

# Elder Law Basics for Legal Aid Attorneys

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# Federal Laws

- Elder Justice Act
- Fair Debt Collection Practices Act\*
- Social Security Act
- Medicare/Medicaid
- Scam/Fraud Protections\*
- ERISA

# State Laws

- Wills & Intestate Succession\*
- Probate Process
- Guardianship\*
- POAs\*
- Advanced Directives\*
- Death with Dignity Laws

\*Covered today

# Risk Factors for Elder Abuse & COVID-19

- Social isolation
- Financial hardship
- Difficulties accessing needed care and supplies
- Anxiety about avoiding COVID-19
- Family/Caregivers vulnerable to increased stress from financial hardships and competing demands on their time
- Estimated 1 in 10 older adults (age  $\geq$  60 years) experience elder abuse annually in the United States
- Only 1 in 24 cases identified and reported to the appropriate authorities
- <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7234937/>

# Federal Law - Fair Debt Collection Practices Act (15 U.S.C. § 1692 –1692p)

- “Debt Collector” - typically a third party that exists solely for the purposes of collecting debts
- Prohibitions against creditor harassment, deception; requirement to validate debts with written proof
- Debt collectors can’t:
  - Call you before 8:00 in the morning or after 9:00 at night
  - Tell anyone other than you or your wife/husband/parent (if you are under 18)/attorney anything about why they are calling
  - Lie to you (or mislead you) about anything
  - Speak to you in an abusive manner
  - Try to collect money that you do not owe

# Federal Law - Fair Debt Collection Practices Act (15 U.S.C. § 1692 –1692p)

- Restrictions on garnishment of wages/assets; “Bankruptcy Bypass”
  - Debt collectors can’t garnish Social Security Retirement or Disability Benefits, SSI, & other public benefits, Worker’s compensation or unemployment compensation (exceptions for debts owed to the government, child support, etc.)
  - Most seniors collect SS, and most low-income seniors have no other source of income and are therefore “judgment-proof” (many assets exempt from collections)
- Provide Debt Collectors with Judgment-Proof letters to eliminate creditor harassment and to prevent collection attempts
- Enforce FDCPA with Know-Your-Rights letters
- Attorney fees allowed for FDCPA violations

# Federal Law – Scam/Fraud Protection

- Government Protections
  - FTC – Consumer Fraud
  - Consumer Financial Protection Bureau
  - FBI Internet Crime Complaint Center
  - FCC – Phone/Internet Fraud
  - IRS – Tax Fraud
  - State AG
  - Local PD
  - Small Claims

# Identity Theft

- Identity Theft Prevention Tools

- Extended fraud alert – A business must verify your identity before it issues new credit. An extended fraud alert, lasting seven years, is available only to identity theft victims. This requires making a police report.
- Credit Freeze - Generally stops all access to your credit report, while a fraud alert permits creditors to get your report as long as they take steps to verify your identity. A freeze is available to anyone, whether or not you are a victim of identity theft.
- Can be done with a simple form submitted to one credit reporting bureau, which is then required to report to the other 2

# State Laws – Adult Protective Services

- Usually covers Abuse, Neglect/Abandonment, Exploitation – Varies from state to state
- APS helps by assessing each individual's unique needs, then developing a service plan to maintain his/her safety, health and independence.
- Protected individuals typically include adults 60 or 65+ and other adults with serious disabilities
- Mandatory Reporting Guidelines
  - If in the course of his/her professional duties, a mandatory reporter is made aware of neglect or abuse, he/she is required to report these concerns to APS.
  - Are attorneys/notaries mandated reporters in your state?

# State Laws - Wills

- Testamentary Capacity
  - Age
  - Sound Mind/Memory
  - Undue Influence - when one person benefits by taking over the decision making process of another person
    - Look for atypical behavior, proximity in time and place to trauma, etc.
- Execution – Signatures, Witnesses/Notaries, Age of Witnesses, Relation of Witnesses, Recording
- Executor
- Revocation/Codicils – How do you make changes?
- Holographic Wills (no witnesses) and Oral Wills (not in writing) – Are they accepted?
- Right of Representation/Per Stirpes/Anti-Lapse Statutes
- Nomination of Guardian for Minor Children

# State Laws – Intestate Succession

- Intestate Succession
- Debts & Family Protections - Spousal Elective Share; Protections for property of certain values
- Bypassing Probate
  - Transfer on Death Affidavits - Home, Car, Accounts, etc.
  - Life Insurance
  - Trusts
  - Joint Tenancy with Right of Survivorship
- Relief from Administration or Simplified Administration – Depends on value of the estate, identity/assets of beneficiaries, likelihood of disputes

# State Laws - Guardianship

- Examination & Determination of Capacity - Typically defined by statute
- **For a more detailed examination of capacity, see ABA Commn. on L. & Aging & Am. Psychological Assn., Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005).**
  - Vnerakraft, Inc. v. Arcaro (1959), 110 Ohio App. 62, 64 - Test to be used to determine mental capacity is the ability of the principal to understand the nature, scope and the extent of the business she is about to transact.
  - In re: Guardianship of Lander 697 A.2d 1298 (Me. 1997) – Petitioner bears burden of proof for determination of capacity in terminating guardianship due to the substantial restriction of liberty of individuals under guardianship
    - Who has the burden of proof for showing incapacity? Ward or Guardian?
  - State ex rel. McQueen v. Cuyahoga Cty. Court of Common Pleas, Probate Div., 135 Ohio St.3d 291, 2013-Ohio-65 – In which the right of indigent wards to appointed counsel at the initial hearing extends to guardianship review hearings.
    - Does your state have a right to counsel for indigent prospective wards?
- Involuntary Commitment vs. Guardianship by Determination of Incompetency – Risk of harm to self/others
- Medical Evaluation & Screening Tools - Victim Susceptibility, Influencer Authority, Specific Tactics, and Unfair Results

# State Laws - Guardianship

- Petition – Person vs. Estate; Limited vs. Non-Limited; Definite vs. Indefinite; Conservatorships – Physically infirm but mentally competent
- Qualifications & Requirements of Guardian
  - Bonding/Valuation of Estate
  - Criminal Record
  - Relationship to Ward
  - Classes
  - Agreement to Appointment
- Compliance & Reporting
  - Frequency of contact/visitation?
  - Financial Accounting?
  - Continuing medical evaluation?

# Power of Attorney – Finances

- Statutory Form POAs
  - Special forms for child care, real estate, bank accounts, motor vehicle, stock, etc.
  - Other forms include the option to select any rights of the Agent (real property, personal property, legal matters, taxes, investments, electronic accounts, etc.)
- Durable POAs vs. Limited POAs; Effects of Incapacity/Disability – Does it incapacity trigger the POA, or terminate it?
- Universal Power of Attorney Act (UPOAA) – adopted by several states for consistency/safeguards against abuse
- Execution Requirements – Witnesses, Notaries, Recording, etc.

# Power of Attorney – Health Care

- Health Care Power of Attorney/Designation of Agent/Proxy
  - Trigger for Effectiveness – Incapacity, Examination by Physicians, etc.
  - Rights & Responsibilities of Agent – Hospitals, Treatment, Medication, Surgery, Transfusions, etc., Access to Medical Records
  - Organ Donation – including specific organs and allowances for use
  - Disposition of Bodily Remains – determination of location and authority for burial/cremation
- Living Wills/Health Care Directive
  - Medical Conditions (Permanently Unconscious, Terminally Ill/Terminally Injured, Total Dependence for Daily Care, Unable to Communicate, Unable to Recognize)
  - Life-Sustaining Treatment, Artificial Hydration/Nutrition, DNR, Comfort Care, Informing Family

# Verses about Caring for the Aging

James 1:27 Religion that is pure and undefiled before God, the Father, is this: to visit orphans and widows in their affliction, and to keep oneself unstained from the world.

Deuteronomy 27:19 “Cursed be anyone who perverts the justice due to the sojourner, the fatherless, and the widow.’ And all the people shall say, ‘Amen.’

1 Timothy 5:1-2 Do not rebuke an older man but encourage him as you would a father, younger men as brothers, older women as mothers, younger women as sisters, in all purity.

Psalms 71:9 And now, in my old age, don't set me aside. Don't forsake me now when my strength is failing.

Isaiah 46:4 And I will still be carrying you when you are old. Your hair will turn gray, and I will still carry you. I made you, and I will carry you to safety.

# What can Christian Legal Clinics do for Older Adults?

- Collaborate with Senior Centers, Assisted Living, Low-Income Senior Housing, etc.
- Warn Older Adults about scams and advise them on reporting
- Advise Low-Income Older Adults as to their Judgment-Proof Status
- Offer assistance with Wills, Transfer-on-Deaths, POAs, and Advance Directives
- Connect grandparent caregivers with appropriate resources
- Assist families with the Probate process
- Assist caretakers with obtaining guardianship
- Listen, Pray, & Encourage!

# Resources

- National Adult Protective Services – Report Abuse, Neglect, or Financial Exploitation - [www.napsa-now.org/get-help/help-in-your-area/](http://www.napsa-now.org/get-help/help-in-your-area/)
- Eldercare Locator – Housing, Insurance, Health, Supportive Services, Legal Assistance - [eldercare.acl.gov](http://eldercare.acl.gov)
- Identity Theft Reporting & Prevention - [www.identitytheft.gov](http://www.identitytheft.gov)
- POAs – Find your local statute here:  
[www.americanbar.org/content/dam/aba/administrative/law\\_aging/c\\_hartpoa.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_aging/c_hartpoa.authcheckdam.pdf)
- Advance Directives/Health Care POA/Surrogate -  
[www.americanbar.org/content/dam/aba/administrative/law\\_aging/c\\_hartpoa.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_aging/c_hartpoa.authcheckdam.pdf)