Erica L. Laughlin assumes ACBA Presidency

By Zandy Dudiak

New ACBA president Erica L. Laughlin said restoring confidence in the justice system is one of her primary goals for her term leading the Pittsburgh Legal Community.

Laughlin—who assumed the presidency on July 1 and will remain in that role through June 30, 2023—said community service affords attorneys the opportunity to meet and work with citizens in-person, and that one-on-one interaction can start the process of restoring trust.

“There seems to be a real desire among attorneys to give back,” she said, something she hopes to tap over the next year.

One specific way she hopes to do this is to re-launch the ACBA “Day of Impact,” which had been planned for 2020, but got canceled due to the pandemic. The vision of the event was to bring the Pittsburgh Legal Community together for a day of volunteer service, including everything from river cleanups to packing boxes at area food banks.

“Just as the Day of Impact should be, Laughlin doesn’t envision giving back to be limited to just that day. She also plans to put a revamped Community Service Committee into action, facilitating these types of opportunities for ACBA members to give back throughout the 2022-23 bar year, and beyond.

Laughlin has other goals for her presidential year, including focusing on lifting the ACBA out of the pandemic and getting back to more in-person engagement within the organization and community.

Engagement among attorneys suffered because of the pandemic, Laughlin explained. She hopes to encourage members to interact on a more personal basis and acquaint newer attorneys with the breadth of everything the ACBA can offer its members.

“Relationships are hard to cultivate virtually, especially for law students and young lawyers, who spent the last two years in a virtual environment,” Laughlin said. “The best way to give back to our profession is being involved. People in the bar are fantastic to work with.”

Another of her goals is implementing the strategic plan recently adopted by the Board of Governors. The strategic plan includes increasing membership, enhancing members’ experiences and developing marketing and branding initiatives.

Laughlin chaired the Strategic Planning Committee, created by Joe Williams during his presidency on July 1, 2020. “It’s well positioned to lead the association,” Williams said. “She is bright, capable and pragmatic. With every issue presented to her, Erica will place the needs of our members at the forefront.”

Laughlin said she wanted to be actively involved as President-Elect in the year leading up to her presidency. Her record of service with the ACBA is testimony to that claim. As an ACBA member, she has chaired both the Women in the Law Division and the Bench-Bar Planning Committee. At present, she serves on the WLD Finance Committee and Civil Litigation Section Council and is also a Young Lawyer Fellow for the ACBP. She has also served on the Nominating Committee, Young Lawyers Division and as a member of the ACBA Leadership Initiative Class, among numerous other roles.

In addition to the ACBA, Laughlin is a member of the Pennsylvania Bar Association and Westmoreland County Bar Association. She previously belonged to the American Inns of Court and American Association for Justice.

She has a civil litigation practice with Strassburger McKenna Gutnick & Gallas, where she is a shareholder and co-chairs the firm’s Business Development and Marketing Committee. She joined the firm in 2004, after graduating from Duquesne University with a B.A. Degree in Journalism and Political Science, and the University of Pittsburgh School of Law.

Originally from North Huntingdon, she resides in PwP with her husband, Nick, and daughters Ella, 7, and Tessa, 5. An avid runner who has completed more than 20 half-marathons and two triathlons, she is also passionate about travel and the arts.

Laughlin serves as a lecturer at St. Vincent College, and is a long-time steering board member of Expressions in Harmony, which provides support and services to women and girls in need. She serves on the Pittsburgh Cultural Trust Corporate Circles Board, the board of Steel City Impact, and is a member of the Pittsburgh Community Broadcasting Community Advisory Council.

The annual ACBA elections were held May 10 to 26. The election was conducted by Intelligator, an independent third party. The results are as follows:

• ACBA President-Elect: Marla N. Presley

• Treasurer: Keri P. Ebeck

• Board of Governors:
  • Board of Governors:
  • Board of Governors:
  • Board of Governors:
  • Board of Governors:
  • Board of Governors:
  • Board of Governors:
  • Board of Governors:

• Judicial Committee
  • Appellate Court Representative: Corri Wood

• At-Large Representatives:
  • Michael W. Calder and Elizabeth Slaby

• Civil Litigation Section Council
  • Corrie Woods

• Women in the Law Division (WLD)
  • WLD Treasurer: Katherine R. Byrne
  • WLD Secretary: Holly Hall

• Family Court Representative
  • Family Court Representative
  • Family Court Representative

ACBA election results now available

The Journal of the Allegheny County Bar Association
The full text and headnotes for the cases below appear in the online, searchable PJ Opinions located at www.ACBA.org.

Commonwealth of Pennsylvania v. David Graves, III, Lazara, J.
Criminal Appeal—Aggravated Assault—Sufficiency of Evidence
Evidence deemed sufficient for Aggravated Assault when Defendant, convicted following a non-jury trial, tells police officer that he is not going to jail, lunges towards officer, and chest bums him.

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Commonwealth of Pennsylvania v. Derrick Bailey, Martini, J.
Criminal Appeal—Sentence—Consecutive Sentences—Abuse of Discretion—Pre-Sentence Report—Statutory Sentencing Factors
Trial court sentenced defendant to consecutive sentences for Indecent Assault and Simple Assault following a plea agreement to the charges but not sentence. Defendant appealed alleging that the sentence was manifestly excessive. Trial court relied upon its right to exercise discretion and obligation to consider the Pre-Sentence Report and the sentencing factors set forth at 42 Pa.C.S.A. 9721(a).

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ALLY Initiative Cohort Class Corner

The Allegheny County Bar Association’s Lawyers Journal will be publishing a small profile of each firm or legal department that is participating in the inaugural ALLY Initiative cohort class. The profiles will be published in the order they are received and will appear in a Lawyers Journal edition that is published between the end of June and October 2022.

Firm or legal department name? Caroselli Beachler & Coleman, LLC

CAROSELLI BEACHLER COLEMAN

Why did your organization join the ALLY Initiative? We recognize the critical importance of accepting, accepting and promoting diversity within our firm, staff and attorneys. As a plaintiffs’ personal injury law firm, we provide services to anyone who has been injured and needs our help, as such our clientele is very diverse. The ALLY Initiative allows our firm to not only promote diversity but to have important conversations about diversity within our firm that we may not have had otherwise. Our firm should reflect the clients we represent, and we believe the ALLY Initiative will help guide our firm towards attaining that goal.

Why is promoting diversity in the legal profession important to your organization? We recognize the legal profession is one of, if not the least diverse professions in the country and in particular, western Pennsylvania. As such we want to make sure our firm becomes more diverse and is a safe space for all people to work and to receive legal services. The acceptance and promotion of diverse perspectives within the Justice System is critical to the integrity and future of the American justice system and we want to be part of that future.

What project goal are you most excited about, and why? Project Goal: Survey employees on issues pertinent to diversity and inclusion and take substantial steps to implement two substantive changes based on that feedback. As noted above the ALLY Initiative program has allowed our firm members to have more open and frank discussions on this subject matter which I believe makes our firm better but also makes us better people leading to better decision making and problem solving within the firm and hopefully within our personal lives as well.

Firm or legal department name? Babst Calland, Clements & Zomner, P.C.

Babst Calland
Attorneys at Law

Why did your organization join the ALLY Initiative? At Babst Calland, we pride ourselves on striving to create an inclusive culture at our firm. The ALLY Initiative is about reshaping our legal community, ensuring the talent pipeline in our industry is reflective of the community we serve, and honing in on the inequities that exist in our workplace and industry at large that affect our employees, clients and neighbors. Babst Calland is excited to expand and intensify our DEI efforts through this initiative.

Why is promoting diversity in the legal profession important to your organization? Babst Calland views diversity as a business imperative that is critical for maintaining a positive and inclusive workplace culture. We experience daily the immense value diverse perspectives bring to Babst Calland’s legal teams. This is just one of the reasons why the hiring, retention and inclusion of legal professionals from a variety of diverse backgrounds is a key initiative of our firm’s strategic plan.

What project goal are you most excited about, and why? Babst Calland and its attorneys strive to actively develop the diverse talent already at our law firm by providing management training opportunities and ongoing mentoring so that our diverse talent can be reflected at upper levels of the organization. To that end, we are very excited for our 2022 Formal Mentoring Circles created by our Women’s Initiative to bring together women attorneys from multiple offices across all practice groups and seniority levels within the firm.
A message from the outgoing chair of the Elder Law Committee

By Robin L. Frank

Over the past two years, I had the privilege of leading the Allegheny County Bar Association’s Elder Law Committee through an “unprecedented” time in many ways. While elder law attorneys made their best attempts to adapt to a legal practice that included video conferences with clients and remote court appearances, our clients relied on us to provide stability and reassurances in the midst of significant uncertainties. Due to the nature of an elder law practice, a high number of our clients found themselves in residences or nursing homes where their access to family members, friends, and other support providers was greatly limited. Despite that, many attorneys embraced the challenge as we worked together to develop creative solutions so that we could offer uninterrupted assistance to our clients in their times of need.

As the pandemic continued, it seemed that the need for elder law services became greater than ever. Some clients sought to make updates to estate planning documents that they obtained decades earlier, while others decided that they urgently needed to meet with an attorney about the #FreeBritney movement or the #I Care A Lot movement after they read about guardianships. They started new discussions about whether their Social Security benefits would allow them to live comfortably on a fixed income. They considered how to protect their estates and other assets would allow them to plan retirement options as they weighed retirement policies, clients considered their savings and implications of establishing trusts, purchasing annuities, or making other retirement investments. As employers created new work policies, clients considered their retirement options as they weighed their Social Security benefits and other assets would allow them to live comfortably on a fixed income. They started new discussions about guardianships after they read about Netflix hings. They held family meetings to make decisions about where they would live and what kind of care they would need, even as their options became limited by provider availability and ever-rising healthcare costs. Every client faced critical questions that could have a major impact on their daily lives. However, it sometimes felt like our answers to each question only resulted in more questions that needed to be answered.

During those times, the Elder Law Committee continued to faithfully hold meetings over Zoom. We tracked legislative changes, we listened to presentations, and we met with judges and court personnel to get the latest updates on local procedures. For some meetings, we held round-table discussions to share our struggles and our victories as we brainstormed about how we could offer improved services to our clients. As I pass the figurative torch to Lori Capone as the new Chair, I have no doubt that the Elder Law Committee will continue to provide its members with an expanded knowledge of our court policies and laws, an understanding of the issues that affect our clients, a genuine camaraderie with other attorneys with an interest in elder law, and maybe even a free lunch once our in-person meetings resume. It has been my pleasure to serve as the committee chair for such a warm and welcoming group, and I look forward to seeing new members and long-standing members alike when we return in the fall!

Robin L. Frank is an attorney with Raphael Ramsden & Behers, PC and outgoing Chair of the ACBA Elder Law Committee. Her fields of practice are elder, entertainment and family law. She can be contacted at rjfrank@rrblaw.com.

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A message from the incoming chair of the Elder Law Committee

By Lori Capone

Elder law attorneys are committed to helping the elderly, the disabled, and individuals with special needs. We are dedicated in our efforts, and we strive to provide our best legal representation tailored to meet our individual client’s needs. Prevalent elder law themes include:

• Financial fraud against the elderly
• Neglect and exploitation of seniors
• Protection of vulnerable adults
• Planning for an ill or disabled spouse or child
• Guardianship
• Decisions that impact us financially, such as choosing a Medicare plan, when to claim Social Security Retirement Income, and how to plan for long-term care
• Medicaid eligibility
• Health Care Advance Directives
• Designation of Health Care Surrogates
• Estate Planning

What do we have planned for 2022?

In short, mentorship, education, and advocacy!

Mentorship: We will engage in an outreach effort to identify new practitioners and bring back past members to cultivate an opportunity where we can collaborate with peers, form lasting relationships, participate in work with other ACBA sections and committees and become active members and future leaders in elder law.

Education: Active participation in the Elder Law Committee will keep us current on practice issues. We strive to provide informative speakers on important elder law topics at our meetings.

Advocacy: We will engage in strategic planning by initiating sub-committees to address key areas of elder law that affect Pennsylvania’s seniors and individuals with disabilities. We envision a legislative advocacy subcommittee to influence legislation and ensure we have the opportunity to be heard on bills that may impact the clients we serve. We plan to explore whether and how the introduction of an ethical collaborative law process may be an effective tool for conflict resolution in different areas of elder law.

The Elder Law Committee will continue to be the voice for our community’s seniors and individuals with disabilities and special needs. We encourage you to join.

Lori Capone is an attorney at the law firm of Sutter Williams LLC and chair of the ACBA Elder Law Committee. Admitted to practice in PA and FL, she concentrates on matters of elder law, Medicaid planning and appeals, estate planning, trusts, litigation, and decedent estate administration. She has represented clients in the Orphans’ Court Division of various counties in Pennsylvania regarding powers of attorney, wills, surcharge actions, and demands for accountings. She also has extensive experience with obtaining, modifying, and terminating guardianships.

Lori Capone

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Aleksandra L. Kovachick
Lorraine W. Mervyn
Robert D. Weinberg
Wexford
(by appointment)

gha-lawfirm.com
Revised ACBA/ACMS Advance Directive now available on ACBA website

By Grace Wankiiri Orsatti

A free advance healthcare directive document is once again available to the public on the ACBA website at ACBA.org/LivingWill. The revised document, which had been available on the ACBA website since 2009, was removed briefly to incorporate amendments made in 2018 to the anatomical gift act. Members of the ACBA Elder Law Committee, in consultation with medical professionals from the Allegheny County Medical Society (ACMS), as well as the Duquesne University Wills Clinic, revised the document to reflect not only the recent changes to the language of anatomical gift act, but also developments that have taken place in the medical profession over more than a decade since the document was last updated.

The revised advance directive, which provides the public with a tool to prepare for and record end of life healthcare decisions, consists of four discrete sections that can be tailored to the user’s needs and complexity of their wishes: Section I - appointment of a healthcare agent, Section II - healthcare agent powers, Section III - the living will, and Section IV - organ donation and anatomical gifts. The four-part document can be completed in its entirety, but individuals who do not wish to, or do not have the ability to complete the entire document may opt instead to complete only one or some of the four sections, without necessarily completing the whole document.

Section I of the document, in which the user may select a healthcare agent and alternate agent to act on their behalf, is viewed by many experts as the most important component of advance healthcare documentation. Even if users do not specify their healthcare treatment wishes, they are strongly advised to select an agent at the very least. Selection of a healthcare agent allows medical professionals to quickly ascertain who is responsible for the incapacitated patient for purposes of coordinating medical care. Moreover, it can help to avoid family disagreement and uncertainty about who will make decisions on behalf of the incapacitated person. It additionally provides the principal with an advocate and can avoid time-consuming guardianship proceedings. Moreover, careful agent selection can reduce the danger of exploitation and abuse by allowing the principal to choose a trustworthy, responsible, and reliable advocate to meet and protect their needs in the event of incapacity.

Section 2 of the document sets forth specific powers granted to the healthcare agent, including the authority to withhold or withdraw medical care, and withhold or withdraw artificial nutrition and hydration. The language of Section 2 mirrors that of the statutory form at 20 PA.C.S.A. § 5471, with the addition of the power to carry out wishes regarding funeral, burial, and the disposition remains. The principal has the option of granting the agent authority to make decisions on their behalf as soon as the document is executed, or in the future upon a determination of incapacity. In addition, the principal has the option of inserting goals for care. To aid in providing clarity to the agent and doctor, the instructions to the document suggest a variety of possible goals that the principal might consider, such as preserving life as long as possible, or being kept alive long enough to give loved ones an opportunity to say goodbye.

The living will section of the document, perhaps the most controversial component of an advance healthcare directive, seeks to guide the healthcare agent as to what specific medical treatments the principal wants and does not want at the end of life. Living wills have recently come under increased scrutiny due to the difficulty of predicting future medical needs far in advance of a medical crisis. Those

Continued on page 10
Death, divorce and other concerns for elderly clients

By Robert D. Weinberg, with contribution from Charles J. Avalli

Poor, sweet Millie. She sits in your office, sobbing. She just turned 70 last week. About five years ago, her dearest husband, Jackleg (that’s what Millie calls him) left her for a sprightly 72-year-old-woman he met at the breakfast buffet at Controversy, a new “club” he was frequenting. He seemed to be having a late life crisis before he left: he bought a motorcycle; he started wearing skinny jeans; and he was staying out past the wee hour of 6:00 p.m. most nights.

But, after a recent motorcycle accident, he sits in the hospital in a coma. Worse, Millie received in the mail a divorce complaint, apparently verified by Jackleg’s attorney with what appears to be a mauve Crayon.

“What should I do,” she blurs through a deluge of seemingly genuine tears.

You are a newly-minted elder law attorney. You remember bits and pieces of estate and family law from law school. So, you do the prudent thing: Google it.

After sorting through the pablum of “optimized” websites, you stumble upon what appears to be a useful resource: the website for Gentile, Horoho & Avalli, P.C.

You step out to a breakfast buffet at Controversy, a new company and its ever-changing workforce. You learn even better news from your call to Gentile, Horoho & Avalli, P.C.: the property will pass to Millie unless a divorce decree is entered, which would convert ownership to tenants in common. It is this case, where Millie has not even been properly served (and preliminary objections would likely dismiss the complaint anyway since it seems Jackleg was not competent to file), a divorce decree is months off, if not longer.

After conveying this information to Millie, her tears stop, and she is all smiles. You gave her very helpful advice and you learned a lot about the interplay between divorce and the probate code. Millie’s cheer is not diminished, as she is leaving, when you remind her that her power of attorney that Jackleg had signed was revoked when he filed for divorce.

Millie as beneficiary is revoked.5 In this case, where Millie received in the mail a divorce complaint (it did not come by certified mail), over and above the questionable Crayola verification. So, no clocks are running for her as yet.

Beyond that, though, what does the establishment of grounds mean for Millie?

Once grounds are established, several important legal implications arise. First, instead of proceeding in Orphans’ Court under the PEF Code, Millie’s economic claims will be resolved in family court under the Divorce Code; there, she can seek equitable distribution and other economic relief, but she loses some of the protections of the PEF Code.

Moreover, the establishment of grounds results in the following immediate consequences:

1. Any provision of Millie’s husband’s will that favors her becomes ineffective for all purposes

2. Unless clearly designated to survive the divorce, any conveyance which was revocable by the conveyor at the time of the conveyor’s death which was to become effective after death is revoked; 1

3. Unless clearly designated to survive the divorce, any designation with her assets largely intact.

The good news for Millie was that after conveying this information to Millie, her tears stop, and she is all smiles. You gave her very helpful advice and you learned a lot about the interplay between divorce and the probate code. Millie’s cheer is not diminished, as she is leaving, when you remind her that her power of attorney that Jackleg had signed was revoked when he filed for divorce.

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1 23 Pa. C.S.A. Section 3323(g).
2 20 Pa. C.S.A. Section 5605(c).
3 20 Pa. C.S.A. Section 6111.1.
4 20 Pa. C.S.A. Section 6111.2(a)(3).
5 20 Pa. C.S.A. Section 6111.2(a)(3).
6 20 Pa. C.S.A. Section 3301(d).
Address and include digital assets in estate plan to avoid headaches and unnecessary legal work

By Lois Vitti

Recently, our firm was approached to handle a relatively small estate. Our client is the Decedent’s niece. She was also named Executrix in a form Last Will and Testament that Decedent downloaded from the internet. Unfortunately, no beneficiary was listed or named in the form Will. Naturally, there is a sibling with addiction issues who would likely inherit all of the estate (and deplete it just as quickly). Our client insists that the Decedent had a proper Will naming her as the beneficiary as well as the Executrix. She was told that the Decedent had emailed the proper Will to her boss and friend. The boss friend deleted the email and cannot locate it in her trash bin. Presumably, the email would be in the outgoing email box of the Decedent or saved in his electronic files. The email is locked in the Decedent’s iPhone and laptop and no list of passwords could be located.

We tried everything we could think of to obtain access to the Decedent’s cell phone and laptop, including trying to find a savvy teenager to assist. After countless attempts to contact Apple, we learned that we needed to petition the Court and obtain an Order for access. After obtaining the Order, of course, we were then told by Apple that we needed additional details (the Apple ID or identification number) that must be included in the Order before our Executrix could have access.

With so much of our lives now located in the digital form, this situation is not unique. When presenting the Petition to the Court, the judge and his staff mentioned that they have seen numerous similar petitions and the frequency is increasing. The Uniform Law Commission (ULC) promulgated a model law to address situations like the one our client faced. The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) (the Act) was adopted by the Pennsylvania Legislature and became effective January 19, 2021, at 20 Pa.C.S.A. § 3901 et seq.

The Act, a personal representative of the estate can gain access to electronic communications by providing the custodian of these communications with:

1. a written request for disclosure in physical or electronic form;
2. a certified copy of the death certificate of the user;
3. a certified copy of the letters, and
4. if requested by the custodian:
   (i) any number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user’s account;
   (ii) evidence linking the account to the user;
   (iii) an affidavit by the personal representative stating that disclosure of the user’s digital assets is reasonably necessary for administration of the estate; or
   (iv) a finding of the court that:
      (A) the user had a specific account with the custodian identifiable by the information specified in subparagraph (i); or
      (B) disclosure of the user’s digital assets is reasonably necessary for administration of the estate.

Obtaining access under the Act will be smoother (in theory) if the client provides for the fiduciary’s access in their estate planning document. A Will should specifically grant to his or her personal representative the authority to manage the client’s digital assets and to have access to the content of electronic communications. The following sample language may be useful to consider when drafting a Will.

**Definitions.** Digital Asset means an electronic record in which I had a right or interest at death and may include data, files, documents, audio, video, images, sounds, social media content, online networking content, apps, codes, credit card points, travel-related miles and points, computer source codes, computer programs, software, software licenses, databases, or the like, which are created, generated, or stored by electronic means.

The term Digital Asset and the rights regarding Digital Assets granted herein specifically includes the content of electronic communications as defined in 18 U.S.C. § 2510(12) and does not include an underlying asset or liability unless the asset or liability is itself an electronic record. For purposes of this definition, “electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities, and “record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

Digital Account means an arrangement under a terms-of-service agreement in which a custodian either carries, maintains, processes, receives, or stores Digital Assets, or provides goods or services for me or a trust created hereunder.

Disposition of Digital Assets. I give my Digital Assets (as defined herein) to:

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**Continued on page 10**
Accountability Act on September 28, 2021. The Senators previously introduced the Act in 2018 but no vote ever took place. In its current form, the Act would require the establishment of a national center to share best practices, training materials, and other guardianship resources between states. Perhaps most importantly, the Guardianship Accountability Act would expand grant funding for courts to offer new training programs, expand background checks for guardians, and take other measures that protect incapacitated people and their assets. Despite the renewed national interest in eliminating guardianship fraud and abuse, much work remains to be done.

In 2014, the Social Security Administration investigated the embezzlement of over a quarter of a million dollars by a guardianship agency in Cambria County. More recently, in 2019, the Delaware County District Attorney’s Office filed felony charges against a couple who ran a family guardianship agency there. The charges involved allegations that the defendants stole over a million dollars from the people that they served as court-appointed guardians. While these cases involved significant financial misappropriations, which led to public outrage, misuses of the guardianship system undoubtedly still occur on a smaller scale as well.

In order to improve the guardianship system and prevent abuse by guardians, the Pennsylvania Supreme Court created an Elder Law Task Force in 2013. Two years later, in 2015, the Supreme Court established the Office of Elder Justice in the Courts (OEJC), along with its Advisory Council, to implement the Task Force’s recommendations. So far, these recommendations led to statutory changes, updated guardianship forms, and the establishment of an online Guardianship Tracking System. Each of these improvements provides more uniformity and oversight in guardianship cases throughout the state.

One of the Task Force recommendations that remains pending would require courts to ensure that each alleged incapacitated person is represented by an attorney. The statewide Orphans’ Court Procedural Rules Committee dismissed this recommendation in the past, after it determined that the courts should decide whether to appoint counsel on a case-by-case basis. In support of its position, the Rules Committee found that requiring legal representation in all guardianship cases would impose a financial hardship on the judicial system, particularly when many cases are uncontested. However, Pennsylvania State Senators Lisa Baker (R-Luzerne) and Art Haywood (D-Philadelphia) are now seeking bipartisan legislative support for a bill that reiterates the goals of the Guardianship Accountability Act on a state level. The forthcoming bill would require legal representation for every person with an alleged incapacity, along with other objectives that are designed to prevent fraud, abuse, and exploitation in guardianship matters.

As legislators contemplate proposed changes to guardianship statutes, the judges and staff of the Allegheny County Orphans’ Court Division continue their work to provide sufficient protections in every guardianship case. In order to satisfy an increased need for legal representation, the Orphans’ Court is updating its list of attorneys who are willing to accept appointments as counsel for allegedly incapacitated individuals in guardianship cases. Additionally, the Orphans’ Court would like to expand its list of potential guardians for people who are deemed to be incapacitated. Although guardianship trainings and certifications are offered by various organizations, formal certification is currently required. Attorneys who are appointed can also be compensated for their services. If you would like to be considered for future court appointments, either as a guardian or as an attorney in guardianship cases, please contact the Court’s Guardianship Department Supervisor, Dan Buzard, at 412-350-5563 or Dan.Buzard@alleghenycourts.us.

Continued on page 10

THERE ARE ENOUGH WORRIES IN LIFE...

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The elder law attorney: An important ally to your practice

By Christine Brown Murphy

It probably doesn’t surprise you that not all estate planning attorneys are created equal, nor are their documents and approach to planning. At Zachariah Brown, we describe the role of an elder law attorney as being an estate planning attorney ‘on steroids’. In other words, we have the added vision, knowledge and experience to address unforeseen risks to a person’s estate associated with aging. Our skillset enables us to engage in planning to minimize taxes while also planning for minor children, grandchildren, disabled heirs, blended families, drug addiction, etc. We also have an understanding of specific rules and available benefits that take our disabled heirs, blended families, drug for minor children, grandchildren, to minimize taxes while also planning to address unforeseen risks to a person’s estate associated with aging. Our skillset enables us to engage in planning to minimize taxes while also planning for minor children, grandchildren, disabled heirs, blended families, drug addiction, etc. We also have an understanding of specific rules and available benefits that take our disabled heirs, blended families, drug

If an elder law attorney was presented with this identical scenario, our guidance would be based upon an understanding that Parkinson’s is a progressive neurological disease that can significantly impair movement, and nearly 70 percent of those diagnosed with Parkinson’s will develop dementia as the disease progresses. We know that families struggle with this illness for many years and often get to a point of being unable to meet the needs of their loved ones at home. As the disease progresses, admission to a nursing home is often, ultimately, the only choice. Because of this knowledge, we know it is imperative to discuss the following matters with George and Mimi:

1. The average cost of nursing home care in Pennsylvania exceeds $14,000 per month; 2. Medicare and other health insurance will pay a very limited role in covering nursing home costs; 3. Medicaid is the primary payer of long term care. You can even be a millionaire and your spouse can qualify for Medicaid; 4. The ways in which the complex rules of gifting, trusts, annuities and the five year look back play a part in Medicaid eligibility; 5. All available care options and benefits; 6. The exposure and risk to their assets if nursing home care becomes necessary; and 7. The need for an effective elder focused estate plan that will accomplish their estate planning goals, offer protection to their estate and leave them prepared to deal with long term care issues should they arise. This “Elder Law Planning” can be the difference between protecting a client’s assets vs. the complete exposure and consumption of the assets that a client has worked a lifetime to accumulate.

For today’s practicing attorneys, it is critically important to understand the protection and security that you can offer to clients by consulting with an experienced elder law attorney. It will help to ensure that you are prioritizing your clients’ best interests and positioning them to optimally navigate the interplay between estate planning and the medical, financial and emotional decision-making of long-term health care needs. If you have questions or concerns about Elder Law planning for your clients, please reach out by calling 724-942-6200 or via our website at PittsburghElderLaw.com.

Christine Brown Murphy, Esquire is a partner of Zachariah Brown P.C. Elder Law and Estate Planning Firm. The firm focuses its practice on Medicaid eligibility; Veterans Benefits planning; estate administration, and estate planning including, wills, powers of attorney, living wills, and trusts. Pittsburgh area office locations include McMurray, McKeesport and Wexford and Florida offices are located in Bradenton and Pompano Beach. Contact information – Phone: 724-942-6200. Website: www.pittsburghelderlaw.com. Email: christine@pittsburghelderlaw.com.

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By Christine Brown Murphy

The elder law attorney: An important ally to your practice

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who rely on living wills are cautioned that the document does not include or predict all possible medical situations and potential outcomes, as an individual’s medical circumstances, personal choices, and individual needs are subject to change. Moreover, users are advised to consult with a medical professional to address their specific healthcare requirements.

Section 4 of the document, pertaining to organ donation and anatomical gifts, incorporates the 2018 revisions to the anatomical gift act (20 Pa.C.S.A. § 8600 et seq.), which require authorization for donation of organs and additional separate authorization for donation of other anatomical gifts. With respect to organs, the document allows users to donate some, all, or none, and users may select whether such donation is for transplant purposes or research purposes and place any such donation is for transplant purposes and include data, files, documents, audio, video, images, sounds, social media content, social networking content, apps, codes, credit card points, travel-related miles and points, computer source codes, computer programs, software, software licenses, databases, or the like, which are created, authorized is intended to be construed to be lawful consent under the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended; and any other applicable federal or state data privacy law or criminal law. For purposes of this section, Digital Asset means an electronic record in which I have a right or interest and may include data, files, documents, audio, video, images, sounds, social media content, social networking content, apps, codes, credit card points, travel-related miles and points, computer source codes, computer programs, software, software licenses, databases, or the like, which are created, or stored by these means. The term Digital Asset and the rights regarding Digital Assets granted herein specifically includes the content of electronic communications as defined in 18 U.S.C. § 2510(12) and does not include an underlying asset or liability unless the asset or liability is itself an electronic record. For purposes of this definition, “electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities, and “record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. For purposes of this section, Digital Account means an arrangement under a terms-of-service agreement in which a custodian either carries, maintains, processes, receives, or stores Digital assets, or provides goods or services for the principal.

While meeting with a client to discuss an estate plan, it is good practice to discuss the location and control of digital information. With all estate planning clients, versions of the above provisions in planning documents may be useful. The practitioner may also do well to suggest that the client prepare an itemized list of all digital assets and include it in the estate documents. By addressing and including digital assets and access to digital information the estate and estate plan, costly headaches and unnecessary legal work may be avoided.

Vitti is the Managing Partner/Owner of Vitti Law Group.

**DIGITAL ASSETS IN ESTATE PLAN** continued from page 7

outright and free of trust to my descendents, per stirpes.

**Executor Powers.** Management Power Over Digital Assets. The Executor shall have the power to access, utilize, manage, close, control, cancel, deactivate, or delete Digital Accounts and Digital Assets in which I had a right or interest at death. This authorization is intended to be construed to be lawful consent under the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended; and any other applicable federal or state data privacy law or criminal law. When drafting a client’s Power of Attorney (POA), it may be extremely helpful to the agent to include language granting the agent access to the principal’s digital information. Because access to digital assets is a “hot power” requiring specific grant of authority by the principal, this language is especially important.

Everying is sample draft language you may consider when drafting a POA for your clients.

**Management of Digital Assets.** My agent shall have the power to access, utilize, manage, close, control, cancel, deactivate, or delete any Digital Accounts and Digital Assets in which I have a right or interest. This authorization is intended to be construed to be lawful consent under the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended; and any other applicable federal or state data privacy law or criminal law. For purposes of this section, Digital Asset means an electronic record in which I have a right or interest and may include data, files, documents, audio, video, images, sounds, social media content, social networking content, apps, codes, credit card points, travel-related miles and points, computer source codes, computer programs, software, software licenses, databases, or the like, which are created, or stored by these means. The term Digital Asset and the rights regarding Digital Assets granted herein specifically includes the content of electronic communications as defined in 18 U.S.C. § 2510(12) and does not include an underlying asset or liability unless the asset or liability is itself an electronic record. For purposes of this definition, “electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities, and “record” means information that is inscribed on a tangible medium or that is stored
Estate planning for traditional retirement accounts

By Andrew G. Sykes

Income tax consequences – and the shortened time for distributions under the SECURE Act – make traditional retirement accounts more of an estate planning challenge than most other assets. This article offers some suggestions for meeting these challenges and getting better results for your client.

These days clients commonly have large portions of their estates in retirement accounts. Many have contributed to their accounts during their working years and have enjoyed employer matching contributions and decades of tax-free growth.

Unlike with a Roth account, distributions from a traditional account are taxed as ordinary income.

Compounding this problem in recent years was the passage of the SECURE Act in 2019, which eliminated the ability of most beneficiaries to stretch their distributions over a favorable period of life expectancy.

Now most beneficiaries inheriting a large portion of the distributions, thereby losing the benefit of tax-deferred growth enjoyed by those who inherited prior to the Act.

Because income tax can eat up a large portion of the distributions, especially for beneficiaries in the highest income tax bracket, you should consider some alternatives when helping your client with estate planning.

One alternative to consider is conversion of a traditional retirement account to a Roth account. Conversion requires payment of taxes for the year when it occurs. But then, there will be no tax on later distributions, and no requirement during the lifetime of the owner to take minimum distributions.

The rationale for making the conversion is that, under the right circumstances, beneficiaries will receive more tax-free income because the account has been allowed to grow tax-free without being diminished by required minimum distributions.

Before making a Roth conversion recommendation, though, be sure to have the scenario reviewed by a qualified financial advisor who is equipped to make the right projections and analysis.

As beneficial as a conversion can be in some situations, it is definitely not right for every client.

Another good strategy for eliminating income tax consequences is to convert the retirement account to life insurance. Consider, for example, a client with sufficient retirement income who does not need a particular IRA to pay for living expenses. If that client is insurable, it may be possible to purchase a paid-up life insurance policy with after-tax distributions from the IRA.

Depending on the age and health of the client, the life insurance proceeds could equal or exceed the IRA’s value.

By converting to life insurance, the client has not only eliminated the beneficiary’s income tax problem but has also eliminated any Pennsylvania inheritance tax that would have been imposed on the IRA at death. If the client’s estate faces the possibility of federal estate tax, an additional measure of protection could be added by putting the insurance into an irrevocable life insurance trust.

Another strategy receiving renewed attention after passage of the SECURE Act is the charitable remainder trust (CRT). If the client is charitably inclined, the CRT offers a way around the 10-year limit on distributions, and a powerful way to benefit both a loved one and a favorite cause.

Suppose the client has a $1 million IRA, a son who is her only heir, and a favorite public charity that she is passionate about. She decides to leave this retirement account to a CRT that will pay her son 5% of its value each year for 20 years following her death. Assuming a 7% growth rate over those 20 years, her son will receive the full $1 million over that time (plus a little extra because of the favorable growth rate), and there will be over $1 million remaining at the end to benefit her favorite cause.

These are a few of the ways estate planning lawyers can battle the effects of income tax on traditional retirement accounts. Such accounts present challenges in estate planning, but they also offer the opportunity for you to provide creative solutions that will give your client a better outcome than they would have achieved without your help.

Andrew G. Sykes practices estate planning and elder law at Sykes Elder Law, LLC (www.elderlawofpgh.com) and offers tips for lawyers on his YouTube channel, Estate Planning Blueprint. He is a Certified Elder Law Attorney (by the National Elder Law Foundation under authorization of the Pennsylvania Supreme Court).

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PUT YOUR TRUST IN US.
Considerations for retirement planning post-SECURE Act(s)

By Addison Walter

The Setting Every Community Up for Retirement Enhancement, or SECURE Act passed Congress in June of 2019 and was signed into law as part of the year-end spending bill that December. Spearheaded by the House Committee on Ways and Means, the SECURE Act sought to address the increasing lack of retirement preparedness nationwide. Though it has been over two years since the SECURE Act became law, much of the population is still unaware of the extent to which it can impact their retirement planning. A second piece of legislation, dubbed the “SECURE Act 2.0,” has already passed the House and is tentatively scheduled to reach the Senate this Summer.

Generally, both SECURE Acts seek to aid individuals and their families in maximizing growth on their tax-deferred accounts, while limiting the likelihood they will outlive their assets to continue to grow on a tax-deferred basis. Now, beneficiaries are limited in their ability to stretch distributions from an inherited IRA or other plan over the beneficiary’s expected lifetime, individuals and/or families with sizeable IRAs or qualified retirement accounts enable greater, tax-deferred account growth, and expanding opportunities for families to work with a professional to extend their retirement savings further into the future.

A. SECURE Act (2019)

From an estate planning and elder law perspective, the most substantial changes introduced by the original SECURE Act were (1) the elimination of rules that permitted retirement asset distributions, such as IRAs or 401(k) plans, to be “stretched” over the life expectancy of a designated beneficiary, (2) an increase in the age where individuals must begin taking Required Minimum Distributions, or RMDS, and (3) the elimination of the rule that prevented individuals from contributing to IRAs past the age of 70.5. Prior to the passage of the SECURE Act, retirement assets passing to a designated beneficiary could be distributed over the course of that beneficiary’s life expectancy. These “stretched distributions” allowed retirement assets to continue to grow on a tax-deferred basis. Now, beneficiaries are limited in their ability to stretch distributions, as most non-spouse beneficiaries are required to take complete distribution of the entire account within ten years of the account owner’s death. Those who are not required to take complete distribution within that ten-year period are known as “Eligible Designated Beneficiaries,” and include surviving spouses, minor children of the IRA owner up to age 21, disabled and chronically ill beneficiaries, and beneficiaries who are not more than 10 years younger than the deceased account owner.

By reducing the ability to stretch distributions from an inherited IRA or other plan over the beneficiary’s expected lifetime, individuals and/or families with sizeable IRAs or qualified plans must strategize as to how best to take distributions (if the 10-year rule applies) while minimizing individual income tax consequences.

Though the elimination of the “stretch distribution” is arguably the most impactful change, the increase in age requirement for RMDS and elimination of the law preventing those over 70 from continuing to contribute to retirement plans both present slight but impactful adjustments. For example, raising the RMD age requirement from 70.5 to 72 allows individuals more time to transfer assets from a traditional IRA to a Roth IRA, thereby optimizing the inherent benefits of these types of accounts far into an individual’s retirement.

B. The SECURE Act 2.0 (2022)

On March 29, the House approved the “Securing a Strong Retirement Act of 2022,” dubbed the SECURE Act 2.0, expanding upon the original SECURE Act’s focus on encouraging retirement savings and participation, particularly as it relates to employer-provided plans. Under the proposed legislation, all qualified employers would be required to automatically enroll employees in all new 401(k) plans, qualified part-time employees would be eligible to make contributions to a 401(k) plan, and tax credits would be made available to encourage small businesses to establish retirement plans for their employees, among other meaningful, employer-related changes. The legislation also further increases the required RMD age from 72 to age 73 (beginning on January 1, 2023), age 74 on January 1, 2030, and age 75 on January 1, 2033, while reducing the federal penalty tax for failure to take an RMD from 50% to 25%. Much like the original SECURE Act, these changes directed at individual accounts enable greater, tax-deferred retirement account growth, and expand opportunities for families to work with a professional to extend their retirement savings further into the future.

C. Proposed Regulations

Crucially, the original statutory language of the SECURE Act is still entirely set in stone, as several provisions were either ill-defined or left open to substantial IRS interpretation. In an attempt to provide clarity, the IRS issued Proposed Regulations on February 23, 2022, and accepted public comment through May 25. Though comments are expected to be addressed by a public hearing scheduled for June 15, the SECURE Act is still effective law as of January 1, 2020. The Proposed Regulations are discussed in detail in the SECURE Act 2.0 article.
Remedies for elderly victims of undue influence

By Martin J. Hagan

Elder abuse is a serious problem in our society. While our health care system allows many people to live well into their 80s and even 90s, this same longevity can cause them to rely on others for help in managing their banking, investments and bill paying. With this dependency comes the risk that a caregiver willexploit the older person for their own advantage by means of undue influence.

As a form of elder abuse, undue influence can easily be hidden behind the mark of a “caring” relative or friend who has been entrusted with the property of a dependent older person. They may still be competent but is too afraid or ashamed to complain of the abuse taking place.

If an attorney is asked to advise an older person who is the apparent victim of undue influence, what are the remedies that could be pursued?

A first step would be to gain an accurate understanding of the situation. If possible, the older person should be evaluated by a psychologist or other professional trained in elder abuse issues for an assessment of their vulnerability to exploitation. When interviewing the older person, the attorney should avoid accepting at face value their denial that any abuse has occurred when there is credible evidence to the contrary. Someone who is denying abuse may well be acting out of fear and intimidation, where such denials are consistent with the presence of undue influence.

1. Break the Perpetrator’s Influence

An intervention could be made to break the influence of the perpetrator over the older person. For example:

- The older person could be physically removed from the isolating conditions that have bred the undue influence.
- Powers of attorney that have given the perpetrator authority over the older person’s assets could be revoked, and their names removed from any joint accounts.
- Trusted family members or other interested parties could be appointed as replacement agents or as trustees to protect and recover the older person’s assets.
- The limitation of this approach, however, is that there may be no one who is willing and able to assume such duties. Moreover, these actions may simply invite retaliation by the perpetrator who will go back and persuade the older person to revoke any new power of attorney and return control to them.

2. Report Abuse to Area Agency on Aging

Each Area Agency on Aging (AAA) office in Pennsylvania offers protective services for older adults (defined as those 60 years of age and older) who are the victims of neglect or physical, mental or financial abuse. Anyone having reasonable cause can report alleged abuse to the AAA and receive anonymity. (The Allegheny County AAA’s phone number for reporting abuse is 412-350-6905.) Once a report is made, the AAA will investigate the allegations and if substantiated prepare a service plan for the older person. The plan may recommend pursuing civil or criminal remedies; however, the AAA itself has no authority to take legal action against the perpetrator.

3. Contact Police and State Prosecutors

Apart from filing a report with the AAA, evidence of the theft of an older person’s cash or other property could be taken to the police, who in turn could refer the case to the District Attorney or the state Attorney General’s Office. (Note that in 2021 Pennsylvania added Section 3922.1 to the Crimes Code at 18 Pa. C.S. § 3922.1, which specifically criminalizes the financial exploitation of older adults. The statute also gives the Attorney General’s Office the authority to prosecute such cases when the amount involved exceeds $20,000.)

4. Bring Civil Action Against Perpetrator

Apart from criminal prosecution, a civil action could be brought on the grounds of undue influence and possibly misrepresentation and fraud. The plaintiff in such an action would be the older person themselves, their agent acting under a durable power of attorney that authorizes the agent to pursue claims and litigation, or the Guardian of their Estate. After the older person’s death, the plaintiff would be the personal representative of their estate.

The potential defendants in such an action would start with the perpetrator(s), but could also include their employer if the facts show that:

- The exploitation occurred during the course and within the scope of the perpetrator’s employment, or
- The employer acted negligently or recklessly in supervising and regulating the activities of its employee.

The types of relief that could be sought in such a case could include:

- One or more of the following remedies:
  - The employer acted negligently or recklessly in supervising and regulating the activities of its employee.
  - The employer acted negligently or recklessly in supervising and regulating the activities of its employee.
  - The employer acted negligently or recklessly in supervising and regulating the activities of its employee.

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have already created confusion; for instance, when an account holder’s death occurs on or after their required beginning date, RMDs are required to be taken every year until the account is fully liquidated, within the ten-year period. This means that some beneficiaries, including those that inherited an account in 2020, may have already missed an RMD for 2021 that virtually nobody realized needed to be taken, thereby incurring a 50% penalty (though the IRS will hopefully waive this penalty).

Consequently, it’s necessary for both individuals and employers to keep abreast of this seemingly-fluid legislation while ensuring they understand the full extent of its benefits (and detriments) to thoroughly take advantage of the new law.

Attorney Addison Walter is a member of SutterWilliams’ Estate Planning/Estate and Trust Administration practice. He is dedicated to tailoring estate plans to each client’s individual needs, taking time to understand each client’s background and planning goals to develop a comprehensive plan and ensuring their family’s needs are cared for. He earned his Juris Doctor from Case Western Reserve University School of Law and his Bachelor of Arts from Temple University.

POST-SECURE ACT(s)

• Request for an accounting
• Demand for the return of assets and setting aside of conveyances
• Request for an injunction “freezing” the bank accounts in which the victim’s money has been placed, pending the outcome of the litigation
• Imposition of a constructive trust
• Demand for money damages, attorney’s fees, and costs

Finally, be aware that special burden-of-proof rules apply in the trial of an undue influence case. They are discussed in James F. Mannion, The Presumption of Undue Influence and the Shifting Burden of Proof, 18 Feduc. Rep. 2d 348.

Martin J. Hagan is a member of Meyer Unkovic & Scott LLP, and past Chair of the ACBA Elder Law Committee.

REMEDIES FOR ELDERLY VICTIMS

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Combatting elder fraud requires a collaborative effort

By Jeffrey Bengel

In 2020, Americans aged 60 and older lost more than $600 million to fraud, scams, and financial exploitation schemes, according to an estimate by the Federal Trade Commission (see Protecting Older Consumers 2020-2021, A Report of the Federal Trade Commission at 26, Oct. 18, 2021). Successfully combating these scams, prosecuting those who carry them out, and recovering funds for their victims requires a collaborative effort from seniors, family and community, financial institutions, healthcare providers, residential facilities and law enforcement. The United States Attorney’s Office can be a partner to anyone working in this important area.

Scams that target seniors have become more prevalent as the population of the country ages. Often, they involve a fraudster impersonating someone else over the phone or online. For example, common scams involve fraudsters posing as a loved-one or authority figure, many victims comply and provide their money or sensitive information to the scammers.

The Western District of Pennsylvania is home to a large number of seniors and, unfortunately, many have been targeted by these scams in recent years. Along with our partners in federal, state, and local law enforcement, the United States Attorney’s Office is committed to investigating and prosecuting scams that target seniors and to pursuing restitution for the victims. Anyone who learns that a senior has been targeted should report the matter to law enforcement so as soon as possible in order to maximize the chances that their money can be recovered and that their scammer can be identified and prosecuted.

But prosecution of offenders who target seniors is not enough. It is far better if these fraudsters are frustrated before they succeed in getting money or sensitive information from their would-be victims. Many scams work by convincing seniors that, for one contrived reason or another, they need to keep their discussions with the scammer a secret - even from their spouse, children, or closest friends. Seniors are often also instructed to lie to banks or other financial institutions about why they need to make the large withdrawals or wire transfers – sometimes in the tens-of-thousands of dollars – that have been instructed to make as part of the scam.

It is important that individuals and entities that interact regularly with seniors trust can also play an important role in keeping their dealings secret, pressure them to make immediate decisions without consulting family, or demand that they give out sensitive personal and financial information over the phone. In addition to prosecuting offenders, the United States Attorney’s Office and federal law enforcement partners are available to work with any interested parties in these efforts at education and prevention. Through its Elder Justice Initiative and based on its experience investigating and prosecuting fraud targeting seniors, the Department of Justice has created resources that can be used to keep seniors and those who care for them advised about recent scams and ways to prevent them. Please do not hesitate to reach out about the ways we can work together to keep our seniors safe from fraud and abuse.

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