The Emergence of and Need for Aging and Longevity Law

By Robert Abrams

I'm 61 years old. I still think I'm a young man. Apparently, I'm not.

According to millions of Americans, especially those under 30 years of age,[1] I'm an old person,[2] a senior citizen,[3] an elder[4] and almost a geriatric.[5] This perception is embraced and enhanced by the media,[6] politicians,[7] and assorted intellectuals.[8]

At least I am not alone. I am part of a growing demographic that currently includes approximately 110 million Americans who are 50 years of age or older,[9] a subset of which are the 62 million people who are at least 60 years of age.[10] Assuming I live long enough to reach my life expectancy, which appears to be 83.6 years,[11] I will become part of the 3 percent of Americans from my generation who have a chance to reach the century mark.[12] It is estimated that if and when I celebrate my 100th birthday, I would become one of the approximately 564,000 centenarians.[13]

Moreover, I am also part of a professional demographic that includes 1,355,963 attorneys in the United States, which includes a subset of 177,035 lawyers in New York State.[14] Many of my fellow attorneys are my age or

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older.[15] I hope and expect to eventually join the demographic of New York attorneys who are over 75 years of age and still practicing law.

While I can take some comfort in these numbers, I am also aware that being part of a growing demographic is not an antidote to the plethora of challenges that accompany increased longevity. In fact, as we "old folk" age together, we apparently become a ubiquitous societal burden which results in health-related, financial, legal and moral/ethical dilemmas.

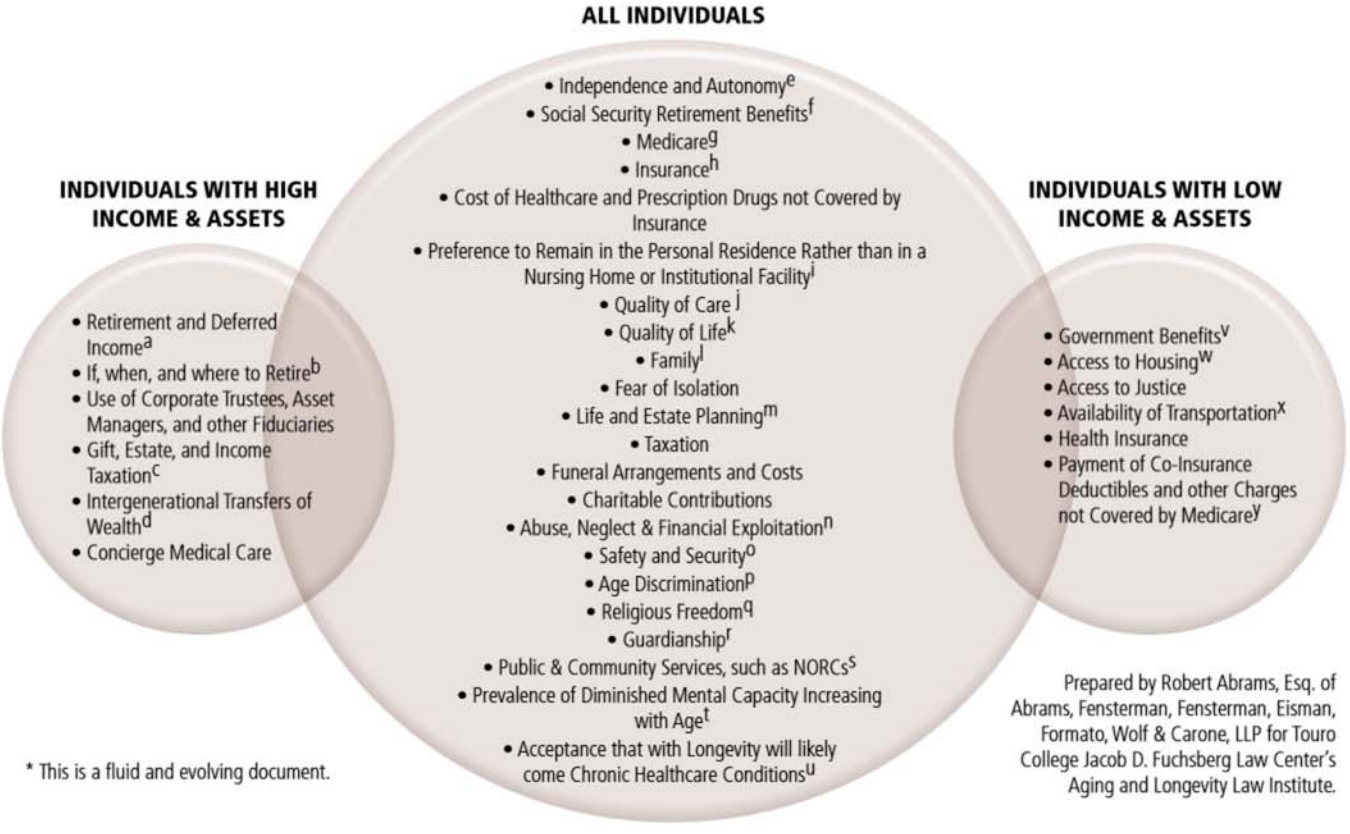
These societal burdens are a direct result of real life individual legal challenges that we and our loved ones may experience as we (they) grow older. As illustrated by the following chart, some such potential legal challenges are universal, while others may be based on financial status.

Ironically, many of the over 100 million Americans who are 50 years of age or older and their loved ones and neighbors, an additional approximate 130 million adult Americans,[16] choose not to consider and/or address these issues until they are directly confronted with one or more of the referenced challenges. Such procrastination will not reduce the likelihood that most of the over 100 million Americans over the age of 50, including lawyers and judges, will require the services of knowledgeable attorneys who are competent to address the complex legal matters that comprise the emerging field of Aging and Longevity Law. Unlike other substantive areas of law that focus on a particular group or subject, Aging and Longevity Law is focused on:

> A confluence of the numerous substantive areas of the law which individually and collectively address the diverse legal challenges and related life contingencies that impact and accompany the increased longevity of the over 100 million Americans who are fifty years of age or older.[17]

Aging and longevity lawyers must not only be familiar with the law but must also understand, *inter alia*, the aging process, the etiology and manifestations of diminished mental capacity, interpersonal, family and business relationships, the health care continuum and possess an understanding of and sensitivity to the realities of aging, which often requires decisions to be made in contemplation of and/or shortly before death.

Legal Issues That Accompany Increased Longevity: Similarities and Differences Due to Financial Status*



* This is a fluid and evolving document.

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Over the past several years, a number of court decisions have helped shape a needed dialogue on legal issues associated with increased longevity. For example, the issue of health care decision-making has changed dramatically over the past 40 years. Seminal cases such as In re Storar[18] and Cruzan,[19] combined with legislative initiatives such as the Healthcare Proxy[20] and the Family Health Care Decisions Act,[21] have made it clear that all adult individuals are presumed to have the capacity to consent to and/ or refuse health care treatment, including artificial nutrition and hydration, as well as other forms of life-sustaining treatment.[22]

Multiple alternatives for surrogate decision-making have been approved in New York over the past three decades. Agents appointed pursuant to a health care proxy may be authorized to make life and death decisions on behalf of the principal.[23] Guardians appointed pursuant to Article 81 of the Mental Hygiene Law may be authorized to make major medical decisions.[24] The Family Health Care Decisions Act and the Do Not Resuscitate Statute are examples of default statutes where the government has established a priority selection system which empowers a surrogate to make health care decisions on behalf of an individual who lacks capacity.

The evolution of health care decision-making has included a discussion and, in some cases, action regarding the legislation of physician-assisted suicide. Some states have authorized physician-assisted suicide, while others, such as New York, have not.

In its' per curium decision in Myers v. Schneiderman,[25] the N.Y. Court of Appeals made the following observation about physician-assisted suicide in New York and throughout the United States:

> As the Supreme Court observed, "[t]he earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828." New York's Task Force on Life and the Law, which was first convened in 1984, carefully studied issues surrounding physician-assisted suicide and "unanimously concluded that [l]egalizing assisted suicide and euthanasia would pose profound risks to many individuals who are ill and vulnerable" and that the "potential danger[s] of this dramatic change in public policy would outweigh any benefit that might be achieved." The Legislature has periodically examined that ban – including in recent years – and has repeatedly rejected attempts to legalize physician-assisted suicide in New York.
>
> The Legislature may conclude that those dangers can be effectively regulated and specify the conditions under which it will permit aid-in-dying. Indeed, the jurisdictions that have permitted the practice have done so only through considered legislative action and those courts to have considered this issue with respect to their own State Constitutions have rejected similar constitutional arguments. At present, the Legislature of this State has permissibly concluded that an absolute ban on assisted suicide is the most reliable, effective, and administrable means of protecting against its dangers.[26]

Notwithstanding the Court's finding that the legislature had a rational basis for criminalizing assisted suicide, the Court also noted by implication that the "present" decision of the legislature was subject to change. I suspect that changes, if any, will be the result of litigation commenced by knowledgeable Aging and Longevity Law practitioners.

In addition to the pursuit of continued clarity on health care decision-making, aging and longevity lawyers will, inter alia, also help develop standards to prevent, detect and address the abuse, neglect and financial exploitation of older persons and identify appropriate safeguards to plan for and address the legal needs and rights of the millions of Americans with diminished mental capacity. As lawyers creatively address these individual and societal problems, the ultimate outcomes will often be decided and/ or guided by judges, who grasp the significance and far-reaching implications of their decisions.

For example, in Campbell v. Thomas,[27] Justice Prudenti determined that a defendant spouse who married a terminally ill man, who suffered with dementia and did not possess the requisite capacity to enter into the marriage, should not be entitled to the surviving spouse's right to an elective share. In her decision, the judge married equity and law to reach a just result:

> We find this result to be compelled not only by the need to protect vulnerable incapacitated individuals and their rightful heirs from overreaching and undue influence, but to protect the integrity of the courts themselves. It is "an old, old principle" that a court, "even in the absence of express statutory warrant," must not "allow itself to be made the instrument of wrong, no less on account of its detestation of everything conducive to wrong than on account of that regard which it should entertain for its own character and dignity." In this case, the record reveals that Nidia secretly entered into a marriage with a person whom she knew to be incapable of consenting to marriage, with the intent to collect, as a surviving spouse, a portion of his estate. A crucial step in the completion of that plan was Nidia's assertion of a right of election in the Surrogate's Court. Of course, the powers of the judiciary are not unlimited, and courts are not capable of righting or preventing every wrong. The courts, however, can, and must, prevent themselves and their processes from being affirmatively employed in the execution of a wrongful scheme.
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> The equitable doctrine pursuant to which we find that Nidia has forfeited her right of election does not displace legislative authority, but complements it. Our decision does not reflect an effort to avoid a result intended by the Legislature. Rather, for the following reasons, it is clear to us that the Legislature did not contemplate the circumstances presented by this case when it enacted EPTL 5-1.2.[28]

Moreover, Judge Prudenti concluded her opinion by calling on the legislature to re-examine the law to prevent this common form of elder abuse and financial exploitation:

> Although we exercise our equitable power to award appropriate relief in this case, we nonetheless call upon the Legislature to reexamine the relevant provisions of the EPTL and the Domestic Relations Law and to consider whether it might be appropriate to make revisions that would prevent unscrupulous individuals from wielding the law as a tool to exploit the elderly and infirm and unjustly enrich themselves at the expense of such victims and their rightful heirs.[29]

Whereas Justice Prudenti requested the legislature to create new legislation, Justice Leone in In re Klapper[30] also provided an important public service when he interpreted Article 81 as a landmark statute that ensured and promoted the rights of incapacitated persons:

> There is no question that the use of such Medicaid planning by competent persons is legally permissible and that proper planning benefits their estates. The question presented herein is whether incapacitated persons should be accorded this same right to engage in Medicaid planning or, more specifically, whether a court, pursuant to Mental Hygiene Law § 81.21, may authorize a guardian to transfer part of an incapacitated person's assets to or for the benefit of another individual for the purpose of Medicaid planning on the ground that the incapacitated person would have made such transfer if he or she had the capacity to act.
>
> To deny a guardian the authority (where the requirements of Mental Hygiene Law § 81.21 are otherwise met) to make such transfer of the incapacitated person's assets would result in denying that person the opportunity which is available to all competent persons of this State who require long-term nursing home care and who have assets they desire to gift to their families, simply because he or she is incapacitated and is unable from a cognitive standpoint to make such transfer himself or herself. Such a result would be in direct contravention of the expressed intention of article 81.[31]

Judge Leone's decision is consistent with the intent of Mental Hygiene Law Article 81 as reflected in the following excerpt from the Law Revision Commission Comments to Mental Hygiene Law § 81.21: "most particularly, the court should consider whether a competent reasonable person in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances."[32]

The increased flexibility afforded to guardians pursuant to Article 81 has allowed them to engage in all matters of planning to ensure that an incapacitated person is entitled to the same opportunities as competent persons, including, but not limited to, estate and Medicaid planning:

- In In re John XX.,[33] the guardian was authorized to effect the transfer of the incapacitated person's (IP) assets for the purpose of rendering the IP Medicaid eligible.[34]
- In In re Elsie B.,[35] the IP's guardian was authorized to exercise the right retained by the IP as settlor of a revocable inter vivos trust by modifying the trust by adding co-trustees.[36]
- In In re Buhaina,[37] the IP's guardian was authorized to use the entire net proceeds due to the IP from her father's estate to establish and fund a supplemental needs trust for the IP.[38]

In each of the above cases, the guardian was required to consider the IP's prior expressed wishes. Such recognition of the individual's prior expressed wishes is particularly important in ensuring their wishes regarding medical and end-of-life care are known and respected.

- In In re Regina L.F. (Lisa R.),[39] the IP had memorialized her end-of-life wishes, including wishes regarding artificial hydration and nutrition, in a health care proxy that she had executed at the age of 66 when she was of "sound mind and body." However, the nutrition and hydration provision inserted into the Supreme Court Order Appointing Guardian conflicted with the IP's wishes which were "clearly and unambiguously" expressed in her health care proxy." Since the law is clear that competent adults can make health care decisions, including the right to refuse life-sustaining treatment, and that such an expression should be respected even if the person subsequently becomes incompetent (see In re Westchester County Med. Ctr. [O'Connor], 72 N.Y.2d 517 (1998)), the provision in the Supreme Court order appointing the guardian was vacated.[40]

Creativity in individual cases has resulted in systematic changes that respond to the legal issues associated with increased longevity. For example, over the last several years, a special unit has been established in the New York County Supreme Court to ensure that individuals with or alleged to have diminished mental capacity, who are defendants in New York County eviction proceedings, are not only provided with legal counsel but, when appropriate, have their matter transferred to the Article 81 Part to have the eviction and a guardianship proceeding combined and presided over by the same Supreme Court justice.[41] Moreover, many local bar associations and individual attorneys routinely provide lo bono and pro bono legal services to low income older individuals who require legal information, counseling and/ or assistance.

A common theme in all of these initiatives is the recognition by dedicated lawyers and judges that many older individuals may suffer from some form of diminished mental capacity and the significant difficulty in determining who should assess capacity and what evidence should be relied upon. Such recognition raises a major area of controversy as to whether, inter alia, capacity decisions should be made independently by a judge with or

without medical evidence or if capacity determinations should be made solely by physicians. This issue is further complicated by the reality that the criteria to determine capacity may vary based, inter alia, on the legal matter at issue,[42] the location,[43] and whether the principal(s) has executed advance directives.[44]

On December 14, 2017 in New York City, NYSBA in coordination with the Aging and Longevity Law Institute at Touro Law School will present a special program on The Aging Brain and the Law. This program will feature legal and medical scholars, including, but not limited to, Elkhonon Goldberg,[45] Harry Ballan,[46] Robert Swidler,[47] and the Hon. A. Gail Prudenti,[48] who will debate the respective roles of legal and medical professions in addressing legal capacity. This program underscores the importance of creating a meaningful dialogue between

Aging Issues

In preparing the curriculum for the nation's first Aging and Longevity Law Online Master's Program, which will commence in the Spring 2018 semester at Touro Law School, I created an outline of the substantive and procedural subject areas on Aging and Longevity Law. Following is a condensed version of some of the subject areas that will be covered. For the complete list go to www.tourolaw.edu.

1. Abuse, Neglect and Financial Exploitation
   - Victimization of individuals with diminished mental capacity
   - High incidence of abuse by family members
2. Advance Directives and Declarations
   - Familiarity with available statutory instruments such as powers of attorney and health care proxy
   - Selecting agents
3. Age Discrimination
   - Statutory and constitutional protection for older persons
   - Awareness of areas of age discrimination including:
     - Employment
     - Health care
     - Housing
4. Autonomy and Personal Choice (Civil and Constitutional Rights)
   - Right to self-determination
   - Right to privacy and confidentiality
   - Enjoyment of privileges such as driving
5. Banks and Other Financial Institutions
   - Personal guarantee and other forms of collateral
   - Reverse mortgages, equity lines and other loan products
   - Spousal obligations
6. Business Law
   - Sale, transfer and/ or purchase of business interests
   - Special tax considerations for transfers between family members
   - Impact of employment on individuals eligible for Social Security
7. Consumer transactions
   - Scams
   - Identity theft
   - Government and private protection/ assistance for victims of consumer fraud
8. Contracts
   - Requisite capacity to enter into a contract
   - Special attention to clauses including personal guarantees, mandatory contribution, liquidated damages, applicable law, etc.
9. Criminal law
   - "Crimes" committed by residents in health care facilities such as nursing homes, psychiatric facilities and hospitals
10. Disability law
    - Federal statutes including the Americans with Disabilities Act and Family Leave Act
    - State statutes designed to protect and respect individuals with disabilities
11. Emergency preparedness
    - Personal (and familial) responsibility
    - Responsibility of health care providers
12. End of Life
    - Right to Die/ Desire to Live
    - Organ Donation
    - "Do Not" Orders: Resuscitation, Intubation, Hospitalization, etc.
    - Hospice care
    - Assisted suicide: a state by state issue
13. Estate Administration and Litigation
    - Familiarity with state(s) probate and intestacy laws
    - Spousal rights
14. Estate Planning
    - Gift and estate tax issues
    - Pros and cons in regard to avoidance of probate

the legal and medical professions to address the medico-legal issues associated with increased longevity.

Conclusion

As I discussed in the opening paragraphs, we have a vested personal and professional interest in Aging and Longevity Law issues. The aging of America's population is unprecedented, especially with the oldest among us,[49] a demographic many of us hope to join.

Analogous to physicians who are certified as geriatricians,[50] lawyers must develop the knowledge and skills to recognize, assess and address the myriad legal issues that impact their older clients as well as understand and appreciate the impact that non-legal factors such as health and mental status; financial status; family dynam-

15. Family law

- Evolving definition of family
- Marriage and spousal rights and obligations
- Divorce and annulments

16. Federalism

- Knowledge of federal statutes that directly impact the aging and longevity demographic including, but not limited to, Medicare, Social Security, Veterans Administration Benefits, Americans with Disabilities Act, Older Americans Act, Family Leave Act, etc.

17. Food, Drugs and Cosmetic Law

- By whom and how are medications paid including but not limited to Medicare drug coverage, private insurance, private pay, Veterans Administration, Medicaid, etc.
- Drug subsidies for low income individuals

18. Government Benefits/Programs

- Eligibility requirements for Medicare, Social Security, Veterans benefits, Medicaid and other federal and state programs

19. Guardianships and Surrogate Decision-Making

- Familiarity with alternatives to and requirements of Article 81
- "All or nothing" mandate of Article 17A
- Family Health Care Decisions Act and other "priority" based statutes

20. Health Law

- Knowledge of the applicable statutes, regulations and case law concerning healthcare providers
- Special attention to the admission and discharge policies of hospitals and nursing homes
- HIPAA and other privacy regulations
- Family Health Care Decisions Act; guardianships and other forms of Surrogate Decision-Making, MOLST, POLST, etc.

21. Insurance law

- Use of hybrid policies such as conversion of life insurance policies to pay for health care
- Impact of cash value of life insurance policy on Medicaid and other government programs

22. Labor and Employment Law

- Taxation of wages for Social Security recipients
- Mandatory/ voluntary retirement

23. Litigation

- Knowledge of basic fundamentals involving Article 81 and 17A guardianships, estate administration, personal injury, medical malpractice and other types of litigation involving the aging and longevity demographic

24. Municipal Law

- Local and state administration and enforcement of federal programs such as Medicaid
- Tax incentives for and obligations of aging and longevity demographic

25. Real Property Law/Landlord Tenant Issues

- Types of ownership and legal implications of such ownership
- Reverse mortgages
- Tax considerations

26. Retirement planning

- Social Security calculations and rules
- Health care needs and coverage

27. Rules of Professional Conduct and Rules of the Chief Judge

- Good faith efforts to help a client who suffers from diminished mental capacity
- Representation of two or more family members, whether or not matter is adversarial

28. Taxes

- Gift and estate taxes
- Taxation of Social Security income

This list continues to evolve as with increased aging and longevity comes many new challenges. n

ics; business and personal relationships; and residence and/ or domicile have on these legal matters.

Increased longevity has and will continue to exasperate existing legal challenges and have and will continue to create new ones. With a combination of education and collegiality, however, the legal community shall be poised to assist our clients (and ourselves) to meet these challenges. n

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4. Black's Law Dictionary, Elder Abuse (Bryan Garner, eds. 10th Ed. 2014) (defining elder as a person at least 60 years old).

5. Geriatric refers to a person of old age and geriatrics, which is a branch of medicine specializing in the health care of the aging population. Stedmans Medical Dictionary, Geriatric & Geriatrics (WestLaw 2014).

6. Colin Milner, et al., Global Population Ageing: Peril or Promise?, Ch. 4, The Media's Portrayal of Ageing, http:/ / www.changingthewayweage.com/ Media-and-Marketers-support/ Articles/ chapter4-medias-portrayal-of-ageing.pdf (discussing the negative portrayal of the aging population as young as 60 in the media).

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18. 52 N.Y.2d 363 (1981).

19. Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261 (1990).

20. N.Y. Pub. Health Law § 2981 (McKinney 2012).

21. N.Y. Pub. Health Law Art. 29-cc.

22. N.Y. Pub. Health Law § 2944-c (McKinney 2012).

23. N.Y. Pub. Health Law § 2982 (McKinney 2004).

24. N.Y. Mental Hyg. Law § 81.22 (McKinney 2010).

25. 2017 WL 3897181 (2017).

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27. 73 A.D.3d 103 (2d Dep't 2010).

28. Campbell v. Thomas, 73 A.D.3d 103, 119 (2d Dep't 2010) (internal citations omitted).

29. Id. at 121.

30. 1994 N.Y. Misc. LEXIS 700 (Sup. Ct., Kings Co. 1994).

31. In re Klapper, 1994 N.Y. Misc. LEXIS 700, at *8–11 (Sup. Ct., Kings Co. 1994).

32. N.Y. Mental Hyg. Law § 81.21 (McKinney 2015), Law Revision Commission Report.

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34. In re John XX., 226 A.D.2d 79, 84 (3d Dep't 1996).

35. 265 A.D.2d 146 (3d Dep't 2000).

36. In re Elsie B., 265 A.D.2d 146, 147 (3d Dep't 2000).

37. 187 Misc. 2d 312 (Sup. Ct., Monroe Co. 2000).

38. In re Buhaina, 187 Misc. 2d 312, 315 (Sup. Ct., Monroe Co. 2000).

39. 132 A.D.3d 1344 (4th Dep't 2015).

40. In re Regina L.F. (Lisa R.)., 132 A.D.3d 1344, 1345 (4th Dep't 2015).

41. Informational Brochure, New York State Unified Court System, Litigants with Diverse Needs, http:/ / www.courts.state.ny.us/ ip/ nya2j/ diverseneeds/ integratedpart.shtml; Shlomo S. Hagler, Innovative Part Integrates Guardianship and Housing Matters, 245 N.Y.L.J. 119 (2011).

42. The determination of whether an individual has the requisite mental capacity depends upon the function the client is attempting to undertake. Capacity requirements fall onto a spectrum, requiring the lowest amount of capacity to execute a will and requiring a greater capacity to execute advanced directives. See generally In re Estate of Kumstar, 487 N.E.2d 271 (N.Y. 1985) (discussing the requisite requirements for testamentary capacity); N.Y. Gen. Oblig. Law § 5-1501(c) (McKinney 2009) (discussing the requisite capacity to execute a Power of Attorney); N.Y. Pub. Health Law § 2980(3) (McKinney 2012) (discussing the requisite capacity to execute a Health Care Proxy).

43. In determining whether a client has requisite capacity, the location of the client becomes paramount as capacity standards differ from state to state and the application of such standards may differ if the client resides in residential facility or hospital, rather than the community.

44. The prior wishes of a principal should be respected; however, in recent years there have been some cases where courts have disregarded the wishes of the principal's agent, even when it may not have been appropriate.

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47. Informational Brochure, Clarkson University: Icahn School of Medicine at Mount Sinai, Faculty: Robert N. Swidler, http:/ / bioethics.uniongraduatecollege.edu/ about/ faculty/ 12/ Robert-N.-Swidler-Esq.

48. Informational Brochure, Maurice A. Deane School of Law at Hofstra University, Administration: Judge A. Gail Prudenti, http:/ / law.hofstra.edu/ directory/ administration/ prudenti/ .

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50. A geriatrician is "a medical doctor who is trained to meet the special health issues of older people." Jonathan Peterson, Where Are the Doctors You'll Need?, AARP Bulletin (Apr. 2016), https:/ / www.aarp.org/ health/ conditions-treatments/ info-2016/ geriatrician-geriatric-doctor-physician.html.

Diagram Endnotes

(a) People over the age of 60 have billions if not trillions of dollars in deferred income. At the mandatory distribution age, 70 ½, such individuals must begin taking distributions of their deferred income to avoid a taxation penalty.

(b) In addition to the numerous personal factors in determining where to retire, including where family is located or relocation to a warmer climate, wealthy individuals may also take into account legal and financial benefits of the states that they may choose to retire in, such as states with no income tax.

(c) Affluent aging individuals must be cognizant of the tax ramifications of their ventures and actions, such as the United States Gift Tax on any transfer to an individual in excess of $14,000 in a taxable year, long term capital gains and losses, and estate tax liability after death. See generally, Internal Revenue Code.

(d) In conjunction with estate planning, wealthy individuals may plan accordingly to avoid excess estate tax liability, including structuring bequests and transfers that skip generations, in an effort to avoid and minimize the Generation Skipping Tax.

(e) Aging and longevity law requires a delicate balance of the civil and constitutional rights of the individual, including, but not limited to, the right to vote, the right to privacy and confidentiality, the right to travel and the right to self-determination against the state's parens patriae powers.

(f) The Social Security Act was signed into law by President Franklin Roosevelt in 1935 in response to the Great Depression. The eligibility rules for Social Security have changed over the past few decades including, but not limited to, the taxation of Social Security benefits for individuals who work, and the eligibility age.

(g) Ninety-seven percent of Americans 65 years of age or over are enrolled in Medicare. Marilyn Moon, What Medicare has Meant to Older Americans, Social Security Administration, https:/ / www.ssa.gov/ history/ pdf/ WhatMedicare-Meant.pdf. Medicare is our de facto national health insurance program for older persons.

(h) Some older individuals have the benefit of retiring with long-term health care insurance as well as other supplemental insurance, while others, primarily of a lower socioeconomic status, may be required to rely on government assistance. Nonetheless, even those individuals that have the benefit of retiring with private insurance are still required to maintain Medicare as their primary insurance and their private insurance as secondary insurance. Informational Brochure, Medicare, Which Insurance Pays First, https:/ / www.medicare.gov/ supplement-other-insurance/ how-medicare-works-with-other-insurance/ who-pays-first/ which-insurance-pays.html.

(i) In accordance with the U.S. Supreme Court Decision in Olmstead v. L.C., 527 U.S. 581 (1999), New York has passed the Olmstead Act, which creates an obligation to provide services to persons that suffer from disabilities by integrating their needs into their current setting, in an effort to avoid relocation of the individual.

(j) There has been serious concern among the medical profession as there is a severe shortage of geriatricians and other medical professionals who are specifically trained to manage aging medical and health related issues.

(k) How one defines quality of life may vary from person to person but every person has a minimum standard for such person to believe there is quality to their life. Numerous states have passed regulations requiring nursing homes to act in a way that promotes the quality of life of their residents.

(l) The definition of family is starkly different than it was 40 years ago. Many families are now considered "blended," which creates significant differences in estate planning and advanced directives.

(m) Simply put, for those who do not plan, the government will ultimately make all material decisions for the person on their behalf, including, but not limited to, intestate estate distribution, health care decisions, personal decisions and financial decisions. See generally Robert Abrams, Are You a Planner or a Gambler?, 83 N.Y. St. B. Ass'n J. 6 (Summer 2011).

(n) Numerous states have enacted independent penal laws, which directly address elder abuse. New York has not, as of yet, enacted an independent penal code, but rather, New York has codified elder abuse as a form of a hate crime, permitting a criminal court to increase the degree of a misdemeanor or felony committed by the defendant if the jury concludes beyond a reasonable doubt that the older individual was targeted because of his or her age. N.Y. Penal Law §§ 485.05 & 485.10. In addition, in civil proceedings, courts have routinely held that they have the inherent equitable power to rectify a wrong committed against an older person due to that person's age and/ or cognitive function.

(o) According to the American Psychological Association and the PEW Research Center, there are approximately 12 million Americans 65 years of age or older who live alone.

(p) A common theme of age discrimination has arisen, especially in the housing and employment areas. New York, as well as Congress, has enacted legislation in an attempt to remedy such discrimination. However, mandatory retirement ages have been upheld by both the N.Y. Court of Appeals, under the New York Constitution, and by the U.S. Supreme Court, under the Federal Constitution

(q) As people age and come closer to death, it is not uncommon for them to become more religious and their need to retain such closely held religious belief becomes paramount. Lawrence T. White, Why Are Old People So Religious?, Psychology Today (Feb. 16, 2016), https:/ / www.psychologytoday.com/ blog/ culture-conscious/ 201602/ why-are-old-people-so-religious.

(r) As a threshold issue, guardians are necessary for people who suffer from diminished mental capacity that have either not executed advanced directives or have executed such directives, but they are either unenforceable or are being abused by their agents. A common issue with guardianships is that the area of regulation is reserved exclusively to the states pursuant to the 10th Amendment. As such, state statutes widely vary in their application.

(s) Domicile and place of residence will determine what type of services are available to aging persons in their community. According to U.S. News, the following are the top 10 cities for aging persons to reside as they provide the best community support for aging persons: Minneapolis, Boston, Pittsburgh, Cleveland, Denver, Milwaukee, San Francisco, Portland, Kansas City and Newark. Philip Moeller, 10 Top Cities for Senior Living, U.S. News (Sept. 29, 2011), https:/ / money.usnews.com/ money/ retirement/ slideshows/ 10-top-cities-for-senior-living.

(t) A major concern to individuals as they get older is that they may begin to suffer from some type of cognitive impairment that will impair their thought process or judgment. According to the Centers for Disease Control, there are currently more than 16 million people in the United States living with cognitive impairment, with an estimated 5.1 million Americans 65 years of age or over suffering Alzheimer's disease, a number which is expected to rise to 13.2 million by 2050. Informational Brochure, Centers for Disease Control, Cognitive Impairment: A Call for Action, Now! (Feb. 2011), https:/ / www.cdc.gov/ aging/ pdf/ cognitive_impairment/ cogimp_policy_final.pdf.

(u) According to the Centers for Disease Control, currently 80 percent of aging Americans are living with at least one chronic medical condition, while at least 50 percent of older Americans suffer from at least two.

(v) Common government benefits include, but are not limited to, Medicaid, Medicaid Supplements, Medicare, Social Security Insurance, Social Security Disability, the Supplemental Nutrition Assistance Program, and the Home Energy Assistance Program.

(w) In certain areas of the country, especially the New York City tri-state area, there is a lack of affordable housing for low-income senior citizens. See generally The Editorial Board, New York's Affordable Housing Shortage, N.Y. Times (Feb. 7, 2014).

(x) Lower income aging individuals face complications with transportation, in that they may be unable to or not easily able to travel to and from doctor's appointments, medical facilities, pharmacies, or the grocery store. Certain municipalities have created programs to assist, such as Access-a-Ride, providing door-to-door transportation to individuals within New York City who are unable to use public transit due to a physical or mental disability.

(y) Many older persons either do not have medical insurance or have medical insurance that does not cover all costs of physician appointments and medications. See generally Informational Brochure, Medicare, Medicare 2017 Costs at a Glance, https:/ / www.medicare.gov/ your-medicare-costs/ costs-at-a-glance/ costs-at-a-glance.html for a list of common out-of-pocket costs that beneficiaries are required to pay for certain services. Due to these exorbitant costs, many older individuals may end up dying rather than receiving the medical treatment they need.