

THE LESSON OF THE IRISH FAMILY PUB: THE ELDER LAW CLINIC PATH TO A MORE THOUGHTFUL PRACTICE

Katherine C. Pearson *

The clinical experience was the highlight of my law school career. The experience provided insight into the real world that a written judicial opinion in a textbook could never fully grasp. . . . The practical skills that I learned at the Elder Law Clinic can be used across the legal spectrum. Case management, client contact, [and] professional decorum with opposing counsel, are all extremely valuable skills in any field of practice.¹

I. INTRODUCTION

During the autumn of 2009 and the spring of 2010, I worked on sabbatical projects from points on the globe that were some three thousand miles away from my desk in the Elder Law and Consumer Protection Clinic at the Dickinson School of Law of the Pennsylvania State University (Elder Law Clinic). In practical

* © 2010, Katherine C. Pearson. All rights reserved. Professor of Law and Director, Elder Law and Consumer Protection Clinic, The Dickinson School of Law of the Pennsylvania State University; 2009–2010 Petersen Visiting Scholar in Gerontology and Family Studies at Oregon State University (in residence during the fall of 2009); and 2009–2010 Senior Scholar for the US–UK Fulbright Commission (in residence during the spring of 2010), working at the Institute of Governance, Public Policy and Social Research at Queens University Belfast, Northern Ireland. I am especially grateful for the opportunity to consult with staff members at Queens University Belfast, including Lecturer in Social Work Joe Duffy and former Queens Lecturer in Information and Technology Law Dr. Subhajt Basu, now at the University of Leeds' School of Law, regarding their research into the counseling and legal needs of older adults in Northern Ireland. I am also deeply appreciative of the inspirational work of Clinical Professor Kate Mewhinney at the Elder Law Clinic at Wake Forest University's School of Law.

1. Interview with Jose Fanjul, Esquire, Assistant District Attorney, New York, New York (Nov. 28, 2008) (available at http://law.psu.edu/academics/clinics_and_externships/elder_law_clinic/student_perspectives). Jose Fanjul is a 2008 graduate of Penn State University's Dickinson School of Law and currently serves as an Assistant District Attorney in Manhattan, New York.

terms, however, I was never very far away, as I found myself speaking about the clinic to academics around the world.² In 2011, Penn State's Elder Law Clinic will celebrate its tenth anniversary of operations; about twenty other law schools in the United States have clinics dedicated to providing legal services to older adults, and there is growing international interest in clinical education connected to elder clients.³ Possibly, Elder Law clinics are helping to pave pathways for the study of the discipline of Elder Law. For example, one study describes the first documented course offered on Elder Law at a United States law school as an Elder Law clinic.⁴

As suggested by the opening quotation from Assistant District Attorney Jose Fanjul, a former Elder Law Clinic student, experiences in such clinics are often highlights of a student's legal education and have relevance beyond the specialization of Elder Law. How does one fund such a clinic serving older adults and establish a client base? What are the unique challenges to having law students represent older adults? What is the value of teaching Elder Law in a clinical setting? Is the clinic valued by the larger legal academy and the legal profession? Using my experience to illustrate one approach to Elder Law clinic development, this Article addresses these questions. But first, in the tradition of clinical teaching, here is a story that demonstrates the theme of this Article—the need for practitioners who are sensitive to concerns of older adults.

2. The Author presented this Article at the Eighth International Journal of Clinical Legal Education Conference, hosted by Northumbria University, Newcastle-upon-Tyne, England, on July 7–9, 2010. The Author also presented a framework for development of a legal clinic serving older adults to the curriculum committee for the Law School at Queens University Belfast in Northern Ireland in March 2010.

3. See a list of Elder Law clinics available at Elder Law Prof Blog, *Elder Law Prof Blog*, "Resources," http://lawprofessors.typepad.com/elder_law/ (accessed Dec. 21, 2010); see also the list of course offerings in law and aging, including clinics serving older adults, provided by Stetson University College of Law, *Elder Law Course Survey*, <http://justice.law.stetson.edu/excellence/elderlaw/ElderLawCourseSurvey.htm> (accessed Dec. 21, 2010).

4. Nina A. Kohn & Edward D. Spurgeon, *Elder Law Teaching and Scholarship: An Empirical Analysis of an Evolving Field*, 59 J. Leg. Educ. 414, 414 n.3 (2010) (noting that the first Elder Law course was a short-lived Elder Law clinic founded in 1972 at the Syracuse University College of Law).

II. THE TALE OF CARROLL'S PUB⁵

The events of this tale took place in Fethard, a town in County Tipperary in southern Ireland. In many small communities in Ireland, “public houses,” better known as pubs, are a center of social life.⁶ They provide a warm, dry place for an evening meal, often accompanied by good music and a tall, cool Guinness. Carroll’s Pub was a humble example of the public house tradition, well located on a corner in the small town, near the family home. The owner, Thomas Carroll Senior, was born in 1912, and he had waited until he was in his late forties to marry Sadie, a younger woman. They raised a happy family, with three children: Winifred, born in 1962; Thomas Junior, born in 1964; and Mary Jane, born in 1968.⁷

Thomas Senior purchased the pub in 1960 and gave it the family name, but everyone agreed that it was his wife, Sadie, who ran the operation with a lot of help from the children, especially daughters Winifred and Mary Jane. It was the type of place that thrived in good times and survived in bad times. The profit from the business maintained the family, and it did well enough to support a full-time barman beginning in 1974. As the children became older, Thomas Junior’s focus turned to farming and the two daughters moved to Dublin, although both daughters returned to Fethard regularly to help in running the pub. The pub was in good hands and would support Sadie, even if she retired.⁸

But life does not always happen as planned, and that rang true in the Carroll family when Thomas’ young wife, Sadie, became ill with cancer. During her illness, Thomas Junior assumed control of the business during the week, and his sisters continued to return home to help on weekends. Sadly, Sadie died in June 1989. Thomas Senior was by all accounts devastated by the death of his wife. By then he was in his late seventies. His increasing health problems caused him physical pain and limited

5. The history of Carroll’s Pub is taken from the proceedings in *Carroll v. Carroll*, [1999] 4 IR 241 (Ir. 1999). The description of the case is based on the proceedings before the trial court (High Court) or before the Supreme Court of Ireland (Éire), and citations are to pages from the text of the Supreme Court’s decision available on Lexis.

6. Cian Molloy, *The Story of the Irish Pub: An Intoxicating History of the Licensed Trade in Ireland*, xi (Liffey Press 2002).

7. *Id.* at *4.

8. *Id.*

his mobility; his vision and hearing were impaired, and with his wife's passing he became depressed. After her mother's death, Mary Jane returned to live in the family home for six months to help her father, and both daughters continued to work in the pub on weekends.⁹

At some point, there was a family discussion about the business side of the pub. The operations had accumulated a value-added tax debt of £20,000 (about U.S. \$25,000). According to the daughters' recollection, they discussed whether for tax reasons it might be necessary to "transfer the business" into Thomas Junior's name.¹⁰ Sometime in May 1990, a lawyer came to the house and their father signed papers, but the daughters did not look at the papers because they believed the papers were only a part of the business operations. Both daughters remembered their father saying at various times that "their home would always be there for them."¹¹

Thomas Senior passed away in March 1992. There was apparently no will to be read. Instead the pub continued to operate, with the hired barman working during the week and the Carroll daughters working weekends. Their brother, Thomas Junior, spent most of his time working farms (by then he owned portions of two farms). In September 1993, Thomas Junior married Michelle, and they lived together in the family home, with Michelle working in the pub when the barman was off duty. The sisters continued to work weekends.¹²

On January 17, 1994, Thomas Junior was involved in a fatal traffic accident. Shortly after their brother's sudden death, the sisters learned from an attorney that they had "no rights in the premises."¹³ The three women, Thomas' sisters and his widow, continued for a while to operate the pub, but by June 1994, the relations between them deteriorated to the point that the sisters retained a lawyer and "[s]teps were taken," including commencement of a suit.¹⁴ The lawyer who handled the deed transaction

9. *Id.* at **4–5.

10. *Id.* at *5.

11. *Id.*

12. *Id.* at **6–7.

13. *Id.* at *7.

14. *Id.*

represented Michelle, Thomas Junior's widow.¹⁵ At this point, I pause the story of the Carroll family in Ireland to introduce the Penn State Elder Law Clinic.

III. CREATING AN ELDER LAW CLINIC: FUNDING, CLIENT BASE, AND SUBSTANTIVE EXPERTISE— THE PENN STATE EXPERIENCE

In 2001, Penn State¹⁶ used outside funding from two sources, a state program known as Interest on Lawyers' Trust Accounts¹⁷ (IOLTA) and a grant from a regional social services agency for older adults, to establish the Elder Law Clinic.¹⁸ The Elder Law Clinic was the newest addition to a strong clinical education tradition at Penn State, which includes a family law clinic with a thirty-year history of service to low-income persons. I used my background as a former supervisor in Penn State's family law clinic and my experiences in clinical teaching at the University of New Mexico School of Law when planning the new clinic.

Title III of the Older Americans Act of 1965¹⁹ supports the development of clinical education indirectly by making funds available to communities for provision of legal services to older adults.²⁰ Title III funds are available for five-year terms,²¹ an important stability factor for new outreach initiatives. New clinics are sometimes criticized as cost-inefficient, especially if entirely

15. *Id.* at *6.

16. In 2000, The Dickinson School of Law, which had functioned for some 150 years as an independent institution, merged with Pennsylvania State University, more commonly known as Penn State. Penn State Law, *History*, law.psu.edu/prospective_students/history (accessed Dec. 21, 2010). While the official name of the law school is The Dickinson School of Law of The Pennsylvania State University, the law school and its clinics increasingly use "Penn State" for identification.

17. IOLTA.org, *What Is IOLTA?*, <http://www.iolta.org/grants/> (accessed Dec. 21, 2010).

18. See Katherine C. Pearson & Lucy Johnston-Walsh, *Partners in Outreach and Advocacy: Interdisciplinary Opportunities in University-Based Legal Clinics*, 11 J. Higher Educ. Outreach & Engagement 163, 165 (2006) (citations omitted) (discussing the establishment and funding of the Elder Law clinic at Penn State).

19. Older Americans Act, 42 U.S.C. §§ 3001–3058 (2006).

20. *Id.* at 42 U.S.C. § 3023 (c)(2). For example, the Thomas M. Cooley Law School offers students the opportunity to enroll in its Sixty Plus Clinic, Inc., Elderlaw Clinic, organized as a separate not-for-profit corporation and funded through private donations and grants including Title III funding under the Older Americans Act. Thomas M. Cooley Law School, *About Us: Free Legal Services 60 PLUS*, <http://www.cooley.edu/60plus/about.html> (accessed Dec. 21, 2010).

21. 42 U.S.C. § 3023.

dependent on hard funding for development. Clinics often need time to attract hard funding and on-going commitment from their universities. The Dauphin County Area Agency on Aging (DCAAA) invited bids by Penn State and other potential providers and awarded a four-year grant to our law school in 2001.²²

The personal collaboration between law students and DCAAA's experienced social workers proved to be important to the success of the clinic, perhaps more important than the seed funding. First, the location—Dauphin County—is in the center of the state and is the home of Pennsylvania's capitol complex. The county “provides a realistic window onto the ‘aging of society,’ a phenomenon that affects policy choices at local, state, national, and even global levels.”²³ When the clinic began in 2001, “[m]ore than [fourteen] percent of Dauphin County's residents [were] age [sixty-five] or older[,] (with an additional [twenty-three] percent falling into the boomer generation that . . . soon [began to] swell the ranks of older adults in the region).”²⁴ Second, the clinic's connection to DCAAA provided an opportunity for teamwork, as the caseworker or “social worker is frequently the first person to recognize the need for legal assistance in problem solving.”²⁵ Thus, the framework of the Elder Law Clinic was built around an inherently interdisciplinary spine. The caseworkers are regular guest speakers for traditional classes or seminars on law and aging policy and are part of both the educational team and the service team in the clinic. Another approach that demonstrates the importance of such interdisciplinary teams to student development is provided by Elder Law clinics that are linked with healthcare service delivery points at their universities or in their communities, such as Wake Forest's well-established Elder Law Clinic located in the university's School of Medicine.²⁶

22. Request for Proposal (RFP) for Legal Assistance for Older Adults in Dauphin County, providing that the contract would be for the period of “July 1, 2001 through June 30, 2002 with the option of renewal through June 30, 2005 upon mutual agreement of the involved parties.” (RFP Feb. 28, 2001) (on file with Author).

23. Pearson, *supra* n. 18, at 166.

24. *Id.*

25. *Id.*

26. See e.g. Wake Forest University School of Law, *Elder Law Clinic*, <http://law.wfu.edu/clinics/elder/> (accessed Dec. 21, 2010) (describing Wake Forest's interdisciplinary program).

An express requirement for Penn State's grant for the Title III funding was the commitment to provide around-the-clock legal services for older adults on issues of emergency protection.²⁷ This was tested rather quickly, as one of our first requests for services was from an older man who was facing a contempt hearing in a decade-old divorce case. In the divorce, the man had agreed to make a future lump sum payment to his ex-wife to settle a property division claim, with the plan that the sale of a business would fund the payment. The property was a business site that the couple had operated during their marriage, but paralleling the failure of the marriage was the failure of the business. In the intervening years after the property settlement was signed, our client had two heart operations, lost his home, and his poor health continued. Our first meeting took place where he was living—in the service bay of the former business, once a gas station. The station had been “red-tagged” by environmental control officials because of deteriorated underground tanks, and the cost to clean up the property made it unmarketable. Our client, who could not afford counsel to represent him in two previous contempt hearings, had been jailed twice for failure to pay the lump sum agreed to in his divorce. He was facing a third hearing for contempt, and he was worried about the likelihood of additional jail time because he still had no significant income. He made it clear that he did not believe he could survive a third incarceration, citing the impact on his physical and mental health.

Our client was exhausted physically and emotionally by the recurring divorce proceedings, his health issues, and his inability to earn enough income for either self-support or to pay the property settlement to his ex-wife. We had less than forty-eight hours to prepare for the contempt hearing. The challenges of getting up to speed on the legal issues were daunting, but we were even more concerned about the client's personal circumstances. This led to the clinic's first collaboration, a practice that has become a unique feature of the clinic: combining the social support services

27. The Author's knowledge of the grant funding process is based on her personal knowledge and experience. Appendix C to the Dauphin County Area Agency on Aging 01-02 Contract for Legal Assistance (DCAAA 01-02 Contract) specifies that the service provider “will be available to provide legal assistance as needed on a 24-hours-per-day on call basis for persons aged sixty (60) and older requiring emergency protective intervention services.” DCAAA 01-02 Contract at app. C, 1 (on file with Author).

available from the county's Area Agency on Aging, DCAAA, with our legal research. DCAAA stepped in quickly to provide alternative housing options for the client and to assess his eligibility for benefits; we decided that the man's best legal avenue was an emergency bankruptcy petition, especially given a host of other debts complicating his financial circumstances. The clinic's partnership with caseworkers at DCAAA mirrors the teams often created by private Elder Law offices to provide families with integrated social and legal services.²⁸

Our clinic also associated with an experienced bankruptcy attorney. Association with visiting part-time practitioners who have special expertise has become a tradition for our clinic. The visiting attorneys, frequently graduates of our law school, volunteer their time or are hired for very modest flat-fee sums, paid with IOLTA money. The visiting attorneys take pride in their role and often work together to supervise students, creating a formidable legal team. Each student has the opportunity to work with multiple supervisors, and each supervisor brings to bear different strengths and skills.

The elderly man's bankruptcy proceedings were fast paced and ultimately provided him with much needed relief, although not without a few trips to the courts of appeals and appearances both in state and federal (bankruptcy) court. Three core legal arguments were presented by the clinic team on his behalf: (1) that unpaid property settlements, unlike support awards, were not proper grounds for jailing on criminal contempt; (2) that the automatic stay created by the bankruptcy petition controlled the legal proceedings; and (3) that the debt created by the settlement agreement was properly dischargeable in bankruptcy as it was a property claim and not an obligation to pay support.²⁹

The case also helped us realize that an Elder Law clinic could involve many different legal disciplines, and thus the experiences for the students would include, but not be limited to, "traditional" Elder Law practice issues. We eventually narrowed the list of

28. For example, see the team of lawyers and other professionals described in the website for the Elder Law Practice of Timothy L. Takacs in Hendersonville, Tennessee at <http://www.tn-elderlaw.com/meetthestaff.html> (accessed Dec. 21, 2010).

29. See *Hogg v. Hogg*, 816 A.2d 314, 319 (Pa. Super. 2003) (distinguishing treatment under the Bankruptcy Code of debts connected to alimony or support from discharge of debts arising from a property settlement).

matters we would agree to handle, but the decision on which issues to handle has been based on frequency of unmet needs of older adults rather than any preconceived notion about what Elder Law as a practice should entail.³⁰ We also soon realized that ethical issues abound in a legal practice representing clients with issues connected to aging, which makes it appropriate to return to the tale of Carroll's Pub in Ireland.

IV. LITIGATION OVER CARROLL'S PUB

The lawsuit filed by the Carroll sisters sought to set aside the conveyance of the home and pub by Thomas Senior to Thomas Junior. The lawsuit was based on two grounds: the transfer was procured by undue influence³¹ or, alternatively, was an "improvident transaction," an equitable concept recognized in Irish law.³² Their brother's widow, represented by the lawyer who handled the real estate transaction between the brother and the father

30. What does a "traditional" Elder Law practice entail? The potential scope is broad. For example, one treatise describes typical choices as follows:

An elder law practice typically focuses on a handful of areas including advance medical directives and the "right-to-die," age discrimination, charitable giving, elder mistreatment (e.g., abuse, neglect, and financial exploitation), governmental benefits (e.g., Social Security, Medicaid, Medicare, railroad retirement, and veteran's benefits), guardianship and conservatorship, health care, housing, long-term care planning, nursing home rights and procedures (e.g., discharge and transfer, quality of care, and resident rights), personal injury, probate administration, and trust and estate planning, among a host of other practice areas.

Julie A. Braun, *Practical Aspects of Establishing, Developing, and Managing an Elder Law Practice*, in, *The Elder Law Portfolio Series*, vol. 1, 1-8 (Harry S. Margolis ed., Aspen Publishers 2002).

31. A similar cause of action is recognized in most American states. For example, in Pennsylvania, a presumption of undue influence arises when evidence establishes: (1) a confidential relationship between a grantor and a grantee; (2) that the grantee received a substantial benefit from the transaction; and (3) that the grantor had a weakened intellect. Proof of mental incompetency or complete incapacity is not required. When the prima facie case is established, the burden is then on the proponent of the gift to prove the gift was free from undue influence. See e.g. *Owens v. Mazzei*, 847 A.2d 700, 706-707 (Pa. Super. 2004) (explaining conditions under which the presumption of undue influence attaches); see generally Thomas Phillip Boggess V, *Causes of Action to Invalidate Testamentary Device on Ground of Undue Influence in Its Execution*, 27 Causes of Action 2d 469 (2005) (providing an overview of the undue influence cause of action, including elements of a prima facie case, defenses, and procedural matters).

32. *Carroll*, [1999] 4 I.R. 241 at *3. In Pennsylvania, it appears that the equitable concept of unjust enrichment, or quasi-contract, is similar to the concept of improvident transaction, serving as a basis for the court to set aside transactions based on comparative fairness factors. See e.g. *Stoeckinger v. Pres. Fin. Corp. of Del. Valley*, 948 A.2d 828, 833 (Pa. Super. 2008) (emphasizing the centrality of justice in the application of the doctrine).

while both were still alive, argued the transfer was a gift—the result of the free will of the father who, although frail, was alleged to have been mentally competent at the time of the transaction.³³

The lower court and the Supreme Court of Ireland ruled that the transaction should be set aside, both on the grounds of undue influence and improvidence of the transaction.³⁴ In doing so, the courts focused closely on the role of the attorney who handled the deed transaction and expressed concern about the potential harm to Thomas Senior. The trial court found that the attorney failed to inquire about several factors deemed relevant to the transaction, including:

- whether Thomas Senior had any other assets to use for his own support;
- whether Thomas Senior had other children or other close-knit relationships in the family;
- what Thomas Senior would do if Thomas Junior did not support him; and
- what Thomas Senior would do if Thomas Junior died before him.³⁵

The attorney attempted to justify his handling of the transaction through testimony and arguments made during the proceedings.³⁶ He recalled that Thomas Senior gave him “clear and unambiguous instructions,” and explained he had drafted alternative deeds, one retaining a right of residence, and one retaining both a right of residence and a right of maintenance and support from the premises.³⁷ The attorney stated that the father wanted his son to have the premises without any conditions—thus implying that the son, rather than the father, dictated the actual terms of the deed that included a retained right for the

33. *Carroll*, [1999] 4 I.R. 241 at **6, 8.

34. *Id.* at **3, 14.

35. *Id.* at *11.

36. Justice Barron observed that, “whatever independence [the lawyer] may have had [during the transaction] has been destroyed by his acting in the present proceedings as solicitor to the personal representative of the donee.” *Id.* at *18.

37. *Id.* at **5–6.

father to reside in the home. Further, the attorney had maintained no notes of the meetings with the father, and it appeared that both the father and the son attended the first meeting (lasting fifteen minutes) and the second meeting (lasting another fifteen or twenty minutes). In offering evidence about the transaction, the attorney “was somewhat uncertain as to whom, strictly speaking, he was acting for in relation to the conveyancing transaction.”³⁸ At one point he believed he was acting for Thomas Senior, until the transfer was complete, at which point he said he was acting for Thomas Junior. The attorney also attempted to explain his role was as a “family solicitor,” representing both the transferor and transferee.³⁹ The few document copies contained in the attorney’s file were all addressed to Thomas Junior, the attorney’s file was maintained under the son’s name, and no written retention agreement existed.⁴⁰

Three Justices from the Supreme Court of Ireland rendered the appellate decision. Two of whom wrote separately to explain the unanimous decision to set aside the conveyance, thereby affirming the decision by the lower court. Justice Denham found that the relationship of the father and the son was such that it raised a presumption of undue influence, which shifted the burden to the son as donee of a purported gift to show the gift was an exercise of the donor’s independent will. Critical to the question of gift was whether the father had “independent legal advice.”⁴¹ Justice Denham noted that the attorney “appeared to misconceive his duty.”⁴² Because the attorney failed to make sufficient inquiry to learn that the asset being transferred was practically the sole asset owned by the father, Justice Denham concluded the attorney

could not advise him fully or explain the consequences of his action. Nor did [the attorney] know of the family, the relationships with the daughters, and so could not advise [the father] on this matter either. In light of the absence of this

38. *Id.* at *6.

39. *Id.*

40. *Id.* at *11.

41. *Id.* at *10.

42. *Id.* at *11.

information [the attorney] could not advise Thomas Carroll senior appropriately.⁴³

Justice Denham conceded that there was no evidence the son used “wiles” to obtain his father’s signature, nor was it necessary to find the father was without capacity.⁴⁴ Rather, Justice Denham concluded that a presumption of undue influence arose because of the nature of their relationship at the time of the purported gift, a presumption that could not be overcome when the father did not have independent legal advice.⁴⁵

The other two members of the panel concurred in the ruling, with Justice Barron writing separately to express additional concerns about undue influence and the role of the attorney in the deed transaction.⁴⁶ Justice Barron noted that the son had selected the attorney, and gave the attorney controlling instructions about the transaction. Justice Barron also noted that the sisters who challenged the transaction “accept[ed] that their brother did not do anything improper.”⁴⁷ But Justice Barron emphasized the attorney’s failures in handling the transaction:

Even if [the attorney] had been the donor’s solicitor what he did would not have saved the transaction. As I have said before, a solicitor or other professional person does not fulfil his obligation to his client or patient by simply doing what he is asked or instructed to do. He owes such person a duty to exercise his professional skill and judgment and he does not fulfil that duty by blithely following instructions without stopping to consider whether to do so is appropriate. Having done so, [the attorney] must then give advice as to whether

43. *Id.*

44. *Id.*

45. *Id.* The Irish law concept of undue influence appears to be tied to a relationship that would be called “confidential” by the laws of many states in the United States, such as Pennsylvania. Evidence of a mere “familial” relationship is usually not enough to shift the burden. Compare the *Carroll* decision with the decision in *Walsh v. Bucalo*, 620 A.2d 21, 23–24 (Pa. 1993), which declined to set aside a mother’s gift of property to her son by which she retained a life estate, and family friction later developed over the mother’s new relationship and subsequent marriage.

46. *Carroll*, [1999] 4 I.R. 241 at *14.

47. *Id.* at *17.

or not what is required of him is proper. Here his duty was to advise the donor to obtain independent advice.⁴⁸

Justice Barron concluded, “In my view this was a case in which the presumption of undue influence arose to transfer the onus to the defendant [son], an onus which has not been discharged.”⁴⁹

Thus, the justices in Ireland articulated what is arguably a core, two-step principle of legal ethics when representing older adults. Restated, older adults engaging in significant legal transactions may need independent legal advice, *and* retained attorneys have an independent obligation to recognize and respond to this potential need. The thoughtful attorney would recognize several options. First, the attorney could have declined to handle the transaction as improvident for a dependent elder. The attorney also could have declined to handle the transaction unless son and father had separate advice, free from any question of conflicting loyalties. The attorney could have learned sufficient facts to provide effective counseling of the elder about his estate planning options. The attorney could have discussed with the father whether he intended to disinherit his daughters. The attorney could have adopted a routine for documenting that any decision by a determined donor was carefully considered and well informed.⁵⁰ Thoughtfully presented advice and documentation of the decisionmaking process will enhance the likelihood that persons affected by the transaction will accept the outcome.⁵¹ Litigation about undue influence or improvidence of the transaction, after the fact, is rarely a speedy or satisfying path.⁵²

48. *Id.* at *18.

49. *Id.*

50. See e.g. Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 Rutgers L. Rev. 1, 1 (2006) (arguing that “permitting agents to act without communicating and consulting with elders is inconsistent with the agent’s underlying duty of obedience”).

51. See Timothy P. O’Sullivan, *Family Harmony: An All Too Frequent Casualty of the Estate Planning Process*, 8 Marq. Elder’s Advisor 253, 257–261 (2007) (discussing a “family fiduciary” approach to long-term planning based on the informed consent of the older adult).

52. For a provocative alternative approach to the issue of undue influence, see Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should be Abolished*, 58 U. Kan. L. Rev. 245 (2010).

*V. INTEGRATING ETHICAL LESSONS WITH SUBSTANTIVE
KNOWLEDGE: CORE CONCERNS*

In the Elder Law Clinic, one of our most frequent ethical discussions focuses on the concept of client identity. As demonstrated by the *Carroll* case, even experienced attorneys tend to see the younger—and sometimes more aggressive—friend, spouse, or family member as the alter ego of the older person. In the Elder Law Clinic, we raise the issue of client identity on the students' first day in the program.

Students who enroll in the Elder Law Clinic usually make a two-semester commitment, earning four graded credits per semester. Students are expected to account for a minimum of twelve hours of clinical time each week and attend a weekly clinic class. Many of the students also take a seminar on Law and Aging Policy along with the clinic, although this is not a pre- or co-requisite. The size of our clinic has evolved over the last ten years, starting with two students earning two credits per semester. More credits and students were added as the client base grew. Our clinic now has six to eight students per semester. We have three part-time supervising attorneys and a full-time clinical fellow, who often serves as the office manager for the clinic. I teach the class component of the clinic.⁵³

As part of the clinic orientation, we provide our students with a written policy guide, and we walk through the document paragraph by paragraph. The document is posted at each of the clinic desks. One of the first paragraphs of that document is a reminder about Pennsylvania's version of Rule 1.14 of the Model Rules of Professional Conduct (Model Rules)⁵⁴ on representing a "Client with Diminished Capacity."⁵⁵ We discuss our clinic policy on client identity. In most instances, our policy is that we represent the oldest person in the family, not their son or daughter. Usually, I can see the students nodding in agreement, although experience has taught me that real appreciation for the policy will develop

53. Penn State's Elder Law Clinic operates twelve months a year, with students compensated at an hourly rate for work during summers and school vacations from a combination of IOLTA grants and hard funding by the Law School.

54. For this Article, citations are to the American Bar Association's Model Rules of Professional Conduct.

55. Pa. R. Prof. Resp. 1.14 (2010).

more slowly. Clinic orientations are fairly boring—perhaps even more boring than a traditional first session of a lecture-based class. I have tried skipping the orientations, but usually I am sorry because then I and the part-time supervising faculty will find ourselves saying the same things individually to the eight students enrolled per semester in the clinic.

Our students will typically inherit three or four existing client files and, over the course of the semester, will open three or four more new client files. Our clinic's caseload is divided roughly into thirds: about one-third of the files are debt-related (including bankruptcy cases, credit card debts, or healthcare debts); about a third of the matters relate to advance planning issues (including simple wills and advance-care directives); and the remaining third are a potpourri of nursing home issues, housing issues, and insurance coverage or health coverage issues. All of the clients are at least age sixty and many of our clients are in their eighties. One of the unique features of our clinic is that we will travel to the client's home for meetings, rather than expecting them to travel to us. Our clients are scattered across three large counties in central Pennsylvania, and our students are warned before applying for the clinic that they will need their own means of transportation. The students soon realize that seeing older adults in their homes is worth the extra effort, for it provides context often vital to a decision about the scope of appropriate legal assistance and the potential need for social support.

Our office plan is an open setting, with desks and phones set in cubicles with three-quarter walls. We have several small and large conference room spaces available, and there are good options for students to choose when needing a quiet space. The supervising attorneys have glass-front offices around the edges of the student spaces, and the doors to the supervisor offices are usually open. There are two big advantages to this arrangement—students have easy access to supervisors and supervisors with well-perked ears can hear what is going on.

A supervisor is always present at the first meetings between students and clients. After the first meeting, students are encouraged to begin meeting with clients on their own as their comfort level increases. Whenever students want backup, or if we know of a potentially difficult setting, supervisors are always available. Frequently, we team a newer student with a more experienced student for interviews. Debriefings with supervisors occur regu-

larly, and students also write status reports for their supervisors on at least a weekly basis. Supervising attorneys review and ultimately cosign all correspondence and pleadings prepared by clinic students.

Frequently, especially during the first few weeks of a new semester, a supervisor will overhear a student talking by telephone with a member of the client's family. The family member may be pumping the student for information—or feeding the student information about a desired result. But each time supervisors hear this dynamic, we either intervene—or if it appears more appropriate, we call the student later into the supervisor's office, and we ask, in essence: "Who is the client on this matter?"; "Do you have permission from the client to be talking to ____?"; "Is there another way that we can help this client without the son or daughter taking control?"

We talk about Model Rule 1.6 on "Confidentiality," which provides that a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent," or unless other circumstances are met.⁵⁶ We ask whether the client has waived confidentiality and, if so, whether the waiver is documented in our records. If there is no waiver, we discuss whether there is a theory of communication under the Model Rules that permits us to consult with the family member.⁵⁷ For example, it may be that collecting information from the family member is necessary for representation of the client, but that leads to a discussion about the fine line that sometimes exists between collecting and disseminating information with family members. Alternatively, once the older client has made voluntary, informed decisions about a long-range plan with the potential to impact the dynamics of the larger family, it may be appropriate for the client, with the assistance of our student attorneys, to discuss the plan with the family, thereby reducing the opportunities for bitterness and recriminations. These decisions should be carefully documented in our clinic files.

56. Model R. Prof. Conduct 1.6(a) (ABA 2010).

57. See Heather A. Wydra, Student Author, *Keeping Secrets within the Team: Maintaining Client Confidentiality While Offering Interdisciplinary Services to the Elderly Client*, 62 *Fordham L. Rev.* 1517, 1517–1519 (1994) (noting that lawyers serving the elder client "may need to work as part of an interdisciplinary team including physicians, psychologists, social workers, accountants, or clergy").

The goal is to have the students articulate their thought processes about client identity, confidentiality, and the potential for elders to be influenced by the desires of other family members. We use written retention letters signed by the client; but it is fascinating to see that even when students have personally handled the execution of the retention agreement with the older adult, they are still tempted during meetings to focus on the younger person.⁵⁸ There are often good reasons to communicate with the younger person, but our goal, again, is to have the students think about the question of client identity and make choices based on a clear analysis of the options. We discuss the dangers of presumptions about diminished capacity and the need, even when there is reduced capacity, to maintain “as far as reasonably possible . . . a normal client-lawyer relationship.”⁵⁹

At our weekly clinic meetings, when we have supervising attorneys and students gathered together, we often review a “client communication” dilemma and discuss the choices made in response to the problem. We hold frequent meetings in which students are encouraged to describe the progress of a particular case, especially those with interesting ethical implications for the practicing lawyer. When students encounter new factual presentations of classic issues, we encourage them to think about using the topic for a short article for our clinic newsletters. We usually ask the students to write reflection pieces at the end of the semester, reviewing their accomplishments and any unique lessons learned during the semester. During the final case review meetings between two supervisors and each student, the supervisors initiate a discussion of how a student handled a particularly interesting or challenging ethical issue.

The decision in the *Carroll* case from Ireland provides an unusually detailed evaluation of the role of the attorney in assisting an older adult to complete a transaction.⁶⁰ In the United States, opinions sometimes hint at the possibility that the attor-

58. See Steven Keith Berenson, *Can We Talk?: Impediments to Intergenerational Communication and Practice in Law School Elder Law Clinics*, 6 *Elder L.J.* 185, 186 (1998) (evaluating Elder Law clinics as small-scale but valuable opportunities for intergenerational dialogue).

59. Model R. Prof. Conduct 1.14(a) (ABA 2010).

60. *Carroll*, [1999] 4 I.R. 241. See also *In re Schell*, 1995 WL 924494 at *509–510 (Pa. Juniata Co. Ct. Dec. 12, 1995) (finding that both the purported agent and the attorney who prepared the documents exerted undue influence over the elderly client).

ney may have missed core ethical concerns with an elderly client, while reserving more direct discussions for disciplinary proceedings or malpractice suits.⁶¹ At the Elder Law Clinic, we use reported cases as tools to discuss both substantive and ethical issues, but the opportunity for students and supervising attorneys to walk hand-in-hand through ethical issues, with the luxury of weekly meetings to review common problems, means that the students are asked to examine almost daily their own role as counselors for older adults. Our goal is to encourage a thoughtful approach to practice, integrating ethical concepts with skills training and development of substantive legal knowledge.⁶²

Ethical issues are often subtle. In one instance, an Elder Law Clinic student was hoping to have the opportunity to prepare a power of attorney and volunteered to assist a secretary on the staff of the university. The secretary requested a power of attorney for her mother, reporting that her mother was departing soon on an elder hostel cruise with friends. The student, trying to be helpful, prepared a broadly worded power of attorney and was preparing to fax it to the secretary when a supervisor intervened. Tough questions were asked politely, including questions about

61. See *Wood v. Jamison*, 167 Cal. App. 4th 156, 159, 163 (Cal. App. 2d Dist. 2008) (holding an attorney liable for breach of fiduciary duty to an elderly client arising from the preparation of documents transferring equity to a man posing as the elderly client's nephew); see also *Fickett v. Superior Court of Pima City*, 558 P.2d 988, 990 (Ariz. App. Div. 2d 1976) (holding that an attorney who represents the guardian of an incompetent person "assumes a relationship not only with the guardian but also with the ward"); *In re Disciplinary Proceedings Against Strasburg*, 452 N.W.2d 152, 155-156 (Wis. 1990) (suspending an attorney based on several allegations of misconduct, including the attorney's failure to meet with the elderly client before advising the client's children to transfer assets out of the elder's estate); but see *In re Winthrop*, 848 N.E.2d 961, 973, 980-981 (Ill. 2006) (suspending the attorney but finding that the attorney's draft of a broadly worded power of attorney used by an agent to loot a ninety-year-old woman's estate was not a violation of the attorney's ethical obligations because the record showed conflicting evidence about the principal's mental state and lucidity at the times she met with the attorney).

62. For further discussion of this sensitive topic, see Katherine C. Pearson, *The Lawyer's Ethical Considerations in Medicaid Planning for the Elderly: Representing Smith and Jones*, 76 Pa. B. Assn. Q. 1, 10 (2005) (describing the "delicate road to travel" for lawyers who advise on Medicaid planning); Timothy L. Takacs & David L. McGuffey, *Revisiting the Ethics of Medicaid Planning*, 17 NAELA J. 29, 29-30 (2004) (examining "whether Medicaid planning is ethically justified in the context of family wealth preservation" and answering no if this goal is divorced from improving an elder's life); Timothy L. Takacs & David L. McGuffey, *Medicaid Planning: Can It Be Justified? Legal and Ethical Implications of Medicaid Planning*, 29 Wm. Mitchell L. Rev. 111, 114, 153 (2002) (arguing Medicaid planning cannot be morally or ethically justified unless "the United States elevates health care to a moral right).

client identity and whether the mother wanted her daughter to have an unlimited power of attorney, and, perhaps most importantly, whether the student was making assumptions about scope of authority for the agent or was taking directions from the secretary-daughter.⁶³ Powers of attorney are vital components of long-range planning, but are equally potent tools in the hands of those with less-than-ideal intentions.

We recognize that most of our clinic students will not practice in Elder Law. We emphasize whenever possible the transferability of skills, knowledge, and ethical awareness to other areas of legal and business practices. The question of client identity and the related question of fiduciary duty from the lawyer to the client have relevance in a variety of transactional matters. For example, in March 2008, the Director of Enforcement for the Securities and Exchange Commission pointed to suits against more than 125 lawyers who were advisors to parties whose actions were alleged to constitute fraud or self-dealing.⁶⁴ Attorneys are often the first or last line of protection for clients, both in individual and corporate settings.

VI. INTEGRATING CLINICAL PRACTICE WITH BROADER VISIONS FOR ADVOCACY AND RESEARCH

During the last ten years of operation, our clinic has witnessed recurring issues that suggest the need for systemic solutions, rather than case-by-case advocacy. For example, the Elder Law Clinic has frequently represented community spouses of elderly residents in nursing facilities. In some instances, the couples are long estranged, despite continuing to be married in

63. One probate judge described a request made by an adult child to an attorney for transactional documents to be signed by an unseen, elderly client as one of the “worst-case scenarios,” opening the door to potential abuse by the agent. See Georgia Akers, *Elder Abuse and Exploitation: The Ethical Duty of the Attorney*, 47 *Houston Law. J.* 10, 15 (July/Aug. 2009) (available at <http://www.thehoustonlawyer.com/aa-july09/page10.htm>) (discussing ways attorneys can identify and prevent elder abuse).

64. Linda Chatman Thomsen, Speech, *Speech by SEC Staff: Remarks Before the Minority Corporate Counsel 2008 CLE Expo* (Chi., Ill. Mar. 27, 2008) (available at <http://www.sec.gov/news/speech/2008/spch032708lct.htm>); see also Paul D. Paton, *Suddenly, They're Holding Corporate Counsel to a Higher Standard*, *Globe and Mail* A19 (July 19, 2007) (commenting on the verdict in a corporate fraud case in which the corporation's attorneys were convicted “for their roles in failing to stop or to sound an alarm about the transactions that lay at the heart of the case”).

name. Pennsylvania does not recognize a legal theory of separation.⁶⁵ The estranged community spouse may be asked to sign admission papers on an emergency basis, usually with oral reassurances by the facility's staff that the community spouse faces no personal liability for the costs. However, if a gap occurs before eligibility for public benefits, the nursing home may return to the community spouse, sometimes claiming that a signature as a "responsible party" creates personal liability for the community spouse. As the result of the repetitive nature of such claims, I wrote a series of articles about the need for greater clarity or a bar on the use of the ambiguous "responsible party" term,⁶⁶ and in turn a Pennsylvania legislator decided to sponsor legislation in an effort to clarify the law. Students in the Elder Law Clinic and Law and Aging Policy class drafted the legislation and wrote supporting memoranda analyzing key issues. One of the clients from the clinic volunteered to tell her story in support of the legislation. The students presented Pennsylvania House Bill 1554 regarding "Third Party Signers to Nursing Home Admissions Contracts" together with the sponsoring legislators at a press conference in 2005.⁶⁷ While the bill did not pass, the experience provided students with new opportunities for written and oral advocacy, as well as greater appreciation for the difficulty of achieving legislative change.

The Elder Law Clinic has also been approached by resident groups at Continuing Care Retirement Communities (CCRCs) in Pennsylvania expressing concern about their rights as residents.⁶⁸ A common question posed by the residents is their right of access to detailed financial information that either supports or could serve as a basis for challenges to fee increases. Other CCRC issues include accountability for staffing decisions that impact

65. 15 Summary Pa. Jur. 2d *Family Law* § 4:66 (2010).

66. E.g. Katherine C. Pearson, *The Responsible Thing to Do about "Responsible Party" Provisions in Nursing Home Agreements: A Proposal for Change on Three Fronts*, 37 U. Mich. J.L. Reform 757 (2004).

67. Pa. H. 1554, (Printer's No. 3151), Gen. Assembly, 2005–2006 Reg. Sess., (May 10, 2005) (amending the Health Care Facilities Act, prohibiting third-party guarantees of payment for admission, imposing powers and duties upon the Department of Health, and imposing penalties for violation).

68. See e.g. Pennsylvania's Continuing-Care Provider Registration & Disclosure Act, 40 Pa. Consol. Stat. Ann. §§ 3201–3225 (West 2010) (creating the organic statute that provides for agency action); Pa. Code tit. 31, §§ 151.1–151.14 (2010) (establishing and implementing the Act's registration and disclosure system for continuing-care providers).

resident care or decisions about facility maintenance or expansion. Recognizing common themes raised by residents has resulted in our students taking a broader look at state regulation of such facilities. Our students are invited to be speakers to resident groups in CCRCs. In turn, the common themes have sparked my own research interest, and part of my 2009–2010 sabbatical research has focused on comparative examination of state CCRC laws and disclosure practices,⁶⁹ leading to a role as a witness during a federal investigation by the Government Accountability Office of CCRC industry practices.⁷⁰

The issues identified while representing clients in the Elder Law Clinic also have fostered clinical education's integration with more traditional courses. Our students regularly use client-generated questions for paper topics in classes such as trust and estate law, health law, insurance law, and professional responsibility. Clients from the clinic have volunteered to speak to classes on client counseling or negotiation, describing their experiences with attorneys in the private bar and comparing the experiences to working with students in the Elder Law Clinic. Practicing attorneys frequently serve as guest speakers in the Elder Law Clinic and in the Law and Aging Policy Seminar, which permits both students and the attorneys to demonstrate the relevance of legal education to the "real" world. Our clinic students regularly serve as law clerks for private attorneys who specialize in Elder Law or trusts and estate planning law, and a small but growing

69. The research began in 2006. See Katherine C. Pearson, *Continuing Care Retirement Communities, State Regulation and the Growing Importance of Counsel for Residents and Their Families*, 77 Pa. B. Assn. Q. 172, 172 n.1 (2006) (describing the "genesis" of the CCRC research).

70. See U.S. Govt. Accountability Off., Rep. to the Chairman, Spec. Comm. on Aging, U.S. Senate, *Continuing Care Retirement Communities Can Provide Benefits, but Not without Some Risk*, 36 (June 2010) (analyzing the types of risks CCRCs are exposed to as well as the risks CCRC residents face and how state laws address these risks). See also Katherine C. Pearson, Statement, Sen. Spec. Comm. on Aging, *Hearing to Examine Continuing Care Retirement Communities*, 111th Cong. D824–D826, 2010 WL 2863779 (July 21, 2010) (recommending a national bill of rights for residents of CCRCs to ensure financial accountability and transparency in operations); Elizabeth Olson, *Concerns Rise About Continuing-Care Enclaves*, N.Y. Times F5 (Sept. 16, 2010) (summarizing the Senate hearing and GAO report on CCRCs and noting how CCRCs have resorted to more complex financial models in an effort to stay solvent); Anton Troianovski, *Scrutiny Turns to Retirement Centers*, Wall St. J. C11 (July 21, 2010) (providing that a Senate hearing is being held to address concerns that residents of CCRCs may not be adequately protected when the CCRC is in financial distress as a result of the current recession).

cohort of graduates with clinical experience are now practicing attorneys and members of the Elder Law Sections for the bar associations in the region, including Pennsylvania, Maryland, and New Jersey.

Additionally, our students recognize the practical need for self-promotion and visibility in the professional community, particularly in a tight job market. Students are given opportunities each semester for public speaking. Elder Law Clinic students develop poise and skill in public speaking when invited to make presentations on hot topics in law and aging by fraternal organizations, church groups, and senior centers. Our clinic also produces a newsletter, *Adventures in Law and Aging*, with student-written articles, published about three times per year. Our students are also regular attendees at an annual, two-day Elder Law Institute hosted by the Pennsylvania Bar Institute and the Pennsylvania Bar Association's Elder Law Section.

VII. THE FUTURE FOR ELDER LAW CLINICS

As the *Carroll* case demonstrates, and as other court decisions from around the world reinforce,⁷¹ there is a need for practitioners who recognize that older persons need competent, independent legal advice from skilled practitioners. Development of specialized knowledge and skills can begin in a classroom, but often it takes application and practice to fully capture the lessons. Law firms may provide on-the-job training, but the pace and pressures of practice often leave little time for reflection and deliberation. Clinics can provide an opportunity for lawyers to establish a personal practice of ethical reflection and decision-making.

Funding for any clinical endeavor is always a serious question, and this is no less true in a time of economic belt-tightening; however, university-based legal clinics provide valuable public services to communities that are underserved. The availability of

71. Compare *Richards v. Law Society*, [2009] E.W.H.C. 2087 (Admin), 2009 WL 2392195 (July 10, 2009) (rejecting an attorney's argument that he had no duty to refer an elderly man for independent legal advice) with *Law Wan-Lan v. Well-Built Dev. Co. Ltd.*, [1988] 2 H.K.L.R. 435, 1988 WL 862316 (Hong Kong Ct. App. 1988) (finding no cause of action existed for an elderly woman against the bank's solicitor who served as a witness for her signature on a power of attorney, as there existed no special relationship between the solicitor and the attorney).

even modest public funding can be leveraged through university-based clinical operations, as the bulk of client services will be compensated with class credits rather than hourly billing. University-based clinics are a core component of the network of legal services available to those who cannot afford fee-based attorneys.

The need for affordable legal services to older adults is recognized on the international front. During my sabbatical, I had the good fortune to participate in a dynamic approach to advocacy for older adults in Northern Ireland, operating as the Changing Ageing Partnership (CAP).⁷² CAP brings together older adults, representatives of government, service providers in voluntary and community groups, and university researchers. One of the research products from the partnership was a study that examined the needs of older adults for legal advice.⁷³ Reminiscent of the sentiments of the Supreme Court of the Republic of Ireland in the *Carroll* case, the report opens with the observation that many older people in Northern Ireland are unaware of “where and when advice is available. Furthermore[, older adults] may be unaware that advice is needed.”⁷⁴ In their recommendations, the authors highlighted the following items:

- the “need for improved communication between relevant health and social care professionals and the legal profes-

72. See Changing Ageing Partnership, *Welcome to the Changing Ageing Partnership*, <http://www.changingageing.org/AboutCAP/> (accessed Dec. 27, 2010) (describing CAP's goal to empower older adults and improve their quality of life by utilizing a holistic approach that focuses on the older individual's health, social relationships, economic status, and community).

73. Subhajit Basu, Joe Duffy & Helen Davey, *Digital Divide, Older People and Online Legal Advice, Report for the Changing Ageing Partnership (CAP), Institute of Governance, School of Law, Queens University Belfast* (June 2009) (available at http://www.changingageing.org/FileStore/QUBSeminarPrograms/SeedGrantReports/Filetoupload_152972,en.pdf). The study employed a mixed methods approach to data collection, with twenty-five semi-structured interviews, seven focus groups, and an observational experiment. *Id.* at 14. All subjects were aged fifty or older and living in Northern Ireland. *Id.* at 12, 14. The original focus of the study was on the use by older adults of the Internet for legal information. The Basu/Duffy CAP study revealed, however, strong feelings on the part of the older adults about access and affordability of attorneys in traditional settings, with the result that many of the recommendations from the researchers focus on access to legal advice services, and not simply on availability of information on the Internet. *Id.* at 68–69.

74. *Id.* at 1.

sion in terms of raising awareness of older people's needs for legal advice at critical periods";⁷⁵

- the "need to provide *specialist* legal services for older people's issues generally and also to meet the particular needs of groups and individuals who are marginalized and socially excluded";⁷⁶
- the need for "[l]egal advice . . . available to older people living in residential care";⁷⁷
- the need for affordable legal services and clear pricing of legal services;⁷⁸ and
- the need for education programs sensitizing students to the legal needs of older adults.⁷⁹

Such a list serves as a simple but effective mission statement for development of interdisciplinary, university-based legal clinics serving older adults, both within and outside the United States.

VIII. CONCLUSION

In the *Carroll* case, the parties' lawsuit commenced in 1994 and the final decision of the Supreme Court of Ireland did not issue until five years later—a timeline that is probably shorter than the average time for conclusion of litigated disputes. One of the practical consequences of the poorly considered transaction was not only the potential harm to the dependent elder but also the actual harm to the extended family. The harm is captured symbolically by photographs of the once proud "family" pub in the act of being destroyed by bulldozers in 2004.⁸⁰ By recognizing the need of older adults or other vulnerable persons for independent

75. *Id.* at 68.

76. *Id.* at 69 (emphasis in original).

77. *Id.*

78. *Id.*

79. *Id.*

80. The Fethard Historical Society provided the Author with access to photographs of the destruction. The pub was demolished to allow for the construction of a new development. Fethard News, *Carrols Pub, Burke Street*, http://www.fethard.com/news_archive/cnews.040304.html (Mar. 4, 2004).

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legal advice and by carefully documenting a well-considered decision process, attorneys can reduce the chances for manipulation or exploitation of older adults and will enhance the potential for families as a whole to be protected from protracted disputes over “improvident” transactions.