

# Elder Abuse Bench Book

P E N N S Y L V A N I A

The Advisory Council on  
Elder Justice in the Courts  
and  
The Administrative Office  
of Pennsylvania Courts

March 2023

**AOPC**



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# ACKNOWLEDGEMENTS

The Advisory Council on Elder Justice in the Courts is grateful to the authors and contributors of this bench book. They include:

Karen C. Buck, Esquire  
Bruce M. Bushwick, MD  
Honorable Ida K. Chen  
Ronald W. Costen, Esquire  
Arthur DiLoreto

Dana N. Goldberg, Esquire  
Honorable Christopher P. Mallios, Jr.  
Diane A. Menio  
Honorable Teresa Osborne  
Erin Parker Raub

The Advisory Council on Elder Justice in the Courts is also grateful for the guidance, direction and oversight provided by the Council's Elder Abuse and Neglect Subcommittee. Those members include:

Judge Sheila Woods-Skipper - Chair  
President Judge George Zanic - Vice Chair  
Karen C. Buck, Esquire  
Ronald W. Costen, Esquire  
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Deborah Hargett-Robinson, Esquire  
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David Shallcross  
Honorable Josh Shapiro  
Secretary Robert Torres  
Honorable Eugene A. Vittone, II, Esquire  
Honorable Stephen A. Zappala, Jr., Esquire

The Council appreciates the contributions from the Pennsylvania Coalition Against Rape, particularly, Suzanne Estrella, Esquire.

Finally, the Council wishes to thank Darren M. Breslin, Esquire, for overseeing the development, researching, coordinating, and editing of this bench book. This project reflects his tireless effort and wise guidance.

Disclaimer: The points of view and opinions expressed in this bench book are those of the authors and not those of the Pennsylvania Judiciary.



# FOREWORD

By Madame Chief Justice Debra Todd  
Supreme Court of Pennsylvania

On behalf of myself and my fellow Justices of the Supreme Court of Pennsylvania, I commend the members of the Advisory Council on Elder Justice in the Courts for their tireless efforts in the preparation and publication of this first edition of the Pennsylvania Elder Abuse Bench Book.

While we are blessed to have an increasing number of elders in our Commonwealth who are living longer, healthier, and more productive lives, our courts are presented with challenges to address their unique needs. Increasingly, pressing issues confront our judiciary involving our aging population. None of these challenges could be more important than protecting our elders from abuse, whether in the nature of financial abuse, physical abuse, emotional abuse, sexual abuse, or neglect. Yet, lacking was an accessible, practical, single-volume resource for Pennsylvania judges to utilize in recognizing and addressing the various facets of elder abuse.

This Bench Book is a compilation of relevant material presented in a succinct format that will serve as the “go to” source for all Pennsylvania judges who face issues surrounding elder abuse. Specifically, the Bench Book combines an outline of the law germane to elder abuse, providing for quick and efficient use, with medical information and subject-specific lists of practical questions, resulting in an especially pragmatic tool for our courts. It will serve the judiciary well as an indispensable resource that should be at the elbow of all trial judges, regardless of the division in which they sit. The Bench Book is especially beneficial as it reflects the accumulated wisdom of both judges and practitioners who focus on elder justice.

The Supreme Court is grateful to the Advisory Council on Elder Justice in the Courts, its Chair, Judge Paula Francisco Ott, and Vice Chair, Zygmunt Pines, Esquire, as well as the staff of the Administrative Office of Pennsylvania Courts, especially Cherstin Hamel and Darren Breslin, Esquire, and the many individuals who contributed in numerous ways to the creation of this Bench Book. Special thanks to the authors, who are listed in the Acknowledgements section. Their tireless dedication to the development of elder law, and, specifically, the protection of elders from abuse, has resulted in a valuable resource for our judges.

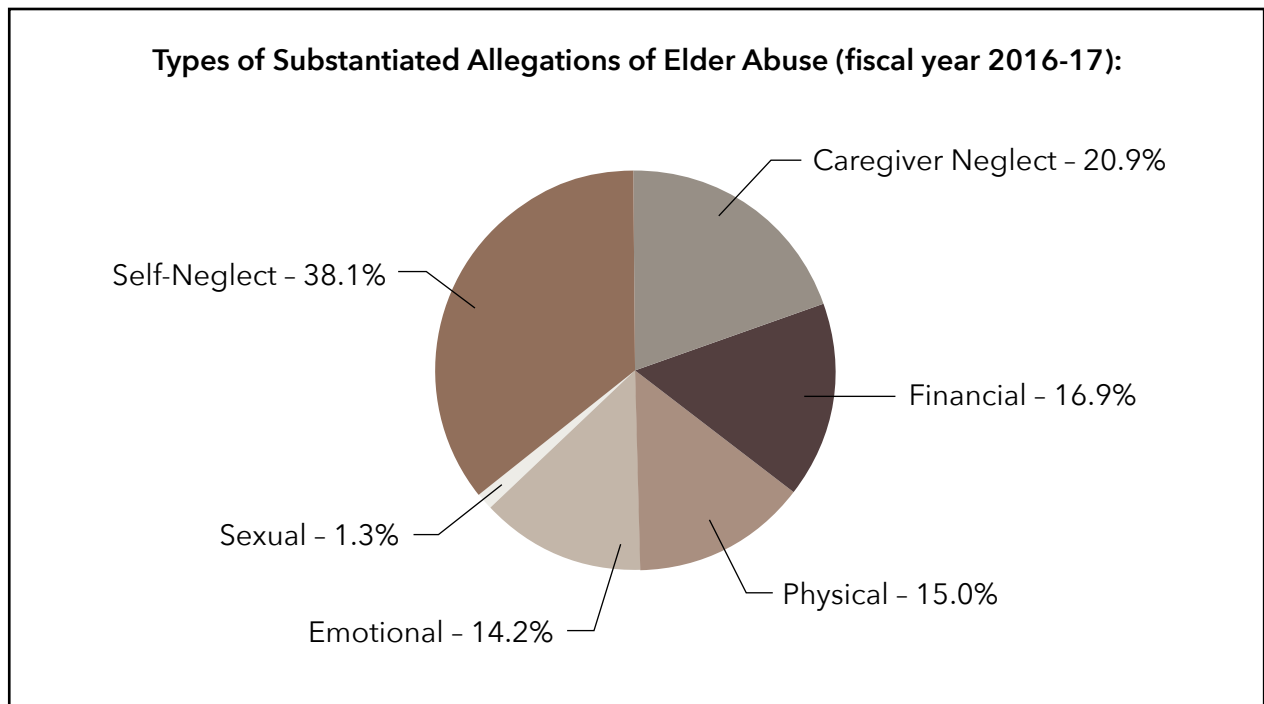
The Pennsylvania Supreme Court, through the creation of the Elder Law Task Force, and the subsequent establishment of the Advisory Council on Elder Justice in the Courts and Office of Elder Justice in the Courts, has demonstrated its deep commitment to our aging population. Through the addition of this timely and significant Bench Book, our judiciary has made manifest once again its deep appreciation of, and dedication to, our Commonwealth’s elders.



## A. Elder Population Demographics and Elder Abuse

Pennsylvania has one of the largest populations in the country of elders, defined as age 60 and older by the federal Older Americans Act, the Pennsylvania Older Adults Protective Services Act, the Department of Aging (Dept. of Aging), and many others. Older Pennsylvanians are diverse. The legal challenges elders face are wide-ranging, engaging all aspects of the legal and judicial systems. Instances of elder abuse and neglect are increasing rapidly. Yet, nationwide, those in the greatest economic and social need may have limited access to legal services. A review and analysis of certain data provides interesting insight to the prevalence of elder abuse in the growing elder population.<sup>1</sup>

- Pennsylvania has a total population of **12.79 million**.
- **2.9 million individuals** age 60 and older reside in Pennsylvania.
- Pennsylvania has the **4<sup>th</sup> highest percentage** of residents age 60 and older.
- By 2020, 1 in 4 Pennsylvanians will be age 60 and older.
- Poverty rates: **8.7 percent** of Pennsylvania elders live in poverty.<sup>2</sup>
- In fiscal year 2016-17, the Dept. of Aging, through its 52 Area Agencies on Aging (AAAs), received **28,633 reports of need** for protective services for individuals age 60 or older and conducted **20,494 investigations**.



Domestic violence occurring later in life is often misunderstood and unrecognized. Perpetrators may be intimate partners, but more often are adult children, grandchildren, and caregivers.

Statistics demonstrate that:

- Elder financial abuse costs older Americans at least **\$2.9 billion** each year.

<sup>1</sup> Penn State Data Center, 2016-2017, available at, <https://pasdc.hbg.psu.edu>

<sup>2</sup> Community Action Association of Pennsylvania, report dated Oct. 23, 2017, available at, [https://www.thecaap.org/file\\_download/95e47bd5-42ec-4068-aa2d-a66f2cae81c4](https://www.thecaap.org/file_download/95e47bd5-42ec-4068-aa2d-a66f2cae81c4)

- Elder victims are **three times more likely** to die prematurely.
- Elder abuse **occurs in all communities**, socioeconomic levels, cultures, races, and settings, both at home, where the majority of elders live, and in institutional settings.
- Elder abuse **continues to be underreported** (estimates range from 1 in 14 to 1 in 44), under investigated, and under prosecuted.
- Elder abuse affects all aspects of an individual's life: health, safety, economic security, independence, housing, family dynamics, and dignity.

According to data available through the Pennsylvania Uniform Crime Reporting System (UCR),<sup>3</sup> the crimes elders face are wide-ranging:

Offense	Victims Age 60 or Older
Murder/Nonnegligent Manslaughter	52
Manslaughter by Negligence	11
Rape	61
Aggravated Assault	1316
Burglary	3016
Larceny-Theft	13986
Other Assaults	5613
Forgery/Counterfeiting	669
Fraud	15882
Embezzlement	282

*2021 Annual Report PA Uniform Crime Reporting System*

## B. Guardianship Tracking System (GTS)

Pennsylvania's Guardianship Tracking System (GTS) is a web-based application used by court-appointed guardians, orphans' court clerks, court staff and judges to file, manage, track and submit Inventory and Annual reports related to the guardianships of incapacitated persons. The GTS integrates statewide guardian information, thereby helping to protect the state's most vulnerable citizens while streamlining and improving the guardianship filing process.

The Office of Elder Justice (OEJC) works with AOPC IT to monitor and analyze GTS data. The OEJC has developed processes for notifying courts when specific scenarios arise. Once aware of a situation identified by the OEJC, the judge assigned to the case can determine what further actions are needed.

### 1. OEJC Processes

#### a. Guardian Accused of a Crime

The OEJC receives a report quarterly from AOPC IT containing cases in GTS in which a crime was self-reported by a guardian on a filed annual guardianship report. The self-reported crime is reviewed by the OEJC and it is determined if the judge presiding on the case should be notified of the self-reported crime. The judge determines if further action is required, such as holding a review hearing or appointing a successor guardian.

#### b. Guardian Alert

A guardian alert is automatically added in GTS when a guardian is removed for cause (abuse, financial exploitation, etc.). Once an alert is added, a notification is sent to the guardian and all GTS court users in counties where the guardian has an active case. In addition, a judge may order an alert be

<sup>3</sup> Available at, <http://www.paucrs.pa.gov/UCR/Reporting/RptMain.asp>

added to a guardian manually in GTS, which includes determining if the guardian should be notified of the alert.

The OEJC receives a report monthly listing all guardians and guardian agencies with an alert that are active on a guardianship case(s). The judge assigned to the case(s) is notified. The judge determines if the guardian should remain active on the case or if a successor guardian should be appointed.

## C. Unified Judicial System Responses to Elder Abuse

The Pennsylvania Supreme Court has become increasingly concerned about elder abuse, neglect, and exploitation in the Commonwealth. To devise strategies to counter and mitigate the effects of elder abuse and increase access to justice for older Pennsylvanians, the Court established the Elder Law Task Force, chaired by Justice Debra Todd, in April 2013.

In November 2014, the Elder Law Task Force published a report with 130 recommendations dealing with elder justice issues primarily involving guardianships, elder abuse, and access to justice for older Pennsylvanians. The report can be found on the Administrative Office of Pennsylvania Courts (AOPC) website at: <http://www.pacourts.us/courts/supreme-court/committees/supreme-court-boards/elder-law-task-force>. Based on recommendations from the Task Force, in January 2015, the Supreme Court created the Office of Elder Justice in the Courts (OEJC) and the Advisory Council on Elder Justice in the Courts (Advisory Council).

The OEJC is part of the AOPC, and is located in the Pennsylvania Judicial Center in Harrisburg. The office is dedicated to assisting the Supreme Court in implementing recommendations contained in the Elder Law Task Force's Report and Recommendations, supporting the work of the Advisory Council, and fostering collaboration with elder justice entities. Through education, training programs, and presentations, the office promotes best practices in the areas of guardianship, elder abuse and neglect, and access to justice for the Commonwealth's courts. The office also calls attention to the prevention of elder abuse, whether physical, financial, psychological, or from neglect, and responds to inquiries and complaints from the public.

The 22 member Advisory Council is chaired by Superior Court Judge Paula Francisco Ott, along with Vice-Chair Zygmunt A. Pines, Esquire. The Advisory Council collaborates with the executive and legislative branches of state government, as well as private and public institutions, schools, and other community partners, to devise ways to counter elder abuse and make recommendations to improve elder justice, generally.

Pennsylvania has approximately 2.9 million residents (22.65%) who are age 60 and over out of a population of 12.79 million. By 2020, this population is projected to increase by 25%. According to the 2010 Census, the Commonwealth is the nation's fourth oldest state in the percentage of the population age 60 and over.

This Bench Book is intended to highlight areas where elder abuse and neglect occur, identify statutes and court rules designed to hinder the occurrence and effects of elder abuse, while enhancing access to justice for Pennsylvania's elder population. It is also intended to provide a reference for all of the Commonwealth's judges presiding over matters where elder abuse, neglect, or exploitation are present or suspected.

## D. Types of Elder Abuse

Elder abuse arises in many different forms. Providing definitions for various types of abuse is a critical first step in helping to prevent abuse or mitigate its effects. Some definitions follow:

**1. Abuse** - The occurrence of one or more of the following acts:

- (1) The infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm, pain or mental anguish.

(2) The willful deprivation by a caretaker of goods or services which are necessary to maintain physical or mental health.

(3) Sexual harassment, rape or abuse, as defined in the act of October 7, 1976 (P.L.1090, No.218), known as the Protection From Abuse Act.

No older adult shall be found to be abused solely on the grounds of environmental factors which are beyond the control of the older adult or the caretaker, such as inadequate housing, furnishings, income, clothing or medical care.

35 P.S. §10225.103

**2. Sexual Abuse** - Intentionally, knowingly or recklessly causing or attempting to cause rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault, or incest.

*Id.*

**3. Psychological Abuse** - The infliction of anguish, pain, or distress through verbal or nonverbal acts. Emotional/psychological abuse includes, but is not limited to, verbal assaults, insults, threats, intimidation, humiliation, and harassment. In addition, treating an older adult like an infant, isolating an elderly person from his/her family, friends, or regular activities, giving an older person the "silent treatment," and enforced social isolation.

Administration on Aging, National Center on Elder Abuse, *available at*, <https://ncea.acl.gov/Suspect-Abuse/Abuse-Types.aspx#emotional>

**4. Self-Neglect** - Inability, due to physical or mental impairment or diminished capacity, to perform essential self-care tasks including obtaining essential food, clothing, shelter, and medical care; obtaining goods and services necessary to maintain physical health, mental health, or general safety; or managing one's own financial affairs.

42 U.S.C.A. § 3002(47)(Older Americans Act of 1965, *as amended*)

**5. Financial Exploitation (or Material Exploitation)** - The illegal or improper use of an elder's funds, property, or assets, include, but are not limited to, cashing a check without authorization or permission, forging a signature, misusing or stealing money. Abuse through otherwise legal instruments, such as a power of attorney, may also constitute financial abuse.

Administration on Aging, National Center on Elder Abuse, *available at*, <https://ncea.acl.gov/Suspect-Abuse/Abuse-Types.aspx#financial>

**6. Resident-to-Resident Abuse (or Resident-to-Resident Aggression)** - Abuse or aggression between long-term care residents, which may include negative and aggressive physical, sexual, or verbal interactions that in a community setting would likely be construed as unwelcome and have high potential to cause physical or psychological distress in the recipient.

US National Library of Medicine National Institutes of Health (NCBI), *available at*, <https://www.ncbi.nlm.nih.gov/pubmed/19750126>

**7. Abandonment** - The desertion of an older adult by an individual or institution that has assumed responsibility for the provision of care needed to maintain the physical or mental health of the older adult (i.e., caretaker). The caretaker's responsibility can arise voluntarily by contract, by receipt of payment for care, from familial relationship, or by court order.

6 Pa.Code § 15.2.

## E. Dynamics of Elder Abuse

Family stressors that may contribute to elder abuse include: discord created by a pattern or

history of violent interactions within the family, lifestyle adjustments and accommodations to living in a multigenerational household, and social isolation. For example, when an aging parent who is frail or who has physical or cognitive limitations moves into a family member's home, the lifestyle, and financial burdens of a multigenerational household can be staggering and trigger elder abuse.

Similarly, elder abuse can occur when younger family members move into an aging parent's or grandparent's home, ostensibly, or perhaps even initially, for the primary purpose of helping care for the elder. However, over time, this living arrangement may turn abusive, either physically or financially.

Elder abuse can also come from nonfamily members, such as caregivers, neighbors, or strangers. Often the signs of abuse are difficult to see by others because so much of it occurs in isolation, with a victim who is often times more and more socially isolated because of factors such as decreased mobility, loss of friends and family, and a less active lifestyle, to name a few. Social and physical isolation can be a significant warning sign of elder abuse and neglect.

See generally American Psychological Association, *Elder Abuse & Neglect*, available at, <https://www.apa.org/pi/aging/resources/guides/elder-abuse>

## F. Pennsylvania's Legal Structure for Combating Elder Abuse

In addition to the criminal and civil laws discussed in Section II, below, the Dept. of Aging, individually or through the AAAs, is generally responsible for either overseeing investigations or providing information and resources on elder abuse.

**1. The Older Adults Protective Services Act (OAPSA)** 35 P.S. § 10225.101 *et seq.* protects Pennsylvanians 60 years of age and older against physical, emotional, financial exploitation, neglect, or abandonment. Reporting of abuse is mandatory for employees and administrators of nursing homes, personal care homes, assisted living homes, domiciliary care homes, adult day services centers, home health care providers, and other facilities specified by their licensing body/entity (listed in #3 below). For the general public, reporting of abuse is voluntary and can be anonymous. The law protects all reporters acting in good faith from retaliation and civil or criminal liability. Under this law the Area Agencies on Aging, discussed below, receive reports 24 hours a day, 7 days a week, and are responsible to investigate within 72 hours.

A statewide 24/7 hotline can also be used at 1-800-490-8505. Law enforcement should be notified if the elder is suspected to be in immediate danger.

See 2018 Benefits and Rights for Older Pennsylvanians, available at, <https://www.aging.pa.gov/publications/benefits-and-rights/Documents/2018%20Benefits%20and%20Rights%20for%20Older%20Pennsylvanians.pdf>

**2. Area Agencies on Aging (AAA)** - Authorized by the Federal Older Americans Act of 1965, 42 U.S.C.A. § 3025, Pennsylvania is represented by 52 AAAs covering all 67 counties and serve as our local agent for the Department of Aging. Pennsylvania's AAAs are a source of assistance and information for the issues and concerns affecting elders and their caregivers. They serve as local resources, providing person-centered information and assistance on issues and concerns affecting elders, their caregivers, and their service providers. They provide resources and assistance across the entire spectrum of services, including home and community based services, care facilities, transportation, and a wide range of other public and non-governmental services. The local provider of protective services is the AAA or the agency designated by the AAA to provide protective services in the area agency's planning and service area.

Importantly, not all cases of elder abuse are reported through protective services. Individual victims may, like other victims, seek protection and/or assistance on their own to stop abuse or exploitation,

remove abusers from their homes, and pursue restitution. Victims may report to police, victim services, including legal services, social services, and/or seek protection directly through the courts.

**3. Mandatory Reporting** - OAPSA requires administrators and employees of the following facilities/agencies to report all suspected abuse (of any individual who is receiving care from the facility/agency) to the local AAA:

- Adult Daily Living Centers
- Personal Care Homes
- Assisted Living Residences
- Birth Centers
- Community Homes for Individuals with Intellectual Disabilities
- Community Residential Rehabilitation Services
- Department of Human Services (DHS) Nursing Facilities
- DHS-Licensed and DHS Operated Residential Facilities for Adults
- Domiciliary Care Homes
- Family Living Homes
- Home Care Registry
- Home Health Care Organization or Agency
- Hospices
- Intermediate Care Facilities for the Intellectually Disabled (private and state)
- Long Term Care Nursing Facilities
- Long Term Structured Residences
- Personal Care Homes
- State Mental Hospitals

Source: <https://www.aging.pa.gov/organization/advocacy-and-protection/Pages/Mandatory-Abuse-Reporting.aspx>

When the abuse rises to the level of sexual abuse, serious bodily injury, serious physical injury, or suspicious death, in addition to reporting to the local AAA, the above facility/agency must also report the suspected abuse to local law enforcement and the Dept. of Aging. *Id.* at §10225.701(b)

The number of mandated abuse reports (also referred to as Act 13 - Mandatory Reporting) has doubled in the last five (5) years.

Failure or refusal to report abuse, obstruction of investigations, or retaliation against facility employees who report suspected abuse may result in both civil and criminal penalties. *Id.* at §10225.706

Most professionals, including judges, magisterial district judges and attorneys, are *not* mandatory reporters under Pennsylvania law, but should report abuse if it is suspected.

## II. Court Actions/Orders to Prevent or Mitigate the Occurrence and Effects of Elder Abuse

The following material identifies civil and criminal actions that may be ordered or sought in an attempt to prevent, terminate, or mitigate elder abuse, neglect or exploitation.

### A. Criminal Matters

#### 1. Preserving Assets

District Attorneys across the Commonwealth are using this statutory provision in appropriate cases to help make elder victims (and others) whole after being victimized.

42 Pa.C.S. § 9728 (e) and (f) provide mechanisms to preserve assets in criminal cases when such assets may be needed to, *inter alia*, pay restitution.

#### **42 Pa.C.S. § 9728(e).** Preservation of assets subject to restitution.

Upon application of the Commonwealth, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond or take any other action to preserve the availability of property which may be necessary to satisfy an anticipated restitution order under this section:

(1) upon the filing of a criminal complaint, information or indictment charging a criminal violation or a petition alleging delinquency for which restitution may be ordered and alleging that the property with respect to which the order is sought appears to be necessary to satisfy such restitution order and judgment; and

(2) if, after notice to persons appearing to have an interest in the property and an opportunity for a hearing, the court determines that:

(i) there is a substantial probability that:

(A) the Commonwealth will prevail on the underlying criminal charges or allegation of delinquency;

(B) restitution will be ordered exceeding \$10,000 in value;

(C) the property appears to be necessary to satisfy such restitution order; and

(D) failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court or otherwise made unavailable for payment of the anticipated restitution order; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

#### **42 Pa.C.S. § 9728(f).** Temporary restraining order.

A temporary restraining order under subsection (e) may be entered upon application of the Commonwealth without notice or opportunity for a hearing, whether or not a complaint, information, indictment or petition alleging delinquency has been filed with respect to the property, if the Commonwealth demonstrates that there is probable cause to believe that the property with respect to which the order is sought appears to be necessary to satisfy an anticipated restitution order under this section and that provision of notice will jeopardize the



availability of the property to satisfy such restitution order and judgment. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this subsection shall be held at the earliest possible time and prior to the expiration of the temporary order.

See also 18 Pa.C.S. § 1106 (Restitution for injuries to person or property).

## **2. Special Issues the Court May Confront Adjudicating Criminal Cases**

### a. Older Adult Testimony.

When an elder has relevant information and is available to testify, that person's health and cognitive status are important concerns, both for the present and future involvement of the individual's testimony. Ageist and paternalistic assumptions should be challenged, but any special needs of the individual should be explored. It has been observed that time delays in cases may result in physical and cognitive health deterioration of the elder victim as well as death. The court should consider the health and cognitive status of the elder victim and act in a fashion to insure that the victim has her/his day in court. This may involve permitting the elder to testify prior to the beginning of the trial as permitted by Pa.R.Crim.P. 500. See also Appendix A. Additionally the court may wish to consider that some elders are cognitively clearest earlier in the day rather than later when they come to testify. Lengthy waiting may be extremely difficult due to health, medication, disability, mobility, and other challenges. For the frailest elders, there may be dialysis, toileting, and other personal care needs that must be attended to by aides and others. Thus, scheduling testimony of elders during the morning hours may be important as some may be less physically and cognitively capable in the later part of the day. Recognizing and accommodating the *individual* needs of elder victims, litigants, and witnesses is key to ensuring meaningful access to the courts.

### b. Using a Power of Attorney to Commit Theft.

Increasingly those who are charged with thefts are often the named agent in a power of attorney document of the elder principal who is the victim.

Often the Commonwealth will allege that the theft took place through the misuse of the power of attorney document by the agent. The first concern that should be addressed is the facial validity of the power of attorney document and whether its drafting and implementation comply with the applicable provisions of the Pennsylvania Power of Attorney Act (20 P.S. §5601, et. seq.). Further, anticipating assertions that the defendant was entitled to gift himself, or others, the court would be best able to deal with these matters when the Commonwealth has prepared the court with information about the existence of a power of attorney and the totality of the circumstances related to its creation. Also, knowledge of whether the power of attorney document contains a specific grant of gifting authority pursuant to the provisions found in the Act will facilitate the court's evaluation regarding the legality of the assertion of gifting authority granted to the agent/defendant, which in some circumstances would abrogate a theft charge. When necessary, the court may compel an accounting as well. 20 P.S. §5610.

See also Sections II. D(9) and II. E, *infra*.

### c. Circumstantial and Expert Evidence.

The Commonwealth at times will be confronted with a victim who is unable to testify or who has become incapacitated. The case may have been brought to the police or by the local area agency on aging serving the county where the victim resides. Because of age or mental condition, the elder victim may have little or no knowledge or understanding of the crime. Thus, the question of how the Commonwealth can proceed to prove its case should be reviewed. Quite frequently, the person charged with theft from an elder is a family member



or caregiver. Often, the defendant's assertion is that the now non-verbal and/or incapacitated victim gave the money to the defendant. This frequently results in the Commonwealth securing a certified fraud examiner (or certified public accountant or other competent investigator or witness) to both analyze the victim's assets and conduct a review or audit of how the victim has historically engaged in gifting of his or her assets. At times this will involve an accountant or other investigator testifying to his or her review of the elder's assets and testifying to the elder victim's history of giving, or not giving, money to others. Such evidence, coupled with other circumstantial evidence offered by other family members, neighbors, clergy, and those of similar status as to the victim's gifting history (particularly where there is evidence of the victim not engaging in gifting) can often be sufficient to convince the trier of fact that there is sufficient circumstantial evidence to support the Commonwealth's allegation(s) of theft.

d. Expert Witnesses.

Many of the crimes highlighted in this section call for expert testimony to prove the Commonwealth's case. Certainly, in the case of neglect of care-dependent person, medical (e.g. nurse or physician) testimony may be required. Also, in those financial cases where the elder is unavailable to testify, the Commonwealth may need to resort to expert financial analysis and expert testimony to establish the elements of the crime. Likewise, other corroborating witnesses regarding the elder's use of funds as gifts also may be needed to make clear the absence or presence of gifting patterns by the elder. Of course, the presence of expert testimony for the Commonwealth's case may also lead to expert testimony for the defense. In the prosecution and presentation of neglect of care dependent person cases, use of photographs depicting the injuries and other pictures of the victim prior to the infliction of the injury will assist the trier of fact regarding the injuries sustained by the care-dependent person. This can be done without inflaming the jury by simply depicting in the most straight forward manner what the average person would observe in viewing the injuries that the care-dependent person has suffered.

e. Victim's Right to not be Excluded from Proceedings

Act 23 of 2019 amended the Crime Victim's Act to add a new victim right under 18 P.S. § 11.201(2.1): the right to not be excluded from any criminal proceeding unless the court determines that testimony by the victim would be materially altered if he or she heard other testimony at the proceeding. Prior to any determination, the court must make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to exclusion. Reasons for any exclusion must be clearly stated on the record.

### **3. Financial Exploitation of an Older Adult or Care-Dependent Person**

In 2021, the Crimes Code was amended by Act 48 of 2021, which added Financial Exploitation of an Older Adult or Care-Dependent Person, 18 Pa.C.S. § 3922.1. Act 48 defines "financial exploitation" and criminalizes an act thereof by of a person in a position of trust. The default grading of the offense is a misdemeanor of the first degree, which increases based on the amount involved to a first, second or third degree felony. The Act provides the attorney general with concurrent jurisdiction to investigate and institute criminal proceedings for violations of Section 3922.1 or related offenses if the amount involved exceeds \$20,000.

### **4. Theft and Other Unlawful Misappropriation of Assets**

The majority of criminal matters involving "older adults" (defined by OAPSA as persons who are 60 years of age or older) involve victims of larceny-theft and other property crimes.

According to the 2015 Pennsylvania UCR, 23,602 elders were victims of larceny theft. The UCR defines larceny-theft as "the unlawful taking or stealing of property or articles of value without the use of force, violence or fraud." In analyzing all property crimes reported as being committed against elders in 2015, another 11,130 crimes involving burglary, motor vehicle theft, and arson were

reported, which along with the larceny-theft cases reveals a total of 34,732 reported cases involving elder victims.

Of note, when the two age categories of the UCR are collapsed to correspond to Pennsylvania law for defining an older adult (ages 60-64 and 65+), this group is reported to experience the largest number of property offenses committed against any age group. It should be noted that these categories do not include "embezzlement, 'con' games, forgery or worthless checks," as defined by the UCR. Thus, given that the actual number of victims from the entire range of criminal asset misappropriation is not encapsulated in the above reported numbers, the victimization problem is even larger.

Experience shows that the majority of theft crimes committed against elders involve charges related to the following crimes detailed in Chapter 39 of Title 18: Theft by unlawful taking (§ 3921); Theft by deception (§ 3922); Receiving stolen property (§ 3925); and Theft by failure to make required disposition of funds received (§ 3927). Theft by unlawful taking and theft by deception are relatively straight forward in their presentation at trial, except where the defendant has utilized a power of attorney document naming him/her as the agent of the elder principal.

Theft by receiving stolen property (§ 3925) is often used when the defendant has stolen money from an elder and has used those funds to purchase goods, services, and property, for themselves or for others. Often the others who receive the benefit of the stolen property are family and friends of the defendant and may be appropriately charged. Usually, if the primary defendant's level of spending is outside of his/her normal financial capability at the time, and there is other admissible evidence that additional recipients knew the proceeds were stolen, it may be appropriate to charge them as well. The Commonwealth must put on evidence, in addition to the evidence of the theft by the primary defendant, proving that the other "receiving" defendants had knowledge that the assets were stolen property.

Theft by failure to make required disposition of funds received (§ 3927) may be an appropriate charge where the elder's funds are managed through the Federal Social Security or Veterans Benefit program known as the Representative Payee Program. Under this fiduciary program the Federal government does not automatically give preference to a power of attorney, or to a state guardianship order; rather the Federal government has its own process whereby an individual applies to serve as the recipient of an elder's Federal benefits that the elder is entitled to receive. This fiduciary program has specific policy guidelines pertaining to how the Representative Payee is to both receive the funds, disperse them, and save any of the remaining funds (See Representative Payee Manual, <https://www.ssa.gov/pubs/EN-05-10076.pdf>).

The charge of failure to make required disposition of funds may be appropriate in those circumstances where the defendant has allegedly stolen the elder's assets and not used them for the benefit of the victim. This charge is also an effective charge where an elder is to pay some portion of the cost of nursing home care from her/his social security benefits. When a representative payee has been appointed, the burden is shifted to the representative payee. If that person fails to pay the institution for the portion of care that the elder is responsible to pay, the victim becomes the facility that is not receiving the funds owed to it and the defendant becomes the representative payee who has not utilized the victim's funds to pay for the elder's nursing home or other needed care. Thus, the elder is relieved from having to testify because he or she is often outside of the orbit of the billing and paying for the nursing home care.

## **5. Forgery and Fraudulent Practices**

There are a number of crimes that fall under Chapter 41, Forgery and Fraudulent Practices. There have been a number of forgery prosecutions, along with other theft charge prosecutions, where (usually) family members, who serve as caregivers, apply for second mortgages or home improvement loans regarding the elder's home and then forge the signature of the elder, or trick the elder to sign the loan document through deception (§ 4114, Securing execution of documents by deception). Generally the defendant does not use the money for the benefit of the elder or repay the loan secured unlawfully.

These crimes are often not discovered until some legal process has been started by the financial

loan entity; a sheriff sale or other process thus ensues in order to recover the value of the loan. Often the elder has no knowledge about what is transpiring until after the local area agency on aging has responded to a call for assistance to the elder, and it is through the investigative efforts of AAA personnel that the theft is discovered. These are often extremely difficult circumstances for the elder if the sheriff's sale or other disposition of the property takes place. The elder is effectively abandoned without a place to live or assets to secure other housing.

Section 4106, Access Device Fraud, is increasingly being charged when an elder's assets are stolen by a family member or caregiver who has taken the elder's access device card and utilizes it to take money through the device, such as through an ATM machine, without the permission of the elder. This is accomplished by the alleged defendant going to an access device machine and using the victim's device card to take money in excess of what has been authorized or by simply using the card to take assets from the victim without pretense of serving the elder. Fortunately, most access device machines take photographs of the person using the machine and often there is a camera proximate to the device that provides an overview of the area, often assisting with the identification of others accompanying the defendant.

There is growing criminal concern regarding family members and caregivers violating § 4120, Identify theft.

The caregiver stealing the identity of the elder is able to use that information to secure credit cards and engage in theft through credit card transactions. The elder's identity is often stolen through acquisition of her/his social security card and other identifying personal information. Often the defendant will intercept the mail, preventing the elder from receiving and reviewing the credit card statement or other account information, because the elder is unable to walk to the mailbox to both gather and review the mail.

Again, it is usually not until late in the process that the theft is discovered when a collection process is begun against the elder. Often, one of the complicating factors is that the alleged defendant names the elder as primary owner of the card and then adds themselves as an authorized user, even though the elder has not applied for the card. Sorting through the claims and counter claims can be tedious. These cases can be effectively investigated and tried, depending on what is purchased using the card, whether the elder is living in a caregiving facility, and the ability of the elder to go to a location to purchase items. Often these thefts turn more on the question of items bought via a computer, e.g., online, and then shipped to the elder's residence or another address. Evidence as to the elder having a computer, or access to a computer, and the knowledge and ability to operate a computer are all of significance in establishing the commission of a theft against an elder victim.

## **6. Neglect of a Care-Dependent Person and Other Crimes of Violence**

### a. Neglect of Care-Dependent Person

The General Assembly enacted 18 Pa.C.S.A. § 2713, neglect of a care-dependent person, in 1995 when evidence emerged that personnel of nursing homes, personal care homes, and similar institutions were failing to provide "treatment, care, goods or services necessary to preserve the health, safety or welfare of a care-dependent person for whom he is responsible to provide care." It also became apparent that non-licensed personnel, primarily family members and others in the community, were offering to care for care-dependent adults for some financial quid pro quo and these caregivers were exhibiting the same failures. In both instances the described failure results in the infliction, by intentional, knowing or reckless conduct, of bodily injury or serious bodily injury upon the care dependent individual. The General Assembly made the infliction of serious bodily injury through such failure a felony of the first degree and the infliction of bodily injury a misdemeanor of the first degree.

Currently community-based care, reimbursed through the Commonwealth of Pennsylvania's Medical Assistance Waiver Program, has grown to the point that there are now substantial numbers

of care-dependent persons who have family members caring for them in the home of the person needing care. The Commonwealth of Pennsylvania pays the family member (or in other cases a home health agency) to provide care to Medical Assistance-eligible individuals needing care. Persons being served in the Waiver Program are also experiencing the same failures and injuries secondary to these failures, resulting in an elder's suffering bodily injury or serious bodily injury.

The "typical" case of neglect of a care-dependent person involves a care-dependent person (an elder, or other adult in need of care) being found to be malnourished, dehydrated, suffering pressure wounds (also known as bed sores), covered in human excrement, and suffering other life-limiting circumstances that have come about because the caregiver (who has a legal duty to care for the care-dependent person) has not provided or procured treatment, care, goods, or services necessary to protect the health, safety, or welfare of the care-dependent person.

Section 2713 of the Crimes Code criminalizes conduct that is either intentional, knowing or reckless, by those who have offered themselves and their skills, for compensation, to others in need of care and have failed to deliver treatment, care, goods, or services necessary to protect the health, safety, or welfare of the care-dependent person. As a result of the caregiver's failure to provide the agreed upon care, the elder victim suffered injuries.

Section 2713 generally requires expert medical, nursing, or health care testimony. This is not a typical case that a police officer or detective can investigate alone but requires others in the health-related professions to assist in gathering and interpreting evidence.

Many of these cases resemble medical malpractice cases in that the Commonwealth must prove that the injured party is a "care-dependent" person; that the accused is in fact a "caregiver" within the meaning of the statute; that the observed and documented injuries suffered by the care-dependent person are the result of the failure of the caregiver to provide "treatment, care, goods or services...." These cases generally require expert testimony, and a health care-related investigator is needed to assist the police and district attorney's office to investigate and prosecute such cases.

This statute does not require that the care-dependent person die, but is focused on the injuries that have resulted as a consequence of the failure to provide care. The statute does not presuppose that the care will necessarily restore the care-dependent person to health but rather is designed to insure that basic "treatment, care, goods or services" are provided to protect the health, safety, or welfare of a care-dependent person. A caregiver can be prosecuted under this statute for inflicting injuries on the care-dependent person as a result of the failure to provide care. When the care-dependent person dies, the death may be attributed to another cause, or may be attributed to the failures or actions of the caregiver.

In some factual patterns, the Commonwealth may choose to not only charge neglect of a care-dependent person, but also endangering the welfare of another (§ 2705), which is a misdemeanor of the second degree. Depending on the strength of the Commonwealth's evidence, this gives the prosecution some ability, pre-trial, to negotiate a plea. There is also the possibility of charging neglect of a care-dependent person as involving only bodily injury, again bringing the grade to a misdemeanor of the first degree.

If an autopsy or other evidence attributes the death to the conduct of the care-giver, then the Commonwealth may choose, depending upon the factual scenario, to charge Involuntary Manslaughter or Homicide. These are all separate actions that do not merge with § 2713. When the caregiver has been charged with inflicting serious bodily injury, the Commonwealth often charges only § 2713, as it is a felony of the first degree, rather than a misdemeanor of the first degree (as in involuntary manslaughter).

In 2018, the General Assembly amended § 2713 and added a third section entitled "Endangering the welfare of a care-dependent person." That section does *not* require the infliction of bodily or serious bodily injury. It requires conduct that endangers the care-dependent person's welfare. It is a misdemeanor of the second degree, except where there is a course of conduct of endangering the welfare of a care-dependent person, in which case it is a felony of the third degree.

Recent amendments have changed the definition of caregivers. Two additional categories of

caregiver were added. Section (4) adds “an adult who resides with a care-dependent person and who has a legal duty to provide care or who has voluntarily assumed an obligation to provide care because of a familial relationship, contract or court order” (e.g., waiver provider under Medicaid; Guardian; or other contracted person and, for the first time, one who voluntarily assumes the care and then does not provide it.) Section (5) includes caregiver as “an adult who does not reside with a care-dependent person but who has a legal duty to provide care or who has affirmatively assumed a responsibility for care, or who has responsibility by contract or court order.”

#### b. Abuse of Care-Dependent Person

Also, the General Assembly created a new crime at 18 Pa.C.S.A. § 2713.1, Abuse of care-dependent person. This statute criminalizes conduct such as (1) harassing, annoying, or alarming care-dependent people through mechanisms such as striking, shoving, kicking, and other physically menacing conduct; or who repeatedly commits acts that serve no legitimate purpose; communicates lewd, lascivious, threatening, or obscene words, language or drawings or who communicates repeatedly to the care-dependent person at extremely inconvenient times; or (2) offenses under § 2709.1 of the Crimes Code, related to stalking. Violations of section 1 constitute a misdemeanor of the third degree and violations of section 2 constitute a felony of the third degree. All of these changes became law as of August 27, 2018.

In 2021, **§ 2713.1 was amended by** Act 49 of 2021, which further defined the offense to include the use of any audio, video or still image of a care-dependent person in any electronic format or medium with the intent to ridicule or demean the care-dependent person. This offense is graded as a misdemeanor of the third degree.

There continues to be a lack of reporting, investigation, and prosecution of other crimes against the elderly, including physical abuse, neglect, and sexual assault. Courts should be aware that these crimes often occur when victims are isolated, often in conjunction with other forms of abuse, and obviously warrant full investigation and, if appropriate, prosecution. It is vital that such crimes not be undervalued in light of the age or frailty of the victim, dismissed as “family matters,” or misunderstood as nonsexual crimes simply because the victim is older.

### **7. Defiant Trespass**

“A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given . . . by actual communication to the actor.” (18 Pa.C.S.A. § 3503(b) (1) (i)).

Defiant trespass under this section is a misdemeanor of the third degree. An elder may file a private criminal complaint alleging defiant trespass against a person (not a tenant) whom the elder has notified to leave and person refuses to do so. Where another party is emotionally, financially, or physically abusing the elder, great risk exists to the elder and the longer the abuser remains in the home, the greater chance that more harm will come to the elder.

### **8. Other Criminal Statutes Where Elder Abuse, Neglect, or Exploitation May Be Implicated**

Other statutes may also implicate criminal conduct against an elder. Some of these include:

- a. Deal in Proceeds of Unlawful Activities, 18 Pa.C.S. § 5111
- b. Forgery - Alteration of Writing, 18 Pa.C.S. § 4104
- c. Forgery - Unauthorized Writing, 18 Pa.C.S. § 4104
- d. Tampering with Record or Identification, 18 Pa.C.S. § 4104
- e. Theft Extortion, 18 Pa.C.S. § 3923

### **9. Criminal Sentencing When the Victim is Over Age 60**

Pennsylvania law establishes mandatory minimum sentences for certain crimes when committed

against an elderly person. 42 Pa.C.S. § 9717 provides:

(a) Mandatory sentence. - A person under 60 years of age convicted of the following offenses when the victim is over 60 years of age and not a police officer shall be sentenced to a mandatory term of imprisonment as follows:

18 Pa.C.S. § 2702(a)(1) and (4) (relating to aggravated assault) - not less than two years.

18 Pa.C.S. § 3121 (relating to rape) - not less than five years.

18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse) - not less than five years.

18 Pa.C.S. § 3922 (relating to theft by deception) - not less than 12 months, but the imposition of the minimum sentence shall be discretionary with the court where the court finds justifiable cause and that finding is written in the opinion.

## B. Criminal Protective Orders (CPO), Including Conditions of Bail and Pretrial Proceedings

Section 4954 of the Crimes Code, 18 Pa.C.S. § 4954, vests in judges the authority to enter pre-trial CPOs as conditions of bail or post-trial CPOs as conditions of sentences in criminal cases. These orders are also commonly referred to as “stay-away orders” and “no-contact orders.” CPOs are most frequently issued in domestic violence cases; however, they can be issued by the court against anybody accused of any crime against a person or property. This chapter will discuss the use of § 4954 CPOs in elder abuse cases.

CPOs can be ordered by a Judge in a criminal court against the defendant after he or she is arrested, charged or found guilty of crimes. CPOs are generally requested by the District Attorney’s Office on behalf of victims or witnesses and they are often issued at the preliminary arraignment where the victim is not present and without input from the victim. The victim might not even be aware of the issuance of a CPO until the District Attorney’s Office notifies them or provides them with a copy of the order.

### **1. Comparing CPOs to Protection from Abuse Orders**

CPOs are different from Protection From Abuse (PFA) orders, which can be issued in a civil lawsuit initiated by a victim filing a PFA petition against the defendant pursuant to the Protection From Abuse Act (PFAA), which is in Chapter 61 of the Domestic Relations Code, 23 Pa.C.S. 6101 *et seq.* The District Attorney’s Office is not involved in the civil legal proceedings in which the victim seeks to obtain a PFA Order, although the prosecutor’s office would be involved in prosecuting a charge of indirect criminal contempt stemming from an alleged violation of a civil PFA Order. See *also* Section II.D. *infra*.

### **2. Deciding Whether to Issue a CPO**

CPOs are expressly authorized in § 4954 of the Crimes Code, 18 Pa.C.S. § 4954, which provides as follows:

Section 4954. Protective orders.

Any court with jurisdiction over any criminal matter may, after a hearing and in its discretion, upon substantial evidence, which may include hearsay or the declaration of the prosecutor that a witness or victim has been intimidated or is reasonably likely to be intimidated, issue protective orders, including, but not limited to, the following:

(1) An order that a defendant not violate any provision of this subchapter or Section 2709 (relating to harassment) or 2709.1 (relating to stalking).

(2) An order that a person other than the defendant, including, but not limited to, a subpoenaed witness, not violate any provision of this subchapter.

(3) An order that any person described in paragraph (1) or (2) maintain a prescribed geographic distance from any specified witness or victim.

(4) An order that any person described in paragraph (1) or (2) have no communication whatsoever with any specified witness or victim, except through an attorney under such reasonable restrictions as the court may impose.

If there is credible information that elder abuse is occurring, the judge may also refer the matter to prosecutors, protective services, the AAA, legal services, or victim services.

There is additional statutory authority for the issuance of CPOs in elder abuse cases that are also domestic violence cases in § 2711(c)(2) of the Crimes Code, 18 Pa.C.S. § 2711(c)(2), which requires that, in domestic violence cases, if the court or bail authority determines that the defendant poses a threat of danger to the victim, the bail authority must impose the additional conditions of bail that the defendant “refrain from entering the residence or household of the victim or the victim’s place of employment,” and that the defendant “refrain from committing any further criminal conduct against the victim.” Conditions imposed pursuant to § 2711(c)(2) are intended to have a limited duration and provide crime victims time to seek a PFA Order, and “shall expire at the time of the preliminary hearing or upon the entry or the denial of the PFA order by the court, whichever occurs first.”

In addition to those statutory provisions, Pa.R.Crim.P. 523 sets forth general release criteria in all criminal cases and requires that judges determine what other non-monetary conditions to impose in addition to setting a monetary amount of bail. Rule 523 provides in pertinent part:

(A) To determine whether to release a defendant, and what conditions, if any, to impose, the bail authority shall consider all available information as that information is relevant to the defendant’s appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with the conditions of the bail bond, including information about:

- (1) the nature of the offense charged and any mitigating or aggravating factors that may bear upon the likelihood of conviction and possible penalty;
- (2) the defendant’s employment status and history, and financial condition;
- (3) the nature of the defendant’s family relationships;
- (4) the length and nature of the defendant’s residence in the community, and any past residences;
- (5) the defendant’s age, character, reputation, mental condition, and whether addicted to alcohol or drugs;
- (6) if the defendant has previously been released on bail, whether he or she appeared as required and complied with the conditions of the bail bond;
- (7) whether the defendant has any record of flight to avoid arrest or prosecution, or of escape or attempted escape;
- (8) the defendant’s prior criminal record;
- (9) any use of false identification; and
- (10) any other factors relevant to whether the defendant will appear as required and comply with the conditions of the bail bond.

In addition to issuing CPOs that prohibit a defendant from having any contact with the victim, the court also has the authority to impose other reasonable conditions such as: staying

away from specified locations; “peaceful” contact if any contact is permitted; firearms and ammunition prohibitions and removal when allowed under law; alcohol or drug treatment, testing, and monitoring; refraining from alcohol consumption or from going to locations where alcohol is sold; mental health treatment; and/or electronic or GPS monitoring if available.

Research on elder abuse shows that all forms of elder abuse can result in premature death and increased likelihood of hospitalization. In light of the unique additional safety concerns in elder abuse cases and often the enhanced vulnerability of the victim, Rule 523 (A)(10) and § 2711 of the Crimes Code authorizes the court to consider the following additional factors in addition to the enumerated factors set forth in Rule 523, which apply to all criminal cases. Some of the other considerations common to elder abuse cases include the following:

1. any history of other abusive acts, especially to the victim and similarly situated individuals;
2. any prior history of abuse in a caretaker relationship;
3. whether the defendant has significant community ties and whether those ties are all through the victim, and is the victim socially isolated;
4. the potential impact of any cognitive impairment the defendant may have impacting her/his ability to follow court orders;
5. any threats to the victim or others, both while the case is pending and in the past if the victim ever told anyone, including threats of abandonment, placement in a facility against the victim’s wishes, and harm;
6. whether the defendant has access to and control over victim’s resources, including assets, property, income, health benefits;
7. whether the defendant has committed abuse against the victim’s pet(s).

In addition to the above, judges should consider the following questions when deciding whether to issue a CPO in an elder abuse criminal case:

1. Is the victim requesting a CPO? If so, why?
2. Is the prosecutor requesting a CPO? If so, why?
3. Is there evidence of threats, intimidation, or undue influence upon the victim?
4. If the prosecutor and victim disagree on the question of whether a CPO is
5. needed, why is that so? Whose position carries more weight?
6. Does the prosecutor’s office request CPOs in all elder abuse cases (or all domestic violence cases) regardless of whether the victim agrees?
7. Does the victim live in the defendant’s home or vice versa?
8. Will a CPO result in an effective eviction of the defendant?
9. Has the victim been connected to community-based advocacy or other supportive services?
10. Has the defendant been connected to community-based advocacy or other supportive services?
11. Does the defendant have a history of drug or alcohol abuse?
12. Will the issuance of a CPO do more harm than good?



If the defendant is also the victim's caregiver, it may be necessary to prohibit the defendant from returning to the victim to perform his or her caregiving responsibilities because doing so might be inappropriate and even dangerous. The attorneys can work with community advocates and allied professionals to identify alternative options for the victim's care needs, including working with adult protective services agencies to identify other care providers.

Research on domestic violence lethality and dangerousness led by Dr. Jacqueline Campbell is also relevant. While not focused on elders, when the case involves domestic violence, the Danger Assessment risk factors may be helpful to a court considering release on bail or own recognizance. These include:

1. Did defendant use or threaten victim with a weapon?
2. Did defendant threaten to kill the victim?
3. Has the defendant tried to choke (strangle) the victim?
4. Is the defendant violently and constantly jealous?
5. Has the victim been forced to engage in unwanted sexual contact?
6. Is there a gun in the house?
7. Has physical violence increased in severity?
8. Does defendant control most or all of victim's daily activities?
9. Has physical violence increased in frequency?
10. Does defendant use illicit drugs?
11. Does victim believe defendant is capable of killing victim?

There is also research on homicide-suicide, which has been studied since the late 1980s at the University of South Florida (USF).

This study found that in a majority of homicide-suicide cases, the couples involved were elderly, and that the perpetrator was nearly always the spouse of the victim. The homicide-suicides in that study were not the result of "suicide pacts," or "mercy killings." Most of the homicide-suicides studied involved the use of a firearm and many of the victims were asleep or shot in the head and, in some cases, the victims had defensive injuries.

While most perpetrators did not suffer from dementia, common features of perpetrators included: controlling, dominant personality, and the perpetrator's perception of separation such as hospitalization or need to move to a nursing home due to illness of either party.

Finally, separation was viewed by the perpetrator as a threat to the integrity of the relationship. The study revealed the following risk factors:

1. spouse is caregiver;
2. advanced old age;
3. declining health of either party;
4. perpetrator has a controlling personality;
5. availability of a firearm;
6. pending hospitalization or institutionalization;
7. history of domestic violence;

8. perpetrator is depressed or suicidal;
9. perpetrator is abusing alcohol or controlled substances; and
10. perpetrator's feeling of isolation, anger, hopelessness, or loss of control.

### **3. CPO Violations**

If a CPO is a condition of bail, a violation can result in a bail revocation or increase. If a CPO is a condition of probation or parole, a violation may be a technical violation that can result in a probation or parole revocation. A violation of a CPO is also a crime that can lead to an arrest, and is punishable under a different statute than violations of PFA orders. CPO violations are punishable pursuant to § 4955 of the Crimes Code, which provides in pertinent part:

Section 4955. Violation of orders.

(a) Punishment. - Any person violating any order made pursuant to § 4954 (relating to protective orders) may be punished in any of the following ways:

(1) For any substantive offense described in this subchapter, where such violation of an order is a violation of any provision of this subchapter.

(2) As a contempt of the court making such order. No finding of contempt shall be a bar to prosecution for a substantive offense under § 2709 (relating to harassment), § 2709.1 (relating to stalking), § 4952 (relating to intimidation of witnesses or victims) or § 4953 (relating to retaliation against witness or victim), but:

(i) any person so held in contempt shall be entitled to credit for any punishment imposed therein against any sentence imposed on conviction of said substantive offense; and

(ii) any conviction or acquittal for any substantive offense under this title shall be a bar to subsequent punishment for contempt arising out of the same act.

(3) By revocation of any form of pretrial release, or the forfeiture of bail and the issuance of a bench warrant for the defendant's arrest or remanding him to custody. Revocation may, after hearing and on substantial evidence, in the sound discretion of the court, be made whether the violation of order complained of has been committed by the defendant personally or was caused or encouraged to have been committed by the defendant.

(b) Arrest. - An arrest for a violation of an order issued under § 4954 may be without warrant upon probable cause whether or not the violation is committed in the presence of a law enforcement officer. The law enforcement officer may verify, if necessary, the existence of a protective order by telephone or radio communication with the appropriate police department.

(c) Arraignment. - Subsequent to an arrest, the defendant shall be taken without unnecessary delay before the court that issued the order. When that court is unavailable, the defendant shall be arraigned before a magisterial district judge or, in cities of the first class, a Philadelphia Municipal Court Judge, in accordance with the Pennsylvania Rules of Criminal Procedure.

### **4. Special Considerations for Elder Defendants**

When the defendant in an elder abuse case is elderly, there may be a perception that there is a sense of urgency to release the defendant from custody because of her/his age and actual or perceived frailty. Jail administrators may express concerns that the defendant "will not thrive" in custody and/or liability concerns related to medical or medication needs, or costs of placement in a medical facility. It is not uncommon for jail officials to minimize the

danger posed by an elderly defendant.

The defense may ask that the defendant be allowed to return to the victim to perform her/his caregiving responsibilities. Even where the focus is on likelihood to appear, however, the court can usually impose any reasonable conditions necessary to protect the safety of the victim and the public. In this case, prosecutors may argue to the court that having the defendant provide care to the victim while charges are pending is inappropriate and even dangerous. The focus, however should remain on the victim's safety, especially if the defendant has previously tried or has actually prevented the victim from reporting abuse or getting medical care, or exerted undue influence on the victim. Prosecutors can work with community advocates and allied professionals to identify alternative options for the victim's care needs, including working with Adult Protective Services to identify other care providers.

## C. Court Orders Pursuant to the Older Adults Protective Services Act

OAPSA ensures access to older adults, including the authority to investigate reports received, develop service plans and authorize the protective services caseworker to clearly inform a party denying access of its legal authority for access (35 P.S. § 10225.304). Older Adults Protective Services (OAPS) has the following authority:

**1. Access to Records** - The agency shall have access to all records relevant to:

- (1) Investigations of reports under section 303.
- (2) Assessment of client need.
- (3) Service planning when an older adult's need for protective services has been or is being established.
- (4) The delivery of services arranged for under the service plan developed by the agency to respond to an older adult's assessed need for specific services.

**2. Access to Persons** - The agency shall have access to older persons who have been reported to be in need of protective services in order to:

- (1) Investigate reports under section 303 and Chapter 7.
- (2) Assess client need and develop a service plan for addressing needs determined.
- (3) Provide for the delivery of services by the agency or other service provider arranged for under the service plan developed by the agency.

**3. Denial of Access to Persons** - If the agency is denied access to an older adult reported to be in need of protective services and access is necessary to complete the investigation or the client assessment and service plan, or the delivery of needed services in order to prevent further abuse, neglect, exploitation, or abandonment of the older adult reported to be in need of protective services, the agency may petition the court for an order to require the appropriate access when either of the following conditions apply:

- (1) The caretaker or a third party has interfered with the completion of the investigation or the client assessment and service plan or the delivery of services.
- (2) The agency can demonstrate that the older adult reported to be in need of protective services is denying access because of coercion, extortion or justifiable fear of future abuse, neglect, exploitation, or abandonment.

**4. Access by Consent** - The agency's access to confidential records held by other agencies or individuals and the agency's access to an older adult reported to be in need of protective services shall require the consent of the older adult or a court-appointed guardian except as provided for

under section 303 or section 307.

**5. Denial of Access to Records** - If the agency is denied access to records necessary for the completion of a proper investigation of a report or a client assessment and service plan, or the delivery of needed services in order to prevent further abuse, neglect, exploitation, or abandonment of the older adult reported to be in need of protective services, the agency may petition the court of common pleas for an order requiring the appropriate access when either of the following conditions apply:

- (1) The older adult has provided written consent for any confidential records to be disclosed and the keeper of the records denies access.
- (2) The agency can demonstrate that the older adult is denying access to records because of incompetence, coercion, extortion, or justifiable fear of future abuse, neglect, exploitation, or abandonment.

**6. Involuntary Intervention by Emergency Court Order** - In addition, in emergency situations, where there is an imminent risk of serious physical harm or death, a provision of OAPSA allows for emergency intervention. 35 P.S. § 10225.307 provides:

- (a) Emergency petition. - Where there was clear and convincing evidence that if protective services are not provided, the person to be protected is at imminent risk of death or serious physical harm, the agency may petition the court for an emergency order to provide the necessary services. The courts of common pleas of each judicial district shall ensure that a judge or district justice is available on a 24-hour-a-day, 365-day-a-year basis to accept and decide on petitions for an emergency court order under this section whenever the agency determines that a delay until normal court hours would significantly increase the danger the older adult faces.
- (b) Limited order. - The court, after finding clear and convincing evidence of the need for an emergency order, shall order only such services as are necessary to remove the conditions creating the established need.
- (c) Right to counsel. - In order to protect the rights of an older adult for whom protective services are being ordered, an emergency court order under this section shall provide that the older adult has the right to legal counsel. If the older adult is unable to provide for counsel, such counsel shall be appointed by the court.
- (d) Forcible entry. - Where it is necessary to forcibly enter premises after obtaining a court order, a peace officer may do so, accompanied by a representative of the agency.
- (e) Health and safety requirements. - The agency shall take reasonable steps to assure that while the person is receiving services under an emergency court order, the health and safety needs of any of the person's dependents are met and that personal property and the dwelling the person occupies are secure.
- (f) Exclusion of remedy. - Nothing in this chapter shall be interpreted to deny any older adult access to the emergency medical services or police protection that would be provided to anyone, regardless of age, in similar circumstances.

## D. Civil Matters

### **1. Protection from Abuse Orders**

PFA orders can apply to older victims, and they may be among the most vulnerable victims a court encounters due to the myriad challenges of aging, dependence, health, and isolation. The dynamics of family violence for older victims may be similar to younger victims (*i.e.*, a partner, including long-married couples and new relationships later in life which may involve a much younger partner), but more often, are distinct, involving adult children, adult grandchildren, or caregivers. Most perpetrators of elder abuse are family members.

Courts should carefully explore the relationship between the petitioner and respondent in each case, recognizing that domestic and family violence does indeed happen later in life, can be devastating, and even deadly to an older person. The dynamics with elder victims must be carefully explored, and the age, health, mobility, physical strength, ability, and other disparities between victim and perpetrator may impact the situation before the court and the need for a protection order.

Pennsylvania courts have regularly explained the purpose of the PFAA. "The purpose of Pennsylvania's Protection from Abuse Act is to protect victims of domestic violence from those who perpetrate such abuse; its primary goal is advance prevention of physical and sexual abuse." Lawrence v. Bodner, 907 A.2d 1109, 1112 (Pa. Super. 2006) *citing* Fonner v. Fonner, 731 A.2d 160, 161-162 (Pa. Super. 1999); see also Commonwealth v. Snell, 737 A.2d 1232, 1235 (Pa. Super. 1999) (purpose of the Act is to protect victims of domestic abuse, and it does so through numerous provisions that enable court to respond quickly and flexibly to both early signs and subsequent acts of abuse with issuance of protection orders).

Petitions can only be filed against family or household members, sexual or intimate partners, (or former partners), domestic partners, or persons who share biological parenthood. 23 Pa.C.S. § 6102. Elder victims may seek protection from abuse by intimate partners, including spouses, or other members of their family or household. The dynamics of domestic violence later in life may involve intergenerational violence (including adult children or grandchildren), caregiver violence, new relationship violence, or longstanding violence in the home. Elder victims in these situations may be dependent upon their abusers for care, transportation, sustenance, or other basic human needs. Each situation must be explored individually and sensitively to determine the unique circumstances.

The PFAA, at § 6102 defines family and household members as "[s]pouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood."

Under the PFAA, the word "abuse" is identified as:

The occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood:

- (1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon.
- (2) Placing another in reasonable fear of imminent serious bodily injury.
- (3) The infliction of false imprisonment pursuant to 18 Pa.C.S. § 2903 (relating to false imprisonment).
- (4) Physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services).
- (5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

23 Pa.C.S. § 6102.

The Pennsylvania Coalition Against Domestic Violence provides the following information about PFAs:

A PFA order from a court gives protective "relief" for a victim (and sometimes children) for up to three years. A person can file for a PFA order from the court for themselves or on behalf of their children who are under age eighteen. A PFA order describes certain things the abuser must

do or is forbidden to do in regard to a victim, and can include many kinds of protection. For example, a PFA order can make it illegal for the abuser to contact, harass and abuse the victim and the victim's children. The PFA order can order the abuser to give back keys, papers, toys, clothes and other items. If the abuser does not follow the order, there can be criminal charges.

Research suggests that PFAs work to deter certain abusers. For a domestic violence victim, getting a PFA is just one part of a larger plan to be safe from the abuse. An advocate or attorney at the local victim services, legal services and/or domestic violence program can help a victim create a safety plan for the family.

In fashioning relief, the court may consider ordering any or all of the following:

- Order the abuser to stop threatening, abusing, harassing, or stalking the victim and the victim's children or grandchildren (recognizing the enormous number of grandparents raising grandchildren).
- Order the abuser to leave the home or household (even if both parties own it or are on the lease).
- Order that the victim's new address or location remain confidential.
- Award temporary custody of children.
- Award temporary spousal or child support.
- Order repayment of expenses that the victim had as a result of the abuse.
- Prohibit the abuser from contacting the victim, victim's children, or family members.
- Order the abuser to turn over any firearms or other weapons.
- Order "any other appropriate relief" like the return of a pet, car keys, important papers, or other personal property.

Courts should carefully explore the relationship between the petitioner and respondent in each case, recognizing that domestic and family violence does indeed happen later in life. The dynamics with elder victims must be carefully explored, and the age, health, mobility, physical strength, ability, and other disparities between victim and perpetrator may impact the situation before the court and the need for a protection order. See also PFA Bench Card in Appendix A.

## **2. Sexual Violence Protection Orders**

In March, 2014, Pennsylvania Governor Tom Corbett signed into law the Protection for Victims of Sexual Violence or Intimidation Act. 42 Pa.C.S. § 62A01 - 62A20. Under the Findings and Purpose section of this Act, the General Assembly provided:

The General Assembly finds and declares that:

- (1) Sexual violence is the most heinous crime against a person other than murder.
- (2) Sexual violence and intimidation can inflict humiliation, degradation and terror on the victim.
- (3) According to the Department of Justice, someone is sexually assaulted every two minutes in the United States.
- (4) Rape is recognized as one of the most underreported crimes, and studies indicate that only one in three rapes is reported to law enforcement.
- (5) Victims of sexual violence and intimidation desire safety and protection from future interactions with their offender, regardless of whether they seek criminal prosecution.

(6) This chapter provides the victim with a civil remedy requiring the offender to stay away from the victim, as well as other appropriate relief.

42 Pa.C.S. § 62A02.

Crimes of sexual violence can occur at any age. Elders often have risk factors that place them at increased risk of being victims of sexual violence. These crimes can and do occur in the community, in their own homes, as well as in long-term care facilities like nursing homes.

A Sexual Violence Protection Order can be issued against a non-family member or even a complete stranger. This is broader than under the PFAA. Importantly, under the definition of "intimidation" in the Act, Intimidation orders are only available to protect minors. 42 Pa.C.S. §62A05.

According to the Pennsylvania Coalition against Rape (PCAR): A Sexual Violence Protection Order is designed to protect victims of sexual violence from further abuse and/or intimidation by their abuser, regardless of whether or not criminal charges have been filed against the perpetrator. Similar in many ways to a PFAA, the key difference lies in the relationship between the abuser and the victim. While PFAs require an intimate or household relationship between the two parties, a Sexual Violence Protection Order does not, and is available to victims of sexual violence who are at continued risk of harm from their perpetrator.

With regard to who may be afforded protection by a sexual violence protection order, these orders offer civil protection to any victim of sexual violence who is at risk of further harm by the perpetrator. Parents or guardians may seek these orders on behalf of minor children.

In addition, the guardian of the person of an adult who has been declared incapacitated under 20 Pa.C.S. Ch. 55 (relating to incapacitated persons) may seek relief on behalf of an incapacitated adult. Protections can be extended to other designated persons who are also shown to be at risk of harm.

Sexual Violence Protection Orders prohibit an offender from having any contact with the victim. Protections can include preventing the offender from entering a victim's home, workplace, school or other locations. Sexual Violence Protection Orders can also be expanded to prevent intimidation/contact from a third party on behalf of the offender or to extend protection to related parties, such as parents, siblings, or children of the victim. Other appropriate relief also may be granted, depending on the circumstances of the sexual assault.

Some examples may include:

Tenant who has been fondled by a landlord who threatens her/his housing.

Employee who has been raped by a co-worker who threatens him or her.

Elder who has been sexually assaulted by a caregiver who is not a family member.

Elder who experiences harassment from a perpetrator or his/her friends or family after reporting a sexual assault.

Elder whose offender repeatedly drives by or shows up at locations where the elder is situated.

Sexual Violence Protection Orders are civil remedies that require a "preponderance of evidence." To obtain a Sexual Violence Protection Order, a victim must prove that the abuse most likely happened, not that it happened beyond a reasonable doubt.

The process for filing for a Sexual Violence Protection Order may vary from county to county, but the process for seeking relief is the same as the processes used for obtaining a PFA. A person can obtain

a Sexual Violence Protection Order regardless of whether or not criminal charges have been filed. Sexual Violence Protection Orders offer protection for up to 36 months. Extensions of the order may be granted.

PCAR, available at, [https://pcar.org/sites/default/files/pages-pdf/svpo\\_final.pdf](https://pcar.org/sites/default/files/pages-pdf/svpo_final.pdf)

### **3. Civil Harassment Restraining Orders**

Pennsylvania does not have an elder abuse protection order, only those civil protection orders previously discussed.

There may be cases in which a civil suit has been filed involving elder abuse. For example, where a civil injunction could bar the perpetrator from taking certain actions which would further deplete the elder victim's assets. (See Pa.R.C.P. 1532. Special Relief. Injunctions). When the court finds that immediate and irreparable injury will be sustained before notice can be given to the other party or a hearing can be held, the court may issue a temporary and immediate injunctive order.

### **4. Ejectment** (Pa.R.C.P. 1051 *et seq.*)

These actions arise in cases involving elder abuse when the perpetrator resides in the residence owned by the elder, the perpetrator has paid no rent, and the perpetrator has not entered into a lease agreement with the elder.

Although the PFAA in Pennsylvania empowers the court to evict and enjoin a defendant from the plaintiff's property for up to three years, these orders can be issued only in certain circumstances. There must be a family or intimate partner relationship between the parties and the plaintiff must aver either a reasonable threat of imminent serious bodily injury, actual physical harm, sexual abuse, false imprisonment, or stalking in order to qualify for an order. When only emotional abuse or financial abuse is involved, the elder will not qualify under the statute for a protection from abuse order. Likewise, where the abuser is not a family member or a partner (e.g., a non-related caregiver), an elder victim will not qualify to seek relief under the PFAA. In such cases, where the perpetrator resides in the elder's home simply by the permission of the elder (with no landlord-tenant relationship), the elder's only recourse to remove the abuser from the home is to file an ejectment action.

c. Ejectment actions require the elder to file in the Court of Common Pleas which may pose difficulties for those with mobility issues. Low income elders must file an *in forma pauperis* petition with the court to waive the court fees, also posing difficulties for *pro se* elders. Without a lawyer, the elder petitioner will need to oversee the service of the petition on the other party, respond to any answers filed by the other party, move for a judgment on the pleadings, represent themselves at a hearing before the court where evidence must be offered, and navigate the execution of the writ of possession issued by the court. The length of the process will vary from jurisdiction to jurisdiction; in some cases the entire process could take up to nine (9) months. In cases where the other party is emotionally, financially, or physically abusing the elder, great risk exists to the elder. The longer the abuser remains in the home, the greater chance that more harm will come to the elder.

### **5. Undue Influence**

In Pennsylvania, the notion of undue influence is most often used in will contests and in contract matters.

What is undue influence? Undue influence may take many forms. Generally, it consists of obtaining a victim's "consent" in order to commit a crime or manipulate another's behavior. Importantly, undue influence is often not an isolated event, but rather a process. Our Supreme Court has defined undue influence as follows:

The word "influence" does not refer to any and every line of conduct capable of disposing in one's favor a fully and self-directing mind, but to control acquired over another that virtually destroys his free agency...In order to constitute undue influence sufficient to void a will, there must be imprisonment of the body or mind...fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery or physical or moral coercion, to such a degree as to prejudice the mind of the



testator, to destroy his free agency and to operate as a present restraint upon him in the making of a will.

In re: Estate of Ziel, 359 A.2d 728, 733 (Pa. 1976) (citations omitted).

## **6. Conversion**

A “conversion” is the deprivation of another’s right of property in, or use or possession of, a chattel, or other interference therewith, without the owner’s consent and without lawful justification. Shonberger v. Oswell, 530 A.2d 112, 114 (Pa. Super. 1987), *citing* Stevenson v. Economy Bank of Ambridge, 197 A.2d 721, 726 (Pa. 1964).

Under Pennsylvania law, a conversion can occur in several ways: (1) acquiring possession of property with the intent to assert a right to it adverse to the owner; (2) transferring the property and therefore depriving the owner of control; (3) unreasonably withholding possession of the property from the one who has the right to it; and (4) misusing or seriously damaging the property in defiance of the owner’s rights.

Conversion is a tort of strict liability. The essence of a suit for conversion is an action for the wrongful taking of an interest in property; therefore, proof of the amount of damages is not an element.

2 Summ. Pa. Jur. 2d Torts § 14:1 (2d ed.) (April, 2018), (internal citations omitted).

## **7. Access to Congregate Care Facilities Act**

The Access to Congregate Care Facilities Act (Act 67 of 2021) requires the Department of Health, in consultation with the Department of Human Services, to establish protocols to allow a resident of a congregate care facility or an individual with decision-making authority for the resident, to designate an individual as the resident’s essential caregiver during a declaration of disaster emergency. Such designation must occur during the intake of the resident into the congregate care facility. An essential caregiver must meet the necessary qualifications to enter the congregate care facility to provide in-person physical or emotional support to a resident of a congregate care facility in accordance with the protocols established. The Act applies for the period commencing from 15 days after a declaration of disaster emergency that results in the closure of congregate care facilities until 60 days after the termination or expiration of the declaration of disaster emergency by executive order, proclamation, or operation of law.

## **8. Fraud**

Fraudulent misrepresentation is recognized in Pennsylvania as an actionable tort. Kubik v. Letteri, 614 A.2d 1110 (Pa. 1992); *see also* Mulgrew v. Sears Roebuck & Co., 868 F. Supp. 98 (E.D. Pa. 1994).

“Fraud” is composed of a misrepresentation uttered with the intent to induce the action undertaken in reliance upon it to the damage of its victim. Fraud is a generic term, which embraces a great variety of actionable wrongs and may be actual or constructive, that is knowingly done.

“Fraud” is any artifice by which a person is deceived to his or her disadvantage. “Fraud” consists of anything calculated to deceive, whether by single act or combination or by suppression of the truth, or a suggestion of what is false, either by direct falsehood or by innuendo, speech or silence, word of mouth, or look or gesture and may be made up by any artifice by which a person is deceived to his or her disadvantage.

2 Summ. Pa. Jur. 2d Torts § 16:1 (2d ed.) (April, 2018) - Overview of fraud; definition of fraud.

## **9. Fraud in the Inducement**

Under Pennsylvania law, the elements of fraud in the inducement are as follows: “(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was

proximately caused by the reliance.” Skurnowicz v. Lucci, 798 A.2d 788, 793 (Pa. Super. 2002), quoting, Bortz v. Noon, 729 A.2d 555, 560 (Pa. 1999).

Eigen v. Textron Lycoming Reciprocating Engine Div., 874 A.2d 1179, 1185 (Pa. Super. 2005)

## **10. Breach of Fiduciary Duty under Power of Attorney**

Under Pennsylvania law, “[a fiduciary] relationship exists where one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side or weakness, dependence or justifiable trust, on the other.” Commonwealth Dept. of Transp. v. E-Z Parks, Inc., 620 A.2d 712, 717 (Pa. Cmwlth. 1993).

Further, when a person authorizes another to act as his or her agent, the relationship between the two may be characterized as a fiduciary relationship. Sutliff v. Sutliff, 528 A.2d 1318, 1323 (Pa. 1987) (citing Restatement (Second) of Agency § 387 (1958)).

“Under Pennsylvania law, the duty of an agent to his principal is one of loyalty in all matters affecting the subject of his agency and ‘the agent must act with the utmost good faith in the furtherance and advancement of the interests of his principal.’” Garbish v. Malvern Fed. Sav. & Loan Ass’n, 517 A.2d 547, 553-54 (Pa. Super. 1986). As the Third Circuit wrote:

To establish a breach of fiduciary duty under Pennsylvania law, a plaintiff must prove not only a fiduciary duty, but also “(1) that the defendant negligently or intentionally failed to act in good faith and solely for the benefit of plaintiff in all matters for which he or she was employed; (2) that the plaintiff suffered injury; and (3) that the agent’s failure to act solely for the plaintiff’s benefit ... was a real factor in bring[ing] about plaintiff’s injuries.”

Dinger v. Allfirst Fin., Inc., 82 Fed.Appx. 261, 265 (3d Cir. 2003), citing McDermott v. Party City Corp., 11 F.Supp.2d 612, 626-27 (E.D. Pa. 1998).

According to the Dept. of Aging, aside from self- neglect and caregiver abuse, financial abuse is the most frequent type of abuse against Pennsylvania elders. Frequently, financial abuse of elders involves the use or misuse by a Power of Attorney (POA) instrument. Abuse through a POA can have devastating and permanent consequences. A complicating factor in combating abuse through a POA involves “standing” to challenge the actions of an agent, acting under a facially valid POA. Without specific statutory authority designating who has standing, there have been inconsistent applications of general common law standing principles across the Commonwealth. The gap in standing results in a decrease of checks and balances on POAs potential misappropriation or mismanagement of an elderly persons’ finances.

Note: While the court has statutory authority to order an accounting by an agent, see e.g. 20 Pa. C.S. § 5531 and § 5610, as shown in Appendix B, the legal ability of an elder’s loved ones, family or friends to *compel* a court review of an agent’s actions remains uncertain in Pennsylvania. Both the Pennsylvania Joint State Government Commission and the Supreme Court’s Elder Law Task Force have endorsed § 116 of the Uniform Power of Attorney Act, which proposes expanded standing as a check against agent abuse.

For the March 2010 Joint State Government Commission Report, see <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2010-14-POWERS%20OF%20ATTORNEY%20March%2023%202010.pdf>.

For the Elder Law Task Force Report, see <http://www.pacourts.us/courts/supreme-court/committees/supreme-court-boards/elder-law-task-force>.

Note: The Revised Uniform Fiduciary Access to Digital Assets Act, Act 72 of 2020 (effective January 19, 2021), governs fiduciary access to digital assets (20 Pa.C.S. §§ 3901-3918). The Act defines the term digital asset as an electronic record in which an individual has a right or interest, but does not include an underlying asset or liability unless the asset or liability is itself an electronic record. The Act applies to: a fiduciary acting under a will or power of attorney executed before, on, or after the effective date; a personal representative acting for a decedent who died before, on, or after the effective date; a proceeding for the appointment of a guardian of the estate commenced before, on,

or after the effective date; and a trustee acting under a trust created before, on or after the effective date.

For a thorough examination of standing to challenge actions by an agent under a POA in Pennsylvania, see Appendix B (Addressing Financial Exploitation of Elders: The Power of Attorney Problem)

### **11. Breach of Contract (e.g. contractor fraud cases)**

The Pennsylvania Supreme Court recently restated the elements of a breach of contract suit. "It is well-established that three elements are necessary to plead a cause of action for breach of contract: (1) the existence of a contract, including its essential terms, (2) a breach of the contract; and, (3) resultant damages. . . . Additionally, it is axiomatic that a contract may be manifest orally, in writing, or as an inference from the acts and conduct of the parties."

Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C., 137 A.3d 1247, 1258 (Pa. 2016).

### **12. Violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law**, 73 P.S. § 201-1, *et seq.* ("UTCPL")

The general purpose of the UTCPL is to protect the public from fraud and unfair or deceptive business practices, and the statute is the principal means for doing so in the Commonwealth. Feeney v. Disston Manor Personal Care Home, Inc., 849 A.2d 590 (Pa. Super. 2004).

A plaintiff may state a cause of action under the UTCPL by satisfying the elements of common-law fraud or by otherwise alleging deceptive conduct. Simmons v. Simpson House, Inc., 224 F.Supp.3d 406 (E.D. Pa. 2016).

### **13. Unjust Enrichment**

In Mitchell v. Moore, 729 A.2d 1200 (Pa. Super. 1999), the Superior Court stated that "[u]njust enrichment" is essentially an equitable doctrine. *Id.* at 1203. See also Styer v. Hugo, 619 A.2d 347, 350 (Pa. Super. 1993), *aff'd*, 637 A.2d 276 (Pa. 1994). Where unjust enrichment is found, the law implies a contract, which requires the defendant to pay to the plaintiff the value of the benefit conferred. Schenck v. K.E. David, Ltd., 666 A.2d 327 (Pa. Super. 1995).

The elements necessary to prove unjust enrichment are "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment for value." Wolf v. Wolf, 514 A.2d 901, 905-06 (Pa. Super. 1986)(overruled on other grounds).

The application of the doctrine depends on the particular factual circumstances of the case at issue. In determining if the doctrine applies, the focus is not on the intention of the parties, but rather on whether the defendant has been unjustly enriched. Mitchell, *supra* at 1203-04.

"To sustain a claim of unjust enrichment, a claimant must show that the party against whom recovery is sought either 'wrongfully secured or passively received a benefit that it would be unconscionable for her to retain.'" Torchia v. Torchia, 499 A.2d 581, 582 (Pa. Super. 1985).

### **14. Fraudulent Conveyances - Generally**

Elder abuse may occur through fraudulent conveyances, including, among other things, improperly enticing or coercing an elder to transfer a deed, allowing property of an elder to become

susceptible to judicial or tax sale and then purchasing same, or fraudulently using legal mechanisms, such as an action in quiet title, Pa.R.C.P. 1061-1068, to obtain title to an elder's property.

## E. Orphans' Court Proceedings

There are many ways in which elder abuse may arise in orphans' court proceedings, including, among other examples, abuse by an agent under a power of attorney, abuse, neglect or exploitation by guardians, and the need for restoration of rights. The companion Guardianship Bench Book covers many of these issues in more depth.

Guardianship Action - individuals may seek to have an elderly victim declared incapacitated, and have themselves appointed as a guardian. Guardians have specific legal responsibilities to ensure the care and welfare of incapacitated persons, act always in the interest of that person, following their personal values, and to report to the court regularly on their actions. Courts have the duty to discern and order the least restrictive alternatives. The new Guardianship Tracking System in Pennsylvania, launched in 2018, will change the way guardianships are filed, tracked, and monitored, and will allow courts to share data and information about guardians, transfers of assets, moving individuals out of the community to long-term care facilities, identify "red flags" of suspected abuse, neglect, or exploitation, and much more, in new and meaningful ways. Guardians may be removed or their actions examined and questioned in appropriate cases. Rights may be restored if an individual no longer needs (or perhaps never needed) a guardian.

Demand for Accounting of Guardian or Agent under Power of Attorney - individuals who suspect abuse by a guardian may petition for an accounting by the court. 20 Pa.C.S. § 5531 and § 5610. If financial abuse by an individual acting under a POA is suspected, an AAA or interested parties may be able to petition the court for an accounting. See discussion on Standing in Appendix B, noted in §II. D (9), *supra*.

If the court suspects misappropriation or other financial abuse, it may order an accounting, and may use the power of contempt to compel an accounting if necessary.

Restoration of Rights - a guardian may be removed if an individual is demonstrated to no longer be incapacitated - or perhaps never was incapacitated.

Removal of Agent under Power of Attorney - if financial impropriety or abuse is indicated, the court may remove a guardian or an agent. For additional information on a court's authority to remove an agent, see the companion Guardianship Bench Book.

## F. Preserving Assets in Civil and Orphans' Court Matters

Preserving the assets of elders is vital, as their ability to recover from losses is either greatly diminished or nonexistent. Court orders in civil and orphans' court actions may be valuable in helping to preserve assets. Some of the actions courts can order are discussed below:

### **1. Civil Court**

a. *Lis Pendens* - *Lis Pendens* may be used to protect the property of an elder when a pending fraudulent conveyance is suspected. *Lis Pendens* is "[a] notice, recorded in the chain of title to real property ... to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome." Black's Law Dictionary 1015 (9th Ed. 2009).

b. *Injunction* - An injunction may be available to stop abusive actions or conduct generally when there is no clear remedy at law and an irreparable injury will occur if relief is not granted.

In Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995 (Pa. 1993), the Pennsylvania Supreme Court clearly established what must be shown to obtain a preliminary injunction.

First, to obtain a preliminary injunction, a party must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

*Id.* at 1001.

## **2. Orphans' Court**

a. *Writ of Sequestration*, 20 P.S. § 783 - A writ of sequestration of real or personal property of an estate or trust, or of the respondent, to enforce an order or decree of the orphans' court division in the administration of the estate or trust, may be allowed by the orphans' court division as fully as in any court of equity, and must be directed to and executed by the sheriff of the county in which the court or branch of the court is located or of any county where property to be sequestered is located. The orphans' court division, by general rule or special order, may prescribe the practice relating to sequestration of real and personal property. To the extent not provided for by general rule or special order, the practice relating to sequestration must conform to the practice in the division of the court having jurisdiction over actions at law. Standard Pennsylvania Practice 2d, § 142:35 (Procedure for sequestration of real or personal property).

b. *Filing of Account*, 20 P.S. § 5610 - This statute provides: "An agent shall file an account of his administration whenever directed to do so by the court and may file an account at any other time. All accounts shall be filed in the office of the clerk in the county where the principal resides. The court may assess the costs of the accounting proceeding as it deems appropriate, including the costs of preparing and filing the account." Failure to file an account after ordered to do so by the court may result in contempt proceedings.

c. *Discovery of Information*, 20 P.S. § 5604(d) - Agencies operating under OAPSA may petition the court for an order requiring access to financial or other documents of an elder if abuse or neglect is suspected and access is denied.

See also §III.F, *infra* regarding the dangers in delaying proceedings.

### III. RECOGNIZING SIGNS OF ELDER ABUSE AND NEGLECT

Recognizing the signs of elder abuse is the critical first step in stopping the abuse. In this section, some common signs of abuse, including physical abuse, psychological abuse, financial abuse (or exploitation), financial coercion, and scams are discussed. Also included is a warning about the dangers of delaying proceedings, and some of the non-traditional costs of financial exploitation.

#### A. Signs of Physical Abuse

The National Adult Protective Services Association identifies the following signs of elder abuse and neglect:<sup>4</sup>

1. sudden inability to meet essential physical, psychological, or social needs threatening health, safety, or well-being;
2. disappearing from contact with neighbors, friends, or family;
3. bruising or welts on the skin, especially those appearing on the face or lateral and anterior region of the arms (physically abused elders are much more likely to display bruises than elders injured by accident);
4. fingerprints or handprints visible on the face, neck, arms, or wrists;
5. burns from scalding, cigarettes, or in shapes of objects such as an iron;
6. cuts, lacerations, or puncture wounds;
7. sprains, fractures, or dislocations;
8. internal injuries or vomiting;
9. appearing with torn, stained, or bloody clothing;
10. appearing disheveled, in soiled clothing, or inappropriately attired for climate.

#### B. Signs of Psychological Abuse

In her 2008 publication [Devious Damage: Elder Psychological Abuse](#)<sup>5</sup>, Bloomsburg University Professor Margie Eckroth-Bucher, PhD, identifies the following signs of elder psychological abuse:

1. passivity, withdrawal, or increasing depression;
2. evasiveness or reluctance to talk openly;
3. avoidance of eye contact or verbal contact with a caregiver;
4. cowering in the presence of the abuser;
5. hopelessness, helplessness, anxiety, or feelings of powerlessness;
6. confusion that is unrelated to any medical condition;
7. change in sleeping or eating habits;
8. missing appointments;

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4 Available at, <http://www.napsa-now.org/get-informed/what-is-neglect/>

5 Available at, <http://www.todaysgeriatricmedicine.com/archive/101308p24.shtml>

9. social isolation from friends or other family.

## C. Signs of Financial Exploitation

The National Adult Protective Services Association identifies the following signs of elder financial abuse:<sup>6</sup>

1. termination of vital utilities such as telephone, water, electricity/gas, or garbage;
2. unpaid bills and liabilities despite adequate income;
3. oversight of finances surrendered to others without explanation or consent;
4. transferring assets to new “friends” assisting with finances;
5. checks written to “Cash;”
6. does not understand his/her current finances; offers improbable explanations;
7. unexplained disappearance of cash, valuable objects, financial statements;
8. unexplained or unauthorized changes to wills or other estate documents;
9. giving-away money or spending promiscuously;
10. appearance of property liens or foreclosure notices.

## D. Signs of Financial Coercion

According to the Nursing Home Abuse Center, the following indicators suggest elder financial coercion:<sup>7</sup>

1. forging the elderly person’s signature on checks or other documents;
2. forcing the elderly person to sign a will, deed, or power of attorney listing the perpetrator as the one who is responsible for the elderly person or who will gain when the individual dies;
3. stealing property or money from the elderly person;
4. promising to give the elderly person lifelong care only if they give them money or their property;
5. using the possessions or property of the elderly person without their permission;
6. perpetrating fraud, which is the use of trickery, false pretenses, deception, or other dishonest acts in order to gain the person’s finances;
7. perpetrating cons or other confidence games in order to gain the trust of the elderly person;
8. perpetrating telemarketing scams in which the elderly person is called and deception, exaggerated claims or scare tactics are used to get the elderly person to send them money;
9. making charges against the elderly person’s credit cards without the authorization of the cardholder.

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6 Available at, <http://www.napsa-now.org/get-informed/what-is-financial-exploitation/>

7 Available at, <https://www.nursinghomeabusecenter.com/elder-abuse/types/financial-abuse/>

## E. Financial Exploitation Scams

The National Adult Protective Services Association identifies the following common financial exploitation scams:

### **1. Common Scams by Strangers:**

- a. lottery and sweepstakes scams - told "you've already won! You just need to send \$2,500 to cover your taxes;"
- b. home repair/traveling con men - told they are in your area and can coat your driveway/roof at a low cost;
- c. grandparent scam - told elder's grandson is in jail and they need the elder to send money immediately;
- d. charity scams - falsely soliciting funds for good causes; (very common after disasters);
- e. utility company scams - told the caller is from the utility company and he/she needs the elder to come outside for a minute. (While an accomplice steals valuables);
- f. roof repair, yard work, home repair scams;
- g. telemarketing scams and accompanying threats;
- h. money sent via telegraphs to people claiming lottery winnings.

### **2. Common Scams by "Professionals":**

- a. predatory lending - elders pressured into taking out inappropriate reverse mortgages or other loans;
- b. annuity sales - the elder may be pressured into using the equity realized from a reverse mortgage (or other liquid assets) to buy an expensive annuity which may not mature until the person is well into their 90s or over 100;
- c. investment/securities schemes - pyramid schemes; unrealistic returns promised; dealer is not licensed;
- d. internet phishing - false emails about bank accounts;
- e. identity theft - credit cards opened fraudulently, etc.;
- f. medicare scams - these are the costliest in terms of the dollar amounts.

### **3. Common Ways Family Members and Trusted Others Exploit Vulnerable Adults:**

- a. using a Power of Attorney, given by the victim to allow another person to handle his/her finances, as a license to steal the victim's monies for the perpetrator's own use;
- b. taking advantage of joint bank accounts in the same way;
- c. using ATM cards and stealing checks to withdraw monies from the victim's accounts;
- d. threatening to abandon, hit, or otherwise harm the victim unless he or she gives the perpetrator what he/she wants;
- e. refusing to obtain needed care and medical services for the victim in order to keep the person's assets available for the abuser;
- f. in-home care providers charging for services; keeping change from errands, paying bills which don't belong to the vulnerable adult, asking the vulnerable adult to sign falsified time



sheets, spending their work time on the phone, and not doing what they are paid to do.<sup>8</sup>

## F. Dangers of Delay in Proceedings

Even more so than cases involving younger victims and witnesses, cases involving older participants present special considerations and dangers inherent in delayed proceedings, such as:

1. victims become older and increasingly frail, physically and cognitively;
2. victims could become physically unavailable;
3. irretrievable dissipation of financial assets;
4. delays increase the likelihood that victim/witness will no longer have capacity or have passed away.

See *also* National Center for State Courts Proposed Performance Measures for Elder Abuse Cases, available at [http://www.eldersandcourts.org/elder-abuse/~/\\_media/Microsites/Files/cec/EA%20Court%20Performance.ashx](http://www.eldersandcourts.org/elder-abuse/~/_media/Microsites/Files/cec/EA%20Court%20Performance.ashx).

## G. Non-Traditional Costs of Financial Exploitation

In addition to the factors noted in Section III A-F, there are other “costs” to consider in elder financial abuse cases, such as:

1. stress on an elder can be particularly damaging;
2. increased medical problems;
3. trauma;
4. increase in mortality rates.

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8 Available at, <http://www.napsa-now.org/get-informed/what-is-financial-exploitation/>

## IV. COMMON TERMS USED IN ELDER HEALTH CARE AND ELDER ABUSE

The following words and phrases are commonly used by elder health care professionals:

- Abandonment - The desertion of an older adult by an individual or institution that has assumed responsibility for the provision of care needed to maintain the physical or mental health of the older adult (i.e., caretaker). The caretaker's responsibility can arise voluntarily by contract, by receipt of payment for care, from familial relationship, or by court order. 6 Pa.Code § 15.2.
- Activities of Daily Living (ADLs) - Everyday tasks related to personal care usually performed for oneself in the course of a normal day. The term includes eating, drinking, ambulating, transferring in and out of a bed or chair, toileting, bladder and bowel management, personal hygiene, securing health care, managing health care, self-administering medication and proper turning and positioning in a bed or chair. 55 Pa.Code § 2600.4.
- Assessment - A determination based upon a comprehensive review of a client's social, physical, and psychological status along with a description of the person's current resources and needs using the instruments and procedures established by the Department for this purpose. 6 Pa.Code § 15.2.
- Care-Dependent Individual - an adult who, due to physical or cognitive disability or impairment, requires assistance to meet needs for food, shelter, clothing, personal care or health care. 35 P.S. § 10225.101.
- Caretaker - An individual or institution that has assumed the responsibility for the provision of care needed to maintain the physical or mental health of an elder. This responsibility may arise voluntarily by contract, by receipt of payment for care, as a result of a family relationship, or by order of a court of competent jurisdiction. 35 P.S. § 10225.101.
- Executive Functions - The ability to think abstractly and to plan, initiate, sequence, monitor, and stop complex behavior. Higher-level cognitive skills used to control and coordinate other cognitive processes. Anne-Marie Kimbell, Ph.D.

<http://images.pearsonclinical.com/images/pdf/webinar/executivefunctionolderadultswebinarhandout4-25-2012.pdf>.

- Facility - Any of the following:
  - (i) A domiciliary care home as defined in § 2202-A of the Act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.
  - (ii) A home health care agency.
  - (iii) A long-term care nursing facility as defined in § 802.1 of the act of July 19, 1979 (P.L. 130, No. 48), known as the Health Care Facilities Act.
  - (iv) An elder daily living center as defined in section 2 of the Act of July 11, 1990 (P.L. 499, No. 118), known as the Older Adult Daily Living Centers Licensing Act.
  - (v) A personal care home as defined in § 1001 of the act of June 13, 1967 (P.L. 31, No. 21), known as the Public Welfare Code.

35 P.S. § 10225.101.

- Incapacitated Older Adult - an elder who, because of one or more functional limitations, needs the assistance of another person to perform or obtain services necessary to maintain physical or mental health. 6 Pa.Code § 15.2.
- Instrumental Activities of Daily Living (IADLs) - Tasks or activities that allow a person to remain

independent in their home. These tasks may include: doing laundry, shopping, securing and using transportation, managing finances, using a telephone, making and keeping appointments, caring for personal possessions, writing correspondence, engaging in social and leisure activities, using a prosthetic device, and obtaining and keeping clean, seasonal clothing. 55 Pa.Code § 2600.4.

- Protective Services Caseworker - A protective services employee, regardless of staff title, who meets the minimum standards in 6 Pa. Code §§ 15.121 - 15.127 and is assigned to perform the following functions:

- To receive reports of need for protective services when necessary.

- To investigate reports received under OAPSA.

- To access the needs of protective services clients.

- To develop and coordinate the implementation of service.

6 Pa.Code § 15.2.

- Report of Need - The written report of an elder in need of protective services received under 6 Pa.Code § 15.23 and recorded on the standardized protective services report form. 6 Pa.Code § 15.2.
- Service Plan - A written plan developed by the agency on the basis of comprehensive assessment of a client's need which describes identified needs, goals to be achieved and specific services to support goal attainment, with regular follow-up and predetermined reassessment of client progress. Specific services to support goal attainment may include, but is not limited to, homemaker services, home-delivered meals, attendant care, other in-home services, emergency shelter or food, legal aid services, transportation, and other such services. Service plans are cooperatively developed by the agency staff, the client or the client's appointed guardian, and other family members when appropriate. The plan shall also address, where applicable, special needs of other members of the household unit as they may affect the elder's need for protective services. 35 P.S. § 10225.101.

### A. General principles

1. Normal functional abilities – effective adaptations to the demands of living independently – are dependent on normal brain function, and are expressed through the voice and the neuro-musculoskeletal systems. Therefore, impairments of brain function (i.e. that result from dementias or strokes), or damage to the peripheral nerves, muscles, bones, or joints (i.e. that result from trauma, arthritis, or advanced diabetes) will result in abnormal functional abilities and loss of independence.
2. The medical capacity evaluation typically includes the following workflow:
  - a. review medical records with attention to historical trends, medications, medical problems, mental health problems, drug and alcohol use, and social support;
  - b. obtain history from the Alleged Incapacitated Person (AIP)/ Incapacitated Person (IP) and/or the AIP's representative;
  - c. assess Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs);
  - d. as needed, administer questionnaires – MoCA, IQcode, PHQ-9 (explained below);
  - e. complete physical exam including attention to special senses, mobility, nutrition, and hygiene;
  - f. order tests/studies to better understand stability of current state;
  - g. if indicated, consult PT, OT, neuropsychologist, and/or geriatric psychiatrist;
  - h. ascertain values and preferences of the AIP;
  - i. be prepared to render an opinion on safety needs, risks of harm, need for supervision/support, reversibility of conditions, and prognosis.<sup>9</sup>

### B. Concepts, Tests, and Instruments to Assess Capacity

#### 1. Activities of Daily Living (ADL)

ADLs are basic life skills that are necessary for self-care and safety in the home. As ADLs decline, personal care needs increase and one's life becomes more restrictive. ADL skills include:

- a. ability to move within the home;
- b. ability to use the toilet;
- c. ability to groom self;
- d. ability to bathe self;
- e. ability to dress self;
- f. ability to feed self.

ADLs can be assessed as: performs independently, needs some help, or totally dependent on others.

As ADLs are lost, personal care needs increase, as do safety concerns when an AIP is left unattended. In cases that are not clear-cut or when interview information is deemed suspect, a physical therapist and occupational therapist can be consulted to observe and evaluate the actual ADL skills.

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<sup>9</sup> The Gerontologist, Vol. 54, Issue 1, Feb. 1, 2014 at 13-20. Available at, <https://academic.oup.com/gerontologist/issue/54/1>

## **2. Instrumental Activities of Daily Living (IADL)**

IADLs are more complex behaviors that require executive functioning - the ability to plan, initiate, and complete a task or skill. Normal IADLs allow a person to function independently in a community. IADL skills include:

- a. ability to manage medications;
- b. ability to prepare food;
- c. ability to use the telephone;
- d. ability to perform basic housekeeping tasks;
- e. ability to manage finances;
- f. ability to travel outside the home;
- g. ability to shop.

A simplified rating of IADL skills is: performs independently, needs some help, or is totally dependent on others.

IADLs require more advanced executive functioning abilities. As IADLs are lost, one requires help from others in order to remain in the community. In cases that are not clear-cut or when interview information is deemed suspect, an occupational therapist can be consulted to observe and evaluate the actual IADL skills.<sup>10</sup>

## **3. The Informant Questionnaire on Cognitive Decline in the Elderly (IQCode)**

The short form of the IQCode by Anthony F. Jorm, is a questionnaire designed to understand how an AIP's memory, ability to know/learn, and executive functioning has changed. It requires a reliable observer who knows the AIP well. The rating scale, relative to a ten year period is:

- a. much improved;
- b. a bit improved;
- c. not much change;
- d. a bit worse;
- e. much worse.<sup>11</sup>

## **4. The Montreal Cognitive Assessment (MoCA)**

MoCA is one of several tools used to evaluate cognitive function. It is administered to an AIP in an office setting and covers the following mental processes:

- |   |          |
|---|----------|
| 1. Visual-spatial perception/executive function | 5 points |
| 2. Naming (animal figures)                      | 3 points |
| 3. Attention (immediate)                        | 6 points |
| 4. Language (fluency and word recall)           | 3 points |

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10 *Id.*

11 Anthony Jorm, A SHORT FORM OF THE INFORMANT QUESTIONNAIRE ON COGNITIVE DECLINE IN THE ELDERLY (IQCODE): DEVELOPMENT AND CROSS-VALIDATION. *Psychol Med* 1994; 24: 145-153. Available at, <https://www.ncbi.nlm.nih.gov/pubmed/8208879>

5. Abstraction (similarities)	2 points
6. Delayed recall (within minutes)	5 points
7. Orientation	6 points

The maximum score is 30 points and a score suggestive of cognitive impairment is 26 and under. This test can be affected by untreated or sub optimally treated medical and mental health conditions.<sup>12</sup>

### **5. PHQ-9**

The PHQ-9 is a questionnaire tool to help establish a diagnosis of major depression. It is administered in the doctor's office and can be used to quantify the behavioral markers of depression and to document progress with treatment.<sup>13</sup>

**Note:** The MoCA and SLUMS (Saint Louis University Mental Status examination) are structured tools to systematically screen cognitive function. The MoCA is a sensitive instrument that aids in identifying mild cognitive impairment. (Another tool used is the MMSE (Mini Mental State Exam), however the MoCA is recommended over the MMSE and SLUMS). The SLUMS exam is a screening questionnaire that tests for orientation, memory, attention, and executive functions. The PHQ-9 is another form that aids in the diagnosis of depression. It is also useful when determining whether treatment is making a difference.

See <https://www.parkinsons.va.gov/resources/MOCA-Test-English.pdf> (MoCA); [http://medschool.slu.edu/agingsuccessfully/pdfsurveys/slumsexam\\_05.pdf](http://medschool.slu.edu/agingsuccessfully/pdfsurveys/slumsexam_05.pdf) (SLUMS); and, [http://www.cqaimh.org/pdf/tool\\_phq9.pdf](http://www.cqaimh.org/pdf/tool_phq9.pdf) (PHQ-9). These are also included in Appendix D.

### **6. Capacity to Make and Communicate Decisions**

An AIP's decision-making capacity should be interpreted in the context of the AIPs historical values and beliefs. (For example, a Jehovah's Witness may make a choice to refuse life-saving blood transfusions, while others may consider that choice irrational). An examination to determine decision making capacity typically involves a face-to-face interview, utilizes open ended questions, and addresses the specific choice the AIP needs to make. Choices associated with high risk of adverse outcomes require a higher standard of decision making capacity than low-risk decisions. The examiner should be able to render an opinion regarding:

- a. the AIP's ability to receive information and communicate internal thoughts;
- b. the AIP's capacity to make a choice;
- c. the AIP's ability to explain the reason for the choice; and
- d. the AIP's ability to appreciate the consequences of that choice.

This examination can be performed by a variety of professionals since the interview skills are not specific to any particular specialty. Validated tools to help the interviewer frame the questions include the *Assessment of Capacity for Everyday Decision Making* (ACED) or the *MacArthur Competency Assessment Tool for Treatment* (MacCAT-T). For difficult cases, a neuro-psychologist or geriatric psychiatrist might be consulted.

**Note:** There are distinct differences between 1) medical and 2) legal assessments of functional abilities. The ABA lawyer's handbook to capacity assessment is an excellent guide [https://www.americanbar.org/groups/law\\_aging/resources/capacity\\_assessment/](https://www.americanbar.org/groups/law_aging/resources/capacity_assessment/)

<sup>12</sup> Nasreddine ZS, Phillips NA, Bédirian V, Charbonneau S, Whitehead V, Collin I, Cummings JL, Chertkow H (2005). THE MONTREAL COGNITIVE ASSESSMENT, MOCA: A BRIEF SCREENING TOOL FOR MILD COGNITIVE IMPAIRMENT. *J Am Geriatr Soc.* 53 (4): 695-9. Available at, <https://www.ncbi.nlm.nih.gov/pubmed/15817019>

<sup>13</sup> Kroenke K, Spitzer RL, Williams JB, Sept. 2001 THE PHQ-9: VALIDITY OF A BRIEF DEPRESSION SEVERITY MEASURE. *Journal of General Internal Medicine.* 16 (9): 606-613. Available at, <https://www.ncbi.nlm.nih.gov/pubmed/11556941>

## VI. COMMON MEDICAL CONDITIONS AND GERIATRIC SYNDROMES

Geriatric syndromes occur in frail elders and can affect quality of life, duration of life, and can reduce or limit independence. A syndrome is a group of signs (physical findings) and symptoms (patient complaints) that occur together and characterize a particular abnormality or condition. The same syndrome in different patients might be caused by different disease processes or failing organ systems. Thus, to best manage the syndrome, the underlying cause should be identified.

Geriatric syndromes share common risk factors:

**Advanced age** (risk increases with age).

**Impaired cognitive function** (any combination of loss of ability to maintain a state of alertness; ability to remember immediate, short term, and long term; ability to understand and express language; and the ability to plan, organize, and complete multistep tasks).

**Diminished functional capacity** (impairment in activities of daily living related to self-care such as bathing, dressing, feeding, toileting, grooming, transferring; and in instrumental activities of daily living, necessary for independence, such as shopping, managing finances, house cleaning, cooking, and mobility outside the home).

**Impaired mobility** (dependence on assist devices or others to maintain postural stability at rest or in motion).

The following chart provides numerous examples of syndromes judges should be aware of, as well as common impacts on patients and implications:

SYNDROME	DESCRIPTION	IMPACT ON PATIENT	PROGNOSIS AND IMPLICATIONS
<b>Delirium</b>	A rapid decline in attention and global mental functioning (level of consciousness, ability to plan, orientation, memory). Possible causes include infection, internal and external toxins, lack of oxygen, drug effects, imbalances of sugar and body salts, brain injury, decompensated mental illness, or sensory deprivation.	<p><u>Appearance:</u> Patients appear anxious or uncharacteristically quiet. They may demonstrate increased or decreased activity.</p> <p><u>Functional:</u> Ability to function will be impaired. Confusion and irrational behavior may result.</p> <p><u>Psychological:</u> This condition can be distressing to both the patient and family/friends.</p>	<p>Delirium is a medical emergency. In the hospital, it is associated with mortality rates from 22% to 76%.<sup>14</sup></p> <p>If a cause can be identified and treated, the patient has a good chance of returning to baseline functioning.</p>

14 New England Journal of Medicine 2006; 354:1157-1165

SYNDROME	DESCRIPTION	IMPACT ON PATIENT	PROGNOSIS AND IMPLICATIONS
<b>Falls</b>	Postural <b>stability</b> , at rest or in motion, requires complex integration of the entire nervous system with the musculoskeletal system. Disease or injury to any part of these systems that one cannot compensate for can result in <b>instability</b> and falls.	<p><u>Appearance:</u> The patient may have obvious disabilities related to joints, bones, and tendon function. Neurologic impairments may be more subtle and require a professional assessment.</p> <p><u>Functional:</u> Limitation of mobility, to varying degrees can be compensated by assist devices such as canes, walkers, wheelchairs, and crutches.</p> <p><u>Psychological:</u> Social isolation may result due to fear of falling outside of the home.</p>	<p>Falls can be the first indicator of declining health and frailty. Falls are responsible for 70 percent of accidental deaths in persons 75 years of age and older.<sup>15</sup></p> <p>Physical therapy is shown to improve balance and strength and can make a difference for those who are deconditioned.</p> <p>It is always prudent to review medication lists and eliminate non-essential drugs that can contribute to postural instability.</p>
<b>Urinary incontinence</b>	The involuntary leakage of urine due to mobility limitations and/or abnormal structure/neuromuscular function of the bladder, urethra, and genital organs.	<p><u>Appearance:</u> Odor and soiling of clothing may be evident.</p> <p><u>Functional:</u> Mobility limitations can result in inability to reach a toilet in time. Risk of fall could increase.</p> <p><u>Psychological:</u> Embarrassment, humiliation, and social isolation can result from untreated incontinence.</p>	<p>Most cases of urinary incontinence can be managed after a medical evaluation. Specialized tests may be needed. Poorly managed incontinence can be a marker for abuse or neglect, or impaired cognitive function that results in diminished functional capacity. (See functional decline and frailty.)</p>



SYNDROME	DESCRIPTION	IMPACT ON PATIENT	PROGNOSIS AND IMPLICATIONS
<b>Functional decline and frailty</b>	Loss of independence in activities of daily living and instrumental activities of daily living can result from physical, mental, substance use, or neurologic disabilities. Use of multiple medications can both cause and exacerbate functional decline.	<p><u>Appearance:</u> Disability due to neurologic, psychiatric, and/or musculoskeletal systems may be evident.</p> <p><u>Functional:</u> Loss of independence that results in dependence on others is a common feature.</p> <p><u>Psychological:</u> This syndrome can be devastating to one's sense of self. People often delay seeking help until a crisis is recognized by the patient or his/her family. Not infrequently, patients are dropped off at a hospital emergency department.</p>	Frailty and a loss of resiliency limits a person's ability to recover from illness or non-biologic stressors, such as changes in one's environment or death of a spouse or friend. As dependence increases, one's need for help necessitates either in-home services or moving to increasingly restrictive domiciles such as assisted living or extended care facilities.
<b>Skin ulcers</b>	Damage to the skin and underlying tissues that are caused by a combination of prolonged pressure over the skin, poor nutrition, and/or diminished circulation to the affected area. Poor hygiene and neglect can be contributing factors.	<p><u>Appearance:</u> This syndrome is seen in diabetics and others with damage to the sensory nerves, circulation, and cognition. The person might be morbidly obese or might be malnourished, exposing bones directly to pressure points.</p> <p><u>Functional:</u> These patients may have limited ability to move or roll independently. Progressive ulcers may result in amputations due to non-healing infections.</p> <p><u>Psychological:</u> These lesions can take weeks to months to heal. They can be demoralizing due to the need for frequent attention with limited progress.</p>	Unless the underlying cause for the ulcer can be addressed (relieving pressure, restoring circulation, or improving hygiene) these lesions may not heal. These can be a marker for end of life or terminal states.

See generally Sharon K. Inouye MD, MPH Stephanie Studenski MD, Mary E. Tinetti MD, George A. Kuchel MD. CLINICAL, RESEARCH, AND POLICY IMPLICATIONS OF A CORE GERIATRIC CONCEPT. First published: 11 April 2007. <https://doi.org/10.1111/j.1532-5415.2007.01156.x>

### A. Prescription Terminology and Challenges in Prescribing to the Elderly

1. Pharmaceutical prescriptions should contain the following elements:
  - a) Patient name, date of birth, address;
  - b) Physician name, address, phone number, State license number, and, when appropriate, DEA number;
  - c) Medication name, dose, and form (i.e. tablet, liquid, metered dose);
  - d) Amount to be dispensed;
  - e) Number of refills;
  - f) Detailed instructions on how to take the medication (amount, frequency, duration);
  - g) Diagnosis or problem being treated (sometimes omitted);
  - h) Wet or electronic physician signature.
2. Challenges in prescribing drug treatment in the elderly:
  - a) Goals of care need to be clearly defined before initiating new treatments. Prolongation of life may be less important than quality of life so treatments that do not support quality of life become optional, or at worst harmful. When in doubt, discontinue questionably effective medications.
  - b) Preventive therapies and tests become less beneficial as life expectancy decreases (less than 10 years).
  - c) The elderly are more likely to take a large number of medications and may have multiple organ system disease/dysfunction. The use of multiple medications (polypharmacy) increases the risks of drug-drug and drug-disease adverse effects and can compromise quality of life.
  - d) Many patients, unsupervised, have difficulty administering multiple medications so the risk for errors in administration or missed doses increases.

### B. Medications that Require Caution with the Elderly

General principles: Many drugs, while shown to be effective in younger populations, do not have a scientific basis to show meaningful outcomes in older patients, resulting in greater risk/benefit ratios (less useful and more dangerous.) The American Geriatric Society has promoted "the Beers criteria," summarized below, to help improve safe prescribing practices. For more information about drug risks in the elderly, see *Journal of the American Geriatric Society*, 2015, vol. 63, pages: 2227-2246.

PHARMACEUTICAL CLASS	COMMON EXAMPLES	POTENTIAL PROBLEMS
<b>Anticholinergics</b>	Antihistamines: (Diphenhydramine)  Parkinson agents (Benztropine)  Antispasmodics: (Dicyclomine, Scopolamine)	Confusion, dry mouth, constipation
<b>Antibiotics</b>	Nitrofurantoin	Lung toxicity, liver toxicity
<b>Cardiovascular</b>	Prazosin  Terazosin  Clonidine  Digoxin  Immediate-release Nifedipine  Amiodarone	Low blood pressure, nausea, vomiting, low blood pressure, lung or thyroid damage with long-term use
<b>Central nervous system</b>	Antidepressants: (Amitriptyline, Paroxetine)  Antipsychotics: (Thorazine, Haloperidol)  Benzodiazepines: (Diazepam, Lorazepam)	Sedating, low blood pressure, heart rhythm problems, stroke, increased mortality, delirium, sedation, delirium, falls, fractures, memory loss
<b>Endocrine</b>	Androgens: (Testosterone)  Estrogens:  Growth hormone  Sliding scale insulin  Oral diabetic agents: (Chlorpropamide)	Cardiac problems, prostate cancer, breast cancer, swelling, joint pain, low blood sugar, low blood sugar, low sodium
<b>Gastrointestinal</b>	Metaclopramide  Mineral oil  Proton pump inhibitors: (Omeprazole, Pantoprazole)	Movement disorders, pneumonia, clostridium infections, osteoporosis
<b>Pain medications</b>	Opiates (Meperidine)  Non-steroidal anti- inflammatory (Ibuprofen, Meloxicam, Ketorolac)	Neurotoxicity, delirium, upper gastrointestinal ulcers, kidney failure, liver failure

PHARMACEUTICAL CLASS	COMMON EXAMPLES	POTENTIAL PROBLEMS
<b>Muscle relaxants</b>	Carisoprodol, Cyclobenzaprine	Sedation, delirium, fractures from falls, questionable effectiveness
<b>Genitourinary</b>	Desmopressin	Low blood sodium levels

See also Appendix C for Medications commonly prescribed for elders, side effects, and considerations when recommending to elderly patients.

## C. Herbal Medications

Herbal supplement use is very common. Unless specifically asked, most elderly persons will not volunteer that they are taking supplements.

Herbal supplement use can result in adverse reactions due to the drug itself, or due to interactions with conventional medications. Two commonly used and potentially serious combinations are:

**Ginkgo Biloba** for memory enhancement can cause increased bleeding risk when also taking warfarin.

**St. John's Wort** for depression can cause serotonin syndrome when also taking serotonin-uptake inhibitors for depression.

The following list includes the most commonly used supplements and their purported benefits:

- **Fish oil** to lower blood cholesterol and triglycerides
- **Glucosamine or chondroitin** for osteoarthritis pain in the knees
- **Probiotics** to restore a natural bacterial balance in the intestines
- **Melatonin** for insomnia and sleep disorders
- **Coenzyme Q-10** to counteract potential toxicity from Statin drugs
- **Echinacea** to boost immune function, relieve pain, reduce inflammation
- **Cranberry** to reduce urinary tract infection risk
- **Garlic** for immune function and heart health
- **Ginseng** to boost energy, lower blood sugar and cholesterol levels, promote relaxation, and treat sexual dysfunction in men.
- **Ginkgo Biloba** for memory enhancement

By Judge Ida K. Chen

### TOP TEN THINGS JUDGE CHEN LEARNED REGARDING PFA CASES AND ELDER LITIGANTS WHICH HELPED TO IMPROVE CASE OUTCOMES

#### **1. CALL THE CASE EARLY**

Call the case early in the day, while the litigant is still “fresh” and more alert and articulate.

The medication they are taking or the time of the day when they take the medication could also have an impact.

As in all your cases, work efficiently, knowing that some litigants depend on “special transit” buses, which do not run as often as other modes of public transportation.

#### **2. COMMUNICATING WITH A SELF-REPRESENTED LITIGANT (SRL)**

Often, the elder petitioner or elder respondent appears without counsel and is a “Self-Represented Litigant” (SRL). However, the litigant may be accompanied by a friend, a concerned neighbor or a relative, who provides “support” for the litigant.

Speak clearly and enunciate. Speak in shorter phrases. Speak plain English.

Keep the conversation “on track” and try to get to the heart of the matter quickly, articulate “boundaries” (“Today, we are here to discuss . . .”)

Frame the issues (“And your problem with that is . . .”) Help the litigant to refocus, if necessary (“Let’s get back to what you mentioned. . .”)

Answer questions simply and directly.

Try to see the “whole picture” - - there may be a multitude of issues intertwined (such as, money disputes which result in physical abuse).

Attempt to understand the litigant’s fears and concerns - - it may be more than just safety, they may fear that the other party wants to send them to a nursing home, take away their ability to manage and control their own financial affairs, move into the family home and “take over”, etc.

Craft court orders that effectively address the issues which brought the matter to court.

At the close of the proceeding, ask the litigant if there are any questions.

#### **3. PROVIDE A SHORT PERIOD OF OBSERVATION IN THE COURTROOM**

Before calling the case, allow the elder litigant to sit in the courtroom, become acclimated to their surroundings, and observe some other case, in order to gain an understanding of the process.

#### **4. ALLEGED ABUSER PROVIDES SUPPORT FOR THE ELDER**

Often times, the person who is the “alleged abuser”, is the person in the household who “helps” the Petitioner, purchases food and makes the meals, picks-up the prescriptions, takes them for their medical appointments, etc.

If the alleged abuser must “stay away”, what kind of help will the Petitioner need?

#### **5. LITIGANT MAY ALSO HAVE A DISABILITY**

It is not unusual for the elder litigant to also have a disability - - using a walker, cane or wheelchair; unable to see or hear well, some memory loss with respect to specific dates or times. (Usually, the Court

Crier will spot these situations at the time the litigant “checks-in” in the waiting room and will discreetly advise you accordingly.)

For litigants in wheel chairs, always clear the courtroom of unnecessary barriers or reposition chairs and furniture, prior to the litigants appearance in the courtroom.

For litigants appearing with a cane, place a chair next to them - - this allows the litigant to rest the cane on the chair, otherwise, the cane (if standing against the table) usually gets knocked down.

As the litigant is ready to leave the courtroom, instead of shouting out loud, “Could someone help him/her with the door?” (which calls attention to their difficulty) just signal the Court Officer with a “nod”, your eyes and a slight tilt of your head, to indicate that the litigant may need help with the (heavy) double doors leading to the waiting room.

## **6. BE AWARE OF THE FAMILY DYNAMICS**

Often times, the “alleged abuser” is an adult son or daughter (niece or nephew) and it is someone the elder petitioner deeply cares for. They don’t want the younger person to “get in trouble with the law” and most of the time, they just want to “get help, or counseling, or “some kind of program” for the “alleged abuser”.

In some matters, family members are vying for property rights, or preventing another family member from caring for the elder or visiting the elder in the hospital.

## **7. SELECTING THE BEST DATE**

When continuing the case to another date, perhaps inquire as to what day of the week is best. Litigants are likely to have “standing appointments” for therapy, dialysis, or an appointment at the VA Hospital, or with some government entity.

## **8. BE AWARE OF INTERSECTING LEGAL ISSUES & MAKE A REFERRAL**

While probing for facts, the court may learn that the parties are involved in a guardianship matter or the alleged abuser may have a “Power of Attorney”.

Early on in the litigation, make a referral to the Senior Law Center, where appropriate.

In some cases, a question may arise as to the litigant’s capacity to understand the nature of the proceeding. (See ABA’s, “A Handbook for Judges: Judicial Determination of Capacity of Older Adults”, and the ABA’s, “A Handbook for Lawyers: Assessment of Older Adults with Diminished Capacity”, for general information.)

## **9. JUDICIAL ADMINISTRATION WITH RESPECT TO A COORDINATED APPROACH TO COURT SERVICES**

Engage the members of your Chambers and Courtroom Staff in a discussion and training to ensure that litigants are being served properly.

Example: Frequently, a social worker or other health professional from a hospital, a mental-health facility, or a homeless shelter, will contact chambers by fax or by phone, to explain that the litigant is not available due to a medical or mental health issue. This will most likely cause the case to be postponed or delayed.

Ask for:

-A “possible discharge” date, to better coordinate the “next listing date”

-A “contact person”, in case the litigant can’t directly communicate

-An address where the litigant can receive court orders or notices from the court; and in the case of a shelter, being mindful to keep the address “confidential”

Be aware that the PFAA allows the Petitioner to be accompanied by a “Domestic Violence Counselor/ Advocate.

## **10. BE PATIENT AND MANAGE THE CASE STRATEGICALLY**

Occasionally, it’s just not a “good day” for the litigant to have a hearing. Ask the litigants if they would like to come back on another day to “review” the matter, or perhaps have a “cooling off period”.

Although courts are encouraged to dispose of their cases quickly, and to expedite cases involving elder abuse, it might be more practical in the long-run to give certain cases “more time” in the system, to allow for monitoring (participating in a drug, alcohol or mental health counseling program) or to allow the development of more perspective between the parties. In other words, be patient with the litigants and slow down the process, if this might lead to a better case outcome.

## APPENDIX B - Addressing Financial Exploitation of Elders: The Power of Attorney Problem

By John N. Kennedy, Esq., Zygmunt A. Pines, Esq., and Darren M. Breslin, Esq.  
of the Elder Abuse & Neglect Committee, Advisory Council on Elder Justice in the Courts

According to the Pennsylvania Department of Aging, aside from self neglect and care taker abuse, financial abuse is the most frequent type of abuse against Pennsylvania elders. Frequently, financial abuse of elders involves the use or misuse by a POA. Abuse through a POA can have devastating and permanent consequences. Currently, without specific statutory authority designating who has standing, there are inconsistent applications of general common law standing principles across the Commonwealth of Pennsylvania. The gap in standing results in a decrease of checks and balances on POA's potential misappropriation or mismanagement of an elderly persons' finances.

### **I. Current Pennsylvania Law on Challenging POA's Actions**

#### *A. Common Law Standing*

There is no specific Pennsylvania statute addressing who has standing to question actions taken by an agent acting pursuant to a power of attorney document ('agent' hereinafter referred to as "POA"). Accordingly, the starting point in Pennsylvania is to analyze case law regarding standing. The Supreme Court of Pennsylvania has explained the concept of standing as existing when "[t]he individual initiating the legal action has been 'aggrieved'...The keystone to standing in these terms is that the [Plaintiff]... [must be] adversely affected in any way by the matter he seeks to challenge...[He must have] an interest greater than the common interest of all citizens in procuring obedience to the law." *Pittsburgh Palisades Park and Charles J. Betters vs. Commonwealth of Pennsylvania*, 585 Pa. 196, 203-04, 888 A.2d 655, 659-61 (2005) (citations omitted). "[A]ggrieved [can be established by a showing of a] substantial, direct and immediate interest in the outcome of the litigation in order to be deemed to have standing." *In re Hickson*, 573 Pa. 127, 136, 821 A.2d 1238, 1243 (2001) (citations omitted). "An interest is 'substantial' if it is an interest in the resolution of the challenge which 'surpasses the common interest of all citizens in procuring obedience to the law.' Likewise, a 'direct' interest mandates a showing that the matter complained of 'caused harm to the party's interest,' i.e., a causal connection between the harm and the violation of law. Finally, an interest is 'immediate' if the causal connection is not remote or speculative." *Pittsburgh Palisades Park and Charles J. Betters*, 585 Pa. at 204, 888 A.2d at 660 (citations omitted).

Due to the absence of a statute specifically addressing who has standing to challenge an action of a POA, one must default to the common law principles of standing on a case by case basis. The individual seeking an accounting of a POA's actions must show a substantial, direct, and immediate interest in the affairs of the principal or the other agent's actions taken under the POA. There are limited reported opinions on these issues. For example, courts have held presumed intestate heirs, known beneficiaries, beneficiaries under a will, or those with a pecuniary interest may have standing to challenge actions taken under a POA. Other courts, however, have held only the principal or his/her personal representative has standing to challenge a POA's actions.

The following Pennsylvania case summaries will be beneficial to understand how the courts are implementing general common law standing analysis in the POA context:

In *Wills, An Incapacitated Person*, 20 Fiduc. Rep.2d 16 (O.C. Adams 1998), the Orphans' Court found the petitioner, an adopted child who filed a petition for appointment of guardian of the person



and revocation of an attorney-in-fact's power under a power of attorney, had a substantial, direct and immediate interest, beyond that of a normal citizen. Petitioner alleged that an attorney-in-fact improperly withdrew a principal's trust money. The Court held, "[a]s the adopted daughter of Robert A. Wills, petitioner has an interest in his well being and therefore has standing...." See *id.* at 20. The Court reasoned "[c]learly, petitioner has a pecuniary interest in the trust, which may be adversely affected by movant's use of the trust monies. Thus, petitioner has standing to challenge the validity of the power of attorney." See *id.* at 19.

In *Nikoden v. Losey*, 27 Fiduc. Rep. 2d 28 (Northampton CCP 2005), the Court held the daughter and intestate heir "has an interest in the property owned by her mother. Her interest is substantial because she has a greater interest in the property than any other citizen in that she stands as an intestacy heir. She has direct interest because harm will be caused to plaintiff if her allegations are correct,...Finally plaintiff has an immediate interest in that there is a connection between the sale of the property for far less than its fair market value and the injury to be sustained by the plaintiff as an intestate heir." (Quoting *Nikoden v. Losey*, No. C0048CV2003-5176 (Pa. Ct. Com. Pl. Nov. 5, 2003)(citations omitted). The Court denied the defendants' motion for summary judgment, finding the daughter had standing to assert a fraud claim and a breach of fiduciary duty, as well as to request an accounting by the POA.

In *Golub Trust*, 27 Fiduc. Rep. 2d. 260 (Phila. CCP. 2006), the Court found the trustee of the trust had standing to raise the issue of the proper distribution to a beneficiary of the trust. The Court held the trust and a beneficiary of the trust "balance" or residue had a direct interest in the sums withdrawn and as such established the direct harm required for standing. Further the Court found that although the trust agreement immunized the trustee for liability from the loss to the trust corpus through the actions of a power of attorney, this did not negate its standing, as fiduciary, to seek proper administration of the trust for the benefit of the beneficiaries and to prevent the overreaching by one of those beneficiaries. However, the Court found the trustee's standing was not sufficient to obtain ultimate relief in an action against the POA regarding the alleged misuse of the power of attorney and that such action must be brought by the Executor of the Decedent's Estate. In conclusion, the Court determined that in the "interest of equity and judicial economy, adjudication of the issues raised by the trustee should be coordinated with action initiated by the executor of Frances Golub's estate as to the alleged misuse of the power of attorney she granted to Zena Shultes."

In *Haskins, et al. v. Carroll, et al.*, 25 Fiduc. Rep. 2d 361 (Bradford CCP 2005), the Court held that 20 Pa. C.S. § 5610 sets forth the general rule for filing an accounting and states that "[a]n agent shall file an account of his administration whenever directed to do so by the Court and may file an account at any other time." The Court went on to state that the "Supreme Court in *Appeal of Beiler*, 144 Pa. 273, 277, 22 A.808 (Pa. 1891), instructs that a party in interest has a right to demand an accounting." The Court held the plaintiffs had an interest in the estate as they stood to benefit under the will, and therefore could demand an accounting.

In the *Griggs Estate* (No. 2), 2 Fiduc. Rep. 3d 354 (Chester CCP 2012), the Court held a widow of a decedent lacked standing to compel an account from her husband's POA. In its opinion, the Court referred to *Golub Trust*, 27 Fiduc. Rep. 2d 206, 265 (O.C. Phila. Co. 2006) and stated "any inquiry into the alleged misuse of a power of attorney is to be made by the person who granted the power, or by the executor of his estate, and not by a beneficiary whose interest was hurt by its exercise." The Court further stated if "an agent breaches the fiduciary obligation owed to the principal, the principal himself, or after the principal's death his personal representative, may proceed to hold the agent accountable." *Rosewater Estate*, 25 Fiduc. Rep. 2d 83, 85 (O.C. Montgomery Co. 2005)." In conclusion the Court held "only the personal representative of a deceased party in interest stands in the shoes of such decedent. Legatees, spouses or next of kin of that decedent really have no such interest." *Kilpatrick's Estate*, 368 Pa. at 402, 84 A.2d at 340-341 (1951). See also, *Deeble v. Houser*, 37 Luzerne Leg. Reg. (1943). The Court dismissed the widow's petition stating that only the executor and successor trustee had the standing to bring a petition ordering an accounting of the POA.

In *Re Mardell Dardarian, Principal*, 3 Fiduc. Rep. 3s 206 (Chester CCP 2013), a daughter of the principal filed a petition requesting the POA to file an account of the principal's finances. The Court

entered an order that stated the agent would file a formal account “after agreement by the parties.” The agent filed an account but did not follow the format required by Pa. O.C. Rule 6.1. The daughter filed objections to the accounting and the respondent filed a Petition to Dismiss and to the Strike the Objections filed by the Petitioner. The Court held it is the principal or the personal representative of his or her estate to move to hold the agent accountable and it “is not to be made by a beneficiary whose interest was allegedly hurt by the exercise of the power of attorney.” *Golub Trust*, 27 *Fiduc. Rep. 2d*, 260, 265 (O.C. Phila. Co. 2006; *Rosewater Estate*, 25 *Fiduc. Rep. 2d*, 84, 85 (O.C. Mont. Co. 2005).

#### B. Older Adult Protective Services Act

Pennsylvania’s Older Adult Protective Services Act was designed “to provide for the detection and reduction, correction or elimination of abuse, neglect, exploitation and abandonment, and to establish a program of protective services for older adults in need of them.” 35 P.S. § 10225.102. If anyone suspects an elder has been abused, neglected, or exploited, that individual may report the suspected actions to the local area agency on aging (“AAA”). 35 P.S. § 10225.302(a). Exploitation is defined as:

An act or course of conduct by a caretaker or other person against an older adult or an older adult’s resources, without the informed consent of the older adult or with consent obtained through misrepresentation, coercion or threats of force, that results in monetary, personal or other benefit, gain or profit for the perpetrator or monetary or personal loss to the older adult.

35 P.S. § 10225.103.

The AAA is obligated to investigate each report of abuse and takes steps to implement the protective procedures provided for in the OAPSA. 35 P.S. §10225.303(a). The AAAs have the right to access to all records related to their investigations and the right to access all persons who have been reported to be in need of protective services. 35 P.S. §10225.304(d)(e). If access is denied, the AAA has standing to seek a court order compelling access:

**(h) Denial of access to records.**--If the agency is denied access to records necessary for the completion of a proper investigation of a report or a client assessment and service plan, or the delivery of needed services in order to prevent further abuse, neglect, exploitation or abandonment of the older adult reported to be in need of protective services, the agency may petition the court of common pleas for an order requiring the appropriate access when either of the following conditions apply:

1. the older adult has provided written consent for any confidential records to be disclosed and the keeper of the records denies access.
2. the agency can demonstrate that the older adult is denying access to records because of incompetence, coercion, extortion or justifiable fear of future abuse, neglect, exploitation or abandonment.

35 P.S. §10225.304(h); see also 6 Pa. Code §15.61(c) and §15.62(c).

However, there is no private cause of action created by the OAPSA. Accordingly, a private citizen cannot allege a violation of the OAPSA and pursue an agent for violating the act.

#### C. Court Ordered Account Under 20 Pa. C. S. § 5610

Separate and apart from any common law analysis of standing, a judge has the discretion at any time to order an agent to file an account. Specifically, 20 Pa.C.S. §5610, provides:

An agent shall file an account of his administration whenever directed to do so by the court and may file an account at any other time. All accounts shall be filed in the office of the clerk in the county where the principal resides.

#### D. *Actual Practice in Pennsylvania*

In practice, there are basically three possible scenarios upon an individual requesting the Court for an accounting of a POA's actions:

1. First: An individual petitions the court for an accounting, and there is no objection or response filed by the POA, and the court does not raise the issue *sua sponte*; the court can grant the request and order the POA to file an accounting to the petitioner.
2. Second: A petitioner requests an accounting and the POA objects and/or the court raises the issue *sua sponte*. The court will likely be presented with the common law standing analysis and determine whether the petitioner has standing. As discussed in section I.A above, there is an inconsistent approach among the courts regarding common law standing as it applies to challenging a POA's actions.
3. Third: The court raises the issue *sua sponte* and/or the POA raises the issue of standing and the judge denies the petition but utilizes §5610 to order the POA to provide an accounting to the court directly.

## **II. Elder Law Task Force Analysis and Recommendations**

### A. *Elder Law Task Force Analysis and Recommendations*

The Elder Abuse and Neglect Committee of the Elder Law Task Force ("Task Force") performed an in depth analysis of POA standing issues. The analysis is contained at pages 187 through 191 of the Elder Abuse and Neglect Committee Report. The analysis of recommendations are summarized as follows.

The Task Force, in considering how best to combat the growing and serious problem of elder financial abuse and exploitation in connection with the use of a POA considered the issue of standing, specifically, who has the legal authority to question POA transactions and whether standing should be expanded to allow more interested parties to challenge actions taken on behalf of a principal. The committee analyzed both the benefits and detriments of expanded standing. The committee concluded expanding standing was a necessary and positive step in creating additional checks and balances to detect, prevent, and stop agent abuse of the elderly. As such, the committee recommended adopting §116 of the UPAA, which states:

- (a) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief.
  - (1) The principal or the agent;
  - (2) A guardian, conservator, or other fiduciary acting for the principal;
  - (3) A person authorized to make health-care decisions for the principal;
  - (4) The principal's spouse, parent, or descendant;
  - (5) An individual who would qualify as a presumptive heir of the principal;
  - (6) A person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;
  - (7) A government agency having regulatory authority to protect the welfare of the principal;
  - (8) The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and
  - (9) A person asked to accept the power of attorney.

- (b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

The Task Force recommended expanding standing for the following reasons;

1. Government and private studies note that financial exploitation in the country is epidemic;
2. Nearly half of the states in the country have expanded standing to challenge actions by agents far beyond what currently exist in Pennsylvania in an effort to prevent abuse;
3. Section 116 may be the only means to detect and stop agent abuse of an incapacitated principal and;
4. Pennsylvania has already enacted §114(h) of the UPAA, but has not adopted the related provisions of §116.

#### *B. Pennsylvania Joint State Government Commission's Position on §116*

In March 2010, the Pennsylvania Joint State Government Commission ("JSGC") issued a Report of the Advisory Committee on Decedents' Estates laws ("JSGC Report"). The following is their verbatim analysis of §116:

#### **Judicial Relief**

Section 116(a) of the UPAA sets forth who has standing to petition the court:

The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

- (1) the principal or the agent;
- (2) a guardian, conservator, or other fiduciary acting for the principal;
- (3) a person authorized to make health-care decisions for the principal;
- (4) the principal's spouse, parent, or descendant;
- (5) an individual who would qualify as a presumptive heir of the principal;
- (6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;
- (7) a governmental agency having regulatory authority to protect the welfare of the principal;
- (8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and
- (9) a person asked to accept the power of attorney.

The Advisory Committee recognized that paragraphs (1), (2), (3), (4) and (7) are straightforward and sensible, but paragraphs (5), (6), (8) and (9) are overly and unnecessarily broad, thereby creating potential problems and raising the likelihood that the process will become too intrusive. Currently, a Pennsylvania court will generally consider allegations of an agent's improper actions if the petitioner has some quantum of proof to that effect. *However, no specific statutory language exists regarding standing for this in Pennsylvania.* (emphasis supplied).

Several members of the Advisory Committee favored retaining current Pennsylvania law, citing no real need to include language analogous to §116 of the UPAA because such inclusion could spawn

additional litigation. Broadening standing expends time and financial resources as the court must consider each petition. Other members reasoned that nothing in 20 Pa.C.S. Chapter 56 provides guidance as to standing, and clarity would be helpful. The fact that a person “may petition” does not mean that relief will ultimately be granted. Since there is no clear law regarding who has standing to bring a power of attorney matter before the court, typically a person files a guardianship petition alleging an agent’s wrongdoing. These allegations likely will occur when the principal is incapacitated or thought to be incapacitated or of weakened intellect.

The Advisory Committee recommends the inclusion of a new section of 20 Pa.C.S. Chapter 56 and an explanatory comment:

§ 5612. Investigation of financial abuse and mismanagement.

The court may order an investigation, appoint a guardian ad litem, make a referral to an appropriate agency or take any other appropriate action regarding allegations that a principal is suffering from financial abuse or mismanagement by his or her agent under a power of attorney:

- (1) upon petition by an appropriate party and a reasonable showing of the financial abuse or mismanagement; or
- (2) after the court is otherwise informed of the financial abuse or mismanagement.

Comment

This section reflects current Pennsylvania practice and procedure regarding the principles that a court would apply in entertaining a proceeding involving alleged financial abuse or mismanagement of the affairs of a principal under a power of attorney. This section specifically leaves the determination of standing to the discretion of the court. It also enables the court to consider information from a report (such as one from a social service agency) or other communication apart from the filing of a formal petition. The court would need to evaluate whether (1) the person submitting the report or communication is genuinely motivated by the best interests of the principal and (2) the assertions or allegations contained in the report or communication are credible and made in good faith.

*C. Task Force’s Position on JSGC’s Conclusions*

The Task Force was not persuaded by the JSGC’s conclusions, noting that many states have expanded standing to challenge a POA’s actions and §116, in conjunction with §114(h) adopted in Pennsylvania, provides important and sufficient protections to the agent and the principal.

*1. Other States*

Prior to the drafting of UPAA §116, at least nine states had laws allowing individuals with a sufficient interest, and upon a showing of good cause, to petition the court to review an agent’s actions and grant appropriate relief. Since 2006, an additional fifteen states have adopted UPAA §116. Since the Task Force report, an additional four states have adopted the UPAA and 2 states (South Dakota & Mississippi) have introduced bills to adopt the UPAA. Accordingly, over half of the states in the country explicitly provide standing to parties interested in the welfare of a principal to seek judicial review of an agent’s actions. (See attached chart showing states which have adopted §116 or a similar statutory provision, enactment dates of each, and case citing to each statute in every state).

*2. Section 116, in conjunction with §114(h) Adopted in Pennsylvania, provide Important and Sufficient Protections to the Principal and Agent.*

The Task Force believed there were sufficient protections provided in §116 to overcome privacy concerns. Specifically, §116 provides protection to the privacy of the principal by adding the following:

- (a) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority for the power of attorney.

Accordingly, any competent principal can prohibit disclosure of financial or other information by requesting the court to dismiss the petition.

In addition, additional protection is afforded by the legislature's adoption UPA §114(h) in Pennsylvania's Act 95 of 2014, Act of July 2, 2014, P.A.L.855,95. Section 114(h) as adopted in Pennsylvania states:

(b) Disclosure of receipts, disbursements or transactions.

- (1) Except as otherwise provided in the power of attorney, an agent shall not be required to disclose receipts, disbursements or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, conservator, another fiduciary acting for the principal, governmental agency having authority to protect the welfare of the principal or, upon the death of the principal, the personal representative or successor in interest of the principal's estate.
- (2) Within 30 days of the request, the agent shall either comply with the request or provide a writing or other record substantiating the reason additional time is needed, in which case the agent shall comply with the request within an additional 30 days.

20 Pa. C.S. §5601.3(d).

Accordingly, an agent is protected from being required to disclose financial or other information, except as requested by the principal, other fiduciary, or an appropriate agency, unless ordered to do so by the court.

Sections 114(h) and 116 were designed to work together, protecting privacy by limiting the number of people who could demand an accounting, but explicitly expanding the list of individuals who could seek judicial review of an agent's actions. As noted in the comment, "§116 operates as a check-and-balance on the narrow scope of §114(h) and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal."

### *3. Failure to Implement JSGC's Proposed Legislation to Combat Financial Abuse*

Although not addressed in the Task Force's report, it is important to recognize, as previously noted, the JSGC did recommend a statute (§5612) be added to provide the court with a greater opportunity to review actions taken by a POA. (Section 5612, as proposed, is set forth in full in section II.B herein).

The legislation was proposed but never adopted by legislature.

### *4. Increased Litigation Concerns and Other Litigation Options*

Another stated concern with expanding standing was the possibility of an increase in litigation, which could in turn impair the utility of a POA. With regards to increased litigation, a review of the cases in states which have adopted §116 and/or a similar expanded POA standing statute, reveal there has not been a significant amount of cases citing to the statutes. Specifically, there are 26 states that have either expressly adopted §116 or have expanded standing to allow a person with 'sufficient interest in the welfare of a person' to petition the court to review a POA's actions. From those 26 states, internal research revealed only forty (reported and unpublished) cases across the United States.

Another rationale discussed was the expansion of standing may not be necessary due to other litigation options. Specifically, it was argued if an individual has concerns about actions by an agent, those concerns should be reported to the local AAA or the Department of Aging, which have the authority to investigate and if necessary, have standing to bring an action through the OAPSA. If it is determined that the elder may

be incapacitated, the AAA may also petition for guardianship. In addition, inappropriate misappropriation by a POA can be reported to the local police and prosecuted by district attorneys.

While it is accurate the AAA will receive reports of financial abuse, the AAA's simply do not have enough resources to analyze and address every alleged inappropriate action by a POA. Likewise, the local police are equally handicapped by their limited resources and expertise to investigate financial abuse. By expanding standing, scrutiny of POA's actions will shift some of the burden from the state/county agencies, police, and district attorneys into the hands of private citizens and courts to address the problem of suspected or actual financial abuse of an elder.

### **III. Other Approaches and Considerations**

At a 2016 elder financial exploitation summit in Philadelphia, Pennsylvania, sponsored by the National Association of Protective Services for Adults, the power of attorney problem was addressed.

New York State, for example, amended its power of attorney laws in 2009 and 2010. The power of attorney statute now provides for the designation of a "monitor" in the power of attorney document. The law allows such a monitor to oversee actions of the agent to protect the elder principal from potential financial abuse. Under the statute, the monitor has the power to request, receive, and compel the agent to provide a record of all transactions and to request and receive a copy of the power of attorney. The New York law also provides for expanded standing to protect the elder principal. Certain enumerated persons interested in the scope and execution of the agent's authority can bring a special proceeding. These people include the agent, any designated monitor, and any third party required to accept a power of attorney as well as the spouse, child, or parent of the principal and the principal's successor in interest. The statutory provisions are also specific with regard to severe limitations on gift giving, the applicable duty of care of the monitor, the duty of financial institutions to honor powers of attorney, and specific cautionary clauses that must be included in every power of attorney. See: *NY General Obligations Law*, Art. 5, secs. 5-1501 et seq.

New York's statutory approach seems consistent with a growing consensus in the banking and elder care communities regarding the benefit of designating a third party in the power of attorney instrument. Such a designated monitor would be able to oversee or be informed of financial transactions for the protection of the elder principal. In a similar vein, financial institutions have increasingly been advocates of a best practice in which a third party, often a relative, is given viewer/read access only to the financial transactions of its elder customers, including those that involve powers of attorney. See, for example, [www.Whealthcare.org](http://www.Whealthcare.org), an initiative begun at the University of Pennsylvania that highlights the relationship between financial and physical health of elders and favors the practice of such passive monitoring. Further consideration should be given to promoting the practice of including third party monitors in powers of attorney instruments.

### **IV. Conclusion**

The Elder Abuse and Neglect Committee of the Advisory Council on Elder Justice in the Courts fully supports the Task Force's recommendation to adopt §116 of the UPAA. Determining who has standing to seek a judicial review of a POA's actions in Pennsylvania is inconsistent across the various counties of the Commonwealth. A POA in one county may be held accountable for misappropriating an agent's resources if a court rules in favor of an individual seeking an accounting or if the county is fortunate enough to have the resources to investigate and prosecute the POA for misappropriation. While in another county, inconsistent application of common law standing concepts, coupled with a lack of resources at AAA and police/district attorney level, may result in a POA not being held accountable for mismanagement and/or misappropriation of an elder's resources. Adoption of §116 will provide clarity regarding who has standing to challenge a POA's actions, thereby increasing the level of scrutiny available to analyze potential elder financial abuse situations.

Both §116 and §114(h) provide adequate safeguards to privacy of the principal and protection for the agent. Both sections were designed to work together. Pennsylvania has already adopted §114(h) and should likewise adopt its natural counterpart, §116. Speculative concern over increased litigation does not appear to be relevant or compelling given the experience of the many states that have adopted §116. Pennsylvania

should join the majority of states and adopt §116. Given the inconsistent application of common law concepts of standing, coupled with a lack of resources of the AAA and local police/district attorneys, expanding the class of individuals who may have critically important and credible information about a POA's handling of our elders' affairs may be the only means to detect, prevent, and stop the behind-the-scenes financial abuse of an elderly person.



Medications commonly prescribed for elders, side effects, and considerations when using in elderly patients.

In addition to the medications identified in Section VII.B., the following medications may have side effects the Court should be aware of:

**Aricept (Donepezil)**– used for treating dementia of the Alzheimer’s type.

Can cause abnormal dreams, diarrhea, dizziness, loss of appetite, muscle cramps, nausea, tiredness, trouble sleeping, vomiting, and weight loss.

Cannot be used if the patient has Parkinson disease or metabolism problems.

**Ativan (lorazepam)**– anti-anxiety medication used to treat anxiety or anxiety associated with symptoms of depression.

Can cause clumsiness, dizziness, drowsiness, headache, lightheadedness, unsteadiness, weakness.

Elderly may be more sensitive to its effects.

**Coumadin (warfarin)**– anticoagulant used to treat or prevent blood clots.

No common side effects.

Can cause severe and sometimes fatal bleeding. People who are older than 65 years are at greater risk of side effects, especially bleeding.

**Lasix (furosemide)**– loop diuretic used for treating high blood pressure, heart failure, or water retention. When effective it will increase urine output.

May result in urinary incontinence or decreased kidney function.

Elderly may be more sensitive to its effects, especially dehydration and loss of potassium. For any change in mental status monitor electrolytes and renal function.

**Prinivil, Zestril (lisinopril)**– angiotensin converting enzyme (ACE) inhibitor. Used for treating high blood pressure, congestive heart failure, and to improve survival after a heart attack.

Can cause lightheadedness, fainting, urinating more or less than usual, fever, chills, body aches, flu symptoms, tiredness, muscle weakness, pounding or uneven heartbeats, chest pain, swelling, rapid weight gain, cough, dizziness, drowsiness, headache, nausea, vomiting, diarrhea, upset stomach, mild skin itching or rash.

Elderly may be more sensitive to its effects, especially low blood sodium levels. Be cautious of possible anorexia.

**Protonix (pantoprazole)**– a proton pump inhibitor which decreases the amount of acid produced in the stomach. Used to treat erosive esophagitis and other conditions involving excess stomach acid.

Can cause diarrhea, headache, nausea, stomach pain, vomiting.

Long term use can result in Clostridium difficile diarrhea, pneumonia, and fractures.

**Remeron (mirtazapine)**– an antidepressant, used for treating depression.

Can cause abnormal dreams, abnormal thinking, constipation, dizziness, drowsiness, dry mouth, flu symptoms, increased appetite, weakness, weight gain.

In elderly, can negatively impact cognitive functioning and ability to sustain attention.

**Seroquel (quetiapine)**– an antipsychotic medication used to treat the symptoms of conditions such as schizophrenia and bipolar disorder.

Can cause constipation, dizziness, drowsiness, dry mouth, lightheadedness, nasal congestion, sore throat, stomach pain or upset, tiredness, vomiting, weakness, weight gain.

May increase the risk of death when used to treat mental problems caused by dementia in elderly patients. Most deaths were linked to heart problems or infection. Elderly patients, especially women, may develop uncontrollable muscle movements. This may affect arms, legs, tongue, face, mouth, or jaw.

**Synthroid (levothyroxine)**– thyroid hormone used to treat low thyroid activity.

No side effects when appropriately dosed. Excess levels can cause anxiety, diarrhea, flushing, mood swings, muscle weakness, hair loss, sleeplessness, stomach cramps, tiredness, vomiting. Elderly may be more sensitive to its effects, may require a lower than normal dose.

**Zoloft (sertraline)**– antidepressant. Used for treating depression or obsessive-compulsive disorder (OCD).

Can cause anxiety, constipation, decreased sexual desire, diarrhea, dizziness, drowsiness, dry mouth, increased sweating, loss of appetite, nausea, nervousness, stomach upset, tiredness, trouble sleeping, vomiting, weight loss.

Elderly may be more sensitive to its effects, especially low blood sodium levels, Be cautious of possible anorexia (loss of appetite).

# VAMC SLUMS Examination

Questions about this assessment tool? E-mail [aging@slu.edu](mailto:aging@slu.edu).

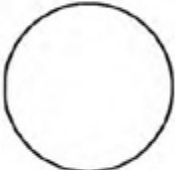
Name \_\_\_\_\_ Age \_\_\_\_\_




Is patient alert? \_\_\_\_\_ Level of education \_\_\_\_\_

\_\_\_\_/1  
\_\_\_\_/1  
\_\_\_\_/1  
  
\_\_\_\_/3  
\_\_\_\_/3  
\_\_\_\_/5  
  
\_\_\_\_/2  
  
\_\_\_\_/4  
\_\_\_\_/2  
  
\_\_\_\_/8

1. What day of the week is it?
2. What is the year?
3. What state are we in?
4. Please remember these five objects. I will ask you what they are later.  
 Apple          Pen          Tie          House          Car
5. You have \$100 and you go to the store and buy a dozen apples for \$3 and a tricycle for \$20.
  - 1 How much did you spend?
  - 2 How much do you have left?
6. Please name as many animals as you can in one minute.
  - 1 0-4 animals    2 5-9 animals    3 10-14 animals    4 15+ animals
7. What were the five objects I asked you to remember? 1 point for each one correct.
8. I am going to give you a series of numbers and I would like you to give them to me backwards.  
 For example, if I say 42, you would say 24.
  - 1 87          2 649          3 8537
9. This is a clock face. Please put in the hour markers and the time at ten minutes to eleven o'clock.
 


- 2 Hour markers okay
  - 2 Time correct


10. Please place an X in the triangle.
 

  - 1 Which of the above figures is largest?
11. I am going to tell you a story. Please listen carefully because afterwards, I'm going to ask you some questions about it.  
 Jill was a very successful stockbroker. She made a lot of money on the stock market. She then met Jack, a devastatingly handsome man. She married him and had three children. They lived in Chicago. She then stopped work and stayed at home to bring up her children. When they were teenagers, she went back to work. She and Jack lived happily ever after.
 

- 2 What was the female's name?
  - 2 When did she go back to work?



- 2 What work did she do?
  - 2 What state did she live in?

TOTAL SCORE \_\_\_\_\_



SAINT LOUIS  
UNIVERSITY



SCORING		
HIGH SCHOOL EDUCATION		LESS THAN HIGH SCHOOL EDUCATION
27-30	Normal	25-30
21-26	MNCD*	20-24
1-20	Dementia	1-19

\* Mild Neurocognitive Disorder

SH Tariq, N Tumosa, JT Chibnall, HM Perry III, and JE Morley. The Saint Louis University Mental Status (SLUMS) Examination for Detecting Mild Cognitive Impairment and Dementia is more sensitive than the Mini-Mental Status Examination (MMSE) - A pilot study. *J Am Geriatr Psych* (in press).

## MOCA-Montreal Cognitive Assessment Test Form

Free Courtesy Copy Provided By:

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MyBrainTest.org provides research and analysis on brain health screening tools, and the cognitive health testing market.

Website: [www.mybraintest.org](http://www.mybraintest.org)

# MEMORY HEALTH CHECK

MemoryHealthCheck is a free resource to learn about human memory, the causes of memory loss, online memory loss tests, and steps you can take to improve your memory.

Website: [www.memoryhealthcheck.com](http://www.memoryhealthcheck.com)

**VISUOSPATIAL / EXECUTIVE**

Copy  
cube

Draw CLOCK (Ten past eleven)  
(3 points)

POINTS

[ ]

[ ]

[ ]	[ ]	[ ]
Contour	Numbers	Hands

\_\_\_/5

**NAMING**

[ ]

[ ]

[ ]

\_\_\_/3

<b>MEMORY</b>	FACE	VELVET	CHURCH	DAISY	RED	
Read list of words, subject must repeat them. Do 2 trials, even if 1st trial is successful. Do a recall after 5 minutes.	1st trial					No points
	2nd trial					

**ATTENTION** Read list of digits (1 digit/ sec.). Subject has to repeat them in the forward order [ ] 2 1 8 5 4  
Subject has to repeat them in the backward order [ ] 7 4 2

\_\_\_/2

Read list of letters. The subject must tap with his hand at each letter A. No points if  $\geq 2$  errors  
[ ] FBACMNAAJKLBAFAKDEAAAJAMOF AAB

\_\_\_/1

Serial 7 subtraction starting at 100 [ ] 93 [ ] 86 [ ] 79 [ ] 72 [ ] 65  
4 or 5 correct subtractions: **3 pts**, 2 or 3 correct: **2 pts**, 1 correct: **1 pt**, 0 correct: **0 pt**

\_\_\_/3

**LANGUAGE** Repeat : I only know that John is the one to help today. [ ]  
The cat always hid under the couch when dogs were in the room. [ ]

\_\_\_/2

Fluency / Name maximum number of words in one minute that begin with the letter F [ ] \_\_\_\_\_ (N  $\geq$  11 words)

\_\_\_/1

**ABSTRACTION** Similarity between e.g. banana - orange = fruit [ ] train - bicycle [ ] watch - ruler

\_\_\_/2

<b>DELAYED RECALL</b>	Has to recall words WITH NO CUE	FACE	VELVET	CHURCH	DAISY	RED	Points for UNCUED recall only
<b>Optional</b>	Category cue	[ ]	[ ]	[ ]	[ ]	[ ]	
	Multiple choice cue						

\_\_\_/5

**ORIENTATION** [ ] Date [ ] Month [ ] Year [ ] Day [ ] Place [ ] City

\_\_\_/6



## The Patient Health Questionnaire (PHQ-9) - Overview

The PHQ-9 is a multipurpose instrument for screening, diagnosing, monitoring and measuring the severity of depression:

- The PHQ-9 incorporates DSM-IV depression diagnostic criteria with other leading major depressive symptoms into a brief self-report tool.
- The tool rates the frequency of the symptoms which factors into the scoring severity index.
- Question 9 on the PHQ-9 screens for the presence and duration of suicide ideation.
- A follow up, non-scored question on the PHQ-9 screens and assigns weight to the degree to which depressive problems have affected the patient's level of function.

### Clinical Utility

The PHQ-9 is brief and useful in clinical practice. The PHQ-9 is completed by the patient in minutes and is rapidly scored by the clinician. The PHQ-9 can also be administered repeatedly, which can reflect improvement or worsening of depression in response to treatment.

### Scoring

See PHQ-9 Scoring on next page.

### Psychometric Properties

- The diagnostic validity of the PHQ-9 was established in studies involving 8 primary care and 7 obstetrical clinics.
- PHQ scores  $\geq 10$  had a sensitivity of 88% and a specificity of 88% for major depression.
- PHQ-9 scores of 5, 10, 15, and 20 represents mild, moderate, moderately severe and severe depression.<sup>1</sup>

1. Kroenke K, Spitzer R, Williams W. The PHQ-9: Validity of a brief depression severity measure. *JGIM*, 2001, 16:606-616

## The Patient Health Questionnaire (PHQ-9) Scoring

### *Use of the PHQ-9 to Make a Tentative Depression Diagnosis:*

*The clinician should rule out physical causes of depression, normal bereavement and a history of a manic/hypomanic episode*

#### **Step 1: Questions 1 and 2**

Need one or both of the first two questions endorsed as a "2" or a "3"  
(2 = "More than half the days" or 3 = "Nearly every day")

#### **Step 2: Questions 1 through 9**

Need a total of five or more boxes endorsed within the shaded area of the form to arrive at the total symptom count. (Questions 1-8 must be endorsed as a "2" or a "3"; Question 9 must be endorsed as "1" a "2" or a "3")

#### **Step 3: Question 10**

This question must be endorsed as "Somewhat difficult" or "Very difficult" or "Extremely difficult"

### **Use of the PHQ-9 for Treatment Selection and Monitoring**

#### **Step 1**

A depression diagnosis that warrants treatment or a treatment change, needs at least one of the first two questions endorsed as positive ("more than half the days" or "nearly every day") in the past two weeks. In addition, the tenth question, about difficulty at work or home or getting along with others should be answered at least "somewhat difficult"

#### **Step 2**

Add the total points for each of the columns 2-4 separately

(Column 1 = Several days; Column 2 = More than half the days; Column 3 = Nearly every day. Add the totals for each of the three columns together. This is the Total Score

The Total Score = the Severity Score

#### **Step 3**

Review the Severity Score using the following TABLE.

PHQ-9 Score	Provisional Diagnosis	Treatment Recommendation <i>Patient Preferences should be considered</i>
5-9	Minimal Symptoms*	Support, educate to call if worse, return in one month
10-14	Minor depression ++ Dysthymia* Major Depression, mild	Support, watchful waiting Antidepressant or psychotherapy Antidepressant or psychotherapy
15-19	Major depression, moderately severe	Antidepressant or psychotherapy
>20	Major Depression, severe	Antidepressant and psychotherapy (especially if not improved on monotherapy)

\* If symptoms present  $\geq$  two years, then probable chronic depression which warrants antidepressants or psychotherapy (ask "In the past 2 years have you felt depressed or sad most days, even if you felt okay sometimes?")

++ If symptoms present  $\geq$  one month or severe functional impairment, consider active treatment

## The Patient Health Questionnaire (PHQ-9)

Patient Name \_\_\_\_\_ Date of Visit \_\_\_\_\_

Over the past 2 weeks, how often have you been bothered by any of the following problems?	Not At all	Several Days	More Than Half the Days	Nearly Every Day
1. Little interest or pleasure in doing things	0	1	2	3
2. Feeling down, depressed or hopeless	0	1	2	3
3. Trouble falling asleep, staying asleep, or sleeping too much	0	1	2	3
4. Feeling tired or having little energy	0	1	2	3
5. Poor appetite or overeating	0	1	2	3
6. Feeling bad about yourself - or that you're a failure or have let yourself or your family down	0	1	2	3
7. Trouble concentrating on things, such as reading the newspaper or watching television	0	1	2	3
8. Moving or speaking so slowly that other people could have noticed. Or, the opposite - being so fidgety or restless that you have been moving around a lot more than usual	0	1	2	3
9. Thoughts that you would be better off dead or of hurting yourself in some way	0	1	2	3

Column Totals \_\_\_\_\_ + \_\_\_\_\_ + \_\_\_\_\_

Add Totals Together \_\_\_\_\_

10. If you checked off any problems, how difficult have those problems made it for you to Do your work, take care of things at home, or get along with other people?
- Not difficult at all     Somewhat difficult     Very difficult     Extremely difficult