

Elderlaw As Family Law

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Hendrik Hartog, [*Someday All This Will Be Yours: A History of Inheritance and Old Age*](#) (Harvard University Press 2012).

How do American law and culture accommodate the fact that old age is almost everyone's fate, and that—though we know for sure that it ends at last in death—its course and the kinds of dependency it brings are so profoundly unpredictable and often categorically intense? In this brilliant, grimly humane page-turner of a book, Hendrik Hartog lays out three different historical periods marked by very different answers to this question.

Before the rise of a market economy in the middle of the nineteenth century, old people were cared for and died in their households, surrounded and aided by relatives and, if they had them, servants or slaves. But as the master/servant relation was replaced by employment in the rapidly industrializing private sphere, and as the household nuclearized into the husband/wife, parent/child family, this ready-to-hand supply of helpers dwindled, often disappearing entirely. In response to these changes, old people who had property started promising to bequeath it to children, other family members, and even housekeepers in exchange for their staying at home and devoting themselves to filling what we would now call the care gap.

Using New Jersey court records, Hartog's archival research traces this large social transformation through a small legal shift: people started suing for specific enforcement of these promises, framing them as contracts no different from those typical of the marketplace, and courts started enjoining these inheritances or, in cases with weaker facts, granting unpaid wages payable from the decedent's estate. Finally, in post-World-War-II America, these lawsuits disappear from the archive as care for the old and the dying became a commodity paid for by social security programs, pensions, and private savings in the now-burgeoning care industrial complex.

By far the bulk of *Someday* focuses on the century-long middle chapter of this story, running roughly from 1850 to 1950. The book's first part takes the point of view of the old person, desperate to avoid solitude and the poor house and advised on all sides to retain control over property as the only way to gain any leverage over the young. The family dramas that occupy these chapters are so vividly told, in such loving detail, that the chapters seem to be punctuated with perfect little short stories of human misery. The second part of the book tells the story of the law, starting with the advice a potential plaintiff would get under the main theories of recovery, and then laying out in transfixing detail how the caselaw evolved to manage, catch up with, and even drive social change.

By the time Hartog reaches this stage of his story, he has built up so much narrative detail, so much social history, and so much law that he is able to trace minute but enduringly important sub-plots: the ways in which gender expectations for sons and daughters could skew decisions about who was doing "extraordinary" work in the home; the ways in which family members sought to intensify status relations that had no legal backing using the tools of contract and property law; the ways in which nonfamily members entered into the care world ever so slowly, bringing contract even deeper into the home. It is so fascinating to watch the old turn from spouses to children to nieces to stepsons to housekeepers for care, and to see how the legal rules that these relationships cue up shifted from those

of traditional family law to those of the market. When is a housekeeper like a daughter? When is a daughter like a housekeeper? Throughout, large legal and social transformations appear in the form of highly specific institutional shifts. For instance, the unpaid-wage cases boosted the rise of nursing as a profession and of the legal distinction between housework and care work that even today marks efforts to regularize domestic labor. Equally intelligible as employment law and as family law, these cases persistently belie the idea, being cemented into American legal ideology during this very period,¹ that the family and its law were the opposite of the market and the bodies of law peculiar to it, contract and property.

Hartog never loses sight of a large, highly paradoxical dynamic, in which the family, the market and the state have continually morphed around each other in response to changing social strategies for meeting human needs for care and freedom. Every chapter refutes the dichotomy embedded in Henry Sumner Maine's motto "the movement of the progressive societies has ... been *from Status to Contract*."² Instead, as Hartog demonstrates again and again, liberal individualism and the market economy depend continually on some allocation of dependency needs among the market itself, the family and the state.

A second major theme of the book is the problem of legal informality. Old people promised to bequeath their farms and later their homes in exchange for care—but everyone seems to have known perfectly well that testamentary freedom meant that the elderly could die without performing their side of the bargain. How many caregivers simply acquiesced when they did? We will never know. But courts confronted with the ones who sued could invoke the doctrine of partial performance to convert the promise into a binding contract, override the Statute of Frauds, and force the inheritance. Hartog shows courts making diametrically opposite decisions on the basis of the same matrix of rules and similar facts, presenting a deeply ambivalent attitude about what to do when the need for formality collided with the need for substantive justice, when the moral complexity of the cases beggared the impulse for predictability.

To take another example that vexes family law today: what to do about informal family relationships that resemble formal ones in every other respect? This theme is threaded throughout *Someday*, but we can focus on Hartog's fascinating substory about informal children. As indentured servitude, slavery and child labor became unthinkable, up came the practice of informal adoption—families bringing distant relatives or even complete strangers into their homes when they were infants or children and hoping that they would remain to care for the old and dying. When they did, and were excluded from wills, and sued—what were they? Were they children? Did the onset of legal adoption make saying yes to that question harder or easier? Were they lucky beneficiaries with no equitable claim on further largess? Were they employees? Anyone concerned about the policy problems we face in family law today, as nonmarital cohabitation and childbearing begin to compete demographically with their marital counterparts, will find this and many related strands of Hartog's narrative endlessly fascinating.

Finally, the Epilogue produces a succinct account of the massive transformations that produced old age as Americans live it now: public law, public welfare, and individual savings meant and often required to be spent down to nothing, have almost evanesced the direct responsibility of family members, making them at most the managers of their elders' care in commercial establishments. And yet, for all the grandeur of these shifts, Hartog concludes with a "reversal" of the account, tallying all the ways in which, even in this diametrically new world, the same anxieties, fears, loves, resentments and regrets permeate the lives of the dying old and their family members today as he found in testimony before New Jersey's equity courts in the 1880s.

Hartog tells us on his first page that he researched this book while his own mother was waning in a retirement community; the book's last words dedicate it to his grandchildren. He put himself into the story, and so I found it impossible to read this book without thinking of my own precarious place on the

great conveyor belt of life. This is family law writing at its best: legally subtle, socially precise, theoretically comprehensive, steadily engaging the human capacity to form productive, life-affirming, loving associations and to crash them in bitter conflicts, and fully exposed to the hard, brute facts of human existence.

1. For my own account of this process, see Janet Halley, "What is Family Law?: A Genealogy, Part I", 23 *Yale Journal of Law & the Humanities* 1 (2011).
2. Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* 170 (1861).

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