Theories on Law and Ageing

The Jurisprudence of Elder Law

Bearbeitet von
Israel Doron

1. Auflage 2008. Buch. xv, 157 S. Hardcover
ISBN 978 3 540 78953 6
Format (B x L): 15,5 x 23,5 cm
Gewicht: 940 g

Chapter 2
Later Life Legal Planning

L.A. Frolik

2.1 Introduction

In response to client needs, elder law has expanded and is gradually redefining itself into "later life planning." While some still identify elder law with helping clients pay for long-term care, specifically in the United States by qualifying for Medicaid, the reality is that the practice of elder law is a rich mosaic of legal planning that is continually evolving to better meet clients' legal, financial and social needs and concerns.

While ten years ago, Medicaid planning to pay for long-term care was the focus of the practice of many, if not most, American elder law attorneys, that is no longer the case. Certainly Medicaid planning remains a core element in any elder law practice, but it is only one of many aspects of the practice that includes guardianship and mental capacity issues, long-term care planning, basic estate planning, drafting trusts, advising trustees, acting as trustees, creating special needs trusts, and advising clients as to their rights vis-a-vis assisted living facilities, nursing homes, and continuing care retirement communities. Elder law is even expanding into financial planning and "life care" planning that assist the client to address their financial and care needs of what for many is likely to be a very long life.

Though elder law attorneys have clients of all ages, because of the vicissitudes of aging, the very old have a particular need for legal assistance. The reality is that growing old, particularly growing very old, presents a host of legal problems. Consequently, for elder law attorneys, the very old, those age 80 or older, are becoming the foci of their practice.

2.2 Physical and Mental Decline and the Need for Legal Assistance

While the rate of aging varies, by age 80 most individuals have declined physically (Williams 1995, p. 3–41). They may have lost strength and flexibility, and so become referred to as frail. Other common, though not universal occurrences, include loss of hearing, loss of vision, often due to macular degeneration, and decline

I. Doron (ed.) *Theories on Law and Ageing: The Jurisprudence of Elder Law*,

in short-term memory. None of these makes the individual incapacitated, but alone or in combination they often result in older persons needing help with their personal or financial affairs.

While the law does not consider physical decline as reason for intervention or as something that precipitates the loss of rights, in reality significant physical decline makes an individual more dependent upon others. As individuals age, they lose physical vigor with the result that often they gradually (or suddenly as in the case of a stroke) can no longer handle their affairs alone and must rely on the assistance of others. Even the most commonplace of disabilities can render an individual incapable of handling some of their affairs. For example, the onset of macular degeneration can mean the loss of the ability to read, not just a newspaper, but more importantly the monthly bank statement or brokerage firm account. If the older person cannot read those statements, much less investment advice newsletters, the investor is no longer capable of actively managing his or her accounts. And the bills must be paid even if the older person's eyesight does not permit reading the mail. The answer, creating a durable power of attorney for property management is one solution, but just what authority the power should grant to the agent, who should be the agent, who should monitor the acts of the agent and whether the appointment of the agent will prevent the later appointment of a guardian are questions best answered by a knowledgeable attorney.

Beyond property management, a client's physical decline should also trigger a reexamination of the client's housing. As individuals reach their 80s, the effects of aging can begin to play a role in their choice of housing. The decline of physical strength and vigor is accompanied by a loss of muscle and joints becoming stiff and painful so that walking becomes more difficult and stairs can become an imposing obstacle. Because bones are weaker and more prone to breaking, slipping on a throw rug or on an icy front stoop creates a significant danger. Whereas formerly maintaining the house and lawn was merely an annoying chore, it now becomes a burden that saps the energy of the older person. Heavy cleaning and household maintenance become almost impossible with the result that the older house that an aging couple has lived in for many years may no longer be appropriate and may even create a risk of injury to them. Of course, the degree that physical decline affects an older person varies greatly from one individual to the next, but for many, the decline in physical capacity means that their current housing situation is no longer appropriate.

Loss of vision presents particular housing challenges for the elderly. With reduced vision, living alone or in a large house is not only difficult but unsafe. For example, hip fractures and other injuries resulting from falls often occur because impaired vision leads to tripping or missing a step. Almost all older individuals suffer some vision loss, including loss of ability to read fine print, sensitivity to glare, a decline of peripheral vision, and difficulty in adjusting from the light to the dark. In addition, many older persons experience eye diseases, for example, it is estimated that over 40% of persons age 75 or older have cataracts. For many, driving is no longer possible and even using simple tools, such as a screwdriver, or reading the instructions for a home appliance become almost impossible tasks, with the result that basic house maintenance – even replacing a light bulb – becomes increasingly difficult.

Hearing loss is also common among older persons. Beginning around age 50, most individuals experience a gradual loss of perception of the higher and lower frequencies, and one-third of adults between 65 and 74 and one-half of those between 74 and 79 experience presbycusis, a gradual deterioration of the inner ear that results in a permanent hearing loss. Although the condition can be somewhat corrected with hearing aids, diminished hearing makes individuals less sensitive to noise that could alert them to dangers or problems in the household. Just one more reason why living alone in an isolated or unsecured house may not be sensible for a very old individual.

Typically, as people age they also suffer a loss of short-term memory that is not associated with the onset of dementia. Rather a decline in short-term memory is a result of the natural aging of the brain and does not indicate a loss of mental cognition or capacity. The individual can reason as well as ever but can find it difficult to remember names, numbers, or specific information. As short-term memory fades, maintaining a house becomes more difficult. For example, trying to remember and compare the different estimates to paint a house can make it difficult to choose the best option. Remembering how to use a new household gadget, such as an automatic bread maker, can be frustrating. Of course, instructions can be written down and lists created of tasks to perform, but instructions can be confusing and lists lost.

While using notes and lists may solve common household puzzles, they are not as useful for more complex tasks such as managing finances where the ability to remember numbers, proportions, advice and warnings is so important. When memory fails, and if poor vision makes reading difficult, the natural response is to rely on someone else to advise, or even decide, as to how savings should be invested. Unfortunately turning to another for assistance can lead to bad advice, poor execution or even worse, exploitation and abuse.

The combination of reduced poor memory, physical vigor, declining vision, and hearing loss can make living alone or maintaining a house very difficult. Tasks that used to be simple, such as raking leaves, changing a fuse, or cleaning out gutters, can become almost insurmountable. Negotiating with individuals to come to the home and perform necessary maintenance or repairs can be a source of exploitation and even danger. Inappropriate housing is just one part of the mosaic of problems faced by the elderly that need to be resolved by a holistic approach that integrates solutions to social, personal and legal problems. An elder law attorney is uniquely situated to provide information and advice tailored to the client's needs. For example, any proposed change in housing requires an appreciation of the potential future needs of the clients so that today's "solution" does not become tomorrow's "problem."

2.3 Chronic Conditions and Housing Choices

Beyond the normal physical and mental declines of aging are the conditions and diseases that erode autonomy and lead to increasing dependence and vulnerability. Severe arthritis, pulmonary disease, strokes, and the most prevalent condition for the very old,

dementia, all create the need for daily help (see generally Section 3 "Medical Conditions," in Beers 2004 [hereinafter Merck Manual]). The progressive nature of many chronic conditions means that over time the individual will lose physical and mental capacity and require ever increasing assistance.

It is at this point that many elderly individuals seek out an elder law attorney. What can a knowledgeable attorney do for such clients? Actually quite a lot. First is the matter of housing. Older individuals need to reside in appropriate housing, that is, housing that is safe, affordable and that presents maintenance and repair tasks that are proportionate to the ability of the older person's ability to deal with, either personally or by hire. Additionally the housing should be near enough to the services that the individual requires so that the services can be obtained at a reasonable cost and in a timely manner.

The client should be helped to triangulate his or her housing location, price and accessibility to services to determine whether the housing is appropriate now and in the future. Often the answer will be that the housing is either not currently meeting the needs of the client or that it will soon not be appropriate in light of the client's deteriorating condition. The solution is either in-home care or relocation. If the answer is in-home care, the attorney can explain the advantages, costs and potential disadvantages such as the problems caused by a careworker not showing up or the risk of theft from having a stranger in home. Relocation offers a variety of choices including an apartment or condominium located near needed services such as a hospital or physician; an age-restricted facility built to meet the needs of a physically impaired resident or that has therapeutic exercise facilities such as a swimming pool; supportive housing that provides housekeeping and meals; assisted living that provides daily personal care in a secure environment; assisted living that specializes in care of residents with dementia; a continuing care retirement community that will accommodate the increasing need for personal care; or a nursing home if the client's medical care needs require that level of care.

Spouses are the most common source of care for older persons with wives caring for husbands being the most frequent arrangement (Smith 2004, p. 351, 361). Because husbands are often older than their wives, have shorter life expectancies, and often are less skilled at or comfortable with being a caregiver, older women who need assistance either must find institutional or paid care or look to their families, usually adult children, for help (Lee et al. 1993, p. 9). Many adult children do provide the increasing care needed by an elderly parent, but while their intentions are good, they often realize neither the extent of the obligation that they are undertaking nor the accompanying legal issues that such an endeavor raises. What begins as an informal, ad hoc arrangement too often grows into a time consuming, stressful, demanding obligation.

When caregiving turns from running an occasional errand to providing regular personal care, the children would be wise to create a caregiving agreement that details the obligations of the children, who will provide the care and what compensation will be paid. Even if family members are willing to donate their labor, someone will have to pay for supplies and some care will likely be provided by specialists, such as visiting nurses. The need for a carefully drawn up contract to

protect the rights of the older person is apparent to any attorney. Unfortunately, too often families think that because they are families, no legal advice is needed. They go ahead and agree that the house of the older person should "go to" the granddaughter who agrees to move in with her demented grandmother, not considering what should happen if the grandmother dies unexpectedly or if she should have to move into a nursing home in a few weeks because the dementia progresses rapidly. If the older person has the necessary capacity to change the deed, the family will often encourage him or her to put the house in joint name with the caregiver relative, who later decides the job is too difficult and moves to another state. Or the caregiver falls in love and has her boyfriend move into the house of the older person. The possible scenarios that could lead to bad outcomes are endless, which is the reason for legal advice and a contract.

If the decision is to hire professional assistance, the attorney will advise the family to use an agency rather than directly hiring a caregiver. Most elder law attorneys can direct families to professionals, not just caregiver agencies. Providing guidance and direction to a client or family in a time of stress and uncertainty is sometimes the most valuable "work" that the attorney can perform. By the time clients or families come to an elder law attorney, it is often too late to plan ahead, rather the need is for immediate action to meet a crisis. A good elder law attorney will have a list of potential housing options and service providers to assist the client or family in finding an appropriate solution.

A decline in mental capacity not only suggests the need to reexamine the client's housing, it also means that the client may now need or may soon need a substitute decision maker. The traditional answer to the loss of mental capacity is guardianship whereby someone petitions a court to find the older person incompetent and in need of a guardian. If the older person is found to be legally incompetent, the court may appoint a guardian who will act as a substitute decision maker and handle the older person's financial affairs and possibly also make decisions concerning the individual's personal affairs. Though filing for a formal guardianship is always a possibility, it is expensive, open to public scrutiny and subject to what can be unwanted judicial oversight and intrusion (for a discussion of guardianship, see Frolik 1981, p. 599). Consequently, most elder law attorneys believe it should be avoided if possible. Fortunately, with foresight and planning, guardianship can be avoided by the use of durable powers of attorney, trusts, and joint ownership arrangements.

2.4 Property Management Options

Even if the older person has lost some capacity, he or she may still have the mental capability to engage in planning for property management. Of course, if the older person has a spouse, the problem is greatly simplified. Typically most, if not all, of the assets are in joint name and so the well spouse can manage the couple's financial affairs. If the assets are not jointly titled, this might be the time to make that occur. If there is no spouse, one option is to jointly title the assets of the older person with

an adult child that will permit the child to pay bills and manage investments. Care must be taken, however, to not inadvertently create joint ownership with rights of survivorship, which would make take the property out of the estate of the older person and make it not subject to the provisions of the older person's will. Jointly held bank accounts can be opened as "convenience" accounts so that the joint owner, the child, does not become the owner of the bank account at the death of the older person. A bank may even permit the child to sign checks on an account without becoming a joint owner.

Because of the post-death ownership problems caused by joint accounts with nonspouses, however, most elder law attorneys discourage their use. Instead they advise the client to sign a durable power of attorney that names an agent to manage the financial affairs of the older person. The older person can sign a durable power of attorney so long as he or she has mental capacity to sign a contract, meaning that the individual can reasonably understand the nature and effect of the act (Frolik and Radford 2006, p. 303, 313). This relatively low level of capacity enables even somewhat demented elderly to sign a durable power of attorney, and certainly elder law attorneys, recognizing the value of doing so, aggressively act to have clients sign such powers even when the client has diminished capacity. Of course, a durable power of attorney must be drafted to comply the legal requirements of the jurisdiction in which it is executed, but standard practice is to have the document witnessed and notarized. Typically more than one copy is signed because the agent acting under the power may have to present an original copy to a third party such as a bank or a brokerage house, who may even insist that they retain an original copy of the power.

The authority granted an agent under a durable power of attorney can be tailored to the needs of the person signing the power, who is known as the principal. Most very old clients are best served by giving the agent extensive powers, usually as broad as legally possible, in order that the agent has the flexibility to respond to whatever may arise. To ensure that the agent acts responsibly, some powers require the agent to account or report to a third party as to what the agent has done. For example, if one child, Marie, who lives near the older person is named as agent, she will have to make monthly reports to the other child, Gwen, who lives far away. This way Gwen will understand what Marie is doing and, if she has any concerns, she can raise them with Marie in a timely fashion. Many powers limit the amount of gifts to prevent the agent from dissipating the estate of the principal. Some powers permit gifts, but only up to a limited amount or only with the approval of another party. Many elder law attorneys, while recognizing the potential danger of permitting gifts by an agent, nevertheless believe that the durable power of attorney should permit them, albeit with some level of protection, to ensure that the agent will have the authority to engage in transfers as part of Medicaid or estate planning.

While the creation of a durable power of attorney for an older client is almost standard practice, it is often not sufficient. The potential problem of managing the finances of a mentally impaired older client is a major concern for elder law attorneys. As life expectancy lengthens and older clients own more assets, the need for more sophisticated ways of providing assistance for asset management and protection

dramatically increases. After the use of a durable power of attorney, the next most popular solution is a revocable living trust in which the clients place their assets for protection in the event that they should lose metal capacity. The clients create a revocable living (*inter vivos*) trust and name themselves as trustees. (A couple often creates a single joint trust and names themselves as co-trustees.) They typically name their spouse, or is there none, the children, as the successor trustee or trustees in the event that they lose mental capacity or choose to resign if they believe that they are no longer effective at managing their financial affairs. At their death, the trust assets will be distributed as directed in the trust, which will provide for distributions that are consistent with the estate plan of the person who created the trust.

Many attorneys contend that older clients of means should routinely execute both a durable power of attorney and a revocable living trust. While a durable power of attorney is very useful for routine activities such as paying bills, a trust is preferable for asset preservation because of the extensive statutory and case law that governs the law of trusts and the obligations of trustees, as opposed to the less well developed legal obligations of an agent acting under a durable power of attorney. Third parties such as banks are also more willing to deal with a trustee than an agent. If the bank has a copy of the trust and a letter of resignation by the settlor of the trust as trustee, the bank should have no problem accepting the authority of the successor trustee.

If the older person has both a durable power of attorney and a living trust, the agent acting under the durable power of attorney will handle routine financial matters such as paying the bills, depositing checks, paying workmen and handling the checking account. The trustees of the living trust will handle the investment decisions and make any distributions or gifts beyond modest holiday gifts. The income of the older person would be paid into the trust with the trustees providing money as needed to the agent acting under the durable power of attorney.

2.5 Later Life Health Care Decision Making

The very old often face critical health care decisions including end of life decisions. The doctrine of informed consent requires that a patient direct his or her medical care and thus preserve personal autonomy. To give informed consent, the patient must understand his or her medical condition, the nature of the proposed treatment or procedure, the risks and benefits of the proposed course of action, and the alternative treatment choices. Clearly, informed consent demands a fairly competent patient who can understand and appreciate the information presented and the choices that must be made. Not all older individuals have that degree of capacity. Consequently, a significant aspect of elder law is to assist older clients to create documents that provide an alternative form of health care decision making in the event that the client is unable to give informed consent to health care.

The client can either sign a living will or appoint a substitute health care decision maker. A living will is a document that attempts to govern the end of life health care of a mentally incapacitated patient. Every state has a statute that grants

individuals the power to sign a living will and imposes a duty on those treating the individual to respect and follow the directions in the living will. Though very popular a few years ago, and still in general use, most elder law attorneys are not enamored with a living will and prefer that the client appoint a surrogate health care decision maker. Living wills are considered to be too inflexible and not finely tuned enough because no one can anticipate what medical decisions need to be made near the end of life (Perkins 2007, p. 5). While a living will can indicate that the individual prefers death to extraordinary medical care, that degree of generality may not be much help when it comes to making specific treatment decisions. Instead, elder law attorneys now prefer to have the individual sign a durable power of attorney for health care, or as it also known, the appointment of a surrogate health care surrogate decision maker, to whom the treating physician can turn to discuss treatment options if the patient has lost the capacity to participate. The agent or surrogate will be empowered to act on behalf of the patient and have authority to act, just as if he or she were the patient, including the right to terminate life sustaining treatment.

Of course, merely appointing a surrogate decision maker is not the end of the matter; the older person must talk to the surrogate about the kind of treatment decisions to make. Ideally the surrogate would understand the values and hopes of the principal and translate that knowledge into decisions that respect and promote the views of the principal. Elder law attorneys realize that the topic of how to be treated at the end of life is something that many would prefer to ignore or put off to a later day. Getting clients to appoint a surrogate and to discuss thoughtfully end of life care with that surrogate is an important aspect of counseling older clients. As the client ages, the document should be revisited, as experience teaches that the health care decisions that make sense for a 70-year-old may not be appropriate for a 90-year-old. The surrogate should be counseled to be aware of the possibility that the older person could someday suffer from depression, dementia or delirium with the result that the older person might resist medical care but appear to have capacity. In such a situation the agent must be prepared to intercede and insist that the older person be aggressively treated for the condition that is interfering with his or her ability to make reasonable decisions about health care.

While planning for a surrogate to make acute health care decisions is important, planning for chronic health care is also a compelling need. Chronic care needs arise from both physical, such as strokes, and mental, such as dementia, causes. Planning for chronic care means thinking about how to obtain necessary care and how to pay for it. As discussed, an individual's choice of housing is an important component of chronic care. For the vast majority of the elderly, the question is whether adequate care can be provided at home or whether they will have to move into an assisted living facility or nursing home. Although having care provided at home is the overwhelming preference of most elderly, too often it is not possible. While a spouse can often provide care for a time, if the chronic condition continues to progress and the patient's needs increase, professional assistance may be needed, and home care may no longer be affordable or in some cases even feasible.

2.6 Planning for Chronic Care Needs

Because long-term care planning is a critical element of later life, elder law attorneys often serve as advisors to spouses and families as to the practical choices open to them when a spouse or parent has chronic care needs. Any elder law attorney can tell of numerous phone calls from adult children who relate how Mom or Dad, "Just can't live alone any more." The family or spouse needs a realistic discussion of how to provide for the needs of the older person—realistic both in terms of quality of care and of cost. For a family, caring for someone with a progressive chronic condition may be a unique experience, but for the attorney, the story is a familiar one. The attorney can advise as to how to find and pay for home health care, respite care and, if necessary, institutional care.

For individuals with in-home care needs, a well spouse is sometimes capable of handling the situation, but often he or she cannot. If, for example, a husband, age 88, has suffered a stroke and requires assistance with dressing and bathing, his spouse, age 85, may not have the strength to act as his personal care assistant or she may become worn down or exposed to injury, such as falling, while assisting her husband. Couples need to realize that caregiving can be very difficult both emotionally and physically, and that a little help can go a long way to preserving the health of the well spouse. An elder law attorney can often give advice as to a way that permits the well spouse to hire help while avoiding feelings of guilt for needing assistance. The mere existence of a spouse, however, does not mean that he or she will be capable of doing much for the spouse who needs long-term care. Often the "well" spouse has needs of her own. For example, if she has macular degeneration and cannot drive, she will have difficulty in shopping and running errands, and her poor eyesight may make it very difficult to manage the couple's finances.

Individuals with chronic care needs must appreciate that their care needs are likely to progress along a continuum, beginning with rather modest assistance to ever increasing levels of care. They must also understand that their care can be divided roughly into two types: custodial and medical. Custodial care refers to non-medical, personal care of the individual such as bathing or dressing. Medical care refers to the provision of medical services such as pain management or physical therapy as well as treatment for the underlying condition.

Custodial care is needed by individuals who have lost the ability to independently perform day to day care needs, which gerontologists have classed as activities of daily living (ADLs) and instrumental activities of daily living (IADLs). ADLs are essential self-care activities and are usually listed as eating, dressing, bathing, transferring between a bed and a chair, and using the toilet (Frolik 2006, p. 65). The inability to perform one of these activities is called a "deficit." Individuals with deficits in ADLs cannot safely live alone because they need daily care and are typically candidates for residence in an assisted living facility where they will receive help as needed. For example, the facility will have special step-in bathtubs that may enable the resident to safely take a bath alone or the facility may provide an aide to assist the individual to take a bath and to get dressed.

IADLs are not as rigidly defined as ADLs and include common activities in and out of the home such as shopping for groceries, preparing meals, performing housework, taking drugs as instructed, going on errands, using a telephone, and managing basic finances such as paying the monthly utility bills (see Section 3 "Medical Conditions," in Merck Manual 2004, p. 22). Individuals with IADL deficits can often continue to live at home, be it a house, condominium or apartment, though they do need assistance, which can come in several forms. An elder law attorney can explain the options and help craft an affordable and safe solution. Groceries can be delivered, taxis or publicly sponsored transportation for the elderly can solve the problem of getting around town, a relative with a durable power of attorney can look over the mail and pay bills, and a daily attendant can visit the older person for a couple of hours each day to assist with housework, prepare a meal and see that the older person takes his or her prescribed medication.

The ability to drive is critical for most Americans to be able to perform the IADLs as there is rarely adequate public transportation, and what they need is usually not within walking distance. Here again, the elder law attorney can raise the issue of whether it is realistic to expect a very old spouse to single handedly perform all the IADLs needs of the couple. Merely asking the well spouse to do that much driving, in light of her slower reflexes and poor eyesight, may put her at considerable risk. Because the burden and risk on the well spouse may not be appreciated by her or even by the adult children, it is part of the duty of the elderly law attorney to raise the issue and point out that the couple may need some assistance.

If no one is available to volunteer to help, the elder law attorney can assist in locating paid help such as a driver, a personal assistant or a daily homemaker assistant. A better solution in many instances is to hire a professional geriatric care manager to either perform the work herself or coordinate the hiring and supervision of others. By virtue of their training as a registered nurse, licensed social worker, or gerontologist, geriatric case managers understand the physical, mental and social needs of the elderly, can assess the client's capabilities and needs, judge what is a realistic expectation of help from a spouse, and coordinate volunteer efforts of family and friends. Usually the geriatric care manager is an independent proprietor but a few elder law offices employ geriatric care managers as staffers and some hire the geriatric care manager as an independent contractor on a client by client basis.

The geriatric care manager knows what resources are available to meet the other needs of the older person and will create a plan for the provision of required services either by the geriatric care manager or by others at a lower cost. For example, the geriatric care manager might only monitor others to perform specific tasks, such as a part-time housekeeper who will do the grocery shopping and prepare healthy meals for the older person. If the older person has no spouse and no available child, the geriatric care manager could drive the individual to doctor's appointments and discuss the care plan with the doctor to assure that it is followed and that all drugs are taken as directed.

Assuming that a geriatric care manager is hired, the role of the elder law attorney is to draft of review the contract between the geriatric care manager and the client

(who could be the individual or a family member) and ensure the contract properly deals with the variety of contingencies that can occur. For example, what happens if the geriatric care manager becomes ill and unable to perform the promised services? What happens if the client loses confidence in the geriatric social worker? A good contract will be adaptable to whatever should occur. The attorney will also review the insurance carried by the geriatric care manager to see that it will provide adequate financial protection in case the geriatric care manager or someone employed by the care manager negligently injures the older person or financially exploits her. The attorney will also advise the client to watch out for self-dealing by the geriatric social worker, hiring of help based on nepotism or kickbacks rather than merit, and fraudulent billing. The client must trust the geriatric social worker, otherwise why hire her, but that trust should be tempered with the reality that it is those whom older persons trust who can most easily abuse and exploit them.

In lieu of hiring a geriatric social worker, some single older clients will prefer to hire a family member, usually an unmarried adult child, to care for them. Often the younger caregiver moves in with the older person, and agrees to provide daily custodial care in exchange for a weekly wage, a lump-sum payment or is paid by being given title to the house. All aspects of such an arrangement demand the need for advice from an attorney. While the client may believe that because a child is providing the care, no formal contract is needed, experience with these arrangements has taught the elder law attorney otherwise. Absent a written contract, the parties may have quite different expectations as to the role of the child. The older person may expect the child to perform many more services and increase the amount of assistance as the needs of the older person become greater. In contrast the child may expect to help for only a few hours a week and never anticipate providing daily care of a very personal nature such as helping the older person dress or bathe.

A contract between the parties will make clear the amount and type of care expected to be performed by the child, and when and how often the care is to be provided. For example, if the child is supposed to perform as a driver for the older person, is that service a daily event, once a week, on demand by the older person or only when convenient for the child? The contract should provide vacation time for the child and provide that the older person will move into respite care for a specified period of time, which might mean moving in with another child or into an assisted living facility. The contract should detail what happens if the care needs of the older person become too demanding or too much of a medical nature for the child to undertake. If the parties cannot agree that the responsibility has become too great, the contract should provide for a third party to decide whether the child is relieved of his or her care obligation. Finally, the contract should address how, when and who decides if the older person should be institutionalized in an assisted living facility or a nursing home. Here too a third party may have to make the call because the caregiver may be a bit too eager to be relieved of his or her duties and the older person too determined to remain at home. Of course, the third party cannot force the older person to move, but the third party could decide that the contract is terminated because the needs of the older person can no longer be met by the caregiver.

Most importantly, the contract must detail the compensation to be paid to the child and what conditions can justify withholding it. A popular method is a fixed weekly wage based upon the estimated value of the services to be performed. An hourly wage is possible, but most older persons do not want to have to gauge whether the value of service is worth the hourly cost. In some instances a lump sum is paid to the caregiver to pay for all future care. What looks like a gamble as to how long the care will be necessary, is in fact a first step in creating eligibility for Medicaid to pay for long-term care, which will pay for the cost of a nursing home if the resident has spent down his or her assets. By prepaying the child, the older person will have reduced his or her assets to nearly zero and live on a pension and Social Security benefits. When the older person can no longer be cared for at home, he or she will move into a nursing home and apply for Medicaid. If the older person had given away assets to the child, Medicaid would have imposed a period of ineligibility. By purchasing care from the child, the older person can transfer assets to the child but not be denied Medicaid on account of having made gifts (Frolik and Brown 2007, pp. 14–45). Of course, the amount of the lump sum payment to the child must be reasonable in light of the probable care needs of the older person, but the care need not end when the old person enters the nursing home as the child can continue to provide modest amounts of supplemental care and supervision to the older person.

2.7 Long-Term Care Insurance

Paying for long-term care in an institution poses significant hurdles. With the annual cost of a nursing home in the United States ranging from $60,000 to $120,000 a year, many clients consider purchasing long-term care insurance. While a few elder law attorneys have become licensed to sell such insurance, most merely advise their clients about the nature of the product and explain its advantages and disadvantages.

Long-term care insurance, issued by private insurance companies, guarantees a fixed monthly cash payment in the event that the insured's health meets the criteria that triggers the payment of the policy benefits (Frolik and Brown 2007, pp. 15–33). Almost all long-term care insurance policies are "indemnity" policies that pay a fixed dollar amount each day that the insured qualifies for benefits. For an increase in the premium, most policies offer inflation protection by increasing the daily payment by a set percentage each year, because the benefits, which seem adequate when the policy was taken out, may prove woefully inadequate when finally paid ten or twenty years later.

Long-term care insurance policies usually pay benefits for skilled nursing home care, custodial care (personal care) such as is provided by an assisted living facility, and home care if the individual meets the criteria as stated in the policy. Most policies are sold to individuals between ages 50 and 84, although a few companies sell to those who are younger and a handful sell to those that are older. The annual premium

naturally rises with the age at which the policy is purchased, though once purchased, the policy premium will not be raised unless the company raises premiums for all similar policies, which unfortunately because of inflation is very likely. Daily benefit amounts vary from policy to policy and the number of days of coverage can vary from one year to life. Part of the role of the elder law attorney is to help the client determine just what combination of benefits is needed. Some want very high daily benefits, others are more concerned that benefits can be paid indefinitely.

Typically the payment of benefits is triggered by:

– An inability to perform a specified number of "activities of daily living,"
– The necessity for supervision and care because of cognitive impairments, or
– The need for long-term care because of a medical necessity, such as a stroke.

A common feature of long-term care insurance policies is a deductible period (also called an elimination period) that requires the policyholder to pay for a specified period before benefits are paid. The longer the deductible or elimination period, the lower the premium. The elder law attorney can point out to the client that it is financially sensible for the insured to pay for the first weeks of care and so realize significant savings in premiums over the life of the policy. The purpose of insurance is to protect against unacceptable risks, and most clients will find that the risk of paying for at least six months of care, while not welcome, is acceptable. Some policies have an accumulation period to satisfy the elimination period. That is, they specify a period during which the total number of deductible days, even if they are not consecutive, can be counted towards meeting the deductible. Accumulation periods are typically three times as long as the elimination period. Some policies have only one (lifetime) elimination period; others restart the deductible period if the days spent in the nursing home are separated by a certain period, such as six months or one year.

Unfortunately many older persons do not think to purchase long-term care insurance until it is too late to do so. Policies are generally not sold to those age 80 or older, and the annual premium rises sharply past age 75. Even younger potential purchasers may have to accept a delay in the starting date of benefit payments because of a preexisting condition. While most policies do not absolutely bar payment for preexisting conditions, most will not pay for the care that arises from a preexisting condition until the individual has qualified for benefits for at least six months. The lesson is that the time to buy long-term care insurance is long before the need for it arises.

The elder law attorney must point out to the client that buying long-term care insurance can be long-term commitment. For example, a sixty-year-old who buys a policy may have to keep paying premiums for twenty or thirty years. Even then the insured may die and have never qualified for the payment of benefits. Because of the need to keep paying premiums for many years, the temptation to let the policy lapse is very great, particularly if the premiums rise and the insured is pressed to pay other expenses. Letting a policy lapse is so unadvisable that the attorney may advise adult children that they may wish to pay for their parents' long-term care insurance if the parents can no longer afford to do so. That payment should be seen as an investment to protect their potential inheritance from being sharply diminished by long-term care costs.

Before buying long-term care insurance, clients should carefully consider whether that is the wisest course of action. An alternative is to move into a continuing care retirement community (CCRC) that promises to provide appropriate care at all levels of need including nursing home care. The large down payment required to enter the home, which may not be refundable, represents prepayment of possible custodial and medical care expenses. The trade-off is the assurance of quality long-term care at the price of the monthly fee of the CCRC, which, of course, will rise over time. Still, the resident of a CCRC knows that appropriate care will be available whatever his or her future care needs may be. As long as the client can afford the relatively high monthly payment, a CCRC may be an attractive alternative to the purchase of long-term care insurance.

Many elder law attorneys counsel some of their clients to forego long-term care insurance and to expect to rely instead on Medicaid. Clients with modest savings and moderate income often conclude that the cost of the insurance is prohibitive in relation to the potential benefits. For example, if a single individual has $300,000 in savings, he or she can afford three or four years of long-term care at a cost of $70,000 to $100,000 per year. If the care needs extend longer than that, the individual will have exhausted his or her savings to be sure, but Medicaid will then pick up the cost of the care. Conversely, clients with a high net worth can self-insure their long-term care costs. For example, a couple with $3 million in savings plus annual Social Security income of $35,000 can absorb as much as $1 million in long-term care costs (about ten years worth) without unduly affecting the well spouse since the income produced by the remaining $2 million should be at least $80,000, which when added to the Social Security payments would produce over $100,000 a year income for the well spouse.

When considering whether to buy long-term care insurance, the client needs to describe the specific risk that is feared because insurance should only be purchased to protect against unacceptable losses. For example, a couple has $400,000 in savings. They buy long-term care insurance that covers both of them because they want to protect the standard of living of the well spouse should the other have to move into a nursing home. Another example, a widowed older woman with $500,000 in savings buys long-term care insurance to help insure that upon her death, her estate will be able to adequately fund a trust for the benefit of her develop mentally disabled adult son. Finally, a couple with $800,000 in savings buys long-term care insurance both to protect the financial well-being of the well spouse and to protect the value of their estate that they wish to leave for the benefit of their three grandchildren whose mother, their daughter, recently died of cancer at the age of 45.

2.8 Counseling a Client with Diminished Capacity

A very significant part of elder law is dementia planning, which is practically a sub-specialty in itself. Almost always begun after the older person has begun to show significant signs of the disease, it requires property management planning

including the creation of durable powers of attorney and trusts, long-term care arrangements, and planning for surrogate health care decision making. The lawyer becomes the guide who helps the family arrange an affordable, safe living arrangement for the older person by assisting the family to select from the array of possible solutions including in-home assistance, a continuing care retirement community, assisted living or a nursing home and also helping the family to craft a method of paying for the needed long-term care. And of course, if a move to a nursing home is indicated, the elder law attorney can investigate the possibility of planning for Medicaid eligibility.

When dealing with older clients, the elder law attorney knows that certain techniques help make a meeting a success. They include:

- Keeping meetings short.
- Meeting at the home of a client who is excessively fatigued or confused by meeting at the attorney's office.
- Using a round table so that the planner can sit next to the client.
- Using large fonts on all printed material to be shown to the client.
- Making sure that there is no background noise.
- Removing unnecessary papers from the meeting table.
- Not sitting in front of a window, which makes it difficult for a client to read the expression on the planner's face.
- Not accepting phone calls during the meeting.
- Taking frequent breaks.

If the client has sufficient capacity, the attorney can help draft an estate plan. Later life wills are a common client need. While the attorney-client relationship may have arisen from other legal needs, often the client also decides to write a new will. While there is no exact information as to the average age of estate planning clients or the age at which individuals write wills, anecdotal evidence indicates that some very old clients, often surviving spouses, revisit wills made in their younger years. Unfortunately, too often it is the spur of declining mental capacity that moves the client to finally update his or her estate plan.

Before the estate plan can be crafted, however, the client and the attorney must work out a plan for paying for potential long-term care. The client must consider what an estate plan should look like in the event that the estate has been depleted by thousands of dollars spent on long-term care or the attorney should try to transfer assets during the life of the client in order to qualify the client for Medicaid payment of long-term care costs. While it is now very difficult to transfer assets and still qualify for Medicaid, there are options, including an irrevocable trust with all income paid to the settlor (the client). The transfer of assets into the trust does create a five year period of possible ineligibility for Medicaid, but careful drafting of the trust distribution provisions can minimize the problem.[1]

[1] Medicaid planning is complicated and should not be attempted without the advice of a qualified elder law attorney. See Frolik and Kaplan 2006, p. 129.

2.9 Late Life Estate Planning

Wills written by those past age 80 or 85 usually represent the last will that the individual will execute. Because very old clients typically do not expect to ever write another will, they take great pains to get this one right. The lawyer who has such a client is used to the special aspects that distinguish this exercise in estate planning from those of younger clients. At a minimum the lawyer feels the press of time. There is a need for timely resolution and execution of the plan because the death or mental incapacity of the client is a very real possibility. Yet a quick resolution may be hampered by a client whose hearing or eyesight makes it a challenge to communicate or whose diminished mental capacity makes it difficult to proceed with any haste. Other very old clients whose minds are intact nevertheless delay making decisions because they are uncertain of what is the right thing to do. The very fact that this may be their final estate plan may cause them to hesitate to act.

The common problem of diminished short-term memory is also a stumbling block because the client who has difficulty recalling information finds it hard to make essential decisions. For example, the proposed plan involves generation skipping, but the day after the meeting with the attorney, the client is very confused as to why that technique is being employed. Declines in hearing and vision also complicate estate planning because of the difficulty of communicating complex proposals to the client. Other possible physical limitations include a loss of energy and attention during a long meeting, different levels of mental capability between spouses, and a client's insistence on having a third party present at meetings or, even worse, a client who will not act until the plan is approved by a third party such as a child or a friend.

An older client may be often uncomfortable or confused by financial or estate planning. The client may be frail, easily tired, and unsure about the complex matters being discussed, such as avoidance of the federal estate tax. Careful counseling by the attorney can usually help the client feel comfortable about these matters. Some very old clients have views towards their property that can cause difficulties, such as being fixated on the distribution of the personally or heirlooms while ignoring the distribution of the intangible, but substantial, assets. A few older clients become agitated when faced with the limitations and failures of their heirs who themselves are not young. For example, an older client may be upset with the course of the lives of adult children or may not approve of the lifestyles of grandchildren. Very old clients typically have descendants whose marriages, divorces, remarriages, life partners and children in and out of marriage may confuse the client as to what is an appropriate manner distribution of the estate. Dealing with these emotional issues is not easy, but solutions must be found if the estate plan and other important documents, such as the appointment of a surrogate health care decision maker, are to be completed.

When drafting an estate plan for older clients, the attorney must pay close attention to whether the client has testamentary capacity. Fortunately, in the United

States, the law favors a finding of sufficient testamentary capacity. As described by a Colorado court:

> … a person has testamentary capacity when the person (1) understands the nature of the act, (2) knows the extent of his or her property, (3) understands the proposed testamentary disposition, and (4) knows the natural objects of his or her bounty, and (5) the will represents the person's wishes. An individual lacks testamentary capacity under the insane delusion test when he or she suffers from an insane delusion that materially affects the disposition of the will.[2]

Because testamentary capacity is so low in the United States, less than what is needed to engage in a valid contract, for example, usually the attorney will decide that the client has sufficient capacity to execute a valid will. Sometimes the attorney will rely on the doctrine of the "lucid interval," which refers to an interval of apparent mental clarity (or at least capacity) for an otherwise incapacitated individual. A will executed during a lucid interval is valid despite evidence even if the testator seemed otherwise incapacitated on the day that the will was signed. The doctrine often has application with a testator with dementia whose mental capacity varies from hour to hour. For example, many elderly suffer from "sun-downing." They have capacity in the morning, but gradually become more disoriented and confused as the day progresses. If the will is signed early in the day, the client may have testamentary capacity, though not have it later in the day as the level of dementia rises.

If the attorney is uncertain that the client has capacity or fears a potential challenge to the will, the attorney should arrange for an examination of the client by an appropriate professional. Some planners videotape the signing of the will to create a record of the client's mental capacity, but to do so acts as a red flag and raises the question as to why it was thought necessary. The better solution is to have the client's mental capacity evaluated by a qualified professional such as a geriatric psychiatrist.

Frequently very old clients insist that a third person – other than the spouse – be present when they meet with the attorney. Such a request raises concerns as to confidentiality, possible conflicts of interest and undue influence. Of course a client can waive confidentiality by signing a waiver, but the attorney should also meet alone with the client and inquire why the client wants the third party present and whether any subjects should be off-limits in front of that individual. During the private session with the client, the planner should discuss any possible conflicts of interest and probe to see if there are any grounds for suspecting undue influence.

Because it is very difficult to successfully challenge the validity of a will based on a claim that the testator lacked testamentary capacity, those who wish to overturn a will often claim undue influence (Frolik 1996, p. 841). The older the client, the more likely an allegation of undue influence, which invalidates a will or a bequest on the basis that the will or bequest reflects the wishes of the agent of the undue influence rather than those of the testator. Even though the testator had the necessary capacity to execute a will, it can be invalidated if the undue influence overrode the will of the testator.

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[2] *In re* Estate of Romero, 126 P.3d 228 (Colo. App. 2005).

The elements of undue influence are:

- A confidential relationship existed between the testator and the influencer.
- The influencer used that relationship to secure a change in how the testator distributed his or her estate.
- The change in the estate plan was unconscionable or did not reflect the true desires of the testator.
- The testator was susceptible to being influenced (Frolik 1996, p. 850).

Confidential relationships include a planner-client, clergy-congregational member, doctor-patient, nurse–patient, parent–child, adult lovers, collateral relatives, siblings, housekeepers and even friendly neighbors. If the older the client was emotionally dependent upon another person, that dependency can be interpreted as susceptibility to undue influence (Frolik 1996; p. 841). All that is necessary is that there be a special trust and confidence between the testator and the alleged influencer. The distribution scheme is both the motivation and the grounds for a finding of undue influence (Frolik 1996, p. 841). For example, a will that favors a new "friend" and leaves nothing to the children is vulnerable to a finding of undue influence. The attorney also must be alert to a claim of undue influence if the older testator insists upon making substantial gifts to "helpful" neighbors or to a "caring" nurse.

The older or more frail the client, the easier it is to claim susceptibility to undue influence. To discourage such claims the attorney should have frank discussion with the client as to the reasons for the bequests, keep detailed notes as to the reasons for the plan of disposition and perhaps encourage some gifts to the "natural" heirs to discourage them from supporting a challenge to the will.

Attorneys must also be alert for signs of clinical depression, which is evidenced by depressed attitude, irritability, anxiety, lack of self-confidence, low self-esteem, poor concentration, poor memory, social withdrawal, hopelessness, and recurrent thoughts of death or suicide. If depression is suspected, the planner should urge the client to seek a professional evaluation because clinical depression can be alleviated and even cured.

2.10 Retirement Planning

Many elder law attorneys now consider retirement planning as part of the practice of later life legal assistance. It is characterized by financial planning and in the United States especially by planning with how to deal with pensions, §401(k) plans and Individual Retirement Accounts. Although most clients will have created a financial plan when they transitioned from work to retirement, many clients need to revisit those plans as they age. They need to consider the current wisdom of the their pattern of investments, consider whether they are spending too much or even too little, and revisit whether their financial plan is coordinated with their estate plan. Many clients prefer to consult financial planners for advice about these subjects, and many attorneys are reluctant to give financial advice. Some attorneys,

however, have obtained the necessary licenses to engage in financial planning and some even sell products such as long-term care insurance. These attorneys believe that it only makes sense for them to expand their practices to meet the needs of their clients.

Other aspects of retirement planning include giving advice about long-term insurance, supplemental health care insurance, and housing and relocation choices. The attorney may also provide information about the tax consequences of the client's re-entry into the workforce as a part-time employee, consultant or entrepreneur.

Some elder law firms have become full service legal, financial and social service responders. They not only provide legal assistance, but employ or contract with other professionals such as accountants and geriatric care managers to provide the services required by the client. These firms have adopted a multi-disciplinary practice and provide a variety of services to meet the needs of their clients.

Some elder law firms are now entering into life care contracts with clients under which the firm agrees to provide lifetime provision of long-term care advice and supervision. The client pays a one time fee that is based upon the attorney's estimate of the value of the future services that the firm will have to provide the client. The law firm either employees or contracts with a nurse or geriatric care manager who helps evaluate the client's needs and if necessary provides services. For example, the attorney may help devise a retirement plan that includes provisions to pay for long-term care, which might include creating eligibility for Medicaid. The law firm will monitor the client's condition and see to it that the client is advised how to obtain the proper level of care in an appropriate environment. If the client enters a nursing home, the firm will monitor his or her condition and help assure that the client receives quality care.

As elder law expands its horizons to meet the needs of older clients, it becomes less strictly the practice of law and more the provision of later life assistance. As such, its future looks bright indeed.

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