Elder and Disability Rights Law continues to be an ever growing area of law that presents a variety of challenges to us as practitioners. The Section has done its best to stay ahead of the curve in a variety of ways.

Jason and Laurie Frank worked closely with the Estates and Trusts Section to insure that Special Needs Trusts remained intact in the face of potential augmented estate legislation. Although the bill did not pass, the unique needs of those clients with Special Needs Trusts, has been carefully and fully detailed with the hope that these Trusts will continue to be protected in future attempts to pass augmented estate legislation. There has been significant progress on the ABLE Act, an electronic registry for Advance Directives, and for the first time, Guardians of wards on Medical Assistance will be paid for their services which, we hope, will inspire more people to provide these essential services. Morris Klein will chair Hot Topics in Elder Law on June 29, which will cover all of the current state and federal legislative issues, as well as special needs trusts, ethics and updates on Medicare and Medicaid.

Guardianship is getting much attention these days, with the creation of a Task Force to conduct a comprehensive overview of current law. Our Section devoted a day long CLE to Guardianship under the able leadership of Ellen Callegary this past Spring. The Section meeting at the MSBA Annual Meeting in Ocean City, chaired by Mary Aquino, also will be dedicated to guardianship issues with a panel presentation featuring Angela Grau, of Davis, Agnor, Rapaport & Skalney LLC; Phoenix Liss Woody, of the Maryland Department of Aging; Erica Wood, of the ABA Commission on Law and Aging; Judge Louise Becker, Circuit Court for Howard County (Ret.) and Connie Kratovil-Lavelle, Director, Department of Family Administration, Administrative Office of the Courts. The moderator for the program is Judge Karen Murphy Jensen, Circuit Court for Caroline County. The program will prove invaluable for anyone practicing in the field of Elder and Disability Rights Law.

We had some very informative and fun Section meetings this year organized by Terry Douglas with help from Wendy Little Schieke, who deserves applause and appreciation for her efforts and organizational abilities. Council member Emmitt Irwin led an informative discussion on issues pertaining to Medicaid Applications at the Bureau of Long Term Care this past fall. Our Section, along with the DC/MD chapter of NAELA enjoyed a lively interactive lunch meeting in Annapolis with a number of state Representatives. In March, the Section featured a presentation on Fiduciary Responsibility by Philip W. Fish from Sandy Spring Trust, which was followed by a reception for Section members and

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legislators. The venue afforded a unique opportunity for us to interact in a more casual environment, while talking informally with fellow practitioners as well as legislators with a particular interest in our area of law.

Law Day, under the leadership of Steve Elville and Marni Greenspoon was again a success, with special thanks to Mary Guay Kramer for her dedication and patience in dealing with all of the volunteers. The Council continues to work tirelessly on many issues including long term care and the Medicaid application process, Community First Choice, and ongoing legislative initiatives.

Challenges, of course, continue. We are looking for ways to get more people home based care through improvements to the waiver program and by eliminating the institutional bias. Bank account ownership is coming under scrutiny as a consequence of the Wagner case, and financial exploitation of seniors is a large and growing problem that needs attention. I invite all Section members to become active in the Section. Please tell the Section Council what concerns you want addressed. Remember, this is YOUR Section.

Many thanks to all the Council members for their dedication and hard work. It is a privilege to work with you. A special thank you to Jennifer Goldberg, Leslie Fried, and Marni Greenspoon for their invaluable contributions to the Council and to the elder law and disability rights communities, as they step down from the Council this year. Looking forward to the incoming leadership of Richard Neuworth as he serves as your Chair for 2016-2017, and hoping to see many of you "downy Ocean, hon" at the MSBA Annual Meeting!

Elena S. Boisvert
MSBA Elder Law and Disability Rights Section Chair, 2015-2016

2016 HOT TOPICS IN ELDER LAW
Wednesday, June 29, 2016 | 9:00 AM - 1:15 PM
Ecker Business Training Center | Columbia, MD
3.5 CLE Credits (.5) Ethics

Be sure NOT to miss the 2016 Hot Topics in Elder Law program! Together with the Continuing Legal Education Department, the MSBA Elder Law and Disability Rights Section presents the 2016 Hot Topics in Elder Law program, the annual seminar that keeps Maryland elder law and disability rights attorneys current and informed of the latest legal changes and developments. Lead by long-time program chair, Morris Klein, Esq. the 2016 Hot Topics seminar will feature various Maryland attorneys who focus on elder and disability rights law.

Experienced faculty will provide federal and state legislative updates on key practice areas affecting elder and disability rights law. Morris Klein, will provide an overview of the Maryland legislative session as well as a review of federal updates, including the ABLE Act. David C. Dembert, of Jacobs and Dembert, P.A. will discuss recent changes in estates and trusts legislation, including the Maryland Fiduciary Access to Digital Assets Act. Mary O’Byrne, of Frank, Frank & Scherr with Ron M. Landsman, will provide an update on special needs trusts in Maryland including SSI and HUD concerns. Lydia Lawless, of the Maryland Attorney Grievance Commission will discuss common ethical issues. David Lipschutz, from the Center for Medicare Advocacy will provide a Medicare update. Lorie Mayorga from the Department of Health and Mental Hygiene will provide Medicaid policy updates. Jason A. Frank and Laurie S. Frank, of Frank, Frank & Scherr will discuss recent Medical Assistance developments including statistics on the Home and Community-Based Options Waiver, the transition from Delmarva to Telligen, and the quarterly long-term workgroup meetings with Department of Health & Mental Hygiene and the Department of Human Resources Mary Aquino of the Legal Aid Bureau will provide an update on Community First Choice.
Joint Account Owner or Thief?
Court of Appeals Muddles the Distinction

By Angela B. Grau

In a case that will likely have far-reaching implications in Maryland, on 17 December 2015, a hotly-divided Court of Appeals ruled that a party to a joint or multiple-party bank account may be found guilty of committing theft from that account. The four judge majority opinion, authored by Judge Watts, who was joined by Judge Greene, Judge Harrell (Retired, Specially Assigned) and Judge McDonald, held that Md. Code Ann., Fin. Inst. § 1-204(f) (“FI”) grants a party to a joint or multiple-party account the authority to access and withdraw funds in the account, but does not confer ownership of the funds in the account, with the result that, as a matter of law, the party can be found guilty of theft. Judge Battaglia wrote a vigorous dissent, joined by Chief Judge Barbera and Judge Adkins, opining that a joint owner of an account does possess an ownership interest in the funds because, by its very nature, a joint account establishes the right of each party to all of the funds in the account. The dissent stated that the majority opinion creates a dangerous precedent, essentially converting a joint account into a convenience account, for the purpose of criminalizing the actions of the Defendant in the case.

In Wagner v. State, shortly after the death of his wife, a father (“Father”) transferred the title to to his checking and savings accounts, to himself and one of his daughters (“Daughter”) as “joint owners.” At trial, Father testified that he told Daughter “this is my money in there, but not hers” and that he specifically instructed Daughter that the only reason he was adding her as a joint owner on his account, was so that she would be able to get his money out for him if he was not able to get it. The detective assigned to investigate the case testified that over a nearly four year period, $251,645.83 was taken from the joint account through ATM withdrawals, cash withdrawals, and wire transfers to the personal checking account of Daughter, and to the bank accounts of companies that Daughter owned. Father testified that he had not authorized any of those transactions, and that he was not even aware that there was an ATM card for the joint account.

Daughter testified in her own defense that Father received his bank statement every month and balanced his checkbook, so Father knew exactly “what he had” and “what he was using and spending.” She further testified that all of the money taken out of the joint account was at request of Father, and with his authorization.

The circuit court found Daughter guilty of both theft and embezzlement (fraudulent misappropriation by fiduciary). Daughter was sentenced to eight years imprisonment, with all but eighteen months suspended, and was ordered to pay $122,355 in restitution to Father.

On appeal, the split Court of Appeals opinions, focussed on the interpretation of FI § 1-204(f); specifically, whether the statute confers an ownership interest to a party to a joint or multiple-party bank account, with the result that a joint owner cannot be convicted of stealing his or her own property. FI § 1-204(f) provides, in its entirety:

“(f) Unless the account agreement expressly provides otherwise, the funds in a multiple-party account may be withdrawn by any party or by a convenience person for any party or parties, whether or not any other party to the account is incapacitated or deceased.”

The majority opinion focused on the plain language of the statute, holding that, absent language in the account agreement expressly providing otherwise, FI § 1-204(f) only grants the authority to access the account and withdraw funds. It does not, in the majority view, bestow ownership of the funds in the account to a party or a convenience person to a joint or multiple-party account. The opinion asserts that FI § 1-204 is solely concerned with the relationship between the parties to a multiple-party account and the financial institution where the account is held, but not among the parties to the account themselves. The majority found significant that the word “ownership,” or any similar term, is not used within the statute, then concluded that the plain language of FI § 1-204(f) only authorizes the act of withdrawal from a multiple-party account “nothing more and nothing less.” Further, the majority stated, equating the authority to withdraw with ownership “strains the clear language of FI § 1-204(f) beyond recognition.”

Although satisfied with its statutory interpretation, the majority opinion also included a lengthy discussion of the FI § 1-204 legislative history, and the common law it was intended to abrogate. Specifically, FI § 1-204 was intended to change the common law principles applicable to multiple-party accounts after the death of an owner, and to eliminate the need for the surviving parties to resort to extrinsic evidence to

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establish the donative intent of the deceased owner. The majority asserted that neither the common law, nor FI § 1-204, nor its legislative history, demonstrated an intent to establish ownership interests among living parties to a joint or multiple-party account; nor otherwise to change any agreement that may exist among living parties concerning the ownership interest in the funds in the multi-party account. In addition, the majority pointed to FI § 1-204(d), which addresses ownership of funds in a multiple-party account after the death of one of the owners. That section provides that any funds in the account upon the death of a party shall belong to the surviving party or parties, unless another agreement exists. Accordingly, the Majority reasoned, equating the right to withdraw funds from a multiple-party account to an ownership interest in those funds, could allow one surviving party to withdraw all funds from the account upon the death of another party, and eliminate the ownership rights of other parties. This interpretation, the majority concluded, runs counter to the plain language of FI § 1-204(d), would effectively render that section meaningless, and thus lead to inconsistent outcomes under FI § 1-204(f) and FI § 1-204(d).

Although the majority opinion focused primarily on the theft conviction, the Defendant in Wagner v. State was also convicted of embezzlement (fraudulent misappropriation by fiduciary). This conviction was upheld on appeal. At the end of its opinion, the majority stated, in a footnote, that Wagner v. State does not stand for the proposition that simply being a party to a joint or multiple-party account automatically makes that party a fiduciary. The majority maintained, instead, that whether a party to a multiple-party account is a fiduciary in connection with funds in the account, is a case-by-case determination. The majority clarified, in a successive footnote, that under the circumstances in the Wagner case, and in particular under the arrangement agreed to between Father and Daughter, that Daughter was to withdraw funds from the joint account only as directed by Father and on his behalf, the evidence was sufficient to demonstrate that Daughter was a fiduciary as to the funds in the account.

Judge Battaglia immediately seized upon the obvious practical implication to the outcome reached by the majority; specifically, that a joint owner to a multi-party account can now criminalize withdrawals from a joint account through parol evidence of oral agreements between the parties after-the-fact. While recognizing the problems with the actions of Daughter, and the sympathetic plight of Father, the dissent astutely emphasizes that as a result of this case, family relationships are forever even more complicated. The dissent further concluded that the majority holding that a joint owner of an account can be found guilty of theft and embezzlement creates “a danger-

ous precedent” because of the high potential for criminal sanctions if a parent were to become disillusioned with a child who is a joint owner on a bank account.

The dissenting opinion also challenged the majority interpretation and application of FI § 1-204, stating that the type of account that Father testified he intended to create, but did not, was a “convenience account” that is also provided for in FI §1-204. Father established a joint account, which was not a convenience account, nor one that included any limitation on withdrawals in the account agreement itself. As a result, Daughter could withdraw money from the joint account without the risk of being prosecuted for theft. Under the majority ruling, however, the dissent asserts that the joint account was converted into a convenience account for the purpose of criminalizing the actions of Daughter.

Further, the dissent asserts that the establishment of a joint account does not create a fiduciary relationship between the parties, nor confer fiduciary obligations upon any owner of the account to the other. The mechanism for establishing such a fiduciary (“trust”) account is also provided in FI § 1-204, separate from that of a joint account. In a trust account, the fiduciary relationship is established by the account agreement. Funds are accessible by the trustee, who is a party to the account and who is authorized to withdraw funds under §1-204(f). The beneficiary of the trust account, does not possess a present right to withdraw funds from the account, but does stand to receive ownership of the account upon the death of all trustees. As the Majority opinion envisions, imposing the fiduciary obligations of a trust account onto a joint account could allow any owner of a joint account to accuse another joint owner of violating his or her fiduciary duties - sufficient to be prosecuted for embezzlement - by withdrawing funds for his or her personal use. This conclusion, the dissent asserts, runs counter to the statute, which specifically contemplates the type of trust relationship suggested by Father through the creation of a “trust account,” rather than a joint account.

The dissenting opinion lead with a quote, that will similarly serves as a fitting close:

“Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.”

- Oliver Wendell Holmes, Jr.
Legislative Summary of the 2016 Session

by Morris Klein

Herewith bills the General Assembly enacted and Governor Hogan signed into law that may be of interest to section members. The first three bills listed, plus the Maryland Fiduciary Access to Digital Assets Act and the Asset Recovery for Exploited Seniors Act, are the most significant. Also noteworthy is the failure to pass of the augmented elective share bill (HB1229 / SB0913).

An in-depth analysis will be provided at the Hot Topics in Elder Law Program on June 29. Look forward to seeing you there!

PUBLIC BENEFITS

HB 0960 (Ch. 439)/ SB0853 (Ch. 438) Guardians of Property and Custodians - Authority to Fund Certain Trusts and Accounts
A guardian of the minor or disabled person may, without court order, pay or apply income or principal from the estate to establish or fund, for the benefit of the minor or disabled person:
(1) a special needs trust, provided that the trustee is subject to the jurisdiction of a court, bonded, and required to file annual accountings of the trust;
(2) a pooled asset special needs trust account, provided that the trust has been approved by the attorney general of the state where the minor or disabled person resides; or
(3) an ABLE account.

A custodian may, without court order, use all or part of the custodial property to establish or fund for the benefit of the minor:
(1) a special needs trust, provided that the trustee is subject to the jurisdiction of a court, bonded, and required to file annual accountings of the trust;
(2) a pooled asset special needs trust account, provided that the trust has been approved by the attorney general of the state where the minor resides; or
(3) an ABLE account.

HB0981 (Ch. 391) / SB0449 (Ch. 391) Maryland Achieving a Better Life Experience (ABLE) Program - Establishment
Requiring the College Savings Plans of Maryland Board to establish the Maryland ABLE Program to help promote financial savings to support individuals with disabilities in maintaining health, independence, and quality of life; renaming the College Savings Plans of Maryland Board to be the Maryland 529 Board; requiring the Board to work in consultation with the Department of Disabilities regarding the Maryland ABLE Program; adds language to the Maryland “limited” statutory power of attorney form to permit gifting to an ABLE account.
Effective July 1, 2016 and for tax years beginning after December 31, 2015.

HB 1181 (Ch. 303)/ SB0939 Maryland Medical Assistance Program - Nursing Homes - Determinations of Eligibility for Long–Term Care Services – Reports and Meetings
Requiring the Department of Health and Mental Hygiene, in consultation with the Department of Human Resources, to submit a report on the State’s progress in determining the eligibility of applicants for long-term care services under the Maryland Medical Assistance Program to specified committees of the General Assembly on or before October 1, 2016, and quarterly thereafter; requiring that specified meetings be held to discuss the reports and to develop strategies to resolve ongoing issues with delays in eligibility determinations.
Effective July 1, 2016

ESTATE PLANNING

HB0507 (Ch. 365) /SB 239 (Ch. 364) Maryland Fiduciary Access to Digital Assets Act
Establishing the Maryland Fiduciary Access to Digital

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Assets Act; authorizing a user to direct a custodian of digital assets to disclose or not to disclose those assets under specified circumstances and in a specified manner; providing that the Act does not change, impair, or expand specified rights with respect to the digital assets of a user; authorizing a custodian to grant a specified fiduciary or designated recipient access to or a copy of specified records under specified circumstances; adds language to Maryland Limited and Personal Statutory Power of Attorney Forms

HB0541 (Ch. 270) / SB0451 Maryland Trust Act - Revocable Trust - Partial Revocation by Divorce or Annulment
Providing for the revocation of specified terms of a revocable trust on the absolute divorce of the settlor and the settlor’s spouse or the annulment of the marriage occurring after the creation of the settlor’s revocable trust, except under specified circumstances; applying the Act prospectively.

HB0887 (Ch. 563)/ SB570 (Ch. 562) Maryland Trust Act - Representation
Providing that, if a minor, an incapacitated, unborn, or unknown individual, or an individual whose location is unknown and not reasonably ascertainable is not otherwise represented under a specified provision of law relating to specified trusts, a grandparent or more remote ancestor may represent and bind that individual in specified circumstances.

HB 0888 (Ch. 222)/ SB0571 (Ch. 221) Maryland Trust Act - Nonjudicial Settlement Agreements
Authorizing, on or after October 1, 2016, specified interested persons to enter into a binding nonjudicial settlement agreement with respect to a matter involving a trust; providing that the nonjudicial settlement agreement is valid only to a specified extent; authorizing an interested person to request a court to make specified determinations with respect to the agreement;

HB0472 (Ch. 486) Estates and Trusts - Registers of Wills - Retention of Estate Files
Repealing a requirement that a register of wills in a county return specified estate files to the personal representative of the estate under specified circumstances; authorizing a register to dispose of specified estate files no sooner than 180 days after the closing of an estate if copies of the files are retained in a specified manner.

HB 0920 (Ch. 396) / SB0509 (Ch. 395) Real Property - Actions to Quiet Title
Authorizing a specified action to be brought to establish title against adverse claims to property; providing for venue and the application of the Maryland Rules in an action under the Act; establishing requirements for a complaint, an answer to a complaint, naming of defendants, joinder of parties, and service of process in an action under the Act; authorizing the court to take specified actions; providing for the effect of a judgment

ELDER ABUSE

HB0718 (Ch. 114) Consumer Protection - Asset Recovery for Exploited Seniors Act
Authorizing the Division of Consumer Protection of the Office of the Attorney General to bring a civil action for damages against a specified person who violates specified provisions of law on behalf of a specified person; authorizing the Division to recover specified damages; authorizing the Division to recover specified costs under specified circumstances; providing that a specified criminal conviction is not a prerequisite for maintenance of an action under the Act; applying the Act prospectively.

Effective July 1, 2016

HEALTH CARE DECISIONS

HB1385 (Ch. 510) Public Health - Advance Directives - Procedures, Information Sheet, and Use of Electronic Advance Directives
Providing that any authentic expression made by an individual while competent of the individual’s wishes regarding health care for the individual “shall be considered” in the absence of a validly executed or witnessed advance directive; requiring the Department of Health and Mental Hygiene to encourage the use of electronic advance directives and provide outreach services to increase public awareness; providing that a witness to an electronic advance directive is not required under specified circumstances.

SB1081 (Ch. 241) Mental Health - Voluntary and Involuntary Admissions - Certification by Psychiatric Nurse Practitioners
Defining “psychiatric nurse practitioner” for purposes of specified provisions of law relating to the voluntary and involuntary admissions of individuals to specified facilities for the treatment of mental disorders; prohibiting a certificate signed by a psychiatric nurse practitioner for the involuntary admission of an individual to specified facilities for the treatment of a mental disorder from being used for an admission under specified circumstances; etc.
Youth is the time for assimilation of wisdom. Old age is time for its application.

~Jean-Jacques Rousseau
1712-1778