

# Mastering Elder Law

**CAROLINA ACADEMIC PRESS MASTERING SERIES**

RUSSELL WEAVER, SERIES EDITOR

**Mastering Administrative Law**

William R. Andersen

**Mastering Alternative Dispute Resolution**

Kelly M. Feeley, James A. Sheehan

**Mastering American Indian Law**

Angelique Townsend EagleWoman, Stacy L. Leeds

**Mastering Appellate Advocacy and Process**

Donna C. Looper, George W. Kuney

**Mastering Art Law**

Herbert Lazerow

**Mastering Bankruptcy**

George W. Kuney

**Mastering Civil Procedure 2d e**

David Charles Hricik

**Mastering Constitutional Law 2d e**

John C. Knechtle, Christopher J. Roederer

**Mastering Contract Law**

Irma S. Russell, Barbara K. Bucholtz

**Mastering Corporate Tax**

Reginald Mombrun, Gail Levin Richmond, Felicia Branch

**Mastering Corporations and Other Business Entities**

Lee Harris

**Mastering Criminal Law**

Ellen S. Podgor, Peter J. Henning, Neil P. Cohen

**Mastering Criminal Procedure, Volume 1: The Investigative Stage 2d e**

Peter J. Henning, Andrew Taslitz, Margaret L. Paris,

Cynthia E. Jones, Ellen S. Podgor

**Mastering Criminal Procedure, Volume 2: The Adjudicatory Stage 2d e**

Peter J. Henning, Andrew Taslitz, Margaret L. Paris,

Cynthia E. Jones, Ellen S. Podgor

**Mastering Elder Law 2d e**

Ralph C. Brashier

**Mastering Employment Discrimination Law**

Paul M. Secunda, Jeffrey M. Hirsch

**Mastering Evidence**  
Ronald W. Eades

**Mastering Family Law**  
Janet Leach Richards

**Mastering Income Tax**  
Christopher M. Pietruszkiewicz, Gail Levin Richmond

**Mastering Intellectual Property**  
George W. Kuney, Donna C. Looper

**Mastering Labor Law**  
Paul M. Secunda, Anne Marie Lofaso, Joseph E. Slater, Jeffrey M. Hirsch

**Mastering Legal Analysis and Communication**  
David T. Ritchie

**Mastering Legal Analysis and Drafting**  
George W. Kuney, Donna C. Looper

**Mastering Negotiable Instruments (UCC Articles 3 and 4)  
and Other Payment Systems**  
Michael D. Floyd

**Mastering Partnership Taxation**  
Stuart Lazar

**Mastering Products Liability**  
Ronald W. Eades

**Mastering Professional Responsibility**  
Grace M. Giesel

**Mastering Property Law, Revised Printing**  
Darryl C. Wilson, Cynthia H. DeBose

**Mastering Secured Transactions (UCC Article 9) 2d e**  
Richard H. Nowka

**Mastering Statutory Interpretation 2d e**  
Linda D. Jellum

**Mastering Tort Law**  
Russell L. Weaver, Edward C. Martin, Andrew R. Klein,  
Paul J. Zwier II, Ronald W. Eades, John H. Bauman

**Mastering Trademark and Unfair Competition Law**  
Lars S. Smith, Llewellyn Joseph Gibbons



# Mastering Elder Law

Second Edition

**Ralph C. Brashier**

CECIL C. HUMPHREYS PROFESSOR OF LAW  
UNIVERSITY OF MEMPHIS SCHOOL OF LAW



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2015  
Ralph C. Brashier  
All Rights Reserved.

Library of Congress Cataloging-in-Publication Data

Brashier, Ralph C., 1957- author.

Mastering elder law / Ralph C. Brashier. -- Second edition.

pages cm. -- (Carolina academic press mastering series)

Includes bibliographical references and index.

ISBN 978-1-59460-759-2 (alk. paper)

1. Older people--Legal status, laws, etc.--United States.
  2. Old age pensions--Law and legislation--United States.
  3. Estate planning--United States.
  4. Social security--Law and legislation--United States.
  5. Older people--Medical care--Law and legislation--United States.
- I. Title.

KF390.A4B73 2014

344.7303'26--dc23

2014037529

Carolina Academic Press  
700 Kent Street  
Durham, NC 27701  
Telephone (919) 489-7486  
Fax (919) 493-5668  
[www.cap-press.com](http://www.cap-press.com)

Printed in the United States of America

# Contents

Series Editor's Foreword	xxi
Preface	xxiii
Chapter 1 · Elder Abuse	3
Roadmap	3
A. Introduction	3
B. Causes of Abuse	5
C. Kinds of Abuse	8
1. Active Abuse	9
a. Physical Abuse	9
b. Sexual Abuse	10
c. Exploitation	10
d. Emotional Abuse	11
2. Neglect	12
a. Neglect by a Caregiver	12
b. Abandonment	14
c. Self-Neglect	14
D. Adult Protective Services	15
1. Lack of Federal Funding	15
2. APS Provisions Generally	16
3. APS Principles and Practices	17
4. The APS Case	17
a. Reporting	17
b. Investigation	20
c. Services	20
d. Remedies	21
E. Miscellaneous Matters	22
1. Limiting the Financial Benefits Available to Abusers	22
a. Caregivers	22
b. Probate Laws and Estate Benefits	23

2. Medical Malpractice and Elder Abuse	25
3. Evidentiary and Criminal Matters	26
4. Abuse Registries	26
5. Nursing Home Litigation	27
6. The Elder Justice Act	28
Checkpoints	29
<b>Chapter 2 · Guardianships and Conservatorships</b>	<b>31</b>
Roadmap	31
A. Overview	31
1. Generally	31
2. State Authority	32
3. The UPC and State Terminology	33
B. When Should a Guardian or Conservator Be Appointed?	35
C. The Petition and the Proceeding	36
1. Petition and Contents	36
2. Jurisdiction and Venue	38
3. Procedure and Due Process	39
a. Notice and Service	39
b. GALs and Visitors	39
c. Counsel	41
d. The Professional Evaluation	42
e. Burden and Standard of Proof	42
f. At the Hearing	43
g. The Least Restrictive Alternative	44
4. The Guardian or Conservator	45
a. Priority Lists and the Respondent's Best Interest	45
b. Conflicts and Self-Interest	46
c. Letters and Bond	47
d. Compensation and Liability	48
5. Temporary Guardianships	49
a. Emergency Guardianships	49
b. Standby Guardianships	49
D. Fiduciary Responsibilities and Decision Making	50
1. Best Interest	51
2. Substituted Judgment	51
3. Statutory Guidance	52
a. The Duties and Powers of a Guardian	52
b. The Duties and Powers of a Conservator	55
E. Terminating the Guardianship or Conservatorship	60



---

1. Generally	60
2. Terminating the Fiduciary Appointment	61
3. Successor Guardian	61
F. Mediation	62
Checkpoints	63
<b>Chapter 3 · Wealth Management and Property Transfers</b>	<b>65</b>
Roadmap	65
A. Introduction	65
B. Durable Powers of Attorney	66
1. Alternatives to Conservatorship	66
2. Uniform Durable Power of Attorney Act 1979	68
a. Creation of a DPOA	68
b. Agent Powers	69
c. Agent Interaction with Court-Appointed Fiduciaries	70
3. Uniform Power of Attorney Act 2006	71
a. Overview	71
b. Creation, Effect, and Termination	72
c. Encouraging Recognition by Third Parties	74
d. Agents Generally	75
e. Agent Duties	77
f. Agent Liability	79
g. Agent Authority	80
h. Statutory Forms	82
C. Nonprobate Properties	89
1. Generally	90
2. Survivorship Properties	90
a. The Joint Tenancy	91
b. The Tenancy by the Entirety	93
c. Joint Bank Accounts	94
3. PODs and Totten Trusts	96
a. POD and TOD Accounts	96
b. Totten Trusts	97
4. Revocable Trusts	98
5. Insurance	101
6. Gifts	101
a. Generally	101
b. Causa Mortis	102
D. Probate Properties	103
1. Intestate Succession	104

a. General Patterns of Distribution	104
b. Methods of Distribution	105
c. Nontraditional Families	107
d. Advancements	111
e. Family Protection Provisions (Excluding the Elective Share)	111
2. Testamentary Succession (Wills)	112
a. Execution	112
b. Revocation	115
c. Construction	119
d. Disinherited Family Members	126
e. Will Contests	132
Checkpoints	135
<b>Chapter 4 · Health-Care Decision Making</b>	<b>137</b>
Roadmap	137
A. Introduction	137
B. The Right to Be Informed	138
1. Informed Consent	138
2. Disclosure	139
a. What Must Be Disclosed	139
b. Standard of Disclosure	141
c. Physician Defenses	142
3. Causation	143
C. The Right to Refuse Life-Prolonging Treatment	143
1. Competent Patients	144
a. Bases for the Right to Refuse Treatment	144
b. State Interests	145
c. Life-Prolonging Treatment Following Patient Refusal	146
d. Competency	147
2. Incompetent Patients	148
a. Bases for the Right to Refuse Treatment	148
b. Role of the Judiciary	148
c. The Patient's Wishes	150
d. Evidentiary Standards and the Role of Courts and Legislatures	151
e. Artificial Nutrition and Hydration as Medical Treatment	154
D. Advance Directives	155
1. In the Absence of an Advance Directive	157
2. Living Wills	158
a. Execution and Revocation	158

---

b. Language and Interpretation	159
c. The Value and Limitations of the Living Will	160
3. Health-Care Powers of Attorney	161
a. Execution and Revocation	161
b. Medical Providers and Insurance Companies	163
c. Rights and Obligations of an Agent	164
4. The Uniform Health-Care Decisions Act	165
a. Definitions	166
b. Execution, Interpretation, and Revocation	167
c. Optional Form	168
d. Surrogates	171
e. Guardians	173
f. Health-Care Information and Health-Care Providers	173
g. Immunities	174
h. Statutory Damages	175
E. Assistance in Dying	176
1. Generally	176
2. Assisted Suicide and the Constitution	177
3. State Law: Oregon's "Death with Dignity" Act	178
a. The Written Request	179
b. The Attending and Consulting Physicians	180
c. The Timing of Requests and the Fifteen-Day Waiting Period	182
d. Reporting Requirements; Effect of Death under the Act	182
e. Immunities, Liabilities, and Penalties	183
F. Euthanasia	184
Checkpoints	186
<b>Chapter 5 • Age Discrimination in Employment</b>	189
Roadmap	189
A. Overview	189
B. Law and Regulations	190
C. The ADEA's General Prohibitions	191
D. Covered Employment	192
1. Private Employment	192
a. Determining Employee Status	193
b. "Twenty or More Employees"	194
c. Nonprofit, Charitable, and Religious Organizations	195
d. Operations in Foreign Countries	195
2. State and Federal Employment	196
E. Employer Defenses and Exceptions	197

1. Bona Fide Occupational Qualification	197
2. Reasonable Factor Other Than Age	198
3. Bona Fide Seniority Systems	198
4. Bona Fide Employee Benefit Plans	198
5. Good Cause	199
6. Law Enforcement Officers and Firefighters	199
7. Bona Fide Executives or High Policymakers	199
F. The ADEA Lawsuit	199
1. Disparate Treatment	200
a. Circumstantial Evidence	200
b. Direct Evidence	202
2. Disparate Impact	202
3. Retaliation	203
G. Procedural Issues	203
1. Sixty-Day Waiting Period after Charge Is Filed	203
2. Timeliness of the Charge	204
3. Civil Actions and Judicial Relief	205
4. Waivers	205
5. Notices and Recordkeeping	207
H. Remedies	208
Checkpoints	210
<b>Chapter 6 · Social Security, Retirement, and Pension Programs</b>	<b>213</b>
Roadmap	213
A. Social Security	214
1. Generally	214
2. History and Highlights	215
3. Laws and Administrative Materials	216
a. Statutes and Regulations	216
b. Rulings	217
c. Manuals and Handbooks	218
4. Financing the Program	219
a. FICA/SECA Taxes	219
b. The Trust Fund	220
c. Who Pays for Whom?	221
5. Eligibility for Benefits	221
6. The Earnings Record	222
7. Covered Employment	223
8. Quarters of Coverage	223
9. Retirement Benefits	224

---

a. Full Retirement Age (FRA)	224
b. Delayed Receipt of Benefits	225
c. Early Receipt of Benefits	226
d. Retirement Earnings Test	227
10. Derivative (or Auxiliary or Secondary) Benefits	228
a. Family Members or Ex-Family Members of a Living Worker	228
b. Family Members of a Deceased Worker	232
11. Disabled Workers and Their Families	235
a. Disabled Worker Benefits	235
b. Spouses' Benefits Based on Disability	237
c. Children's Benefits Based on Disability	238
12. Determining Cash Benefit Amounts: PIA and AIME	238
a. Generally	238
b. Preventing Windfalls	240
c. Government Pension Offset	241
13. Representative Payees	242
14. Protection of Payments ("Anti-Assignment")	244
15. Underpayments and Overpayments	245
16. Administrative and Judicial Review	246
a. Initial Determination	246
b. Reconsideration	247
c. Hearing	247
d. Appeals Council Review	249
e. Judicial Review	249
17. Representation of a Claimant	250
18. Taxation of Benefits	252
19. Reforming the Program	253
B. Other Public Retirement and Pension Programs	254
1. Railroad Worker Benefits	254
2. Government Employment	256
a. Federal	256
b. State and Local	258
c. Military	259
C. Veterans' Benefits	260
D. Private Sector Pension and Retirement Plans	263
1. Overview of Employee Benefit Plans	263
2. Kinds of Plans	264
a. Defined Benefit Plan	264
b. Defined Contribution Plan	265

3. ERISA	266
a. Qualified and Nonqualified Plans	267
b. Plan Participation	267
c. Vesting of Benefits	268
d. Retirement Benefits	269
e. Spousal Rights	270
f. QDROs	271
g. Distributions and Taxation	273
h. Benefit Claims	280
Checkpoints	281
<b>Chapter 7 · Supplemental Security Income</b>	<b>283</b>
Roadmap	283
A. Introduction	283
B. Eligibility Requirements	284
1. Who May Be a Beneficiary	285
2. Location of the Beneficiary	286
3. Marriage of the Beneficiary	287
4. Continuing Assessment of Eligibility	288
C. Asset Limitations: Income and Resources	289
1. Income	289
a. Generally	289
b. Countable Income	290
2. Valuing In-Kind Support and Maintenance	293
3. Resources	295
a. Nature and Ownership of Resources	295
b. Countable Resources	295
c. Resource Exclusions	296
4. Deeming	297
D. The Appeals Process	298
Checkpoints	299
<b>Chapter 8 · Medicare</b>	<b>301</b>
Roadmap	301
A. Introduction and Overview	301
1. A Limited, Federal Health Insurance Program	301
2. The “Parts” of Medicare	302
3. Related Health Care Concerns, Programs, and Insurance	303
B. Laws and Administrative Materials	304
C. The Original Medicare Plans (Parts A and B)	304

---

1. Part A	304
a. Financing	304
b. Eligibility and Enrollment	305
c. Coverage	309
2. Part B	319
a. Financing	319
b. Eligibility and Enrollment	319
c. Deductible	324
d. Coverage and Coinsurance	324
3. Exclusions and Priority of Payment	333
a. Items and Services	333
b. Medicare as Secondary Payer	335
4. Appeals and Rights	336
a. Limitation on Liability; Notice	336
b. The Appeals Process	337
D. Part C (Medicare Advantage Plans)	340
1. Generally	340
2. Protections for Enrollees (Including Appeals)	342
3. Kinds of MA Plans	343
4. Other Medicare Plans	345
E. Part D	346
1. Generally	346
2. Drug Coverage Rules	347
3. Points to Consider	347
4. Grievances and Appeals	348
a. Grievances	348
b. Appeals	348
5. Enrollment and Payment	351
a. Generally	351
b. Premiums and Premium Penalties	352
c. Payments	354
F. Medicare/Medicaid “Dual Eligibles”	356
G. Medicare’s Future	358
H. Medigap Policies	359
1. Generally	359
2. Coverage under the Standardized Plans	360
3. Right to Purchase	362
4. Prices	364
5. Consumer Protection Provisions	365
Checkpoints	366

<b>Chapter 9 · Medicaid</b>	367
Roadmap	367
A. Overview	367
B. Statutes, Regulations, and Administration	368
1. Federal	368
2. State	369
C. Benefits	370
1. Generally	370
2. Availability	371
3. Quality Assurance	372
4. Fiscal Integrity: Third-Party Liability	373
D. Eligibility and Coverage	373
1. Generally	373
2. Coverage	374
a. Mandatory Coverage: The Categorically Needy	374
b. Optional Coverage: The Optional Categorically Needy	377
c. Optional Coverage: The Medically Needy	379
E. Income and Resources	380
1. Income	381
a. Earned and Unearned Income	381
b. Countable Income	382
2. Resources	382
a. Countable Resources	383
b. Spend Down	384
F. Spouses and Institutionalization	384
1. Income	384
a. Attribution Rules	384
b. CSMIA	385
2. Resources	387
a. The “Snapshot”	387
b. CSRA	387
G. Asset Transfers and Institutionalization	388
1. The Five-Year Look-Back	388
2. Exempt Transfers	390
3. Trusts	390
a. Generally	390
b. Trusts Exempted from the General Rules	391
4. The Counselor Penalty	392
5. Transfers before February 8, 2006	393



---

6. Noninstitutionalized Individuals	393
H. Medicaid Liens, Adjustments, and Recoveries	394
1. Inter Vivos Liens	394
2. Recovery from the Estate	394
a. Generally	394
b. Long-Term Care Insurance	395
c. The Estate	395
I. Procedures	396
1. Application	396
2. Determinations of Eligibility	396
3. Hearings and Appeals	397
a. Generally	397
b. Hearing Procedures	398
c. Local Hearings and Appeals	399
Checkpoints	400
<b>Chapter 10 · Long-Term Care</b>	<b>401</b>
Roadmap	401
A. Introduction	402
B. Who Furnishes Long-Term Care?	403
C. Paying for Long-Term Care	405
1. Family Members and Personal Savings	405
2. Reverse Mortgage	406
3. Life Insurance	408
4. Medicaid and Other Governmental Programs	409
5. Specialized Insurance for Long-Term Care	409
D. Long-Term Care Insurance	410
1. Generally	410
2. Coverage and Services	412
a. Who Provides Long-Term Care Policies?	412
b. What Are the Benefits and Costs?	414
3. Policies Providing Special Benefits under Federal Law	419
a. Tax-Qualified Policies	419
b. State Partnership Policies	420
4. When Are Benefits Provided?	422
a. Maximum Benefit Limits	422
b. Trigger Mechanisms	423
c. Elimination Period	423
d. Restoration of Benefits	424
5. Where Are Benefits Provided?	425
a. Facilities Covered	425

b. Alternatives to Nursing Home Care	425
Checkpoints	427
<b>Chapter 11 · The Home</b>	429
Roadmap	429
A. Introduction	429
B. Private Dwellings	430
1. Home Ownership	430
a. Monitoring and Home Modification	430
b. Family, Friends, and Community Programs	431
c. Paid Caregivers in the Home	431
d. Reverse Mortgages	433
e. Selling the Home (Tax Consequences)	436
f. Donating the Home	439
2. Rental Units	440
a. Government Assistance Programs	441
b. Age Discrimination and Accommodations in Housing	442
C. Congregate Living	445
1. ALFs and CCRCs	445
2. Board and Care Homes	446
3. Nursing Homes	447
a. Generally	447
b. Nursing Home Costs and Comparisons	449
c. Federal Laws and Regulations	449
d. Private Actions against Nursing Homes	469
Checkpoints	471
<b>Chapter 12 · The Professional Responsibilities of the Lawyer</b>	473
Roadmap	473
A. Introduction	473
B. Lawyer Competence	475
C. Scope of Representation and Allocation of Authority	476
D. Diligence, Communication, and Fees	477
E. Confidences and Conflicts of Interest	480
1. Confidences	480
a. Fiduciary Representation	481
b. Joint Representation	482
2. Conflicts	484
a. Generally	484
b. Consent	484

---

c. “Who’s the Client?”	485
d. The Drafting Lawyer as Fiduciary or Attorney for the Fiduciary	486
e. Client Gifts, Bequests, and Business Transactions	487
F. The Client with Diminished Capacity	489
1. Generally	489
2. Protective Action	490
3. Client Confidences	491
4. Emergencies	492
5. Advance Directives and Other Legal Documents	492
Checkpoints	494
<b>Mastering Elder Law Master Checklist</b>	495
Chapter One · Elder Abuse	495
Chapter Two · Guardianships and Conservatorships	496
Chapter Three · Wealth Management and Property Transfers	497
Chapter Four · Health-Care Decision Making	498
Chapter Five · Age Discrimination in Employment	499
Chapter Six · Social Security, Retirement, and Pension Programs	501
Chapter Seven · Supplemental Security Income	502
Chapter Eight · Medicare	502
Chapter Nine · Medicaid	503
Chapter Ten · Long-Term Care	504
Chapter Eleven · The Home	505
Chapter Twelve · The Professional Responsibilities of the Lawyer	506
<b>Index</b>	507



# Series Editor's Foreword

The Carolina Academic Press Mastering Series is designed to provide you with a tool that will enable you to easily and efficiently “master” the substance and content of law school courses. Throughout the series, the focus is on quality writing that makes legal concepts understandable. As a result, the series is designed to be easy to read and is not unduly cluttered with footnotes or cites to secondary sources.

In order to facilitate student mastery of topics, the Mastering Series includes a number of pedagogical features designed to improve learning and retention. At the beginning of each chapter, you will find a “Roadmap” that tells you about the chapter and provides you with a sense of the material that you will cover. A “Checkpoint” at the end of each chapter encourages you to stop and review the key concepts, reiterating what you have learned. Throughout the book, key terms are explained and emphasized. Finally, a “Master Checklist” at the end of each book reinforces what you have learned and helps you identify any areas that need review or further study.

We hope that you will enjoy studying with, and learning from, the Mastering Series.

Russell L. Weaver  
Professor of Law & Distinguished University Scholar  
University of Louisville, Louis D. Brandeis School of Law



# Preface

I thank my colleagues Donna Harkness, William Kratzke, Janet Richards, Dorothy Wells, and Nicholas White for their insightful comments and suggestions on drafts of various chapters of this book. I am grateful to Meelad Hanna, Emma Redden, Richard Townley, and Shannon Wiley for their research assistance and to Cheryl Foshee Edwards and Linda Hayes for their administrative assistance.

I also thank the students in my Elder Law classes at the University of Memphis. Their passion and commitment provide a constant source of inspiration. Their interest and curiosity provide a constant opportunity to learn new things and to see old things afresh. Their stories and the stories of their families provide a constant reminder of the increasing importance of Elder Law and of the need for lawyers to serve America's growing elderly population.

