

Contents

<i>Preface</i>	xxi
<i>Acknowledgments and Gratitude</i>	xxv
CHAPTER 1 Introduction to Elder Law and the Aging Process	1
A. Introduction	1
B. An Overview of the Field of Elder Law	2
C. An Overview of Aging	3
1. Characteristics of the U.S. Elderly Population	4
a. Size	4
b. Demographics	5
c. Social Supports	6
2. The Aging Process	6
a. Physical Changes	7
b. Psychological Changes	8
c. Social Changes	9
3. Social Services Available to Older Adults	12
CHAPTER 2 Elder Law Practice	13
A. Introduction	13
B. Models of Elder Law Practice	13
1. Traditional Client Representation	13
2. Family Representation	14
3. Multi-Disciplinary Practice	15
4. Elder Mediation	16
Jennifer L. Wright, Practical Concerns in Elder Law Mediation	17
C. Ethical Challenges of Elder Law Practice	20
1. Maintaining Confidentiality and Avoiding Conflicts of Interest	21
MRPC 1.6: Confidentiality of Information	22
MRPC 1.7: Conflict of Interest: Current Clients	22

2. Representing Clients with Actual or Suspected Capacity Concerns	26
a. The Challenge of Assessing Capacity	27
Exercise 2.1	30
b. The Challenge of Working with Clients with Limited Capacity	30
MRPC 1.14: Client with Diminished Capacity	31
<i>In re Disciplinary Proceeding Against Eugster</i>	33
CHAPTER 3 The Legal Status of Old Age and Age Discrimination	45
A. Introduction	45
B. The Constitutional Status of Age-Based Classifications	46
<i>Massachusetts Board of Retirement v. Murgia</i>	47
C. Medical Care	51
<i>Salgado v. Kirschner</i>	51
D. Safety Statutes	56
1. Driving	56
Fla. Stat. Ann. §322.18(5) (2019)	56
N.D. Cent. Code §§39-06-13, 39-06-19 (2019)	57
2. Elder Abuse	58
Or. Rev. Stat. §124 (2019)	58
E. International Human Rights Law	60
Israel Doron & Itai Apter, The Debate Around the Need for an International Convention on the Rights of Older Persons	62
F. Employment	68
1. Statutory Excerpts	69
Age Discrimination in Employment Act, 29 U.S.C. §§621 et seq.	69
2. Types of ADEA Claims	73
a. Disparate Treatment	74
<i>Gross v. FBL Financial Services, Inc.</i>	74
b. Disparate Impact	79
<i>Smith v. City of Jackson, Mississippi</i>	80
<i>Villarreal v. R.J. Reynolds Tobacco Co.</i>	87
3. Adverse Employment Action Requirement	98
<i>Dediol v. Best Chevrolet, Inc.</i>	99
CHAPTER 4 Surrogate and Supported Decision-Making	105
A. Introduction	105
B. Decision-Making Standards and Approaches	106
C. Durable Powers of Attorney	108
1. Types of DPOAs	108
2. DPOA Execution Requirements and Considerations	109
3. Sample DPOA	110

Statutory Form Power of Attorney	111
Exercise 4.1	116
4. DPOA Abuse	116
<i>Mowrer v. Eddie</i>	117
<i>Gupta v. Lincoln National Life Insurance Co.</i>	121
D. Living Trusts	125
E. Representative Payees and VA Fiduciaries	126
F. Advance Directives	127
1. Types of Advance Directives	127
2. Advance Directive Execution Requirements and Considerations	133
3. Sample Advance Directives	134
Health Care Proxy	134
Uniform Health Care Decisions Act Advance Health-Care Directive Form	135
4. Interpreting Ambiguous Instructions	140
<i>S.I. & F.H. v. R.S. & South Nassau Communities Hospital</i>	140
5. Factors Triggering the Use of Advance Directives	143
<i>Payne v. Marion General Hospital</i>	143
6. Revoking an Advance Directive or Removing a Health Care Agent	150
7. Default Surrogate Statutes: An Alternative to Health Care Proxies?	152
Exercise 4.2	153
G. Guardianship and Conservatorship	153
1. Overview of the Process of Obtaining a Guardianship	154
Sample Petition: Uniform Guardianship, Conservatorship, and Other Protective Arrangement Act §603	157
2. The Role of Counsel for the Respondent	163
<i>In re Guardianship of Herke</i>	164
3. Basis for Imposition of Guardianship	168
a. Standard for Appointment	168
<i>Matter of Maher</i>	169
<i>Smith v. Smith</i>	172
b. Scope of Appointment	174
<i>In re Guardianship of Inez B. Way</i>	175
4. Guardians' Authority and Responsibilities	177
<i>Karbin v. Karbin ex rel. Hibler</i>	178
5. Guardianship Reform	185
Robert D. Dinerstein, Tales from a Supportive Guardianship	187
H. Supported Decision-Making	189
<i>Texas Supported Decision-Making Act</i>	190
Supported Decision-Making Agreement	193

1. Guardianship Mediation	196
<i>In re Guardianship of Macak</i>	198
I. Representing Clients with Appointed Surrogates	203
1. Client with an Attorney-in-Fact	203
ACTEC Commentary on MRPC 1.14	203
<i>In Re Runge</i>	204
2. Client Subject to Guardianship	211
CHAPTER 5 Income in Older Age—Sources and Challenges	215
A. Introduction	215
B. Social Security Benefits	217
1. Overview of OASDI	217
2. Eligibility for OASDI	218
a. Becoming Insured	218
b. Age-Based Eligibility	218
c. Disability-Based Eligibility	219
d. Derivative Eligibility	219
<i>Thomas v. Sullivan</i>	220
3. The Amount of OASDI Benefits	225
a. Calculating the Basic Entitlement	225
b. Timing the Taking of Benefits	225
c. Electing and Timing Derivative Benefits	226
d. Effect of Earnings on OASDI Benefits	229
4. Special Protections for OASDI Benefits	230
5. Appealing SSA Determinations	230
<i>Hermes v. Secretary of Health & Human Services</i>	231
6. The Effect of SSA Overpayments	233
<i>Johnson v. Barnhart</i>	234
7. Controversies over OASDI	236
C. Private Pensions	239
1. Incentives that Encourage Private Pensions	240
2. Types of Pension Plans	240
3. Federal Protections for Pension Beneficiaries	242
D. Savings	243
E. Family Support	245
<i>Swoap v. Superior Court of Sacramento County</i>	246
<i>Health Care & Retirement Corp. of America v. Pittas</i>	254
Exercise 5.1	259
F. Other Sources of Income	260
1. Supplemental Security Income (SSI)	260
2. Military Retirement Benefits and Veterans' Pensions	261
CHAPTER 6 Financing Health Care	263
A. Introduction	263
B. Medicare	264

1. Overview of Medicare	264
2. The Four Parts of Medicare	265
a. Medicare Part A	265
b. Medicare Part B	267
c. Medicare Part C	269
d. Medicare Part D	271
Exercise 6.1	272
3. Paying for Out-of-Pocket Costs	272
4. Medicare Appeals Process	274
5. Limitations on Coverage	277
a. Traditional Medicare Limitations	277
<i>Smith v. Thompson</i>	277
b. Managed Care Limitations	281
<i>Shah v. Secretary of Health & Human Services</i>	281
6. The Medicare Home Health Benefit	284
<i>Russell v. Sebelius</i>	284
7. The Future and Financial Status of Medicare	291
Richard Kaplan, Top Ten Myths of Medicare	292
C. Medicaid	293
1. Overview of Medicaid Coverage	293
2. Eligibility for Basic Medicaid Coverage	294
3. Eligibility for Medicaid Coverage for Long-Term Care	296
a. Effect of Transfers for Less than Fair Market Value	296
<i>Godown v. Department of Public Welfare</i>	298
b. Spousal Impoverishment Protections	302
i. Calculating Standard Spousal Impoverishment Protections	302
<i>Poindexter v. Illinois</i>	303
ii. Retaining Additional Assets and Income	308
<i>Johnson v. Lodge</i>	308
c. Medicaid Liens and Estate Recovery	314
<i>In re Estate of Darby</i>	316
4. Medicaid Planning	322
a. Ethical Considerations	322
<i>New York State Bar Association v. Reno</i>	325
<i>In the Matter of Mildred Keri</i>	328
b. Medicaid Planning Techniques: Transfers and Purchases	336
<i>Reed v. Missouri Department of Social Services, Family Support Division</i>	340
<i>Estate of Ethel Barnett v. Department of Health & Human Services</i>	343
c. Medicaid Planning Techniques: Divorce and Spousal Refusal	347
John A. Miller, Medicaid Spend Down, Estate Recovery and Divorce: Doctrine, Planning, and Policy	348
<i>Morenz v. Wilson-Coker</i>	350

D. Other Sources of Health Care Coverage	353
1. Long-Term Care Insurance	353
2. Employer-Provided Health Care Benefits	356
<i>Sprague v. General Motors Corp.</i>	357
CHAPTER 7 Housing and Long-Term Care	369
A. Introduction	369
B. Aging in Place	370
1. The Appeal of Aging in Place	370
Stephen Golant, Commentary: Irrational Exuberance for the Aging in Place of Vulnerable Low-Income Homeowners	371
2. Leveraging a Home to Support Aging in Place	373
a. Sale and Leaseback	373
b. Reverse Mortgage	373
<i>Estate of Jones v. Live Well Financial, Inc.</i>	376
c. Home Sharing	380
3. Obtaining In-Home Help	382
a. Rights Under the Americans with Disabilities Act	382
b. The Emergence of Consumer Directed Care	384
Daniela Kraiem, Consumer Direction in Medicaid Long-Term Care: Autonomy, Commodification of Family Labor, and Community Resilience	385
c. Protections for Home Care Workers	388
d. Emerging Models of Service Coordination	390
e. Sources of Payment for Home Care	391
4. Aging in Place Exercises	393
Exercise 7.1: Role-Playing	393
Exercise 7.2: Counseling & Research	395
C. Nursing Homes	396
1. Nursing Home Admission: Reasons and Process	397
2. The Statutory and Regulatory Framework Governing Nursing Homes	398
Exercise 7.3	401
3. Nursing Home Residents' Rights	401
a. Statutory and Regulatory Framework	401
Requirements for Long-Term Care Facilities, 42 CFR §483, Subpart B (2019)	401
Exercise 7.4	416
b. Balancing Competing Interests	417
<i>Chaney v. Plainfield Healthcare Center</i>	417
4. Enforcing Nursing Home Residents' Rights Through Informal Processes	423
5. Enforcing Nursing Home Residents' Rights Through Litigation	424
a. Private Rights of Action	424
<i>Grammer v. John J. Kane Regional Centers</i>	425

b. The Role of Statutory Violations Absent a Private Right of Action	432
<i>Estate of French v. Stratford House et al.</i>	432
c. Types of Quality of Care Claims	436
<i>Zaborowski v. Hospitality Care Center of Hermitage, Inc.</i>	437
<i>Riley v. Maison Orleans II, Inc.</i>	441
d. The Impact and Enforceability of Mandatory Arbitration Clauses	447
e. Summary Problem	448
D. Assisted Living	449
1. Overview of Assisted Living	449
2. Duties of Assisted Living Facilities	451
a. Level of Services	451
<i>Storm v. NSL Rockland Place, LLC</i>	452
b. Protecting Residents from One Another	459
<i>Pollack v. CCC Investments, d/b/a Tiffany House by Marriott</i>	459
E. Continuing Care Retirement Facilities	461
<i>Seabrook Village v. Murphy</i>	464
F. Protection from Disability Discrimination in Housing	470
<i>Cason v. Rochester Housing Authority</i>	470
<i>Weinstein v. Cherry Oaks Retirement Community</i>	479
<i>Herriot v. Channing House</i>	483
CHAPTER 8 Elder Abuse and Neglect	491
A. Introduction	491
B. The Phenomenon of Elder Mistreatment	492
1. Types of Elder Mistreatment	492
2. Patterns in Elder Mistreatment	493
3. Warning Signs	494
C. Approaches to Remediating Elder Mistreatment	497
1. Mandatory Reporting	497
R.I. Gen. Laws §42-66-8 (2019)	499
Wis. Stat. §46.90 (2019)	499
2. Social Service Intervention	501
<i>Doe v. South Carolina Department of Social Services</i>	501
3. Civil Sanctions	509
Improvident Transfers of Title Act, 33 Maine Rev. Stat. §1021 et seq. (2019)	510
4. Criminal Sanctions	513
Nina A. Kohn, <i>Elder (In)Justice: A Critique of the Criminalization of Elder Abuse</i>	514
D. Legal Definitions of Elder Mistreatment	517
1. Malfeasance	517
<i>State v. Maxon</i>	517
<i>In Re Chapman</i>	523

<i>State v. Stubbs</i>	529
2. Neglect	534
a. Third-Party Neglect	534
<i>People v. Heitzman</i>	534
<i>Sieniarecki v. State of Florida</i>	542
b. Self-Neglect	548
CHAPTER 9 Death and Dying	551
A. Introduction	551
B. Counseling Terminally Ill Clients	551
Georgia Akers, On Death and Dying: Counseling the Terminally Ill Client and the Loved Ones Left Behind	552
Ed de St. Aubin et al., Elders and End-of-Life Medical Issues: Legal Context, Psychological Issues, and Recommendations to Attorneys Serving Seniors	555
C. The Right to Refuse Life-Sustaining Care	558
1. Refusal of Life-Sustaining Care for Cognitively Incapacitated Persons	559
<i>In the Matter of Anna M. Gordy</i>	559
2. Refusal of Nutrition and Hydration	563
Thaddeus Pope & Lindsey Anderson, Voluntarily Stopping Eating and Drinking: A Legal Treatment Option at the End of Life	563
D. The Right to Die and Receive Aid in Dying	567
1. The Constitutional Approach to the Right to Die	567
<i>Washington v. Glucksberg</i>	568
2. The Statutory Approach to the Right to Die	578
The Oregon Death with Dignity Act, Or. Rev. Stat. §§127.800 et seq. (2019)	579
Oregon Health Authority, Oregon Death with Dignity Act 2018 Data Summary	586
Exercise 9.1	589
E. Hospice Care	590
Medicare's Hospice Regulations, 42 CFR §418 (2019)	591
CHAPTER 10 Family Relations in Later Life	599
A. Introduction	599
B. Divorce in Later Life	599
1. Special Considerations in "Grey Divorces"	600
<i>Snyder v. Snyder</i>	601
2. Policy Implications of "Grey Divorce"	607
C. Elder Caregiving and Caregivers' Rights	608
1. Overview of Family-Provided Elder Care in the United States	609
Summary: Families Caring for an Aging America	609
2. Public Policy Support for Family Elder Care	612

<i>Dillon v. Maryland-National Capital Park & Planning Commission</i>	613
3. The Obligation to Provide Care	617
Law of the People's Republic of China on the Protection of the Rights and Interests of the Elderly (2018 Amendment)	617
D. Grandparenting and Grandparents' Rights	619
1. Grandparents as Visitors	619
<i>Troxel v. Granville</i>	620
<i>Blixt v. Blixt</i>	626
Exercise 10.1	638
2. Grandparents as Supplemental Care Providers	638
3. Grandparents as Parents	640
a. Financial Support	641
b. Custody and Decision-Making Authority for Grandchildren	642
<i>In re Paternity of V.M.</i>	642
<i>Penland v. Harris</i>	645
<i>Table of Cases</i>	651
<i>Index</i>	653