

Facts About

Law and the Elderly



“Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence.”

— John Adams, December 1770

ABA American Bar Association

Division for Media Relations and Public Affairs

Acknowledgments

The information for *Facts About Law and the Elderly* was compiled with the help of the American Bar Association Commission on Law and the Elderly and its staff, primary among them Nancy Coleman, Charles Sabatino, Erica Wood, Lori Stiegel, Naomi Karp and Norma Gregerman. The book was created for use by members of the media by the ABA Division for Media Relations and Public Affairs.

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Introduction

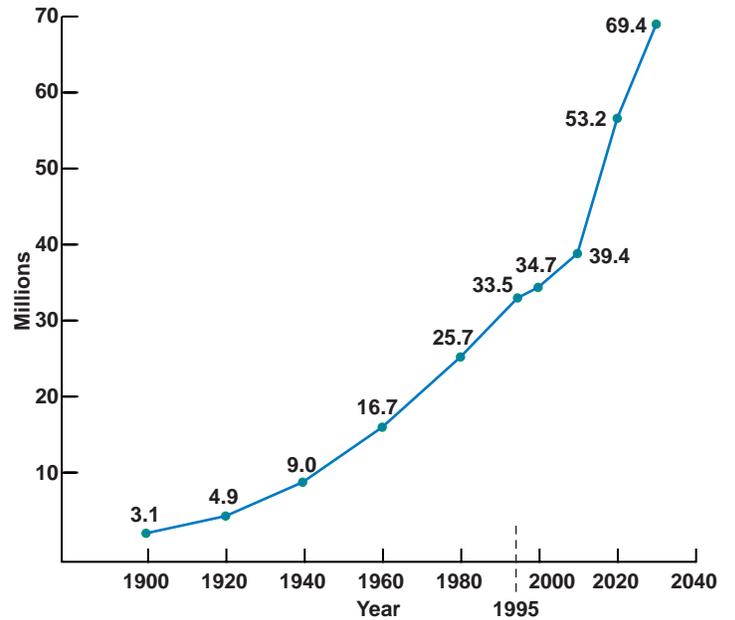
Question 1 How many older Americans are there?

Answer There were some 33.5 million people 65 years of age or older in 1995, representing 12.8 percent of the population, an increase of 2.3 million, or seven percent, since 1990, compared to an increase of five percent for the under-65 population.

The older population will continue to grow. The growth will slow during the 1990s because of the relatively small number of babies born during the Depression, and will increase most rapidly between 2010 and 2030, when the “baby boom” generation reaches age 65. There will be about 70 million older Americans in 2030, more than twice as many as in 1990. They are expected to represent about 20 percent of the population at that time.

Source: U.S. Bureau of the Census

Graph 1 / Number of Americans Age 65 and Older 1900–2030



Source: U.S. Bureau of the Census

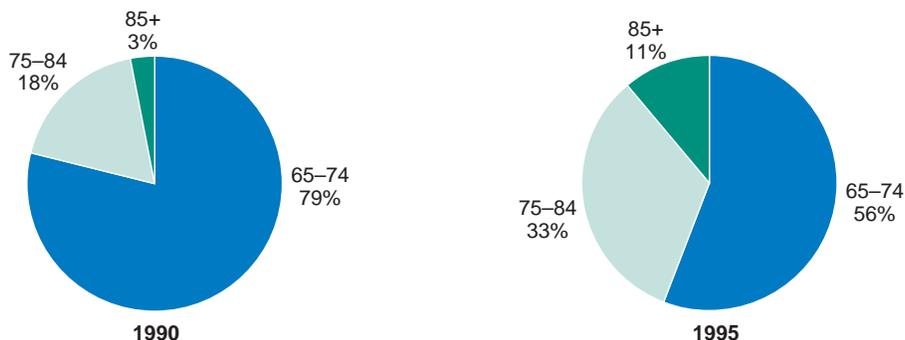
Question 2 How old is the population of older Americans?

Answer The older population is getting older. In 1995 the 65–74 age group (18.8 million) was eight times larger

than in 1900, the 75–84 group (11.1 million) was 14 times larger, and the 85+ group (3.6 million) was 29 times larger. A child born in 1995 could expect to live 75.8 years, about 28 years longer than a child born in 1900.

Source: U.S. Bureau of the Census

Graph 2 / Percent of Americans Age 65+ by Age Group, 1990 and 1995



Source: U.S. Bureau of the Census



Question 3 What legal issues are becoming more prominent as the demographics change?

Answer Among the most important legal issues affecting the elderly in America are those that have an effect on a person's independence — the right to care for oneself even in the face of difficulty rather than to be placed under guardianship, for example, and the right to make one's own decisions about health care and end of life planning. As the population ages, it is also becoming

much more common for children to need to care for their aging parents, which sometimes leads to stresses that result in elder abuse. And another fact of American demographics — our high divorce rate — has made the move to recognizing grandparents' rights more prominent as well. This booklet cannot pretend to answer every law-related question affecting the elderly; instead, it focuses on these four topics that have major effect on the way we live, and end, our lives.



Elder Abuse

Question 4 What is elder abuse?

Answer Elder abuse may take many forms. Statutory definitions of elder abuse may include physical abuse, psychological or emotional abuse, sexual abuse, financial exploitation, neglect, abandonment, and even self-neglect. As a result, the courts may see elder abuse in a variety of contexts: criminal cases of assault, battery, rape or theft (which may carry enhanced penalties when committed

against an older person); civil fraud or conversion matters; personal injury actions; guardianship or conservatorship; mental health commitment; special protective proceedings; cases involving health care decisions for an incapacitated patient; and criminal or civil cases regarding institutional care.

Sources: Stiegel, Lori A., *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse*, American Bar Association, 1995

National Center on Elder Abuse, What is Elder Abuse?
http://www.interinc.com/NCEA/Elder_Abuse/

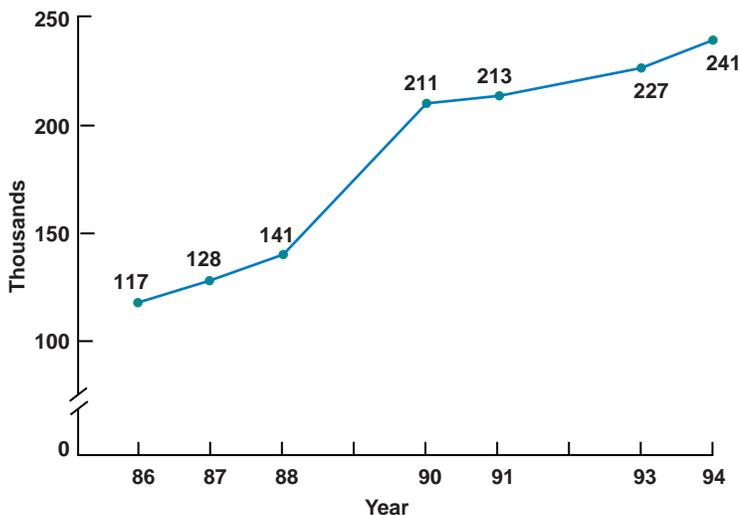
Question 5 How many incidents of elder abuse are there each year?

Answer The extent of elder abuse is not completely known, but it is widely agreed that the problem affects a significant number of older persons. The National Aging Resource Center on Elder Abuse (now the National Center on Elder Abuse) estimated that 820,000 elders became victims of elder abuse in 1994, excluding self-neglecting elders. Adding self-neglecting elders raised the number of victims to 1.86 million.

It is also expected that the number of reported cases will grow. The nation’s elderly population is growing at a much greater rate than any other segment. As people live longer, frailty and vulnerability increase, along with the potential to become victims of abuse, fraud and exploitation. In addition, recent initiatives by government agencies and by professional organizations have expanded awareness of elder abuse and fostered increased reporting. The National Center on Elder Abuse reports that there was a 106 percent increase in the number of reported cases between 1986 and 1994, from 117,000 to 241,000.

Source: National Center on Elder Abuse, Elder Abuse Information Series #2
<http://www.interinc.com/NCEA/Statistics/>

Graph 3 / Reported Cases of Elder Abuse 1986–1994*



* figures exclude self-neglecting elders

Source: National Center on Elder Abuse, Elder Abuse Information Series #2



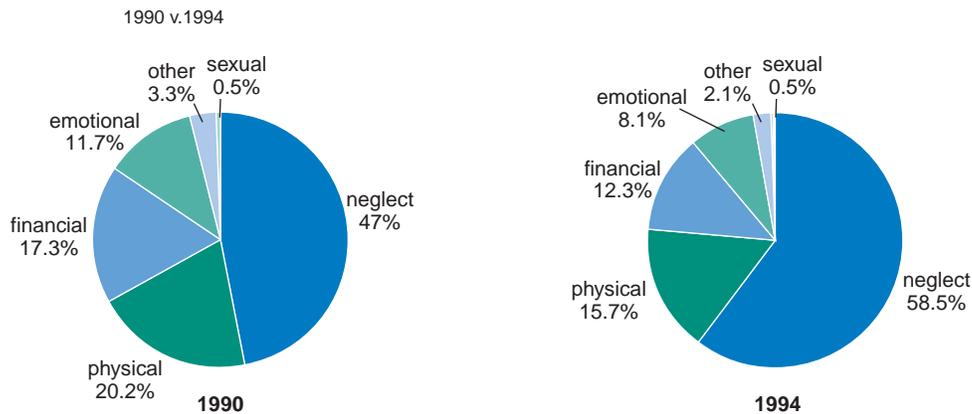
Question 6 What is the most common type of elder abuse?

Answer According to figures from the National Center on Elder Abuse, neglect is the most common form of elder maltreatment, and its incidence grew dramatically between 1990 (47 percent) and 1994 (58.5 percent).

Physical abuse in 1994 accounted for 15.7 percent of cases (down from 20.2 percent in 1990), while financial exploitation represented 12.3 percent of substantiated reports (down from 17.3 percent in 1990).

Source: National Center on Elder Abuse, Elder Abuse Information Series #2 <http://www.interinc.com/NCEA/Statistics/>

Graph 4 / Prevalence of Various Types of Elder Abuse



* figures exclude self-neglecting elders
Source: National Center on Elder Abuse, Elder Abuse Information Series #2



Question 7 Who are the abused?

Answer The majority of elder abuse victims are female, although the gender gap narrowed between 1990, when 68.3 percent of reports involved female victims, and 1994, when 62.1 percent of reported victims were female. The median age of elder abuse victims (excluding self-

neglecting elders) was 76.5 years in 1994; the median age of self-neglecting elders was 77.2 years. In 1994, 65.4 percent of victims were white, 21.4 percent were black and 9.6 percent were Hispanic. The proportions of Native American and Asian American/Pacific Islander victims were each less than one percent.

Source: National Center on Elder Abuse, Elder Abuse Information Series #3 <http://www.interinc.com/NCEA/Statistics/>



Question 8 Who are the abusers?

Answer More than two-thirds of perpetrators are family members, typically adult children, most often those serving as caregiver. There was no significant difference in the ratio of male to female abusers in 1994 — 50.6 percent were male, and 49.3 percent female.

Source: National Center on Elder Abuse, Elder Abuse Information Series #2
<http://www.interinc.com/NCEA/Statistics/>



Question 9 How many states have laws about elder abuse?

Answer All 50 states and the District of Columbia have enacted legislation addressing domestic or institutional abuse of the elderly. The statutes vary widely in the age at which a victim is covered; the definition of elder abuse; classification of the abuse as criminal or civil; types of abuse covered; reporting requirements; investigation procedures; and remedies. The laws, however, were

written as long as 20 years ago, and were based on the laws addressing child abuse, which primarily concern physical abuse. As a result, these old laws are weak on matters such as financial exploitation (children have no money to exploit), and offer few remedies other than removal of the abused person from the setting where the abuse is occurring or provision of services intended to alleviate or terminate the abuse.

Source: Stiegel, Lori A., *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse*, American Bar Association, 1995



Question 10 Is the reporting of abuse mandatory?

Answer Reporting of abuse is mandatory in some states by some persons, but the requirements vary widely. Colorado, Illinois, Iowa, Kentucky, New York, North Dakota, South Dakota and Wisconsin are the only states without some form of mandatory reporting.

Source: Stiegel, Lori A., *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse*, American Bar Association, 1995

See Table 1 on following page.



Question 11 What are the sanctions for failure to report abuse?

Answer That depends on the state. People who are required to report elder abuse who fail to fulfill their responsibilities may be found guilty of a misdemeanor and either jailed or fined. Some state laws provide that such a person may be held liable for damages incurred by an abused person as a result of failure to make a report. In addition, some statutes specify that a mandated reporter who is a licensed professional may be reported to the

appropriate licensing authority for failure to report. Some states, on the other hand, impose no sanctions.

Every state has at least one statute providing immunity from civil and/or criminal liability to anyone who makes a report of abuse in good faith. Most such statutes also provide that the immunity doesn't apply if the person making the report is also the person who committed the abuse that was reported.

Source: Stiegel, Lori A., *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse*, American Bar Association, 1995

See Table 2 on page 8.

Table 1 / State-by-State Mandatory Reporting Requirements—Who Must Report Elder Abuse*

State	Health Professional	Human Services Professional	Clergy	Law Enforcement	Long Term Care Facility Employee	Financial Professionals and Staff	Other	Any Person
Alabama	•							
Alaska	•	•	•	•	•			
Arizona	•	•		•	•	•	•	
Arkansas	•	•		•	•			
California	•		•	•		•		
Colorado								
Connecticut	•	•	•	•	•			
Delaware					•		•	•
District of Columbia	•	•		•	•			
Florida	•			•	•	•	•	
Georgia	•	•	•	•	•		•	
Hawaii	•	•		•	•		•	
Idaho	•	•		•	•		•	
Illinois								
Indiana	•	•		•	•			•
Iowa								
Kansas	•			•			•	
Kentucky								
Louisiana								•
Maine	•			•				•
Maryland	•	•		•				•
Massachusetts	•	•		•			•	
Michigan	•	•		•			•	
Minnesota	•	•		•	•		•	
Mississippi	•	•			•			•
Missouri	•	•	•	•	•		•	•
Montana	•	•		•	•		•	
Nebraska	•	•		•	•		•	
Nevada	•	•	•	•	•		•	
New Hampshire								•
New Jersey	•	•					•	
New Mexico								•
New York								
North Carolina								•
North Dakota								
Ohio	•	•	•	•	•		•	
Oklahoma					•			•
Oregon	•	•	•	•			•	
Pennsylvania								
Rhode Island	•	•		•	•		•	•
South Carolina	•	•		•	•		•	
South Dakota								
Tennessee								•
Texas								•
Utah								•
Vermont	•	•		•	•		•	
Virginia	•	•		•			•	
Washington	•	•		•	•			
West Virginia	•	•		•				
Wisconsin								
Wyoming								•

* Mandates derive from elder abuse and/or institutional abuse laws Source: American Bar Association Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse, 1995

Table 2 / State-by-State Mandatory Reporting Requirements—Sanctions for Failure to Report Elder Abuse

State	Misdemeanor	Jail	Fine	Civil Liability	Report to Licensing Authority
Alabama	•	•	•		
Alaska			•		
Arizona	•				
Arkansas	•				
California	•	•	•		
Colorado					
Connecticut			•		
Delaware			•		
District of Columbia	•	•			
Florida	•				
Georgia	•				
Hawaii	•				
Idaho	•				
Illinois					
Indiana					
Iowa	•			•	
Kansas	•				
Kentucky	•				•
Louisiana		•	•		
Maine					
Maryland			• 1		
Massachusetts			•		
Michigan			•	•	
Minnesota	•			•	
Mississippi	•		•		
Missouri	•				
Montana	•				
Nebraska	•				
Nevada	•				
New Hampshire	•				
New Jersey			•		
New Mexico	•				
New York					
North Carolina					
North Dakota					
Ohio					
Oklahoma	•				
Oregon			•		
Pennsylvania					
Rhode Island	•		•		
South Carolina	•	•	•		•
South Dakota					
Tennessee	•				
Texas	•				
Utah					
Vermont		•	•		
Virginia			•		
Washington					
West Virginia		•	•		
Wisconsin					
Wyoming					

¹ Maryland: Only for an employee of the institution where the abuse occurred

Source: American Bar Association Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse, 1995

Guardianship



Question 12 What does it mean to have “capacity”?

Answer Capacity is the ability to understand relevant information and make decisions to meet one’s essential daily needs. Adults are presumed by law to have capacity, unless a judge rules otherwise. Adults with capacity have the right to make decisions affecting their person — living arrangements, health care, marriage and so on — or property — spending, savings, and gifts of property

during life or after death. States have different tests for deciding whether someone has capacity to make decisions. Some are based on whether a person has a particular condition (such as a mental illness, mental retardation or dementia). Some are based on whether a person is able to make or communicate decisions. Others are based on the person’s ability to do certain things, such as manage money or make health care decisions. And some combine some or all of these factors.

Source: American Bar Association, *A Professional’s Guide to Capacity and Guardianship*, 1996



Question 13 What is guardianship?

Answer Guardianship is a legal relationship established following a court hearing, when a guardian is appointed by a judge to make decisions for another who lacks capacity. The authority granted to a guardian may cover virtually all aspects of the ward’s life, or it may pertain only to certain aspects. The guardian owes the incapacitated person a special duty of care and accountability.

Source: American Bar Association, *A Professional’s Guide to Capacity and Guardianship*, 1996



Question 14 Who needs a guardian?

Answer A guardian may be appointed when a person lacks capacity to make personal and/or property decisions, and may be at risk of harm without the protection of a guardian.

Source: American Bar Association, *A Professional’s Guide to Capacity and Guardianship*, 1996



Question 15 How is the decision made that a person needs a guardian?

Answer The process varies among the states, but in general it involves these steps:

- Someone petitions the appropriate court to declare the person in question incapacitated and to appoint a guardian.
- The alleged incapacitated person and certain family members are notified about the petition and hearing.

- The person is examined to assess capacity, usually by a doctor, psychologist or social service provider, or some combination of them. In some states, a “guardian ad litem” or “court visitor” also meets with the alleged incapacitated person, acting as the “eyes and ears of the court,” and makes a report to the judge.

A hearing is held, and the judge determines whether a guardian is necessary.

Source: American Bar Association, *A Professional's Guide to Capacity and Guardianship*, 1996



Question 16 How many adults are under guardianship in this country?

Answer No one knows. Guardianship cases are handled by different courts in different jurisdictions. Many courts do not process or do not keep adult guardianship records.

However, one estimate by the Associated Press in 1987 was that there were approximately 400,000 adults under guardianship in the United States, a number that has likely increased and is likely to continue to increase as the population ages.

Source: Associated Press, “Guardians of the Elderly: An Ailing System,” 1987



Question 17 What happens if an individual needs a guardian, but there is no family member or friend who is willing to or capable of acting as the guardian?

Answer Private guardians or guardianship agencies may be available for persons who can pay for their services. In some states or localities, public guardianship programs exist to serve low-income incapacitated persons. In jurisdictions without a public guardianship program, a government agency or official may serve as the guardian of last resort for poor persons.

Source: American Bar Association, *A Professional's Guide to Capacity and Guardianship*, 1996



Question 18 Can a guardianship ever be terminated?

Answer It is possible to terminate a guardianship and restore an incapacitated person's rights if he or she regains capacity. A court hearing is required. Restoration is rare, as it is often difficult for the incapacitated person to retain a lawyer and/or prove capacity.

Source: American Bar Association, *A Professional's Guide to Capacity and Guardianship*, 1996



Question 19 Are there disadvantages to guardianship?

Answer Guardianship may take away from an incapacitated person important legal rights (such as the right to vote, marry, decide where to live, make gifts or make health care decisions).

Guardianship can be expensive and emotionally difficult for everyone involved. And although guardians must report to the court in most states, sometimes no one makes sure that the guardian is acting appropriately on behalf of the incapacitated person.

Source: American Bar Association, *A Professional's Guide to Alternatives to Guardianship*, 1996



Question 20 Are there alternatives to guardianship for an incapacitated person?

Answer Less restrictive legal measures and social programs may serve to delay or even prevent guardianship. These may allow someone to make decisions or take actions for an incapacitated person without having a judge declare the person incapacitated and appoint a guardian.

Some of the alternatives must be planned by a person before he or she loses capacity, while others may be used to help someone who lacks some or all capacity and did not plan for that possibility.

Source: American Bar Association, *A Professional's Guide to Alternatives to Guardianship*, 1996

See Table 3 on following page.

Table 3 / Alternatives to Guardianship

Alternative	Effect of the Alternative
Durable Power of Attorney (DPA)	A durable power of attorney allows a capable persons to grant another person authority to act for him or her if incapacity occurs. DPAs usually affect property decision-making, but may also relate to health care.
Trust	A trust enables a person (“grantor”) to transfer ownership of property into a trust that is managed by a trustee for the benefit of the grantor. Trusts allow a trustee to manage property in the event of the grantor’s later incapacity.
Joint Ownership	Joint ownership of land or bank accounts may allow a co-owner to manage an incapacitated co-owner’s property.
Voluntary Guardianship Over Property	Allowed by only a few states, this enables a person who is worried about losing capacity to plan for property management with court oversight.
Daily Money Management (DMM)	Daily money management services help people with their financial affairs, including check depositing and writing, checkbook balancing, bill paying, insurance claim preparation, tax preparation and counseling, and public benefit applications and counseling. DMM is voluntary; a person must be capable of asking for or accepting services.
Representative Payee	A representative payee is appointed by a government agency to receive, manage and spend government benefits for a beneficiary. A beneficiary may request a representative payee, but usually the agency requires one when a beneficiary is incapable of managing benefits. The representative payee’s authority is limited to the government funds for which he or she is the payee.
Living Will	A living will gives directions about treatment desired if a person is terminally ill and near death, or in a “persistent vegetative state,” and cannot make or communicate health care decisions. Generally, laws limit the directions to those about the use, withdrawal or withholding of life-sustaining or life-prolonging procedures.
Health Care Power of Attorney	A health care power of attorney enables a person to name an agent or proxy to make health care decisions if he or she becomes unable to do so. It may address any type of health care decision, and may include guidance to the agent about the type and extent of health care desired.
Health Care Advance Directive	A health care advance directive combines the health care power of attorney and living will into one document.
Health Care Surrogate or Family Consent Laws	Health care surrogate or family consent laws provide legal authority for certain groups of persons (e.g., spouses, children or parents) to make health care decisions for an adult who cannot make or communicate such decisions due to disability, illness or injury, and who has not authorized someone else to do so.

Rights of Grandparents



Question 21 Do grandparents have visitation rights to their grandchildren?

Answer Traditionally, the common law denied grandparents visitation with a child over a parent's objections. But since 1965, all 50 states and the District of Columbia have enacted legislation enabling grandparents to petition the courts for visitation rights with grandchildren. The laws do not make granting of visitation rights automatic — they merely give grandparents the right to ask for a visitation order.

Source: American Bar Association, *Legal Guide for Older Americans*, 1997



Question 22 Who may petition for visitation?

Answer Many states permit only grandparents to petition for visitation, but some have extended the right to other relatives, such as great-grandparents, aunts, uncles and siblings, and even non-relatives with whom the child has a close relationship. In these and other areas, state law governs.

Source: American Bar Association, *Legal Guide for Older Americans*, 1997



Question 23 Under what circumstances may a petition be filed?

Answer Most commonly, a grandparent (or other permitted third party) may petition for visitation after the death of a parent or upon divorce of the parents. Some statutes allow petitions when a parent is incarcerated, when a child is born out of wedlock, and when the child has previously lived with the grandparent.

Source: American Bar Association, *Legal Guide for Older Americans*, 1997



Question 24 What standard is used in deciding whether to order visitation rights?

Answer In most states, the court must decide whether visitation is “in the best interest of the child.” A few grandparent visitation laws list specific factors the court should consider, such as the prior relationship between the grandparents and grandchildren, the mental and physical health of the parties, and the preference of the child, if the child is old enough to express a preference.

Source: American Bar Association, *Legal Guide for Older Americans*, 1997



Question 25 Will visitation be ordered after a child is adopted?

Answer Under state adoption laws, an adoption completely terminates the legal relationship between the child and the birth parent, and most courts have said that the relationship with the biological grandparents is terminated as well. When a grandchild is adopted by a stepparent (as when the grandparent’s child has died) or close relative, many state laws provide that the adoption does not automatically rule out grandparent visitation rights.

Source: American Bar Association, *Legal Guide for Older Americans*, 1997



Question 26 Will visitation be ordered when the child is in an “intact family”?

Answer No state statute specifically allows grandparents to seek visitation when the nuclear family is intact, and it is extremely rare for a court to grant visitation under such conditions. The decisions made by parents about what is in their children’s best interest will generally not be questioned by a court unless there is evidence of abuse or neglect.

Source: American Bar Association, *Legal Guide for Older Americans*, 1997



Question 27 Must visitation rights be decided in court?

Answer In some jurisdictions, judges refer many child custody and visitation disputes to mediation as an alternative to trial, and in some court systems referral of visitation cases to mediation is mandatory.

Source: American Bar Association, *Legal Guide for Older Americans*, 1997



Question 28 What is “kinship care”?

Answer Kinship care providers are non-parent relatives who have become the primary or sole care givers for children whose parents are unable to care for them. These are often older relatives, and particularly grandparents. More than three million children in the U.S. live with older relatives, and in at least one million homes a grandparent is the sole or primary care giver.

Source: American Bar Association, *Legal Guide for Older Americans*, 1997



Question 29 What is the legal relationship of a child to a “kinship care giver”?

Answer Many kinship caregiving arrangements are informal, but a grandparent caring for grandchildren should consider establishing a more formal legal relationship — custody, guardianship or even adoption — in order to make it easier to do the things that must be done to care for the child — register the child for school, for example, or obtain medical or dental insurance, apply for public benefits, or get health insurance. In some situations, where a state agency has intervened to remove a child from a dangerous home, the child may be placed

with relatives as a foster child; in such an arrangement, legal custody generally remains with the state.

Some states have established mechanisms to allow enhanced authority for kinship caregivers without limiting the role of the parents, such as “consent” legislation, under which the child’s parents can authorize another adult to obtain medical, surgical, dental or mental health treatment for children in their care. Some states also now allow for “standby guardianship,” which allows a parent to designate a guardian for a child in the event of the parent’s death or incapacitation.

Source: American Bar Association, *Legal Guide for Older Americans*, 1997

Medical and End of Life Planning



Question 30 Is physician-assisted suicide legal?

Answer The U.S. Supreme Court in 1997 ruled that physician-assisted suicide is not a constitutional right, and left it to the states to determine for themselves. To date, physician-assisted suicide is legal only in Oregon.

Source: *Washington v. Glucksberg, Quill v. Vacco*



Question 31 Does everyone need a living will?

Answer A living will, standing alone, is not the document most people need. The first document most people should have is a Health Care Power of Attorney (or Health Care Proxy) that names a trusted person as agent, or proxy. Even better would be to have both

documents, or a single document called an Advance Directive that combines the features of a living will and a Health Care Power of Attorney. The laws of some states, however, make this option inadvisable.

Source: Sabatino, Charles P., "Ten Legal Myths About Advance Medical Directives," *Clearinghouse Review*, October 1994



Question 32 Why is a proxy appointment more important than a living will?

Answer Most living will forms are limited in what they can accomplish and what conditions they cover. Most forms, for example, provide instructions that apply only if the individual is in a terminal condition or permanently unconscious; yet most health care decisions that need to be made for someone lacking capacity concern questions about day-to-day care, placement options, and

treatment options short of "pulling the plug." A health care proxy can make that kind of decision, as well as interpret the instructions in a living will. Without a crystal ball, no one can anticipate the specific and often complicated circumstances he or she may face. The proxy acts not only as legal decision maker, but also as spokesperson, analyzer, interpreter and advocate.

Source: Sabatino, Charles P., "Ten Legal Myths About Advance Medical Directives," *Clearinghouse Review*, October 1994



Question 33 Is a Health Care Power of Attorney ever inappropriate?

Answer If there is no one close to the individual whom he or she trusts to act as health care proxy, then the health care power of attorney should not be used. In this circumstance a living will is safer, despite its limitations.

Source: Sabatino, Charles P., "Ten Legal Myths About Advance Medical Directives," Clearinghouse Review, October 1994



Question 34 Are written advance directives legal in every state?

Answer Every state has a health care proxy law, and all states but Michigan and New York have a living will statute. Even in these states, however, both kinds of advance directives are recognized as a matter of practice. The laws of the different states vary widely, however, in terminology, in the scope of decision making they address, and in the formalities required for making an advance directive.

Source: Sabatino, Charles P., "Ten Legal Myths About Advance Medical Directives," Clearinghouse Review, October 1994



Question 35 Will one state recognize an advance directive written according to another state's laws?

Answer Many states expressly recognize out of state advance directives if the directive meets the requirements of either the state where it was written or the state where the treatment decision arises. When there is doubt, the rules of the state where the treatment will take place will normally control.

Source: Sabatino, Charles P., "Ten Legal Myths About Advance Medical Directives," Clearinghouse Review, October 1994



Question 36 Are oral instructions valid?

Answer A person physically unable to execute an advance directive may provide oral instructions that are reduced to writing by a doctor or another person, acting for the patient.

Witnessed properly, several states recognize such statements as formal advance directives. Less formal

instructions, such as a conversation with family, friends or physicians, will not have the same legal status, but they do constitute important evidence of one's wishes, and help to expand upon, clarify and reinforce individual preferences.

Source: Sabatino, Charles P., "Ten Legal Myths About Advance Medical Directives," Clearinghouse Review, October 1994



Question 37 Does naming a proxy mean the individual gives up control?

Answer Naming a proxy does not mean someone has given up any authority or choice. As long as the person is able to make decisions, his or her consent is required for medical treatment, regardless of what the

patient's agent or written instruction may say. In most states, health care advance directives are "springing" — they have no legal effect at all unless and until the patient lacks the capacity to make health care decisions. In states where this is not true, the patient nevertheless retains the right to override the proxy or revoke the directive.

Source: Sabatino, Charles P., "Ten Legal Myths About Advance Medical Directives," Clearinghouse Review, October 1994



Question 38 How does someone go about writing a health care advance directive?

Answer Most states provide a form for appointing proxies or creating advance directives. The majority of these forms are optional. In states where the form must be substantially followed, changes and additions to the standard language are permissible. The services of a lawyer can be helpful, but a lawyer is not required.

Source: Sabatino, Charles P., "Ten Legal Myths About Advance Medical Directives," Clearinghouse Review, October 1994



Question 39 Are health care providers legally obligated to follow an advance directive?

Answer As a matter of law, medical providers cannot treat an individual against his or her wishes, including wishes contained in a directive or contrary to the decision of the patient's authorized proxy. There can be complications, however. First, the doctor or health care facility must know about the directive in order to implement it. It is up to the patient and those close to the patient to ensure that everyone who might need a copy of the directive has a copy. Second, vague language in a directive does not give much guidance, and even giving a proxy broad authority to interpret one's wishes doesn't help much if the proxy is not sure what the patient would want done. Third, most states permit a physician or facility to refuse

to honor an advance directive based on reasons of conscience, but the facility must notify the patient of its policies regarding advance directives at the time of admission, and should provide assistance in transferring the patient to a provider who will comply with the directive. Fourth, emergency medical personnel are required in most states to resuscitate and stabilize patients until they are brought safely to a hospital. Many states now address this situation by procedures that allow emergency personnel to refrain from resuscitating terminally ill patients who are certified as having a "do not resuscitate order" and who have an approved identifier, such as a special bracelet.

Source: Sabatino, Charles P., "Ten Legal Myths About Advance Medical Directives," Clearinghouse Review, October 1994



Question 40 Can family members make health care decisions for someone who does not have an advance directive?

Answer Several states expressly designate default "surrogates," typically family members in order of kinship, to make some or all health care decisions. Even without such laws, most doctors and health facilities routinely rely on family involvement in decision making, although disagreement among family members can easily undermine this. In such situations, patients risk having decisions made contrary to their wishes, or by persons they would not choose.

Source: Sabatino, Charles P., "Ten Legal Myths About Advance Medical Directives," Clearinghouse Review, October 1994

See Table 4 on following page.

Table 4 / Health Care Surrogate Decision-Making Legislation

State	Living Will	Proxy	Surrogate Consent*	Emergency Personnel DNR
Alabama	•	•	•	
Alaska	•	•		•
Arizona	•	•	•	•
Arkansas	•	• †	•	•
California	•	•		•
Colorado	•	•	•	•
Connecticut	•	•	•	
Delaware	•	•	•	
District of Columbia	•	•	•	
Florida	•	•	•	•
Georgia	•	•	•	•
Hawaii	•	•		•
Idaho	•	•	•	•
Illinois	•	•	•	•
Indiana	•	•	•	
Iowa	•	•	•	
Kansas	•	•		•
Kentucky	•	•	•	
Louisiana	•	•	•	
Maine	•	•	•	
Maryland	•	•	•	•
Massachusetts		•		
Michigan		•		•
Minnesota	•	•		
Mississippi	•	•	•	
Missouri	•	•		
Montana	•	• †	•	•
Nebraska	•	•		
Nevada	•	•	•	•
New Hampshire	•	•		•
New Jersey	•	•		
New Mexico	•	•	•	•
New York		•	• (DNR only)	•
North Carolina	•	•	•	
North Dakota	•	•	•	
Ohio	•	•	•	
Oklahoma	•	•		
Oregon	•	•	•	
Pennsylvania	•	• †		•
Rhode Island	•	•		•
South Carolina	•	•	•	•
South Dakota	•	•	•	
Tennessee	•	•		•
Texas	•	•	•	•
Utah	•	•	•	•
Vermont	•	•		
Virginia	•	•	•	•
Washington	•	•	•	•
West Virginia	•	•	•	•
Wisconsin	•	•		•
Wyoming	•	•	•	•

* Surrogate statute default family decision-makers in the absence of an advance directive.

† Health care proxy is contained only within the living will statute; proxy authority may be limited to terminal illness or persistent vegetative state.

Source: American Bar Association Commission on Legal Problems of the Elderly, Health Care Surrogate Decision-Making Legislation, July 1, 1997

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