons to public accommodations and opportunities for employment previously closed to them. The ability to remain at home and not be inappropriately institutionalized in a nursing home or other facility is appropriately framed as a civil rights issue. The ADA gives many opportunities for creative advocacy on behalf of clients.

The U.S. Supreme Court's *Olmstead v. L.C. rel. Zimring*¹⁴³ decision held that the ADA prohibits states' public programs from unnecessarily institutionalizing persons with disabilities. Among other things, *Olmstead* required states to have a "comprehensive, effectively working plan" for placing qualified individuals in less restrictive settings, and waiting lists that move at a "reasonable pace."¹⁴⁴ States must assess whether persons have been inappropriately placed in state institutions, nursing homes, and other

elder abuse goes unreported. See ELDER AND DEPENDENT ADULT ABUSE: TRAINING TO IDENTIFY FINANCIAL ABUSE: HEARING ON A.B. 109 BEFORE THE SENATE JUDICIARY COMM., CAL. ASSEMBLY 109, 2001-2002 REG. SESS. (Cal. 2001).

138. See Charles H. Roadman II, *Surveillance Cameras in Resident Rooms*, AHCA NEWS RELEASE, (Aug. 1, 2000), available at <http://www.ahca.org/brief/080100.htm>.

139. See Jessica Rappaport, 'Granny Cams' Under Surveillance, TECH TV (Apr. 15, 2002) available at <http://www.techtv.com/news/culture/story/0,24195,3379593,00.htm>.

140. See Roadman, *supra* note 138.

141. See TEX. HEALTH & SAFETY CODE ANN. § 242.847(a) (Vernon 2001 & Supp. 2002).

142. 42 U.S.C.A. §§ 12101 *et seq.* (1995 & West Supp. 2000).

143. 527 U.S. 581 (1999).

144. *Id.* at 605-06.

facilities. The Medicaid program is critical. Not only do these state programs receive and provide major funding for both institutional and home and community-based services, but also eligible individuals have a legal entitlement to receive appropriate statutory services.¹⁴⁵ States must administer “services, programs and activities [*e.g.*, Medicaid] in the most integrated setting appropriate to the needs” of disabled persons.¹⁴⁶ In addition, many states make the “medically needy”—individuals who fit into a federal benefit program category, such as the aged, blind, or disabled, but whose income or resources are above the eligibility levels for the benefit program-eligible for Medicaid.¹⁴⁷ These persons can qualify if their income, minus incurred medical expenses, is less than the state’s income and resource levels.¹⁴⁸

Medicaid “waivers” allow states to avoid compliance with otherwise applicable federal laws and to provide services to persons at home or in the community, avoiding placement in a hospital or nursing home.¹⁴⁹ To this end, waivers can be used to provide services normally unavailable to Medicaid beneficiaries, including case management, homemaker/home health aides, personal care, adult day-care, health, habilitation and respite care.¹⁵⁰ Medicaid waiver programs offer great opportunities, but many problems need attention from family law practitioners. States have enjoyed almost unchecked flexibility in how they administer their home and community-based services. In many states, for example, beneficiaries have been placed on waiting lists, sometimes for years. These waiting lists violate the statutory requirement that “assistance shall be furnished with reasonable promptness to all eligible individuals.”¹⁵¹ Another Medicaid requirement, the “free choice” provision, provides that when a state covers both institutional and waiver program services, it must inform eligible individuals about feasible alternatives, if available under the waiver. Individuals have

145. See 42 U.S.C.A. § 1396a (Supp. 2000).

146. 42 U.S.C. § 12132; 29 U.S.C. § 794 as implemented by 28 C.F.R. § 35.130(d) and § 41.51(d).

147. See 42 U.S.C.A. § 1396a (Supp. 2000). The following jurisdictions have medically needy programs: California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

148. See 42 U.S.C.A. § 1396a(a)(17) (Supp. 2000).

149. See 42 U.S.C.A. § 1396n(c); 42 C.F.R. § 440.180 *et seq.* See generally 42 U.S.C.A. § 1396a(a)(21) (“[I]f the State plan includes medical assistance in behalf of individuals 65 years of age or older who are patients in public institutions for mental diseases, [a State plan for medical assistance must] show that the State is making satisfactory progress toward developing and implementing a comprehensive mental health program, including provision for utilization of community mental health centers, nursing facilities, and other alternatives to care in public institutions for mental diseases”).

150. See 42 C.F.R. § 440.180 (1999).

151. 42 U.S.C.A. § 1396a(a)(8) (Supp. 2000). See also 42 C.F.R. § 435.930 (“agency must: (a) furnish Medicaid promptly to recipients without any delay caused by the agency’s adminis-

the right to choose whether they will receive care under the waiver program or in an institutional setting.¹⁵²

Many states have failed to implement effectively their waiver programs, chiefly because of cost concerns. This should be challenged. To receive federal reimbursement, waiver services must be at least “cost neutral,” *i.e.*, the average per capita cost of home care may not exceed the average per capita cost to Medicaid of institutional care.¹⁵³ Moreover, the quality of care and quality of life at home is likely to be better than in an institution. Yet in fiscal year 2000, 73% of Medicaid’s long-term care funds were spent for institutionalized persons; only 27% went to provide services in the community.¹⁵⁴ Numerous suits have been brought to rectify this imbalance;¹⁵⁵ many more should be filed.

V. Grandparent-Grandchildren Relationships

A. *The Role of Grandparents*

Historically, the extended family has been common in American society and grandparents have always played a prominent role. Today that role is greater than ever. Based on current life expectancy, Americans can expect to spend about half of their life in the role of grandparent.¹⁵⁶ In single-parent households, as well as in the increasingly two-job traditional two-parent family, third persons are often asked to assist in everyday tasks of child rearing and to assume a share of the financial, psychological, and emotional role of parents. Grandparents have always been, and are even more so today, family members who meet these needs. Moreover, grandparents are increasingly facing the challenge of raising their children’s children. Between 1990 and 2000 there was a 30% increase in children living in grandparent-headed households—from 3.5 million in 1990 to 4.5 million in 2000.¹⁵⁷ At least 1.5 million children now live in a household where neither parent is present and the grandparent is the primary caregiver.¹⁵⁸

trative procedures; [and] (b) continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible . . .”) *Id.* § 435.911 (“agency must establish time standards for determining eligibility and inform the applicant of what they are”).

152. See 42 U.S.C.A. § 1396n(c)(2) (Supp. 2000); 42 C.F.R. § 441.302(d) (1999).

153. 42 U.S.C. § 1396 n(2)(D).

154. Fiscal Year 2002 Data, compiled by the MEDSTAT Group, available at <http://www.cms.gov/> (last visited March 17, 2004) (’02 institutional expenditures, \$57.41 billion; community expenditures, \$24.72 billion).

155. See, e.g., Consent Decree, Flores, et al., v. Huphreys, et al., Cause No. 49D02-0007-CP0971 (entered Feb. 18, 2004) Marian Co. (Ind) Superior Ct.; see also, Clarence Sundstrom, *Strategies for Implementing Olmstead Directives*. VICTIMIZATION OF ELDERLY AND DISABLED, 55-56 (Nov.-Dec. 2001) (discussing numerous cases).

156. Ellen Marrus, *Over the Hills and Through the Woods to Grandparent’s House We Go: Or Do We*, *Post Troxel*, 43 ARIZ. L. REV. 751, 759 (2001).

157. *Id.*

158. Ken Bryson & Lynne M. Casper, *Coresident Grandparents and Grandchildren*, U.S.

Grandparents can be positive influences on grandchildren in many ways.¹⁵⁹ What matters to a child is the presence of a sensitive, loving adult who provides the child with a sense of security, stability, and physical and psychological well-being.¹⁶⁰ Many experts believe the grandparent/grandchild relationship is uniquely significant to children, providing them with emotional security and valuable role models.¹⁶¹ In addition to one-on-one contact with the child, grandparents interact with and support the grandchild's parents,¹⁶² transmit values,¹⁶³ mediate between parents and children and rescue families in trouble.¹⁶⁴ Children often reside with or are taken care of by grandparents after their parents divorce or separate.¹⁶⁵

Bureau of the Census, available at <http://www.census.gov/prod/99pubs/p23-198.pdf>. Press Release, AARP, Grandparents Face Challenges Raising Grandchildren (New York) available at, <http://www.aarp.org/states/ny/Articles/a2003-06-24-ny-grandparents.html>.

159. A recent AARP Grandparenting Survey (The AARP Grandparenting Survey: The sharing and caring between mature grandparents and their grandchildren) explored many facets of the grandparent-grandchild relationship including communications, grandparent roles, activities, spending patterns, relationships, and values. AARP conducted a national survey of 823 grandparents age fifty and older found that 82% of grandparents had seen a grandchild in the past month, 85% had talked to a grandchild on the telephone, and 53% had sent a grandchild a greeting card. Also within the last month, about seven in ten had shared a meal with a grandchild, half had watched a television comedy or had their grandchild spend the night, and about four in ten shopped for clothes, took part in exercise or sports, watched educational television, attended a religious service, or watched a video. Fifty percent of grandparents say they frequently play the role of friend or companion for a grandchild. When asked to rate their relationship with one grandchild, chosen randomly by the computer, grandparents gave an average rating of 8.7 on a 10-point scale. AARP Grandparenting Survey, available at <http://research.aarp.org/general/grandpsurv.html>.

160. Shelley A. Riggs, *Response to Troxel v. Granville: Implications of Attachment theory for Judicial Decisions Regarding Custody and Third-Party Visitation*, 41 FAM. CT. REV. 39, 45 (2003).

161. ARTHUR KORNHABER & KENNETH L. WOODWARD, GRANDPARENTS/GRANDCHILDREN: THE VITAL CONNECTION 55 (1981). One psychological study, which focused specifically on the ties between grandparent and grandchild, found that grandchildren who maintained close contact with their grandparents were more at ease with the elderly, generally more emotionally secure, and less likely to be abused or become dependent on drugs. See Rebecca Brown, Comment, *Grandparent Visitation and the Intact Family*, 16 S. Ill. U. L.J. 133, 133 (1991). Vincent K. Adkins, *Grandparents as a National Asset: A Brief Note*, 24(1) ACTIVITIES, ADAPTATION & AGING, 13-18 (1999).

162. Riggs, *supra* note 160, at 45.

163. Values grandparents say they most want to pass on to their grandchildren are morals or integrity (42%), success or ambition (21%), or religion (20%). Riggs, *supra* note 160, at 45.

164. Marrus, *supra* note 156, at 758. This article lists some of the values present in the grandchild/grandparent relationship as:

Transmission of values from one generation to another; . . . serving as arbitrators between parents and children concerning values that are central to family continuity and individual enhancement. . . . [G]randchildren. . . perceive their grandparents as influential in their value development. Furthermore, studies have shown that grandparents can have "as much (if not more) influence upon the developing child as the child's own parents." The mediating role that grandparents, particularly grandmothers, often take on between the mother and child can indeed improve the mother/child relationship. *Id.*

165. Riggs, *supra* note 160, at 45. More than one third of parents and three quarters of their children will likely reside in a grandparent's home during or after a divorce. *Id.*

B. Visitation

Under common law doctrine, parents determined whether grandparents (or others) could have a relationship with their children. Unfettered parental autonomy in these matters was based on the idea that parents ordinarily act in the child's best interest.¹⁶⁶ That power was bolstered by a long series of Supreme Court decisions recognizing a parent's right to direct the upbringing of his or her child as a fundamental liberty interest under the Fourteenth Amendment.¹⁶⁷ Responding to rising divorce rates and other dramatic changes in American family life, all states passed statutes in the 1960s and 1970s recognizing the rights of third parties—especially grandparents—to participate in children's lives. These statutes typically named specific classes of individuals who may petition a court to determine if visitation is in the child's best interest.¹⁶⁸ Although there were contrary decisions,¹⁶⁹ most state courts upheld the constitutionality of these third-party-visitation statutes against challenges by parents.¹⁷⁰

The United States Supreme Court's 2000 decision in *Troxel v. Granville*¹⁷¹ reversed this trend, but its implications remain cloudy. Nine Supreme Court Justices wrote six opinions, appearing as divided as the family that litigated the case. The plurality opinion found the challenged Washington visitation statute "breathtakingly broad" and failed to accord deference to the parent's constitutionally protected autonomy:¹⁷²

The decision whether . . . an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the Court must accord at least some special weight to the parent's own determination.¹⁷³

166. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (Child's "interest is inextricably linked with the parents' interest").

167. E.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (stating "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom includes preparation for obligations the state can neither supply nor hinder"); *Wis. v. Yoder*, 406 U.S. 205, 232 (1972) (explaining that "the primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *H. L. v. Mathieson*, 450 U.S. 398, 410 (1981) ("[W]e have recognized that parents have a "guiding role" to play in the upbringing of their children, which presumptively includes counseling them on important decisions") (citation omitted).

168. See, e.g., KAN. STAT. ANN. § 38-129 (1993) (grandparents who can demonstrate "substantial relationship with grandchildren"); MD. CODE ANN., FAM. LAW § 9-102 (1999); GA. CODE ANN. § 19-7-3 (c) (West 1999) (visitation to be granted if in "best interests of child").

169. See, e.g., *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993).

170. The "vast majority of courts that have addressed the constitutionality of grandparent visitation statutes authorizing visitation if in the best interest of the child have upheld those statutes as constitutional." *Campbell v. Campbell*, 896 P.2d 635, 644 n18 (Utah Ct. App. 1995) (citing cases). See also, e.g., *King v. King*, 828 S.W.2d 630 (Ky. 1992) *cert. denied* 506 U.S. 941 (1992).

171. *Troxel v. Granville*, 530 U.S. 57 (2000).

172. *Id.* at 69-70.

173. *Id.* at 70.

The “special weight” to be given a parent’s decision-making in future cases was, probably purposely, left ambiguous in the plurality’s “as applied” constitutional analysis. The checkered pattern of subsequent cases challenging existing state visitation statutes attests to the lack of consensus by state courts regarding the precise meaning of *Troxel*.¹⁷⁴ Some state appellate courts have found existing state statutes facially unconstitutional when no question was raised about the fitness of the parent.¹⁷⁵ Others, taking Justice O’Connor’s suggestion,¹⁷⁶ have essentially rewritten grandparent visitation statutes to include more rigorous requirements before a trial court could overrule a parent’s right to decide visitation issues.¹⁷⁷ In other states, legislatures have redrafted their statutes to narrow the opportunity for courts to order visitation.¹⁷⁸

Yet grandparents with significant relationships with grandchildren are not without hope. Maintaining that relationship—which is separate and distinct from that of parents and child¹⁷⁹—is often in a grandchild’s best interests.¹⁸⁰ Some recent decisions have acknowledged a child’s right to continue such relationships. A New York family court observed:

174. See Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Court’s Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT REV. 14-38 (2003) (analyzing ten cases decided by state supreme courts in eight states since the *Troxel* decision. Three state courts declared grandparent visitation statutes unconstitutional as applied. One decision found the statute unconstitutional on its face, three found their state statutes facially constitutional, and one reached the same result regarding a visitation statute that applied only in cases of divorce).

175. See, e.g., *Wicham v. Bern*, 769 N.E.2d 1 (Ill. 2002); *Linder v. Linder*, 72 S.W.3d 841 (Ark. 2002) (mother’s unfitness to decide grandparent visitation did not equate to unfitness to parent).

176. *Troxel*, *supra* note 171, at 72-73.

177. See, e.g., *Roth v. Weston*, 789 A.2d 431 (Conn. 2002) (party seeking visitation must establish parent-like relationship and show denial of visitation would cause harm to child contemplated by neglect/dependency statutes).

178. See, e.g., N.D. CENT. CODE § 14-09-05.1 (2002) (specific finding needed that visitation will not interfere with parent-child relationship, and removing presumption that grandparent visitation is in the best interest of the child); OR. REV. STAT. § 109.119 (2001) (petitioner must overcome presumption that legal parent acts in best interest in the child by clear and convincing evidence); TENN. CODE ANN. § 36-6-306 (2001) (finding of danger of substantial harm to child needed before hearing required on petition for visitation).

179. See *Mimkon v. Ford*, 332 A.2d 199, 204-05 (N.J. 1975) (“[v]isits with a grandparent are often a precious part of a child’s experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship”). See also ARTHUR KORNHABER & SONDR A FORSYTH, GRANDPARENT POWER (1994); Christine Davik-Galbraith, Note, “Grandma, Grandpa, Where Are You?”—Putting the Focus of Grandparent Visitation Statutes on the Best Interests of the Child, 3 ELDER L.J. 143 (1995).

180. Dr. Arthur Kornhaber has noted that the consequences of denying a grandchild a relationship with their grandparents is “[t]o deny children access to their heritage and to prevent them from carrying that legacy into the future is a grave error which inflicts profound psychological wounds on all concerned.” Nicole E. Miller, *The Best Interests of All Children: An Examination of Grandparent Visitation Rights Regarding Children Born Out of Wedlock*, 42 N.Y.L. SCH. L. REV. 179, 191-92 (1998) (quoting KORNHABER & FORSYTH, *supra* note 179).

This Court views the New York Legislature, and many of the comments in *Troxel*, as telling parents and grandparents alike that, given the apparent disappearance of the traditional family, children's best interests require the opportunity for participation by siblings and grandparents to be sure that the moral obligations of familial relationships are carried out. What used to be known as the common law is not so common any more. Non-biologic care givers are assuming previous strictly parental roles more and more frequently.¹⁸¹

In another case, the court noted:

The historical development of family law in America, and the expansion of individual constitutional rights by the Supreme Court of the United States and the Court of Appeals of the State of New York, give foundation to a holding that a child has a constitutional right to maintain contact with a person with whom the child has developed a parent-like relationship. Accompanying that right, is also a right to the equal protection of the laws. This requires that the child have the due process necessary to claim his right. This claim can be given constitutional protection, while at the same time giving due recognition, respect and protection to a parent's constitutional right to the custody, care and control of his or her child.¹⁸²

On a more basic level, lawsuits between grandparents and parents regarding visitation obviously reflect enormous tension and conflict within these families. The adversarial nature of these cases, and the generally winner-take-all result, should lead family lawyers to consider their role thoughtfully in these situations. This type of litigation may well produce serious harm for the child. Additionally, the very length of these cases is often an additional detriment. The bitter dispute in *Troxel* between the mother and the grandparents regarding visitation with the daughters of the deceased husband proceeded through the trial court twice and through three levels of appellate review. The litigation lasted seven years. And in another high-profile grandparent—parent case, the O.J. Simpson contest took more than five years of trial and appellate review and ended only after a negotiated settlement.¹⁸³

What can we deduce from these examples? *Troxel* resembles “high conflict” child custody and visitation contests between divorcing parents,

181. *Fitzpatrick v. Youngs*, 717 N.Y.S. 2d 503, 507 (Fam. Ct., 2000). See also *In re Paternity of Roger D.H.*, 641 N.W.2d 440 (Wis. Ct. App. 2002); *Giljour v. Harris*, 795 So. 2d 350, 358 (La. App. Ct. 2001).

182. *Webster v. Ryan*, 729 N.Y.S.2d 315, 341 (Fam. Ct. 2001).

183. The Browns appealed and won a reversal and remand based on procedural and evidentiary errors by the trial court. *Guardianship of Sydney Simpson, et al.*, 79 Cal. Rptr. 2d 389 (App. Ct. 1998). Before a second custody trial, the parties negotiated a settlement, essentially reiterating the initial trial court decision. Juditha Brown was prompted to drop the custody fight at the urging of the children, who asked her to let them stay with their father. Hector Becerra, *Simpson's Former In-Laws Agree to Let Children Stay With Him Settlement*, LOS ANGELES TIMES, Aug. 6, 2000, at B3.

generally agreed by family lawyers and judges to be damaging to all concerned.¹⁸⁴ The contentiousness between parents ending their relationship is often present in grandparent visitation disputes. The parent may be motivated not by the child's best interest but by hostility to the family of the estranged partner or spouse. The characters in these human dramas find their lives probed by partisan experts; old incidents and wounds are revisited by opposing counsel in the courtroom, in pleadings, and in depositions. These lawsuits exact an enormous toll upon all participants. In a grandparent—parent visitation case, a New York court observed that the case presented a “tragedy in human interpersonal relationships which is basically beyond purview of the law.”¹⁸⁵ Another court examining extended litigation over grandparent visitation commented:

We can only wonder how courts are to determine when visitation has been unreasonably denied where, as here, a parent and adult child have become so estranged that they can not communicate and act only to hurt one another. We can only wonder what business courts have getting into such intra-family disputes.¹⁸⁶

Mediation or other less formal means of dispute resolution may well be better alternatives. A trained mediator encourages the parties to listen to one another, communicate their needs, and to explore alternatives and accommodations to reach a consensual decision on issues relating to children. Cooperation and compromise may resolve some or all of the issues that separate the parties, or at least narrow the gap so that attorneys may negotiate a settlement of the remaining issues.¹⁸⁷ Results of these processes include higher settlement rates and reduced court congestion, which enable courts to spend greater time on remaining cases.¹⁸⁸

184. “Amidst all this potential conflict there is a child. There can be no doubt that children survive divorce, and sometimes they do remarkably well. Yet, at the very least the parent's divorce is a trying time for the child, and at most it can cause life-long trauma.” PETER N. SWISHER, H. ANTHONY MILLER & JANA B. SINGER, *FAMILY LAW: CASES, MATERIALS AND PROBLEMS* 1093 (2d ed. 1998); “When a custody dispute goes to court, it is often bitterly fought. In the midst of the battling over their own rights, it is easy for parents to lose track of their children's needs and interests.” HARRY D. KRAUSE, LINDA D. ELROD, ET AL., *FAMILY LAW: CASES, COMMENTS AND QUESTIONS* 629 (4th ed. 1998).

185. *Doe v. Smith*, 595 N.Y.S.2d 624, 627 (1993).

186. *Komosa v. Komosa*, 939 S.W.2d 479, 482 n.2 (Mo. Ct. App. 1997).

187. Linda Silberman & Andrew Shepard, *Consultants Comments on the New York State Law Revision Recommendation on the Child Custody Dispute Resolution Process*, 19 COLO. J.L. AND SOC. PROBS. 399, 407 (1985).

188. Jay Folberg, *Mediation of Child Custody Disputes*, 19 COLO. J.L. AND SOC. PROBS. 413, 423 (1985). (Jurisdictions, such as San Francisco, that require mediation report settlement rates as high as 90%; 86% settlement rate in Dade County, Florida, and more than 54% in Los Angeles County). Thirty-three states have statutes or court rules that mandate mediation in contested custody and visitation cases. Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 FAM. ADVOC. 34 (1995).

VI. Elder Abuse & Neglect

Elder abuse and neglect is surely an unpleasant topic, but one that must be confronted by family law practitioners. Although no firm data on the actual amount of mistreatment exists, the number of elderly adults abused each year is believed to be between 1.5 and 2 million.¹⁸⁹ Only one in eight cases is actually reported to authorities; much mistreatment occurs within the family, and the elderly person is often simultaneously embarrassed by the abuse, fearful of future mistreatment and, paradoxically, protective of the abuser.¹⁹⁰ This "hidden problem" often affects persons with limited contact with outsiders.¹⁹¹

Elder maltreatment often has a devastating impact on victims. Because of their age, health, or limited resources, victims typically have few options for resolving or avoiding abusive situations. Their physical frailty makes them more vulnerable to physical or other abuse, and poor health often accentuates the problem.¹⁹² Older persons may be less able to recover from financial exploitation because of fixed incomes or a short remaining life span. The loss of a home lived in for many years may be particularly traumatic because of its familiarity, memories, and the trauma of being moved. It is no surprise that abuse and neglect correlate with a higher death rate. Studies have shown mistreated elders are 3.1 times more likely to die than their nonmistreated counterparts.¹⁹³ Elder abuse and neglect is as dangerous to the health and well-being of older adults as many chronic diseases associated with death and disability.¹⁹⁴

Although there are many different statutory and judicial definitions of

189. SUBCOMM. ON HEALTH & LONG-TERM CARE OF THE HOUSE SELECT COMM. ON AGING, 101ST CONG., *ELDER ABUSE: A DECADE OF SHAME AND INACTION*, XI (Comm. Print 1990) [hereinafter 1990 ELDER ABUSE HOUSE REPORT] (estimating more than 1.5 million persons may be victims of such abuse each year and the number is rising). See 1990 National Center on Elder Abuse, *The National Elder Abuse Incidence Study*, pt. 5, *Conclusions*, available at <http://www.aoa.gov/abuse/report/H-Conclusions.html> (hereinafter NEAIS). See also Karl Pillemer & David Moore, *Highlights from a Study of Abuse of Patients in Nursing Homes*, 2 J. ELDER ABUSE & NEGLECT 5, 18-19 (1990) (finding 36% of all nursing home personnel reported seeing at least one incident of physical abuse by staff members; 40% admitted committing psychological abuse in the past year).

190. See, e.g., Jordan Kosberg & Daphne Nahmiash, *Characteristics of Victims and Perpetrators and Milieus of Abuse and Neglect*, in *ABUSE, NEGLECT, AND EXPLOITATION OF OLDER PERSONS: STRATEGIES FOR ASSESSMENT & INTERVENTION* 31 (L. Baumhover and S.C. Beall eds., 1996).

191. *Id.* at 32.

192. Although it would be inaccurate to describe the vast population over sixty-five with one generalization, physical decline eventually becomes an aspect of the aging process. See generally D. TOMB, *GROWING OLD* 15-40 (1984). Chronic health problems increase dramatically in this age group. R. ATCHLEY, *SOCIAL FORCE & AGING* 91 (1988).

193. See Mark S. Lachs et al., *The Mortality of Elder Mistreatment*, 280 JAMA 428 (1998).

194. See *id.*

financial abuse, it generally consists of the illegal or improper use of an elder's assets, *e.g.*, theft, fraud, and breach of fiduciary or caregiver duty. At most, only one out of every five financial abuse cases is reported.¹⁹⁵ Though the reasons for financial abuse may vary, the fact that persons over the age of fifty-five control at least 70% of the nation's household net worth reflects its target.¹⁹⁶ There is also an important gender issue. Many older women have never handled their own financial affairs, depending on their husband for that function. While learning to manage their resources, they are often an inviting target.

Lawyers are in a strategic position to identify and repair financial abuse, especially by family members. At least five states require attorneys to report any reasonable belief that financial abuse has occurred.¹⁹⁷ Lawyers often draft durable powers of attorney and create and administer guardianships, trusts, and other instruments.¹⁹⁸ As a result, attorneys are often in a position to warn clients about the possibility, or actual misuse, of these legal devices. Warning signs of financial exploitation include: dramatic changes in withdrawal patterns; unusual checks written to cash; signatures that do not appear genuine; a decrease in a senior's spending; unpaid bills after a long history of prompt payment.

VII. Ethical Issues in Representing the Elderly

A. Identifying the Client

Often the lawyer is contacted not by the older person, but by a son, daughter or other relative. These family members are frequently involved in advising, assisting, and even directing financial and practical arrange-

195. NEAIS, *supra* note 189, at 4.

196. *Kemper Funds Study Reveals Investors over Age 55 Control Nation's Wealth*, SENIOR JOURNAL.COM, June 26, 2000 available at <http://www.seniorjournal.com/NEWS/2000%20Files/June%2000/FTR-6-26-00SnrsCntrlWlth.htm>.

197. ARIZ. REV. STAT. ANN. § 46-454(B) (West 2000) (attorneys in some roles have a duty to report); MONT. CODE ANN. § 52-3-811(3)(f) (2000); NEV. REV. STAT. § 200.5093 (1999); OHIO REV. CODE ANN. § 5101.61A (Anderson 2000); TEX. HUM. RES. CODE ANN. § 48.051 (Vernon 2000). *See also* DEL. CODE ANN. TIT. 31, § 3910 (1999) (requiring any person with a reasonable belief that abuse is occurring to report); FLA. STAT. ANN. § 415.1034(1) (West 2000) (requiring any person having knowledge of abuse to report); KY. REV. STAT. ANN. § 209.030(2) (Michie 2000) (requiring any person having reasonable cause to suspect abuse to report); N.H. REV. STAT. ANN. § 161-F:46 (1999) (requiring any person suspecting or believing abuse has occurred or is occurring to report); N.M. STAT. ANN. § 27-7-30 (Michie 2000) (requiring any person having reasonable cause to believe abuse is occurring to report); OKLA. STAT. ANN. TIT. 43A, § 10-104 (West 2000) (requiring any person with reasonable cause to believe abuse is occurring to report).

198. One of the issues that a principal should consider when executing a financial durable power is whether to include a power to make gifts. This type of power is frequently granted in financial durable powers of attorney. The grant of such a power should be made with great caution. *See generally* Hans A. Lapping, Note, *License to Steal: Implied Gift-Giving Authority and Powers of Attorney*, 4 ELDER L.J. 143 (1996).

ments for care of the aged relative. The elderly person may not even be present at the interview. If present, the elderly person typically is accompanied by one or more younger family members who provides the documentation or information the attorney needs about the senior citizen or his property.¹⁹⁹ Bankbooks, mortgage documents, financial statements, tax returns, etc., may well be under the control of the relative. There may, of course, be a conflict of interest between the child and the parent, and if it is evident initially, the attorney must quickly decide who the client is and explain completely and openly to other family members the limitations this will impose. A written retainer agreement may be a practical way of clarifying the client's identity or a letter to other family members clearly stating that the lawyer is not representing them.

An attorney has the duty to maintain complete confidentiality regarding almost all client disclosures.²⁰⁰ When the client is the senior, he or she should be informed that confidentiality is waived if a child or another family member is present during the interview, reads mail from or to the attorney, or is invited to participate in other ways. Asking the accompanying family member to wait in another room while the attorney meets privately with the senior client may immediately produce an awkward situation for those not familiar with attorney-client privilege.

B. Joint Representation

As an alternate solution, the lawyer may be asked to represent multiple clients, including the aged person, who have "sought the services of one lawyer to help them resolve differences or execute a transaction between or among themselves. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but common representation may be inferred from other circumstances."²⁰¹ When the lawyer acts as an intermediary, he or she must obtain informed consent from each client after having explained the advantages and disadvantages of common representation. That may be difficult with an aged, dependent family member.

Independent of that consent, the lawyer must reasonably believe that the matter can be resolved on terms compatible with clients' best interests, that each client is competent to make informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the clients.²⁰² While acting as an intermediary, the lawyer must be impartial

199. LAWRENCE A. FROLIK & ALISON MCCHRYSTAL BARNES, *ELDER LAW: CASES & MATERIALS* 60 (2d ed. 1999).

200. MODEL RULES OF PROF'L CONDUCT R. 1.6 (1998) (hereinafter, MODEL RULES).

201. MODEL RULES R. 2.2. The comment states that "a lawyer acts as intermediary under this rule when the lawyer represents two or more parties with potentially conflicting interest."

202. *E.g.*, can the attorney fulfill his or her obligation to each individual including loyalty

as to the competing interests of the individual clients. If there is any conflict in this intergenerational representation, the attorney must make a choice of whom to represent and inform all parties. This often will be difficult for an attorney contemplating future legal work as executor or attorney for the estate or future representation of younger family members. All rights to confidentiality and attorney/client privilege must be waived as between the clients involved in the intermediation, although commentary to Rule 2.2 suggests that it may be possible to preserve some limited rights.²⁰³

C. Payment of Fees

If the family member, typically a child, is paying the parent's attorney fees, that information must be disclosed and appropriate consent obtained.²⁰⁴ The assets of many aged persons—*e.g.*, retirement accounts or equity in a mortgaged home—are often unavailable quickly or without substantial changes in personal and living arrangements. The duty of loyalty is impaired, however, if the attorney gives priority to another's interests, such as those of the payer of the fee, thus rendering the lawyer unable to advocate effectively for the client.

D. Capacity

A particularly sensitive matter in dealing with elderly clients is assessment of the capacity of the elderly relative to make decisions. Often a decision about whether to seek guardianship may be the triggering event that brings the family member, and perhaps the elderly parent, to the lawyer's office. Determining the degree of mental impairment that must be present to predict an individual's need for assistance is difficult for most lawyers.²⁰⁵ Legal capacity varies according to the decision to be made.

(*i.e.*, avoiding conflicts of interest (MODEL CODE OF PROF'L RESPONSIBILITY Canon 5 (1980) [hereinafter MODEL CODE]; MODEL RULES R. 1.7); competency and diligence (MODEL CODE Canon 6 (1980); MODEL RULES R. 1.1); zealous advocacy (MODEL CODE EC 7 (1980); MODEL RULES R. 1.1 & 1.2). Is communication sufficient to enable the client to make informed decisions about the representation? MODEL CODE EC 7-8 (1980); MODEL RULES R. 1.4.

203. The comment to Rule 2.2 provides: A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information related to the representation. *See* MODEL RULES R. 1.4 and 1.6 (1998). ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:36 (1993).

204. A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client." MODEL RULES R. 1.7. *See also* MODEL RULES R. 1.8(f)(1).

205. The following standard was proposed by THE PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTHCARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATION OF INFORMED CONSENT IN THE

VIII. Conclusion

Family law practice and the elderly intersect at many points. The topics discussed in this essay are by no means exhaustive; numerous other issues could have been analyzed. The legal needs of the elderly implicate numerous bodies of substantive and procedural law. Even mundane day-to-day matters such as the older person's driving privileges present legal and interpersonal challenges.

Effective lawyers seek to maximize the probability of achieving client objectives while minimizing legal risks and costs. In representing elderly persons, traditional lawyering skills—interviewing, counseling, planning, drafting, etc.—are critical. Even the best planning and implementation often will require monitoring and alteration as circumstances change. Our challenge as family law practitioners is to grow in skill and knowledge to meet the needs of our older clients and their families.

PATIENT-PRACTITIONER RELATIONSHIP 57-62 (1982):

Decision making capacity requires, to a lesser or greater degree: (1) possession of a set of values and goals; (2) the ability to communicate and to understand information; and (3) the ability to reason and to deliberate about one's choices. An emotional state consistent with the task also is required.