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Introduction

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INTRODUCTION

HOWARD S. KROOKS, JD, CELA, CAP

This inaugural issue of Touro Law Center's Journal of Aging, Longevity, Law, and Policy represents an enormous undertaking by the Law Center to connect the dots among three disciplines — aging, longevity, and the law — that often intersect and deserve more comprehensive review and analysis under one umbrella. I applaud Touro Law Center's initiative to refocus our efforts to explore the multi-faceted issues arising from aging, longevity, and the law, and am honored to serve as guest editor of this inaugural edition of the Journal.

The Journal is an example of the Law Centers' commitment to foster an interdisciplinary scholarly conversation in this area of the law. In 2013, Touro Law Center established the Aging and Longevity Law Institute designed to provide members of the bench and bar, law students, professionals from other disciplines and members of the community with the information, tools, and resources to address the legal needs of the approximately 100 million Americans 50 years of age and older. This Journal complements this effort by providing a forum for innovative thinking on legal issues affecting individuals as they age and will publish articles and commentary at the vanguard of academic exploration. Practitioners, judges, health care professionals, and students can access this Journal online and gain practical insights to this growing practice area.

In my discussions with Bar leaders and members of the judiciary, I see the critical need for a forum — this Journal — to explore the intersection of aging, longevity, and the law. This area of practice has grown quickly, as lawyers and other professionals have recognized the critical need for sensitive and expert advice to navigate the treacherous path that elders and their families must walk, as they face the many challenges of aging and the legal thickets at every bend of the path. It has been my privilege to be part of the growth of this field, to join with far-sighted leaders, whose compassion for the elderly and regard for their dignity has been the foundation of our professional organizations. As lawyers assisting seniors and their families, we have come to realize that we need allies in many other fields to best promote aging that is characterized by respect, comfort and meaning. My professional life has been devoted to these goals and to assisting other lawyers to do the same. The organizations we have created over the years, and which I am grateful to have served, the National Academy

of Elder Law Attorneys, the National Elder Law Foundation, the Elder Law Section of the New York State Bar Association and others have fostered these aims and encouraged research and study to improve the laws that touch on a long life. An interdisciplinary Journal can be the ground for this exchange of ideas and provoke action for beneficial reforms. We know that the law and legal systems must adapt to the changes that are inevitable in an aging society, so I welcome the contributions this Journal can make.

This issue of the Journal contains articles focusing on guardianship. What better way to launch the Journal than to analyze guardianship, where the principles of aging, longevity, and the law intersect at every turn? The concept of guardianship, the process by which states assist its most vulnerable members of society unable to manage their own affairs by appointing another individual to act on behalf of those in need, has been around for hundreds of years. Yet in the last three decades alone we have seen substantial reforms being made to state guardianship statutes. This suggests that change is not easy, and the concept of providing a mechanism to care for society's most vulnerable, yet needy, population, is ever-evolving. As lawyers concerned about the impact of aging and longevity on our society, we must study guardianship processes and procedures in order to achieve meaningful reform, and to implement currently held yet constantly changing beliefs regarding the best way to care for these individuals. In the last year alone, there have been numerous articles written in national and local publications pointing out the flaws of our current system. This suggests that, as far as we have come in formulating new and progressive thoughts and ideas designed to protect vulnerable adults from the effects of aging and longevity, we must continue to evaluate how well we are meeting the needs of aging adults, and strive for reform that is designed to better meet those needs. Now is a particularly important time to examine guardianship in light of the recent cases alleging that guardians have misappropriated assets of their wards and/or not acted in the best interest of their wards.

RECHARGING ADULT GUARDIANSHIP REFORM

Against this uncertain backdrop, Erica Wood, Assistant Director of the American Bar Association Commission on Law and Aging, leads off our inaugural issue by analyzing six current paths of reform that are bringing new energy to drive changes in practice that could affect individual lives. Her article, *Recharging Adult Guardianship Reform: Six Current Paths Forward*, presents a snapshot of these six current channels, the history on which they rest, the potential they

bring for moving toward the vision of reform, and the obstacles they face. The six channels of reform are: (1) standards of practice; (2) clarification of guardianship jurisdiction for multi-state cases; (3) new approaches to court oversight; (4) guidelines for high conflict cases; (5) the supported decision-making concepts; and (6) state working interdisciplinary networks of guardianship stakeholders. Wood concludes that while none of the above paths is a panacea, each one may open doorways to move toward an effective and person-centered system of adult guardianship law and practice.

THE USE OF PUBLIC GUARDIANSHIP PROGRAMS
AND/OR PRE-RELEASE “ADVOCATES” TO ENSURE
SUCCESSFUL RELEASE RE-INTEGRATION
INTO SOCIETY

With more than two million individuals behind bars, the United States is considered the largest incarcerator in the world. A significant percentage of that population is elderly, and the figures are increasing, rather than decreasing. State and federal correction budgets are the fastest growing expenditures, second only to Medicaid. Unfortunately, costs related to care for elderly persons prisoners are outpacing other expenses. In response, new ways to cut costs, particularly as it relates to elderly or infirmed prisoners, are being proposed. An increasing number of states have expanded early release programs, such as medical furloughs or compassionate release programs, to reduce prison populations. While there are a number of articles on the issue of compassionate release or early furlough programs, very little research has been done on pre-release assistance and planning to elderly or infirmed inmates to ensure post release continuity of care. This is significant as a large percentage of elderly or infirmed inmates suffer from an average of three chronic illnesses while incarcerated. Regardless of whether an elderly inmate is paroled, unconditionally released, or allowed compassionate or early release from prison, measures should be in place to ensure orderly and humane re-entry efforts for aging inmates. In her article entitled *The Silver Tsunami: Aging Prisoners, Early Release, Guardianship and Prisoner Advocate Initiatives For Long Term Care Beyond The Prison Walls*, Professor Martina E. Cartwright proposes a number of prisoner reentry initiatives, particularly efforts which utilize public guardianship programs and/or pre-release “advocates,” to ensure successful release and re-integration into society.

THE CONFLICT BETWEEN PATIENT AUTONOMY
AND PHYSICIAN BENEFICENCE

The recent media event that followed Brittany Maynard's choice to die with dignity reveals a counter-intuitive tension in the field of medical ethics and law. Though patient advocates claim that her death shows progress in medical ethics, the American Medical Association still upholds that, instead of participating in assisted suicide, physicians must aggressively respond to the needs of patients at the end of life. This reflects a much broader issue with respect to the tension in medical ethics between the primacy of patient autonomy and other values, such as to do no harm and beneficence, inherent in the medical profession. Autonomy and its corollary, informed consent, comprise the moral justification for respecting patients' choices to refuse treatment and, by extension, for physician-assisted suicide. It is also the basis for the use of advance directives, which are meant to preserve autonomy when a patient is later deemed incompetent. This conflict in the medical profession and in the social sphere between patient autonomy and physician beneficence and non-maleficence is reflected by a divergence within the law. Federal and state legislation has provided patients the right for their wishes for end-of-life medical care in an advance directive to be respected, while courts and common law precedent has refused to provide recourse when that right is ignored. In his article entitled *Advance Directives: A Case of Changing Social Norms And Their Legal Implications*, Professor Ira Bedzow examines the social basis for legislation that supports advance directives. He then analyzes empirical evidence as to why many physicians are reluctant to follow them. Finally, Bedzow reviews certain decisions in which the courts were unwilling to recognize the claims of patients against physicians who have refused to comply with their wishes to limit care at the end of life. Through this examination, Bedzow shows that, despite the increase in priority of patient autonomy in medical ethics, the value of sustaining life still holds primacy both as a professional value and as a state interest.

BOOK REVIEWS

Touro Law Center's student body plays an integral part in the Journal of Aging, Longevity, Law, and Policy as student editors and as book review authors. The Journal offers students the opportunity to further their knowledge in substantive areas of aging and longevity law, as well as the chance to collaborate directly with faculty and authors throughout the article review process. Each Journal edition

will offer thoughtful commentaries on published books in the field of aging and longevity law.

Tara Darling reviewed Atul Gwande's highly acclaimed book, *Being Mortal: Medicine and What Matters in the End*. Alanna McGovern reviewed *The Ethics of Health Care Rationing: An Introduction*, authored by Greg Bognar and Iawo Hirose in 2014. Jenna Cohn reviewed *Aging in Comparative Perspective: Process and Policies* by Ian Gillespie Cook and Jamie Halsall.

The launch of this Journal holds great promise for advancing the ability of the bench and bar to examine current needs and innovations, vital to progress for our laws, courts and the legal profession. If we are to fashion a legal system responsive to the needs of our elders and respectful of their humanity, we will need the contributions of scholars, advocates, students and activists to spark new ideas, engage the debate and chart a path forward.

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