

Dementia and the Law

By Rose Mary Bailly and Robert K.P. Cannon

When Robert (hereinafter “Bob”) Abrams, Esq., suggested we write an article on the multitude of New York laws that impact older individuals with dementia and their families, he was eager to offer the following perspective and guidance:

With few exceptions, America’s system of legal jurisprudence is reactive in nature and often the product of compromise, monetary considerations, and an imbalance of political power. Our response to the legal implications of dementia is no different.

A hodgepodge of laws were designed or repurposed, at least to some degree, to address legal issues confronted by individuals with dementia and their loved ones. These laws vary in effectiveness and collectively fail to create a coordinated response to this unprecedented public health emergency that affects tens of millions of Americans.

As lawyers we must advocate for and counsel our clients within the confines of the legal system that our legislative leaders have created. While the current system can be frustrating for practitioners, it can be overwhelming and bewildering for individuals with dementia, in particular their loved ones who must navigate and overcome legal barriers as they struggle to adjust to their new reality.

As members of the legal community, we lack the skill and training required to develop a cure or treatment for dementia. We can, however, help and comfort our clients by ensuring we act with sensitivity, efficiency, and a modicum of predictability, as we assist them in navigating the dementia-related legal maze.

While researching and writing this article, Bob’s observations remained at the forefront of our minds. This article demonstrates that, although the legal system’s approach to dementia has evolved as our knowledge and understanding of the disease has grown, the sheer breadth and complexity of law in this field present challenges to attorneys and laypersons. The purpose of this article is to provide the reader with a sampling of the many laws that not only address the issues facing the individual with dementia but also the laws designed to ease the burden on the family and society as a whole.

New York ranks among the top four states with the highest number of older adults, coming in just behind Texas with 2.9 million people age 65 and older.¹ In New York, the population of individuals 65 or older in 2015 represented 15 percent of the population,² and the aging of the Baby Boomers gives us every reason to believe the percentage will grow. New York has taken into account its older population, a significant portion of which suffers with dementia, by developing laws that protect individuals as they age.

Indeed, Governor Andrew Cuomo recently signed two new laws relating to caregiving for older adults, that affirm New York’s continuing commitment to its aging population.³

The Caregiver Advise, Record, and Enable Act, Chapter 391 of the Session Laws of 2016,⁴ amends the Public Health Law to require that “hospitals allow patients to formally designate a caregiver before they leave the hospital, or are transferred to another facility . . . [and] hospital workers to provide the caregiver with instruction or training on how to perform tasks for the patient at home, such as changing bandages or administering medication.”⁵

Chapter 471 of the Session Laws of 2016 amends the Education Law to create a new job category known as Advanced Home Health Aides.⁶ These individuals will receive additional training and, acting under the supervision of a licensed registered professional nurse, will carry out advanced tasks in a person’s home.

Thus, aging New Yorkers, including those with dementia, will be able to remain in their homes and their communities instead of institutional settings.

This article discusses some additional laws that protect New York's vulnerable population. This list is not exhaustive, but illustrates the variety of ways the public policy of the state is mindful of its aging citizens.

CIVIL

RECOGNITION OF AN AGING POPULATION

The state Office for the Aging was created to inform “the public, especially the elderly themselves, on subjects beneficial to the community which relate to the needs, abilities, resources, opportunities, rights, entitlements, and other issues affecting older people in New York state.”⁷ The activities of the office follow the requirements of the federal Older Americans Act of 1965, as amended.⁸ Of special note is the New York State Legal Services Initiative, a collaboration facilitated by Bob, endorsed by Governor Cuomo, and run by the state Office for the Aging.⁹ The initiative's purpose is to increase access to affordable legal assistance to three targeted population groups, including New York's older adults, with the ultimate aim being to ensure equal access to justice.¹⁰

HOUSING AND COMMUNITY LIVING

It is critical that the law encourages older individuals, including individuals with dementia, when appropriate, to remain in the community. This concept became an integral part of the law following the 1999 U.S. Supreme Court ruling in *Olmstead v. L.C.*,¹¹ wherein the court held that states must, in accordance with the Americans with Disabilities Act, provide community-based treatment for persons with mental disabilities.¹² In response, New York State developed the Olmstead Implementation Plan that addresses issues, including but not limited to, integrated housing, transportation, and community services to ensure individuals with disabilities, including older adults with dementia, receive services in the most integrated setting appropriate to their needs.¹³ The following laws have been enacted to enhance the protections afforded to older individuals living in the community:

Discrimination. It is illegal to discriminate, in housing and public accommodations, on the basis of age, disability, familial status – having children under age 18, and other criteria.¹⁴

Other Tenant Protections. Tenants, or their spouses living with them, who are 62 years or older, or who will turn 62 during the term of their lease, may notify their landlord, in writing, of their intention to move and terminate the lease if they are certified by a physician as no longer able to live independently.¹⁵ Moreover, persons who are 62 years of age or older and who live in buildings being converted to cooperatives or condominiums in New York City,¹⁶ and Nassau, Rockland, and Westchester counties, and other municipalities are entitled to remain in their apartments without buying and may retain all rights of rent-regulated tenants.¹⁷

Naturally Occurring Retirement Communities (NORC). NORC programs for neighborhoods of single-family homes and low-rise apartment buildings that have become densely populated with older individuals help them “age in place” and prevent isolation and alienation. NORC funding makes possible health care aid, transportation, and other services that allow the occupants to live independently in their homes.¹⁸

The Enriched Housing Program. This program, licensed by the New York State Department of Health, offers community living arrangements with supportive services primarily for people 65 years of age or older who are unable to perform some activities of daily living. Program services include assistance with personal care, meals, shopping, housekeeping, and a 24-hour, on-call emergency service.¹⁹

Access to Home Program. This program provides financial assistance to property owners to make homes accessible for low- and moderate-income persons with disabilities.²⁰

Ability to Drive. Depending on where they reside, an older individual's ability to drive may have an enormous impact upon his or her ability to remain in the community. An individual's ability to drive is dependent upon the individual's mental and physical condition and ability to follow traffic laws and rules, not the individual's age. Pursuant to New York's Vehicle and Traffic Law § 506, if the commissioner of Motor Vehicles has reasonable grounds to believe that an individual is not qualified to drive, the commissioner may require such person to submit to an examination to determine his or her qualifications.²¹

FINANCIAL ASSISTANCE WITH HOUSING

Real Property Tax Credit. This state tax credit program assists eligible elderly and moderate-income homeowners and renters.²²

Real Property Tax Exemption. This exemption, known as the circuit-breaker, allows tax exemptions to homeowners aged 65 and older if they meet certain requirements.²³

STAR Property Tax Exemption. This exemption offers couples over the age of 65 who own their home or co-op apartment and meet residency and income guidelines an "enhanced" school tax rebate under the STAR program.²⁴

Senior Citizen Rent Increase Exemption (SCRIE). This exemption grants certain exemptions from rent increases to tenants who are senior citizens. If a tenant or tenant's spouse is 62 years of age or older living in a rent-regulated apartment, with a combined household income at or below the income eligibility level and paying at least one-third of their disposable income toward their rent, they may qualify.²⁵

Sharing a home. The law permits tenants to share their apartments with a roommate who is not on the lease, thus allowing older adults on fixed incomes to share living expenses.²⁶

HEALTH CARE

The rights of a patient in a hospital or nursing home include, among others, the right to autonomy, disclosure of information, and privacy.²⁷ In addition, all patients in New York State hospitals have a right to receive a written discharge plan before they are discharged from the hospital. The plan should describe the arrangements for health care services required upon a patient's discharge, which must be secured or reasonably available to the patient prior to discharge.²⁸ Patient privacy in health care facilities is largely governed by the Health Insurance Portability and Accountability Act (HIPAA).²⁹

Decisions by Surrogates. An individual, known as the principal, can execute a health care proxy appointing an agent to make health care decisions on the principal's behalf, in the event the principal is unable to make such decisions.³⁰ In the absence of a validly executed health care proxy, a surrogate from a prioritized list may make medical decisions for a patient in the event the patient lacks capacity to make such decisions personally, and did not previously make such decisions.³¹

The Attorney General Medicaid Fraud Control Unit investigates and prosecutes individuals and companies responsible for improper or fraudulent Medicaid billing schemes committed by hospitals, nursing homes, pharmacies, doctors, dentists, nurses, and other health care entities billing the Medicaid program.³²

FINANCIAL PLANNING

It is critically important for individuals of all ages, in particular older adults, to implement a plan to ensure that their financial needs, and the financial needs of their family and loved ones, are protected in the event the individual can no longer handle his or her affairs. As practitioners, it is important to be cognizant of the potential financial impact that a dementia diagnosis can have not just on the victims and their loved

ones but also upon their employees, co-workers, and business partners. For that reason, laws have been enacted to ensure that financial devastation can be avoided for the individual who plans ahead.

Joint Bank Accounts. Individuals may hold money in their accounts jointly with another individual, and each person has full access to the account with the right of survivorship in the proceeds of the account.³³

Joint Bank Account for Convenience Only. The owner of this type of account adds another individual's name to the account for purposes of convenience only, i.e., check writing, bill paying, transfers, and withdrawals. The individual listed for convenience does not own the money in the account.³⁴

Totten Trust Account. The owner of this type of account directs that the amount remaining in the account at the time of the owner's death be paid to a named beneficiary.³⁵

Powers of Attorney. An individual can create a power of attorney for financial and estate planning thereby appointing an agent to manage the individual's financial affairs without court intervention; however, the agent can be required by the court to account for the management of the individual's affairs.³⁶

Wills and Trusts. These documents are used to protect and preserve and distribute property during lifetimes or at death.³⁷

PROTECTION OF RIGHTS AND PROTECTION AGAINST ABUSE AND EXPLOITATION

A critical function of government is ensuring the rights of its citizen body are protected. Arguably, this function is most frequently put to the test when preserving the rights of vulnerable populations. As many commentators have observed, the manner in which a government treats its most at-risk populations is a true measure of society. The final sections of this article address a variety of New York laws that have been enacted to ensure that the basic rights of older persons, including those with dementia, are protected.

Private Right of Action Against Residential Health Care Facility. A patient of a residential health care facility who suffers injuries as a result of being deprived of any right or benefit may maintain a private right of action. The N.Y. Public Health Law defines the right or benefit as one that is "created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule, or regulation or by any . . . federal statute, code, rule, or regulation."³⁸ Injuries include, but are not limited to, "physical harm to a patient; emotional harm to a patient; death of a patient; and financial loss to a patient."³⁹ The remedies provided by the statute are in addition to and cumulative with any other remedies available to a patient, at law or in equity or by administrative proceedings, including tort causes of action, and may be granted regardless of whether such other remedies are available or are sought.⁴⁰ Damages recovered will not impair Medicaid eligibility.⁴¹ Exhaustion of administrative remedies is not required prior to the commencement of any action, and any waiver, by a patient or legal representative, of the right to commence an action under this section, is null and void.⁴²

Witnesses' Testimony. Testimony can be preserved if a party or a key witness is not expected to survive the time period necessary to commence an action and seek the disclosure in the context of it.⁴³

The Right to Vote. An individual's right to vote is a cornerstone of American democracy and, for many, one of few opportunities to engage in politics. However, despite protection at both federal and state level, the right to vote is not absolute. The National Voter Registration Act of 1993 authorizes states to remove registrants from official lists of eligible voters "by reason of criminal conviction or mental incapacity."⁴⁴ Pursuant to New York Election Law, "no person who has been adjudged incompetent by order of a court of competent judicial authority shall have the right to register for or vote at any election in this state unless thereafter he shall have been adjudged competent pursuant to law."⁴⁵

In a recent NAELA article titled, *Voting Under Guardianship: Individual Rights Require Individual Review*, Michele J. Feinstein and David K. Webber propose that no state should revoke an individual's right to vote, even if that person has been declared incapacitated, "without an individualized inquiry into whether the person truly lacks the capacity to understand and participate in the electoral process."⁴⁶ Despite the obvious importance of voter rights, there appears to be no published New York case law addressing an incapacitated person's right to vote.

The following is an overview of some of the protections afforded to older adults against abuse and exploitation, including guardianships.

Protecting an Incapacitated Person. Parens patriae is a Latin term meaning "parent of his or her country."⁴⁷ Black's Law Dictionary defines the term as the legal doctrine by which the state is regarded "as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves."⁴⁸ The state's *parens patriae* is a critical legal doctrine that authorizes the state to intervene in matters affecting individuals unable to care for themselves and forms the basis for New York's guardianship laws, including Article 81 of the N.Y. Mental Hygiene Law (MHL). A court can appoint a guardian to meet the personal or financial management needs of an individual who either consents to the appointment or is found by the court to be unable to care for his or her self, is at risk of harm because of that inability, and fails to understand or appreciate that risk.⁴⁹ Unlike its predecessors and the more inflexible Article 17-A of the Surrogate's Court Procedure Act, MHL Article 81 allows courts to fashion orders of appointment tailored to the specific needs of a particular incapacitated person.⁵⁰ Moreover, it requires that all guardians take into account the incapacitated person's personal wishes, preferences, and desires.⁵¹

Annulment of a Marriage of a Spouse Who Is Incapacitated or Has a Mental Illness and Protecting an Estate. An action can be maintained by any relative of a person with a mental illness to annul a marriage on the ground that one of the parties had a mental illness at the time of the marriage.⁵² Moreover, a husband or wife is not considered a surviving spouse for purposes of asserting the right to an elective share against the deceased spouse's will if the court determines that a valid "final decree or judgment of divorce, of annulment or declaring the nullity of a marriage or dissolving such marriage on the ground of absence . . . was in effect when the deceased spouse died."⁵³

Adult Protective Services. Adult Protective Services responds to reported concerns about individuals in the community, without regard to their income, who have no one willing or able to assist them and who may have mental or physical impairments that render them unable to: (1) manage their own resources; (2) carry out the activities of daily living; or (3) protect themselves from physical abuse, sexual abuse, emotional abuse, active, passive or self-neglect, financial exploitation, or other hazardous situations.⁵⁴

The Long-Term Care Ombudsman Program. The program, maintained by the Office for the Aging, advocates for residents by: (1) investigating and resolving complaints made by or on behalf of residents; (2) promoting the development of resident and family councils; and (3) informing government agencies, providers, and the general public about issues and concerns impacting residents of long-term care facilities.⁵⁵

Disclosure of Information to Investigators. Banking organizations are authorized to disclose an individual's financial information to social services officials and the Department of Social Services investigating financial exploitation.⁵⁶

Order of Protection. A court can issue an order of protection for any spouse, former spouse, parent, child, or member of the same family or household⁵⁷ or to protect an incapacitated individual or an individual alleged to be incapacitated.⁵⁸

Mandatory Reporting of Abuse and Neglect in a Facility. Certain individuals are required to report abuse or neglect of a resident in a health care facility. Such individuals include the operator or employee of such facility, any person under contract to provide patient care services in such facility, and any nursing home administrator, physician, medical examiner, coroner, physician's associate, specialist's assistant, osteopath, chiropractor, physical therapist, occupational therapist, registered professional nurse, licensed

practical nurse, dentist, podiatrist, optometrist, pharmacist, psychologist, licensed master social worker, licensed clinical social worker, speech pathologist, or audiologist.⁵⁹

CRIMINAL

Older adults, in particular those who suffer with dementia, are extremely susceptible to abuse, including, but not limited to, physical, psychological, emotional abuse, and financial exploitation. Such abuse is perpetrated not only by strangers but by family members and professionals. It is the government's role to reduce the rates of abuse and ensure that criminal acts committed against older adults and those that suffer with dementia are prosecuted. To that end, New York County – and other counties throughout New York – has established Elder Abuse Units to address the needs and concerns of older crime victims and to enforce laws designed to protect older adults.

The state's criminal laws recognize that older adults can fall victim to crime and punish the perpetrators of criminal acts, such as fraud and identity theft,⁶⁰ offenses that endanger the welfare of vulnerable elderly and incompetent persons,⁶¹ and hate crimes, where the perpetrator intentionally commits a crime against an individual who is 60 years of age or older.⁶²

CONCLUSION

Although this article focuses on the bigger picture and provides an overview of some laws enacted to protect older individuals, we as lawyers must be cognizant of what we can do on an individual level to ensure the protection of one of society's most vulnerable populations. We must recognize the need for sensitive and expert advice to assist our clients and their families as they navigate through this "legal maze." As we serve this vulnerable population, we must strive to further our knowledge and understanding not just of the laws referenced in this article but also of the other professional services available to older adults, especially those suffering with dementia. As such, an interdisciplinary approach to this field must be encouraged to ensure older adults and their families receive all the services and support they require.

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ENDNOTES

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5. N.Y. State, *supra* note 3.
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8. 9 N.Y.C.R.R. § 6651.2(f) (1987).
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15. N.Y. Real Prop. Law § 227-a (McKinney 1999).
16. N.Y. Gen. Bus. Law § 352-eeee (McKinney 1988).
17. N.Y. Gen. Bus. Law §§ 352-eee (McKinney 1988).
18. N.Y. Elder Law § 209 (McKinney 2016).
19. N.Y. Soc. Serv. Law § 461 (McKinney 1984).
20. N.Y. Priv. House. Fin. Law, Art. XXV.
21. N.Y. Veh. & Traf. Law § 506(1) (McKinney 1973).
22. N.Y. Real Prop. Tax Law § 467 (McKinney 2016).
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24. N.Y. Real Prop. Tax Law § 425 (McKinney 2016).
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29. Pub. L. 104-191, 110 Stat. 1936 (1996).
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36. N.Y. Gen. Oblig. Law, Art. 5, Tit. 15.
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38. N.Y. Pub. Health Law § 2801-d(1) (McKinney 2009).
39. *Id.*
40. *Id.* at (4).
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60. N.Y. Penal Law, Art. 190 (McKinney 2016).
61. N.Y. Penal Law, Art. 260 (McKinney 2016).
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