

# Florida State University Libraries

---

Faculty Publications

Center for Innovative Collaboration in Medicine and Law

---

2012

## For Love, Legacy, or Pay: Legal and Pecuniary Aspects of Family Caregiving

Marshall B. Kapp



Title: For Love, Legacy, or Pay: Legal and Pecuniary Aspects of Family Caregiving

Running Head: Legal and Pecuniary Aspects of Family Caregiving

Marshall B. Kapp, J.D., M.P.H.

Director, Florida State University Center for Innovative Collaboration in Medicine and Law

1115 W. Call Street, Tallahassee, FL 32306-4300

850-645-9260 (phone), 850-645-8441 (fax), [marshall.kapp@med.fsu.edu](mailto:marshall.kapp@med.fsu.edu)

Author's Note: Some of the ideas expressed in this essay borrow from the author's previous work in Kapp, M.B. (2012). Legal issues in aging families. In R. Blieszner & V. Bedford (Eds.), *Handbook of families and aging*, 2<sup>nd</sup> ed. Santa Barbara, CA: ABC-CLIO.

## ABSTRACT

Most caregiving and companionship provided by family members and friends to older individuals in home environments occurs because of the caregiver's feelings of ethical and emotional obligation and attachment. From a legal perspective, though, it might be ill-advised for an informal caregiver to admit such a motivation. Building on a recently published study of relevant litigation, this essay discusses changing cultural and legal aspects of family caregiving when there is some expectation of pay, property, or future financial legacy in return for the caregiver's present work and sacrifices.

## KEY WORDS

Family caregiving/caregivers; Law/legal/litigation; Pecuniary; Financial; Compensation; Ethical/moral; Informal caregiving/caregivers

## INTRODUCTION

Many older individuals with acute or chronic medical or mental conditions require various kinds of assistance in their daily lives. Historically, much of this assistance has been provided by families (conceived of here both functionally and in terms of blood or marriage relationships) (Kane & Penrod, 1995). Family care taking is a type of management that may take the form of family members paying, hiring, and/or coordinating paid service deliverers who attend to the impaired individual's needs. Family caregiving, on the other hand, ordinarily takes the form of personally providing direct, hands-on long term care services to one's impaired relative. Besides specific services needed by the impaired person to accomplish activities of daily living, family caregiving frequently has involved the sort of companionship (such as co-habitation and other forms of physical closeness) that older relatives have desired to stave off fears of loneliness and social isolation. While family care management raises a number of interesting issues, particularly regarding filial responsibility to contribute financially to purchasing direct, professional care for the older family member (Rickles-Jordan, 2007), this essay focuses instead on some of the implications of caregiving and companionship provided directly to older people by their relatives.

More specifically, this essay briefly explores one aspect of the family caregiving relationship—whether it rests on love/guilt or on pecuniary expectations—with special attention to legal connotations and consequences. This discussion builds largely on a recently published study, *Someday All This Will Be Yours: A History of Inheritance and Old Age*, in which Princeton legal historian and former property law professor Hendrik Hartog (2012) examined in detail more than 200 New Jersey appellate court decisions (and, in many instances,

accompanying trial transcripts) published between the late 1840s and the early 1950s to gain an understanding of family caregiving relationships gone awry.

## FAMILY CAREGIVING MOTIVATIONS

Family is a place where work occurs. Ordinarily, family caregiving activities are undertaken on a voluntarily chosen basis (Wylie & Brank, 2009). Feelings of indebtedness or reciprocity, gratitude, intimacy, compassion, and guilt may act as compelling psychological, moral, and religious pressures, but such pressures do not change—at least from a legal perspective—the voluntary, gratuitous nature of the caregiving relationship (Funk & Kobayashi, 2009).

However, as revealed by Hartog's descriptions of the human stories underlying the judicial opinions he parses, sometimes characterizing the caregiving relationship simply as a labor of loving devotion paints a very incomplete and potentially unfair picture of the motivations and understandings involved. Care and caring may be paid for not only through love and guilt, but also through cash and land. Often, caregiving and related personal sacrifices (such as delaying or foregoing marriage, career, social life, or the privacy of one's own living arrangements) are motivated at least in part by the caregiver's expectation of present or eventual material—as well as ethical and emotional—reward. When such an expectation is disappointed, many caregivers suffer in silence, but others pursue legal remedies and make a matter of public record the kinds of scenarios that Hartog describes in his fascinating, cogent, and copiously referenced volume.

## FAMILY CAREGIVING RELATIONSHIPS GONE AWRY: LITIGATING RIGHTS AND REMEDIES

The cases that Hartog identifies and takes apart fall into three categories of failed family caregiver expectations about a *quid pro quo* for the caregiver's efforts. One group of cases involves alleged unfulfilled promises made by the person receiving care and companionship to the family member providing that care and companionship that, during the life of the older person, he or she would convey certain property to the caregiver. Disputes in this category are ordinarily litigated after the alleged promisor's death, and have taken the form of contract claims seeking specific performance of the promise made (in other words, forced conveyance of the property from the relative's estate to the caregiver), with the caregiver's rendering of care and companionship during the deceased's lifetime counting as the legal consideration for the deceased's promise.

Legal claims premised on this theory were often unsuccessful. First, usually the plaintiff caregiver's burden of proof was overwhelming because there was no written evidence of the care recipient's promise, thereby making the claim run afoul of the virtually universal Statute of Frauds requirement that contracts dealing with the conveyance of property be in writing to be valid. Moreover, caregiver petitioners (and especially female caregivers) were until very recently confronted with the strong cultural and legal presumption or default rule that, whatever the personal sweat and sacrifices undergone, family caregivers acted as they did out of moral and emotional attachment rather than crass mercenary ambitions. By contrast, work done in anticipation of some form of compensation was something negotiated with and done on behalf of strangers. To rebut that presumption, caregiver petitioners had the difficult task of showing extraordinary commitment and life changes ("an unusual story and an unusual relationship" (Hartog, 2012, p. 188)) beyond the selfless devotion and gratuitous gift relationship that society

naturally expected family members (particularly daughters, daughters-in-law, and nieces) to demonstrate toward members of the preceding generation(s).

A second group of cases entails alleged attempts by older individuals to secure the care and companionship of family members by promising them an inheritance at the time of the care recipient's death, followed by the failure to fulfill that promise in the writing of the final will. That failure to perform the promise might have resulted either because of a change of mind (or heart) on the part of the care recipient after the promise was made or inertia that delayed the writing or modifying of a will until it was too late. As Hartog (2012, p. 10) explains, "The moment of parental death was one that was widely understood as a distinctively legal moment in the life course. Inheritance, probate, and the transfer of familial assets were paradigmatic moments when everyone knew they had to deal with the law." Older persons often did figure out that the promise of an inheritance worked well in cajoling care and companionship from their adult children in a day when inheritance was the only realistic opportunity for financial security available to many younger people thinking ahead to their own old age. Nevertheless, caregiver attempts to harness judicial force to rewrite a deceased person's testamentary bequest, or to create a bequest in the situation of a care recipient who died without executing a valid will, have met huge obstacles. One problem was the previously noted cultural and legal presumption that family caregivers did whatever they did because of moral and emotional attachments rather than an inducement of future financial enrichment. Caregiver petitioners asking for will modifications usually were thwarted too by the doctrine of "testator's freedom," the almost unbridled right of an individual to bequeath property upon death as that individual wishes, regardless of inconsistent promises made during his or her lifetime. The idea of a testator's freedom that cannot easily be promised away by the testator is uniquely American, premised on a

powerful respect for property rights, and departs markedly from the approach of civil law countries in which property re-distribution after the owner's death is compelled by detailed statutes (Madoff, 2010).

Legal claims brought under the two categories of cases just described are based on a "labor theory of value," under which the caregiver's labor created an ownership interest in property (Hartog, 2012, p. 259). A third, alternative type of dispute involving allegedly thwarted expectations by family caregivers arose in situations in which caregiver petitioners argued that, even if specific performance of the caregiver's promise to convey property either while alive (*inter vivos*) or through a will was not going to be enforced, the caregiver was entitled as a matter of fairness to be paid from the care recipient's estate at least an amount equal to the value of the services actually provided. These claims rested on the legal doctrine of *quantum meruit* as a second best remedy when one party has performed his or her end of the bargain but specifically enforcing the other party's promise itself is not feasible or desirable.

#### IMPLICATIONS FOR FUTURE PRACTICE AND POLICY

The nineteen and twentieth century legal claims and their resolutions analyzed in *Someday All This Will Be Yours* raise fundamental questions about how family caregiving relationships ought to be framed in modern American society. Older normative rules are changing and previous cultural and legal presumptions are being replaced. Relationships within families and between families and the state are radically different than they used to be.

We must reject an analytically attractive and pure, but never really socially realistic, tendency to dichotomize the caregiver experience, recognizing instead that a person may simultaneously be both a family member, with the related emotional and ethical connotations of



that label, and a business employee. Morality and materiality are not incompatible. Caregiving can be both an act of love and a marketable commodity bought and sold between non-strangers.

In terms of practice, it may be advisable to more formally memorialize, in a timely and transparent manner, the precise promises and expectations surrounding a family caregiving arrangement, particularly when those promises and expectations entail paying the family member with money or property for caregiving services (Knight, 2009a; Knight 2009b). A useful tool may be “the personal service contract, sometimes known as a personal care agreement. This is a compact between parent and child that says the child agrees to provide certain services to the parent in exchange for a specified compensation.” (Wainey, 2009, p. 30) One benefit of a caregiver contract, which could also involve relatives other than the care recipient’s adult children, is that this arrangement

can help reduce the size of a parent’s estate and thereby improve their (sic) chances of becoming eligible for long-term care coverage under Medicaid. They [caregiver contracts] can also minimize battles between siblings and other family members. For many other families, the contracts simply help reward the significant amounts of time, effort and money that family members often spend watching over and taking care of an elderly relative. (Silverman, 2006, p. D1).

When an employment relationship involving family members (or others outside of agencies or organizations) is unambiguously created by contract, there are a number of legal issues that need to be clarified. For instance, is the older care recipient, as the employer, required to withhold, from the employee’s paycheck, and pay the employer’s portion of, the employee’s Social Security and Medicare taxes under the Federal Insurance Contributions Act (FICA)? Do federal and state unemployment and workers’ compensation taxes need to be paid? Additionally, must the employer verify and document the caregiver’s eligibility to work in the U.S., is the employer exposed to liability for injuries incurred by the caregiver on the job, and is

the employer possibly subject to the risk of discrimination and harassment suits brought by caregivers? These possibilities may seem rather far-fetched, but they are really no more unlikely than many of the colorful scenarios that resulted in the litigation recounted in *Someday this Will All Be Yours*.

At the public policy level, there are avenues to be considered if we wish to encourage and facilitate family caregiving for physically or mentally compromised older persons, whether or not there is a formal caregiving contract. For example, families could be provided with tax credits in return for voluntarily taking on caregiving duties (Kaplan, 2005); these credits might be particularly influential for family members who would need to give up paid employment outside the home (and thus sustain a reduced income) in order to care for an older relative. In some situations, the current dependent care tax credit may be available to help with the costs of providing care to a disabled parent or spouse. Under Section 21 of the Internal Revenue Code, this tax credit is available today for the care of an older relative only if an applicant for the credit can adequately document that the person being cared for was “physically or mentally incapable of caring for himself or herself” and had “the same principal place of abode as the taxpayer for more than on-half of such taxable year.” We could, of course, go altogether beyond a tax credit strategy and instead use public funds to pay family caregivers directly.

To a significant extent, Social Security, pensions, Medicare, and Medicaid have for many older people replaced families as financially essential units. Programs guaranteeing older people entitlements to social, governmental resources inevitably exert a crowding out dynamic on traditional family caregiving duties. Nonetheless, neither public nor private financial safety nets can deliver care itself. It would be delightful if, as growing numbers of physically and mentally compromised older individuals need help to remain functioning at home, family caregiving

flourished exclusively on the basis of perceived love and mutual solidarity. This ideal universe, however, is unrealistic. Practically as well as morally, potential and actual family caregivers have legitimate interests and claims of their own to protect (Ter Meulen & Wright, 2012). If those interests and claims are not acknowledged, we are likely to see a further diminution of family involvement in the direct care of their loved ones, in favor of even greater reliance on government programs, professional agencies, and organizations. Clarifying and solidifying the legal as well as ethical boundaries of the family caregiving relationship will promote the practice of family caregiving and the psychological benefits that derive therefrom by safeguarding the respective rights and responsibilities of all of the participants in this special arena of human interaction.

## REFERENCES

- Funk, L.M., & Kobayashi, K.M. (2009). "Choice" in filial care work: Moving beyond a dichotomy. *Canadian Review of Sociology*, 46(3), 235-252.
- Hartog, H. (2012). *Someday all this will be yours: A history of inheritance and old age*. Cambridge, MA: Harvard University Press.
- Kane, R.A., & Penrod, J.D. (1995). *Family caregiving in an aging society: Policy perspectives*. Thousand Oaks, CA: Sage.
- Kaplan, R.L. (2005). Federal tax policy and family provided care for older adults. *Virginia Tax Review*, 25(2), 509-562.
- Knight, V.E. (2009a, January 15). Relatives can be paid to look after elderly. *Wall Street Journal*, D2.
- Knight, V.E. (2009b, March 19). What to do if you are the boss of a caregiver. *Wall Street Journal*, D2.
- Madoff, R.D. (2010). *Immortality and the law: The rising power of the American dead*. New Haven, CT: Yale University Press.
- Rickles-Jordan, A. (2007). Filial responsibility: A survey across time and oceans. *Marquette Elder's Advisor*, 9(1), 183-204.
- Silverman, R.E. (2006, September 7). Who will mind mom? Check her contract. *Wall Street Journal*, D1.

Ter Meulen, R., & Wright, K. (2012). Family solidarity and informal care: The case of care for people with dementia. *Bioethics*, 26(7), 361-368.

Waitey, D.A. (2009). Preventing family feuds. *Trial*, 45(4), 30-33.

Wylie, L.E., & Brank, E.M. (2009). Assuming elder care responsibility: Am I a caregiver? *Journal of Empirical Legal Studies*, 6(4), 899-924.