Chapter 5
Family Matters: Some Emerging Legal Issues in Intergenerational and Generational Relations

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Whether it is in the context of advising a client on estate and life planning, the preparation of a will, a power of attorney,[1] *an advance directive or around the time of the coming into effect of these instruments and in the manner of their performance or in the resolution of family and caregiver conflicts around life transitions, including living arrangements, guardianship, and medical decision-making, lawyers often have to deal with family members in an array of situations raising important ethical considerations for the practitioner and important opportunities to clarify and define rights, wishes and values of the older client, to explain legal responsibilities of caregivers and legal representatives, to prevent mistakes from happening and to resolve problems before they lead to litigation.*

The emotional and legal costs of litigation are high. No fiercer fights are fought than by family who feel wronged by a parent or family member whether justified or not. Families may be torn apart and millions of dollars wasted. Experiences in dealing more effectively with these issues, and other aging concerns, which are at the core of the practice of Elder Law, have taken us beyond Elder Law to develop standards of practice having application to the representation of clients of all ages, to innovate new applications of ethics and alternative dispute resolution, to apply collaborative and integrated approaches to problem solving and planning, and to foster better understandings and a new cultural shift to openness and communication with family in succession, incapacity and end-of-life planning.

The aging of society and the longer life spans of older adults means that generations are linked together for more years than ever before in history.[2] *Great-grandparents are still alive in many families and relationships between grandparents and grandchildren are diverse and expanding, while at the same time there are fewer children, siblings and cousins in many families. Another trend is the rate of divorce, re-marriage and co-habitation in old age. This phenomenon has produced a complex set of intergenerational relations within*

[1] A "power of attorney" herein refers to and includes, from time to time, general, specific, continuing, enduring and durable powers of attorney of whatever nature and all other legal documents executed by a capable person wherein another is appointed to act as legal representative for that person for some stated purpose(s) while the latter is competent and/or incompetent.

[2] Bengston et al. (2002).

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biological and reconstituted families.[3] *While levels of solidarity or closeness across generations have been retained a good deal of conflict has been observed.*[4]
Sociologists have posited that the parent–child and other family relationships have dimensions both of solidarity, characterized by closeness and support, and of conflict, characterized by tension and disagreement. There is an evolving third construct at the intersection of these two: ambivalence.[5] *Whether relations are positive, negative or ambivalent there is no doubt family life can be complex, contradictory and uniquely challenging as one ages. If one is able to successfully meet these challenges a unique strength arises. If not realized, one is left vulnerable and open to ongoing disruption in one's life.*[6]

5.1 Ethical Issues Involved in Representation by a Lawyer When Family and Others Seek to be Involved[7]

> Why am I left in the waiting room? Your parent, an elder relative or disabled adult child is getting legal advice. Shouldn't you be included? After all, you might be very involved in helping him or her with important matters. Perhaps you even arranged this appointment.[8]

Family members may be very involved in the legal concerns of an older person and may even have a stake in the outcome. While family and friend involvement is very important they need to be helped to understand the ethical obligations that lawyers are required to follow.

It is possible, in some circumstances, for more than one family member to be clients of the same lawyer. This is common in married couples. However, there are several reasons why lawyers always need to meet with the client alone for at least part of the case evaluation process. The lawyer will need to explain to the family member or friend his professional duties to his client of loyalty, confidentiality and avoidance of conflicts of interest.

It is important to understand that many of the present generation of older clients (unless they were previously engaged in a profession or business) find a visit to a lawyer's office intimidating. Many will have had little experience with lawyers during their lives. Very often the subject matter of the interview is emotionally laden, as the issues requiring the client's interaction with counsel deal with mortality or potential loss of independence. Extra care is needed to ensure the client's comfort so that communication can proceed uninhibited.

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[3] It will not be possible in this chapter to explore the vast array of emerging family law issues arising from later-life divorce, re-marriage, cohabitation and grand-parenting.

[4] Lowenstein and Bengtson (2003).

[5] Supra note 2.

[6] Gibson and Hartley (2006).

[7] This section includes extracts from Soden (2005) with permission of the publisher.

[8] Extract from the ethics brochure, "Understanding the Four C's of Elder Law Ethics?" prepared by Wake Forest University, School of Law,and adapted by the American Bar Association, Commission on Law and Aging.

Some older clients may have the support of a third party, normally a family member, in the course of representation, starting with the initial interview. A competent but dependent client or one with some diminishing mental capacity may rely on another person to articulate his or her wishes. The lawyer must ensure that the client's decisions are free and enlightened and that the client is not subject to undue influence. For this reason the lawyer must provide adequate time, in an appropriate setting, to interview the client alone, preferably on more than one occasion, to confirm capacity, freedom from undue influence, and the goals of representation.

In addition to traditional estate and later life planning, lawyers, accountants, health care, and other service professionals sometimes enter the lives of their clients at crucial moments where timely action is often necessary. The professional is privileged to have intimate contact with clients and their families, and is uniquely placed to identify current or future needs before those needs would otherwise be identified or addressed. Because of their status lawyers and other professionals enjoy a high degree of respect, deference, and compliance. This special trust and special power carries a heightened responsibility to see that neither is abused.

Special responsibilities and ethical principles include guarding against such subtle abuses as paternalism and ageism towards the older client. A paternalistic attitude leads one to substitute one's own judgment of what one feels is in the client's best interests, and then to convince the client of this view. Benign ageism is a generalized view of older and disabled persons as frail, vulnerable and requiring protection. The autonomy of a physically frail or vulnerable person, but one who is otherwise capable, or of the mentally impaired person, are at times co-opted in the name of expediency when a professional fails to zealously advocate the least intrusion upon a person's rights of independence and self-determination. Information provided with the client's consent by family members, while useful and well-intended in most instances, can be misleading when imbued with an attitude of overprotection. In addition, legal and other professionals often unintentionally err on the side of protecting against risk, rather than supporting autonomy.

> A doctor has evaluated a client as having the onset of dementia and in need of financial and asset protection because of the potential of exploitation or dissipation of assets. The client has no power of attorney. In addition to considering the advisability and need for the opening of a limited guardianship or taking of other appropriate protective measures, questions involving a move to a long-term or other care facility, sale of one's home, the ability, notwithstanding diminishment of capacity, to execute powers of attorney for finances and for healthcare, and a (testamentary and living) will, come into play which will have an important impact on the dignity, self-determination and quality of life of the client. The lawyer will be called upon to advocate the wishes of his client in many regards, and, where appropriate, with the assistance of multidisciplinary professionals. Ethically and professionally the lawyer would be failing his older client if he were to take the family's side in what they believe to be in the older client's best interests.

Being a competent legal advisor demands more than a strict technical knowledge of the law. A lawyer serving an older or disabled client will frequently be called upon to assume the additional roles of advisor, counselor, drafter, supporter, reinforcer, and friend. The older client will depend on the lawyer to deal with

needs that exceed the strictly "legal," and the lawyer has to be sensitive to these needs. For example, a family in the midst of a dispute over a nursing home placement at the time of later life planning may present a superficial legal problem, but one with deep psychological roots and intergenerational dimensions. The lawyer has to evaluate these roots and factors as well as the legal issues.[9]

Elder law lawyers have had to alter the parameters of their practices to facilitate and resolve legal and non-legal planning and concerns. The circle of close family members and friends of older clients has dramatically diminished often with the result that there are no close relatives on whom to rely. Additionally resources are often disparate and difficult to access. But it is also the case that older clients are more willing to defer to an independent counselor than to involve family. This attitude may be due to a desire to retain independence and control over all aspects of their affairs or not to be subject to their children's advice and directives until their wishes and decisions are fully formulated with legal counsel. Maintaining some distance from family during the initial legal counseling also has the distinct advantage for the lawyer of avoiding potential conflicts of interest and ethical dilemmas. Family and friends are less likely to be accused of undue influence over the older person or that they unjustly benefitted from decisions that were made if they too maintain their distance during legal consultation. Involving family at a second stage, with representation, to inform them of decisions and to invite their views as to certain matters is quite appropriate.

Having assessed the issues the client is faced with, the lawyer has to choose wisely whether to act as zealous advocate, counselor, peacemaker or problem-solver. He may be faced with conflicting values and interests in deciding what roles to play. Technical mastery of the law and zealous advocacy may not be the best options in serving the client, particularly the older client, needing simplified, efficient and sensitive solutions to the issues and problems he is faced with. It is lawyers in practice who make most of the judgments in law, not judges in courts. They are accordingly entrusted with the great responsibility to do right by and for their client. A lawyer's judgments about what advice to give his client and what role he should play require not just specialized skills for the task at hand but faithfulness to the client's goals. He has to be sure that he is not being directed or influenced by anyone else's goals, including a family member's, and that his client is fully and freely consenting to a proposed course of action. The lawyer must explain the ramifications of what he is proposing, the legal restrictions and time involved and be sure the client can understand the options, risks and solutions proposed.

The lawyer is called upon in all fields, but no more acutely than in the field of Elder Law, to exercise sound ethical and practical judgment in representing his client. Elder Law lawyers are regularly called to deal with multifaceted problems, sometimes chaotic and fragmented. They must identify and confirm early on who

[9] Supra note 7, Piccini-Roy (2005).

the client is in the case and to whom they consequently owe their duties of loyalty and confidentiality.

Professional ethics is not a subject separate from other facets of professional activity, but rather is interwoven into every aspect of acting professionally and goes to the very heart of a lawyer's desire to deal sensitively with family members and obligation to serve clients competently and loyally, particularly clients in vulnerable circumstances and those with diminished capacity.

5.1.1 Representing the Client with Diminished Capacity

One phenomenon which is correlated to, though not caused by, older age is dementia. The label implies no specific cause or pathological process, nor is it an inevitable part of normal aging. While prevalence of dementia increases with age, a substantial majority of older adults, even into great old age, never suffer from any cognitive impairment, or, alternatively, its presence or degree does not adversely affect the normal activities of their daily lives. Physical frailty or disability should never be confused with incapacity nor should mental illness be confused with incapacity. To associate incapacity with aging or with disability is fallacious and discriminatory, but when it is present in a client the lawyer requires appropriate knowledge and ethical standards.

The most obvious ethical dilemmas for a lawyer arise when an older client has diminished mental capacity. A person with diminished capacity may be totally incapable without legal capacity at all or have diminished capacity but be capable of making binding decisions for some matters and not others.

It is long settled that capacity is task-specific and time-specific.[10] A client may suffer cognitive deficits in some domains but remain intact in others. Some clients may exhibit poor orientation regarding date or time, but be well aware of how they want to distribute their estates. Conversely, some clients with significant cognitive deficits may appear cognitively intact owing to their abilities to revert to overlearned behavior, such as appropriate social graces or past business experience.

The standard against which capacity should be measured is the standard set by the individual's own habitual or considered standards of behavior and values, rather than against conventional standards held by others. Without knowledge of this personal frame of reference, in addition to assessment of one's circumstances and the level of risk to one's person and property, as the case may be, involved in the decision or transaction at hand, capacity judgments have insufficient anchor and are liable to be based on someone else's judgment of the propriety of certain behavior, clothed in the clinical language of incapacity.[11]

When a lawyer does not know a client, greater inquiry is clearly required. However, such inquiry need only be related to the task or transaction in question.

[10] Sabatino (2000).

[11] Silberfeld and Fish (1994) at 47–48.

Careful inquiry involves being able to answer the question: is the decision consistent with which the client is? Looking into values, standards, and the subjective frame of reference of the client may help confirm that a particular decision, which might otherwise be considered ill-advised or lacking in good judgment on the part of the client, is consistent with that person's character and goals, and not an evidence of incapacity or undue influence.

Sometimes it is simply by developing a rapport that a lawyer can appreciate and understand a client with some cognitive impairment. More fully understanding the client's values, lifestyle and corroborating the client's wishes and capacity may also involve communicating with family. The lawyer must obtain the client's prior consent and should verify independently, where possible, that the family member is a trusted and objective observer whose values and standards are consistent with the client's. The lawyer should be wary of receiving all his information from one family member and carefully verify expert evaluations submitted from this perspective. It is far too often the case in respect of medical and psychosocial assessments that the entire history of the client, sometimes recorded over several years, has been provided from the perspective of one family member. A great danger in an incapacity assessment is that eccentric, stubborn, abnormal, risk-taking behavior, as sometimes perceived by members of one's family, will be confused with incapacity.

If a lawyer is unsure about a client's mental capacity, it is imperative that the lawyer have a solid process to follow in order to ensure a client's capacity before taking any instructions. There are some obvious warning signs which should trigger this necessary process. They include: (a) arrangements for the initial meeting with a client are made by someone other than the client; and (b) another person accompanies the client to the meeting and is involved in the meeting with phrases like, "What I think mom wants to do with her money is. . . ."

Any such reasonable doubt as to incapacity for the task at hand should be resolved in favor of seeking the client's consent to an independent professional evaluation to remove any questions or concerns about a future challenge. Such an assessment of free and informed consent might be corroborated by the client's chartered accountant or even another lawyer. It need not be by a medical professional, absent any known cognitive diminishment, subject to the nature of the transaction. The verification of a proposed *inter vivos* gift to charity, for example, might be susceptible to challenge by the family arising solely from the fact that it represents a substantial portion of a client's assets. On the other hand a challenge could be avoided or successfully defended if an assessment of the client's informed consent were made by an appropriate professional demonstrating that the gift was both consistent with the client's values, reasonable in relation to his all-over holdings and in line with his tax and succession planning.

Although it appears that the initial problem for the lawyer representing the client with diminished capacity is ethical, more fundamentally it is practical. How does one maintain a normal relationship?

Different legal acts require different degrees of capacity. Even an incapacitated client may have the capacity to enter into a lawyer-client relationship. The

relationship may have to be restricted or modified as the result of diminished capacity, (for example, a client can be given less information or given information in smaller doses), but the framework remains the same.[12] Nevertheless the ability to communicate with a client with diminished capacity might be severely hampered by the client's dementia. This may occur at the outset, with the passage of time with a long-standing client or even over the course of a single mandate. Although the lawyer can explain, can the client continue to understand? Can the client reach an informed decision, if able to reach a decision at all? If the client's mental incapacity is severe and protective action is needed to safeguard the client's health or safety, loyalty can be severely compromised if the lawyer initiates protective action for the client.

The ethical dilemma arising from the duty of loyalty to a client who cannot initially form, nor during the course of representation maintain, a lawyer-client relationship is difficult to grapple with but essential to be dealt with. To arrange for any assistance from a third party, including family, or for protective action, including an evaluation, without the consent of a client would violate duties of loyalty and confidentiality, unless formal leave is granted.

The guiding ethical principles of professional assessment and intervention are always: to presume capacity; to maximize client capacities; to intrude to the least extent possible on a client's decision-making and autonomy when some measure of protective action is recommended; to promote the prior expressed competent wishes of the client with diminished capacity, to the extent known or knowable, in default of which, to promote the client's known or knowable values and standards, and finally, when values and standards are unknown, to advocate a "best interests" or "reasonable person" standard. There is also the connected but subsidiary ethical goal of fostering community resources and family connections to assist and support the cognitively impaired client so that he remains secure yet involved and assisted in decision-making to the extent of any residual capacity.[13]

5.1.2 Determining Who the Client Is: Dangers of Joint or Multiple Representations

Lawyers, who work with clients with diminished capacity, or clients who are competent but have physical disabilities or frailties, frequently interact with the family members of these clients.

> Consider the former client who becomes partially incapable and contacts the lawyer for help in dealing with situations presented by the incapacity, including the naming of a legal representative under a power of attorney. He arrives at the lawyer's office with, or the meeting is set up by, the person who seeks to be named as attorney or proxy.

[12] Fleming and Morgan (2001) at 741–742.

[13] Sabatino (2000), supra note 10, at 502–503.

> Consider the family of a former client, currently incapable, who seeks the advice and services of a lawyer to take some protective action for their incapable relative.
>
> Consider the new or former client with some diminished capacity who may need representation in contesting a capacity assessment or guardianship proceeding because the proceedings are premature or the proposal guardian undesired and/or inappropriate.
>
> Consider the individual requiring protection in virtue of a private or public limited or full guardianship who simply wants to know that his due process rights have been protected and that his voice will be heard in legal proceedings or other procedures, whether contested or not.

Such cases present some important ethical issues for the lawyer. In addition to determining in every case who his client is and to whom he owes the duty of loyalty, how long might the lawyer represent a client with diminishing capacity without seeking formal court appointment as legal counsel and the appointment of a guardian *ad litem* for his client? Is joint representation ever possible in cases where legal representation, capacity and civil rights are at issue? Does the law, or will the court, in all cases ensure the person facing protective proceedings is represented by legal counsel?

The lawyer must clarify for all involved, as early as possible, to whom the lawyer owes the duty of loyalty and what the implications for confidentiality and decision-making are. The lawyer must also be aware of confidentiality and conflict of interest issues which should not be breached.

In avoiding conflicts of interest, the lawyer's duty to protect the client's best interests extends beyond the apparent resolution of the immediate problem. When drafting a trust, a power of attorney or taking a protective action, a lawyer should be ethically obligated to assure that formal authority is not being transferred to another person who turns out to have a conflict of interest with the older person. In such a situation the lawyer could potentially violate his fiduciary duties to the client. The nature and extent of these due diligence and monitoring duties, though evident, are unclear.

While most lawyers understand that there are difficulties inherent in simultaneous representation or sequential representation of multiple clients, they may sometimes forget that there are actually two separate issues at work in joint representation: the actual interests of the clients may be opposite and there is the need to maintain confidentiality of both clients' communications. These can usually be resolved by competent clients agreeing that confidences will be shared before the lawyer can agree to act, and by using waivers of conflict and confidentiality provisions.[14]

Clients with mild cognitive impairment may, with adequate information and sufficient explanation, understand the nature of the waiver of conflict and confidentiality; however, any doubt about the ability of the client to waive confidentiality or conflict requirements should be resolved against such a waiver and that will usually make it very difficult for a lawyer to represent a client with some incapacity

[14] Fleming and Morgan (2001), supra note 12 at 761.

and any other individual in connection with the same or a related matter.[15] Careful attention to the nature of the case and the potential for conflict must also be considered in connection with all cases of joint representation.

Even in a situation in which a waiver has been understood and validly consented to by a client who is still capable of giving a valid consent, the waiver will not protect if a conflict, which has not been or cannot be waived, arises later. In such a case the lawyer, due principally to the privileged communications he has been privy to during the joint representation, will have no option but to withdraw from representation of *all* parties, and, in particular, from the representation of the client when he needs the continued representation most urgently.[16]

When a former client is no longer capable of forming a lawyer-client relationship, the lawyer may have learned personal, as opposed to generally known, information from his former client over the course of a previous representation. That information could be used to the disadvantage of the former client in the course of representing the children or parent, as the case may be, of an older person.

The lawyer may be approached by a member of the family or friend who seeks to be named as private guardian for an incapable adult. The reputedly incapable person may even be a former client. The lawyer may accept to represent the friend or family member while the person whose capacity, autonomy and protection are at issue, remains unrepresented. Lawyers involved in such a family situation, even a harmonious one, may delude themselves into believing that they can indirectly represent the incapable person's interests but this paternalistic attitude is not consistent with professional ethical obligations.

Representation of the incapable older adult whose civil rights are at stake is not universally legislated. Where it exists by statute, it may be facultative. There is a continued resistance by courts and families to recognize the need for legal counsel, driven by paternalistic attitudes and the perception that there will be duplication of process and of legal fees. Recognition of minors' rights to legal counsel in the family law context went through these growing pains years ago and is now broadly accepted.

This author advocates that representation by legal counsel be prescribed by statute in all instances where loss or transfer of a person's civil rights is at stake, except where the court determines that the person's refusal of legal counsel is reasonable in the circumstances. This would ensure due process under the law and, in particular, respect for the public order rule of *audi alteram partem* for the incapable or reputedly incapable person.

The ethical problems inherent in legal representation of clients who are vulnerable or who have diminished capacity are substantial and perplexing. While formal ethical rules require the lawyer to maintain a normal relationship, this will often be difficult in the real world. The client's limited ability to make good legal decisions,

[15] Fleming and Morgan (2001), supra note 12 at 762.

[16] Fleming and Morgan (2001), supra note 12 at 778.

coupled with the possibility of shifting capacity and a strong paternalistic tradition, make representation of this client more difficult.

Such issues as when to withdraw from representation, when to consult with another lawyer, when to seek court approval for representation, and when, how and for whom to take protective action are matters that need elaboration and refinement within the law and further guidance from practice advisors.

In order to protect the client's legal interests and the lawyer's professional standing, the best course of action for an Elder Law lawyer is to act as an advocate for the older client's wishes and to avoid the possibility of conflicts of interest or disclosure of confidential communication by representing more than one member or, indeed, any member of a family in a case where the civil rights and the integrity of the older person are at the heart of the representation.

The need to rigorously respect ethical obligations need not conflict with the avoidance of conflicts of interest, misunderstandings and future challenges by family within properly elaborated later life and succession planning and elder transitions. The involvement of family in such cases is sequential and complementary. The client's wishes and goals are assessed by and with his legal counsel and then as part of the planning process the client explains or discusses, as the case may be, his choices and approaches with his family in the presence of his legal counsel and/or another professional who is there to assist and attest to decisions.

5.2 Planning, Prevention and Settlement of Disputes: The Protections Offered by Informal and Formal Family Meetings and Mediation

> . . .Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. . .
>
> From Notes for a Law Lecture, Abraham Lincoln, July 1, 1850

Mediation embraces a broad range of processes to assist parties in resolving conflicts outside or within the courtroom setting. The key feature of all forms of mediation is a neutral facilitator, usually, although not necessarily, a trained mediator, who assists parties in framing issues, communicating, developing mutually acceptable agreements and solutions relating to legal and non-legal issues that all parties can accept. Because mediation implies informed consent, self-determination and equal decision-making ability it has been considered inappropriate when the client has diminished capacity and there is necessarily a power imbalance. The fact that an adult has diminished capacity does not automatically mean that he does not retain the ability to express wishes, make decisions or enter into agreements with the aid of an attorney. Mediation need not jeopardize legal rights at the expense of preserving relationships and purchasing peace. The adult should be adequately represented by

skilled legal counsel or a party knowledgeable about the legal rights and duties of the parties when diminished capacity is present or disputes or abuse are at issue.[17]

Mediation may be used where a variety of aging issues are a factor in an existing dispute situation (an attorney has made a contested nursing home placement or is intending to sell the family home for self-interest or contrary to the older person's wishes, values and means)[18] or as a structured informational session with a view to preventing potential conflicts amongst family and caregivers. In planning meetings the issues do not entail the resolution of disputes but rather the conveying of information and the seeking of opinions. The presence of a neutral party establishes authority, transparency and facilitates communication and understandings of more complicated, unknown or undiscussed matters. Even when a family is harmonious there may still be some elements of concern or doubt around issues and intentions in light of past family history.

A neutral facilitator is essential. In many informally mediated family planning meetings around estate, later life planning, elder transitions and end-of-life issues, this party may be the client's social worker or doctor or the latter can be present to help a certified mediator or facilitator to maintain neutrality by expanding on general information.[19] The family may also accept, to simplify matters, that the meeting be simply led by the client's legal counsel, as the meeting will have been called at the client's request. In all cases minutes of the meeting and any agreements reached, where applicable, should be circulated following the meeting to those in attendance and to those invited but absent. Finding solutions which are tailored to the needs and wishes of the client, and using the opportunity to provide education about the rights of the client and responsibilities of caregivers and attorneys or substitute decision-makers, ensures that the parties invited to the session are more likely to abide by conclusions.[20]

Of course, mediation may also be used in conflicts which do not directly involve the older person such as communication amongst adult children where there are shared legal, financial and health care decision-making responsibilities, staff conflict and quality of care in long-term care or in estate settlement issues.[21]

The one area of great concern is abuse, neglect and exploitation of older persons. Most experts advocate that mediation and facilitation are not appropriate in cases of abuse. However, where cases of abuse do not involve physical violence or are not egregious, e.g. the case involves some degree of correctable neglect or innocent denial of rights or caregiver stress resulting in verbally abusive outbursts[22] or where there is financial exploitation which may respond to restorative justice and other

[17] Park et al. (1992), at 639.

[18] Butterwick et al. (2001).

[19] Larsen and Thorpe (2006), 301.

[20] Wood (2001) at 811–812.

[21] Foxmen and Mariani (2010), 17.

[22] Mariani and Begler (2008) at 277.

measures of restitution, mediation may be quite appropriate. The session must be appropriately structured to ensure that there are no solutions which are contrary to the older person's free will. In addition to representation by legal counsel, appropriate safety measures should also be in place in such cases which may include adult protective services and other arrangements for monitoring and follow-up by professionals and others in the family and community to ensure protection from reprisals. The person must not be placed in a situation where they can be at increased risk following the session when returning to the home of an abuser upon whom they are dependant.

An important and growing use of mediation in resolving adult guardianship cases has been pioneered by the Center for Social Gerontology in the United States since 1991.[23] While capacity or the degree of incapacity of an adult is not itself susceptible to mediation it may be the central issue in a contested adult guardianship case. Issues of capacity may be resolved prior to mediation and thereby obviate the need for mediation and adult guardianship proceedings altogether[24] or require determination by the court where there are opposing medical experts. However, other matters, notably conflicting opinions by siblings wanting to have "custody" of a parent or by the client who opposes the appointment of the guardian, may well be resolved by mediation even while the contestation of incapacity is later taken to the court for determination.[25]

The adult with limited capacity who contests the guardianship will require adequate representation, support and advice and may require other accommodations such as multiple sessions, appropriate timing and an adapted venue for such sessions, as well as accommodations for hearing and visual impairments.[26] If it appears that his expressed wishes will not prevail in the mediation session, these matters should proceed to adjudication before the court with its attendant procedural and substantive safeguards.[27]

The intervention of lawyers and courts need not be slow, expensive and intimidating provided the roles of these latter are, in the future, sensitively and efficiently adapted and utilized. They need not be a last resort if developed as integral partners in intervention and in the continuum of access to justice.

The opposing party or parties may be unwilling to meet or to mediate and be hardened in their determination to pursue litigation. Power imbalances may be too great. However, it is hoped that mediation in contested adult guardianship cases becomes a mandatory first step in the process. If the court refers the parties to mediation upon the filing of the petition, the parties may resolve in advance many of the disputes that surround the appointment of a guardian, provide education to the

[23] Larsen and Thorpe (2006), supra note 19 at 310; Radford (2001–2002) at 617.

[24] Gary (1997) at 414.

[25] Wood (2001), supra note 20 at 801.

[26] Radford (2001–2002), supra note 23 at 651–652.

[27] Sabatino and Basinger (2000) at 137; Radford (2001–2002) supra note 23 at 664.

guardian and may even devise a framework that may make guardianship unnecessary. Early intervention[28] within or without the court system in the form of mediation may not only offer information, education and coping strategies but address tensions and issues before emotional positions become entrenched and escalate into combat.

Of course where the older person is unable to participate because he lacks requisite capacity, even with the assistance of counsel,[29] mediation is inappropriate.[30]

The following examples illustrate the variety of uses of mediation and facilitated meetings and the multiple opportunities for the resolution of issues which respectfully recognize relational dynamics, family history and the continuing roles and status of family members in an older client's life.

5.2.1 The Family Meeting in Planning and Dispute Avoidance

Estate and life planning begins with detailed planning. Many of the issues in the planning process can be better understood and hence wishes are more likely to be respected when legatees under a will, executors, attorneys, proxies and other family members having legal or other interest in being involved are brought into the process for their opinions and information. Where the distribution of assets under a will and the administration of one's estate during life and upon death is more complex, where there is to be unequal treatment of children or where there is a history of disagreement, resentment, jealousy or distance in a family, a family conference meeting ("family meeting") and agreement[31] of understandings are recommended.

> Mrs. Bruce is a recent 80-year old widow who owns her own house and has about $500,000 in savings. She has two children, a son who is successful and a daughter, a single mother, who has always struggled financially. Mrs. Bruce intends to leave the house which she owns free and clear and most of her savings to her daughter. She did not intend to tell her son. They had always had a very good relationship and she expected he would understand the needs of his sister and the good intentions of his mother. Mrs. Bruce was surprised when her accountant told her it might be perceived that she was disinheriting her son. The financial advisor recommended a professionally facilitated family meeting at which Mrs. Bruce could explain her plans to her two children.
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> Her son said he would like two things from his mother's estate: his father's coin collection and some portion of her savings towards an education fund for his children. Mrs. Bruce said she had intended to sell the coin collection and put the proceeds of sale into savings but was happy to know this collection held a sentimental attachment for her son. She also set up a trust fund for the education of the grandchildren. The son had no problem with the balance of his mother's estate being left to his sister. She would be provided for

[28] Radford (2001–2002), supra note 23 at 612.

[29] Gary (1997), supra note 24 at 432.

[30] Wood and Karp (1994) at 57.

[31] Hull (2005).

and not be dependent on him and his children's university educational fund would be in place. Mrs. Bruce's daughter was happy that her future financial worries were taken care of.

It is difficult to convince clients about the potential of problems arising as the result of estate and incapacity planning. Yet we know how one's planning instruments can become the subjects of litigation due not just to poor drafting, the nature of the assets, or a lack of expert advice but far too often, because of family secrets and vulnerabilities or family members who are acrimonious.

Many people do not like to talk about death, dying and dementia. The following subjects also make clients naturally uncomfortable: extramarital affairs, family business issues, spendthrift legatees, family concerns with sons and daughters in-law, special needs beneficiaries and unequal treatment of children. But there needs to be a shift in how we think of estate and later life planning and a change in attitude and culture. The plans can no longer be developed from the top down. They are most successful when developed from the bottom up. There is less likelihood that family members will challenge a will or a power of attorney when they have learned the reasons for the distribution of property or for the naming of certain representatives and have the opportunity of expressing their opinions.

Another example might be a gift of money that a parent has made to one child towards the purchase price of a house and has not informed other members of the family. If the gift is not documented and if the parent's remaining assets are not sufficient to provide an equivalent amount to the remaining children, it could cause a succession issue. There may or may not be grounds for a challenge to the parent's free will or capacity in such a case but the potential of a bitter sibling fight alleging that the "gift" was really intended as a loan repayable to the parent's estate.

A family meeting allows the client to address both the distribution of his or her estate and naming of representatives as well as any emotional issues that may arise around these decisions. Reactions are often driven by feelings. This is especially true when one person is treated differently or receives less than another in an estate. The family meeting process is an excellent way to avoid a legacy of bad feelings and resentment.

Not all of the family may agree to attend the meeting and perhaps there will not be unanimity at the end of the day by those in attendance. The meeting should nevertheless be held and any missing members informed of the agreement of understandings reached by those present even if they will not sign it. While the agreement will not prevent a disgruntled member from laying a challenge or claim, the notes of the client and his lawyer will demonstrate the lengths to which the client went to satisfy everyone, without forfeiting his or her goals. The meeting and the agreement will bear witness to the client's capacity and free and informed consent.

The family meeting can assist with developing family transitions. Conflicts can arise with respect to older family members who are in transition, with respect to care, housing and legal representation (e.g. under a power of attorney or guardianship and in end-of-life decision-making). Family members want to do what is best for their relatives but as a group are sometimes at odds about the best means of arriving at consensus, which respects their family member's right to consent, if capable, or which

respects previously expressed competent wishes. Learning to facilitate multi-party decision-making and building conflict resolution skills, including mediation and conciliation, will be very helpful when working with families.

This kind of meeting before a family is in crisis can strengthen ties and enable all family members to deal with changing relationships in an older family member's life and with the realities of the situation. It allows sibling rivalries to be addressed at a time when everyone is calm and thoughtful, reflective decisions can be made. Meetings may also involve geriatricians, financial advisers and social workers, as needed and desired, these latter acting as experts and facilitators or informal mediators of situations, in appropriate cases.

Mediation, whether formal or informal, offers a confidential process, a less expensive and less time-consuming route for dispute prevention and resolution, allowing parties more control over the resolution. It can preserve family dynamics, particularly those which may be tenuous and strained, and is frequently a favored route for older persons.

> A divorced father has lived with a woman for thirteen years with whom he has had a wonderful life. He now has moderate dementia. He wants to stay at home and his common law spouse, still a top executive in the workforce, wants to care for him with the assistance of public and private caregivers during the weekdays. The man was a successful professional who had lived a high life and had significant debts when this woman came into his life. She agreed that they become a couple and that he come to live with her provided he paid off all of his debts which he did by selling his one remaining asset, his country home. He has five sons, two living at a distance and two with a history of psychological problems.

The woman visited an Elder Law lawyer seeking information as to her role and responsibilities as the legal representative of her spouse. It was immediately clear to the lawyer that the party who needed representation was the spouse with dementia. The woman recognized and accepted that the lawyer would represent her husband. Her spouse was visited alone by the attorney and a second visit was held later with his spouse. At the suggestion of the lawyer he gave the lawyer a mandate to represent him in a planning meeting with his children so that they would be informed of his plans and decisions, his wife's role, and the children's roles in his life. It was recommended that the social worker who had assessed the man's psychosocial status be invited to the family meeting as a neutral third party to explain his social, economic and psychological challenges and needs now and in the future and how these might be best organized in accordance with his wishes and choices. Legal counsel would explain the legal duties of a legal representative, the representative's measures to ensure transparency and accountability, what each spouse would pay for, details about his plan of care, end-of-life wishes and even funeral arrangements.

All sons participated in the meeting, two by Skype. As anticipated by legal counsel who had recommended the meeting as an important preventative measure, the sons did have questions and initial suspicions that their father's common law spouse might appropriate their anticipated inheritance, given her extensive powers as financial administrator of the affairs of their father. A review of the facts, the law,

the generous undertakings of the spouse and information from the social worker dispelled these notions. The client did not discuss his Will although he had left all he had to his common law spouse, save for specific legacies of pieces of art to his sons. Discussion of his estate plan was not necessary, in the circumstances, as the man agreed, reluctantly initially, that his legal counsel convey to his children that after paying his extensive debts all he had left was a very small life pension from his former firm, enough with careful financial planning with his accountant, to pay for his caregivers. His spouse would assume all household expenses and all food costs. He additionally had an amount of savings whose capital value had diminished incrementally over the last several years, leaving a little cushion for anticipated future care needs and final expenses.

Reassurances of the importance of the sons' continuing and increased participation in the life of their father were made by the father, a man previously inaccessible to his sons during his busy professional life. The client was also able to confirm that he wanted his common-law spouse to care for him. He explained that he was ready to go into long-term care if ever his care at home became too difficult for his spouse or too expensive, and further explained, with assistance, his wishes and values about care at the end of his life and his funeral arrangements. Minutes of the family meeting were prepared by legal counsel and circulated by the father's spouse to members of the family.

While the holding of such a meeting had involved embracing cultural and attitudinal change on the part of this man and his spouse, a departure from the tradition of keeping private one's personal life and plans, all parties had appreciated the results. The family meeting was important to the promotion of rights, strengthening of family ties and the avoidance of suspicions, criticisms and disputes which would indirectly but inevitably affect the client during his lifetime and potentially his wishes and property distribution following his death.

Unlike mediation in which the goal is to reach a negotiated agreement, which reflects the best interests of all parties or aids in reaching mutually acceptable agreements, the family planning meeting may employ a mediator or other neutral third party but the decisions will have already been made by the older family member in advance of the meeting in consultation with his legal counsel or advisor, the meeting serving to report on wishes and decisions. It is certainly possible for a family member in attendance to suggest something which had not previously been contemplated by the client (e.g. in explaining his estate planning arrangements in a family meeting the parent may learn that not all his children want to inherit the family cottage. This information may provide the opportunity to leave the cottage to those who want it and provide a method to compensate the others for their share of its value as at the testator's death. It may also allow for the broad lines of a property management agreement to be agreed to amongst those who want the cottage.) The client could then take these matters under advisement, depending on the complexity of the issue, and convene a second meeting to inform the family of his final decisions.

5.2.2 *Use of Informal Mediation in the Early Resolution of a Dispute*

Family discord may often be resolved by timely intervention and education.

> A father of three adult children remarried thirty years ago. The woman mistrusts the children and the children never warmed to her, although they know their father loves and relies on her. The father now has moderate Alzheimer's disease and is in a residential care facility. His wife, herself under treatments for cancer, cannot care for him at home. The wife has told the residence to control the father's outings and to have the children call her to organize and approve the timing of their visits. The nursing staff has complied. The children are also told by the residence that they can have no information about the evolution of the father's conditions, mentally and physically, because the wife legally represents the husband. They do not want to hear about their father's conditions from his wife because they do not trust her. The wife wishes to sell the matrimonial home and has instituted legal proceedings to seek court authorization to do so. The banking power of attorney she holds is not sufficient for the purpose and her husband is no longer capable of executing an enduring general or specific power of attorney. The husband, with the assistance of his children, has called legal counsel to contest this unilateral move by his wife as he maintains he has been incorrectly assessed as incapable and has not been consulted on the intended sale.

The father's attorney recognized at their first meeting that the father had substantial residual capacity and arranged for a revaluation of his capacity. The attorney confirmed the client's desire that his wife to be his legal representative and principal caregiver, notwithstanding being upset with her for doing things behind his back, and that he wanted his children to be informed and actively involved in his life. He wanted the residence to inform his children about his health whenever they wished for information and for his wife to understand that he could make his own decisions about visits and outings while respecting his wife's daily scheduled visits and subject to informing the residence. The social worker assigned to the residence was contacted and a meeting was planned to settle any misunderstandings and discord amongst the parties. The wife's lawyer who had been mandated to obtain a court order to sell their home was cooperative. He understood that a settlement of the husband's concerns would ensure a smooth and uncontested court hearing on the issue of the sale.

By the time of the meeting the client's physical condition had declined further causing additional cognitive decline. He now recognized his need for full assistance and support. In advance of the meeting he advised his attorney that he no longer was angry with his wife, would not contest the sale of the house, was prepared to stay in the residence if visits continued with the same frequency as they had in the past and confirmed his acceptance of his wife handling all financial affairs for him subject to regularly accounting to him. This was reported at the meeting.

In the meeting the wife and her confidant, her brother, also learned from both lawyers and the social worker that the husband had rights and wishes which were always to be promoted, despite diminishment of capacity and despite her role as his representative. He was able to and should continue to make his own decisions about with whom and when he wanted to visit with family and as to when he felt up to

going out. The client confirmed his choice of his wife as his representative and that his wishes were to be respected. He told the residence social worker that he wanted his children to be kept informed always and a note to that effect was placed in the residence file. The wife, having let down her defenses with the resolution and confirmation of her role, agreed to let everyone know that the children were to be kept informed of their father's mental and physical health. Emphasis was also placed on the important continuing role of the children in the life of their father.

The residence, the wife and the children were all educated about the client's wishes and legal rights and all discord was dispelled in a timely fashion, clearing the way for an uncontested judicial authorization to sell the client's real estate, ensuring his on-going involvement in his own decision-making and the harmonious involvement of his children and wife in his daily life. The attorney sent minutes of the meeting to all parties and scheduled follow-up to ensure these agreements and understandings were being respected.

Had any attempt been made at the meeting to change the client's principal wishes and positions as explained to his attorney in advance of the meeting there would have been need for a further meeting so that counsel could determine whether his client was freely consenting to any change of position. The client acting alone might unknowingly give up statutory rights or solutions might not conform to the law. The disputes or other issues regarding transitions should always be settled with attention to and full knowledge of the identifiable rights of the older client, even those which a client may wish to waive.

5.2.3 Court Mediation in an Adult Guardianship Case

Even where mediation has been initially refused by the parties there is still the opportunity to convert a court hearing into a mediated session to inform, educate and resolve emotional issues underpinning contestations within a procedurally protective context.

> A nephew had acted as investment advisor and had annually filed income taxes for his maiden aunt and her sister for over twenty-five years. The nephew had always been paid for his financial services in the past at the insistence of his two aunts. Her sister had died and the surviving aunt now had moderate dementia. The nephew had been named a number of years ago as her attorney under enduring powers of attorney for finances and for health care decision-making. As she declined, she complained to other family members that her nephew had had her declared incapable by a doctor and placed her in a terrible residence where she could not talk to anyone because they were all unable to communicate.
>
> Some of the members of the family, moved by their relative's complaints, and by nature suspicious, believed the nephew's only interest was his aunt's money and that he had influenced his aunt to name him as attorney at a time when she was already in decline. Further it was felt by some that the nephew did not have any sensitivity to the aunt's dislike of the residence she was in. These family members filed a judicial opposition to the nephew's continued representation. The aunt's one remaining elderly sister, living at a distance, proposed that she be named as her sister's legal guardian while other family members advocated the Public Guardian and Trustee. The family members were not

represented by legal counsel and had refused to participate in any informational or mediated meeting. The matter inevitably proceeded to court.

The aunt was represented by legal counsel who was appointed by the court prior to the hearing as *amicus curiae* to ensure transparency as there was some doubt as to the ability of the aunt to fully communicate with or adequately instruct legal counsel on all issues. Her condition had, however, stabilized now that she was in a residence, receiving her medication on a regular basis and no longer self-administering. She confirmed to counsel her confidence in her nephew and her desire that only he represent her. She further confirmed that the staff at the residence did treat her well and that the food was good. The reason she declined to participate in activities and to socialize was that she had always been a solitary person throughout her life.

In responding to the family's concerns the nephew had hired a social worker to evaluate the care and reputation of the residence, his aunt's satisfaction with the residence and whether she might be better served elsewhere or in other ways. The social worker confirmed that the residence was one of the best and came highly recommended to the nephew by nurses and social workers previously involved with the aunt when she was at home. The nephew also engaged a chartered public accountant to audit his financial management from the time he began handling his aunt's daily affairs and had asked his aunt if he could communicate it and future periodic audits to the concerned members of the family. She declined the disclosure.

The sole issue before the court was to determine whether probative evidence of mismanagement of finances or of care by the nephew existed. No such evidence was produced. That being the case judgment would have issued summarily from the bench dismissing the family's motion.

However, legal counsel to the aunt explained to the judge the suspicions held by the family, particularly by her sister who had sent a letter to the court, about the aunt's suspected incapacity at the time she appointed her nephew, the concerns about money he had received in the past and what he might pay himself in the future, and the aunt's apparent unhappiness with her residence. Because the sister was not present in court the judge had initially dismissed her letter as immaterial but legal counsel prevailed upon the judge to continue the hearing as a mediated session led by the judge during which experts already in the court would answer all concerns and allegations raised by the family and the sister, in particular. The answers would be heard by the judge as mediator and then become part of the court record available to the family who were not present. In so doing the doubts and disputes would be silenced and the aunt would cease to be at the eye of a continuing family storm.

The aunt's geriatrician testified as to her capacity at the time of executing the powers of attorney, the social worker spoke of the aunt's good care at one of the city's top residences and of the aunt's satisfaction with the residence. The social worker further confirmed she would remain as case manager to the aunt to ensure her on-going satisfaction and level of activity. The role of the nephew as legal representative was explained by the judge mediator as one which was required to be performed gratuitously by a family member in the absence of a clause providing for remuneration under the powers of attorney and that the nephew was required to

render an accounting to the Estate of the aunt upon her death or earlier termination of the nephew's mandate. Self-dealing was against the law. The judgment and the transcript were sent to the family members.

The court in question had no jurisdiction to oblige the parties to mediate but increasingly welcomed counsel's recommendations of mediation or of facilitated informational meetings as part of or in place of an adjudicated process. In this particular case, given the distance of the elderly sister, the general entrenchment of positions by family members, had these issues not been addressed in the presence of a neutral legal authority the fuelling of discontent would likely have continued and been visited upon the very person who required peace in her life, the aunt. This family was prepared to listen to what was said in court.

There is no substitute for effective communication amongst family members. While there is no guarantee of success, those who work through their plans and potential disagreements together in a timely manner with a professional mediator and other specialized professionals, as needed, are more likely to protect their assets and choices and avoid litigation.

5.3 The Informal Caregiver's Legal Issues for Caregiving

> Each of us is, will be or has been a caregiver at some time in our lives.
> Ann Soden, 2005
>
> Traditionally, the majority of informal caregivers have been family members but this has changed over the last twenty years. Families no longer live as close to one another. These trends mean there are fewer family members to share care, and may explain the growing number of friends and neighbors now providing, in particular, hospice palliative care. Family and informal caregivers play a key role in hospice palliative and end-of-life care, and their role continues to evolve. The tasks that informal caregivers are asked to take on is changing and is influenced by a number of factors, including larger social, demographic and economic trends, the unique experience associated with caring for someone who has dementia or is at the end of life, as well as changes in health policy and services.
>
> The age of the informal and family and other caregiver can have serious implications. More informal caregiving is falling on older, frailer spouses, partners, and siblings, and on older children who may themselves have age-related health problems.
>
> There is a lack of policies that focus specifically on the multiple needs of the family or informal health care assistants/caregivers.
>
> Extract from a speech by Sharon Baxter**,** Executive Director, Canadian Hospice Palliative Care Association, May 5, 2005

Family and other caregivers are the cornerstone and default safety net system within the contemporary long-term-care system, providing much of the assistance to individuals who have difficulties in performing activities of daily living or are faced with terminal illness or end-of-life other care and want to remain in a non-institutional environment. Care from adult children and spouses, in particular, significantly reduces nursing home admissions for older people.

In the industrialized world taking care of parents has been considered a normal and expected phase of life. However, if baby boomers cannot expect that the same

level of government benefits and state support will be provided to them, will the multigenerational family increasingly to be relied upon as their default safety net for care when the former are themselves stretched to the limit to provide for themselves and their families?[32] In the western hemisphere assumptions about the provision of filial support for daily living needs no longer have wide acceptance. Economic and social costs both to society and to potential caregivers is increasing, while the tax base and the pool of family caregivers, especially women, is shrinking. And in Asia, reliance on family[33] is also suffering due to pressures of economic development and population mobility.[34]

Yet with care reverting to the community and the home, families are facing an increased demand to care for loved ones with little formal support or education. Thousands of families and others, including friends and volunteer caregivers, work through chronic care and end-of-life challenges daily with no formal training. They are not accountable to standards of conduct or of practice of professionals but play a key role in our health-care system by providing nursing and end-of-life care and often acting in critical and chronic situations as substitute decision-makers with little experience or guidance.

We know that most people want to be cared for at home as long as possible. This will require holistic changes in how health services are delivered and supported, as family and caregivers take on a wider range of tasks including clinical, ethical and legal responsibilities.

Those who provide care do not identify themselves as caregivers but rather as sons and daughters, parents, spouse, grandparents, siblings, friends, neighbors and loved ones. It is in this spirit that the term "caregiver" refers not only to people related to the care recipient by blood or marriage, but also to others with whom the care recipient has a close emotional relationship.

Nevertheless, in many circumstances, the extent of one's legal rights or responsibilities will depend on whether one strictly meets the applicable definition of family member contained in relevant statutes, regulations and case law.

5.3.1 Is There a Duty to Care?

A basic issue for many caregivers confronted with long-term-care or end-of-life needs is whether there exists a legally enforceable obligation on their part to provide caregiving assistance to the individual (for instance, when an individual at risk prefers to remain in her own home rather than entering a nursing home). Although strong arguments may support a moral duty in this situation no law

[32] Hancock (2002).

[33] Goodman and Peng (1996); Takahashi (2004).

[34] Ramesh (2004).

compels family members to personally provide direct, hands-on care to dependent relatives.

While hands-on care is not prescribed by law, many jurisdictions have provided by statute for a parent to claim support from their adult child.[35] Filial support obligations have the potential to enable any parent in need to directly claim support from their child, stepchild, grandchild, and, at least indirectly, from their child's spouse.

Filial support legislation has been little used. As the population ages, and the average life span increases, this little-known area of law may become fertile ground for two groups of litigants: first, governments seeking to recover the cost of caring for older citizens; second, older persons struggling to preserve their quality of life.

Various reasons help explain the infrequent recourse to filial support legislation: older parents are reluctant to bring legal action against their children, many adult children continue to voluntarily provide care and support for their older parents, and many third parties who would otherwise bring applications for support for those older parents for whom they care, are ineligible to apply. These laws continue to be important as an expression of values, "assum[ing] and perpetuat[ing] a familist philosophy" about the older person's role within the family and society at large. The ideal model of family relationships and obligations expressed in such legislation may no longer be a true reflection of society's values and structure. And yet, the parental support obligation may be one of the only avenues for ensuring that aging parents do not grow old in poverty[36].

5.3.2 Legal and Ethical Standards of Care

While parents are legally obligated to care for their minor children, caregivers of dependent adults are people who have chosen this role. This means that they legally could have chosen to decline, albeit that for many caregivers the role is often thrust upon them without any meaningful choice.

[35] In Canada this filial support obligation historically existed in the *Civil Code of Quebec*, and was introduced in most Canadian jurisdictions about the time of the Depression in the 1930s as a response to the government's difficulty providing for the older members of the population. In effect the statutory obligation, where enacted, has rarely been employed in modern times because of the availability of direct health care in virtue of Canada's universal health insurance and indirect health care available in long-term care institutions at a cost not exceeding one's federal pension. However in *Burgess v. Burgess*, [1994] O.J. No. 4004 (Ontario Prov. Div.), Mr. Justice Fisher stated he believed the Ontario provisions were added, "to allow the State to make well-off children pay for parents in nursing homes rather than the State paying for them." Indeed the judge remarked, "the effect of [statutory filial support obligations] is far more sweeping."

[36] Supra note 7, Bala (2005).

The duties of the caregiver and the lack of government support for families in the context of caregiving may be much more complex, though, from legal, ethical and psychological perspectives. Once a person has undertaken the caregiver role, then human rights legislation, relevant statutes and the common law, make it illegal, as a form of mistreatment, abuse or neglect, for the caregiver to willfully ignore the basic needs of or, otherwise through acts or omissions, to endanger the dependent person, including, in certain cases, witnessing physical mistreatment by professionals and volunteers and failing to act.

Decisions a caregiver may make which are based upon a consideration for the care recipient's best interests in a good-faith effort to weigh the burdens versus the benefits of a particular medical treatment or other types of intervention when the care recipient's wishes and values are not known or are not possible to obtain, should not be considered mistreatment.

For example, part of the caregiver's role in palliative care at the end of life is knowing when it is medically advisable to stop feeding a person who is dying; when to reduce medication, if at all; how to advocate and manage pain; and what therapies or standard procedures to discontinue (e.g. taking one's temperature, blood pressure, respiration and pulse). Families are often made to feel guilty about stopping these procedures. When the care recipient's wishes are not known or are not possible to obtain in the circumstances, the prudent caregiver should consult the health care team, or the ethics committee of the institution, if applicable, particularly in situations of family disagreement.

When a person agrees (tacitly or expressly) to undertake the caregiving role, both the caregiver and the care recipient have certain expectations as to what their relationship will involve. Since each party makes at least implied (and, in some cases, express) promises about his or her own end of the bargain, their relationship may be characterized as a contract. It behooves both the caregiver and care recipient to reach as clear an understanding as possible, as early as possible, about their mutual expectations and commitments. This understanding may be altered continually, of course, as the needs and capacities of the respective parties evolve over time.

Occasionally an undertaking to care is made conditional upon or in consideration of the transfer of property, commonly referred to as a "care agreement" or upon a gift of money. Whether it is called a care agreement or by any other name, essentially a contract for services is being proposed. Both parties should seek expert legal and accounting counsel and carefully consider with these specialists whether such an agreement or contract is ethical, fair and appropriate in the circumstances. If it is not, it may be set aside or its obligations reduced because of undue influence by the care recipient or on the basis of unconscionability (exploitation).

Finally, while the law does not impose direct caregiving responsibilities on families, a family may insist on participating in caregiving for a disabled or ill relative even when that person objects. Families have neither a duty nor a right to be involved, as long as those individuals who object to the family providing direct services to them are capable of making and expressing their own autonomous decisions.

Informal family caregivers frequently act as legal representatives for financial[37] and health care decision-making. They require not just medical information and understandings but legal knowledge about the nature of their fiduciary duties and health care responsibilities in order to perform their roles in accordance with the law, their contract, if one exists, and the wishes of the person they represent. They need to understand their duties, including the duty to understand, respect, support and advocate the right of the care recipient represented to make all decisions he is capable of.

Caregivers are often under significant stresses created by the burdens of balancing many aspects of their lives. Important supports, including appropriate respite care for at-home caregivers, tax credits, paid compassionate leave and other compensation for those caregivers in the workplace are urgently needed.

Family matters. But families never expected to have to deal with many of these issues and are unprepared for them: caregiving, mental and physical impairments of family members, end-of-life decisions, elder care, housing transitions and the need for resilience and support in the face of crises. These important family issues are global phenomena requiring thoughtful social and economic policies, action and education.

5.4 Conclusion

> As new conditions arise…the law instead of being fixed and static becomes a living, changeable entity shaped to satisfy the needs of society.
>
> The Honorable Brian Dickson, former Chief Justice of Canada (1973–1990)

Older adults, as well as other disenfranchised groups such as women, the poor and immigrants, do not recognize that their most pressing problems are legal problems. And their most pressing problems are frequently not recognized as legal by courts. Older persons' concepts of justice and of the most appropriate remedies for achieving justice differ from those of many judges and lawyers.[38]

The examination of the proper role of law and the practice of law in the context of aging has challenged us to construct new concepts of law and practice and to facilitate the diverse ways this demographic lives, navigates and negotiates their everyday relations. It has led us to develop new ways of securing justice adapted to this clientele. In so doing we now address the legal and non-legal[39] challenges of aging and see them as part of the same whole and endeavor to promote more efficient human solutions to the rights-based issues of this population.

Our work is far from done. We can draft the best rules, the best procedural safeguards, but if they are not applied or applied in a paternalistic fashion and if

[37] Tilse et al. (2005).

[38] McGuire and Macdonald (1996) at 550–551.

[39] Gary (1997) supra note 24 at 400 and 413.

people are unable to access the law or cannot do so in a timely fashion and in a format which conforms to their sense of how justice is to be achieved, then it is all for naught. Refining ethical, creative and cost-effective solutions for our clients, guided by equitable laws, will continue to be the mission for Elder Law and beyond.

References

Bala N (2005) Family law and the older Canadian. In: Soden A (ed) Advising the older client. Lexis Nexis Butterworths, Toronto

Bengston VL, Giarrasso R, Mabry JB, Silverstein M (2002) Solidarity, conflict and ambivalence: complementary or competing perspectives on intergenerational relationships? J Marriage Fam 64:568–576

Butterwick SJ, Hormel PA, Ingo Keilitz I (2001) Evaluating mediation as a means of resolving adult guardianship cases. Center for Social Gerontology, Ann Arbor

Fleming RB, Morgan RC (2001) Lawyer's ethical dilemmas: a "normal" relationship when representing demented clients and their families. Ga Law Rev 35:735

Foxmen B, Mariani K (2010) Introduction to elder mediation. In: Using mediation to resolve disputes involving the elderly. Pennsylvania Bar Institute, 17

Gary SN (1997) Mediation and the elderly: using mediation to resolve probate disputes over guardianship and inheritance. Wake Forest Law Rev 32:397

Gibson JW, Hartley BB (2006) The dynamic of aging families. Cultivating Change LLC

Goodman R, Peng I (1996) The East Asian welfare states: peripatetic learning, adaptive change, and nation-building. In: Esping-Andersen G (ed) Welfare states in transition. Sage, London, pp 192–224

Hancock L (2002) The care crunch: changing work, families and welfare in Australia. Crit Soc Pol 22(1):119

Hull IM (2005) Advising families on succession planning: the high price of not talking. Lexis Nexis Butterworths, Toronto

Larsen R, Thorpe C (2006) Elder mediation: optimizing major family transitions. Marquette Elder Advisor 7–2:293

Lowenstein A, Bengtson VL (eds) (2003) Global aging and challenges to families. Aldine de Gruyter, New York

Mariani K, Begler AL (2008) Mediation as a tool for elder care planning. In: 4th Annual ADR Institute. Pennsylvania Bar Institute, 270

McGuire SC, Macdonald RA (1996) Small claims court cant. Osgoode Hall Law J 34(3):550

Park M, Wood E, Gottlich V (1992) Developing a legal services program policy on alternative dispute resolution: important considerations for older clients and clients with disabilities. Clearinghouse Rev:635

Piccini-Roy M (2005) General planning for the older client: a case management and the multidisciplinary approach. In: Soden A (ed) Advising the older client. Lexis Nexis Butterworths, Toronto

Radford MF (2001–2002) Is the use of mediation appropriate in adult guardianship cases? Stetson Law Rev 31:611

Ramesh M (2004) Review article: issues in globalisation and social welfare in Asia. Soc Pol Soc 3(3):321

Sabatino CP (2000) Representing a client with diminished capacity: how do you know it and what do you do about it? J Am Acad Matrim Law 16:481

Sabatino CP, Basinger SL (2000) Competency: reforming our legal fictions. J Ment Health Aging 6–2:119

Silberfeld M, Fish A (1994) When the mind fails: a guide to dealing with incompetency. University of Toronto Press, Toronto
Soden A (2005) Dilemmas in an elder law practice. In: Soden A (ed) Advising the older client. Lexis Nexis Butterworths, Toronto (second edition 2012)
Takahashi M (2004) Beyond crisis and dissonance: the restructuring of the Japanese welfare state under globalism. Soc Pol Soc 3(3):283
Tilse C, Wilson J, Rosenman L (2005) Minding the money: a growing responsibility for informal carers. Aging Soc 25(02):215
Wood EF (2001) Dispute resolution and dementia: seeking solutions. Ga Law Rev 35:785
Wood EF, Karp N (1994) Mediation-reframing care conflicts in nursing homes. Generations 54