

1-1-1996

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Recommended Citation

UB Law Forum (1996) "Elder Law Counseling: Coping with a Revolution," *UB Law Forum*: Vol. 9 : No. 1 , Article 36.

Available at: https://digitalcommons.law.buffalo.edu/ub_law_forum/vol9/iss1/36

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Elder Law Counseling: Coping with a Revolution

“Aging is the largest sociological, economic and therefore legal revolution which will occur in the next two decades, and as such it will probably move to the center of your lives in that time,” said David Dunkelman, the keynote speaker, to the practitioners and students who attended the 20th Alumni Convocation on elder law counseling. Panelists discussed the sociological implications of America’s aging population as well as the complex legal problems that arise for older people and their families.

Participants in the Convocation, held in the University’s soaring Center for the Arts, delved into the harsh realities and often emotionally wrenching issues that revolve around health care, economics and family relations. Especially in Erie County, where 17 percent of the population is 65 or older, “A growing demand exists for practitioners who can meet the particular needs of older clients with knowledge and sensitivity,” said Sandra S. O’Loughlin, the program’s chair.

“There’s really a quiet revolution out there,” said David Dunkelman, a gerontologist and attorney who is president of the Weinberg Campus, a major new geriatric community in Amherst. Dunkelman noted that the fastest-growing age group is those 100 and over, and said, “It’s very probable that many of us and our children will live to the age of 120 routinely.”

As a result, he said, the geriatric care system is “malconfigured,” emphasizing acute care rather than the



Professor Kenneth F. Joyce (left) and Law Alumni Association President Garry M. Graber

long-term care that a longer-living population will require. And Dunkelman torpedoed one myth about elderly Americans: that they’re largely poor. In fact, he said, the 65-plus generation controls 75 percent of the nation’s wealth.

This demographic shift gives rise to a number of questions, as Dunkelman listed: “What is aging? What is ageism? What is competence? Those are whole new realms that we don’t even have a framework for deal-

ing with.

“There’s no existing legislative policy on aging in America. Don’t think you’re going to run to your newspaper today, tomorrow or any time in the next decade and find a solution. This will be an evolving thing.”

Samuel L. Gifford II, vice president of National Health Care Affiliates Inc., a Buffalo firm that operates a nationwide group of retirement facilities, spoke on how to choose a nursing home for a loved one. “According to

the latest census data," Gifford noted wryly, "the future of aging seems to be quite assured. It's the future of the aged that concerns us." Financial pressures, he said, can mean that "middle-aged, middle-class parents will have to decide whether to send their children to college or take care of their elderly parents."

In choosing a nursing home, he

"For the most part," Gifford said, "like most decisions in life, choosing a nursing home is really a matter of common sense."

UB Law School Professor Anthony H. Szczygiel noted that many long-term care programs are underutilized, such as a variety of home care options that would enable elderly persons to continue to live in their own

case basis, looking at levels of care, looking at sources of funding, to try to put together a package that will address your needs and wants in an individualized way.

"What I'm encouraging you to do, when you get these cases, is to step back and look at the individual and ask, what is the problem and what can we do to address that problem? What you're going to be working on is an individualized health plan for the people who come to you. Given their individual circumstances, you'll try to patch together something that will meet their needs.

"It's difficult work. Sometimes it's heart-wrenching work."

Karen L. Nicolson, an attorney for Legal Services for the Elderly, Disabled or Disadvantaged of Western New York Inc., gave some practical tips from her experience with the Medicaid system, specifically how to approach an administrative hearing appealing a decision to deny or cut off aid.

"It's a different type of law than most attorneys are used to," she said. For one thing, it's faster — cases often are brought, argued and decided inside of four months. One's adversaries are not attorneys, but case workers and other Medicaid agents. And most of the rules of evidence don't apply; hearsay evidence, for example, is admissible on both sides. And discovery rules, she said, favor the plaintiff: the Department of Social Services is required to share its evidence with the plaintiff, but the plaintiff has no such obligation.

Nicolson ran through the procedure involved in such a hearing, suggesting for example that attorneys submit a memo of law after the hearing to frame the legal issues for the state hearing officer. She also spoke about how to appeal an adverse decision, done through an Article 78 proceeding. "This is the time that lawyers get involved on the other side," she said.



Honorable Barbara Howe

suggested making the decision systematically, asking about the facility's levels of care, activities, housekeeping, food service and residents' attitudes. Much can be learned simply by observing, he said: "At the end of the day, the important questions will be the ones answered at gut level — is the staff bright and cheerful? Is the facility odor-free? Are signs and menus posted? Are the grounds neat and well-kept?

homes.

"People tend to come to lawyers in crisis," he said. "Mom's in the hospital, they're going to release her tomorrow. What are we going to do?"

He encouraged practitioners to help their clients think the decision through, exploring all the options rather than selecting a nursing home, for example, because a hospital discharge planner suggests doing so. "It's a lot tougher to decide on a case-by-

David R. Pfalzgraf, a private practitioner with Renda, Pares & Pfalzgraf, addressed some of the family issues involved in working with elderly clients and their adult children. He cautioned attorneys about the pitfalls of representing more than one side in an elder law case, even when everyone involved agrees. Such a situation, he said, can turn sour rapidly: "We are dealing with families and pieces of families that have various interests."

"In most cases," Pfalzgraf said, "in dealing with families that want advice on elder law issues, I take the position that I am selling information. I don't make any recommendations. And it's my belief that they're entitled to this information in writing. To protect myself, it's a good idea to have that information in writing. And to the extent that the client will rely on this information, they should have it in writing, too."

In preparing documents for elderly clients, Pfalzgraf noted that he won't do that at the instruction of someone else — even making home visits, if necessary, to talk to the older person directly. If there's a question of competency, he suggested encouraging the family to obtain a doctor's letter: "It's in everyone's best interest."

And when an older person needs to sign documents, he prefers that to be done in his office, with the rest of the family in the waiting room. "It's refreshing," he said, "to see the face of the elderly person light up when I do this."

UB Law Professor Kenneth F. Joyce took on the topic of advance directives, asking how effective they have been and how they might be better used.

"The tools, I think, basically are there with

respect to property and personal care," he said, distinguishing between the "presently operative" power of attorney, which takes effect upon signing, and the power of attorney that takes effect at some future time "upon the occurrence of a contingency specified in the instrument."

This second type, the "springing" power of attorney, came into play only in 1988. Joyce said the statute contains some provisions designed to safeguard the rights of the elderly person. The court, he said, is required to engage in a two-pronged process: Is the person incapacitated, and is guardianship necessary? The statute also says the court cannot give to a guardian the power to revoke any directives regarding property or health care — ensuring that the signing of an advance directive is binding even when the signer becomes incapacitated.

The Hon. Barbara Howe, New York State Supreme Court justice for the Eighth Judicial District, spoke about Article 81 of the state Mental Hygiene Law, the language that allows petitions on behalf of alleged incapacitated persons. The article's governing principle, she said, is to maintain personal autonomy whenever possible.

"Any time a person brings a petition alleging incapacitation," she said, "you're risking hurting the person. It's like an indictment. Anybody can bring this order to show cause to the Supreme Court. What was meant to be done by this law is to provide safeguard after safeguard after safeguard for the respondent."

The court, Howe said, is supposed to restrict the individual "only to the least degree necessary. Just because a person can't do some things doesn't mean he or she can't do most things."

The justice also brought up some issues that have arisen in several Article 81 cases, including the question of eccentricity. She cautioned against a too-restrictive view of competency, noting that an older person "has the right, for example, to sit in the big old house (and say), 'Let the estate decay for those ungrateful children.' We have the right to be different."

The convocation, attended by almost 200 practitioners, students and faculty members, was followed by a luncheon at which UB President William R. Greiner presented the 1995 Edwin F. Jaeckle Award to Gerald S. Lippes '64. ■



Elder Law panel participants