CHAPTER 1

1. Objectives
2. Introduction
   a. America’s ever-increasing elderly population has developed legal needs particular to their age group. This changing demographic has spawned the creation of the Elder Law specialty as a legal practice.
   b. Legal issues of importance to the elderly client often focus on personal independence and decision making.
   c. Elder law practice typically emphasizes life planning before death, unlike traditional estate planning that generally emphasizes what happens to an individual’s property after his death.
   d. Pertinent and related elder law topics that may play a role in client representation include but are not limited to 1. government benefits; 2. housing options; 3. age discrimination; 4. economics of retirement; 5. disability law; 6. bankruptcy; 7. estate planning; 8. institutionalization; 9. fraud issues; 10. Social Security, Medicare, and Medicaid; 11. marriage; 12. grandparenting; 13. health care issues; 14. abuse; 15. guardianships and conservatorships; 16. senior living facilities; and 17. funeral planning. Elder law practitioners should be prepared for ethical issues relating to any of the listed topics.
   e. The most holistic elder law practices use a network of allied professionals to provide the most cost-effective and productive service to their clients.
3. Population Growth
   a. Population aging is a worldwide phenomenon.

b. California is home to the largest population of residents 65 years old and older, followed by Florida, New York, Texas, and Pennsylvania. Half of older Americans live in nine states: California (3.6 million); Florida (2.8 million); New York (2.4 million); Texas (2.1 million); Pennsylvania (1.9 million); and Ohio, Illinois, Michigan, and New Jersey (each with more than 1 million).

c. There were approximately 35 million people age 65 or older in the United States by 2000. This number increased from 1900 by 10 times. It has been predicted that one in five people in the United States will be 65 years or older by 2025.

d. By 2025, the 78 million adults comprising the group called the baby boomers will begin to hit age 85 and it has been estimated that nearly nine million Americans will be over age 85.

e. Older Americans are mostly women because women have a longer life expectancy—living an average of six years longer than men.

4. Exhibit 1–1: Projected Population of the United States 2025

5. When Is Someone Considered Elderly?
   a. There is no one particular age when a person should automatically be defined or described as elderly.
   b. Both the federal and state governments provide age-related protections and benefits, for example, the federal government’s Age Discrimination in Employment Act of 1967 and the Age Discrimination Act of 1975.
   c. Social Security retirement benefits and Medicare eligibility.
   d. The federally created Older Americans Act (OAA).
6. Creating the Right Office Environment
   a. A law firm paralegal or office manager may be asked to assist in the design or renovation of the office space of an elder law practice. It is important to look to the demographics of a firm's clientele.
   b. Striving for compliance with the Americans with Disability Act usually ensures that the office will be accessible to a firm's elderly and possibly impaired clients.
   c. Many elder law clients travel to an elder law firm with a family member. However, it may not be wise for the family member to remain with the elderly client during an office visit. The question of which person is the client and issues of undue influence could become a concern during the visit.

7. Tea and Sympathy: Practicing Therapeutically
   a. Legal talents must coexist with compassion. Attorneys, paralegals, and support staff working in an elder law practice need to understand the special needs of the older client.
   b. Therapeutic Jurisprudence is defined as the melding together of a client's legal and psychological issues by his attorney and the firm's legal support staff to better serve the client's needs.
   c. A personalized legal plan.

8. Exhibit 1–2: Evaluating Elderly Clients

9. Elder Law Practice: A Paralegal's Role

10. Elder Law Practice: Luke Enters the Picture
   a. Working in an elder law practice means having to understand the special needs of the older client.

11. Senior Benefits
   a. Every state and territorial government has enacted legislation creating agencies that are empowered to administer, design, and advocate programs and services for their elderly citizens. The Area Agencies on Aging (AAA) are public agencies serving the needs of senior citizens within a defined geographic area. These agencies may generically be called state units on aging.
   b. The Older Americans Act (OAA).
   c. The federal government's Department of Health and Human Services along with the national Administration on Aging and the Centers for Disease Control and Prevention are the umbrella agencies for the state- and community-based programs.

12. Exhibit 1–3: Network of Agencies Serving the Needs of the Nation's Elderly

13. Protective Services for Seniors
   a. Each of the 50 states provides for the protective services of an ombudsman for its institutionalized elderly. Each state also has a legal process for initiating a public guardianship or public conservatorship for elderly adults with no willing or responsible family members or friends who can serve in that capacity.

14. Seniors Becoming Empowered
   a. The larger the elder population pool, the greater their political power.

15. Duty to Care for Nation's Elderly?
   a. A majority of states have found it necessary to impose a statutory duty on adult children to provide financial assistance to their indigent parents.

16. Exhibit 1–4: Sample Duty of Care Statute

17. Seeking Personal Independence
   a. How long a client will be able to take care of his personal and financial needs without some level of assistance is an issue of huge importance for clients.

18. Elder Law Practice
   a. Mr. MacGee, an octogenarian and longtime caregiver, facing the needs of his wife.

19. Medical Problems and the Elderly
   a. Nearly all elderly Americans will experience some type of chronic health condition in their last years of life.
   b. The good news is that Americans are staying healthier and living longer. The average life expectancy for American women is 77; for American men it is 75.

20. Mental Illness and the Elderly
   a. Living longer means the onset of age-related mental illness may increase.
   b. Statistics show that elderly people kill themselves at a higher rate than any other segment of the population.

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c. Mental health experts have warned that a national crisis in geriatric mental health care is on the horizon.

d. Medical services, community services, support systems, and training programs concentrating specifically on geriatric mental health nationally have been called nonexistent and a potential disaster.

21. Dealing with Cognitive Disorders
   a. **Dementia** is a general term used to describe a mental illness associated with the impairment of an individual’s brain function.
   
   b. **Alzheimer’s disease (AD)** (a type of dementia) reportedly is responsible for 50 to 75 percent of all dementias, but there are at least 50 others.
   
   c. Alzheimer’s is typically described as a disease of the elderly. This is only partially true. Younger people can be stricken by the disease.

22. Exhibit 1–5: Diagnostic Characteristics Based on **DSM-IV**

23. Caring for the Elderly
   a. Unfortunately, the boom in longevity is often accompanied by illness and the immediate need for personal caregiving.
   
   b. The families of the elderly do approximately 80 percent of the unpaid care of our nation’s oldest citizens.
   
   c. The assistance of a **geriatric care manager** may be helpful in determining the appropriate care plan for an elder.
   
   d. **The Family and Medical Leave Act (FMLA)** provides a federal safety net for working Americans who need to take time off from work to care for a family member suffering from an illness or who have their own medical condition to deal with.

24. The Shadow of Long-Term Care
   a. The majority of older Americans will need some type of assistance with their daily lives. Long-term care of some kind will be needed by two out of every three Americans 65 years old and older.

25. Elder Abuse
   a. Within the last decade it has been estimated that on an annual basis, the number of victims of physical and mental elder abuse has reached 820,000. Self-inflicted abuse raises the number to an estimated two million victims.

26. Parenting Issues That Never Really End
   a. An elderly client may be the parent of a minor child or the client may have an adult child who is mentally or physically challenged. In either case, the elderly client will likely need assistance in the eventual transfer of his parental responsibilities to another designated guardian.

27. Recognizing the Firm’s Client
   a. Who is the law firm’s client in an elder law practice? It may seem like a simple question, but it can lead an attorney and paralegal through an ethical minefield.

28. Summary

29. Key Terms

30. Review Questions

31. Ethics Alert
   a. The question of who the firm’s client is often arises in an elder law practice. For example, a son may bring his elderly father to a law firm for legal representation and insist on being involved in every step of the representation. If the son pays the attorney’s fees, does that make the son the firm’s client? Is the firm representing only the father? Is the firm representing both the father and the son? Should the attorney and paralegals share the father’s information with the son? What if the father is impaired in some way? Does that matter?

32. Helpful Web Sites

33. Endnotes

CHAPTER 2

1. Objectives

2. Introduction
   a. A **last will and testament** is defined as a document in which a person directs how her property is to be distributed after her death.
   
   b. Approximately 40 percent of Americans over 45 years of age have never drafted a **will**.
   
   c. In general, a client’s estate includes all of her assets, less all debt, plus death benefits from all life insurance policies not held in an irrevocable trust.
   
   d. The legal requirements for properly executing a will vary from state to state. Some
states follow the Uniform Probate Code (U.P.C.) and other states have enacted more state-specific legislation and follow their state’s common law decisions.

3. Drafting a Will
   a. The person who writes her own will is called the testator.
   b. Generally three elements must be present when a person writes a will. First, the testator must fully understand the legal consequences of writing a will. Second, the testator must know the full extent of her property (the old-fashioned term bounty is often used in the explanation of this second element). Third, the testator must know the names of the proper recipients of her property.
   c. There are basically three types of bequests made by a testator in a will. They include: 1. a general bequest; 2. a specific bequest; and 3. a residuary bequest.

4. Property Ownership and Wills
   a. Both real property and personal property can be owned.
   b. Real property can be owned in one of four ways: 1. tenancy in severalty (also known as sole ownership); 2. joint tenancy; 3. tenancy in common; and 4. tenancy by the entirety (also known as community property).
   c. Another way to describe a type of real property ownership is to state the type of estate the real property is. Generally, an estate is described as a fee simple absolute or a life estate or a tenancy for years.

5. Marriage and Wills
   a. Two types of statutes pertain to wills that husbands and wives should know about. These include the elective share statutes and the pretermitted spouse statutes. Collectively, these statutes may be described as taking against the will.
   b. Basically, the elective share statute states the following to the surviving spouse: Take what you received from the will, or you have a choice of taking a statutorily predetermined share after your deceased spouse’s debts are paid.
   c. The pretermitted spouse statute states the following to the surviving spouse: If you are not mentioned in your spouse’s will, the law will treat you as if your spouse had no will and died intestate. The pretermitted spouse will then be eligible to take an intestate share of the testator’s estate (which in most states is defined as at least half of the estate).

6. Exhibit 2–1: Client Interview Questionnaire
7. Without a Will: The Law of Intestate Succession
   a. All 50 states consider a person who dies without a will to have died intestate. The proper term to call a person who will inherit property from a deceased person who without a will is heir. The term distributee is also used to describe a person statutorily entitled to a decedent’s property through the intestate statutes. The term next of kin or kindred relationship is also used to define all persons entitled to inherit from a person who has not left a will. Determining who an intestate’s next of kin is can be done by looking to the consanguinity factors.

8. Exhibit 2–2: Sample Arizona Intestacy Statute
9. Without a Will, What Happens to Property?
   a. Without a written will, a judge must get involved and will look to the degree of relationship between the decedent and any statutorily designated heirs.
   b. Per stirpes distribution describes a method of dividing a deceased person’s estate by giving out shares equally by representation or by family groups. Alternatively, per capita distribution may occur.

10. Ensuring Proper Will Execution
    a. The formal requirements for properly executing a will vary from state to state depending upon whether a state has adopted all or portions of the U.P.C. or has more state-specific requirements.
    b. Attestation clauses facilitate probate by providing prima facie evidence that a testator voluntarily signed her will in the presence of witnesses.
    c. Self-proving affidavits are sworn statements by eyewitnesses that the will has been duly executed.
    d. All states require a will to be witnessed by at least two witnesses, except Vermont which requires three witnesses.

11. Exhibit 2–3: Basics of Will Execution: Literally Putting It All Together
12. Safekeeping a Will
   a. A testator's will and important papers should be located as soon as possible after her death.
   b. A will is best kept with the testator in a safe, accessible location.

13. Less Than Perfect: Questionable Will Creation
   a. A handwritten will is called a **holographic will**.
   b. A questionable will format is the **oral will**. The oral will is technically known as a **nuncupative will**. The nuncupative will is accepted by a minority of states but only during wartime conditions or from a testator's deathbed.
   c. The U.P.C. does not permit the nuncupative will format. Another ill-advised format is the use of joint or mutual wills. The sharing of one will by two individuals is likely to invite litigation.

14. Using Form Wills
   a. A minority of states have statutorily authorized simple fill-in-the-blank will forms.

15. How to Change or Revoke a Will
   a. A **codicil** is an addition to a will that changes the will.
   b. Three legal terms describe the revocation of a will: 1. **revocation by a physical act**, 2. **revocation by operation of law**, and 3. **revocation by a subsequent (or later) writing**.

16. To Err is Human, But Still Unacceptable
   a. Lawyers and their support staff can get into all sorts of difficulties if they fail to follow their particular state's technical requirements for drafting and executing a will.

17. Dealing with a Conflict of State Laws
   a. If a question arises of what state laws should be applied to a client's case, the most common conflict of law rule usually directs the questioner to apply the law of the state where the decedent's **domicile** was at her death.

18. Elder Law Practice
   a. Sixty-five-year-old Henry Buss is in good health and certainly has the mental capacity to prepare a will. He is married to Lila and they have a minor daughter, Dana. Both Henry and Lila, older parents, are most concerned about providing for their daughter.


20. Choosing the Right Person
   a. Usually one person is named in a will as the person who will ensure that all of the bequests are distributed, that all of the probate property of the testator is transferred, and that all of the estate's creditors and taxes are paid. The U.P.C. uses the term **personal representative** to describe a man or woman who manages, administers, and distributes a decedent's estate according to the terms of a will or the appropriate state statute if the decedent has died testate. Some states call this person an **executor**.
   b. If there is no will, a court will name a person called a personal representative in U.P.C. states and an **administrator** in non-U.P.C. states to ensure that the estate is properly distributed.
   c. The duties of an executor/personal representative or administrator encompass the details of settling an estate. These details can include: 1. locating all of the testator's real and personal property; 2. paying creditors and taxes; 3. ensuring the smooth transfer of the assets to the heirs as per the will or applicable statute; 4. locating witnesses to a will; 5. obtaining death certificates; 6. hiring professional assistance (e.g., attorneys, accountants, household assistance, appraisers, and/or estate sales personnel); 7. dealing with financial investments; 8. contacting beneficiaries; and 9. the practical maintenance of assets that may include buildings, businesses, and other investments.
   d. A personal representative/executor may have to deal with a will contest. A will contest happens when someone disagrees with the validity of the will and legally claims that the will should be judged invalid by the appropriate court.

20. Estate Administration
   a. Paralegals will need to learn the estate administration process because the process entails plenty of client content, paperwork, and procedural steps that they can handle under an attorney's supervision.
   b. Learning the location of a decedent's last domicile is necessary to determine which county court has jurisdiction over a person's probate estate.
21. Initiating Probate
   a. The probating of a will can usually be initiated in at least two ways, but different procedures may be followed depending on individual states. For example, the personal representative/executor may go to a Surrogate’s Court alone, (i.e., ex parte) without notice being given to anyone and request that the will be admitted to probate. Another way that a will can be probated is to give all beneficiaries listed in the will notice and apply to have a hearing before a judge.
   b. If a will is considered self-proved, it usually will be admitted to probate without further proof of proper execution.
   c. If a person dies intestate, her next of kin will need to apply to the appropriate court for letters of administration. (Some states use a different term to describe the same thing.)
   d. An alternative to letters of administration can occur in most states when the surviving spouse or next closest kin can provide what is generally called an affidavit in lieu of administration.

22. The Work of the Estate
   a. Once a will has been admitted to probate or letters of administration have been issued, there can be a long list of duties to which the personal representative/executor must attend.
   b. All states direct personal representatives/executors and administrators to pay debts according to their state’s abatement statute.
   c. The living joint tenants of bank accounts owned with the deceased can draw on any bank accounts up to half the amount in the accounts.
   d. Claiming any insurance proceeds.
   e. The personal representative, executor, or administrator will have to transfer to the proper beneficiary any vehicles owned by the testator.
   f. Stocks and bonds usually can be transferred by sending the designated transfer agent the stock certificates together with stock powers including affidavits of domicile and Surrogates’ certificates.
   g. A personal representative, executor, or administrator will usually have to file a public notice in an official legal newspaper so that any outstanding creditors are notified to come forward within a designated period of time.
   h. The personal representative/executor or administrator also is responsible for filing the final tax return for the decedent and the fiduciary income tax return providing the income of the estate after the death of the decedent.

23. Transferring Property Outside the Probate Process
   a. Reasons for avoiding probate may include the fact that a will becomes a public document filed with the decedent’s county of domicile for anyone to read.
   b. In addition, tax savings may be possible when property is not transferred solely through the probate process. The legal mechanisms created to conduct these transfers without going through the probate process are often called will substitutes.

24. Retirement Accounts
   a. Every individual retirement account (IRA) or company retirement plan asks its owner to name a beneficiary on the account’s form.
   b. Failure to name a beneficiary of investment accounts results in the proceeds of the account going to owner’s estate and if there is a will, being distributed through the residuary clause of the owner’s will.

25. Bank Accounts
   a. Some bank accounts transfer outside the probate process. These bank accounts include: 1. Joint and survivor accounts; 2. Payable-on-death accounts; 3. Agency accounts; and 4. the Savings account trust, also known as a Totten trust.

26. Life Insurance
   a. Life insurance is another example of an asset that passes outside a will.

27. Contesting a Will
   a. Any questions regarding a will’s authenticity, proper jurisdiction, the mental capacity of the testator, or any applicable dispute usually stops the admission of a will to probate. The person filing the lawsuit has the burden of proving her case by clear and convincing evidence, in addition, the filer must be in a position to gain from the will being found invalid.
   b. A testator who wants to avoid a will contest and all the distress it will cause after her death may include an in Terrorem clause.
also called a no contest clause, in his will. The majority of states do not enforce a no-contest clause unless there is probable cause for the contest.

28. Defining Mental Capacity

a. The grounds used to contest a will usually bring forth two types of issues. The first issue involves questions regarding the testator’s mental capacity at the time she signed the will. The second issue involves questions of undue influence upon the testator by the persons inheriting from the testator.

b. Today three elements involving mental capacity must be present when writing a will. If any one of these three elements is missing, the testator’s will may be suspect. First, the testator must fully understand the legal consequences of writing a will. Second, the testator must know the full extent of her property (the term bounty is often used). Third, the testator must know the names of the individuals who are the proper recipients of the testator’s property (e.g., the testator’s family members).

29. Defining Undue Influence

a. The only way to fight such a claim of undue influence is to rebut with clear and convincing evidence. Clear and convincing evidence is defined as stronger evidence than a preponderance of the evidence (evidence that something is more likely to be true than false) but not as strong as beyond a reasonable doubt.

30. Defining Fraud

a. Discussing fraud in the context of creating a will usually involves one or both kinds of fraud known as fraud in the inducement or fraud in the execution. Fraud in the inducement occurs when a person misrepresents the facts with the intent to deceive the testator to influence the testamentary disposition of the testator’s property. Fraud in the execution occurs when a person misrepresents the character or contents of the document to be signed by the testator, which does not, in fact, carry out the testator’s intent.

31. Elder Law Practice

a. Mary Loomis and her husband, Harry Loomis, need help to stop what they described to their attorney, Tara Jensen, as a great injustice being done by family members.
3. Introduction Planning before a Health Emergency

a. All 50 states allow for documents collectively known as **advance directives for health care**. Approximately 40 states have forms for drafting advance directives for health care. About 20 states require that these forms be substantially adhered to, but those 20 states still allow additional language to be inserted. Known by a variety of synonymous names, such as advance medical care directive, advance health care directive, **health care power of attorney (HCPOA)**, and **durable power of attorney for health care**.

b. Whatever name an advance directive for health care goes by, the primary objective should be the same—to specify an individual’s health care decisions and to identify who will make decisions for that individual in the event he is **unable to communicate** his wishes to doctors. Generally, one or two types of advance directives for health care documents are used. The first type is a **living will**. A living will is self-directed and should describe an individual’s wishes regarding medical treatments the person would want if he was unable to share his wishes with health care providers.

c. The second type of advance directive for health care document is a **medical power of attorney**. The medical power of attorney document allows an individual to appoint a trusted person to make health care choices when the individual is not able to share his health care choices with health care providers. The living will and the medical power of attorney frequently are merged into one document, which is a good idea if state statutes permit it.

d. **Do Not Resuscitate order**—Nearly all states have enacted legislation that allows their citizens to choose to refuse artificial means of support.

e. A medical power of attorney is very **specific** in its purpose (i.e., the making of medical treatment decisions by one person [usually called an **agent**, a **health care proxy**, or a **health care representative**] for another person).

f. Another type of power of attorney is called the **special power of attorney**. The authority behind a special power of attorney usually ends with the completion of the responsibility.

g. A **durable power of attorney** remains in effect even if the creator becomes incompetent. When a durable power of attorney is written so that the authority of the **attorney-in-fact** begins at a later time upon the occurrence of a certain event (usually incapacity), the document is called a **springing durable power of attorney**.

4. Should Everyone Have an Advance Directive for Health Care?

a. Everyone should have an advance directive for health care because it protects an incapacitated person’s choices when he is unable to protect his own interests and choices.

5. Medical Terminology Used in Advance Directives


6. **Exhibit 3–1: E-2-20 Withholding or Withdrawing Life-Sustaining Medical Treatment**

7. Choosing a Health Care Proxy

a. The choice of a health care proxy (also known as a health care agent or health care representative) who has similar end-of-life beliefs is one more preventive action that helps ensure that a creator’s health care decisions are respected.

8. Asking Others to Make a Health Care Decision

a. Decisions that a health care proxy makes for an incompetent patient should be accepted by the patient’s physician. However, four situations may require either institutional (e.g., a hospital) or judicial review and intervention in the decision-making process. These four situations include: 1. No available family member is willing to be the patient’s surrogate decision maker; 2. There is a dispute among family members, and no decision maker has been designated in an advance directive for health care; 3. A health care provider believes that the family’s decision is
not what the patient would have decided if he were competent; and 4. A health care provider believes that the decision is not one that reasonably could be judged to be in the patient's best interests.

9. Exhibit 3–2: The Responsibilities of a Health Care Proxy

10. When Does an Advance Directive for Health Care Become Operable?
    a. Incapacity is the key operable point.

11. When Does a Durable Power of Attorney End?
    a. The creator of an advance directive for health care can change or revoke his directive if he still has capacity. It is better if the old written advance directive is destroyed and a new advance directive is written and signed. Copies of the creator's advance directive for health care should be given to the designated proxy, to close family members, and to the creator's doctors to include with the medical records.

12. Practical Advice
    a. A law firm can provide clients with a card stating that the bearer has an advance directive for health care.

13. Where Should an Advance Health Care Directive Be Kept?
    a. It has been estimated that 35 percent of advance directives for health care cannot be found when needed. The U.S. Living Will Registry has been electronically storing advance directives for health care since 1996.

14. Practitioners Should Be Aware of Statutory Changes
    a. One change is that all hospitals and nursing homes are now required by federal law to offer living wills as a no-cost service. Changes in state laws pertaining to health care directives frequently occur.
    b. Elder law professionals also should be aware of the changes wrought by the 1996 passage of the Health Insurance Portability and Accountability Act (HIPPA), the first federal privacy standards designed to limit the information that health care professionals can share, use, and release to others concerning their patients.

15. Elder Law Practice


17. Living Wills Traced to Quinlan Case
    a. Karen Ann Quinlan is a well-known name in the personal right-to-die national debate.
    b. In large part, the living will concept can be traced back to the 1975 Quinlan case.

18. Private Questions Answered Publicly in Court
    a. The Cruzan case was the first case where the Supreme Court was presented with the issue of whether the U.S. Constitution provided a right-to-die.

    a. A state may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state.

20. The Legacy of Public Tragedies
    a. Public tragedies have led to public awareness.

    a. Physician-assisted suicide occurs when a physician knowingly assists in fulfilling a patient's desire to die. The term assisted-suicide can be used when a non-physician assists in fulfilling an individual's desire to die.

22. Wrestling with Right-to-Die Issues
    a. The subject of physician-assisted suicide has been debated for years in Europe and Australia. Australia became the first country in the world to legalize euthanasia, but it overturned that ruling less than a year later in 1997. Euthanasia is the act of painlessly putting to death of a person suffering from an incurable or painful disease without the final decision being made by the suffering person (often because the person is not conscious, capable, and communicative), but rather by the person's physician. Euthanasia sometimes is described as a mercy killing.
    b. Oregon's Death with Dignity Act provides the right to die only to competent adults who have been diagnosed with a terminal illness; in addition, two doctors confirm that the person is competent and has only six months to live.

24. Court Says No to Euthanasia

26. Status of Physician-Assisted Suicide
   a. There are criminal prohibitions against physician-assisted suicide and heavy state criminal penalties levied upon those who participate in it. The U.S. Supreme Court has failed to find such penalties a violation of the Fourteenth Amendment’s Due Process clause in any of the state laws against physician-assisted suicide.

27. Palliative Care
   a. Palliative care is the comprehensive management of the physical, psychological, social, spiritual, and existential needs of patients.

28. Exhibit 3–4: World Health Organization’s Definition of Palliative Care

29. Summary
30. Key Terms
31. Review Questions
32. Ethics Alert
33. Helpful Web Sites
34. Endnotes

CHAPTER 4
1. Objectives
2. Introduction
   a. A guardianship is a legal management tool put in place by state law to protect and aid individuals who have different abilities to care for themselves. All 50 states and the district of Columbia have enacted guardianship statutes. Some states have adopted the uniform Probate Code (UPC) in their guardianship legislation; others have guardianship statutes of their own design or have modified the UPC.
   b. Approximately 1.5 million adults are under public or private guardianship in the United States.
   c. The person found to be incompetent may then have another person, called a guardian, appointed by a court to make personal and financial decisions for the person adjudged incompetent.
   d. The major difference between a guardianship and a conservatorship is that a conservatorship is a voluntary undertaking requested by a conservatee that requires the conservator to handle some personal and financial decisions for the conservatee. On the other hand, a guardianship is a completely involuntary proceeding with a legal declaration that a person is legally incompetent and becomes the guardian’s ward. Some states use the term decisional incapacity rather than incompetence. Louisiana uses the term interdiction instead of guardianship.

3. The Origins of Guardianships and Conservatorships
   a. The original legal concept of society and its courts protecting the incapacitated individual and her property stems from the ancient Roman concept of PARENTS PATRIAE.

4. Guardianship Exposé Led to Change
   a. The greatest changes in guardianship law may stem from two newspaper exposés that investigated the damaging effect of guardianships on elderly wards.
   b. The exposé led to the American Bar association’s Commission on Legal Problems of the Elderly formulating a recommendation for a national improvement in guardianship law.
   c. A strong element in the revised UGPPA is the insistence that limited guardianship or limited conservatorship should be tried first whenever the facts dictate and that all guardians and conservators should consult with their wards whenever possible before making a decision regarding their wards.
   d. The revised UGPPA included the new concept of parental or spousal appointments generally called standby guardianships in state legislation.

5. Applying the Least Restrictive Alternative
   a. Alternatives to traditional cookie-cutter guardianships are in keeping with what is known as the least restrictive alternative (LRA) principle.

6. When to Seek a Guardianship
   a. Whether a person has a durable power of attorney in effect can impact the decision of when a guardianship should be sought.
b. All care facilities should ask to see letters of guardianship, which are issued by the appropriate court and name a guardian.

7. How Should Competency be Judged?
   a. What does make a person legally competent or incompetent? It should be noted that some states use the term capacity.
   b. Typically, most states have a two-part criteria for determining competence. First, the person whose competence is questioned usually must fall within a specific category. This category may include an individual with mental health issues or advanced age. Second, the individual must be found to be unable to care for her physical well-being or property. This second requirement should help ensure that advanced age or developmental disabilities alone do not initiate a guardianship proceeding.

8. Types of Guardianships
   a. Concepts such as limited, partial, or temporary guardianships have become more acceptable.

9. Private Guardianship
   a. When a private individual is named a guardian, a private guardianship is created.

10. Public Guardianship
    a. Since the early 1900s, the U.S. government has been called on to act as a surrogate decision maker through the public guardianship concept.
    b. The main purpose behind the Office of the Public Guardian is to provide guardianship or conservatorship services of last resort when there are no willing and appropriate family members or friends who can serve.

11. Special Medical Guardianship
    a. Sometimes a guardianship appointment is made so that a medical procedure can be performed. This typically occurs when life-threatening treatment is needed.

12. Temporary Guardianships
    a. There is also a need for temporary guardianships on occasion.
    b. A temporary guardianship order may then mushroom into a full-fledged capacity hearing.

13. Undertaking the Guardianship Process
    a. All 50 states have state-specific and comprehensive guardianship statutes.
    b. The attorney begins by drafting a guardianship complaint (also called a guardianship petition in some states) and order to show cause.
    c. Generally, a guardianship petition must have documentation listing the type and value of the estate in question. The complete listing of all assets assists the court in determining exactly how large a bond the guardian should have to post.
    d. Courts typically prefer an allegedly incapacitated respondent to appear in court unless the respondent is so mentally and/or physically infirmed that she cannot.
    e. Whether the alleged incapacitated person has a last will and testament, any powers of attorney, and/or an advanced directive for health care should be determined.
    f. Typically, any interested third party can bring an action for appointment as a guardian.
    g. Necessary questions that a proposed guardian’s attorney should ask are whether the proposed guardian has ever been convicted of a felony or filed for bankruptcy.
    h. Of great importance is the documentation establishing probable cause and detailed specificity in the pleadings as to why the court should declare a guardianship.

14. The Guardianship Proceeding
    a. A guardianship petition filed with the county court system will be heard in court and must follow court rules.
    b. The individual subject of the petition has the right to be notified and a right to be present at the court hearing.
    c. Depending on a state’s statutory requirements, an attorney, a guardian ad litem, or a court evaluator may appear in court for the named party.
    d. Generally, the person hearing a guardianship case is called a judge, but in a small number of states another judicial officer serves in the role of the judge. This judicial officer at a guardianship hearing may be called a hearing officer, referee, commissioner, or magistrate.
    e. Appeals from guardianship orders are collected in books called the Mental Health Reporter.
15. Physician Input Needed  
   a. Important are medical affidavits from at least one physician, and most states usually require two physicians who have examined the alleged incapacitated person within a short time prior to the guardianship petition being filed.

16. Making Guardians Accountable  
   a. All guardianships should be monitored after they are granted. The vast majority of states require *periodic financial reports* and *personal well-being reporting* to the court that granted the guardianship. States differ in how thorough the reports must be.
   b. Accountability standards vary greatly from state to state.
   c. An important job for all guardians is to monitor any services the ward should be receiving.
   d. Any guardian’s report should include the mental and physical state of the ward. The report should summarize the visits the guardian has made to the ward and the activities in which the ward has participated since the last report.
   e. National guardianship standards also have been drafted by the *National Guardianship Association*.

17. Terminating a Guardianship  
   a. Reasons for terminating a guardianship from the ward’s perspective include: 1. the incapacitated person dies; 2. the incapacitated person is adjudicated capable; 3. the guardianship is adjudicated unnecessary; and 4. a timed guardianship of a certain period has expired.
   b. A guardianship may also be terminated because the guardian has died, has resigned, or will be replaced. A petition to discharge the guardian from further responsibility for her ward should be filed.

18. Exhibit 4–1: List of State Guardianship Statutes
19. Exhibit 4–2: Sample New York Guardianship Statute
20. Elder Law Practice
21. Exhibit 4–3: Guardianship Petition
22. Exhibit 4–4: Sample of Affidavit Requirements
23. Exhibit 4–5: Sample Medical Affidavit

25. Exhibit 4–7: Petition for Termination of Guardianship and Discharge of Guardian and order of Termination and Discharge

26. Challenging a Guardianship Appointment  
   a. Generally, the standard of review for such matters is to determine whether the trial court abused its discretion in reaching its judgment.

27. Case 4–1: *In the Matter of: The Guardianship of Jessie K. Simmons*

28. Caregiving Issues  
   a. Today, families are providing care for longer periods of time for loved ones who are more ill, aged, or disabled than in the past. Caregiving for another usually occurs to varying degrees before a guardianship or conservatorship is considered necessary.
   b. The Administration on Aging defines a family caregiver as anyone who provides care without pay and who has personal ties to the care recipient.

29. Defining Caregiving  
   a. Caregivers may assist in varying degrees with the activities of daily living including bathing, toileting, eating, and providing transportation.

30. Caregiver Stress  
   a. Mental health issues
   b. Physical health issues
   c. Financial burdens

31. Can Caregivers Be Paid?  
   a. Caregiving can be an expensive, uncompensated undertaking.
   b. The Choices for Care program was viewed as a cost-cutting measure because such in-home care is much less expensive than the alternative of a person being placed in a Medicaid-funded institution. More states are expected to join Vermont in making an effort to curb the $38 billion spent by Medicaid on institutional care nationwide.
   c. The Cash & Counseling program allows elderly Medicaid recipients to receive special grants to pay for and manage their own care.
   d. Another concept in compensating caregivers is the caregiver contract, also called personal-service or personal-care agreements.

32. Elder Law Practice
33. Summary
CHAPTER 5

1. Objectives
2. Introduction
   a. Previous chapters have suggested that a person’s estate plan should provide for an orderly transfer of the individual’s assets to his chosen beneficiaries. Creating a legal mechanism called a trust can help with that transfer.
   b. A trustor transferring personal property can be more specifically called a settlor. If the creator is transferring real property, he is called a grantor.
   c. A trustee is the person to whom the property has been transferred for the benefit of another and who is responsible for the trust’s administration.
   d. A beneficiary is entitled to the benefit of the trust.

3. Trust Essentials
   a. The key ingredient needed to make a valid trust is the splitting of the legal and equitable interests in the property in question.
   b. A trust included in a will and designed to take effect after a testator’s death is called a testamentary trust.
   c. A trust written and enacted by a creator while he is still alive is called an inter vivos trust.
   d. Strict requirements must be followed when any type of trust is created. A trust must have a legal purpose. A trust must not break the rule against perpetuities.
   e. One of the most important requirements of creating a trust that is sometimes forgotten is the funding of the trust.
   f. Types of trusts include express trust, implied trust, constructive trust, and charitable trust.

4. The Role of the Trust’s Creator
   a. A trust’s creator must have legal capacity to meet the criteria for conveying property via a trust.
   b. A trust’s creator must also have a transferable interest in the property in question and show a clear intention to create a trust that splits equitable and legal title in the property. Most trusts must be in a written format in order to comply with each state’s version of the Statute of Frauds.
   c. The majority of states require some kind of written document generally known as a trust instrument to provide proof of the trust’s creation.

5. The Role of the Beneficiaries
   a. Any person or legal entity can be a trust beneficiary. A key point when discussing beneficiaries is that the trust must name the beneficiaries clearly. The best-case scenario is to include the specifically named persons or entities.
   b. A second-tier or subsequent interest is called a remainder. The beneficiary who receives the remainder interest is called a remainderman.

6. The Role of the Trustee
   a. The trustee must understand his role as a fiduciary. A fiduciary is a person who holds a position of trust, responsibility, and duty to another.
   b. If a trustee dies, wants to resign, or becomes incapacitated, a successor trustee should already be chosen and named in the trust. This person will be available to fill the exact role of the original trustee.
   c. Usually it is best to have one trustee named at one time.
   d. Failure to develop and increase assets could lead to claims of breach of trust.
   e. A trustee can also be sued for specific performance by a beneficiary who alleges the trustee is not fulfilling his obligations. The prudent person standard is often used to objectively view the behavior of a trustee.
   f. The trust’s creator can include an exculpatory clause to lessen the burden on a trustee.
   g. Another drain on a trust corpus can be a bond that is often required by statute unless waived by the creator.

7. Who Can Be a Trustee?
   a. An individual or legal entity such as a bank or another type of corporation may fill the
role of trustee. Most states have statutes detailing who or what may serve as a trustee.

8. The Trust Administration Process
   a. Once the trustee accepts his role, the list of duties and responsibilities that are part of the trust process starts growing. Some states require a trustee to register the trust with the court that has jurisdiction over the trust. An attorney representing a trustee should make sure any documents such as deeds or securities are drafted and recorded, necessary insurance is purchased, and upkeep on any trust property continues.

9. What Type of Property Can Be Put into a Trust?
   a. Any kind of property can be put into a trust as long as it can be legally transferred. The property can be tangible or intangible. The property held in the trust may be called trust property, a trust fund, the trust corpus, the trust res, the trust principal, or the trust estate. Cash placed in a trust is usually called the principal. Although the term corpus estate may be used for any property placed in trust, real property placed in a trust is usually just called the corpus, personal property (other than cash) that is placed in a trust is usually called the res.
   b. A client may consider transferring his business into what may be called a grantor-retained annuity trust.

10. Tax Savings With Trust Creation?
    a. Both the federal and state governments may require an estate to pay taxes based upon its value. State estate taxes are calculated as a percentage of the entire taxable estate if the deceased person lived in a state with estate taxes. Not all states have state estate taxes and those without that tax burden are especially popular with older citizens.
    b. Another way to reduce the amount of taxable estate is for the owner to begin gifting his money away before he dies. This gifting is technically known as the annual gift tax exclusion.
    c. Federal tax savings may not be an issue for all law firm clients.
    d. The assets of a properly created trust will not be included in the creator's taxable estate. Unless a trust is included in a will, probate is also avoided when a trust is involved.

11. Trusts, Marriage, and Tax Savings
    a. An individual may inherit an unlimited amount of assets from his spouse tax free. Each individual also has a personal exemption.

12. Tax Avoidance Strategy

13. Types of Trusts
    a. 1. a spendthrift trust; 2. a discretionary trust; 3. a support trust, also called a special needs trust; 4. an irrevocable life insurance trust; and a charitable trust.
    b. A marital trust may be created to continue to provide for a surviving spouse and any designated remaining beneficiaries following a surviving spouse's death. A pet owner can also ensure the continued care of a beloved pet by utilizing a pet trust document.

14. Spendthrift Trust
    a. A spendthrift trust allows one person to give money or property to another without the fear that it will be squandered by the recipient or totally accessible to creditors.

15. Discretionary Trust
    a. A discretionary trust provides some leeway in carrying out its terms. A discretionary trust is also called a sprinkling or spray trust.

16. Support Trust
    a. Because minor children lack the legal capacity to handle their own finances, a support trust or special needs trust fits the needs in the case of minor children very well. This trust is also used for challenged adult children who are unable to meet their own needs.

17. Irrevocable Life Insurance Trust
    a. Proceeds of a life insurance policy payable upon the death of a decedent become part of the decedent's estate unless a life insurance trust has been created prior to the decedent's death or the policy was owned by another person. Insurance trusts may be irrevocable.

18. Charitable Remainder Trusts
    a. A charitable remainder trust (CRT) permits the creator to transfer his assets into a lifetime income without incurring capital gains or estate taxes.

19. Marital Trusts
    a. Such a trust may be called a qualified terminable interest property (QTIP).
trust. In some states, it is called a marital trust, credit shelter trust, an A and B trust, a husband and wife trust, or a bypass trust in some states.

b. The beneficiary spouse will receive income generated by a marital trust’s corpus tax-free because the beneficiary spouse had no ownership interest. The trust is designed with one spouse named as both the grantor and trustee and his spouse as the secondary trustee who will benefit from the trust once the grantor dies. When such a purpose is created while both spouses are living, then the spouses can utilize tax-saving strategies and ultimately preserve estate assets for their designated beneficiaries. The typical marital trust designates the creator’s children as beneficiaries, but allows the widowed spouse to withdraw adequate income or possibly even dip into the trust’s principal for support during his lifetime.

20. The Life Estate Option
a. A life estate is a property interest that lasts until a named person or persons die. The person, or persons, or entity to inherit the estate after the life estate is called the residuary beneficiaries.

21. Pet Trusts
a. A pet trust is now a viable possibility in most states.

22. Exhibit 5–3: Sample Pet Trust Statute

23. Elder Law Practice

24. Exhibit 5–4: Sample Will with Special Needs Trust

25. Chapter Summary

26. Key Terms

27. Chapter Review Questions

28. Ethics Alert

29. Helpful Web Sites

30. Endnotes

CHAPTER 6

1. Objectives

2. Introduction
a. More than three in seven adults are not currently married, but share their home with a partner. Also, a significant number of unmarried partners sharing a household are gay and are not legally permitted to marry in the majority of states even if they wished. A small minority of states are now allowing unmarried heterosexual partners and homosexual partners to register their partnership or proceed with limited civil unions in order to activate some marriage-like rights.

b. Marriage brings with it a wealth of over 1,000 rights and obligations to spouses.

3. Cohabitation and the Elder Law Perspective
a. Unmarried cohabitating opposite-sex couples aged 65 and older rose 73 percent from 1990 to 1999.

4. Legal Protections for Cohabiting Partners
a. While the focus of domestic partner legislation has been primarily on same sex couples, some cities and states in the United States allow heterosexual residents to register as domestic partners or reciprocal beneficiaries.

b. Certain states permit heterosexual couples to enter into domestic partnerships only if they are above a certain age.

c. Termination of such rights and obligations usually can occur by filing for termination with the applicable court (usually a family court in the county where the couple is domiciled).

5. Exhibit 6–1: Sample of States and Cities Offering Domestic Partner Registration

6. Landmark Cohabitation Case: Palimony Added to Dictionary
a. The California case of Marvin v. Marvin, 122 Cal. App.3d 871, 176 Cal. Rptr. 555 (1981), added the word palimony to the English language. Palimony is defined as financial support paid between persons who are not, and never were, married.

7. Marvin Case Has Long-Term Effect
a. The famous and the unknown have been inspired by the contractual issues and palimony concepts of the Marvin case.

b. Contractual issues may involve such terms as implied contract, express contract, and equitable remedy.

8. Palimony after Death?

a. The palimony concept continues to be expanded, as evidenced by a recent New Jersey Supreme Court case that allowed palimony claims to be made against a deceased cohabitant’s estate.
9. Cohabiting Couples Must Create Their Own Legal Protections
   a. The first point an unmarried but cohabiting couple should realize is that married couples take vows that give them access to an extensive legal arsenal. Each of the 50 states has statutes and well-established case law pertaining to just about every marriage scenario imaginable. Unmarried and cohabiting couples are largely on their own in crafting legal protections that fit their particular partnership.
   b. The unclear legal ramifications of living together without marriage continue to make the creation of a written and notarized cohabitation agreement a good idea.

10. Creating the Optimum Cohabitation Agreement
   a. When unmarried couples decide to create a cohabitation agreement, both parties should be aware of the agreement’s ramifications.

11. Marriage and the Elder Law Perspective
   a. Women are far more likely than men to be widowed, but elderly men are twice as likely to remarry following a divorce or death of a spouse. Marriage among the elderly is rising.
   b. A civil marriage is defined as a government sanctioned union that is created when a government employee officiates at a marriage ceremony, after which the participants are declared husband and wife.
   c. Another type of marriage is called common law marriage.
   d. A deterrent against marriage is the fear of financial obligations for a new spouse’s debt becoming the responsibility of both spouses.
   e. Inheritance issues play a role in remarriage.
   f. A key issue for elder law attorneys and their engaged-to-be-married client is usually the preservation of the client’s premarital assets.

12. Exhibit 6–2: Marriage in the United States

13. Marriage and Gay Couples
   a. A civil union is defined as a legal designation given to homosexual partners which confers certain marriage-like rights.

14. Prenuptial Agreements
   a. The majority of Americans marry in their lifetimes. Another fact of American life is that those marriages are not lasting.
   b. This is where the prenuptial agreement concept comes in handy. A prenuptial agreement, also known as an antenuptial agreement, is a contract made between two individuals before their marriage to each other.
   c. Today, each state’s requirements for creating a valid prenuptial agreement can be different based upon whether the state has enacted the Uniform Premarital Agreement Act (UPAA). At least 25 states and the District of Columbia have enacted the UPAA. The remaining 25 states have legislation and case law applicable to their individual states. However, the general requirements for all states include the following: (1) a written agreement; (2) contractual capacity of the parties; (3) voluntary agreement free of fraud, duress, and undue influence; (4) the agreement must not be unconscionable; and (5) full disclosure of assets.

15. Exhibit 6–3: Guide to Uniform Premarital Agreement Act

16. What Should Be Included in a Prenuptial Agreement?
   a. Whatever the factual scenario, all prenuptial agreements should clearly state what each individual understands she is to receive or give to the other spouse if the marriage fails. A knowledge of contract law is necessary to draft prenuptial agreements. Contract terms include offer, acceptance, consideration, parole evidence, and rescission.

17. No Two Prenuptial Agreements Are Alike
   a. Each prenuptial agreement is different from the next because each agreement is negotiated by the parties involved. The future spouses may be described as the payor and payee spouses.

18. Elder Law Practice

19. Summary of Bridget and Robert’s Interview

20. Exhibit 6–4: Questions for the Prenuptial Agreement Interview

21. Exhibit 6–5: Sample Prenuptial Agreement

22. Prenuptial Agreement Leads to Constructive Trust Created for Widower


24. Deceased Spouse’s Honesty Questioned

26. The Rights of Surviving Spouses
   a. All of the separate property states (except Georgia) provide for surviving spouses via what is known as an elective share. The elective share (sometimes called a forced share) provides that a spouse may take the option of accepting a devise from her deceased spouse’s will or may renounce her devise and take a legislatively designated share of the estate.

27. Homestead Exemption Designed to Protect Families
   a. Homestead laws were originally designed to ensure that a decedent’s spouse and children would be able to stay in the family home after the decedent’s death.

28. Divorce and the Elder Law Perspective
   a. The legal costs of divorce in the United states amount to more than $30 billion per year. In fact, each year more than 1.8 million people divorce.
   b. Elder law clients marrying later in life usually have two pragmatic concerns before walking down the aisle. First, what type of asset protection can be instituted prior to their nuptials? For example, how can I make sure the kids from my first marriage do not lose out because I remarried? Secondly, if one of the spouses dies, the issue of what financial protections exist for the surviving spouse becomes important. For example, a widow may question if her husband’s death will result in her not being able to afford or even inherit the house she may have been living in for years.
   c. A well-drafted prenuptial agreement and an estate plan (e.g., at least a will and perhaps a trust of some kind) could take care of these concerns.

29. Deciding to End a Marriage
   a. A husband and wife who wish to end their marriage typically have two choices. The spouses may be able to meet the criteria to be granted an annulment, or they may seek an absolute and full divorce from each other.
   b. The legal term used to describe a separation from one’s spouse is usually judicial separation, although some states use other names, including legal separation, limited divorce, divorce mensa et thoro, separation from bed and board, and divorce from bed and board. Separate maintenance is another term similar to judicial separation.
   c. The inclusion in the divorce complaint (also called the divorce petition or dissolution petition in some states) of the reason the plaintiff is seeking a divorce is important legally.
   d. The creation of no-fault causes of action opened a new world in divorce litigation. The discord was lessened and the negative connotation of fault was eclipsed by no-fault divorce statutes that included the new legal terms irreconcilable differences, irremediable breakdown and incompatibility.

30. Temporary Support
   a. Temporary support, also known as pendente lite support, is the legal solution to the financial difficulties that can occur during divorce proceedings. Literally translated, pendente lite means “during the pending litigation.”

31. How Property Is Owned
   a. The two types of property ownership concepts applicable to marriage are generally called the community property and separate property concepts. Eight states that are known as community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Alaska allows a married couple to choose which type of concept they wish to apply. Wisconsin has a differently named system, but it is similar to community property.
   b. Community property states are those states that call most property acquired during the marriage the property of both partners no matter whose name the property is in. The separate property concept essentially permits individual ownership of property by a married couple except for property clearly designated as jointly owned.

32. How Property Is Divided Between Divorcing Spouses
   a. The majority of states apply property division laws that utilize the legal concept known as equitable distribution. The minority of states apply the community property concept.
33. Issues Involving Death, Divorce, and Beneficiaries
   a. The majority of states provide that if a person dies without drafting a will and without children, her spouse will inherit all of the deceased spouse’s assets.

34. The Divorce Discovery Process
   a. Interrogatories
   b. Depositions
   c. Pre-trial hearings

35. The Alimony Issue
   a. **Alimony** is defined as an allowance from one spouse to another that usually continues until the recipient spouses remarries, dies, or perhaps, begins cohabitating with another partner. Alimony is called *spousal maintenance* or *spouse support* in some states.


37. Modification of the Alimony Obligation
   a. In discussions about alimony, the bottom line is that a judge’s order to pay alimony is always subject to review and modification at a later time.

38. Termination of the Alimony Obligation
   a. The four main reasons that most court will terminate alimony include remarriage of the payee spouse, death of the payee or the payor spouse, cohabitation by the payee spouse, and disability of the payor spouse.

39. Chapter Summary
40. Key Terms
41. Chapter Review Questions
42. Ethics Alert
43. Helpful Web Sites
44. Endnotes

**CHAPTER 7**

1. Objectives
2. Introduction
   a. As of 2005, just 60 percent of 60-year-olds, 32 percent of 65-year-olds, and 19 percent of 70-year-olds were still employed. So while many workers may plan to keep working, life events may interrupt those plans.

   b. Median net worth of households headed by people over 65 years old was close to $200,000 in 2004.

   c. One in seven households headed by individuals 65 to 74 years old are worth $10,000 dollars or less. Current retirees report that 58 percent look to the Social Security Administration’s (SSA’s) benefits as a major source of income.

   d. Traditional pension plans have been cited as a major source of income for 43 percent of current retirees. Thirty-two percent of current retirees have cited personal investments as a major source of income as well.

   e. The median income for America’s retired women was $12,080 in 2004 compared to $21,102 for retired men.

3. Social Security Benefits
   a. Twenty percent of Americans depend *solely* on Social Security benefits. The majority of Americans over 65 years old depend on Social Security benefits for at least 58 percent of their annual income.

   b. Benefits are not so generous that the typical elder law client should or can depend on their Social Security benefits payment as their sole source of retirement income.

4. Social Security: Where It Began
   a. The original concept of providing benefits to America’s retired workforce is attributed to President Franklin D. Roosevelt’s New Deal legislation of the 1930s Depression era.

5. The Differences between OASDI and **Supplemental Security Income (SSI)**
   a. OASDI benefits are funded by contributions made to a *general revenues fund*. SSI benefits are not. The individuals who are eligible to receive SSI benefits are those citizens who are physically or mentally disabled in ways that are statutorily described and whose incomes are within extremely low limits.

6. How to Become Eligible for OASDI Benefits
   a. The Social Security Act usually covers any person working in the United States full time. A covered full-time worker and his employer each contribute a certain percentage of the worker’s salary. (In 2007 it was 6.2 percent each.)

   b. If a worker is lucky enough to have unearned income or income in excess of
$97,500 (the 2007 amount), he does not have to remit any FICA tax on income earned over $97,500.

7. Will Benefits Be Available in the Future?
   a. The trust funds held by the Social Security Administration had assets of $1.378 trillion in 2002.
   b. Trustees of the Social Security and Medicare programs, the nation’s two largest benefit programs, have announced that the benefits for 78 million baby boomers expected to retire will not be available by 2019 and 2041, respectively, unless the federal government can fund the programs differently.

8. Who Is Entitled to Receive Benefits?
   a. The original legislation was designed with a retirement age of 65 years. The retirement age has now been increased to 67 years old for anyone born after 1960.

9. The Individual Worker
   a. First, to qualify for benefits for himself, a worker must be fully insured. The fully insured status is determined by counting the number of years a worker has worked. If a worker has at least 10 years of total employment and FICA contributions, he is considered fully insured.
   b. A Social Security penalty is applied to any income earned by a worker between 62 years old and the SSA’s designation of the worker’s eligible retirement age.

10. Exhibit 7–1: Social Security Eligibility

11. Derivative Beneficiaries
   a. Survivors of eligible workers are known as derivative beneficiaries. Any benefits paid to a derivative beneficiary are based on the deceased worker’s earnings history. Survivors include the deceased worker’s spouse, minor children, adult children disabled before age 22, and perhaps other dependent family members.
   b. Lump sum death benefits and survivor income benefits must be determined.

12. Exhibit 7–2: Social Security Thresholds for Survivor Eligibility

13. How to Apply for Benefits
   a. Each person in the workforce will receive notification from the SSA when he has worked long enough to fulfill the requirements to receive Social Security payments.
   b. A husband and a wife may receive their individually earned Social Security benefits based upon the number of years in the workforce. If a spouse dies, the local SSA agency office should be notified. A surviving spouse is entitled to continue to receive his own individual Social Security benefits payment or may opt to receive his deceased spouse’s Social Security benefits payment instead if the amount is higher than his own.

14. Challenging SSA Decisions
   a. If a worker disagrees with the official SSA’s annual statement regarding the worker’s earnings, he may request a correction be made to the official record.

15. Medicare
   a. Medicare is health insurance provided by the federal government to seven out of eight of U.S. residents 65 years and older whether they are rich or poor.
   b. Medicare eligibility is tied to Social Security eligibility.
   c. Medicare-eligible individuals need to sign up for benefits at their local Social Security office within seven months after their 65th birthday unless they are already receiving Social Security benefits or a railroad pension.

16. The Parts of Medicare
   a. Generally, Medicare Part A pays hospital bills and Medicare Part B pays an insured’s physician bills.
   b. Medicare Part A is usually provided cost-free, but a premium is required to receive Part B coverage.
   c. Generally known as the Medicare Advantage Plan, the purpose of Medicare Part C is to offer options not provided in the other parts.
   d. Many people covered by Medicare also have medicap insurance.

17. Exhibit 7–3: Medicare Premiums for the Four parts of Medicare (2008)

18. Prescription Coverage
   a. Part D became available to current Medicare Part A or Part B enrollees in 2006.

19. What Medicare Covers
   a. Medicare covers specific acute medical treatment. Medicare does not pay for any general custodial type care of a patient. Such coverage reflects the position that Medicare benefits
will pay for medical services described as *reasonable and necessary in the treatment of illness, injury, or to improve the function of a malformed body member*.

b. Once a deductible is met Medicare does have extensive coverage for practically every hospital cost.

20. Exhibit 7–4: Non-Hospital Medicare Coverage

21. Appealing Medicare Decisions
   a. Every individual entitled to Medicare also is entitled to certain guaranteed rights.
   b. The requirements of the Original Medicare Plan appeals process include the following: 1. the subscriber must circle the item in question on the Medicare Summary Notice and explain the coverage disagreement, 2. the subscriber must sign his signature and include his telephone number, and 3. the subscriber must send the Medicare Summary notice to the address on the Appeals Information section.
   c. The appeal must be made within 120 days of receiving the Medicare Summary Notice. Recent changes include the requirement that all second-level appeals, also known as Medicare reconsiderations, be conducted by Qualified Independent Contractors (QICs).

22. Attorneys Advocating for Medicare Beneficiaries
   a. It is unlikely that an elder law attorney will be asked to handle Medicare appeals because many clients in such a position cannot afford an attorney’s fees.

23. Exhibit 7–5: Medicare Rights


25. The Role of the Medicare Ombudsman
   a. A Medicare Ombudsman should ensure that beneficiaries get assistance with Medicare questions or complaints and assistance with appeals.

26. Medicaid
   a. **Medicaid** is a federally funded and *state administered* health insurance program that provides all types of medical care to individuals who cannot afford to pay for some or all of their medical bills.

27. Medicaid Eligibility Requirements
   a. The Medicaid program has strict eligibility requirements. These requirements may include the following: a person’s age; whether a person is pregnant, disabled, blind, or aged; a person’s income and resources (such as bank accounts, real property, and other items that can be sold for cash); and the fact that a person is a U.S. citizen or a lawfully admitted immigrant.

28. Using Medicaid to Finance Long Term Care

29. Preventing Self-Imposed Impoverishment
   a. The most recent tightening of eligibility requirements came from the passage of the federal **Deficit Reduction Act of 2005 (DRA)**.
   b. The purpose of the DRA is to prevent individuals in need of nursing home or other long term care from transferring their assets to others and then applying for Medicaid-funded long-term care due to their *self-imposed* impoverishment.
   c. Most states require long-term care patients to spend down to $2,000 in assets before they can qualify for Medicaid.
   d. The DRA now requires all states to review any transfers of assets by a Medicaid applicant within the *60 months* before application was made. This time period for investigating asset transfer is called the **look back period**.

30. Elder Law Practice

31. Exceptions to Medicaid Transfer Penalties
   a. There are certain kinds of transfers to which penalties would not be applied.

32. Avoiding Spousal Impoverishment
   a. Self-paying for nursing home care for a medically needy spouse may leave the spouse still living in the community with little income or resources. This led Congress in 1988 to enact Medicaid’s spousal protection provisions to prevent what had begun to be described as spousal impoverishment.
   b. Generally, a **community spouse** may keep one-half of the couple’s total countable assets up to a maximum of $101,640 (2007). This
designated amount is called the **community spouse resource allowance** (CSRA).

c. The community spouse is entitled then to some or all of the monthly income of the institutionalized spouse. The amount of the entitlement is determined by the minimum monthly income level provided by the state Medicaid agency. This dollar amount is called the **minimum monthly maintenance needs allowance** or MMMNA.

33. Elder Law Practice
34. The Medicaid Appeals Process
   a. Each state must have an administrative appeals process in place for their Medicaid program or face the loss of federal funding. An applicant who believes that he has been unfairly denied Medicaid funding and believes he is facing too long a period of Medicare ineligibility due to an allegedly improper transfer of assets can proceed with the submission of a **hardship waiver**.

35. Taxes
36. Income Taxes
   a. All income earned in the United States has been subject to federal income taxes since the Twentieth Amendment was passed in 1913.
   b. **Section 83** of the Internal Revenue Code concerns the taxing of Social Security benefits.

37. Capital Gains Taxes
   a. **Capital gains** are any profits made on the sale of assets, including real and personal property.

38. Estate Taxes
   a. When a person dies, all of his assets are added together to determine the total value amount of the **gross estate**.
   b. The states that do have a state estate tax (not every state has one) require a state estate tax to be paid if the estate is a taxable estate because it is valued over a certain state-designated monetary amount.
   c. Some states have a **state inheritance tax**.

39. Exhibit 7–7: Federal Estate Tax Chart
40. How Tax Deductions Are Created
   a. The Internal Revenue Service Code provides that certain expenses will create income tax **deductions** or **credits**.
   b. Deductions are called either **itemized** or **standard**.

41. Procedure for Paying Estate and Inheritance Taxes
   a. The executor/personal representative or administrator of every estate must ensure that a federal estate tax return is filed with the IRS within nine months of a decedent’s death.
   b. The tax return is filed not in the name of an individual, but in the name of the decedent’s estate; and the estate gets its own **tax I.D. number**.
   c. An estate pays a **state estate tax**. The recipient pays any inheritance taxes that are owed. Any life insurance purchased and paid out to named beneficiaries will not result in an inheritance tax being owed by the beneficiaries.

42. Financial and Retirement Planning
   a. A plan set up by an employer to provide financially for employees after they stop full-time employment is generally called a **retirement plan**.
   b. A **qualified plan** is a plan that meets IRS requirements for employers to deduct payments from an employee’s paycheck and place them in an employee’s retirement account. These qualified plans are generally known as **401k plans** (if the employer is a for profit business) or **403b plans** (if the employer is a non-profit entity).
   c. A **defined-benefit plan** is the name often used to describe a pension.
   d. With a **money-purchase plan** (or defined-contribution plan), an employer, an employee, or both has specified that a certain amount of money can be contributed to a retirement fund.
   e. An **Individual Retirement Account** (IRA) is designed for the individual to self-manage and fund his own retirement account.
   f. Another similar investment opportunity is the Roth IRA. Contributions made to a Roth IRA are not tax-deductible, but their earnings are tax-free.
   g. A **required minimum distribution** (RMD) is the minimum amount of money that individuals with IRAs, 401Ks, or 403Bs must withdraw by a certain age.

43. Update Beneficiary Designations
44. Financing Long-Term Care
   a. Long-term care can be defined as assistance to a person who is unable to help himself with the daily requirements of living.

45. Exhibit 7–8: Estimating the Future Cost of Nursing Home Care

46. Should a Client's Plans Include Purchasing Long-Term Care Insurance?
   a. The statistical probability of a purchaser of long-term care insurance needing long-term care is a contrastingly large 50 percent.
   b. Elder law clients may be unaware that Medicare does not pay for any long-term care.
   c. The answer lies in what type of policy is purchased and what that policy provides for the costs incurred.
   d. Long-term care insurance should never be purchased if the premiums will significantly compromise the purchaser's lifestyle.
   e. Some insurance companies offer to pay a percentage of a policyholder's long-term care costs. Most companies offer a very specific per-day coverage amount. Either way inflation coverage is essential.
   f. An important question is who will decide if an insured is entitled to benefits.
   g. The bottom line is that long-term insurance is too expensive for many people; and if a person is already ill, he may not be considered insurable.
   h. Legal action may be appropriate when a client is unhappy about his long-term care insurance contract. When reading the contract all courts usually use an objective standard and look to the plain meaning of the words that the company used.

47. Medicaid Changes Affect the Purchasing of Policies
   a. The federal government has issued a policy that allows state Medicaid programs to disregard any assets that a Medicaid recipient received from a private long-term care insurance policy when the state moves to recover assets from a Medicaid beneficiary's estate.

48. Exhibit 7–9: Tax Deductions on Long-Term Care Insurance

49. Viatical Settlements
   a. Viatical settlements involve the purchase of another person's life insurance policy by an investor in return for a cash payment that is a percentage of the policy payout.
   b. Viatical investments have become a much more complicated investment strategy and big business for investors who are spending billions yearly to buy life insurance policies from the elderly. On a negative note, viatical fraud remains one of the country's top investment scams according to the North American Securities Administrators Association.

50. Reverse Mortgages
   a. A reverse mortgage allows the older homeowner to benefit from such appreciation and to use the accrued equity in his home to mortgage the house.
   b. A reverse mortgage is designed for the older homeowner who is having difficulty making ends meet, owns his own home, and wants to be able to continue to live in that home until his death. The homeowner must be at least 62 years old to apply for a reverse mortgage.

51. Balancing the Benefits and Drawbacks of Reverse Mortgages
   a. When an elderly homeowner dies, the mortgaged house will pass to the lending institution unless the estate of the deceased homeowner can pay back the money lent through the reverse mortgage.
   b. Closing costs on reverse mortgages are some of the highest in the mortgage industry.
   c. A positive note is that any other assets of the borrower are untouchable by the lending institution making the reverse mortgage.

52. Financial Planning After Losing a Spouse
   a. Clients may need to be advised on how to prepare for the continued financial support of loved ones after their death. Before a crisis, clients should be advised to organize financial documentation. These documents may include trusts; business contracts; tax returns; employee, life, medical, and life insurance benefits; and investments and bank accounts.
   b. Before hiring a financial planning expert, clients should scrutinize how the advisor gets paid. A form called an ADV will disclose that information.
53. Claiming Forgotten Money
   a. Corporate accounting practices have led to large mounts of unclaimed money being handed over to state governments. For example, clients who have forgotten bank accounts will have those accounts transferred to their state's unclaimed property offices within three to five years of client contact with the bank ending. Other reasons for the huge increase in unclaimed property have been attributed to the popularity of Internet stock accounts being opened and forgotten.
   b. Attorneys and their staff should include as a routine inquiry whether their clients have a right to any unclaimed funds in the state treasury.

54. Exhibit 7–10: Where to Find Unclaimed Money in State Coffers

55. Railroad Retirement Benefits
   a. A railroad employee can earn a service annuity based upon his age and depending upon the employee's years of creditable railroad service.

56. Veteran’s Benefits
   a. The sheer number of elderly veterans ensures veterans benefits being a topic of importance for most elder law practices. Armed services veterans may be eligible for federal and state veterans benefits. Dependency and indemnity compensation (DIC) should be available.

57. Elder Law Practice
58. Elder Law Practice
59. Chapter Summary
60. Chapter Review Questions
61. Key Terms
62. Ethics Alert
   a. The American Bar Association’s Model Rules of Professional Conduct serves as the basis for the majority of state codes of professional conduct for lawyers.

63. Helpful Web Sites
64. Endnotes

CHAPTER 8
1. Objectives
6. Staying at Home
   a. Most senior citizens want to stay in the comforts of their own home. This is often referred to as aging in place.
   b. Today the term home care has evolved to describe non-medical care such as housekeeping and companionship.
   c. One newer option assisting seniors in making their stay-at-home choice easier is the virtual retirement community.
   d. House sharing is another option for those who want to remain at home.

7. Subsidized Housing
   a. Subsidies for public housing usually are funded by the federal government's Department of Housing and Urban Development (HUD) and administered by each state through local county and city agencies.
   b. There are basically two types of subsidized housing. The first type is generally described as public housing, which usually refers to the government-subsidized project-based construction of public housing. The second type of subsidized housing is usually called public voucher-based.

8. Assisted Living Facilities
   a. Across the country assisted living is the generic term used to describe housing that provides some assistance to residents with daily needs.
   b. Common terms for assisted living facilities include residential care, personal care, adult congregate living care, board and care, domiciliary care, adult living facilities, supported care, enhanced care, community-based retirement facilities, adult foster care, adult homes, sheltered housing, and retirement residences.

9. Senior Communities
   a. Senior communities (also called congregate housing) are designed for more active seniors who can live independently within their own residence.

10. Moving from a House to an Apartment
    a. A viable alternative for some seniors is to sell their home and move to an apartment.
    b. Rental types include the following: 1. Rental housing offering all types of market rate units to all age ranges; 2. Rental housing designed for anyone 55 years and older (there are usually exceptions to the age restrictions for spouses or caregivers who are younger); 3. Affordable rental housing designed for senior citizens below a certain income level; 4. Public housing; and 5. Rural rental help.

11. Elder Cottage Housing Opportunity
    a. The better-known term for Elder Cottage Housing Opportunity (ECHO) granny flat (or mother/daughter unit).
    b. Granny flats are small apartments built onto an adult child's home or built independently on the adult child's property. They may even be mobile homes. The granny flat works only if local zoning regulations allow it.

12. Group Homes
    a. Group homes are another option and are usually designed for the relatively self-sufficient senior to provide some household maintenance and companionship needs. Group homes are definitely not nursing homes.

13. Adult Foster Care
    a. Adult foster care is typically used for adults when they do not need continual care giving.

14. Board and Care Homes
    a. Board and Care homes are a type of group home that offers 24-hour supervision and some personal care services. They are similar to adult foster care.

15. Continuing Care Communities
    a. Another housing option that combines every type of eventuality is a continuing care retirement community (CCRC). These communities are sometimes called step care or progressive communities. The communities also may be called life care communities.
    b. These communities are designed to care for a resident until the end of the resident’s life. The resident of a life care community can (for a fee) move to a life care facility as an independent elder and be assured that any future reductions in her physical or mental abilities will still allow her to be part of this chosen life care community.
    c. All CCRCs offer essentially three levels of care.
    d. Typically, a large one-time out-of-pocket entry fee will be charged; monthly fees for...
utilities and maintenance of the community are additional.
e. Some states highly regulate CCRCs, other states do not.

16. Contractual Ramifications of a CCRC
a. Contracts will differ according to the types of services, housing, and amenities included. Residents may be able to opt for plans that range from traditional or modified to a more à la carte selection.

17. Exhibit 8–2: An Example of CCRC Statutory Language

18. Nursing Homes
a. Nursing homes are no longer as prominent among long-term care options as they used to be as recently as the early 1990s.

b. The descriptive term nursing home is an umbrella term used to define a residential care facility whose purpose is to care for individuals that are no longer in need of hospitalization but are still too dependent on personal assistance to reside in their own home without that personal assistance.

c. A nursing home stay is still a cost-effective alternative to hospital care.

d. Federal law requires that the nursing home term only be used when a facility provides skilled nursing care or rehabilitation services for injured, disabled, or sick persons.

19. The Patient’s Bill of Rights

20. Choosing a Nursing Home
a. Research is necessary to make sure the facility will meet the needs of the person moving there, will be an acceptable place to live, and will be affordable and within the means of those who will pay the bill.

21. Choosing a Nursing Facility for Alzheimer’s Patients
a. The same questions asked at a nursing home should also be asked for the Alzheimer’s patient, but with the additional focus on whether the special needs of Alzheimer’s patients are considered. Quality programs for Alzheimer’s residents feature both group and individual activities that are designed to be failure-free and build patients’ confidence.

22. How to Pay for a Nursing Home Stay
a. One way to pay for a nursing home stay is by self-paying if a resident has available income, has savings accumulated, has family or adult children who can pay, or uses a combination of all three. Self-pay may be the way most residents begin their nursing home residency, but once their self-pay options are depleted, more than half of all nursing home residents have Medicaid pay for their care. In fact, the federal government paid nearly $39 billion for nursing home care in 1999.

23. Preparing Legal Documents Prior to Moving to a Nursing Home

24. Nursing Home Regulation
a. Nursing homes are issued a governmental license permitting them to provide such nursing care.

b. Along with a license, many homes want to be certified to accept Medicare/Medicaid-paying patients. The seeking of Medicare/Medicaid certification involves another long list of requirements that the nursing home must meet. Another term often used to impress new residents is accreditation. Such accreditation does not provide a guarantee that the home is meeting accreditation standards every day—indeed, neither does licensing or certification.

25. The Patient’s Bill of Rights
a. In 1987, Congress enacted the Nursing home Reform Law, which has since been incorporated into the Medicare and Medicaid regulations.

26. Exhibit 8–3: Patient’s Bill of Rights

27. Problem-Solving Residents’ Complaints
a. If a resident or the resident’s representative has a complaint regarding the long-term care facility, an ombudsman can intervene on behalf of the resident. Ombudsmen are located throughout the country, will investigate complaints, and often will mediate between a facility and a complainant. The ombudsmen are paid by the federally funded state offices on aging and are free to the public.

28. Suing to Get Out
a. Jesse Fitchett was a 70-year-old partially paralyzed resident of the Laguna Honda nursing Home in San Francisco, California, for
over six years before a class action lawsuit led to his being released and being moved to a one-bedroom apartment in an outside community. The class action lawsuit was one of the first of its kind in the country.

b. The lawsuit was based, in large part, on a 1999 U.S. Supreme Court decision that found that if a disabled person preferred to live in the outside community and the cost would be the same or less than living in a nursing home, then the failure to offer a choice would be considered discriminatory.

29. Elder Law Practice

30. Hospice Facility

a. A hospice facility is not really a residential option for seniors; it is end-of-life care that should be seriously considered at the appropriate time.

b. Hospice facilities provide supportive care to meet the special needs arising out of the physical, psychological, spiritual, social, and economic stresses that are part of the final stage of an illness and that occur during the dying process and bereavement period. Medicare provides payment for a list of hospice services that are provided under the care of a treating physician. Hospice services will be provided if all other curative treatment has ended.

31. Chapter Summary

32. Key Terms

33. Chapter Review Questions

34. Ethics Alert

35. Helpful Web Sites

36. Endnotes

CHAPTER 9

1. Objectives

2. Introduction

a. By the mid-1960s, laws barring age discrimination in employment had already been passed in 14 states. Unfortunately, such state legislation had little impact on lessening age bias. During the same time period Congress passed the landmark 1964 Civil Rights Act barring race, color, religion, national origin, and sex discrimination. The 1964 Act did nothing to bar age discrimination.

3. Federal Protection Against Age Discrimination

a. The Age Discrimination in Employment act of 1967 (ADEA) prohibits discrimination on the basis of age in programs and activities receiving federal financial assistance.

b. The age limit was brought down to 40 years of age before Congress passed the act. Congress later revised the upper limit in 1986 by eliminating forced retirement at any age with certain exceptions. The ADEA applies to private employers with 20 or more employees, the federal government, and any local government. The U.S. Supreme Court has held that the ADEA cannot be applied to state governments. However, most states have enacted state versions of the ADEA.

c. If employment involves a bona fide occupational qualification (BFOQ), an exception may be made to the ADEA. A BFOQ is defined as a good faith job requirement that must be fulfilled by the applicant.

4. Exhibit 9–1: Excerpt from ADEA Statute

5. The ADEA Today

a. All of the baby boomers are now old enough to be covered under the ADEA.

b. Of all workers filing age bias charge in 2002, 64 percent were from 40 to 59 years old.

c. The Equal Employment Opportunity Commission (EEOC) has been empowered by Congress through the ADEA statute and the earlier Civil Rights Act of 1964 to fight discrimination in employment.

6. Filing an Age Discrimination in Employment Case

a. Any worker who thinks his employment rights have been violated should first exhaust all available options to resolve the situation before filing a charge with the EEOC. After exhausting any available remedies, a worker may file an age discrimination in employment charge with the EEOC.

b. The EEOC charge should include the following: 1. The complaining party’s name, address, and telephone number(s); 2. The name, address, and telephone number(s) of the respondent employer, employment agency, or union that the filer is alleging discriminated against the complaining party; 3. The number of respondent’s employees; 4. A short description of the alleged
violation; and 5. The date of the alleged violation. All laws enforced by the EEOC (except the Equal Pay Act) require filing a charge with the EEOC before a private lawsuit may be initiated in court.

7. Proving an Age Discrimination In Employment Case
   a. To understand how to describe an age discrimination in employment scenario, it is necessary to understand the employment at-will concept. Employment at will is employment that may continue only as long as the employer or employee wishes to continue the employment relationship.

   b. Age discrimination cases are often heavy with motions to dismiss and summary judgment requests.

   c. It is through interrogatories, depositions, and requests for production of documents that the evidence grows (or does not grow) to support a case. This evidence is gathered during what is called the discovery process. Age discrimination cases may be taken on a contingency fee basis.

   d. A plaintiff's case (including age discrimination in employment cases) is judged by the legal standard described as a preponderance of the evidence. The U.S. Supreme Court has allowed a presumption of discrimination, even without direct evidence, if the plaintiff’s legal team has eliminated all other legitimate reasons for the firing. Failure of an employer to prove legitimate reasons for a firing can lead to a finding that the reasons given by the employer were mere pretext and subterfuge.

   e. A typical scenario occurs when an employee is fired because of a company downsizing. If there is a reduction in force scenario, the employer must treat the age of all employees neutrally. Another scenario occurs when an employer claims that even though age discrimination may have played a part in a worker's dismissal there still was another legitimate business reason for letting an employee go. This is sometimes known as a mixed motive case.

   f. Courts dealing with age discrimination claims use the terms disparate treatment and disparate impact. There are subtle differences. Disparate treatment occurs when one or more employees are treated differently by an employer because of their age. Disparate impact occurs when a seemingly innocent nondiscriminatory action results in the reality that older workers suffer and young workers do not.

8. Remedies Available to Successful Plaintiffs
   a. The term making the plaintiff whole is often used in a discussion of how a plaintiff's financial damages should be calculated.

   b. Remedies may include claims for back pay, front pay, liquidated damages, injunctive relief (a non-financial remedy), and attorney fees.

9. Employers and Age Discrimination
   a. A prospective employer should be careful to avoid the appearance of bias of any kind. An employer should periodically review his hiring practices.

   b. Most age discrimination claims are for alleged wrongful discharge. Interestingly, the ADEA (even with its good intentions) may have helped put a damper on the hiring of workers over 40.

10. Defending Against Age Discrimination Claims
    a. The EEOC must notify all possible defendants in the case as soon as possible and investigate the claims. There is a point following the investigation that the EEOC may dismiss the claim because it has not found the claimed discrimination. This technically is called a no cause finding. If the EEOC investigators believe that age discrimination did take place, a for cause finding is the result. Approximately 60 percent of all EEOC age discrimination investigations end in a no cause finding.

    b. A for cause finding leads to more EEOC involvement. The EEOC will attempt to bring the parties together to settle the case. Approximately 10 percent settlements are orchestrated by EEOC personnel. If settlement does not work, the EEOC may file a lawsuit in federal court against the defendant on the plaintiff's behalf.

    c. The complaining employee also has the option of seeking private counsel to file a lawsuit against his former employer. Prior to seeking private counsel the EEOC must issue a right-to-sue notice to the plaintiff. This notice ends the EEOC's active involvement in the case. The complaining employee may also proceed to hire private counsel even if
a no cause finding was the result of the EEOC investigation or if the EEOC investigation is not yet completed.

d. The ADEA does not permit class action lawsuits (unlike Title VII). There is a very strict statute of limitations on age discrimination claims. The 180-day filing deadline is extended to 300 days if a charge also is covered by a state or local age discrimination law. Failure to meet the ADEA filing deadlines extinguishes complainants' rights.

e. Many states have anti-discrimination laws and agencies responsible for enforcing those laws. The EEOC refers to these agencies as Fair Employment Practices Agencies (FEPAs).

11. Waiving an Employee’s Rights Under the ADEA
   a. An employer is allowed to ask an employee to waive (ADEA Waiver) any of the employee’s rights under the ADEA as part of an ADEA settlement or incentive to terminate employment.

12. Recent Case Aids Plaintiffs
   a. The United States Supreme Court expanded the potential for age discrimination lawsuits in the more recent Smith v. City of Jackson, Miss., 544 U.S. 228, 125 S.Ct. 1536 (2005) case.

13. Elder Law Practice
14. Chapter Summary
15. Key Terms
16. Chapter Review Questions
17. Ethics Alert
18. Helpful Web Sites
19. Endnotes

CHAPTER 10

1. Objectives
2. Introduction
   a. Abuse is found within all ethnic, financial, and social groups.
   b. Issues pertaining to the abuse of the elderly usually involve family members. Abuse of elderly family members is considered domestic violence.
3. Exhibit 10–1: Results of Elder Abuse Survey
4. The Role of the Administration on Aging
   a. The Administration on Aging is the federal agency under the Department of Health and Human Services given the job of shepherding elder initiatives and programs through the system. The agency deals with the elder abuse problems in the United States through its funding of the National Center on Elder Abuse (NCEA).

5. Defining Elder Abuse
6. Exhibit 10–2: Elder Abuse Defined
7. Self-Neglect
   a. Reports of alleged self-neglect represent 50 percent of all cases brought to the attention of state Adult Protective Services (APS).
   b. The elderly suffering from the early undiagnosed stages of dementia are particularly susceptible to self-neglect.
   c. Depression may also play role in the incidence of self-neglect among the elderly. The centers for Disease Control and Prevention have reported that the suicide rate for people 65 years and older is higher than in any other age group.

8. Federal and State Laws Offer Vulnerable Elders Protection
   a. There are some major differences among the states. Some states require mandatory versus voluntary reporting of suspected abuse. Some states emphasize the protection of incapacitated or vulnerable elderly residents. Some states provide broad powers to their investigators of elderly abuse reports while other states limit such power.
   b. The Older American Act had been in effect for over 40 years when Congress reauthorized the Act and added the funding for Title VII, Chapter 3. The main purpose of Chapter 3 is to work toward prevention of elder abuse, neglect, and exploitation.

9. Reporting Abuse
   a. Reports of alleged abuse can be made to the agencies that are designed to protect the elderly. The Administration on Aging provides a national toll-free help line called the Eldercare Locator if a local help line is not available in a particular area.

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10. Moral or Legal Responsibility to Report Abuse?
   a. Legal responsibility is generally left to mandated reporters. Mandated reporters usually are doctors, nurses, home health care workers, guardians, trustees, law enforcement personnel, attorneys, and any other individuals in a fiduciary role to the victim. A minority of states have gone further and made it mandatory for any person who knows of abuse to report it.

11. How Are Elder Abuse Perpetrators Punished?
   a. Across the country, specific state statutes detail the criminal penalties abusers will face. Some states have increased the jail time when physical violence is against an elderly victim.

12. Exhibit 10–3: Sample State Adult Protective Services Act

13. Financial Crimes and the Elderly
   a. State agencies responsible for investigating elder abuse claims have reported the largest abuse explosion has occurred in financial exploitation.
   b. The enactment of the federal government’s Do Not Call Registry is one more way to protect citizens from possible fraudulent activities.

14. Court Says Protect Your Own

15. Identity Theft
   a. Identity theft is the illegal obtaining of personal information for the purpose of using the stolen information to commit theft and fraud. Identity theft, the largest source of consumer fraud in the United States, is on the rise.
   b. Two federal agencies heavily involved in identity theft investigations include the Social Security Administration and the United States Postal Service.
   c. The Federal Trade Commission is the federal agency empowered to coordinate all federal and state agencies investigating identity theft.

16. Property Theft
   a. Churning.
   b. Visit by a stranger to a senior citizen’s home on a false pretense.
   c. Using romance in defrauding their victims.
   d. Free lunch seminars masquerading as education-only sessions. The elderly are being targeted at free lunches with high-pressure sales pitches aimed at getting them to purchase new investments and open new accounts.

17. Elder Law Practice

18. Chapter Summary

19. Key Terms

20. Chapter Review Questions

21. Ethics Alert

22. Helpful Web Sites

23. Endnotes

CHAPTER 11

1. Objectives

2. Introduction
   a. The wholesome virtues of family life can be tragically interrupted by death, divorce, or other personal traumas.

3. Grandparents’ Role in Custody and Visitation
   a. The changing reality of family life at the end of the twentieth century saw America’s children living with only one parent in 28 percent of the country’s households. By 1998, approximately 4 million children lived with a parent in a grandparent’s home. And 1.4 million children were being raised solely by a grandparent without the presence of a parent.
   b. Widespread enactment of third-party visitation statutes recognizing that, in addition to their parents, children may also benefit from relationships with statutorily specified persons who are not their parents.

4. What Is Best, Grandma’s Babysitting or Day Care?
   a. One widely publicized case weighed the benefits of grandparent babysitting versus day care.

5. Exhibit 11–1: Factors Previously Considered in Grandparent Visitation

6. Child Custody and Visitation Fundamentals
   a. The U.S. courts have a long history of supporting a parents’ paramount right to decide what is best for their children.
   b. Following the jurisdictional hurdle, the primary legal question that a judge who is hearing custody or visitation matters asks is the threshold question known across the county as the best interests of the child test.
7. Determining What Is Best for the Children
   a. The best interests of the child test is used by all 50 states as a guideline for the courts to follow. However, different state courts are determined by analyzing a number of factors.

8. Reaching for Uniformity: The UCCJA Is Born
   a. The Uniform Child Custody Jurisdiction Act (UCCJA) was promoted as a model child custody statute that should be put into effect in all 50 states. This standardization was intended to eliminate the possibility of parents removing or kidnapping their children to another state and requesting a new custody hearing once they established their new state’s jurisdiction over the children on the single test that the children were present in the state. Various sections of the UCCJA have been interpreted inconsistently across the country.


10. Offspring of the UCCJA
    a. The UCCJA was ultimately revised by the NCCUSL to reduce confusion. The result was the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which provides newer, more uniform methods for expedited interstate enforcement of custody and visitation orders.
    b. The UCCJEA amended the UCCJA to bring it into conformity with two newer federal statutes, the Parental Kidnapping Prevention Act (PKPA) and the Violence Against Women Act (VAWA).
    c. The first and most important requirement is to determine the child’s home state. A state becomes a child’s home state when the child has lived there for six months. Under the UCCJWA, once the home state is designated, that state has continuing jurisdiction.

11. The Many Options of Child Custody
    a. Alternate physical custody.
    b. The children may stay in the family home while the parents alternately move between the family home and another home.
    c. Joint parental custody.
    d. Sole custody.

12. Advocating for the Children: The Guardian Ad Litem’s Role
    a. A guardian ad litem (GAL) in the context of a child custody or visitation lawsuit is a person who may be appointed by a judge to look after the interests of a child or children during the litigation. A GAL may also be appointed in any matter involving children or adults with special needs.
    b. The GAL may also be called an advocate or a children’s advocate.

13. The Psychological Expert’s Role
    a. Battling spouses or grandparents often hire psychologists when custody and visitation rights are at issue.
    b. A confidentiality waiver allows the psychologists to discuss matters that normally would be privileged information.

14. The Child’s Role in Custody and Visitation Determination
    a. The age of the children is usually taken into consideration, and there is no guarantee that a judge will agree with the children’s wishes or that a child will be asked his opinion.

15. The Final Judgment
    a. A person found guilty of contempt of court may face a monetary fine, jail time, or both.

16. History of Grandparent Visitation Legislation
    a. The first documented grandparent visitation lawsuit came from the Supreme Court of Louisiana.
    b. The first official grandparent visitation statute was enacted in New York in 1966. This statute was a result of a growing grandparents rights movement.
    c. Eventually, the states had a variety of grandparent visitation legislation, also known as grandparenting time legislation, enacted to ensure grandparents would be able to continue their relationships with their grandchildren.

17. States Split on Grandparents’ Rights
    a. No state has ever given a grandparent an absolute right to definite visitation. Rather, the states have generally given grandparents the right to petition a court for visitation under certain circumstances. For the most part, a state’s grandparent legislation is one
of two types. First, some states view grandparent visitation as only a small interference or burden on a parent’s right to parent. These states broadly provide for grandparents to petition the court and ask that the best interests of the children in question be the most important factor and not the parents’ fundamental right to parent their own children.

b. Other states more narrowly provide for non-parents to seek visitation. Usually these narrowly defining states do not give standing to nonfamily members even to bring a visitation petition. In addition, grandparents in these states have a higher threshold to meet.

18. Elder Law Practice
19. Asking the Right Questions
   a. Grandparents seeking visitation should be prepared to produce documentary evidence, including witness’ names, to support their claim that visitation is in the best interests of their grandchildren.

20. Exhibit 11–3: Sample Interview Questions to ask in a Grandparents Visitation Dispute
21. Courts Vary in Interpreting Grandparent Rights
23. Biological Connection Touted
25. Case Brought Legal Confusion
27. Grandparent Visitation Post-Troxel
   a. In general, one of three things has happened in state courts since Troxel. State grandparent visitation statutes have been found constitutional, unconstitutional, or unconstitutional as applied. This makes the issue of grandparent visitation very state-specific in the post-Troxel world.

28. Chapter Summary
29. Key Terms
30. Chapter Review Questions
31. Ethics Alert
32. Helpful Web Sites
33. Endnotes

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8. Funeral Homes and Worse Case Scenarios


10. Personal Preference Laws
    a. An individual may want to ensure that her burial wishes are carried out by detailing burial or cremation decisions in a will or in a letter of instruction. Unfortunately, there is no guarantee that such decisions, *even those included in a will or letter of instruction*, will be carried out.
    b. **State personal preference laws** may permit an individual’s next of kin to disregard such instructions and to decide whether their deceased family member will be buried or cremated.


13. Law Designed to Protect Consumers
    a. The **Funeral Industry Practices Rule**, commonly known as the **Funeral Rule**, was promulgated in 1982 and made effective in 1984. The Federal Trade Commission (FTC) administers the Funeral Rule, which requires funeral providers to provide consumers with information regarding funeral products and services and ensures consumers pay for only the products and services they want and need.
    b. No one is legally required to use the services of a funeral home.

14. Exhibit 12–2: Personal Preference Law

15. Exhibit 12–3: Funeral Rule Excerpt

16. Funeral Costs
    a. Funerals are among the highest-priced purchases that consumer’s make. In 2007, the typical U.S. funeral cost $6,000 dollars.

17. Payment Strategies
    a. A person can arrange for her funeral to be paid for in one of three ways: 1. Prepaying prior to a person’s death; 2. Paying after a person’s death out of the person’s estate; and 3. Ignoring the issue. Paying for one’s funeral ahead of time is considered to be paying pre-need, or **pre-funding** one’s choices.
    b. These options include (but are not limited) to the following: 1. Pre-need insurance, also called **burial** or **funeral insurance**; 2. life insurance; 3. annuities; 4. a bank or a funeral trust; 5. a pay on death bank account; and 6. a state pre-paid funeral trust fund.
    c. A minority of states have passed legislation designed to protect pre-need purchasers.

18. Guiding Clients Who Prepay Funeral Costs
    a. Clients may ask attorneys to review contracts and make sure funds are secured.
    b. Clients may want to consider an irrevocable prepayment plan when eligibility for Medicaid benefits is a concern. Such prepayment is permitted and does not influence the Medicaid’s determination of eligibility.

19. Veterans Burial Benefits
    a. The U.S. Department of Veterans Affairs (VA) provides a small stipend to assist with the financial costs of a veteran’s funeral.

20. Funeral Planning Societies
    a. The goal of the Funeral Consumers Alliance is to protect a consumer’s right to choose a meaningful, dignified, affordable funeral.

21. Fraud Prevention
    a. Over $20 billion was invested in pre-need funeral and cemetery plans as the twenty-first century arrived, but no federal regulation had been designed to monitor how safely those dollars were invested.
    b. Only 10 states have consumer protection laws dealing with consumers recovering funds from pre-need burial contractors.


23. Disinterment
    a. **Disinterment** is defined as the removal of a body from a grave or tomb.


25. Chapter Summary

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28. Helpful Web Sites

29. Endnotes