



ELDER LAW

Section Newsletter



A Publication of the Pennsylvania Bar Association Elder Law Section

Message from the Chair

Pennsylvania Proposes Expansion of Medical Assistance Estate Recovery

By *Katherine C. Pearson*

This is my first opportunity to write as the chair of the PBA Elder Law Section. I appreciate the honor of serving in this position, especially as I know most lawyers view law professors with a skeptical eye and uneasy memories. (Hey, I feel the same way at times!)



Katherine C. Pearson

As I type, I've been the chair for all of 12 days. Suffice it to say, this is already interesting, as the challenges for Elder Law practitioners always seem to hide behind the next legislative bush. I was already grateful to Linda Anderson for her leadership this last year; now I'm learning exactly how valuable she has been (and will continue to be) as I attempt to follow in her footsteps. Thank you Linda – and Leslie Wizelman – and all the other past chairs that have helped this Section grow to a membership of more than 800!

Right now the Elder Law Section leadership is hard at work responding to HB 1351. Section 1214 of this bill contains DPW's proposal to expand Medicaid Estate Recovery to non-probate assets, including real and personal property held in joint names, plus life estates and other traditionally exempt forms of ownership. The bill would also give the commonwealth expanded lien

powers plus exclusive control over disputes (because all of this falls outside of probate court jurisdiction), and may also involve increased sanctions or penalties for administrators, executors, trustees — and attorneys. The bill was introduced on April 28, and may be the tip of the iceberg in terms of attempts to add substantive changes to Pennsylvania's Medical Assistance laws, tied closely to budget initiatives.

You can help by talking to your state senators and representatives about how your clients (their voters) would feel about losing non-probate assets to the state.

I urge everyone to keep their membership to the Elder Law Section's e-mail listserv active so that we can keep you informed about such developments.

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Message From the Chair

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It is going to take a team effort to respond successfully and quickly to ill-conceived initiatives that affect long-term care for older adults. We've already received great support from PBA sections on Family Law; Real Property, Probate and Trust Law; and Solo and Small Firms on key initiatives.

On a more upbeat legislative note, our Section has an opportunity to help in a national effort to resolve disputes about where guardianship battles should be resolved. The Uniform Adult Guardianship and Protective Proceed-

ings Jurisdiction Act ("UAGAPPJA" – a mouthful) adopts a definition of "home state" for the at-risk person, as a way to avoid so-called "granny-snatching" cases. If you would like to be part of a task force to work on this legislation in Pennsylvania, just let me know!

I'm best reached by e-mail this year (as I'm actually on sabbatical from my regular teaching job) at kcp4@psu.edu. I look forward to working with you all, and hope to see many of you at upcoming PBA events such as the Elder Law Institute in July. ■

12th Annual Elder Law Institute Takes Place in Harrisburg in July

By Sally Schoffstall

Mark your calendars now for the 12th Annual Elder Law Institute, Thursday and Friday, July 23-24, at the Harrisburg Hilton. The program this year will feature 39 sessions on the Elder Law issues that you face daily in your practice including, "Stretching Income for Seniors," "Crunching the Numbers," "Hardship Waivers," "PDA Waiver/In Home Services," "Real Estate Planning in a Medicaid World," "VA Benefits for the Elderly," "Pa.'s New Assisted Living Regs," and many other interesting topics.

In addition to Jeff Marshall and Rob Clofine's "Year in Review," the Thursday kickoff sessions include Eric Carlson, director of the Long-Term Care

Project for the National Senior Citizens Law Center in Los Angeles. Eric will speak on evictions from long-term care facilities. As an added bonus, and courtesy of the PBA Elder Law Section, all attendees will receive a copy of Eric's "20 Common Nursing Home Problems — and How to Resolve Them."

On Friday morning the Institute will also host three breakfast roundtables: "Elder Law for Newbies," "Oil and Gas Leases" and "Pre-Paid Funeral Plan Issues.

In addition to the planned sessions, there are always many opportunities at the Institute to catch up and socialize with your Elder Law colleagues. So please arrange your summer schedule now so that you are able to attend. See you at the 2009 Elder Law Institute! ■

More information, including online registration, for the Elder Law Institute is available on the Pennsylvania Bar Institute Web site at www.pbi.org; use the drop-down menu to choose Elder Law or enter Course 5502 in the search field.

Elder Law Section

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Pa. Legislature May Adopt "Suitability Standard for Sale of Annuities"

By Dana M. Breslin, CELA

What can you do when your 85-year-old client has been sold an annuity under the terms of which he is not eligible to receive payment, without penalty, until he is over 95 years old? Currently in Pennsylvania, there is very little you can do if those restrictions are part of the contract and the time to cancel the contract has expired. This is because Pennsylvania has no requirement that an annuity product be suitable for the consumer's needs. Hopefully this will soon change. The Pennsylvania Senate recently passed SB 237, Printer's No. 242, by a vote of 50-0 to amend the Pennsylvania Insurance Law to require an insurer to take reasonable steps to ascertain the consumer's basic financial information such as age, financial status, tax status and investment objectives and based on this

information to make recommendations that the insurer reasonably believes is suitable for the consumer. The bill will now move to the House for consideration.

The House has a similar bill, HB 1119, Printer's No. 1322, which has been referred to the House Appropriations Committee. However, two unrelated amendments have been submitted for this bill.

While some consumer advocates feel these two bills do not go far enough to protect the consumers, both bills create a critical standard. If they become law, you will be able to seek legal recourse for your clients who have been sold inappropriate products.

The Elder Law Section provided letters to senators and representatives urging passage of these two bills. Hopefully by the time you read this article, the

"Suitability Standard" will have been signed into law. However, if not, please contact your local senator thanking him/her for passage of SB 237 and contact your local representative urging passage of legislation establishing a Suitability Standard for sale of annuities in Pennsylvania. ■



Dana M. Breslin

Dana M. Breslin is certified as an Elder Law Attorney by the National Elder Law Foundation. She practices with Pappano & Breslin, Brookhaven, (610) 876-2529.

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PBA Recommendation and Report: Proposed Expansion of Medical Assistance Estate Recovery Program

The Report and Resolution were submitted for approval to the PBA. The PBA Board of Governors voted unanimously to recommend adoption in May. The PBA House of Delegates meets June 4, and our proposed resolution will be considered at that meeting. Please visit the Elder Law Section Web site to get the latest update on the status of this resolution.

**PENNSYLVANIA BAR
ASSOCIATION
ELDER LAW SECTION
RECOMMENDATION
That the Pennsylvania Bar
Association formally adopt the
following resolution:**

The Pennsylvania Bar Association is concerned with efforts to expand estate recovery, including Section 1412 of House Bill 1351 of 2009 (Printer's Number 1666), introduced on April 28, 2009. Such proposed legislation would enlarge estate recovery beyond the probate estate of a Medicaid recipient. It would allow Pennsylvania's Department of Public Welfare to impose administrative liens against interests created by joint tenancy, tenancy by the entireties, tenancy in common, survivorship, life estate, living trust or other arrangements. Such legislation is likely to create significant complications for estate administration, and will adversely affect ownership and transfer of both real and personal property. Such legislation seeks to impose obligations and administrative penalties that will deter individuals from serving as executors and trustees and lawyers from representing these fiduciaries. The safety of older Pennsylvanians will be compromised when they refrain from seeking needed long-term support services because of fear of such new liens asserted by the commonwealth. The PBA takes the position that

Pennsylvania's Medical Assistance Estate Recovery Program be limited to claims against the Medicaid recipient's probate estate.

REPORT

Pursuant to the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), States implemented Estate Recovery Programs in an effort to offset, where appropriate, portions of the long term care expenditures of the Medicaid program. Pennsylvania implemented its Medical Assistance Estate Recovery Program in 1994 (MAER). The MAER authorized the Department of Public Welfare (DPW) to attempt to recover remaining assets from a decedent's probate estate who received Medical Assistance benefits during her lifetime. Since its inception, the MAER claim has been limited to the decedent's probate estate.

Medical Assistance (MA) programs for the elderly and disabled provide needed medical and social services to those who could not otherwise afford the necessary care to meet their needs and avoid life threatening situations. The financial eligibility guidelines for these programs are strict and generally limit the MA recipient to retain \$2,400 in countable resources in order to qualify for MA covered services in skilled nursing facilities and through home and community based services. Many MA consumers are already forced to spend down their life savings in order to access these programs but may retain modest exempt resources. House Bill 1351, introduced on April 28, 2009, attempts to further impoverish MA recipients and their families through expansion of the MAER claim to include non-probate property, which in most cases, endangers the family homestead.

There are a multitude of legal and equitable interests in various types of property held by a decedent at death. Many of these interests are difficult to quantify. The expansion of Estate Recovery seeks to attach some speculative interest in such property which would be ambiguous to the average consumer (and innocent third parties) who may not even be aware of the ownership of such interest and the consequences of receiving MA benefits as it relates to a possible future claim against such interest.

Currently, a majority of the states maintain an Estate Recovery Program that is limited to the probate estate. In addition, significant litigation has ensued in other jurisdictions where Estate Recovery has been expanded and Massachusetts recently repealed its expanded Estate Recovery Program because of challenges. While each state may tailor its Medicaid program within the parameters set by federal law, special consideration is due in Pennsylvania where we have a large elderly population who need to access MA programs to maintain their health, safety and welfare, and where we need to maintain incentives for younger family members to stay in the commonwealth.

HB 1351 Aggravates Hardship to MA Recipients and Their Families

Given the low countable resource allowance for MA programs, the most valuable asset retained by the MA recipient is usually the exempt homestead. Upon death, this home is sometimes still owned by the MA recipient and under current law becomes subject to probate and the MAER claim. The MA recipient's family members are often devastated by the news of the commonwealth's claim; they had invested significant time

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PBA Recommendation and Report: Proposed Expansion of Medical Assistance Estate Recovery Program

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and money into the maintenance and improvement of the home during the MA recipient's lifetime and are forced to take legal action after the MA recipient's death to "prove" their equitable interests to DPW in a hardship waiver process that is often subjective. To expand MAER beyond the probate estate, to reach family homesteads without regard to the form or duration of co-ownership, adds insult to injury for the families of MA recipients.

The expansion of MAER would also increase the likelihood that family members of a MA recipient would choose *not* to maintain the home of the MA recipient, thus allowing the home to deteriorate or be sold for delinquent taxes or mortgage debt, leaving nothing for MAER to recover and further contributing to the current housing crisis. At least under the current MAER, the state has some recovery of MA expenditures when a family member chooses to maintain the value of the home or even better, purchases an interest in the home during the MA recipient's lifetime and such funds can be used to supplement the needs of the MA recipient or prepay the MAER claim, with the expectation that the family member may receive some portion of the home upon the death of the MA recipient. Simply stated, the expansion of MAER provides a disincentive for families to maintain the homestead of a MA consumer, which increases hardship and reduces the value of assets that could be claimed under the current MAER law.

Expansion of MAER is Cost Prohibitive

Under existing law, the parameters for determining the value of the probate estate are reasonably certain. The assets held in the probate estate present clear targets for claims by DPW, with relatively

few opportunities for ambiguity about value. However, if MAER is expanded to interests held by the MA recipient at death, interests that are not traditionally subject to probate and court oversight, the costs of administration of recovery will rise dramatically. Under expanded MAER, DPW will need to employ significant additional resources, not only to identify the non-probate interests held by the decedent at death, but also the identity of the joint owner, beneficiary or other party who held an interest with the decedent at the time of death. Therefore, DPW will spend considerable resources investigating these interests, many of which will lead to little or no recovery. Further, because of the lack of education regarding MAER among the general public and their justifiable reliance on their ownership interests, there would be a considerable increase in hardship waiver requests, further increasing the administrative burden on DPW for enforcement.

Expansion of MAER Burdens Related Third Parties

HB 1351 lacks clarity about the scope of its expansion, but it would appear to impact a host of third parties. Many people own interests in assets such as life insurance, joint bank accounts, and trust accounts. It is unreasonable to expect the providers of such services, such as banks, life insurance companies and trust companies, to adhere to the intent of HB 1351 without imposing burdensome new procedures on releasing assets upon the death of a MA recipient. The proposed expansion of MAER to non-probate assets would require insurance companies to first check with DPW prior to paying a claim for fear of defending against litigation involving the decedent. Joint bank account or accounts titled as "payable on death" to a third party normally do not require a formal probate proceeding. The pro-

posed expansion of MAER, however, would require all banks to first inquire with DPW as to the existence of a claim prior to releasing funds to a third party with a contractual right to such funds. While banks and insurance companies are just a few examples, the volume of such administration alone would cause havoc among these industries.

Section 1412 of HB 1351 Violates Due Process

HB1351 attempts to give DPW sole authority to determine liability of a person, such as a co-tenant, remainderman, or trustee, to pay the Department's claim. In seeking to recover from non-probate estates, DPW stands in the shoes of a creditor. To permit any creditor to have the sole authority over determination of priority and enforcement of its claims, without a statutory mandate for a fair system of hearings and appeals by a disinterested entity such as the courts, is a violation of fundamental notions of due process.

The commonwealth's policy is to assist elderly and disabled individuals through the MA program in a cost-effective manner. While financial constraints may guide decisions regarding publicly funded programs, the expansion of MAER to include non-probate assets would be counterproductive to enrollment in these programs and cost prohibitive to enforce. The proposed legislation would have far-reaching effects in numerous areas of law such as real estate and title matters, creditors' rights, fiduciary obligations in estate and trust administrations, insurance law and banking laws. Therefore, any consideration to expand MAER should be carefully considered in light of these collateral effects.

Respectfully Submitted,
Katherine C. Pearson
Chair, Elder Law Section
May 4, 2009

Elder Law Numbers Quick Reference



By Robert C. Gerhard III, CELA

		EFFECTIVE DATE
Personal Needs Allowance	\$45	July 1, 2007
MNO-MA Resource Limit	\$2,400	
NMP-MA and PDA Waiver Resource Limit	\$2,000 plus \$6,000 disregard	(\$8,000 limit)
NMP-MA and PDA Waiver Program Income Limit	\$2,022	January 1, 2009
Home Maintenance Allowance	\$701.40	January 1, 2009
Minimum Community Spouse Resource Allowance	\$21,912	January 1, 2009
Maximum Community Spouse Resource Allowance	\$109,560	January 1, 2009
Minimum Monthly Maintenance Needs Allowance	\$1,750	July 1, 2008
Maximum Monthly Maintenance Needs Allowance	\$2,739	January 1, 2009
Shelter Standard	\$525	July 1, 2008
Utility Monthly Allowances		October 1, 2008
Utility Allowance, including heat:	\$491	
Utility Allowance, non-heating	\$258	
Utility Allowance, phone only	\$32	
Average Monthly Cost of PA Nursing Home Facility Care	\$7,235.82	January 1, 2009
Average Daily Private Pay Rate	\$237.89	January 1, 2009

Robert C. Gerhard III limits his Montgomery County practice to elder law matters. He specializes in asset protection and planning for long-term care. He is author of the legal treatise, *Pennsylvania Medicaid, Long-Term Care 2009 Edition*, and *the Pennsylvania Medicaid Law Source*, both published by the George T. Bisel Company, and can be contacted at www.paelderlaw.net or (215) 885-6785 with questions or comments.

Medicare 101 for Attorneys

By *Kathleen M. Martin*

Since attorneys who deal with elder law, by definition, work with older adults and their caregivers, Medicare issues often arise in the course of providing representation. Since Medical Assistance advocacy requires extensive knowledge of many rules and regulations, it is tempting to let Medicare issues take care of themselves. However, even if direct Medicare advocacy is not a core area of your practice, a working knowledge of how Medicare works can help you provide more complete service to your older clients, the disabled population and their caregivers. Additionally, we will all face decisions about Medicare coverage some day, maybe in the not too distant future.

Traditional Medicare is an insurance model, based upon the Blue Cross/Blue Shield model. It consists of “parts,” i.e. Part A, Part B, Part C and Part D. Part A is hospital insurance, which covers hospital stays, skilled nursing in a facility (limited benefit), home health care and hospice care. Most people qualify for this benefit at age 65 years at no cost (if there is a 10-year work history, or if a spouse had a least a 10-year work history). Part B is medical insurance, which covers physician services, some outpatient services, ambulance services and durable medical equipment. The premium is currently \$96.40 per year for most beneficiaries. Part D is the prescription drug benefit that provides limited assistance with outpatient prescription drugs through private insurers. Part C is the Medicare Advantage Program, which is an alternate delivery system for Medicare services through private plans approved by The Centers for Medicare and Medicaid Services (CMS). Part C plans replace traditional Medicare for beneficiaries who choose this option.



Kathleen M. Martin

ney disease and have had a transplant or three months of regular dialysis, or be under age 65 years and receiving Social Security or RR retirement disability, after a 24-month waiting period (this is waived for certain disease processes, such as ALS). There are enrollment rules and penalties for failing to timely enroll for benefits. Employer group health care benefits can be creditable coverage, delaying the time that a person must choose Medicare benefits without any penalty.

Hospital coverage under Part A must be in an acute care hospital and there is a cost sharing requirement. In 2009, the acute hospital cost sharing includes a deductible per spell of illness of \$1,068, with \$0 co-pay for days 1-60, \$267 per day for days 61-90 and \$534 per days 91-150. A spell of illness continues until the beneficiary has not received hospital or skilled care in a SNF for 60 consecutive days. SNF coverage generally requires a three-day admission to a hospital under Medicare coverage (3 “midnights”), admission to Medicare certified SNF within 30 days of discharge from the hospital and the need for daily skilled nursing or rehabilitation. SNF coverage can be up to 100 days per spell of illness; co-insurance starts at Day 21. Currently the co-insurance cost is \$133.50 per day. Hospice care and home health care are also Part A benefits, with overlap with Part B. Generally, there is no cost-shar-

To be eligible for Medicare, the beneficiary must be age 65 or older (the eligibility date is not currently tied to full eligibility for Social Security benefits, which is currently beyond age 65 years), or have end-stage kid-

ing requirements for these programs.

The issue of deductibles and co-insurance requires the consideration of purchasing Medigap insurance to cover the gaps in traditional Medicare coverage. The federal government has created 12 standardized plans (Plans A through L, not to be confused with Parts A, B, C and D), although plans H, I and J are not available to new buyers due to the advent of Part D plans. Medicare (www.medicare.gov) has information on “Choosing a Medigap Policy” on its Web site or in paper form. Many insurers sell these plans, including AARP. Retired persons may also have these plans available from their former employer. The key is to decide what type of coverage needed (does the individual travel frequently, see doctors who charge more than Medicare will pay, have a chronic condition that generates high medical bills, have the income to pay premiums, etc.). There is a list of companies who sell plans by state at “Medicare Options Compare” on the Medicare Web site. Another good site is www.medicare.gov/caregivers, which is designed for caregivers to help loved ones negotiate Medicare options. Additionally, there was a recent article on www.elderlawanswers.com on “How to Choose a Medigap Policy,” which is an excellent resource to assist you in helping your clients or your loved ones.

Medicare Part B covers some types of outpatient care, including but not limited to, physician visits, lab testing, ambulance costs and durable medical equipment. In 2009, the deductible for Part B is \$135. Part B has a monthly premium which is currently \$96.40 for persons with incomes under \$85,000 annually or \$170,000 per couple. A premium increase that is due to a sudden spike in income may be waived in certain circumstances. Some low-income

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Medicare 101 for Attorneys

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beneficiaries are eligible to have their Part B premium waived through a program with the Department of Welfare. There are several issues that may arise related to Part B coverage, but the most common is failure to apply for Part B in a timely manner, or declining coverage when it is not in the beneficiary's best interest to do so.

Medicare Part D is the prescription drug benefit, which is the newest benefit under Medicare. Part D is handled through private plans, or as part of the Part C plan elected by a beneficiary. It is helpful to know that a Part D plan is required when a beneficiary who is Medicare eligible qualifies for Medicaid in a nursing home. Also, the state prescription benefits, PACE and PACENET, are now "PACE plus Medicare;" the PACE program will pay for the Part D plan for qualified individuals.

Medicare Part C, or Medicare Advantage, is the most difficult for beneficiaries to understand. These plans are substitutes for traditional Medicare and are obtained through private insurers. These plans are required to deliver the same "package" of services as traditional Medicare, but may offer additional coverage. Advantage plans can be coordinated plans (such as HMOs, PPOs or special needs plans), private fee-for-service plans or Medicare Medical Savings Accounts. Advantage Plans are heavily marketed, but usually not adequately explained to beneficiaries or their families. During the Bush administration, enrollment in these plans was encouraged, with the goal of containing costs for the Medicare program, although insurance companies were being subsidized heavily to stay in the program. The Obama administration has indicated an interest in looking at these plans and the overall cost, as part of the proposed healthcare reform.

Advantage plans can appear to be a bargain since the premiums are often less than traditional Medicare plus a Medigap plan. However, beneficiaries need to examine the plans carefully ...

Advantage plans can appear to be a bargain since the premiums are often less than traditional Medicare plus a Medigap plan. However, beneficiaries need to examine the plans carefully, since "high end users" who have chronic illnesses and access providers frequently may actually pay more out-of-pocket than if they paid for a good Medigap plan. HMOs are a common type of advantage plan. Beneficiaries are often shocked to learn that they must give up their usual physicians for ones who participate in the plan. Co-pays can be high and referrals must be obtained for any provider visits other than for the primary care physician. These plans often severely limit hospital stays and stays in a SNF, since that is what coordinated care plans are designed to do: save money by limiting expensive care. Some facilities do not accept the plan, particularly if the beneficiary becomes ill while traveling or is transported to a hospital out of network. Some long-term care facilities may not accept these plans. Advantage plans often are no advantage after all.

The above information is very basic and intended as a general overview. Medicare is a complex program that unfortunately is not fully understood by beneficiaries and providers alike. There are many opportunities for lawyers who work with the elderly and disabled to be of assistance. A discussion of all of the issues that can arise is beyond the scope of this article. The statutory basis of Medicare regulations can be found at 42 USC 1395 *et seq.* (Title 18 Social

Security Act) and in 42 CFR (400 section). The POMs can be helpful and Medicare online manuals (www.cms.hhs.gov/manuals/).

Attorney Vicki Gottlich of the Center for Medicare Advocacy Inc. (www.medicareadvocacy.org), at a recent NAELA seminar, listed some areas that lawyers might study in order to be helpful to clients. There are increasing instances of Medicare beneficiaries being held in acute care hospitals under "observation" and not being actually admitted. The patient is usually unaware of this distinction until he or she is presented with a large hospital and pharmacy bills which are not covered by Medicare and also is denied Medicare coverage for skilled nursing care. Medicare beneficiaries may also appeal an untimely discharge from the hospital, but may not be aware of the procedures.

Gottlich also referred to what she called pervasive myths perpetrated by providers, especially nursing home personnel. One is that Medicare coverage is not available unless the beneficiary shows continued improvement. Related to this is that Medicare will not cover physical therapy if it is "only for maintenance." In reality, the restorative potential of the beneficiary is not the issue. The patient may need skilled services to prevent further deterioration or to preserve current capabilities (42 C.F.R. §409.32(c)). Other myths include the rumor that Medicare will not cover for long periods and that Medicare will not cover care for people with certain diagnoses.

Other myths include the rumor that Medicare will not cover for long periods and that Medicare will not cover care for people with certain diagnoses.

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Binding Arbitration Agreements: A Hidden Minefield in Powers of Attorney

By *Martin S. Kardon*

Imagine your client: A distinguished gentleman you genuinely liked with a wonderful, engaging wife of 50 years. You were pleased to prepare their Wills and Durable Powers of Attorney and gave them a warm send off as they left your office that afternoon. If it weren't for the reality of keeping the lights on in your office you probably would have done the job for free just for the chance to help out such fine people.

Now fast forward four years and their daughter calls you because the wife is too distraught to speak. Her beloved husband died due to outrageous and actionable neglect at the nursing home she was compelled to place him in due to advanced Alzheimer's. "This injustice will not go unpunished" you promise her. A colleague accepts the referral and initiates a lawsuit once the estate is opened up.

The next phone call you receive about the case is the bad news that it is subject to a restrictive arbitration clause in the nursing home admission document signed by the wife (since the husband was incapable of doing so). Discovery is virtually unavailable and damages are going to be capped. While your colleague will soldier on for the widow and you, the case value is worth 10 percent or less due to that arbitration provision. The wrongdoing will most certainly go unpunished. As you try to figure out how this could happen, you suddenly realize that the Power of Attorney you prepared (a copy of which the nursing home obtained upon his admission) gave her this power. Neither you nor your clients ever even considered this. Does the wife realize you exposed her to this risk in the form cranked out from your computer?



Martin S. Kardon

Binding Arbitration Agreements are the latest strategy employed by the nursing home industry to protect themselves from civil liability for the neglect and abuse of patients residing in their facilities. These agreements are part of the numerous papers signed by family members upon the admission of their loved ones to the facilities. They provide, among other things, for the surrender of the right to a jury trial requiring instead an arbitration held by a predetermined group (for example the American Arbitration Association), for limitations on discovery (e.g. no depositions), caps on damages (usually \$250,000) and no punitive damages.

Binding Arbitration Agreements are the latest strategy employed by the nursing home industry to protect themselves from civil liability for the neglect and abuse of patients residing in their facilities.

While the courts would certainly not enforce an agreement signed by a person who is mentally impaired, where there is a Durable Power of Attorney granting the right to enter into contracts and make agreements, the attorney in fact would be empowered to enter into such an arbitration agreement upon signing the admission documents.

A loved one's admission to a nursing home is always stressful, rarely done without great emotion and often in the context of pressure from a hospital insisting that the patient had to leave

immediately. Nonetheless, despite the unavoidable clouding of the mind accompanying this process, the courts have enforced such agreements and will likely continue to do so unless the Power of Attorney explicitly withholds the right to enter into a time of admission arbitration agreement.

Accordingly we recommend that in all Durable Powers of Attorney the following language be inserted:

NO POWER TO AGREE TO BINDING ARBITRATION. Although I have given my attorney-in-fact this general and durable power of attorney, I specifically withhold from my attorney-in-fact the power to agree or consent to binding arbitration, or to agree to any other process that would preclude the right to have a jury decide any issue in controversy concerning my person or my property; this does not, however, preclude non-binding alternative dispute resolution processes such as mediation.

In so doing you will protect your clients in the event there are future calamities in any long-term care settings and preserve their rights to trial by jury and the full panoply of rights and protections offered by our ancient and honored system of justice. ■

Martin S. Kardon is a shareholder in the firm of Kanter, Bernstein and Kardon P.C. of Philadelphia, and specializes in representing the families and victims of elder abuse and neglect.

Elder Law Section Web Site Is New and Improved

By Robert DeLong Jr.

Thanks to the collective efforts of your PBA staff, Elder Law Section Council members, and with valuable cooperation from the Pennsylvania Bar Institute, now



Robert DeLong Jr.

with just with a quick click on the Web you will find the content of the PBA Elder Law Section's Web site significantly upgraded and improved. You can explore it all at www.pabar.org.

If you are an experienced Web surfer and have the time to discover, simply click on a "button" on the Elder Law Section members home page and enjoy.

For less technologically savvy users, the following is a "button-by-button" guide to the new and improved content and a how-to operation of the Web Site. You might want to print out this article and keep it handy. This narrative will describe each button on the Section member home page — from the left-hand side of the screen display top to bottom and then the right.

Included first is a description of what any member of the public as well as any PBA member can see when they surf into the Elder Law Section (Public Area) on the PBA Web site. This is vital for all of us as the site now includes an Elder Law Section Directory that enables potential clients to find contact information for each of us.

NOTE: Please make a point of checking your personal contact information for accuracy!

Elder Law Section Home Page – Button-by-Button

What the Public Sees When They Visit Your Section Web site

About the Section – Public Area: This content can be viewed by any member of the public when they "surf" into the Elder Law Section on the PBA Web site. The content of this button is standard across all PBA sections, but we added the Elder Law Section's Mission Statement to this button to better ensure that Public visitors understood the senior-first focus of Elder Lawyers.

How to Join the Section – Public

Area: The presentation of these first two "buttons" is consistent with all PBA Sections across the association's Web site. Its purpose is to enable PBA members to quickly and easily pay their Elder Law Section dues and gain access to the other resources available in the Members-only area.

Sample Newsletter – Public Area:

Our Fall 2008 newsletter is the currently featured sample. The hope is to educate the public of the excellent work of the Section and, again, to encourage non-PBA and/or non-Elder law Section member attorneys to join up.

Helpful Elder Law links for Lawyers

– Public Area: Another public relations effort that here features Rob Clofine's updated "Favorite Links to useful Web sites."

Section Directory – Public Area:

Here you can find a referral for that friend of a client who resides outside your practice community elsewhere in the commonwealth; or you might use this link to find a fellow practitioner or expert in your own county. When you visit this

button, please be sure to check your own listing for accuracy. If you find an error in your listing you can e-mail me at robertdelongesq@hotmail.com with any changes to your contact information. Please include in the e-mail's subject line the description "Elder Law Section Directory Change Request" and I will see that the change is promptly made to our database.

Leadership/Council Members –

Public Area: A handy reference list of the current contact information of the 23 Elder Law Section council members and their terms of office.

Why You Need an Elder Law

Attorney – Public Area: An exceptional, succinct essay by longtime council members Bob Gerhard and Ellen Wase, written to emphasize the important contributions made to the lives of Pennsylvania seniors by our many sincere Section members.

Elder Law Section at Work for You –

Public Area: An ever-growing list of the many formal efforts by the Section council and its members to positively impact the lives of seniors in Pennsylvania.

Committee/Section Day Sign-up

Form – Public Area: Periodically, the PBA adds or changes these last buttons to provide ready means for members to communicate their attendance at various PBA functions. These items are customary throughout the PBA Web site and their content is controlled by the PBA staff.

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Elder Law Section Web Site Is New and Improved

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Elder Law Section Member Home Page – *Members-Only View*

- **About the Section**
- **How to Join**
- **Section Directory**
- **Leadership/Council Members**
(all repeats of the Public area)

Section Organization Documents, Resolutions and Information —

Members-Only View: Here Section members can examine the strategic plan for our Section as drafted by the Section leadership in April 2008 as well as other important documents including our screening tool used by the Council to ensure that we spend our limited advocacy time and talents wisely. Here we have also reprised our Section resolutions, recommendations and formal comments on proposed public policies touching seniors in Pennsylvania.

Listserv Sign-up — *Members-Only View*

All Section members should sign up for this tremendous interactive forum. Whether you are new to Elder Law practice or a seasoned veteran, there is always something to be learned by reading the many interesting discussions among your fellow practitioners. Signing up is easy, just click on this button and follow the prompts. If you have changed your e-mail address, are going on vacation or otherwise wish to manage your e-mail box volume, you can suspend or change your subscription to the listserv by following the simple instructions found here.

Listserv Archives — *Members-Only View*

A tremendous resource — that is searchable. Because of technical limitations, please note that you must first elect to search (on the left-hand side) messages from Jan. to Dec. 6, 2006, or (on the right-hand side) more recent messages from Dec. 6, 2006, forward.

Once you click on the search button you are taken to a page where you can elect to page through messages by month and year. Alternatively, the *Search Archives* button at the top of the page takes you to an interactive search format. You can instruct the search to look for specific authors or indicate other search parameters. For example, most e-mail users know to include a central description of the topic to be discussed in the Subject or Message Bar of an e-mail message. Accordingly, go to the “Subject Contains” field and type in a topic description — the “what” of your search. Try it out and see what you get!

Please note that we hope to eventually have a search capability across all the buttons and content, but this feature is currently beyond the technical capacity of the Web site.

Practitioner Resources — *Members-Only View*: Featured here are perhaps the most informative documents now available on the Section Web site for members’ ready reference: interactive excerpts from recent annual Elder Law Institutes!

Regular Institute attendees are always intrigued to read the **Annual Case Law Summaries** by Rob Clofine. Also included are the **Annual Legislative and Regulatory Updates** by Jeff Marshall, as well as his thoughtful **Introduction to the Deficit Reduction Act of 2005 (DRA)**. Importantly, this online version features interactive hyperlinks to most of the statutes, regulations and cases covered in the text. Remember, Feb. 6, 2009 marked the third-year anniversary of the DRA (effective date 2/8/2006). Because we are now over three years along, all MA applications need to particularly examine gifting (and other) records from that time forward (unless a trust is involved, then (still) a five-year look back).

Hot Topics — *Members-Only View*:

If you have read about a new trend or thread in the elder law practice or an important recent case, you are likely to find it reprised here. For example, if you have a question about the status of Assisted Living Facility Regulations, you can find a link here. One the our recent additions is an enormous file of redacted documents recently received by Stan Vasiliadis as a result of his Right-To-Know Law inquiry. If you can volunteer, the Council is looking for Section members willing to help sift through this 8.11 mega bites of data. Please contact Stan directly regarding any acorns you find here.

Favorites and Links – (Repeat of the

Public Area): Recently revised by Rob Clofine, you will find automatic hyperlinks (the little pointing finger) to the captioned Web sites. Please revisit this button periodically as we expect to continue to add more links over time.

Newsletters — *Members-Only View*:

The Elder law Section newsletters are remarkably informative, well-researched discussions of key issues and trends. Each Section member receives a PDF copy by e-mail, but here you can find a complete historical library of our newsletters for ready reference and reprinting.

Newsletter Archive and Search — *Members-Only View*:

Our newsletters in a new and improved *searchable* format. For example, the phrase “estate recovery” reveals seven results from 2002 to 2008.

Outreach and Marketing —

Members-Only View: A reprise of Bob Gerhard and Ellen Wase’s essay on “Why you need an Elder Lawyer” is

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Elder Law Section Web Site Is New and Improved

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here along with a still-timely PowerPoint by Kemp Scales regarding the dangers posed to Seniors by unscrupulous sales of “investment” products like trust mills and inappropriate annuities.

Sign Up! PBI Elder Law Programs —

Members-Only View: This button contains a link to the PBI home page. Currently, the PBI Web site is itself undergoing some changes. At the moment, on the right-hand side of the page you can see a link to the status of the Assisted Living Regulations. Clicking on this link brings you a reprint of a recent Section newsletter article by Dana Breslin. You can also search the PBI site for all PBI course offerings in Elder Law and related matters.

- **Committee/Section Day Sign-up Form(s) – (repeat Public area(s))**

Let Us Know What You think!

Ongoing financial concerns continue to dramatically influence commonwealth and federal budgets, so you can expect to see even more substantive content on the Section Web site in the future. Please stop by periodically to keep abreast of developing issues.

To make this Web site more productive for all Section members, please share your constructive ideas for future enhancements. Ideas and volunteers are always welcome! Please address your comments to the Elder Law Section council’s Web Site liaison — me — at robertdelongesq@hotmail.com. Thanks! ■

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Medicare 101 for Attorneys

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Other areas for elder law attorneys are Part B enrollment issues, Part D issues and coordination of benefits issues. It is important in this area of law to know where to find the correct information and where to turn to for help. The Center for Medicare Advocacy is a good resource, as are the Medicare Web sites. Medicare distributes a booklet called “Medicare and You,” which is updated each year (can also be found online). Local APPRISE counselors (can be accessed by calling the local Agency on Aging) are trained volunteers who can be a valuable resource to beneficiaries and their caregivers.

Knowledge of Medicare can prove to be helpful in your everyday practices, as well as a valuable marketing tool to encourage clients to engage your services. ■

Kathleen M. Martin is with O’Donnell, Weiss & Mattei P.C. in Pottstown. She can be reached at kmartin@owmlaw.com or (610) 323-2800.

Help With Your PBA Elder Law Section Listserv

To subscribe, login on the PBA Web site with your PBA member username and password, select the “Committees/Sections” tab, then the “Sections” tab, then the “Elder Law Section” tab, then the “Listserv Sign-Up” tab. The subscription form can also be accessed directly at www.pabar.org/public/listservform.asp.

Once subscribed to the listserv, you will get the following confirmation message:

“File sent due to actions of administrator traci.raho@pabar.org.”

To send a message to members of the listserv, address your e-mail to elder@list.pabar.org.

To reply only to the sender, hit “Reply,” and type your personal reply to the sender. This response will only go to the sender, not to the entire listserv membership. You can manually add other recipients outside of the sender or the membership.

To reply to the entire listserv membership, hit “Reply to All,” and type your response. This response will go to the sender and to the entire listserv membership.

To unsubscribe, send a message to listserv@list.pabar.org with “unsubscribe elder” in the body.

To change your e-mail address, you must unsubscribe the old e-mail address using the old e-mail address and subscribe the new e-mail address using your new e-mail address. Sending an e-mail to the list will not change your e-mail address on the listserv.

For customer service, contact Traci Raho, PBA Internet coordinator, (800) 932-0311, Ext. 2255. ■

The Curious Case of the Persistent Step-Up

In which the mysterious basis rules concerning joint tenancies and life estates are unveiled and explicated.

By John Payne

A Legal Myth

Few legal myths are as persistent as the idea that the gratuitous transfer of a joint or remainder interest in property will cause the loss of the basis step-up on the death of the transferor. This piece of disinformation is pernicious because it is a selling point for trust mills pushing expensive estate planning kits and questionable investments. Many attorneys are confused about this and advise clients to use unnecessarily complex estate plans, solely to preserve the step-up in basis on death. This article is a primer on estate planning using joint tenancies and life estates, emphasizing the effect on tax basis of passing property through will substitutes.

Retention of a joint interest, a life estate, or even a beneficial use will cause property to be included in the gross estate for estate tax, triggering a basis step-up on the death of the original owner. The principles are not new, but a concise and understandable treatment of the basis rules is difficult to find. To decipher the basis rules in most treatises it is necessary to consult several chapters to come to an understanding of when property gets a full step-up. Furthermore, repeal of the estate tax may make a major change in the treatment of life estates.

The fact pattern is usually quite simple: a client wants to confer ownership of a piece of property effective on his or her death. After introducing a typical small-estate planning situation, the various rules governing tax basis will be discussed.

The Gunn Case

Take the case of Benjamin Gunn, a former entrepreneur in marine acquisi-

tions. Despite early successes, his net worth had declined due to imprudent investments of liquid assets at The Admiral Benbow and several spectacularly unsuccessful connubial ventures. He is living on Social Security and his assets consist of his home and 1,000 shares of stock in a successor corporation to The East India Company. The home and the stock have very low tax basis. He wants his nephew, James Hawkins, to receive the home and his stock on his death. A major estate-planning goal for Gunn is the avoidance of taxes.

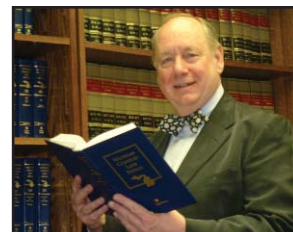
Estate Planning Alternatives

The three alternatives I discussed with Mr. Gunn were to use a will to pass the property, to create a revocable living trust funded with the property, or to use transfer on death designations and a quitclaim deed, so the property would transfer immediately on death. Relying on a will would require that his estate be probated. Creating a trust would avoid probate, but the cost up front would be as much as the expense of probating the estate on his death. He did not want his property to pass through probate nor did he want it to be subject to capital gains tax.

Considering these various alternatives — expense being the prime consideration — Gunn decided to make Hawkins a joint tenant in his house and on the stock. This would prevent him from selling them without Hawkins' agreement, but he trusted Hawkins, who had often proven his honesty and loyalty. Gunn was to come back a fortnight hence to execute the deed and transfer the stock.

Two days later he called because he had read on the Internet that making Hawkins a joint tenant would subject the

property to capital gains tax after his death. He called me a poltroon and a gutter-dwelling caitiff: passing myself off as a lawyer when I don't know the difference between a tariff and a traffic jam. He finally wound down and agreed to let me explain why what he had read is incorrect.



John Payne

Concern About Basis

Gunn's concern was that his property would not have fair market basis in Hawkins' hands. Basis is a valuation from which capital gains are calculated. If Hawkins' basis in Blackacre or the stock rose to its fair market value, he would pay no capital gains tax on sale.

In the absence of a basis step-up, Hawkins would receive "carry-over" basis — i.e. Gunn's basis — and be subject to capital gains tax on the difference. In most instances, appreciated assets received by gift have carry-over basis in the hands of the recipient. However, property acquired by reason of the death of another person has basis equal to fair market value as of the date of death or alternate valuation date.¹ This is referred to as the basis "step-up," and the trigger for the step-up is found in the Estate and Gift Tax portion of the Internal Revenue Code, not the Income Tax portion.

This is important because the basis rules were written to ensure that property did not escape estate tax. It was acceptable to Congress to benefit lower-income taxpayers so that more property could be drawn into the gross estate for estate tax calculations. After all, the rate imposed under the estate tax was higher than the tax on capital gains. Congress

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The Curious Case of the Persistent Step-Up

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wrote the rules to bring as much of the decedent's property as possible into the gross estate, without regard to income tax benefits.

Property in the decedent's gross estate is property "acquired by reason of death."² Thus, counting the property for estate taxes — a serious disadvantage for a large estate — will have the beneficial side-effect of stepping-up the basis for the beneficiary.

Like all good urban legends, the myth that a joint tenancy prevents a full basis step-up grows out of a seed of truth and sounds reasonable.

Like all good urban legends, the myth that a joint tenancy prevents a full basis step-up grows out of a seed of truth and sounds reasonable. The kernel of truth pertains to joint tenancy between spouses, also known as tenancy-by-entireties. After enactment of the Economic Recovery Tax Act of 1981, if a husband and wife are the only joint tenants in a piece of property, the property receives a 50-percent step-up in basis on the death of either spouse.³

Basis for Surviving Spouse

Take the case of Dana and Shannon, who are married. Dana purchased Whiteacre out of her own money for \$10,000 in 1985, but took title jointly with Shannon. In 2005, when Dana died, the property was worth \$100,000. In Shannon's hands, Whiteacre now has a tax basis of \$55,000.⁴ The result would be the same if Shannon died, with Dana as the survivor.

There are two important exceptions to this 50-percent step-up. The first is that both halves of community property have a stepped-up basis on the death of either spouse.⁵ The second is found in federal case law.

Prior to 1977, the basis step-up was based on which spouse provided the consideration for the property. This change in treatment gave rise to the *Gallenstein* case.⁶

Mr. Gallenstein purchased property with his own funds in 1955, but took title jointly with his wife. After his death, she claimed that because the property was purchased before the 1977 amendments to IRC § 2040, the property should have a full step-up in basis. The Service only allowed a 50 percent step-up. The Sixth Circuit Court agreed with Ms. Gallenstein, and established the rule that if entireties property was purchased before 1977, and the spouse who provided more than half of the consideration for the purchase dies, the surviving spouse may claim a basis step-up based on the portion of the consideration provided by the deceased spouse.

The discussion of basis step-up between spouses is a digression from the situation of Mr. Gunn, whose most recent matrimony was terminated several years ago. But it is necessary to comprehend the situation where a spouse is involved to understand why there is such a widespread misunderstanding of the basis rules.

It being generally true that when one spouse dies only half of entireties property gets a step-up in basis, one tends to reason by extension that the same rule applies to all joint tenancies. Fortunately for gratuitous joint tenants who are not married to their donor joint tenants, the rule does not apply.

It being generally true that when one spouse dies only half of entireties property gets a step-up in basis, one tends to reason by extension that the same rule applies to all joint tenancies.

Fortunately for gratuitous joint tenants who are not married to their donor joint tenants, the rule does not apply.

The transfer of Hawkins' joint interest will be gratuitous. After the execution of the new deed, Gunn and Hawkins will each own an undivided interest in Blackacre. A superficial reading of IRC §§ 2033 & 2040 would lead one to believe that on Gunn's death, only his portion of Blackacre would receive a step-up in basis.

IRC §§ 2033 & 2040 and Joint Tenancy

IRC § 2033 provides, "The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."⁷ The interest of Gunn in Blackacre would seem to be limited to his interest as a joint tenant.

IRC § 2040 reinforces this appearance. It states, in part:

The value of the gross estate shall include the value of all property to the extent of the interest therein held as joint tenants ... except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration ...⁸

The phrase "to the extent of the interest therein" limits the inclusion in the gross estate — and consequently the basis step-up to the portion owned by the decedent, unless the other joint tenant was the original owner. This would cover the situation if Gunn made Hawkins a joint tenant by gift and Hawkins died. Whether there is a step-up when the decedent is the original owner — that is Mr. Gunn — is answered by the next subparagraph.

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The Curious Case of the Persistent Step-Up

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This states:

Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time *acquired by such other person from the decedent for less than an adequate and full consideration* in money or money's worth, there shall be *excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person ...*⁹

In this subparagraph, “excepted” means that the interest is excluded from the gross estate. Therefore, the interest of a joint tenant who does not pay full consideration for that interest is included in the decedent’s gross estate, conferring a step-up in basis. This applies to personal and real property, alike.

Whoever wrote the article that Gunn read might be surprised to learn of this seeming loophole in the tax law. He would be shocked to learn that not only joint tenancies, but life estates and even mere use of property can confer a step-up in basis.

IRC § 2036 and Beneficial Use

Gunn might have conveyed Blackacre to Hawkins for no consideration, reserving a life estate. He might also have conveyed the property, but continued living in it until he died. In either case, the property would be included in Gunn’s estate under IRC § 2036.¹⁰ That section provides that “the gross estate shall include the value of all property” in which the decedent retained for life or “for any period which does not in fact end before his death ... the possession or enjoyment of, or the right to the income from, the property” or “the right to designate the

persons who shall possess or enjoy the property.”¹¹ However, there is a possible problem with life estates after 2009.

After termination of the estate tax, the basis of assets acquired from a decedent after 2009 may be increased by \$1.3 million, plus \$3 million for a spouse. However, the termination of a life estate by the death of the life tenant is not considered “acquired” from a decedent under new IRC § 1022.¹² Thus, there may be no basis step-up. Similarly, property in which the decedent retained a general power of appointment is not considered “acquired” from a decedent and may not receive the basis step-up under the new law. At this point the matter is in doubt.

It is likely that the technical problem will be corrected by Dec. 31, 2009, because Congress would not want to play a “gotcha” on the hundreds of thousands of taxpayers receiving property subject to a life estate, not expecting to pay capital gains tax. However, this should receive careful review by estate planning attorneys in the run-up to 2010.

Control Issues

Putting property in joint tenancy or deeding it with a reserved life estate will avoid probate while preserving the basis step-up, but there are other considerations. The most important is the loss of control over the property. Depending on the nature of the property and how it is titled, the donor may lose the ability to dispose of the property without the permission of other owners. With bank accounts, the opposite problem arises; other joint tenants have full access to the funds and may remove them at will. There are work-arounds for these issues — for example the grantor may insist that the grantees execute instruments transferring their interests back in case the grantor wants to

dispose of the property — but there may be problems if the instruments come into the wrong hands. There are also problems of delivery and potential gift tax when the plan involves transfers back and forth. Unrecorded or undelivered deeds raise questions about whether the interests are effectively conveyed.

There are many ways attorneys have devised to pass real property to grantees while retaining the grantor’s ability to convey. In simple situations, one Michigan lawyer executes a quit claim deed, signed by two witnesses including a notary. Witnesses are not necessary for a deed in Michigan, but are necessary for a will. By having witnesses, the deed is effective as a will even if challenged as a deed. To the deed he attaches a written instruction from the grantor to the personal representative or trustee, signed and dated the same date as the deed, stating that the deed should be delivered to the register of deeds upon the grantor’s death, and that it is intended to convey title to the grantees at that time. In the written instruction the grantor expressly reserves the right to otherwise sell, mortgage, etc the property. The grantor also indemnifies the agent for any penalties or other problems that might be caused by delayed recording of a deed.

Some states also permit “transfer-on-death” deeds. The grantor conveys the property to grantees, effective on death. The deed is immediately recorded and the death certificate of the grantor is recorded at the appropriate time, effecting the transfer.

Sale of Principal Residence

A thorny problem arises if the property is the grantor’s principal residence and the grantor decides to sell it after deeding it to others. The seller may

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The Curious Case of the Persistent Step-Up

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exclude up to \$250,000 of gain¹³ on the sale of the principal residence.¹⁴ However, if the seller does not own the whole property, only a prorated portion of the gain may be excluded. The statute is not explicit on whether the seller must have exclusively owned, as well as lived in, the principal residence for the required two years, so the original owner should be permitted to claim the full exclusion if the joint tenants quitclaim their interests back before the sale. The Service has stated that a joint tenant may exclude gain to the extent of the joint tenant's interest.¹⁵ The ruling does not state that the joint tenant may *only* exclude gain to the extent of the interest. There is very little guidance on this section and the regulations do not address the issue. The statute does not say that the person must be an "exclusive" owner. It just says "owner."

Furthermore, the statute contains this provision:

At the election of the taxpayer, this section shall not fail to apply to the sale or exchange of an interest in a principal residence by reason of such interest being a remainder interest in such residence, but this section shall not apply to any other interest in such residence which is sold or exchanged separately.¹⁶

After sorting out all the negatives, subsection (d)(8)(A) seems to apply to the situation where the owner has conveyed a remainder interest in the property, followed by a sale. If the remainder is sold at the same time as the life interest, the seller may elect to cover both interests under the capital gains exclusion.

It could reasonably be inferred that where the seller is the only resident and the house has been the principal residence for the requisite period, the fact

that other joint tenants, who never paid for their interests anyway, give back their interests just before the sale will not prevent the seller from excluding the whole gain. However, some well-respected tax practitioners believe that the seller must have been the sole owner, as well as resident, of the property for the entire two years. Considering the lack of a clear answer, some caution and careful counseling would be warranted before changing the ownership of a principal residence.

The IRC §121 problem and the other complications raised by diluting ownership of one's property make joint tenancy or a transfer with a reserved life estate for estate planning an issue that should be approached with care. However, in some cases these simple devices are not only the least expensive but the most sensible way to effect the transfer of an estate on death.

Conclusion

There is a widespread myth that putting property in joint tenancy or transferring property subject to a life estate confers a present interest and impairs the basis step-up on death. This is incorrect. The gift of a joint interest or putting an intended beneficiary's name on property, retaining a life estate, does not take the property out of the donor's gross estate. Since property that is included in the gross estate for estate tax purposes receives a step-up in basis, it is considered acquired by reason of death and capital gains tax is calculated with regard to fair market basis as of the death of the donor, not carry-over basis. There are some disadvantages to using a quitclaim deed for estate planning. Adding names to one's home will dilute ownership for gain exclusion on sale of the primary residence. This is a problem if the home is to be sold during life. Also, joint tenancies can make sale of property difficult

or allow joint tenants to block desired transactions. Therefore, despite their utility and ease of use, quitclaim deeds and other forms of dispersed ownership should be carefully analyzed lest the original owner find himself or herself deprived of the benefit of valuable property. ■

John Payne is with Garrison LawHouse P.C. in Wexford.

¹ 26 USCA § 1014. In general terms, the alternate valuation date is a date chosen by the personal representative that is within six months of the date of death.

² 26 USCA § 1014(b)(9).

³ 26 USCA § 2040(b). But see 26 USCA § 1014(b)(6), which confers a full step-up for community property even though the survivor's interest is not included in the decedent's gross estate.

⁴ Half of the property retains its original tax basis of \$5,000. The other half is stepped up to \$50,000.

⁵ IRC § 1014(b)(6).

⁶ *Gallenstein v. U.S.* (6th Cir. 1992), 975 F.2d 286, 289.

⁷ 26 U.S.C.A. § 2033.

⁸ 26 U.S.C.A. § 2040(a).

⁹ 26 U.S.C.A. § 2040(a).

¹⁰ 26 U.S.C.A. § 2036.

¹¹ *Id.*

¹² 26 U.S.C.A. § 1022.

¹³ For a married couple, the exclusion is \$500,000.

¹⁴ 26 USCA § 121.

¹⁵ PLR 8942008, 1989 WL 596548 (Oct 20, 1989).

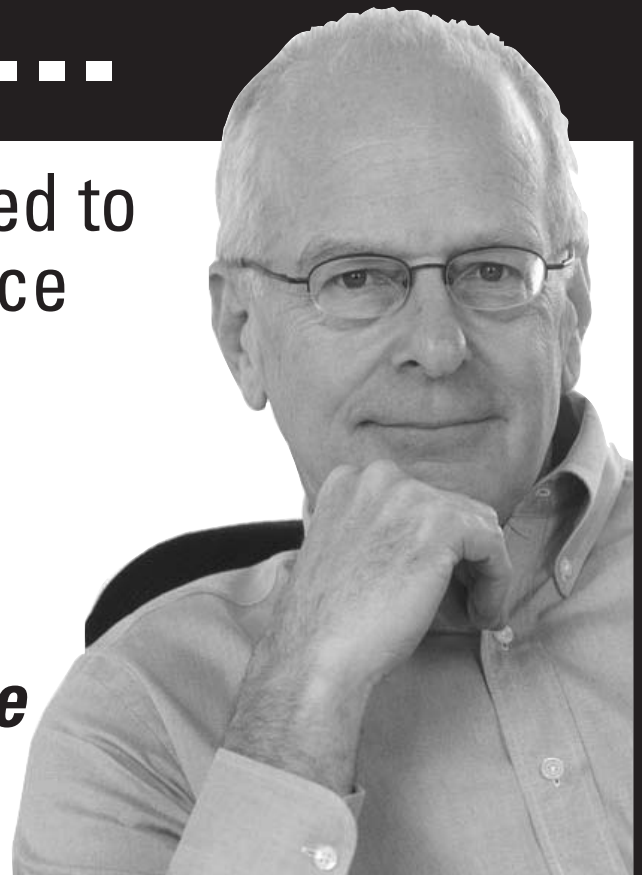
¹⁶ IRC § 121(d)(8)(A).

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Advance Care Planning After Act 169

By Jeffrey A. Marshall, CELA

An important aspect of an elder law practice is helping clients plan in advance for possible future incapacity. We create powers of attorney and trusts that authorize surrogate financial decision-making and the preservation of family financial security. And we create health care directives intended to ensure that the right health care decisions will be made. These health directives typically contain instructions as to the types of treatment the client wants to receive at the end of life.

It is relatively easy to evaluate the success of our planning for financial incapacity. Financial benefits can be monetized and measured. We can estimate how much was saved because a client's home and investments were placed in an irrevocable trust more than five years before the client needed nursing home care. We can calculate the savings achieved because gifting powers were included in a power of attorney and facilitated early eligibility for Medicaid or VA benefits.

But how do we measure the success of our health care planning? Do our efforts really increase the odds that appropriate decisions will be made for our clients when the time comes? Do the advance directives we prepare actually help our clients receive the most desirable care? How do we assess whether the right treatment decisions were made? How do we even start to evaluate what constitutes the "right" care? These are some of the questions that trouble me.

I start with the premise that the goal of advance planning is to improve the odds that the client will receive appropriate and desirable health care in the future, especially at the end of life, and that the burdens and stress on the client's loved ones will be reduced.



Jeffrey A.
Marshall

I know that there is a good chance that the relative success or failure of my planning efforts will be consequential. Half of patients for whom important end-of-life decisions need to be made are incapable of participating in those decisions.¹

Most advance directive forms give the client the opportunity to list current treatment preferences. Does this advance instruction approach increase the probability that my client will receive quality compassionate care at the end of life? Does it help avoid a "bad" death without adequate comfort care and dignity? Does it reduce family conflict and burdens? This was the underlying theory of the Advance Directive for Health Care ("Living Will") Act that Pennsylvania enacted in 1992.² That act authorized competent adults to create legal documents that answered two questions: (1) what are health treatment decisions should be made if you are incompetent and terminally ill and (2) who is the best person to serve as your surrogate decision maker for end-of-life issues.

Unfortunately, living will-type instruction documents apparently do not increase the odds that our clients will receive appropriate, caring, desirable treatment at the end of life. The advance instruction approach is based on the questionable premise that individuals can accurately determine and describe the treatment decisions they will want under unknown circumstances in the future. But advance instructions, if created without pertinent context, are likely to be outdated or irrelevant or otherwise inappropriate

when real-life circumstances arise. The advance instruction approach fails to account for changes that occur in our values and preferences over time as we experience transitions in our health and functional capacity. In addition, instructions contained in living wills are frequently misunderstood or ignored by health care providers.

The advance instruction approach fails to account for changes that occur in our values and preferences over time as we experience transitions in our health and functional capacity. In addition, instructions contained in living wills are frequently misunderstood or ignored by health care providers.

Over the last two decades, many studies have documented the failure of advance health care planning that relies primarily on legal instruction directives such as the living will.³

The legal approach to advance care planning may have served to impede rather than promote effective advance care planning. An ample body of research, summarized by Fagerlin and Schneider⁴ and others, reveals that conventional advance directives have had relatively little impact on end-of-life decision making. Tersely summarized, some of the significant reasons for the lack of impact include the following:

- too few people make use of the legal tools;
- when they do, they do not understand the forms they complete nor the future decisions that might have to be made;
- the forms themselves do not

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- provide much guidance;
- patients' goals and preferences for care may change;
- when principals name an agent or proxy, the agent seldom understands the principals' [sic] wishes;
- even if they have done all the above, health care providers usually do not know about the directive; and
- even if providers know one exists, it does not affect patient care.⁵

This means that even the most well considered instruction directives are usually meaningless in real life. They are certainly irrelevant if family and health care providers are unaware of them or don't refer to them.

With Act 169,⁶ Pennsylvania has enacted "state of the art" laws on advance directives and surrogate decision making. The act includes an "example" advance directive form that includes pages of treatment instructions. But given the irrelevance of written instructions in real life, wouldn't most of our clients be as well served by a document that merely names an agent and alternate agent and says nothing else?

Under these circumstances what can we do as lawyers to help our clients get appropriate and desirable care in the future? If we want to meaningfully affect the quality of care our clients receive, it appears that we need to move beyond the legal approach of written instruction documents.

What if we direct more attention to the surrogate decision maker? Pennsylvania's laws have long authorized the delegation of at least some decision making authority. And now Act 169 has clarified the role, responsibility and authority of a health care agent, and created default representatives for adults who have no agent.

The appointment of an agent, especially one who is given broad discretion to adjust to uncertain and changing circumstances, does seem to offer the potential for better-informed decision making. And it respects the client's choice of surrogate and recognizes that treatment decisions also have an impact on the client's family and loved ones. Of course the designated agent must truly care about the client and be willing to accept the burdens required to make decisions, under stress, over a potentially lengthy period of time.

The appointment of a caring agent with discretion to deal with real life situations has potential. But studies show that an uninformed agent will be unlikely to know what to do when called on to act.⁷ In order to respect the client's values, the agent needs to understand them. So, in the post-Act 169 era, I continue to worry that the advance directives I prepare are little assurance of good future care unless they appoint an agent who is willing and able to act, is prudent, compassionate and well informed.

My recognition of the importance of an informed and caring agent has moved me beyond legal document preparation toward assisting my clients and their agents with more comprehensive advance care planning.

My recognition of the importance of an informed and caring agent has moved me beyond legal document preparation toward assisting my clients and their agents with more comprehensive advance care planning. "[A]dvance care planning is a broader, less legally-focused concept than that of advance directives. It encompasses not only preparation of legal documents but also

discussions with family members and physicians about what the future may hold for people with serious illnesses, how patients and families want their beliefs and preferences to guide decisions ..., and what steps could alleviate concerns related to finances, family matters, spiritual questions and other issues that trouble seriously ill or dying patients and their families."⁸

Advance care planning involves reflection, discussion and communication with family members and health care providers. So, I encourage my clients to spend time considering their personal values and discussing those values with their family members and potential care givers. The completion of an advance directive takes place after that reflection and discussion. The conversation is more important than the document.

At the initial consultation with my clients, I now give them "homework" on advance care planning. The American Bar Association Commission on Law and Aging has created a "Consumer's Tool Kit for Health Care Advance Planning" that can be used to prepare handouts for clients. The Kit is available online at www.abanet.org/aging/pdfs/consumer_tool_kit_bk.pdf.

I give Tool 7, "The Proxy Quiz for Family & Physician" to clients for whom I will be preparing advance directives. I ask them to take it home and take the quiz with their choice for agent and other available family. I've found that clients are quite willing to accept this responsibility. When they return for their second appointment, we discuss the results of that process. The chosen surrogate is encouraged to attend that appointment in person or by phone.⁹ Only then is the advance directive completed.

In addition, I have tried to expand my personal ability to counsel families

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on end-of-life issues by taking the Respecting Choices® Advance Care Planning Facilitator training course and becoming a Respecting Choices® facilitator. The Respecting Choices® program provides education on how to effectively facilitate the process of advance care planning.¹⁰ The training course can be taken online.

Is this enhancement of my services sufficient to guarantee that my clients will receive the most appropriate care at the end of life? Of course it's not. Better is not the equivalent of sufficient. But the lawyer will never be able to create an advance plan that fully ensures that the client will get the "right" care or that the agent will always know which treatment choices to make. We can only increase the odds that more appropriate care will be provided.¹¹ By facilitating communication and shared decision making between our clients and their family members, we are at least moving in the direction of improving end-of-life decision-making and care.

But the lawyer will never be able to create an advance plan that fully ensures that the client will get the "right" care or that the agent will always know which treatment choices to make. We can only increase the odds that more appropriate care will be provided.¹¹

Of course, facilitating communication between our clients and their families may not be the most financially profitable use of a lawyer's time. But it does feel like the right thing to do, which is an important consideration for most of the elder law attorneys I know. For they understand that, "in no small measure, the kind of society we are will be measured in the years ahead by how well (or

how poorly) we care for those elderly persons who cannot care for themselves; by whether we support the caregivers who devote themselves to this noble task; and by whether we sustain a social world in which people age and die in humanly fitting ways — always cared for until the end, never abandoned in their days of greatest need."¹² ■

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¹ Institute of Medicine, Committee on Care at the End of Life, *Approaching Death: Improving Care at the End of Life* (Marilyn J. Field & Christine K. Cassel, eds., Natl. Acad. Press 1997).

² Act 24 of 1992.

³ See, *Taking Care: Ethical Caregiving in Our Aging Society*, Chapter 2, "The Limited Wisdom of Advance Directives," The President's Council on Bioethics, Sept. 2005. See also, Bruce Jennings, Gregory E. Kaebnick, and Thomas H. Murray, eds., *Improving End of Life Care: Why Has It Been So Difficult?* *Hastings Center Report*, vol. 35, no. 6, special report (2005); Angela Fagerlin & Carl E. Schneider, *Enough: The Failure of the Living Will*, 34 *The Hastings Center Report* 30-42 (March-April 2004); Peter H. Ditto, et. al, *Advance Directives as Acts of Communication*, 161 *Arch. Intern.*

Med. 421-430 (2001); E.J. Larson & T.A. Eaton, *The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act*, 32 *Wake Forest L. Rev.* at 278 (1997); J. Teno et al, *Advance Directives for Seriously Ill Hospitalized Patients: Effectiveness with the Patient Self-Determination Act and the SUPPORT Intervention*, 45 *J. of the American Geriatrics Society* 500-507 (1997); David Orentlicher, *The Illusion of Patient Choice in End-of-Life Decisions*, 267 *JAMA* 2101-2104 (1992); Diane E. Hoffmann, Sheryl I. Zimmerman & Catherine J. Tompkins, *The Dangers of Directives or the False Security of Forms*, 24 *J. of Law, Medicine & Ethics* 5 (1996); Rebecca Dresser, *Confronting the 'Near Irrelevance' of Advance Directives*, 5 *J. Clin. Ethics* 55-56 (Spring 1994).

⁴ Angela Fagerlin & Carl E. Schneider, "Enough: The Failure of the Living Will," 34 *The Hastings Center Report* 30-42 (March-April 2004).

⁵ Charles P. Sabatino, *Advance Directives and Advance Care Planning: Legal and Policy Issues*, pp 18-19, U.S. Department of Health and Human Services, Oct. 2007.

⁶ In 2006 Pennsylvania enacted Act 169, which updated Pennsylvania's laws governing health care and end-of-life decision making for incompetent persons. The new law, which comprises Chapter 54 of the Probate, Estates & Fiduciaries Code, took effect in Jan. 2007.

⁷ See, David I Shalowitz, Elizabeth Garrett-Mayer, and David Wendler, *How Should Treatment Decisions Be Made for Incapacitated Patients, and Why?* *PLoS Med.* 2007 March; 4(3): e35; Suhl, J,

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Elder Law Case Updates

By Robert C. Gerhard III, CELA

Spousal Annuities

Weatherbee v. Richman, 595 F. Supp. 2d 607, 2009 U.S. Dist. LEXIS 4402 (W.D. Pa. 2009)

There have been significant developments this past year dealing with the use of spousal annuities in the Medicaid-planning context. By way of background, spousal annuities are a method of protecting otherwise non-excluded resources for the benefit of a nursing home resident's community spouse. Assets are used to buy an annuity that generates a payment stream to the community spouse. Medicaid law provides that the income of a community spouse is exempt from the eligibility computations and to date, annuity payments have been treated as income.

The Department of Public Welfare does not object to a DRA-compliant annuity that pays out monthly amounts that, when combined with the community spouse's other income, does not exceed that community spouse's monthly maintenance needs allowance

The Department of Public Welfare does not object to a DRA-compliant annuity that pays out monthly amounts that, when combined with the community spouse's other income, does not exceed that community spouse's monthly maintenance needs allowance (MMNA). The MMNA is the amount of monthly income required by a community spouse, according to Medicaid's own formula, in order to avoid impoverishment. The current maximum MMNA that can be granted without an increase by an administrative law judge is \$2,739.

The Department of Public Welfare has been denying benefits where applicants' annuities are not compliant with the requirements of the DRA and where annuities generate more income than needed to meet the community spouse's MMNA requirements after considering the community spouse's income from other sources. The MMNA calculation is different for every community spouse and is arrived at by making computations set forth in a specific formula defined by Medicaid law.

A DRA-compliant annuity meets the following requirements:

1. The annuity must be irrevocable and non-assignable;
2. The annuity must be actuarially sound;
3. The annuity must provide for payments in equal amounts, with no deferral and no balloon payments made; and
4. The annuity must name DPW as the beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the applicant/recipient or the annuity names DPW as the beneficiary in the second position after the CS, minor child, or disabled child, for at least the total amount of medical assistance paid on behalf of the applicant/recipient.

The case of *Weatherbee v. Richman* involved the purchase of a spousal annuity. Adeline Weatherbee completed the resource assessment paperwork and her spousal share of assets was computed. She had excess resources of \$442,696.05. After purchasing two pre-paid funerals and a car, she used the remaining excess resources of \$387,756.06 to purchase an actuarially sound, irrevocable, non-assignable annuity for her sole benefit. The annuity generated a payment stream of \$4,423.47/month for 107 months. The

CAO denied Medicaid benefits due to the annuity, treating the annuity payments as a resource that placed the couple over the applicable resource limit. The Department of Public Welfare asserted that the annuity could be sold for cash on the secondary market and that the DRA permitted the commonwealth to treat the annuity as a resource, rather than exempt income of the community spouse pursuant to 42 U.S.C. §1396p(e)(4), which states, "Nothing in this subsection shall be construed as preventing a State from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity described in paragraph (1)." Judge Sean J. McLaughlin of the U.S. District Court for the Western District of Pennsylvania disagreed, and determined that Weatherbee's annuity could not be treated as a resource, that Pennsylvania law providing otherwise was in conflict with federal law and that benefits should not have been denied due to the annuity purchase. Judge McLaughlin affirmed the continued propriety of spousal annuities in the Medicaid planning under applicable law stating,

I conclude that if Congress had intended to "ring the death knell" for otherwise compliant annuities, it would have done so. It did not. I also find that it would be incongruous for 42 U.S.C. §1396p(e)(4) to have the meaning ascribed to it by the DPW. As set forth below, Congress delineated earlier in the subsection those additional requirements with which a Medicaid applicant must comply in order to successfully transfer assets, without penalty, to an irrevocable annuity. It is unreasonable to assume that

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Congress would have intended to take with one hand (i.e., through the operation of 42 U.S.C. §1396p(e)(4)) that which it had just given with the other.

The Department of Public Welfare has appealed this decision to the Third Circuit, and the ultimate resolution of the spousal annuity question is likely many months away. It is important for practitioners to know that even with the recent *Weatherbee* decision, the use of certain spousal annuities in the Medicaid-planning context remains risky. Even though the recently litigated cases have all been decided in favor of the Medicaid applicants, spousal annuities that do not comply with the DPW safe-harbor provisions are likely to be challenged by the Department and litigated. The ongoing threat of litigation is having a chilling effect on risk-averse community spouses who might otherwise invest their assets in such an annuity.

Even though the recently litigated cases have all been decided in favor of the Medicaid applicants, spousal annuities that do not comply with the DPW safe-harbor provisions are likely to be challenged by the Department ...

Guardian's Authority To Decline Life Sustaining Treatment in Absence of End-stage Medical Illness or PVS
In re D.L.H., 2009 PA Super 25, 967 A.2d 971, 2009 Pa. Super. LEXIS 30 (Pa. Super. Ct. 2009)

Does a plenary guardian have legal authority to refuse life-sustaining med-

ical procedures for an incapacitated person who does not have an end-stage medical illness nor is in permanent vegetative state without first seeking Orphan's court approval? The Superior Court said "no." The guardian is not a healthcare agent as defined in 20 Pa.C.S. §5456, and as the guardian is duty-bound under 20 Pa.C.S. §5521 to assert the rights and best interests of the incapacitated person.

The court held that before a trial court could ever grant a guardian the authority to decline life-preserving medical treatment on behalf of an incompetent, the guardian must first petition the court for the authority to do so, proving by clear and convincing evidence that death is in the incompetent's best interest.

The court held that before a trial court could ever grant a guardian the authority to decline life-preserving medical treatment on behalf of an incompetent, the guardian must first petition the court for the authority to do so, proving by clear and convincing evidence that death is in the incompetent's best interest. In order to establish that death is in the incompetent's best interest, a guardian, at a minimum, must provide reliable medical expert testimony documenting the incompetent's severe, permanent medical condition (or severe, permanent medical condition with progressive features) and current state of physical/psychological deterioration and pain. In the absence any evidence of an incompetent's expressions during or prior to treatment, the quality of the medical evidence should be of such character that a court is definitively convinced that the bene-

fits of prolonging life, as a result of medical treatment, are markedly outweighed by the incurable nature of the incompetent's medical condition and the consistent, recurring degree of pain. In other words, based on the medical facts, diagnosis and prognosis of the particular case, a court should be able to conclude, without hesitation that extending life would amount to an "inhumane act" that runs so contrary to basic notions of fundamental decency that death furthers the best interest of the incompetent. A court is not to place any emphasis on the fact that a life-long incompetent, prior to receiving treatment, suffers from a mental disability or other cognitive deficiency in making such a determination, since this is the person's natural state of being.

A court is not to place any emphasis on the fact that a life-long incompetent, prior to receiving treatment, suffers from a mental disability or other cognitive deficiency in making such a determination, since this is the person's natural state of being.

D.L.H. was a 50-year-old male who has suffered from profound mental retardation since birth, he never executed a legal instrument expressing his desires in regard to potential life-sustaining treatment and his parents were his court-appointed plenary guardians. D.L.H. became ill with aspiration pneumonia after he swallowed a hairpin and vomited. He was to be placed on a mechanical ventilator and his parents attempted to decline this medical treatment, stating that mechanical ventilation was not in his best interest. Over the guardian's objections, D.L.H.

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remained on the ventilator for three weeks and then was removed from the ventilator. The parties agreed that D.L.H.'s condition was not an end-stage medical illness and did not place him in a persistent vegetative state.

Gifts Exceeding Authority Granted by Power of Attorney

Brodsky Estate (O.C. Div. Montg. 2008) 29 Fiduc. Rep. 2d 57

Brodsky Estate is another in what seems like an ongoing series of cases involving agents who misuse a power of attorney. Cecelia Brodsky's son withdrew \$210,000 from an account they owned jointly while serving as her agent under power of attorney. The power of attorney instrument permitted "unlimited gifting" to others, but not the agent himself except for the limited purposes of the agent's health, maintenance, support or education. It appears that the son was making asset transfers in an effort to qualify his mother for Medicaid-funded long-term care benefits. Judge Stanley R. Ott found that the son's admitted purpose of these transfers was to spend-down his mother's money so the government could "pick up the tab" (in the son's own words) for his mother's care, not any of the permitted purposes set forth in the power of attorney, and held that the gifting was improper. The son was surcharged \$210,000 plus interest. Gifts were also made to that agent's wife and sons totaling \$30,000, but those gifts were allowed by the court since they fell within the scope of the authority conveyed by the instrument.

Brodsky's son incorrectly believed that since he was listed jointly on the account with his mother, and would eventually inherit what was in the account by right of survivorship, that he

could withdraw funds during her lifetime without a problem. The court flatly stated that this was not the case, and that he breached his fiduciary duty as agent when he made the improper gifts to himself. Adding salt to the son's self-inflicted wound, the court observed that had the son not made these improper withdrawals, he would have been entitled to any remaining balance pursuant to 20 Pa.C.S.A. §6304(a). However, when he removed the \$210,000 from the account during his mother's lifetime, he severed the joint tenancy and thereby lost any right he would have had to the money as the surviving party on a multiple-party account.

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Information on this case was obtained from the *Fiduciary Review*, which discussed the *Brodsky* decision in its March 2009 issue. Call (610)275-8200 to subscribe to the *Fiduciary Review*. ■

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⁸ Institute of Medicine, Committee on Care at the End of Life, *Approaching Death: Improving Care at the End of Life* (Marilyn J. Field & Christine K. Cassel, eds., Natl. Acad. Press 1997 at 198-199.

⁹ Having the surrogate involved at this point not only provides an opportunity for additional communication between client and surrogate, it represents a cross-marketing opportunity for the lawyer.

¹⁰ More information on Respecting Choices® is available online at www.respectingchoices.org.

¹¹ We can "never get end-of-life care 'right,' because death is not a puzzle to be solved. Death is an inevitable aspect of the human condition. But let us never forget: while death is inevitable, dying badly is not." Bruce Jennings, Gregory E. Kaebnick, and Thomas H. Murray, eds., "Improving End of Life Care: Why Has It Been So Difficult?" *Hastings Center Report*, vol. 35, no. 6, special report (2005), page S57.

¹² *Taking Care: Ethical Caregiving in Our Aging Society*, Chapter 2, "The Limited Wisdom of Advance Directives," The President's Council on Bioethics, Sept. 2005.

Legislative Report

By *Steven Loux*

The PBA Legislative Department seeks to inform section members about adopted or pending legislation that affect our practice areas. The Section encourages members to express opinions regarding any pending legislation's importance or impact by contacting appropriate legislators, the PBA Legislative Department or the leaders of the section. To obtain copies of any bill cited below, please e-mail me at steven.loux@pabar.org, call me at 1-800-932-0311, ext. 2246, or directly access bills and other legislative information online at www.legis.state.pa.us.

LEGISLATION

Below find bills by topic. Unless otherwise noted, reference to a committee means a House committee for House bills, a Senate committee for Senate bills. Bills supported by the PBA are so noted; otherwise the PBA has no position on the listed legislation and is providing each bill summary for informational purposes only. All dates refer to 2009 unless otherwise specified.

Annuity Transactions

HB 1119 and **SB 237**, sponsored, respectively by Rep. Anthony DeLuca (D-Allegheny) and Sen. Jake Corman (R-Centre), are similar bills amending The Insurance Company Law. The bills add an article providing for suitability of annuity transactions, which shall apply to any recommendation (with exceptions) to purchase or exchange an annuity made to a consumer by an insurance producer or insurer that results in the purchase or exchange recommended. The legislation provides for duties of insurers and insurance producers: in making a recommendation to a consumer for the purchase of an annuity

or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the insurance producer or insurer shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to the consumer's investments and other insurance products and as to the consumer's financial situation and needs. The bills provide for enforcement. SB 237 also provides, in the context of §320 of The Insurance Company Law (relating to annual and other reports), for the confidentiality of certain documents, materials and information. HB 1119 received first consideration in the House on April 1 and was then re-referred to the Appropriations Committee, while SB 237 passed the Senate 50-0 on April 20, and was then referred to the House Insurance Committee. **The PBA supports both bills.**



Steven Loux

Care Homes and Elder Care

HB 56, sponsored by Rep. Ken Smith (D-Lackawanna), amends the Older Adults Protective Services Act (OAPSA) further defining "facility" to include an assisted living residence. The bill further provides for reporting by employees by requiring reports of neglect rises to the level where serious physical injury or the threat to life and safety will result. The legislation also provides that the local provider of protective services must include information in its written report to the Department of Aging (DoA), which indicates where the suspected neglect

occurred. The bill passed the House 192-0 on March 30, and was then referred to the Senate Aging and Youth Committee.

HB 139, sponsored by Rep. Robert Godshall (R-Montgomery), is a joint resolution proposing an amendment to the Constitution adding that the General Assembly may establish standards and qualifications for a state personal income tax credit for long-term care premiums paid by an individual. The bill was referred to the Finance Committee on Jan. 30.

HB 203 and **SB 349**, almost identical bills sponsored, respectively, by Rep. Godshall and Sen. Stewart Greenleaf (R-Montgomery), exempt licensed nursing facilities operated by a licensed continuing care retirement community (CCRC) from the requirements under 55 Pa. Code §§ 1187.21(2) (relating to nursing facility participation requirements) and 1187.21a (relating to nursing facility exception requests — statement of policy) under the following conditions: (1) the CCRC has admitted more than 400 residents under a continuing care agreement and (2) the nursing facility is part of the CCRC campus. The bills provides for certified and non-certified nursing facilities on CCRC campus, applications for nursing facility beds certified by the medical assistance program, nursing facility medical assistance reimbursement, and DPW notification. HB 203 was referred to the Aging and Older Adult Services Committee on Feb. 2, while SB 349 was referred to the Public Health and Welfare Committee on Feb. 20.

HB 245, sponsored by Rep. Phyllis Mundy (D-Luzerne), amends the Family Caregiver Support Act remov-

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ing the definitions of “adult,” “chronic dementia” and “relative”; adding definitions of “adult with chronic dementia” and “care recipient”; and expanding the definition of “primary caregiver.” In addition, where a care receiver’s household income is under 200 percent of the federal poverty guidelines, the bill increases the maximum amount available to a qualified primary caregiver 1) from \$200 to \$500 per month for out-of-pocket expenses for obtaining day or night respite care services, transportation to respite care service locations or other supportive services defined by regulation, and consumable supplies such as incontinence pads and 2) from \$2,000 to \$6,000 for the entire duration of the case for expenses for home modifications or assistive devices which help the care receiver to carry out tasks required for daily living such as grab bars, safety devices and wheelchair ramps. HB 826, sponsored by Rep. Matthew Baker (R-Tioga), amends the same act, increasing the maximum amount available to a qualified caregiver to 1) \$600 per month for out-of-pocket expenses and 2) \$6,000 for the entire duration of the case. HB 245 passed the House 193-0 on March 30, and was then referred to the Senate Aging and Youth Committee, while HB 826 was referred to the Aging and Older Adult Services Committee on March 10. **The PBA supports both bills.**

HB 282, sponsored by Rep. Don Walko (D-Allegheny), amends Title 18 (Crimes and Offenses) adding that the offense of neglect of care-dependent person includes intentionally, knowingly or recklessly endangering the welfare of a care-dependent person for whom the offender is responsible to provide care by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of the

person. This offense is a second degree misdemeanor unless there is a course of conduct, whereby it becomes a third-degree felony. HB 373, sponsored by Rep. Jim Wansacz (D-Lackawanna), amends Title 18 adding that the offense of neglect of care-dependent person includes the first-degree felony of 1) causing death by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of the care-dependent person and 2) using a physical or chemical restraint or medication on a care-dependent person contrary to law, such that death results. HB 282 passed the House 195-0 on March 16, and was then referred to the Senate Judiciary Committee, while HB 373 received second consideration in the House on March 25, was re-referred to the Aging and Older Adult Services Committee where it was reported as amended on May 6, and was then re-referred to the Appropriations Committee on May 11.

HB 288, sponsored by Rep. Kevin Murphy (D-Lackawanna), amends the OAPSA to further define “exploitation” as an act or course of conduct by a caretaker or other person, including an individual who is acting under a power of attorney. The bill passed the House 193-0 on Mar. 30, and was then referred to the Senate Aging and Youth Committee.

HB 309, sponsored by Rep. Kenyatta Johnson (D-Philadelphia), amends the OAPSA further defining “facility” to include an assisted living residence and adding definitions for “chronic dementia” and “cognitive impairment.” The bill provides for disclosures to facility residents and prospective residents along with other appropriate parties in instances in which a physician holds a financial or ownership interest and is the attending or primary care physician

for a resident or prospective resident of the facility. The legislation also provides that the facility resident or prospective resident or a family member or legal representative of the resident/prospective resident may choose the physician making the disclosure or an independent physician to be the primary care provider. The bill passed the House 193-0 on March 30, and was then referred to the Senate Aging and Youth Committee.

HB 310, sponsored by Rep. Mauree Gingrich (R-Lebanon), the Long-Term Care Quality Improvement Act, establishes the Long-Term Care Quality Improvement Council and provides for its composition and duties. Among its powers, the council shall conduct examinations, investigations and audits and hear testimony and take proof under oath or affirmation at public or private hearings on any matter necessary to its duties. The council shall contract with an independent, qualified, experienced and nationally recognized entity qualified to develop, implement and continuously update and revise voluntary consensus standards for long-term care providers to do all of the following: (1) provide comprehensive comparative information regarding the characteristics of long-term care providers and services provided by them; (2) provide comprehensive comparative information regarding the quality of care services provided by such providers; (3) identify, evaluate and promote the adoption of best practices for such providers and provide comprehensive comparative information regarding the utilization of best practices by such providers; (4) identify and validate performance measures for the evaluation of the quality of long-term care and provide comprehensive comparative information regarding the quality of long-term care

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offered by such providers based upon such performance measures; (5) provide information for such providers, which benchmarks combine information relating to the characteristics, services, compliance history, adoption of best practices and quality of care as determined by performance measures, for use in a rating system that will assist consumers and family members in making informed choices for obtaining long-term care; (6) provide a comprehensive comparative information system that is readily available to consumers, their family members and the general public without cost both through publications and Internet access regarding such providers and that assists in the selection and utilization of long-term care and services; (7) provide recommendations to the quality improvement council for long-term care policies, practices and procedures that may be instituted for the purposes of enhancing and improving the quality of long-term care provided and (8) establish annual quality improvement goals for long-term care facilities in Pennsylvania. The council shall report annually to the General Assembly. The bill was referred to the Aging and Adult Services Committee on Feb. 9.

HB 311, sponsored by Rep. Gingrich, the Long-Term Care Assessor Training and Certification Act, provides for the training and certification of qualified assessors of individuals needing long-term care services. The DoA shall develop a training and certification program for qualified assessors. Only those qualified assessors trained and certified by the DoA shall be permitted to conduct assessments that identify the services a consumer requires. This program shall be separate from the Options program, but nothing in this act shall be construed to permit a qualified assessor,

other than a local area agency on aging (AAA), to perform an Options program assessment. The DoA shall make available to the public a listing of qualified assessors. Within one year of the effective date, the DoA shall report to the General Assembly on programs within Pennsylvania and throughout the country that seek to maximize the effectiveness of charitable pharmaceutical programs and to provide recommendations for new laws and initiatives to enhance the ability of Pennsylvanians to take advantage of such programs. The bill was referred to the Aging and Older Adult Services Committee on Feb. 9.

HB 312, sponsored by Rep. Gingrich, the Long-Term Care Consumer Notification Act, requires long-term care facilities and home and community-based providers to post certain information relating to licensure, notices of enforcement and where to find information relating to the licensing agency. Additionally, long-term care providers must maintain for each consumer a current record of the name, address and telephone number of the consumer's designated person, which must be provided upon request to the commonwealth agency responsible for oversight of the provider. Whenever a long-term care provider receives a notice of enforcement action and a summary of such action from the commonwealth, the summary shall be transmitted to the consumer's designated person within seven days, where feasible. The bill passed the House 193-0 on March 30 and was then referred to the Senate Aging and Youth Committee.

HB 313, sponsored by Rep. Gingrich, the Home and Community-Based Services Accountability Act, grants an AAA providing services under a waiver the overall responsibility to ensure that care management of consumers is com-

petently provided to consumers in accordance with DoA standards and the care plan. The AAA shall coordinate supportive services needed to promote and maintain consumer independence and shall monitor consumers by using consumer contact plans developed and administered through the AAA. The legislation provides for care plan home visits, an annual review of care plans, criminal background checks, communicable disease screenings, recordkeeping, and consumer telephone access. The bill was referred to the Aging and Older Adult Services Committee on Feb. 9.

HB 371, sponsored by Rep. Edward Staback (D-Lackawanna), amends the Public Welfare Code, in general powers and duties of DPW, providing for on-site complaint investigations and plans of correction at personal care homes and assisted living residences. The bill received second consideration in the House on March 30.

HB 372, sponsored by Rep. Staback, amends the Health Care Facilities Act, in licensing of health care facilities, further providing for definitions and requiring the Department of Health (DoH) to initiate investigations of complaints at long-term care nursing facilities within 24 hours if the complaint is a priority complaint or within 48 hours if the complaint is a general complaint. The bill passed the House 193-0 on March 30 and was then referred to the Senate Public Health and Welfare Committee.

HB 494 and **SB 32**, similar bills sponsored, respectively, by Rep. Paul Costa (D-Allegheny) and Sen. LeAnna Washington (D-Philadelphia), provide for minimum staffing standards for long-term care nursing facilities, post-

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ing information on staffing levels, and penalties for violations. HB 494 was referred to the Aging and Older Adult Services Committee on Feb. 18, while SB 32 was referred to the Public Health and Welfare Committee on Jan. 20.

HB 821, sponsored by Rep. Karen Boback (R-Luzerne), the Long-Term Care Consumer Relocation Coordination Act, requires certain long-term care facilities to coordinate with licensing agencies and local AAAs to provide assistance to consumers in circumstances involving relocation of consumers. The bill provides for a long-term care ombudsman as an agent for the DoA to investigate and seek to resolve complaints made by or on behalf of older individuals who are consumers of facilities, which complaints may relate to action, inaction or decisions of facilities, public agencies or of social agencies or their representatives and which may adversely affect the health, safety, welfare, interest, preferences or rights of consumers. The legislation provides for the ombudsman's duties. The bill passed the House 193-0 on April 20 and was then referred to the Senate Aging and Youth Committee.

HB 827, sponsored by Rep. Harry Readshaw (D-Allegheny), amends the Public Welfare Code further providing for uniformity in administration of assistance and regulations as to assistance, for authorized signatures on employability assessment forms to include a certified registered nurse practitioner or licensed physician's assistant, for medical assistance payments and for rules and regulations for personal care homes. For purposes of post-eligibility determination of eligibility for medical assistance payment toward cost of care in a facility, an individual is permitted to deduct an amount

for maintenance of a single medical assistance eligible individual's home if a physician has certified that the individual is likely to return to his or her home within a six-month period from the date he or she entered the facility. The bill was referred to the Health and Human Services Committee on March 10.

HB 857, sponsored by Rep. Douglas Reichley (R-Lehigh), the County Ombudsmen for Senior Housing Act, provides that the chief executive of a county may appoint a county ombudsman for senior housing residents for any senior housing facility in the county that provides services to at least 25 residents. The ombudsman shall serve for two years. The duties of the ombudsman are further provided for in the legislation. The bill was referred to the Aging and Older Adult Services Committee on March 11.

HB 932, sponsored by Rep. Thomas Killion (R-Delaware), amends Article IV (relating to Public Assistance) of the Public Welfare Code, repealing § 472 (relating to other computations affecting counties). The bill was referred to the Health and Human Services Committee on March 13.

HB 1376 and **SB 381**, identical bills sponsored, respectively, by Rep. Eddie Day Pashinski (D-Luzerne) and Sen. Patricia Vance (R-Cumberland), amend the Continuing-Care Provider Registration and Disclosure Act. The bills empower the Insurance Department to conduct examinations of providers. The legislation provides for the authority, scope and scheduling of the exams. HB 1376 received first consideration in the House on May 7, and was then re-referred to the Appropriations Committee; while SB 381 was referred to the Banking and Insurance Committee on Feb. 20.

SB 475, sponsored by Sen. Richard Kasunic (D-Fayette), amends the Health Care Facilities Act by providing for quality assurance inspections. The DoH shall annually conduct random, unannounced inspections of 25 percent of the licensed health care facilities within Pennsylvania. The purpose of the inspection shall be to ensure that health care facilities and services continue to meet high quality standards and that all citizens receive the humane, courteous and dignified treatment and the quality care and services to which they are entitled. The bill was referred to the Public Health and Welfare Committee on March 2.

SB 476, sponsored by Sen. Kasunic, amends the Health Care Facilities Act further providing for term and content of licenses. Whenever practicable, the DoH shall prepare and maintain an inspection report for every long-term care nursing facility visited. The inspection report shall contain: 1) the date the inspection was completed; 2) the number, nature and scope of violations found, if any; 3) the nature of the sanctions assessed against the facility, if any; 4) the date(s) the facility is to be brought into compliance with the law or regulation; and 5) any other information DoH deems pertinent. In accordance with 45 Pa.C.S. Ch. 3 (relating to legal advertising), the DoH shall, within 30 days of completion of each long-term care nursing facility inspection, publish in a newspaper of general circulation within the county where the facility is located a summary of the inspection report. The summary shall list the name, address, telephone number and county where the facility is located. The bill was referred to the Public Health and Welfare Committee on March 2.

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SB 477, sponsored by Sen. Kasunic, the Nursing Home Performance Information Act, requires the DoH to annually publish in electronic and paper media a consumer guide on nursing home performance. The initial guide shall contain information from calendar year (cy) 2006; the second guide shall contain information from cys 2006 and 2007; and the third guide shall contain information about cys 2006, 2007 and 2008. All subsequent consumer guides shall contain information from the last three cys. The legislation provides for the contents and formatting of the guide. The bill was referred to the Public Health and Welfare Committee on March 2.

SB 575, sponsored by Sen. Vance, the Long-Term Care Consumer Protection Act, requires facilities to display the following in a public and conspicuous location where they may easily be observed and read: 1) the license permitting operation of the facility; 2) all reports of inspections issued during the preceding year and 3) notices of any enforcement actions currently being undertaken against the facility. Facilities shall also maintain for each resident, where applicable, a current record of the name, address and telephone number of the resident's representative(s), which shall be provided upon request to the applicable department. Whenever a facility receives from the applicable department a notice of enforcement action, the notice shall also be transmitted by the facility to the representative for each resident of the facility within 10 days. Finally, no later than 24 hours after a facility receives notification from the applicable department of an enforcement action, it shall post the notification on each entrance to the physical location of the facility. The notice shall remain posted until such

time as the action taken by the applicable department has been resolved, and if an appeal is filed, until all issues on appeal are determined finally. The legislation provides for regulations and penalties. The bill was referred to the Public Health and Welfare Committee on March 5.

Government Agencies

HB 1152, sponsored by Rep. Mundy, the Department of Aging and Long-Term Living Act, establishes a cabinet-level state agency combining the DoA and selected functions of DPW and providing for its powers and duties. The legislation makes related repeals. The bill was referred to the Aging and Older Adult Services Committee on March 31.

HR 107, sponsored by Rep. Tim Hennessey (R-Chester), directs the Legislative Budget and Finance Committee to study and issue a report to the General Assembly on the impact of expanding the powers and duties of the DoA to include administration of certain programs currently administered by DPW. The resolution was referred to the Aging and Older Adult Services Committee on March 3.

Grandparents

HB 537, sponsored by Rep. Bill Kortz (R-Allegheny), amends Title 42 (Judiciary), in juvenile matters, further providing for disposition of dependent child by adding that if the court determines that temporary or permanent physical and legal custody shall be given to an individual or entity other than a child's parents, guardian or other custodian, a grandparent who wishes to be given custody shall be considered and a study done by the probation officer or other person or agency designated by the court. A grandparent who wishes to be given custody shall have standing in any court proceeding under

this chapter involving the child or children. The bill received first consideration in the House on March 31 and was then re-referred to the Appropriations Committee.

SB 120, sponsored by Sen. Raphael Musto (D-Luzerne), the Grandparent Caregiver Support Program Act, establishes the Grandparent Caregiver Support Program to serve as a resource for grandparents and other older adult relative caregivers. The program shall provide: 1) technical assistance and training for grandparent and older adult relative caregivers support groups; 2) information and referral for grandparents and other older adult relative caregivers; 3) assistance to grandparents and other older adult relative caregivers in gaining access to available services; 4) counseling to grandparents and other older adult relative caregivers in making decisions and solving problems relating to their role of caregiver to a child and 5) for the publication and dissemination of printed material related to services available to grandparents and other older adult relative caregivers. The bill was referred to the Aging and Youth Committee on Jan. 30.

SB 128, sponsored by Sen. Anthony Williams (D-Philadelphia), the Intergenerational Family Care Act, creates an intergenerational family care pilot program to aid persons who are not the biological or adoptive parents in raising children and providing a model for a possible full-scale intergenerational family care program. The program shall be administered by DPW and assist families by: 1) providing rental assistance to intergenerational family units; 2) ensuring that persons within DPW are educated in the issues of child custody; 3) improving the suitability of intergenerational dwelling units for

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children by constructing activity areas for children; 4) formulating application procedures for nonprofit organizations seeking to aid intergenerational family units; 5) ensuring that persons within DPW are trained regarding the issues of affordable housing; 6) providing day-care assistance for heads of households of the target families who are working and 7) providing caseworkers to assist and counsel target families. DPW shall determine which families are eligible for the program. The bill received first consideration in the Senate on March 17, and was then re-referred to the Appropriations Committee.

Health Care

SB 208, sponsored by Sen. Vance, amends Title 42 adding that a benevolent gesture or admission of fault by a health care provider or assisted living residence or personal care home prior to the commencement of a medical professional liability action shall be inadmissible as evidence of liability or as evidence of an admission against interest. SB 626, sponsored by Sen. Greenleaf, amends Title 42 in rules of evidence, providing for expression of empathy by adding that in a medical professional liability action, an expression of empathy made by a health care provider to a patient prior to the commencement of the action shall be inadmissible, regardless of which party seeks to introduce the statement. Further, an admission of liability or fault shall create a rebuttable inference of negligence in a medical professional liability action. SB 208 was referred to the Judiciary Committee on Feb. 19, while SB 626 was referred to the Judiciary Committee on March 16.

Jury Duty Exemption

HB 73, sponsored by Rep. Costa, amends Title 42 exempting from jury duty persons 70 years of age or older

who opt not to serve. SB 347, sponsored by Sen. Greenleaf, amends Title 42 exempting persons 75 years of age or older who request to be excused from jury duty. HB 73 passed the House 190-2 on Feb. 11, and was then referred to the Senate Judiciary Committee; while SB 347 was referred to the Judiciary Committee on Feb. 20.

Provision of Protective Services

HB 644, sponsored by Rep. DeLuca, amends the OAPSA. The bill authorizes an agency to petition a court of common pleas for an emergency order to provide protective services to an older adult who is at imminent risk of death or serious physical harm, including exploitation that may lead to imminent risk of death or serious physical harm. The court of common pleas shall grant the agency's petition if it finds, by a preponderance of the evidence, that if protective services are not provided, the older adult is at imminent risk of death or serious physical harm. Additionally, the bill specifies permanent employment bans and employment bans for a period of 10 years from facilities depending on an individual's conviction. SB 651, sponsored by Sen. Vance, amends the OAPSA, authorizing an agency to petition a court of common pleas for an emergency order to provide protective services to an older adult who is at imminent risk of financial exploitation, death or serious physical harm. The court of common pleas shall grant the agency's petition if it finds, by a preponderance of the evidence, that failure to provide protective services will place the older adult at imminent risk of financial exploitation, death or serious physical harm. The bill also specifies permanent employment bans and employment bans for a period of 10 years from facilities depending on an individual's conviction. HB 644 was referred to the Aging and Older Adult

Services Committee on Feb. 27, while SB 651 was referred to the Aging and Youth Committee on March 19.

Tax, Generally

HB 138, sponsored by Rep. Godshall, amends the Tax Reform Code (TRC) providing for a personal income tax credit in the amount equal to the lesser of 20 percent of any premiums paid during the taxable year by the taxpayer for a long-term care policy for the taxpayer, the taxpayer's spouse, or both, or \$500. The bill also imposes duties on the Secretary of the Commonwealth and the Legislative Reference Bureau. The credit shall apply to taxable years beginning after Dec. 31, 2006. HB 763, sponsored by Rep. Scott Petri (R-Bucks), amends the TRC providing for a long-term care insurance tax credit in the amount of 20 percent of the long-term care insurance expenses incurred by the taxpayer during the taxable year. The total amount of tax credits approved by the Department of Revenue shall not exceed \$20 million in any fiscal year. Of that amount, \$5 million shall be allocated exclusively for small businesses. The Secretary of Revenue shall submit an annual report to the General Assembly indicating the effectiveness of the credit no later than Mar. 15 following the year in which the credits were approved. The credit shall expire Dec. 31, 2018. HB 138 was referred to the Finance Committee on Jan. 30, while HB 763 was referred to the Finance Committee on March 6.

HB 583, sponsored by Rep. Stephen Barrar (R-Delaware), amends the TRC, adding that the surviving spouse of a deceased individual may file a joint return. The bill was referred to the Finance Committee on Feb. 24.

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Taxing Legal Services

SB 70, sponsored by Sen. Jeffrey Piccola (R-Dauphin), amends the Tax Reform Code, in sales and use tax, by making technical changes, providing definitions and removing certain provisions for exceptions for certain services rendered. The bill requires that any service other than a medical service, when the primary objective of the purchaser is the receipt of any benefit of the service performed, as distinguished from the receipt of property, and for exclusions from the tax, be subject to the tax imposed unless specifically exempted. Additionally, the bill provides for exemptions from the sales and use tax by removing current exemptions from several items including disposable diapers and other related products; steam, natural and manufactured and bottled gas, fuel oil, electricity or intrastate subscriber line charges, basic local telephone service or telegraph service; wrapping paper and related items; and vessels designed for commercial use of registered tonnage of 50 tons or more when produced by the builders thereof upon special order of the purchaser. Exemptions are added for medical goods or services by a hospital; medical, dental or hospice services; goods or services involving Medicare Part B transactions; and the sale or rental of real property. The bill was referred to the Finance Committee on Jan. 29. **The PBA opposes this bill in so far as it imposes a tax on legal services.**

Miscellaneous

HB 61, sponsored by Rep. Dan Frankel (D-Allegheny), amends Title 75 (Vehicles) further providing for issuance and content of driver's license by requiring PennDOT to promulgate rules for provision of a small decal for attachment to a driver's license or iden-

tification card identifying the licensee or cardholder as having executed an advance directive for health care or a do-not-resuscitate order, or both. The bill was referred to the Transportation Committee on Jan. 26.

HB 269, sponsored by Rep. Katharine Watson (R-Bucks), the Adult Day Resource and Referral Act, provides that the DoA shall arrange for the availability of adult day resource and referral services in defined geographic areas across Pennsylvania through contractual agreements with public or private entities that can fulfill the responsibilities of an adult day resource and referral agency. The DoA shall provide for the establishment and maintenance of a central adult day services database, shall compile all information from adult day resource and referral agencies with which it has a contractual agreement and shall establish a comprehensive, accurate and up-to-date reference base on adult day services in Pennsylvania. Specified are the services, at a minimum, to be provided by an adult day resource and referral agency. The legislation also provides for standard operating procedures for such agencies. The bill was referred to the Aging and Older Adult Services Committee on Feb. 5.

HB 798, sponsored by Rep. Marguerite Quinn (R-Bucks), amends the Public Welfare Code stipulating procedures for the review of special needs trusts by DPW. DPW shall review the trust to determine if it conforms with the requirements of Title XIX of the Social Security Act, § 1414 of the Public Welfare Code, any other state law and any regulations or statements of policy adopted by DPW to implement § 1414. If DPW finds that the trust does not meet any of these requirements, it shall provide the trustee, within 45 business days of its receipt of the trust for review,

written notice stating the areas of non-conformity and possible solutions. If the trustee does not receive notification from DPW under within 45 business days of DPW's receipt of the trust for review, the trust shall be deemed to be in conformity with these requirements as of the date it was submitted. Upon receipt of the written notice a trustee shall have 45 business days to resubmit a revised trust to DPW for review. A revised trust found to be in nonconformity with these requirements shall be considered void. If DPW determines that the revised trust conforms with these requirements, the trust shall be deemed to be in conformity with these requirements as of the date the trust was originally submitted. The bill was referred to the Health and Human Services Committee on Mar. 9.

HB 839, sponsored by Rep. Mark Longiotti (D-Mercer), amends the Medicare Supplement Insurance Act requiring that an insurer must refund the balance of any premium paid under a Medicare supplement policy upon receipt of proof from the insured that other insurance coverage was obtained. The bill was referred to the Insurance Committee on March 10.

HB 931, sponsored by Rep. Richard Grucela (D-Northampton), amends the Vital Statistics Law further providing for general powers and duties of the DoH by requiring the DoH to implement a Web-based death registration system for the creation, storage and transfer of death registration information; for disclosure of records and for evidentiary sufficiency of records; providing for access to records on the Internet; and making an appropriation. When 100 years have elapsed after the date of birth or 50 years have elapsed after the date of death, the records of

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these events shall become public records, and information shall be made available in written form and without fee or charge for access on the Web site established and maintained by the DoH. The DoH shall establish and maintain a searchable database of all birth and death certificates records it holds and maintains. The database shall be subject to any limitation placed on the accessibility and release of personally identifying information contained in a record by any other provision of law. Finally, the DoH shall establish and maintain a searchable index database of all death records for which more than two but fewer than 50 years have elapsed. The database shall be open to public examination without charge or fee on an Internet Web site. The information open to public examination in the index shall include the decedents' names, dates of death, dates of birth, places of death and places of birth. The bill was referred to the Health and Human Services Committee on March 13.

HB 1351, sponsored by Rep. Dwight Evans (D-Philadelphia), amends the Public Welfare Code further providing for lifetime limit, for payments to counties for services to children, for departmental administration of county child welfare services, for needs-based budgeting process, for review of county submissions and for limits on reimbursements to counties; further defining "exempt hospital;" further providing for administration; providing for managed care organization assessments; further providing for other prohibited acts, criminal penalties and civil remedies and for repayment from probate estates; providing for limit on claim reduction and for false claims; and providing for necessary action to qualify the commonwealth for additional Medical Assistance funds under the American Recovery and Reinvestment Act of 2009. In particular,

the legislation amends § 1412 of the code (relating to repayment from estates), providing that an individual's estate shall include all of the following: 1) all real and personal property and other assets subject to inclusion within the deceased individual's estate under Title 20 (Decedents, Estates and Fiduciaries) and 2) any other real and personal property and other assets in which the deceased individual had any legal title or interest at the time of death, to the extent of such interest, including such assets conveyed to a survivor, heir, or assign, of the deceased individual through joint tenancy, tenancy by the entireties, tenancy in common, survivorship, life estate, living trust or other arrangement. Further, if property subject to DPW's claim is held by a person, including a cotenant, remainderman, or trustee, then the person holding such property is liable to pay DPW's claim. The bill was referred to the Health and Human Services Committee on April 28.

SB 266, sponsored by Sen. Jay Costa, Jr. (D-Allegheny), amends Title 20 further providing for payments to family and funeral directors by raising various limits from \$3,500 and \$4,000 to \$10,000. The bill was referred to the Judiciary Committee on Feb. 19.

SB 850, sponsored by Sen. Corman, is the Senate Republicans' proposed commonwealth budget for the 2009-10 fiscal year. Among other things, the proposed budget eliminates all state funding (\$3,172,000) for civil legal services. The bill passed the Senate 30-20 on May 6, and was then referred to the House Appropriations Committee. **The PBA opposes this bill in so far as it eliminates this funding.** ■

May 12, 2009

Contact the Editors

Thanks to the Section members and others who contributed to this newsletter. It would not be possible without your help.

We are sure you will agree that the newsletter is one of the most valuable benefits of membership in the Section.

We need your help to continue providing this high-quality resource. Please contact the editors with your offerings for publication, your request to be involved and with any suggestions in general.

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