

OCTOBER 1996  
VOL. 30 ■ NO. 6

# CLEARINGHOUSE REVIEW

JOURNAL OF POVERTY LAW

## INSIDE

Medicare Managed  
Care

Assisted Living

Including Elders in  
Family Court

Mediation of Disputes in  
Adult Guardianship  
Cases

Americans with  
Disabilities Act and  
Social Security Act

Exclusion from Services

Tobacco

Legal Services Delivery



# Elder Law

Copyright 1996 by the National Clearinghouse for Legal Services, Inc. All rights reserved.

## **Not Just for Kids: Including Elders in the Family Court Concept**

*By Erica F. Wood and Lori A. Stiegel*

Erica Wood and Lori Stiegel are both associate staff directors of the American Bar Association Commission on Legal Problems of the Elderly, 740 15th St. NW, Washington, DC; (202) 662-8690.

### **I. Introduction**

National and state judicial systems are poised at a time of change. The "future of the courts" /1/ must take account of the technology revolution, globalization of the economy, shifts in power to the states, increasing diversity, and the demographics of aging. As "baby boomers" begin to bulge the older population, questions will emerge for elder law advocates and judicial experts. How can courts best prepare for an aging society? What attributes of court systems will effectively protect the rights and respond to the needs of older persons? What type of judicial milieu should we aim for? What should be the range of dispute resolution options to best "fit the forum to the fuss" /2/ for the elderly? What expertise should decision makers possess? How should the court fit into the broader system of elder rights?

One slant on these queries is to look at how state courts are organized and managed. A number of states have established special family courts. Although the focus of a family court generally is on divorce and dissolution, custody, child support and visitation, adoption, spousal and child abuse, and juvenile delinquency, older persons are integral to family and family problems. As demographics change, families increasingly include older persons and their adult children, three and even four generations with differing but interrelated needs. This article examines the potential of family court to ensure justice for the elderly.

### **II. The Family Court Idea: Boon to Elders?**

The concept of family court is not new. The first model was created in Cincinnati, Ohio, in 1914. Almost 50 years later, a statewide system was established in Rhode Island (1961), followed by Hawaii (1964), South Carolina (1968), the District of Columbia (1970), and Delaware (1971). Within the next 25 years, New Jersey, Connecticut, New York, and Vermont moved to institute versions of family court. Other states have family courts or experimental pilot sites in specific districts or circuits. State-level commissions in eight states have actively considered the creation of family courts during the past four years. /3/ Growing interest in family court systems prompted the National Council of Juvenile and Family Court Judges to convene a National Family Court Symposium in 1990, which produced recommendations for a model family court. /4/

A family court system brings together under one judicial administrative division jurisdiction over all cases relating to families. This prevents piecemeal solutions to family crises; avoids duplication,

delay, and forum shopping; and allows for integration of social services within the court structure for a more humane result. At the heart of the family court concept are several key tenets that could be of real benefit to older persons.

### **A. *Therapeutic Approach to Helping Families***

A hallmark of the family court concept is a holistic "balancing of legal issues with psychological and sociological concerns." /5/ The National Family Court Symposium described the family court as an institution that "takes into account the special needs, feelings, and individual rights of the people it serves." /6/ Elder law attorneys and advocates know that legal problems of the elderly -- especially in protective services and surrogate decision making, advance planning, bioethics, and health and long-term care -- are intertwined with themes of family relationship, the psychology of aging, and the need for supportive community resources. With elders, law can rarely be considered in a vacuum. The family court ecology might be a good fit.

### **B. *Coordination and Management of Court and Community Resources***

Inherent in the idea of family court is the coordination of (1) multiple cases concerning the same family and (2) multiple court and community services for families. For example, an adult guardianship case may involve a pending elder abuse charge, family counseling, mental health and capacity screening, case management services, and home and community-based care. According to the National Family Court Symposium's model recommendations, the family court should "facilitate the coordination and management of the various adjunct agencies which provide services" /7/ to families, that is, it should have a coordinator for internal court management activities as well as liaison for community services relevant to family court cases. This might bring a new depth to guardianship and related cases and enable more robust consideration of all of the angles and possibly more frequent imposition of less restrictive alternatives.

Moreover, extending the theme of court-community coordination, family courts could play an important role in linking the judicial system with the aging network. This was a key recommendation of the National Conference on Court-Related Needs of the Elderly and Persons with Disabilities. The conference called for interdisciplinary coordinating committees including judicial players (judges, court management personnel), members of the aging network (state and area agencies on aging, social service providers, aging organizations) and members of the disability network (the protection and advocacy agency, centers for independent living, disability advocates, access experts). /8/

Regular interaction between state/area agencies on aging and family court personnel could spark more effective legal representation and better referrals, as well as identify service gaps. Under the Older Americans Act, state agencies on aging are responsible for advancing elder rights by helping older persons understand their options, to exercise choices, to benefit from services and opportunities authorized by law, and to resolve disputes. /9/ State agencies could work in partnership with family courts, bar associations, and legal services advocates. Their combined vision could be a powerful resource.

### **C. Accessibility**

Conferees at the National Family Court Symposium believed that the family court should be designed to meet the "psychological, space and security needs" of children and families. /10/ Accordingly, they recommended that family courts include waiting rooms for children and witnesses, child evaluation facilities, and offices for family meetings. Integrating older people into family court would compel an emphasis on barrier removal and accessibility.

Indeed, all courts should target physical access and user-friendly procedures to meet the needs of a diverse and aging population. The Trial Court Performance Standards recommend that court facilities be "safe, accessible, and convenient to use" and that "all who appear before the court are given the opportunity to participate effectively without undue hardship or inconvenience." /11/ In 1991, the National Conference on Court-Related Needs of the Elderly and Persons with Disabilities urged that each judicial district develop an accessibility plan to meet the requirements of the Americans with Disabilities Act (ADA) /12/ and to make justice accessible for all persons, including those with impairments. /13/ Calling for a judicial system based on the principles of "universal design," the conference supported case management that allows for flexible scheduling to accommodate individual needs (transportation, time of day, illness, medication effects) and that flags cases needing special processing or assistance early in the judicial process. /14/ These recommendations were endorsed by the ABA House of Delegates in August 1991.

Family courts could provide leadership by showcasing accessible facilities. They could demonstrate innovative ways to meet the ADA mandates of program accessibility, effective communications (including provision of auxiliary aids), and modification of rules and procedures to avoid discrimination against persons with disabilities. Family courts, for instance, could have doors that open easily, lever door handles, upgraded lighting and acoustics, comfortable waiting rooms, and available telephones. Courtrooms with movable furniture could be changed to suit an intimate proceeding involving abuse or end-of-life treatment. Court forms could be in large type and plain language, minimizing "legalese." Kiosks or videos could direct people to court services. Family courts could welcome appropriate support persons, schedule frequent breaks, and encourage court visits to orient families in advance. They could have an "access hot line" or ombudsman to coordinate accommodations and answer questions as well as personnel trained in responding to the needs of elders. Many ways of facilitating access are low in cost. In cooperation with community resources, family courts could share the price of accommodations and make good use of volunteers.

### **D. Judicial Education**

The National Family Court Symposium conferees agreed that issues addressed in family court would be complex and would require special knowledge and skills. They recommended mandatory judicial education and training in family law and family issues. /15/ This could include grounding in basic issues of elder law, including capacity, advance directives, protective services, bioethics, and long-term care. Judges could bring to bear up-to-date knowledge of case law, recent legislative changes, community resources, and communication techniques, thereby making for more fine-tuned decisions involving older persons.

## **E. *Alternative Dispute Resolution***

Family courts should incorporate a full range of dispute resolution options. The National Family Court Symposium recommended that "the procedure of the family court should stress alternatives to the adversarial model whenever appropriate and consistent with constitutional safeguards." /16/ A family court "often consolidates alternative dispute resolution tools such as mediation, arbitration, settlement conferences and status conferences into more focused and authoritative procedures." /17/

Mediation and other forms of dispute resolution have exciting potential to help older persons solve problems promptly and humanely. They offer approaches that are quick, inexpensive, convenient, and informal. The solutions that emerge from alternative dispute resolution can be more creative and more suited to individual needs than might be possible through traditional legal channels. /18/ The National Conference on Court-Related Needs of the Elderly and Persons with Disabilities urged that each judicial district have "the means to screen, refer, and provide alternative dispute resolution in appropriate cases involving elderly persons and persons with disabilities. . . ." /19/

A number of cutting-edge projects throughout the country are demonstrating the promise of mediation to address aging issues. Courts are testing mediation in selected adult guardianship disputes. /20/ Hospitals and nursing homes are beginning to consider mediation of acute and chronic care conflicts, as well as bioethical dilemmas. /21/ The Department of Justice promotes the use of mediation in resolving Americans with Disabilities Act claims. /22/ Moreover, the Older Americans Act supports the development of alternative dispute resolution options. /23/ In 1995, a national conference on "Collaborative Approaches: Disability, Aging, and Dispute Resolution" highlighted imaginative applications of dispute resolution and offered a glimpse of what may be ahead.

The blossoming of alternative dispute resolution for the elderly and the goals of the family court in supporting nonadversarial settlements could converge. Family courts are squarely positioned to foster exactly the kind of dispute resolution that is now being pioneered.

## **F. *Concerns About Family Courts***

Naturally, a distinct court -- particularly one involving special training and services -- raises concerns about adequate resources and added costs. Judge and court staff qualifications, burnout, and turnover also need consideration. Legal issues of older persons do not always concern family and thus may not be appropriate for family court. At the same time, older persons face problems, such as the loss of the ability to drive, that may not be handled in family court, although a holistic approach would be highly beneficial.

The National Family Court Symposium participants made a number of recommendations to address these concerns. These include (1) ensuring that family court judges be appointed or elected specifically to that court; (2) requiring that the judges have interest and experience in children's and family issues and law; (3) according family court judges the same status as general jurisdiction court judges; and (4) expecting family court judges to commit to serving an extended period of time on the family court bench and to participating in ongoing training in family law matters. /24/

### **III. The Family Court Jurisdiction: What Aging Cases Fit?**

#### **A. Adult Guardianship**

The total number of adult guardians in state courts is not known, but a 1987 estimate placed it at 400,000 to 500,000, and it most likely has increased since then. /25/ Although adult guardianship is an important part of the business of state courts, it is dwarfed by other components of state court caseloads, including juvenile, domestic relations, criminal, civil, and traffic cases. /26/ Many guardianships are decided in probate court, with decedents' estates and will contests. Others come before general jurisdiction courts, sometimes "sandwiched between" felony trials. /27/

Adult guardianship has undergone significant reform in the past decade. However, further changes are required to bring about more tailored guardianship decisions, full consideration of less restrictive alternatives, and better guardianship services. Many court hearings are still cursory. Judges generally continue to write plenary rather than limited orders. Monitoring, though strengthened, is still uneven. Guardians often lack sufficient direction from the court to provide a full measure of assistance to wards. Courts frequently lack contact with community resources that could affect guardianship decisions and plans. /28/

One answer might be to place adult guardianship in family court. The National Family Court Symposium recommended that "family court jurisdiction should include adult and juvenile guardianship and conservatorship." /29/ Family courts might prove a better setting than probate or general jurisdiction courts. They might spur a more unified approach toward multifaceted guardianship cases, which typically have medical, social services, psychological, and financial as well as legal aspects. Trained judges could better grapple with intractable determinations about capacity, placement, family dynamics, and health care. Family courts might allow more time for complex guardianship cases to unfold. The judiciary might be less likely to grant plenary guardianships without examining other options. Of course, this assumes a family court with sufficient funding, visibility, and status. While it might not solve all guardianship ills, it may be a better match than a probate or general jurisdiction court where the myriad of human factors sometimes gets short shrift.

#### **B. Elder Abuse**

While recommendations about family court jurisdiction usually incorporate child abuse and domestic violence, /30/ elder abuse is not generally included in the family court domain. Participants in a 1995 study on elder abuse and state courts conducted by the American Bar Association Commission on Legal Problems of the Elderly did not reach consensus that elder abuse cases should be handled in family courts and instead recommended that the issue be studied further. /31/

One criterion used to determine whether a subject belongs in the family court's jurisdiction is whether the issue is likely to be a onetime event. Because many incidents of elder abuse are not

likely to be settled by a single visit to a court, they fit this criterion. /32/ In addition, cases involving elder abuse could benefit from the therapeutic approach as well as the case management offered by a family court. Judges and lawyers have indicated that different divisions of a court may have jurisdiction over related cases involving elder abuse without knowledge of that fact. /33/ For example, an abuser could petition for guardianship over an abused elder in probate court while being tried for abuse in the criminal court. Because elder abuse and guardianship are often linked, it may be valuable to have the same court hear both types of cases. Moreover, a judge who is knowledgeable about child abuse and domestic violence is likely also to understand and appreciate the dynamics of elder abuse.

On the other hand, elder abuse encompasses more than physical violence and sexual abuse, and family courts may be less adept at handling such matters as financial and institutional abuse. The current trend toward criminalizing aspects of elder abuse also poses complications in determining court jurisdiction of these issues. Participants at the National Family Court Symposium did not reach a consensus on including criminal cases within the family court's jurisdiction and instead articulated the advantages and disadvantages in their report. /34/

### **C. Cases Affecting Grandparent Caregivers**

Most family courts include abuse and neglect, adoption, custody, visitation, and guardianship cases within their purview. Accordingly, those types of cases that happen to involve grandparents as caregivers for their grandchildren would seem to be encompassed within the family court's jurisdiction. Other types of grandparent cases in which family courts might become involved include (1) granting the grandparent authority to make medical and other health treatment decisions on behalf of the child; (2) granting the grandparent authority to enroll the child or children in school; and (3) protecting the safety of the responsible or custodial grandparent from abusive children. Family court judges and other court personnel should be knowledgeable about laws, programs, and services for older persons and special programs that may provide benefits or other help to a family composed of children and a grandparent.

### **D. End-of-Life Treatment Cases**

The National Family Court Symposium recommended that "legal-medical issues, e.g., right to die . . . and living wills" fall within the jurisdiction of family court. /35/ Since such cases usually involve family disputes, it seems logical and appropriate that they be heard by judges trained in matters of family dynamics and in courts adept at linking to services and counseling as well as using various forms of dispute resolution. Nevertheless, one might question whether those cases that involve disputes between an institution and the family, rather than between two sides of the family, belong in the family court setting. The balance of power and dynamics may be quite different in cases involving institutional disputes, and these cases may be more likely to raise constitutional issues.

## **IV. Court for Elders Only?**

In 1996, the Florida Department of Elder Affairs proposed a bill authorizing the demonstration of an "Elder Courts Division" in three of the state's largest and most elderly judicial circuits. /36/ The impetus behind this proposal, apparently the first of its kind in the country, was the Governor's

Elder Abuse Prevention Task Force. Its members believed that the state's elderly could and should benefit from the therapeutic approach offered by family courts and that a court devoted solely to elders' issues would be capable of handling cases expeditiously.

Interdisciplinary teams with members trained in aging were to be an integral part of the courts' function. The courts were to be available around the clock seven days a week and were to be granted jurisdiction over probate, guardianship, trusts, crimes against the elderly, abuse, neglect, exploitation, mental health commitments, health care advance directives, and other areas determined by the circuit's chief judge. Alternative dispute resolution mechanisms were to be required. Moreover, training of judges and court personnel on aging issues was deemed mandatory, as was public and provider education about the court's role.

The state courts administrator raised concerns about the costs associated with the proposed demonstration project. Based on experience in developing family courts, the administrator indicated that costs could be significant for members and management of the interdisciplinary teams; case management personnel; revision of court procedures and record management; security, facilities, and staffing for round-the-clock courts; transportation of elderly criminal defendants from one court facility to another; education of judges, court staff, the public, and service providers as required in the bill; and training, recruitment, and management of volunteers to assist in the elder courts. As a result of the administrator's concerns, the proposal was amended dramatically. /37/ The demonstration projects were eliminated, and the bill instead called upon the Judicial Management Council to study court response to older persons. The bill passed the House but was not considered by the Senate. Nevertheless, the Supreme Court of Florida agreed that the Judicial Management Council would study the issue. /38/

Florida's proposal raises interesting issues. Advocates need to examine carefully whether it is more advisable to work toward (1) making all courts more accessible, as recommended by the National Conference on Court-Related Needs of the Elderly and Persons with Disabilities; (2) including elderly issues in family courts; or (3) establishing a separate court for older persons only.

## **V. Conclusion**

The prospect of including aging issues in family courts raises many questions. Answers will require research and further thought. Meanwhile, elder law attorneys and advocates should be involved in the debates about developing family courts and establishing their jurisdiction. Without them, the questions about including older persons' issues in the jurisdiction of family courts probably would not be raised. Bar association sections and committees on elder law, as well as task forces on family violence or elder abuse, may offer useful forums for entering the debate.

### Footnotes

/1/ The American Bar Association (ABA) reports that justice commissions or court futures commission activities are in place or being considered in 22 jurisdictions, while others are following up previous futures work. ABA Office of Justice Initiatives, Summary of State and Local

Justice Initiatives 4 (1995). See also the list of court futures projects funded through the State Justice Institute.

/2/ Larry Ray, *Fitting the Forum to the Fuss*, *Common Ground*, Sept. -- Oct. 1989, at 14 -- 17.

/3/ Information from Hunter Hurst, Jr., National Center for Juvenile Justice (July 1996). Definitions of family courts differ. The center lists 13 states with family courts or pilot sites in specific districts or circuits. These include: Maine, Virginia, Pennsylvania, Illinois, Nevada, Kentucky, Minnesota, Alabama, Mississippi, California, Florida, Missouri, and Oregon. State-level commissions have considered family courts in Colorado, Utah, Kansas, Ohio, North Carolina, Indiana, Washington, and Maryland. See also Robert E. Shepherd Jr., *The Unified Family Court: An Idea Whose Time Has Come*, *ABA Crim. Just. Sec. News*, fall 1993, at 37 -- 39.

/4/ Sanford Katz & Jeffery Kuhn, National Council of Juvenile and Family Court Judges, *Recommendations for a Model Family Court: A Report from the National Family Court Symposium* (May 1991). These recommendations were endorsed by the ABA Section of Family Law. The ABA reaffirmed its commitment to unified children and family courts in a resolution passed by the ABA House of Delegates in August 1994.

/5/ Jeffrey A. Kuhn, *The Family Court: A Better Brand of Justice for Nevada's Children and Their Families*, *Nev. Fam. L. Rep.*, spring 1992, at 3.

/6/ Katz & Kuhn, *supra* note 5, at 1.

/7/ *Id.* at 10.

/8/ *Id.* at Recommendation I(A).

/9/ 42 U.S.C. Sec. 3058j.

/10/ Katz & Kuhn, *supra* note 5, at 2 -- 3.

/11/ National Ctr. for State Courts & Bureau of Justice Assistance, *Commission on Trial Court Performance Standards*, *Trial Court Performance Standards Standards 1.2, 1.3* (1990).

/12/ ABA Comm'n on Legal Problems of the Elderly et al., *Court-Related Needs of the Elderly and Persons with Disabilities: A Blueprint for the Future -- Recommendations of the February 1991 Conference* (1991) (Recommendation II(A)).

/13/ *Id.* at 3, Preamble.

/14/ *Id.* at Recommendation VI.

/15/ *Id.* at Recommendation 12.

/16/ Katz & Kuhn, *supra* note 5, at Recommendation 5.

/17/ Kuhn, *supra* note 6, at 3.

/18/ Robert Hoffman & Erica Wood, *Mediation: New Path to Problem Solving for Older Americans*, Senior Consumer Alert, Winter 1991 -- 92. See also American Ass'n of Retired Persons' Consumer Affairs Section, *Stop! You're Both Right! A Guide for Dispute Resolution Programs in Serving Older Americans* (1995).

/19/ ABA Comm'n on Legal Problems of the Elderly, *supra* note 13, at Recommendation V(A).

/20/ The Center for Social Gerontology, *Adult Guardianship Mediation Manual* (forthcoming Fall 1996). See also Susan Hartman & Saily Barinaga-Burch, *Mediation Can Provide a Good Option in Adult Guardianship Cases*, Soc'y of Profs. in Disp. Resol. News, Winter 1996. Additionally, an ABA study on elder abuse and the courts, *infra* note 32, recommended that use of alternative dispute resolution in elder abuse cases should be studied further.

/21/ Nancy N. Dubler & Leonard J. Marcus, *Mediating Bioethical Disputes: A Practical Guide* (1994). See also Erica Wood & Naomi Karp, *Mediation: Reframing Care Conflicts in Nursing Homes*, *Generations*, Winter 1994; and Erica Wood & Naomi Karp, "Fitting the Forum to the Fuss" in *Acute and Long-Term Care Facilities*, 29 *Clearinghouse Rev.* 621 (Oct. 1995).

/22/ Key Bridge Found. for Educ. and Research, *Want to Resolve Your ADA Complaint?* (1996). See also Disability Rights Section, Civil Rights Div., *Enforcing the ADA: A Status Report from the Department of Justice* (1996). Each quarterly report includes a section on mediation.

/23/ 42 U.S.C. Sec. 3058j(b)(7).

/24/ Katz & Kuhn, *supra* note 5, at Recommendations 6 -- 12.

/25/ Associated Press, *A Special Report -- Guardians of the Elderly: An Ailing System* (1987). See also The Center for Social Gerontology, *National Study of Guardianship Systems: Findings & Recommendations* (1994).

/26/ National Ctr. for State Courts et al., *Examining the Work of State Courts: Annual Report* (1994). See also National Ctr. for State Courts et al., *The Pulse of Justice: The Business of State Trial and Appellate Courts* (1993).

/27/ Interview with Hon. Robert L. Harris, Chief Circuit Court Judge, Richmond, Va. (1993).

/28/ The Center for Social Gerontology, *supra* note 21. See also *Guardianship*, 17 *Md. J. Contemp. Legal Issues* (1995 -- 96) (including eight articles on guardianship); ABA Comm'n on Legal Problems of the Elderly, *State Guardianship Legislation: Directions of Reform* (1988 -- 95) (annual state legislative summaries); ABA Comm'n on Legal Problems of the Elderly & Comm'n on Mental and Physical Disability Law, *Guardianship: An Agenda for Reform* (1989).

/29/ Katz & Kuhn, *supra* note 5, at Recommendation 17.

/30/ *Id.* at Preface and Recommendations 13 -- 15.

/31/ Lori A. Stiegel, *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse* 25 (1995).

/32/ Victor Eugene Flango & H. Ted Rubin, *How Is Court Coordination of Family Cases Working?*, *Judges J.*, Fall 1994, at 11.

/33/ Katz & Kuhn, *supra* note 5, at 24.

/34/ *Id.* at Comment to Section III. Additionally, it is interesting to note that some jurisdictions such as Dade County, Florida, have established specialized domestic violence courts. Information from Hunter Hurst, Jr., *supra* note 4.

/35/ Katz & Kuhn, *supra* note 5, at Recommendation 17.

/36/ Fla. H.B. 1451 (1996).

/37/ Fla. H.B. 1451 (1996) (as amended).

/38/ Conversation with Emily Moore, General Counsel of the Florida Department of Elder Affairs (July 19, 1996).