

Aging Outside the Traditional Family: Problems and Possibilities

By Cate Russell and Hina Qureshi with Deirdre Lok

This article is part of an ongoing series brought to you by the Section's Elder Abuse Committee. The authors are students at the HELP (Helping Elders through Litigation and Policy) Clinic at Brooklyn Law School, taught by Jane Landry-Reyes, Esq. of Brooklyn Legal Services, Elder Law Project, and Deirdre Lok, Esq. of the Harry and Jeanette Weinberg Center for Elder Abuse Prevention. Through the clinic, students carry a caseload advocating for older adults in Brooklyn Housing Court and participate in a seminar exploring the legal ramifications of aging in our society.



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Introduction: A Growing and Vulnerable Single Elderly Population

As the United States' substantial baby boomer population ages, a significant and growing portion is doing so outside the confines of the traditional nuclear family. The number of single-person households (including the never-married, divorced, and widowed) steadily increased from eighteen percent in 1970 to nearly twenty-seven percent in 2003, according to U.S. Census Reports.¹ Demographic trends also suggest that U.S. households are childless at increasing rates. According to U.S. census data, the number of women who have not given birth by the ages of 40 to 44 jumped from approximately ten percent in 1980 to nearly nineteen percent in 2010.² This trend is likely to grow as the baby boomers age. Legal structures should adapt to reflect the United States' cultural shift toward more single-person households and provide greater protections for this vulnerable population in old age.

The elderly population struggles disproportionately with illness and disability. Even absent serious illness, the elderly often have limited mobility and diminished senses that make it difficult to navigate ordinary tasks without assistance. Compared to the elderly aging within families, single adults are particularly vulnerable because societal expectations and legal presumptions about their caregiving are unclear. This population's relative isolation also makes them disproportionately vulnerable to elder abuse. By contrast, for those aging in traditional families, these vulnerabilities are mitigated. For example, caregiving expectations are

relatively stable for those with adult children. Children are often present to monitor their elderly parents' condition, to hire caregivers or provide care themselves, to coordinate medical care and hospital stays, and to transition their parents to assisted living facilities when needed. For elderly patients who lack immediate family members, and adult children in particular, hospital discharge planners struggle to coordinate safe discharges for patients who lack an obvious caregiver.

It is important to note that a majority of elder abuse is perpetrated by family members, most commonly adult children or spouses.³ Therefore, older adults aging within traditional families are certainly not automatically insulated from abuse as they age, and should still have safeguards in place. However, people aging outside traditional family structures often lack the default caregivers and decision-makers who are often heavily relied upon in our society, creating unique gaps in service.

Gaps in Coverage Under the Family Medical Leave Act

Similarly, while designating emergency contacts, health care proxies, or powers of attorney is a relatively simple task for those with spouses or children, it can be daunting for those who live alone. Nevertheless, individuals can easily make nontraditional choices for health care proxies and powers of attorney by contract. Even when an individual fails to designate a health care proxy, states like New York in its Family Health Care Decisions Act,⁴ recognize that "close friends" can perform this role when family members are unavailable. By contrast, individuals simply cannot use contracts to create legally recognized relationships for the purposes of government benefits, like employment protections under the Family Medical Leave Act (FMLA).⁵

The FMLA only affords employment protections for a narrow category of caregivers: spouses, parents, and children. Even siblings are excluded. While friends and siblings often provide precisely the same caregiving services as spouses, parents and children, the FMLA does not protect them because of their relationship status. This gap in coverage can be critical, especially for those with limited resources. For covered caregivers, the FMLA requires employers to provide up to 12 weeks of unpaid leave per year, to continue providing the same medical benefits, to restore employees to the same position, and if the same position is unavailable, to restore employees to another position that is substantially equal in pay, benefits, and responsibility.

Alternative Models: “Friends-Helping-Friends” and Reciprocal Beneficiaries

To address this critical gap in coverage for single elderly adults, there is a growing need to legally recognize relationships like friendships, which exist outside marriage and the traditional nuclear family. Legally recognizing friendships for some purposes could alleviate some of the uncertainties and vulnerabilities faced by single and childless elders. In fact, recognizing the primacy of friendship in their lives, some single elders have formed support networks for mutual caregiving with their peers. A “friends-helping-friends model” is growing in popularity among aging single, widowed and divorced women.⁶ The purpose of these associations is to be available as a support network for one another in situations where others would ordinarily rely on their immediate family for support. These models often involve joint living arrangements, and are even accompanied in some cases by contractual agreements that designate mutual caregiving rights and responsibilities between friends. But these joint living arrangements and contractual agreements exist without legal support because friendship is not a legally recognized relationship and comes with none of the legal rights that are enjoyed by parents, spouses, and children in most jurisdictions. Without these legal rights, the friends-helping-friends model for illness and old age “is a luxury of those who can afford to do it with no help from the government or their employers.”⁷

The need to recognize a broader array of personal relationships is particularly acute in the elder care context. But the problems that arise in this context highlight broader concerns that have been raised by a small movement to elevate the legal status of friendship, and challenge the privileged status of marriage, in our society writ large. For single adults living outside the traditional family model, friendships are often their primary source of support. As the growing trend towards more single-person households continues, the law should extend protections that it has reserved

for marriage and close family to friends that perform the same supportive role in one another’s lives. In addition to medical leave, spouses possess other legal rights that would be equally beneficial for adults who maintain mutually supportive relationships with close friends. These additional rights include the right to bring wrongful death suits, hospital visitation rights, and default health care decision-making rights during incapacitation. Another particularly crucial right for elderly friends in joint living situations is the right to remain living in a joint home after a friend’s death.

Hawaii state law provides a good alternative model for supporting friendships in ways that could ease vulnerabilities for elder single adults as they age. A 1997 Hawaii law⁸ allows single individuals to register with the state as “reciprocal beneficiaries,” without making any assumptions about the nature of their relationship. Reciprocal beneficiaries need not be in an intimate relationship, can be of the same or opposite sex, and can even be related. Reciprocal beneficiary status confers certain rights on this mutual relationship that would otherwise be reserved for marriage alone. These include inheritance rights, workers’ compensation rights, rights to sue for wrongful death, health insurance and pension benefits for state employees, hospital visitation rights, and health care decision-making rights.⁹ Other states should adopt similar models, which would give elder single adults far more flexibility and security in structuring their living and medical care arrangements as they age.

Conclusion

Demographic trends toward a growing population of single and childless elders are clear. This elderly population faces special vulnerabilities because they lack clear and stable support networks. This vulnerability is worsened by gaps in coverage under the FMLA. For single elders who could rely on close friends for caregiving in times of need, the FMLA fails to provide employment protections when friends care for seriously ill friends. This critical gap in coverage discourages alternative support networks that the law should support as the aging single population grows. Rather than reserving critical legal benefits for traditional marriages, states should follow Hawaii’s model and provide an array of benefits to mutually supportive beneficiaries. This model would support mutual caregiving arrangements for vulnerable single adults as they age and prevent a potential crisis in caregiving for this growing population.

For questions or to join the Elder Abuse Committee, please contact joy.solomon@hebrewhome.org. For a list of state-wide elder abuse resources, please visit nysba.org/ElderAbuseResourceGuide/.

Endnotes

1. Jane Gross, *Alone in Illness, Seeking Steady Arm to Lean On*, N.Y. TIMES, Aug. 26, 2005, <http://www.nytimes.com/2005/08/26/health/26alone.html?scp=1&sq=%2522grace%20mccabe%2522&st=cse&r=3&>.
2. Phyllis Korkki, *Childless and Aging? Time to Designate a Caregiver*, N.Y. TIMES, Sept. 11, 2012, <http://www.nytimes.com/2012/09/12/business/retirementspecial/for-childless-older-people-legal-and-logistical-challenges.html>.
3. The National Center on Elder Abuse at the American Public Human Services Association, *The National Elder Abuse Incidence Study*, September 1998, pg. 7.
4. Family Health Care Decisions Act, 2010 Laws of New York, Art. 29-CC § 2994.
5. Family Medical Leave Act, 29 USC 28 §§ 2601, 2611-2619, 2631-2636, 2651-2654.
6. Jane Gross, *Older Women Team Up to Face Future Together*, N.Y. TIMES, Feb. 27, 2004, <http://www.nytimes.com/2004/02/27/national/27RETI.html?ex=1217390400&en=9a707456311ee029&ei=5070&pagewanted=all>.
7. *Id.*
8. Haw. Rev. Stat. § 572-1.
9. Lesbian, Gay, Bisexual and Transgender Family Law § 8:19.

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