The Aged Client and the Law

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For Maureen, Alycia
and my parents

Preface

This book aims to fill a gap in the curriculum in gerontology programs and in the literature on aging available to the general public. The legal problems encountered by older persons and their families are numerous but unfamiliar. Professionals serving such clients must themselves master the intricacies of subjects as varied as public benefits, health care decisionmaking, and elder abuse. The elderly and the middle-aged alike are increasingly aware of the need to plan for their inevitable contacts with government agencies and the legal system.

The emphasis in this book is on the interaction between the law and the individual client. The larger public policy dimensions of a benefit program or a legal issue are mentioned only briefly. These aspects are covered extensively elsewhere in the literature of aging. Footnotes have also been omitted to avoid cluttering the book with statutory and case references of interest largely to lawyers.

An expression of gratitude is here tendered to the administration of Hofstra Law School for its technical assistance and especially to Elena Milack for her generous secretarial help in preparing this volume.

John J. Regan
May 9, 1990

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Contents

1

The Aged Client and the Legal System

Most people have few encounters with the legal system during their working lives. The purchase or sale of a home, the execution of a will, a divorce, and perhaps a lawsuit for personal injury are the only events that bring the average person into contact with lawyers and the law. Dealings with government agencies may consist only of applications for various licenses. Only the poor learn to cope with bureaucracies and the legal system out of necessity. For them, survival may depend on such knowledge, while for the middle class these experiences are often no more than troublesome annoyances.

Older people, especially after retirement, often find that their lives become dependent on government benefits and consequently on the agencies that administer these benefit programs. They are puzzled by the forms to be filled in, disturbed by the impersonal attitude of some agency personnel serving the public, and upset when something goes wrong—a check fails to arrive on time or has the wrong amount, a claim is disallowed, conflicting information leads to an impasse.

The elderly must also make plans and decisions that raise important legal and financial questions. Should the homestead be sold? How can taxes be minimized? What living arrangements make sense if illness strikes? How does one qualify for government benefits? Must one spend his or her life's savings in order to survive? Who will take care of the individual and make decisions on the person's behalf if long-term physical or mental incapacity should develop?

In the search for help with these problems, the older person will usually turn to his or her family or to trusted friends. But these persons may not be able to provide knowledgeable aid. The law and the benefit programs administered by government agencies often are

a mystery to the average person. At this point, the social worker, the health care professional, or the geriatric administrator may be the next source consulted for information and advice.

This chapter will describe the American legal system which the adviser and the aged client encounter. While this system is not unfamiliar, the relevance of particular aspects of the system to the concerns and needs of the older person will be emphasized.

THE SOURCES OF LAW

American law devises from four sources: constitutions, statutes, administrative regulations, and court decisions.

Constitutions

The United States Constitution is the supreme law of the land. It is, fundamentally, a grant of power from the states establishing the federal government. The first part of the Constitution provides the framework and powers for the executive, legislative and judicial departments. Twenty-six amendments follow, including the first ten, the Bill of Rights, which guarantee that Congress cannot abridge certain fundamental rights. Among these provisions are the rights to freedom of speech, press and the free exercise of religion; to be secure from unreasonable searches and seizures; to a speedy trial by jury with the assistance of counsel in many cases; to be protected from self-incrimination; and to numerous other protections from governmental action. The Fifth Amendment also prohibits the federal government from depriving a person of life, liberty or property without proper procedural protection. Shortly after the Civil War, the Fourteenth Amendment's due process and equal protection clauses imposed the same Fifth Amendment limitations on the states. Subsequent interpretation of the Fourteenth Amendment by the United States Supreme Court has defined due process to include most of the provisions of the Bill of Rights as well.

The federal Constitution acts as a brake on the conduct of the states, the federal government, and their agencies and employees. Its provisions do not directly address the activities of private individuals and organizations. Nonetheless, where a private party's relationship with government takes on certain characteristics, that party's activities may be considered "state action" by the courts, thus subjecting them to the limitations of the Constitution. Thus, for example, a

private hospital or social agency may be required to adopt certain procedures or policies in staff appointments or patient/client care if its operations are considered "state action." Factors such as the amount of government funding, the extent and influence of government regulations, and the type of function performed by the institution may indicate that the organization's activities are subject to constitutional limitations. This conclusion, in turn, may permit clients or patients to invoke constitutional protections in their dealing with an institution or organization.

Statutes

Statutes are laws enacted by a legislature—the United States Congress, a state legislature or a local legislative body such as a city or county council, and signed by the President, the governor, or other local executive officer. Health care providers and recipients are subject to significant federal legislation, such as the various Civil Rights Acts, the Hill-Burton Act, Medicare and Medicaid. State legislation deals with the licensing of facilities and professionals, health codes, zoning, guardianship and related interventions, and the family.

All legislation—federal, state and local—must be consistent with the United States Constitution. In some cases, federal statutes will also supersede state and local laws. Courts interpret statutes when their meaning is vague, ambigious, or disputed, but otherwise a statute takes precedence over a judicial decision dealing with the same subject.

Administrative Regulations

Many federal and state administrative agencies are authorized to issue regulations within the agency's area of expertise. These regulations are similar to statutes, but usually deal with more specific issues arising out of the implementation of a statute. Of particular concern to the aged and the professionals who serve them are regulations published by the Department of Health and Human Services (HHS), the Federal Trade Commission (FTC), the Internal Revenue Service (IRS), and the National Labor Relations Board (NLRB). These regulations usually are published daily in the Federal Register and collected annually in the Code of Federal Regulations. At the state level, the state health department, the department of social services (or

human resources), and various licensing agencies have similar rule-making power.

Agency regulations must conform not only to the federal Constitution, but they must also be consistent with the statute under which they are issued and be within the agency's authority.

Judicial Decisions

The last major source of law is judge-made. Decisions of courts in individual cases not only resolve the immediate dispute before the court, but they also form an important body of law governing many personal and business relationships and interests. This system, known as the common law, had its origins in England centuries ago and was carried to America in colonial times, where it has continued to develop in the courts, principally at the state level.

Two aspects of a judicial decision should be noted. The first is the legal doctrine of *stare decisis,* or precedent. In resolving disputes, courts are required to look back on how other courts in the same state have resolved similar disputes and to apply the same principles in settling the case presently before the court. In the future, other courts with new cases will also conduct the same type of inquiry, thereby providing continuity and stability to people as they pursue their personal and business affairs. Sometimes, a legislature will adopt or change through a statute the legal principles developed by the courts, but many areas of civic life (e.g., liability for injurious conduct) remain to a large extent within the domain of the courts.

Besides its chronological dimension, *stare decisis* also has a vertical structure. A lower court is bound by the decisions of higher courts in the same court system. A trial court in New York, for example, must follow the decisions of the state's higher courts, but not those decided by other trial courts around the state. Courts in one state are not bound by decisions in other states, although sometimes such decisions may be regarded as sensible and influential. Decisions of the United States Supreme Court are binding in all states.

The second hat worn by a judicial decision is known as the legal doctrine of *res judicata.* Once a court has decided a specific case and all possible appeals of that decision have been exhausted or expired, the decision becomes final and not subject to further litigation. The purpose of this policy is to prevent endless struggle over the same controversy and to permit the disputants to get on with their lives. Thus, for example, a court decision finding a defendant to be negli-

gent, which is not overturned on appeal, is final and cannot be the subject of a subsequent lawsuit on the same issues or factual findings.

THE COURT SYSTEM

Settling disputes is the primary function of the courts. Litigation is channeled through two court systems in this country—the federal courts and the various state court systems. Each has its own structure and jurisdiction.

The Federal Courts

A lawsuit begins in the federal courts in the United States District Court located in every state or in several regions of larger states. Like any trial court, the federal district court conducts trials and makes findings of fact.

Two types of cases lie within the jurisdiction of the federal courts. The first, known as a diversity of citizenship case, involves a dispute between citizens of different states or nations, where the amount in controversy exceeds $10,000. A corporation is considered a citizen of the state of its incorporation and of the state of its primary place of business operations.

Cases involving "federal questions," i.e., the application of the Constitution or laws of the United States, may also be filed in the federal courts, and in some cases, must start in federal courts. In most cases, except those in which the federal courts have exclusive jurisdiction (e.g., bankruptcy matters), the dispute may be commenced in either the state or the federal court or, if brought into state court, the defendant may have it moved to the federal court if it meets the diversity of citizenship or federal question criteria.

Appeals from the federal district courts go to the United States Courts of Appeals. The country is divided into twelve circuits or regions to hear appeals from the district courts within these circuits. In addition, the Court of Appeals for the Federal Circuit hears only certain types of cases, such as those involving claims against the federal government by federal employees. Appellate courts do not conduct trials. Their function is to review the evidence and the findings of the trial court to determine whether that court acted reasonably and applied the law properly. The appellate court may modify the lower court's decision, reverse it entirely, or reverse it and order the trial court to hold a new trial or take other appropriate action.

Still another appeal beyond the Court of Appeals may be possible, this time to the United States Supreme Court. Not every appeal is taken by this court. Only those (a small percentage) for which the Supreme Court grants a writ (order) of certiorari or for which an appeal is a matter of legal right will be heard.

The State Courts

Like the federal courts, the state court system usually is composed of three tiers (or only two in the less populous states). Some states have a single statewide trial court system, while others utilize several different trial courts with specialized jurisdiction (e.g., family court, criminal court, small claims court).

The type of review given to an appeal by a state appellate court is similar to that described in connection with the federal appeals courts. The review generally focuses on the principles of law applied at the trial level and the sufficiency of the evidence there to support the court's findings. The decision of the state's highest court usually is final, but in certain cases involving constitutional or other federal issues, an appeal to the United States Supreme Court is possible.

ADMINISTRATIVE HEARINGS

Besides their rule-making powers, some federal and state administrative agencies are authorized to hear disputes involving matters within the agency's jurisdiction. These cases are usually heard by "administrative law judges" (ALJ's), who conduct trials, hear and evaluate evidence, and make rulings binding on the parties. Usually the case involves a claim by an individual against the agency (and indirectly the government) for some benefit or right which the individual alleges has been improperly denied the person. For example, a beneficiary denied Social Security benefits may ask the Social Security Administration for a hearing before an ALJ, or a person denied Medicaid benefits may request a "fair hearing" conducted by an ALJ employed by the state Medicaid agency. These decisions are usually appealable to the courts, but the evidence developed at these hearings often plays an important role in shaping the scope of review and the ultimate decision of the court.

The Process of Litigation

The law dealing with the rights and duties of people is called substantive law. Another body of law, termed procedural law, governs the litigation process.

A lawsuit or "action" begins when one party, the plaintiff, files a complaint with the court against another party, the defendant. A copy of this complaint, together with a summons, will then be served on the defendant. The latter must respond in some fashion within a fixed period, usually 20 days, or else the plaintiff will receive judgment by default. Thus litigation is essentially an adversarial process, whereby the opposing parties each present their side of the case to a neutral decisionmaker, who will determine the merits of the controversy and select a remedy. Courts do not entertain abstract or one-sided disputes. Rather, the premise of the system is that the truth or the best resolution of the dispute will emerge from the clash of opposing parties.

The defendant's response can take several forms. He or she may admit, deny, or plead no knowledge of the allegations in the complaint. The defendant might file a counterclaim against the plaintiff for some other grievance, such as where a patient sues a hospital for negligence, which in turn countersues the patient for unpaid bills. The defendant also might sue to bring a third party into the lawsuit as another defendant. For example, a hospital sued by a patient injured by defective equipment might in turn sue the equipment manufacturer to recover any damages awarded the plaintiff-patient. Along with these responses, the defendant may submit a variety of pretrial motions to the court, attempting to win the case without the need for a trial.

Contrary to popular belief, litigation does not produce surprise evidence or witnesses at the trial. The trial is preceded by an extensive process of discovery. There are a variety of methods for learning the strength of the other party's case, either to prepare for trial or to settle the case without a trial. Discovery may involve a deposition or statement under oath from a witness; written questions submitted to the adversary or to witnesses; the inspection and/or copying of documents and other evidence; a physical or mental examination of a party; and an agreement or stipulation between the parties as to certain facts, thereby avoiding the need to prove them in court. The judge may conduct a pretrial conference to clarify the issues in dispute and to promote a settlement between the parties.

The trial follows, often with a jury if requested by either party. Evidence is introduced and witnesses testify. The judge rules on the admissibility of one evidence and objections of either party to the questions, statements or actions of the opposition. The judge also explains to the jury the rules of law which must guide the jury's evaluation of the evidence prescribed during the trial. The basic role of the jury is to sift the evidence introduced at trial and to reach certain conclusions (called "fact-finding") in the light of the applicable law. The jury's decision is its verdict; if the judge agrees with it, the court judgment will be entered in accord with it. The judgment gives the victorious party the right to have the losing party carry out the penalty provided, such as paying a sum of money or taking certain action. If the loser fails to comply, the winner may seek additional help from the court (e.g., authorization to receive payment from the loser's bank account) or from the local sheriff (e.g., by seizing certain property of the loser). Sometimes, the collection of the judgment is more difficult than the trial, especially in the small claims courts, and therefore a victory in the courts may indeed be pyrrhic.

The losing party at the trial level usually has the option of filing an appeal to a higher court. The party who appeals is known as the appellant while the adversary is called the appellee. The names by which the case is known and reported can be reversed on appeal. For example, a case which began in the trial court under the title *Bush v. Reagan* may be called *Reagan v. Bush* if Reagan lost at the trial level and appealed. The appellate court will review the evidence submitted and the law applied at the trial, and then enter its own judgment. Often, the appellate court will explain its conclusions in a written opinion, which, in turn, may provide guidance in the future as to how disputes involving similar facts must be decided.

LAWYERS AND LEGAL ASSISTANCE

Litigation in the courts (except in small claims court) requires the assistance of an attorney. The help of a lawyer may also be necessary in writing or changing a will, planning for the disposition of a person's property prior to his or her entry into a nursing home, or in selling a home.

Where can a person find legal help at a modest cost? The starting point might be the state or county bar association, which will provide a list of local attorneys who accept referrals on a reduced fee basis. The National Academy of Elderlaw Attorneys, a professional association of lawyers with special interest in problems of older persons, also