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THE ETHICAL MANAGEMENT OF ASSETS FOR ELDER CLIENTS: A CONTEXT, ROLE, AND LAW APPROACH

STEVEN H. HOBBS* and FAY WILSON HOBBS**

INTRODUCTION

A husband and wife, a mother and father, work their entire lives in pursuit of the Great American Middle Class Dream. They raise a family and launch their children into independent adulthood. They purchase a home, a car, and accumulate other assets. To the extent life allows, they struggle to control their own destinies and live praiseworthy and useful lives. They scrimp and save for their "golden years," sometimes with a plan but most times without one.

As they ease past their middle years into senior status, they are confronted with the reality of aging—not surprisingly, aging has been there all along, it cannot be denied. Without delineating all the tasks of aging,¹ one thing seems certain, that we want as much self-determination, dignity, and sense of power as possible. These desires are particularly true in the management of our physical environment and the control of our financial assets. Mary Baird Carlsen describes the process as creative aging.² Terry Hargrave says that the chief goal is to "finish well,"³ even given the extraordinary challenges of the aging process.

The acknowledgement of the aging process is crucial to our understanding of ethical practice for the lawyer who works with elderly clients.

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The authors acknowledge the thoughtful assistance of Rachel Rust, M.S.W. and 1995 J.D. candidate at Washington and Lee University School of Law and Barbara Stevens, R.N., in formulating the methodological approach used in this article. Special thanks also go to Patricia Hale for her research assistance.

1. For example, the need to protect the assets accumulated over a lifetime, provide for their spouses, children, grandchildren.

2. See Mary Baird Carlsen, *Creative Aging: A Meaning-Making Perspective* (1991).

3. Terry Hargrave was a keynote speaker at the 1991 American Association of Marriage and Family Therapists Annual Conference. He is a leading expert on developing therapeutic models of intervention for families wrestling with the issues of aging. Hargrave considers the intergenerational nature of families as they struggle with unresolved relationship problems. Such problems impact the capacity to love and trust other family members. Consequently, these problems may not be resolved when the aged family member dies, leaving deep emotional hurt. As a family therapist, he helps families find the emotional and relational resources to confront these problems. Hargrave states that "[h]elping aging families finish well means helping them come to the end of life with resolved issues so that they can empower one another with love and trust." Tape of 1991 American Association of Marriage and Family Therapists Annual Conference (Nov. 3, 1991) (on file with author).

We must place and measure our sense of ethics within the context of the aging process. When the elderly come into our office they are coming to us to help them finish well. It follows, thus, that our role is defined significantly by their tasks and realities. We are to be advisors and counselors-at-law, in the largest sense, offering creative legal tools the elderly can use to assist them on this journey through the aging process.

This Article explores the context of aging as a phenomenon that defines the lawyer's role in the use and application of laws designed to assist the elderly in the aging process. Critical to our understanding of the lawyer's role is the recognition that the aging process usually takes place within the context of a family and, to an extent, within a larger social community. Our ethics are defined by this context, our role within it, and the as-yet-undetermined and still-emerging values implicit in elder-law.

In order to arrive at the role ethics play in elder-law, this Article is divided into five parts. Part I describes the desire of the elderly to "finish well." Part II examines the role the family plays in this process and raises certain questions regarding who the lawyer's client is. This part borrows a multisystems model of family from the field of social work. The model is based on the theory that the family is a series of relational systems. These multiple systems provide resources for solving asset management problems. Part III examines the lawyer's role in the aging process. Part IV defines the ethical boundaries and Part V poses specific ethical issues that need resolution. This Article concludes that a multisystems approach can help identify the elder-law lawyer's ethical responsibilities by enhancing the lawyer's understanding of the familial context within which an elder person confronts the challenges of aging. Furthermore, by using a multisystems approach the lawyer will more competently recognize the needs of the elder person, understand the values of the legal regime of asset management, and enable the elder person to finish well.

I. THE CHALLENGE TO FINISH WELL

As professionals working with older clients, we need to be able to understand them: who they are, what their past experiences have been, and how they have come to see their life. The journey is a continuous process, a series of intermediate steps, according to Carlsen, consisting of having basic needs met and conquering the challenges of life.⁴ Those who have entered the last phase of human development represent the stream of life at its fullest flow, carrying all the rich and varied experiences of the past into the present.⁵

Having reached this plateau, elder persons need to be free from worries about the remainder of their journey. However, more often they live

4. See Carlsen, *supra* note 2, at 79.

5. See Gerald A. Larue, *Geroethics* 23 (1992).

in fear that their choices and rights will be abridged because of their advancing age.⁶ They live in fear of stagnation because of a societal perception that they are uncreative and unwilling to adopt new ideas.⁷ They live in fear that their control will be swept away.⁸

Jules Willing "asks us to realize that 'older people need the freedom to worry—to be challenged and involved in the conflicts and tasks of everyday life—it is part of their needed stimulation.'"⁹ Clients need to be empowered rather than treated.¹⁰ Too often we parent our clients, "often treating them as children, incapable of participating in the decision-making process. We must become facilitators and supportive advocates for our clients as we guide them, their families, and their caretakers to more enlightened solutions to their problems."¹¹ The goals of the professional "include precision, objectivity, and a perspective from which we see a person in his or her wholeness rather than with simplistic attention to one particular trait or characteristic."¹²

II. THE FAMILY CONTEXT

Whenever we discuss divestment of assets or the distribution of assets we are discussing the family managing assets accumulated over a lifetime. The problem for the lawyer is that she must approach asset management¹³ from different angles and for different tasks. She must provide assistance for the wise use of assets for basic living needs. She must engage in Medicaid planning, estate planning, and general gifting of present assets. The attorney also must assist in the decisions regarding the use and ownership of shared assets—when they exist.

The principal function of an attorney advising elderly clients is the distribution or use of assets in a manner that maximizes resources for the family unit. In this regard the needs of the family unit are analyzed and prioritized. An assessment is made of the nature and extent of the available resources—both monetary and non-monetary (such as human resources, social services, and community resources). The lawyer's task is then to put the resources to use in a way that most efficiently and effectively meets the needs of the elder person and his family. With an understanding of available resources, the family can plan for providing the basics such as food, shelter, and medical care. The family also can determine whether supplementary insurance should be purchased, homes or other property sold, new living arrangements made, trusts established,

6. See *id.* at 107 (citing Art Linkletter, *Old Age is Not for Sissies* 49-50 (1988)).

7. See Harry R. Moody, *Abundance of Life: Human Development Policies for an Aging Society* 21 (1988).

8. See Carlsen, *supra* note 2, at 79.

9. *Id.* at 109 (quoting Jules Willing,).

10. See *id.* at 78.

11. *Id.* at 110.

12. *Id.* at 113.

13. For the purpose of this Article we consider not only the divestiture of assets, but also how assets are to be managed for the benefit of the elderly.

and any other assets redistributed which aid in meeting needs. Along with a plan for asset management, including the divestment of some assets, the lawyer should see who is available to help put the plan into action and what social services can be of assistance. In this panoply of resources and moveable parts the lawyer should establish who will be the responsible party in which situations and how that may change as needs and resources change.

The dilemma arises when the decision must be made as to who gets to keep or spend the assets. Will they be gifted, or utilized for health care—especially after a catastrophic illness? How can the assets be shared among family members who usually have different interests? How do we preserve the assets for the benefit of the family member who accumulated them and dispose of those assets in a way which respects the wishes of the individual(s) who earned them?

To answer these questions, this Article proposes a method grounded in a therapy model that social workers and mental health professionals use. The model's basic assumption is that an individual or a family is being presented to the therapist to solve a particular problem. The solution may require more than just the individual to implement—other family members and other resources may have to come into play. The therapist will only be aware of these broader solutions if she applies a therapy model that is designed to elicit this information.

Dr. Nancy Boyd-Franklin has developed such a model that she finds particularly useful in counselling Black families and that is adaptable equally to families with elderly members who have asset management problems to solve.¹⁴ Boyd-Franklin calls it a multisystems approach.¹⁵ "The multisystems model is a theoretical concept utilized by the therapists to organize complex data and to plan and prioritize intervention."¹⁶ In essence, the model assumes that many problems can be solved, at least initially, within a family system or systems:

The concept of system is used to refer to a group of people who interact as a functional whole. Neither people nor their problems exist in a vacuum. Both are inextricably interwoven with broader interactional systems, the most fundamental of which is the family. The family is the primary and, except in rare instances, the most powerful system to which a person ever belongs The physical, social[,] and emotional functioning of family members is profoundly interdependent, with changes in one part of the system reverberating in other parts of the system.¹⁷

14. See Nancy Boyd-Franklin, *Black Families in Therapy: A Multisystems Approach* (1989). Throughout the discussion of Boyd-Franklin's multisystems approach, an attempt is made to relate the theory to the asset management problems confronted by the elder-law attorney.

15. See *id.* at 133

16. *Id.* at 148.

17. Monica McGoldrick & Randy Gerson, *Genograms in Family Assessment* 4-5

The system may arise from an individual's use of his own unique process for problem solving or it may arise from a marital couple's way of coping with life's problems. Each client has many family-type systems at her disposal. Within any one of these systems or within a combination of these systems may lie the solution to a client's problem.

Under the Boyd-Franklin multisystems approach, there are seven levels or systems that can be accessed for problem solving.¹⁸ Level one is the individual, who may be sufficiently capable of solving the problem.¹⁹ This typically is a single person, without any problems with mental or physical capacity, who is perfectly able to plan ahead for his or her senior years. Level two is composed of subsystems within the family.²⁰ This level includes such subunit relationships as spouse-spouse, parent-child, or siblings. Here, a spouse of an adult child may be presenting a health care or Medicaid problem to the elder-care lawyer for assistance in divesting the assets of an incapacitated elder person. Level three is the family household.²¹ The elder person may be living with an adult child and that child's immediate family. The adult child in this situation has assumed the primary responsibility for caring for the elder person.

Level four goes further to include the relevant extended family organization which provides a support system for the family member.²² Sib-

(1985). See also Evan Imber-Black, *Families and Larger Systems: A Family Therapist's Guide through the Labyrinth* (1988).

18. In her book, Dr. Boyd-Franklin first describes the therapeutic process and then presents a discussion of multisystems levels. See Boyd-Franklin, *supra* note 14, 133-56. We have switched the order so that we can discuss systems first and then describe how they are used in the therapeutic process. Dr. Boyd-Franklin also constructs a graph of the various levels which is a series of concentric circles with level one being at the core and level seven being placed in the circle furthest from the core. See *id.* at 149.

19. See *id.* at 148-52.

20. See *id.* at 152-54.

21. See *id.* at 153. Dr. Boyd-Franklin notes that sometimes it is difficult for many black families to reveal who is actually in the family group, making the problem solving task more challenging:

After the first few sessions, as trust begins to build between the therapist and the family, the therapist will inevitably begin to learn more details about the extended family network. The therapist must have some knowledge of Black cultural patterns in order to ask the questions that will help to give a true sense of the real "family." The necessity of this knowledge forces us as family therapists to take a very careful look at the intake forms we use to collect family information, the questions we ask, and the timing of these questions.

Id. at 152.

This should be equally true with the elderly and their families. The lawyer needs to know who has what interests, who tends to be most influential in making decisions, and how an asset management plan might effect the family system.

22. See *id.* at 154-55. In the management of assets process it is important to be aware of who may be giving advice besides you. Others in the family system may be useful resources in crafting a solution.

Boyd-Franklin has some suggested questions to emphasize this point:

1. How do other family members feel about this problem?
2. To whom do you go for advice?
3. Have a lot of people tried to give you their opinion about this problem?
4. To whom would you listen for advice on this issue?

lings, nephews, nieces, and other relatives may share the responsibilities of looking after the elder person. However, members of the extended family may not all live in the same household or even in the same locality. Level five considers the support system provided by nonblood kin and friends.²³ This support system is particularly important for the elder person who is no longer in direct contact with blood relatives. Level six explores church and community system resources.²⁴ This system is very important for the elder person considering gifting some assets to a religious organization.²⁵ Finally, level seven looks to social service agencies and other outside systems.²⁶ The outside systems may include residential care facilities, medical care providers, or state agencies such as a department of social services which may oversee Medicaid.

Boyd-Franklin notes that "[t]he elegance of the multisystems model is it provides an overall framework that allows a therapist to provide treatment successfully at whatever level or levels (individual, family, extended family, or other systems) that is relevant to the situation at hand."²⁷ This method is further premised on an understanding of the therapeutic treatment or problem solving process.²⁸ There is a six-step cyclical process that can be used "at all system levels."²⁹ The process is made up of the following steps:

-
5. To whom would your child (children) listen?
 6. In the past, to whom would you go when you had something serious like this to deal with?
 7. Who helps you out when you have troubles?
 8. Have you experienced any recent losses (deaths, moves, divorces, fights, cutoffs, etc.) within the extended family nonblood kin, or friendship network?

See id. at 154.

23. *See id.* at 154-55.

24. *See id.* at 155-56. What can be said about Black families by Boyd-Franklin can also be applicable to the elderly:

In times of crisis, the church becomes a very important social service system for many Black families . . . [T]he crisis of fire, homelessness, hospitalization, illness, isolation, and so forth can often be helped by the support of the church "family." For many Black clients and families who are emotionally cut off or geographically isolated from their biological extended family, helping them find a church family and address their fears about doing so can have a long-term therapeutic effect.

Id. at 155.

25. First, the religious or spiritual belief system is so strong in some . . . families that the therapist may find it useful to simply explore it as part of general information gathering. For those families for whom religion is of paramount importance, the therapist will quickly receive feedback regarding that importance. It may be helpful to make reference to spiritual statements made by family members as a help in reframing family impasses.

Id. at 155.

26. *See id.* at 156.

27. *Id.* at 149.

28. *See id.* at 135. For the elder-care lawyer, the problem solving process is directed towards the efficient and effective management of assets.

29. *Id.* The cyclical nature of the treatment process assumes that treatment is not a one time operation, but is an evolving process that occurs as trust is established by con-

- Step 1. Joining and engaging new subsystems
- Step 2. Initial assessment
- Step 3. Problem solving (establishing credibility)
- Step 4. Use of family enactment prescriptions and tasks
- Step 5. Information gathering: the genogram
- Step 6. Restructuring the family and multisystems³⁰

Certain important aspects of the treatment process can be noted without going into great detail on each step. The first step is about gaining trust with the family as defined by the elder person.³¹ Everyone with an interest can be engaged in solving the management of assets problem. This is particularly important to avoid misunderstanding about the use of powers of attorney to dispose or transfer assets.³² The second step involves taking an initial assessment of the family, its basic structure, and the general nature of their problem. A lawyer may do this through observation that gives an intuitive feel for who these people are.³³ The elder-care lawyer will find it useful to know if there are hidden sibling rivalries regarding the care and control of the elder person and her assets.

The third step, problem solving, is designed not to solve all aspects of a problem, but to provide a way to answer some initial questions and to gain some credibility.³⁴ For example, an elder person facing medical care decisions might decide whether to transfer title of the family homestead to his spouse. Other Medicaid planning issues can be tackled over a longer period of time.³⁵ The fourth step is designed to get everyone in-

fronting each aspect of a problem or problems. This is apropos of the elder-care lawyer as well. The management of assets can occur over an extended period of time.

30. *Id.* at 135.

31. *See id.* at 135-39.

32. *See* Sanford J. Schlesinger & Barbara J. Scheiner, *Estate Planning Using Powers of Attorney*, Tr. & Est. July 1992, at 38.

In drafting a durable power of attorney in an attempt to qualify the principal for Medicaid, particularly nursing home financial assistance, several matters must be considered: (1) a power to divest the principal of sufficient assets so as to qualify for medical assistance; (2) a power to convert the principal's assets into assets to be owned by the principal which are exempt from the resources allowable under the Medicaid rules and regulations; (3) a power to disclaim an inheritance; and (4) a power to change the principal's domicile to another state where the Medicaid eligibility rules are more favorable.

Id. at 43.

33. This is not alien to lawyers who usually engage in client and case assessment in the initial office interview.

34. *See* Boyd-Franklin, *supra* note 14, at 140. Boyd-Franklin sees this as a critical part of solving the ultimate problem presented by the family:

First, it serves an educative function in that it quickly initiates families who are new to the treatment process. Secondly, many of our families are "multiproblem families" who feel overwhelmed by a vast number of problems. Clear attention early on to identifying and rating the priorities of the problems that the family feels are most pressing will help to mobilize or empower the family by identifying specific problems that can be solved.

Id. at 140.

35. *See* Louis A. Mezzulo, *Advice On Planning Medicaid Qualification*, Tr. & Est., July 1991, at 8.

volved in the problem solving process.³⁶ The participants share tasks to be accomplished both in and out of the office.³⁷ In the context of asset management, this could include gathering information about assets such as location, value, and who has current possession.

The fifth step is to continue to gather information about the family's structure and its dynamics.³⁸ This step includes drawing a "genogram or family tree."³⁹ A genogram is a map or diagram that lays out the family history, identifies current and past legal family relationships, and establishes who may have an interest in family assets.⁴⁰ The final step is to draw upon all of the multisystems model's information and resources to construct a management of assets plan.⁴¹

The multisystems approach can be a useful planning tool for thoughtful, competent consultation with an elder person seeking a viable plan for asset management. Many good lawyers already use this approach with initial intake questionnaires and the completion of informational documents.⁴² The multisystems approach is certainly a more comprehensive approach than, for example, simply drafting a will without concern for the larger context of estate planning.

Furthermore, judges, without calling their process a multisystems approach, will use this method to sort out the facts of a case involving the assets of an elder person. The following fact situation, based on a case examining the validity of a will challenged on the basis of undue influence on the testator, is such an example: The family was composed of a father, daughter, son, and two grandchildren.⁴³ Mother had died nineteen years ago leaving an estate that had only been recently settled, with father serving as executor.⁴⁴ During 1972, the daughter was appointed conservator of the father, who was subsequently placed in a nursing home after living for some time in daughter's house.⁴⁵ The jury found the father incapable of managing his own affairs.⁴⁶

36. See Boyd-Franklin, *supra* note 14, at 141-42.

37. Dr. Boyd-Franklin notes:

Enactment and the assignment of tasks in and out of sessions also comprise a very important component of the empowerment of Black families in the treatment process. This empowerment is particularly essential for Black families who feel powerless to change the "system."

Id. at 142.

Certainly empowerment and a sense of self-determination is an important part of what lawyers should do when working with the elderly.

38. See *id.* at 142-48.

39. See *id.* at 142.

40. See McGoldrick & Gerson, *supra* note 17, at 1.

41. See Boyd-Franklin, *supra* note 14, at 142-48.

42. The major purpose in using these forms is to obtain early in the consultation an expression by the client of what he or she desires to do with assets such as joint checking or savings accounts.

43. See *Beyers v. Billingsley*, 369 N.E.2d 1320, 1323 (Ill. App. Ct. 1977).

44. See *id.* at 1323.

45. See *id.*

46. See *id.* at 1325.

There [was] evidence that he wouldn't take care of his health, such as he wouldn't feed himself, he wouldn't even go to meals when they were prepared for him all the time. He wouldn't bathe. He would urinate virtually anywhere. He urinated in the bank, sandbox, on the dishes in the sink and faces of his grandchildren [H]e would smear feces over the walls. He thought everyone was a crook. He didn't trust anybody. Nobody could tell him what to do unless he wanted to.⁴⁷

Father had several friends who were not related to him; a banker named Robert and three brothers named Gene, Bobby and James.⁴⁸ Father, who had been placed in a nursing home by his daughter, left the nursing home and travelled some distance to Bobby's home.⁴⁹ Father stayed with Bobby during which time Bobby cared for Father. Also during this time, friends of Father, including his lawyer, Rumley, worked to have the conservatorship switched from father's daughter to Robert.⁵⁰ On the same day that the conservatorship was changed, Rumley came to Bobby's house where father was staying.⁵¹ Rumley had Father sign a new will which gave Father's friends large bequests and made them trust remaindermen and residuary legatees to the absolute exclusion of Daughter and her descendants.⁵² Robert was made trustee and executor under the will.⁵³

In this case, the appellate court upheld an earlier will which left most of the assets to the testator's family.⁵⁴ The court agreed with the trial court's finding that the more recent will leaving the assets to new found friends was invalid.⁵⁵ In addressing the evidentiary, procedural, and substantive issues, the court relied on circumstantial evidence drawn from the family systems of the testator.⁵⁶ In his opinion, Judge Scott declared:

Pertinent circumstantial evidence consisted of decedent's living arrangements, when and how those arrangements came into existence and terminated, decedent's manifest physical and mental conduct at various times, his customary manner of transacting business, who were the natural objects of his bounty, who were the actual objects of the [last] will.⁵⁷

This evidence or information would be similar to what a family therapist would gather in assessing and intervening in a family problem. In this case, the problem would be finding an appropriate method to handle the

47. *Id.*

48. *See id.* at 1322.

49. *See id.* at 1326.

50. *See id.* at 1325.

51. *See id.*

52. *See id.* at 1325-26.

53. *See id.* at 1326.

54. *See id.* at 1325, 1329.

55. *See id.* at 1329.

56. *See id.* at 1323-27.

57. *Id.* at 1323.

father's declining mental capacity and to manage his assets in a manner not inconsistent with his desires and needs.

III. THE LAWYER'S ROLE

The lawyer has a variety of functions that the ethical rules seem to insist must remain separate. The lawyer is to help with disability planning, asset management, asset dispersal, and navigating the slippery slope between mental and physical capacity and incapacity. Additionally, the lawyer must help determine who will use which power of attorney and will make key medical and financial decisions. Professor Donaldson's work on the ethics of representing the elderly captures the difficulties of confidentiality, conflicts of interest, and client identification.⁵⁸

The tasks confronting the lawyer are varied and complex and often require the use of non-legal skills such as counselling, reconciliation, and the sensitive chore of dealing with the emotions and fears of individuals facing the concluding chapters of their lives.⁵⁹ Yet, the elder person is looking for advice from an advocate and even from an intermediary to help resolve the family tensions attendant to the issue of "finishing well." The attorney must be sensitive to serving the best interests of the elder person in the context of the elder's family system and his participation in the decisional process.⁶⁰ Consequently, other professionals may be useful in guiding the asset management process.⁶¹

Ultimately, what we are discussing is placing the attorney as a professional in the context of a family travelling through the aging process.

58. John E. Donaldson, *The Ethical Considerations of Representing the Elderly*, Tr. & Est., July 1991, at 18. See also, Luther J. Avery, *The Rules of Professional Conduct For Lawyers Are Confusing*, Tr. & Est., April 1992, at 8.

59. For a good discussion of some of the many issues confronting the attorney who practices in the elder law area, see, Family Advoc., Summer 1993. The American Bar Association Family Law Section devoted the entire Summer 1993 issue of Family Advocate to the issues in elder-law.

60. For a good discussion of some of the tensions involved in helping a client within his or her family system, see Paul R. Tremblay, *Counselling Clients Who Weren't Born Yesterday: Age & The Attorney-Client Relationship*, Family Advoc., Summer 1993, 24, 25-26.

61. See Anne Bersin-Rosenthal, *Geriatric Care Management: Do You & Your Client Need Help?*, Family Advoc. Summer 1993, 66, 66-67. The article points out the need for the attorney to be aware of resources that are available to help work through the aging process:

Family members sometimes take on the major responsibility of caring directly for their older relatives. This can be stressful, frustrating, and discouraging. Remind the caregiver that the older person's well-being depends on the caregiver's physical, emotional, and financial health. Encourage caregivers to take care of themselves.

A professional geriatric care manager can help in these situations, relieving the family member of constant responsibility. The care manager can also establish respite care in the form of temporary placement. Some companies are recognizing their employees' need for elder care, offering to pay for the services of professional geriatric care providers.

Id. at 67.

The traditional notions of representation and adversarial ethics do not quite fit. Therefore, treating the family unit as a client, as suggested by Patricia M. Batt is an appropriate method of ethically providing services in the elder law context.

The recommended solution allows elder lawyers to be retained by the family to represent the family unit. Applying this entity approach to the elderly client's family unit is responsive and realistic. It is responsive because in recognizing the family unit as a client, the elder lawyer can represent the very family interests that prompted members to seek legal advice. It is realistic since "the entity theory as a practical matter forces the lawyer to face up to the possibility that different groups within the organization may not see eye-to-eye and that he may have an independent responsibility to guide the client through troubled times." This recognition of probable "troubled times" better captures the family representation dynamic.⁶²

Viewing the family as a unit or entity, however, is only the beginning of the analysis. The family is a complex of individuals in intimate, human relationships. This is the basic premise of the multisystems approach suggested earlier. The unit model suggests that a member can leave or exit the organization the same way a corporate officer or director can resign or be fired. But the family cannot readily kick out a member, nor can a member readily quit. If one does leave, a huge hole is left in the family system that may never be filled. Consequently, the legal professional providing service in the complex of family systems is really functioning in the role of intermediary as suggested by Model Rule 2.2.⁶³

62. See Patricia M. Batt, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 *Geo. J. of Legal Ethics* 319, 339-40 (1992) (quoting Geoffrey C. Hazzard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 234 (1985)).

63. Model Rules of Professional Conduct Rule 2.2 (1994). This emphasis on lawyer as intermediary was suggested by Madonna Cook and Louise Crawford, students in Steven Hobbs' Professional Responsibility Class at Washington and Lee University School of Law.

Model Rule 2.2 states:

- (a) A Lawyer may act as intermediary between clients if:
 - (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
 - (2) the lawyer reasonably believes that the matter can be resolved on terms of compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
 - (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
- (b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
- (c) A lawyer shall withdraw as intermediary if any of the clients so request, or

What the attorney is doing in the complex elder-law area is providing professional services to people who have particularized needs associated with aging. The attorney's legal skills, when used in conjunction with counselling skills help meet these needs in the context of the client's family systems. The idea that different areas of practice require ethical guidelines unique to that practice is what prompted the American Academy of Matrimonial Lawyers to issue its own standards of conduct.⁶⁴ Judge Stanley Sporkin has also suggested this for the corporate and securities law area.⁶⁵

IV. DEFINING ETHICAL BOUNDARIES

Given the premise that the attorney is providing professional services in a family coping with the aging process, an analysis of the attorney's ethical responsibility must be developed in this context. The elder person should be the focus of the attorney's loyalty. If the "client" is a couple, their joint needs should be the paramount concern of the professional. Children, who might have an interest in the outcome provided, must subordinate their interest to that of their parents. As discussed below, the children stand as fiduciaries of the parents and as beneficiaries of the services provided—not only as possible recipients of family assets but also in terms of peace of mind that their parents' fundamental needs are met as they navigate the aging passage.

In divorce mediation, the lawyer's ethics are guided by the important values implicit in family law. In the context of mediation, the law encourages the parties to work out their own dissolution agreement compatible with their needs and their requirements of the law. Steven Hobbs' earlier article considered further how the ethics of the lawyer are in part established by the role, the law and the context of the given practice.⁶⁶ Another earlier article considered how the law of domestic relations is a reflection of what society values or considers of critical importance to its

if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Id.

64. See *Bounds of Advocacy: American Academy of Matrimonial Lawyers Standards of Conduct* (1991).

65. As the legal profession enters a whole new world of lawyering, the Bar must ensure that the rules governing the practice of law are as pertinent, prudent, and relevant as possible to meet the demands of our high-tech society. The Bar has already pretty much stripped the current ethics rules of their general usefulness. These existing ethics codes merely espouse certain general principles that apply to all lawyers, such as you don't co-mingle a client's funds with your own. They do not provide enough fact-specific provisions that apply directly to many of the various legal specialties.

Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 *Geo. J. of Legal Ethics* 149, 149 (1993).

66. See Steven H. Hobbs, *Facilitative Ethics in Divorce Mediation: A Law and Process Approach*, 22 *U. Rich. L. Rev.* 325, 363-64 (1988).

existence.⁶⁷ Using a theological ethics theory developed by Professor James Gustafson,⁶⁸ the article explored how individual family relationships are constructed by society's laws, which are in turn shaped by understanding the fundamental nature of families.⁶⁹ The issue is posed as follows:

What is the law and society enabling and requiring us, citizens or members of society, to be and do as participants in the patterns and processes of interdependence in marriage and family life? A secular answer expressed in Gustafson's terms would be that we must relate not only ourselves, as families and family members, but also all things pertaining to family in a manner appropriate to our relationship with society and its laws. This answer acknowledges the fact that through our societal and legal relationships, we are shaping and influencing the very nature of society and law.⁷⁰

Consequently, a study of elder-law should illuminate values and purposes society has chosen to emphasize in the context of aging. How does the law enable us to divest our assets? What is required of us when we divest assets? How does divestiture of assets fit into the patterns and processes of family life?

Answers to these questions construct the ethical framework for the attorney.⁷¹ Given the available legal tools to assist in the aging journey, the lawyer's role is to facilitate the trip in a manner as determined by the client. The principal task of the finishing well process and the elder-law attorney who provides assistance should be to facilitate the establishment of financial, social, and emotional security for the parties to the greatest extent practicable.⁷² The law provides for the management of assets in a way that both provides for the current and future care of the elder person and allows for the dispersal of assets to the natural objects of their affections. The lawyer should help facilitate these objectives by using his

67. See Steven H. Hobbs, *In Search of Family Value: Constructing a Framework for Jurisprudential Discourse*, 75 Marq. L. Rev. 529, 567 (1992).

68. See 1 James M. Gustafson, *Ethics From a Theocentric Perspective: Theology & Ethics* (1981).

69. See Hobbs, *supra* note 66. This process is part of what Professor Carl E. Schneider calls a moral discourse. See Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1806 (1985). The *In Search of Family Value*, article noted that:

Each case is the real-life drama of a family working out what is valuable and important to it, while at the same time remaining within the bounds of the law. When our lives interact with the law, a discourse arises about who we are, what our hopes and dreams are for our family, and how we form companionate relationships, and how we view raising children.

Hobbs, *supra* note 67, at 530.

70. See Hobbs, *supra* note 67, at 533.

71. This is the approach Hobbs used to construct the ethical framework for the attorney in the divorce mediation context. "Mediation creates ethical responsibilities that promote the purity of the mediation process itself." Hobbs, *supra* note 66, at 364. The laws of divestiture of assets as it affects the elderly inform the ethical parameters as well.

72. See *id.* at 358.

skills, expertise, and experience to marshal the assets in a way that serves the interests of the elder person. This approach helps to promote self-determination and enhances the dignity of the individuals traversing the aging process.⁷³

Because lawyers give advice on the management of other people's assets, they are placed in the capacity of fiduciaries.⁷⁴ The attorney helping manage the elder person's assets "stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part."⁷⁵ One court has examined this duty in broader terms:

An attorney at law should be a paragon of candor, fairness, honor, and fidelity in all his dealings with those who place their trust in his ability and integrity, and he will at all times, and under all circumstances, be held to the full measure of what he ought to be. Equity would indeed be impotent if a trusted legal advisor could profit by withholding the benefit of his special knowledge and skill, or by giving false counsel during the continuance of a relation in the highest sense confidential and fiduciary.⁷⁶

The attorney should not personally profit and should protect the client's assets from waste and fraud. She should competently use her abilities to achieve the objects entrusted to her by the client.

The legal standards which provide the means for asset management inform facilitative ethics and fiduciary duties. The professional must be aware of what elder-law allows and does not allow. She must be aware of the values that are inherent in the way law has been structured by our society as it attempts to accommodate the needs of our senior citizens. She must know what the law is, enables, and requires of families as they struggle to meet the challenges of the aging process.

Professionals who provide services to elderly client must take care that their focus remains on assisting the elder person in finishing well. Lawyers are the fiduciary in which trust is reposed to ensure that assets are managed well and in accordance with their clients' wishes; that the needs of other family members are respected to the extent that these needs are secondary to the fundamental needs of the elderly person; and that in the event of failing health and diminished physical and mental capacities, right will be done by them.

From an asset management perspective, the lawyer's ethical duty is, first and foremost, not to let the assets waste away. The attorney is entrusted with the fruits of a life's work and utmost care must be exercised to maximize these resources. The attorney must follow the rules of di-

73. See *id.* at 358 (quoting J. Folberg & A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* 35 (1984)).

74. See Peter Brown, *The Punctilio of An Honor the Most Sensitive*, Tr. & Est., April 1992, at 4.

75. Black's Law Dictionary 625 (6th ed. 1990) (defining "Fiduciary Capacity").

76. *Sanguinetti v. Rossen*, 107 P. 560, 563 (Cal. Ct. App. 1906).

vestiture to achieve the anticipated results. Whether this involves gifting, spend-down, or trust establishment, the work should not be subject to legal challenge for failure to follow the law competently. A lawyer must not manage the assets in a fashion which could create legal liabilities such as result from an action for fraud or a prosecution for tax code violations. A lawyer must not allow misuse or misappropriation of the assets by other family members or other persons who may influence the elder person. The family members or other connected persons are bound by the same fiduciary duty as the lawyer to take care of the assets for the benefit of the elder person. If the lawyer assists such persons in the misuse or misappropriation, she too could be subject to discipline⁷⁷ or civilly liable for breach of fiduciary duty.⁷⁸

V. SPECIFIC ETHICAL ISSUES

In the area of management of assets, all ethical issues converge. First, who is the client when it comes to managing assets? If we provide professional services to the family as a unit is there a principal spokesperson who speaks for all? When there is no apparent agreement on the options available, can we resort to dispute resolution mechanisms? Identification is not as important as focus. Under our analysis, the needs and desires of the elder person are the focus. Their participation in whatever manner is crucial. A spouse or significant other might also have an equally or complementary interest in the asset management process. In this case the counselling skills of the attorney can be brought to bear in the intermediation of reasonable alternatives. The key is to provide options and let the elder person make decisions to the extent practicable.

A secondary order of concern is the children or other family members who may be dependent on the elder person. They may share a present or contingent interest in an asset. Their needs should be addressed by respecting the desires of the elder person consistent with the legal rights of the other family members. The decision making process is multimodal when considering how and when assets should pass to the next generation. We base this premise on the fact that there is a functioning family. It must be recognized that human nature (greed in particular) often pits the individual against the family. In this instance the role of the attorney changes to that of protector of the elder person and we get back to a more traditional representational analysis. The ethical decision for the lawyer is to determine whether if you were operating as a provider of professional service, you could switch hats and become an adversarial advocate. If you are focusing on the interest of the elder person, have you advised other family members that your allegiance is to the elder? Is this disclosure with the elder person's consent sufficient protection? This

77. See Model Rules of Professional Conduct Rule 1.2 (1994).

78. See *In re Hockett*, 734 P.2d 877, 883-84 (Or. 1987) (en banc) (holding attorney liable for assisting an outsider waste a client's assets).

is a value judgment that an individual practitioner would make unless otherwise directed by the bar.

Similarly, sometimes the client must fight the elder-care system. It may be necessary to work through the confusing maze of insurance coverage and nursing home placement process. Or creditors may be overly aggressive and unjustly attach assets. In these circumstances the lawyer must be an adversarial advocate. (Keep in mind that the conflicts issue also may have to be addressed if the lawyer was providing services to the family as a unit).

Second, there are inherent conflicts of interest in providing services to an individual who may feel the need to take into account the needs and interests of other family members. If we assume either that the client lacks capacity or that there is a strong possibility that physical and mental incapacity may occur, the professional must consider issues of substitute judgment, the best interest of the elder person, and the decision maker who may have an ultimate stake in the residue of the assets.

Third, it is unclear to whom the duty of confidentiality is owed and in what circumstances the duty of confidentiality arises. We are not sure when the rules should be different and when exceptions to the rules should apply. Is the duty owed to the elder person, the client if it is a child of the elder person, or to a third party who is providing other services such as health care or financial advise?⁷⁹ What must be disclosed to government agencies in applications for medicaid or other government assistance?

Fourth, the attorney who provides services in this area must have a high degree of competence and command specialized skills and knowledge. He must know the tax laws, rules for Medicaid eligibility, how to sift through the maze of issues presented by the Social Security Administration or the state department of social services, and the ins and outs of estate and trust work. Medicaid is a social safety net that is provided to individuals after they spend-down their available assets. In this as well as in many other asset transfers, one must be concerned about fraudulent transfers which compromise the rights of creditors or other third parties. Trusts can be arranged in a manner to take care of the person when he is no longer capable of self-determination. In addition, trusts aid in the disposition of one's assets at the end of life. All this must be done within the parameters of appropriate estate planning and the rules of the tax code.

Fifth, the elder service professional must recognize the heightened fiduciary responsibility that is placed on him when entrusted with managing valuable assets. The example which follows can be useful in working through a multisystems analysis focused on the elder person, as the attorney, with fiduciary responsibility, facilitates the management of assets

79. The third party might even have information that must be kept confidential and may influence the professional in asset management decisions. For example,

possessed by the elder person. It is an example which considers the dilemmas faced when the attorney is asked to represent a spouse or child, and the person who accumulated the property is incapacitated and has failed to give written directions about divestment planning prior to becoming incapacitated.

EXAMPLE - Children who are successor trustees of now incapacitated Mother's living trust ask how to get assets out of the trust and into their names so that assets are not used for Mother's care. If the trust contains no gifting powers, the children may try to reconstruct Mother's "real wishes" to be congruent with theirs, and they may say Mother was never properly advised by whomever (not always a lawyer) prepared the trust and never meant to have all the money spent on her care costs.⁸⁰

CONCLUSION

As the above example indicates, planning is important if the desires of all concerned are to be realized. An effective asset management plan can be achieved only if there is clear communication with the client and his family. When all understand the goals there is less likelihood of disappointment and confusion when asset management becomes difficult because of disability or death. Additionally, planning is enhanced when all concerned are educated regarding what options are available under applicable law.

Attorneys working in elder law must focus on the context in which asset management matters arise. First, the unique challenges facing elder persons must be understood. They are coming to the end of life's journey and should be empowered to finish their course well. The elderly cope with life issues wrapped around personal relationships and the tasks of resolving their affairs. Second, these matters invariably involve the elder person in the context of the family. There are multiple family systems which must be considered as an asset management plan is constructed. Each system has valuable resources that can empower the elder person in her quest to conclude life's affairs with dignity and purpose. To provide planning services to an elder person as if her family did not matter negates the importance of personal relationships within which life is lived. Finally, the context of elder law must be taken into account in the planning process. An effective asset management plan should reflect what the law enables an elder person to accomplish. Additionally, the plan must

80. Another useful example is: The spouse who is agent under a poorly drafted power of attorney for an Alzheimer's victim spouse has most assets in joint ownership with the ill husband. Some assets may be in his name alone. His income is under the income cap, so that he will eventually qualify for Medicaid. There is no evidence that he would vehemently object to divestment planning. A check of his estate plan reveals that the will provides that she is the sole heir and that any asset transfer would not harm the interests of children from a prior marriage or other prospective heirs. The solution to her problem would be to transfer joint assets to sole ownership, have some of the solely owned assets placed into an irrevocable income trust for her, and arrange smart pre-eligibility exemption planning including divestment if that is in her economic interests.

reflect what the law requires to make the final passage a fulfilling and rich experience. The best plan is useless if it cannot be legally enforced.

A contextual focus on the nature of the issues an elder client brings to the office and the values implicit in elder law necessarily suggest a unique role for the attorney. The attorney is truly a counselor who offers sage advice within the context of familial relationships. The primary focus is on empowering the elder person's navigation of the last passage of life's journey. The challenge for the attorney is to recognize and be prepared to understand the varied and often changing capacities of the elder person. Here is where the various family systems can be most useful to achieve the asset management task in a way most reflective of the desires of the elder person.

The ethical framework utilized by elder law attorneys must take into account the contextual focus and the special role of counselling within a family situation. While mindful of confidentiality and conflict of interest concerns, the attorney should facilitate the elder person's goals in a manner which respects her ability to participate in the management of her affairs. The bulwark of the attorney's ethical duties is his fiduciary relationship to the client. His responsibilities are marked by the requirements of elder law and the process by which the law enables the elder person to finish well.