

## THE ELDER LAW ATTORNEY: WORKING WITH GRIEF<sup>†</sup>

Clifton B. Kruse, Jr.

*In this article, Mr. Kruse confronts the difficult issue of dealing with a client's grief. The author provides a synopsis of the role of the elder law attorney, a cogent discussion of the various types of grief and how to identify them, and some techniques that the elder law attorney can incorporate into his or her practice to help clients deal with their grief. More specifically, Mr. Kruse suggests that if elder law practitioners ask the right questions, avoid forcing the grieving client into making any irreversible decisions, and listen and remain attentive, they can assist their clients and their clients' families in their time of great need while still performing their vital legal services.*

Readers and contributors to this publication are lawyers who typically limit their practices to estate planning, estate administration and elder law issues. "Elder law" is a term coined by practitioners whose focus is on a population group, persons 65 years of age and older, and the myriad of legal problems individuals within

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Clifton B. Kruse, Jr. is a partner in the law firm of Kruse & Lynch, P.C. in Colorado Springs, Colorado. He limits his practice to estate planning, estate administration and elder law. He is the author of *Third-Party and Self-Created Trusts - A Lawyer's Comprehensive Reference*, published by the American Bar Association; "Self and Spousal-Settled Income Trusts," published in *Medicaid Trust Portfolio Series*, by Little Brown & Co., 1993, (amended 1994); and "Settlement Trusts," published by Little Brown & Co., (June 1995). He has written numerous law journal articles on trusts, estates and elder law.

Mr. Kruse received his Juris Doctorate from Washburn University in 1963 and is a member of the Colorado Bar Association. He is a Fellow in both the

that group face, including health care, Medicare and Medicaid planning, elder abuse, and problems involving dementia and capacity.<sup>1</sup> This article focuses on the practitioner who serves this population, and the sensitivity to clients' feelings that such a practice demands.

Estate planning and estate administration are commonly involved in the elder law attorney's menu of interests because such subjects are important to the community of older persons. Estate planning deals with preparing planning documents, primarily wills and trusts. Estate administration involves working with family members who have lost somebody—with survivors who are grieving. The estate administration lawyer concludes the client's estate plan by putting into effect what has been arranged by the deceased family member.

## **Elder Law**

Elder law is focused on multiple legal issues that older persons face. In addition to estate planning and the administration of decedents' estates, it deals with preparing powers of attorney in anticipation of disability and health care advance directives. It includes helping people who are frail and who are chronically disabled. The elder law practitioner's clients are those who often require assistance with the requisites of daily living (e.g. getting out of bed, toileting, walking, dressing, preparing food and eating). Lawyers practicing elder law consider legal issues relating to assisted living and life in nursing homes, and the legal consequences that follow institutionalization.

Working with older clients involves lawyers being present in a milieu where personal grief is sometimes intense. It requires a relationship with clients and their families in pre-mortem contexts, and

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American College of Trust and Estate Counsel, and the National Academy of Elder Law Attorneys, and is currently serving as President of the National Academy. Mr. Kruse is a frequent lecturer on the subjects of elder law and estate planning for various professional legal educational associations, including the ABA, the National College of Probate Judges, the American Association of Law School Professors, the American College of Trust and Estate Counsel, and the National Academy of Elder Law Attorneys.

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1. Such lawyers seek specialized help for their clients when that is indicated. Generally, such lawyers are knowledgeable in matters relating to capacity. They work with clients whose competence is often, at best, diminished, and at worst, lost altogether. See LAWRENCE A. FROLIK & MELISSA C. BROWN, *ADVISING THE ELDERLY OR DISABLED CLIENT* ch. 15 (1992).

with clients who are anticipating their own deaths. Lawyers who practice elder law are involved in arranging their clients' affairs as their clients near their end-life. Elder law attorneys assist families who are losing somebody and families who have a member who is now demented and nearing life's end. Such lawyers also deal with clients who are confused, angry, frightened and frustrated.<sup>2</sup>

In the practice of estate planning, estate administration and elder law, lawyers often become quite close to their clients and their family members. The lawyer, in this family-oriented practice, frequently become friends with his or her clients, and as confidantes and advisors over the years, form strong lawyer-client relationships. The lawyer and client like each other. Practitioners in this arena are fortunate in this regard . . . and so are their clients. The clients that such legal counselors help often return to them, and they refer their friends and families to them as well. Such lawyers may not need to promote their services.<sup>3</sup>

### Witnessing Grief

In this lawyer-client milieu, attorneys witness and become part of family loss and grieving. In estate planning, clients talk about death and the deaths of their family members; and in estate administration, handling the legal consequences following the death of a family member, lawyers witness grief, the often emotional and ultimate consequence of the estate planning process.

In these areas of practice, attorneys work with clients when they are receiving home health care or when they are in hospitals, nursing homes and hospices. Clients are sometimes terminal, aware of their eminent death, and so are their family members and friends. In antici-

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2. See Peter Margulies, *Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073 (1994).

3. Contrary to the attitude of some members of the Bar, evidenced in the Preface in the June issue of *The Colorado Lawyer*, 23 COLO. LAW. 1245 (1993), elder law attorneys do not think of their practices as "a business [that] provides legal services to clients in exchange for payment," or as expressed in SOL M. LINOWITZ, *THE BETRAYED PROFESSION* 2 (1994), "Law is a Business Like Other Business." Since anyone who receives income for what they do now refers to themselves as "professionals," lawyers who are privileged to practice in these areas and who provide more than self-interested services, evidence a vocation, a commitment to prudent statesmanship, something beyond a "professional business" that looks to personal profit and measures its success on the satisfaction of traditional business goals. See also ANTHONY T. KRONMAN, *THE LOST LAWYER* 11 (1993).

pation of the unwanted death, the process of personal grief, and the grief of those who share in this person's life and death, begins, and the family lawyer is a part of this process.

In other situations, grief that lawyers who practice in these areas witness is reactive and acute. Clients die from unexpected events, such as accidents, suicide, or sudden and unexpected medical problems.

### **Acute and Pathological Grief**

In the administration of estates, lawyers helping families sometimes confront survivors who are experiencing pathological grief. Family members may be stuck in shock, denial, regret or anger and need professional help to escape this trauma although such despondence is seen less by lawyers than the grief that may be described as acute.

Where a spouse survives the death of his or her husband or wife, for example, except in large and taxable estates, the lawyer's typical involvement with the family is abbreviated. Properly planned, except for large and taxable estates, there is not a great deal to do legally when the first spouse dies. Lawyers see the survivors following the death, during the acute phase of grief, but often not again for awhile, unless the surviving spouse's will is rewritten or unless a family member or friend calls indicating the need for help.

Daily visits to the gravesite still a year or more following the loss of a loved one, for example, suggest pathological grief. When a grieving widower calls out a daily command to the family dog, "Come on, boy, let's go see mommy," we witness in that client a continuing trauma that suggests pathology, the symptoms of illness and, perhaps the need for psychological intervention and care.

In refusing to do what appears necessary to accept the reality of the death that has occurred, the loss of a spouse or other family member results in the survivor or survivors being vulnerable, sometimes suicidal, depressed, and frequently belligerent in their refusal to allow help.

### **Help Coming from Listening**

Concerned trust and estate and elder law attorneys recognize the types of grief that their clients are experiencing, though perhaps not

by medical name. Grief is anticipatory, acute, chronic, or pathological, and it plays an important role in the client-survivor getting well through the healing process.

Sometimes there is no one else who hears the survivor's sorrow, no one who carefully and empathetically listens to the mourning survivor. A client once told her attorney about her now retired attorney.<sup>4</sup> "Tell me about him," the attorney asked. "He listens to me; he really listens," the client said. Is there a higher compliment for a lawyer-counselor? Sometimes clients tell their attorneys that their children ought to be lawyers. "My kid ought to be a lawyer," they will say, "Why?" we ask. "Because she loves to argue." Well . . . not a lawyer who works with clients who have lost or are losing someone. In that case, she must learn to listen caringly and quietly.

Lawyers who are experienced in elder law have learned to sit by their older clients who are grieving, to hold their hands while they talk and listen to them if that is comforting to them. This keeps the lawyer close and focused on the client and helps the counselor relate to them. The attorney feels a relationship and can, therefore, be more empathetic with the client. The lawyer's empathy is sometime stimulated by looking at a picture of the client's loved one who is now deceased. The lawyer and client look at the picture together as the client is moved by the memories this encourages.

## Asking the Right Questions

In conversing with clients who have lost or are losing someone, attorneys practicing elder law do not ask "How are you doing today?" but rather ask "How did you sleep last night?" "With whom are you eating?" "What are you doing about your own health?" "With whom are you sharing your feelings?"<sup>5</sup> Who is listening to you?" This will tell us more about our clients' mental health than meaningless phatic<sup>6</sup> talk will. The lawyer who listens to the client's response to these

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4. The attorney is Bernard A. Trott, now retired, a long-time practitioner and much admired counselor who practiced in Colorado Springs, Colorado.

5. Frank S. Berall, Benton E. Gates, Jr., Edward G. Heilman, and Paul W. Robinson, "What Lawyers Should Know in Representing Bereaved Clients," Seminar, American College of Trust and Estate Counsel, March 1990.

6. ANTHONY BURGESS, *A MOUTHFUL OF AIR* (1992). Burgess, in this text on linguistics, defines phatic talks as meaningless social chatter as opposed to communication.

“non-legal” problems, will help both lawyer and client build a strong, trusting relationship.

## **The Passing of Intense Sorrow**

When lawyers are serving a surviving family member in the process of helping to administer the deceased member’s estate, thoughtful attorneys watch for the change when their client begins to respond to his or her new situation and has stopped reacting and denying the unwanted reality. The lawyer-counselor looks for the cessation of anger, free-floating and aimed at random targets . . . sometimes even including the attorney. Focused on the client’s need, the lawyer assures the client that his or her untoward feelings are expected, that it is normal to be in shock, to be numb, to deny reality, to feel regretful and guilty, and to be resentful and angry, knowing that through expression of these feelings, acceptance of the survivor’s new life will come, and self-confidence will resurface. Experienced elder law and estate administration attorneys do this in the context of performing their clients’ legal work.

## **Avoiding Irreversible Decisions**

In this practice, lawyers try to avoid irrevocable and significant long-term decisions that those experiencing grief are inclined to prematurely make; an example may be moving and selling the family home that, for most, represents a foundation, a basis for security and safety; practitioners discourage quickly remarrying, or gifting resources, adding the survivor’s child’s or children’s names as co-owners of the family real estate, investments and accounts. Clients often feel an urgency to do this in the belief that it will simplify administration when the survivor dies. The grieving client ignores and is frequently uninformed about the adverse tax consequences and other effects in simplifying their estate. They do not consider what subsequent lack of control of their assets will mean in their continuing life. In the aftermath of losing one of the clients’ family members, elder law and estate administration lawyers encourage their clients to make only short-term and reversible decisions.

When parents are lost in death, the children move one step closer to mortality; with the loss of a spouse, the survivor realizes that he or she is next. The survivor is now by the Maginot line separating

life from death, and in that realization, the surviving client may feel, in his or her grief, that "I'm next and the sooner the better." The survivors with whom the lawyer is engaged can't often comfortably tolerate the devastating aloneness. Part of their own life has been taken in the death, and the loss is intimately felt. It is sometimes like a loss of part of one's own body, particularly where the survivor is the decedent's spouse and has been significantly dependent upon him or her.

During the six to twelve months that must pass before a survivor begrudgingly accepts the reality of their loss, feeling like their sorrow will never end, the client must endure anger, guilt, depression and a feeling of isolation. Young children traveling with parents on long trips provide an analog. Five minutes after leaving and at regular intervals thereafter the children say: "Are we there yet?" Traveling long distances is hard for young children and for young parents, too. In the voices of children we are reminded of personal history. And in the process of helping with the estate, sensitive lawyers quietly assure clients that one day at a time they will be better; that they will soon arrive. The destination, more peaceful days and nights, will soon be like the increasingly bright lights of the city we long for in our highway travel, as they emerge in the night. Clients sometimes believe that they won't feel better until the estate is closed, perhaps giving ceremonial finality to their loss. As in divorce, the final hearing sometimes brings closure to the hurtful memory and rebirth follows.

## **Social and Physical Changes Associated with Aging**

Lawyers who work with older clients, particularly elder law attorneys, are aware that physical changes sometime affect the survivors. Social patterns change. The elder survivor often doesn't fit in his or her social circle anymore. The survivor's financial condition may worsen. The elder survivor may need protection from aggressive sellers of investments, from realtors who read death notices and imagine that they have buyers for the survivors' homes, and even from well-intended sellers of funeral plans. Elder clients certainly need protection from aggressive marketers who give "free" seminars to attract audiences by parading before for them the imagined horrors of probate.<sup>7</sup> Sometimes survivors need protection from children and

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7. See Gale A. Norton, Attorney General of the State of Colorado, *Consumer Alert, Living Trust Scams*, a news release released July 30, 1992, available from the Colorado Department of Law, Office of the Attorney General, 110 16th Street, 10th

stepchildren, too. Some children are ready to relieve the remaining parent of his or her things at a time when the grieving survivor is vulnerable and before the parent is ready to part with them.

Lawyers who are sensitive to client sorrow know when acceptance of the survivors' loss comes. Clients can look at pictures of the deceased without going to pieces; they can discuss their loss with composure; they can laugh again and be warmed by their good memories.

The analog of grief caused by death is the feelings following other loss; divorce, for example, resulting in the loss of a spouse and sometimes even loss of children;<sup>8</sup> loss of work; forced retirement; and adverse changes in lifestyle over which one has little or no control.

### **Pre-mortem Planning**

Elder law attorneys and attorneys who plan estates and are involved in crisis planning, work with clients who commonly know that they are critically ill. Pre-mortem estate planning is arranged. For readers who are unfamiliar with the magnitude of the lawyer's responsibility in such contexts, this is what such lawyers do.

The attorney reviews the client's estate plan. When terminally ill, clients may wish to completely or partially revise their historic planning designs. Facing death, they sometimes feel and think differently. In this context, issues dealing with competency, with medications that may be mind-altering that the client is taking, and an awareness of the possibilities of will and trust contests, are concerns. Lawyers often look to physicians for assurance that the client is aware and able to make and communicate responsible decisions. Lawyers need to be satisfied that clients know their family members and are

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Floor, Denver, CO 80202. Attorneys General in a number of states are similarly enforcing consumer protection statutes in cases involving sales of "trust kits" to residents, particularly vulnerable older persons. The current attorney general in Massachusetts is particularly aggressive in this regard.

8. Loss of a child forces parents apart. There is an 85 percent divorce rate among couples who lose children. Child suicide magnifies grief. Lawyer Frank S. Berall has said that if we lose our spouse, we lose the making of memories. If we lose our child, we lose our dreams. There is frustration in addition to sorrow when a child is lost. Such unfortunate parents must then decide to whom their accumulated wealth should descend. That decision seems meaningless when our child is gone. Berall et al., *supra* note 5.



aware of their resources and their value, and that they are cognizant of the effect of testamentary acts accomplished at this time.<sup>9</sup>

In pre-mortem planning, lawyers determine if the surviving spouse can responsibly manage assets and whether there is a current investment management account. What is his or her experience with managing assets? What is the state of the survivor's health and interests and vulnerabilities? The lawyer determines whether a professionally managed trust or durable general or limited power of attorney handled by a responsible child or children, or other person in whom the survivor has confidence, should be recommended because management skills in the survivor are lacking. The attorney asks whether there will be significant life insurance proceeds received at the client's death introducing the survivor to wealth that has been previously unknown.

In the death planning context, the lawyer determines whether there are health care decision making arrangements in place: advance directives, durable powers of attorney for health care decisions, or living wills, and the lawyer inquires to ascertain if the client understands them.

The thorough attorney looks for "do not resuscitate" orders and ascertains whether they are desired or in place. In this practice area, the lawyer helps arrange for organ and tissue donations when they are desired, and finds out whether funeral and burial decisions have been made. Are they pre-arranged and have they been prepaid? Has an obituary been prepared? Should there be personal letters addressed to family members to be opened at the client's death? Should attempts at reconciliation with those with whom the lawyer's client is estranged be made?

The lawyer in the environment of pre-mortem planning locates the client's will and other planning documents. He or she discusses with the client what instructions should be given to persons who will be in charge when the client's death occurs. Has a summary of assets and of whom to call with phone numbers and description of benefits, with payers and key account numbers and addresses, been prepared? Are there potential military benefits such as the Survivors Benefit Program? Has the DD-214 form, the key that unlocks retired military benefits, been located? What are the social security numbers of former

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9. See *Cunningham v. Stender*, 255 P.2d 977 (Colo. 1953). See also *Hanks v. McNeil*, 168 P.2d 256 (Colo. 1946).

spouses whose benefits may be claimed by the surviving spouse if they result in higher payments to him or her? What are the names, including the maiden name, of the client's parents, their birth dates and place of birth, information that is required on death certificates? Inquiry is made about safe deposit box access. Who can get in it? Where is the box and key? All such issues are on the lawyer's pre-mortem checklist. All of this takes place typically in an environment of acute grief as the dying family member, his or her lawyer, the heirs and friends, mournfully go about the business of pre-planning that which the anticipated death makes necessary.

### **Post-mortem Practice**

When clients die, the wise lawyer acknowledges their family's loss, recognizing that the survivors are grieving and that they have a right to and a need to grieve, and that expressions of sorrow are appropriate, even in the lawyer's office. Working with survivors, the attorney recognizes that they have lost something and are hurting and are in mourning. Lawyer Frank S. Berall wrote that a client had told him that he remembered only two things about his initial conference with his attorney following his wife's death. First, that the lawyer never came around from behind his desk to say that he was sorry about the client's loss, and second, that he didn't remember anything else about the conference.<sup>10</sup> An experienced attorney, one sensitive to the client's feelings, would not be a participant in such an error.

In the post-mortem context, the elder law practitioner is concerned about the survivors. The lawyer is aware that assignments may not be carried out. He or she may need to say on more than one occasion to the grieving spouse, "Bring me your last year's tax return." The lawyer is aware that grieving makes one different for awhile, less efficient, less energetic, less interested, and that this is a normal part of the healing process. The caring lawyer assures the clients that they know that such survivors are not always like this and that their feelings of melancholy are normal and necessary to healing.

At best, in the context of post-mortem legal services, lawyers are aware that clients try to find someone to blame for their loved one's death and that quickly encouraging a lawsuit against someone the client is blaming may bring only more agony and frustration.

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10. Berall et al., *supra* note 5.

In post-mortem planning the lawyer may help with the budgeting process, assuring the survivor that he or she will have adequate resources if that is the case, because many clients fear, following loss of a spouse, that they will run out of funds.

Attorneys whose practices focus on elder law have a greater opportunity for counseling than do many of their colleagues who work in other areas of practice. Such lawyers grieve, too, with their clients. They are not unaffected. The elder law attorney faces the clients' depression, denial, bitterness, shock, numbness and feelings of aloneness, making themselves available to quietly and patiently listen so that their clients can recover. The survivors may have few, if any, others who listen to them. Their families, particularly with older survivors, talk about them as though they, too, are dead. Well-wishers come by and inquire about the survivor, "How is she doing?"—and she is there to ask! Furthermore, the well-wishers routinely advise. They use their mouths, rather than soft shoulders and ears, which would be more helpful.

Because of the personal nature of the relationship with clients, lawyers who work with older people involved in pre- and post-mortem planning effortfully perform their service with quiet understanding and compassion. They are, in their professional roles, esteemed by the privilege of humanely helping their clients and their client's families in a time of great need.