

Briefing Document for Legislative Agenda 2019-20 Session
Pennsylvania Association of Elder Law Attorneys' (PAELA)

I. Introduction

The Pennsylvania Association of Elder Law Attorneys (PAELA) is a non-profit association of lawyers who provide legal services to older adults and individuals with special needs. PAELA's mission includes ensuring the development of laws that enhance the lives of our clients while protecting their interests. Our 178 members are from all parts of the Commonwealth and represent some of the most experienced elder law attorneys in private practice.

PAELA has been actively advocating in Harrisburg for over a decade. We welcome the opportunity to serve as a resource on issues impacting older adults and individuals with special needs.

II. Legislative Agenda

1. Implementation of Managed Care and Use of IEB for Home and Community Based Services.

PAELA members are very concerned about the difficulties consumers in PA are having accessing home and community-based services. Attached are comments PAELA submitted to DHS in response to its recent RFI in connection with the enrollment process and IEB contract.

2. Presumptive Eligibility for HCBS – HB 51. PAELA supports this legislation. Many older adults are forced to choose a nursing home over less restrictive home and community-based services because of the lengthy process involved in obtaining eligibility for HCBS. This important legislation would even the playing field and provide a means for eligible individuals to receive presumptive eligibility and retroactive coverage once approved for benefits. Attached is PAELA's letter of support.

3. Powers of Attorney – HB 535. PAELA has concerns about HB 535 and opposes its enactment. PAELA attorneys recognize that it is important to protect principals from financial abuse by agents. But this goal must be balanced with the need to preserve the effectiveness of the power of attorney as a low-cost, flexible, and private form of surrogate decision making. A more detailed outline of our concerns is attached.

4. Older Adult Protective Services Act - HB 205. PAELA is monitoring and has concerns about HB 205 which expands definition of exploitation to include certain actions by Agent under POA. PAELA is also monitoring legislation that will be introduced by Senator Mensch to rewrite the entire OAPSA. Last Session, there was a House and Senate Bill to re-write the statute. PAELA comments to the proposed rewrite from the last session are attached.

5. Physician's Orders for Life Sustaining Treatment (POLST) – SB 142 and HB 987. PAELA supports enactment of this legislation. A copy of our letter of support is attached.

6. **Guardianship Bills** – PAELA is monitoring the following bills:

- a. **SCO 253** – JSGC comprehensive guardianship bill (was SB 844)
- b. **SCO 101** – Peter Falk’s law. *PAELA letter of concern sent.*
- c. **HB 899** – Guardianships and Mental Health Care

In the last session, the Senate passed legislation to amend Pennsylvania law regarding family visitation of incapacitated persons. This Bill, popularly known as Peter Falk’s Law, has been approved in a number of states, but it died in the state House last Session. PAELA opposed the Bill last Session. This Sessions, PAELA has raised strong concerns about a draft Bill, similar to last Session’s Bill, that may be offered this Session. More detailed comments on this issue are attached.

PAELA is monitoring legislation that may be introduced this Session, that was introduced last Session to implement the Joint State Government Commission’s recommendations on comprehensive changes to Pennsylvania’s guardianship law. This was SB 844 from last Session. More detailed comments on guardianship reform are attached.

7. **Fiduciary Access to Digital Assets- SB 320.** PAELA is monitoring SB 320, which will give Pennsylvania residents the power to plan for the management and disposition of their digital assets in the same way they can make plans for their tangible property: by providing instructions in a will, trust, or power of attorney.
8. **Retirement investment protection commission – HB 696.** PAELA is monitoring HB 696, which would establish the Senior Citizen Retirement Investment Protection Commission. The commission would develop public policies, procedures, educational tools and issue a report in an effort to stop this harmful and predatory practice.
9. **Filial support – HB 713.** PAELA opposes HB 713.

HB 535 Comments

PAELA has concerns about HB 535 and opposes its enactment.

The Bill proposes two changes relating to powers of attorney. The first seeks to amend Section 5601(d) of Title 20 of the Pennsylvania Consolidated Statutes. This section provides the Acknowledgment Form that an agent is required to sign in order to have authority to act. HB 535 would add the following language to the Acknowledgment Form:

“I UNDERSTAND THAT IF ANY INTENTIONAL ACT OR OMISSION ON MY PART AS THE AGENT CAUSES HARM TO THE PRINCIPAL, I MAY BE SUBJECT TO CRIMINAL PENALTIES.”

PAELA attorneys recognize that it is important to protect principals from financial abuse by agents. But this goal must be balanced with the need to preserve the effectiveness of the power of attorney as a low-cost, flexible, and private form of surrogate decision making. HB 535 adds nothing substantive to the Crimes Code regarding abusive actions by agents. It implies that imprudent action of an agent or even reasonable conduct that unexpectedly yields harmful consequences places an agent at risk for criminal prosecution. This ambiguous and terribly worrisome general statement might cause a rational person to reconsider taking on the responsibilities of serving as agent.

We need to recognize that most agents are trustworthy, are responding to the needs of the principal, and that their service is a form of caregiving. Serving as agent already involves taking on tremendous responsibilities, burdens and worries. Adding a fear of criminal liability to those burdens and worries will cause trustworthy agents to decline the role, and thus limit the effectiveness of powers of attorney as the primary surrogate decision-making tool in Pennsylvania.

Those few potential agents who have criminal intentions are not going to be deterred by the proposed change to the Acknowledgment Form. It will be the trustworthy agents, already anxious about the potential scope of their responsibilities and liabilities, who will refuse to take them on.

Please also note that the agent’s Acknowledgment Form was changed by Act 95 of 2014, the comprehensive revision to Pennsylvania’s power of attorney law that you were so much a part of passing. It passed without a single dissenting vote in both the House and Senate. HB 535 would effectively amend this well-considered legislation that many stakeholder organizations worked on for over four years.

The second change proposed by HB 535 relates to Section 5604(d) of Title 20 of the Pennsylvania Consolidated Statutes. This change would grant additional authority to protective services agencies to seek confidential records of a principal without the principal’s consent. Specifically, it would require disclosure of confidential information without any evidence of abuse by an agent. A power of attorney enables a principal to choose an agent who is familiar with the principal’s background, values, biases and preferences and to maintain the confidentiality of one’s financial and personal affairs. It enables a principal to protect against the unwanted disclosure of a principal’s sensitive personal information.

HB 535 would allow protective services agencies to step in and second-guess the actions of an agent on mere unsubstantiated suspicion and without any evidence of illegal conduct. Act 95 of 2014 carefully crafted a balance between two competing objectives: (a) preservation of privacy and autonomy of principals; and (b) protection of principals from financial exploitation. HB 535 unacceptably upsets that balance.

OLDER ADULT PROTECTIVE SERVICES – PROPOSED AMENDMENTS

April 19, 2018

Pennsylvania, as has many other states, passed legislation for purposes of protecting abused, neglected, exploited or abandoned elderly individuals, with a uniform statewide reporting and investigating system that dovetails with protective service resources. As of 1987, Pennsylvania's Older Adult Protective Services Act, 35 p.s. Sec. 10225.101, et seq (hereinafter referred to as the "Act") provides protective services to individuals age 60 and over.ⁱ Governor Wolf recently proposed amendments to the Act. PAELA provides the following comments to the proposed amendments on behalf of the families we represent in their efforts to provide a safe environment for their loved ones.

Currently, the primary focus of the Act is mandatory reporting of suspected **physical or sexual** abuse to a resident of a care facility by any employee or administrator of that facility. All reports of abuse are to be reported to the local area agency on aging (AAA) and licensing agencies, with possible additional reporting requirements to the Department of Aging and local law enforcement if the abuse is in the nature of sexual abuse or serious physical injury. As currently enacted, there is no companion provision for financial abuse or exploitation.

The need to enhance protections for financial abuse and exploitation of elders was outlined in the Elder Abuse and Neglect portion of the Pennsylvania Supreme Court Elder Law Task Force Report issued in 2014.ⁱⁱ The proposed amendments expand the definition of elder abuse to include **financial abuse and exploitation**. Since financial institutions can play a vital role in preventing and responding to this type of abuse, the proposed amendments also place a voluntary reporting requirement upon financial institutions.ⁱⁱⁱ

The proposed amendments essentially endorse the wholesale adoption of the FINRA rules recently adopted in February, 2018.^{iv} FINRA is the Financial Industry Regulatory Authority which enacted rules to address financial exploitation of seniors and vulnerable adults, putting in place the first uniform national standards applicable to interaction between seniors and **investment firms**. One rule requires making reasonable efforts to obtain the name and contact information of a trusted contact person for a customer's account. A second rule permits the FINRA member to place a temporary hold on disbursement of funds or securities where there is a reasonable belief of financial exploitation and to notify the trusted contact of the temporary hold. In general, we question the wholesale adoption of this second rule in the broader context of financial abuse and exploitation that occurs outside the investment firm setting. Our specific concerns include the following:

1. The amendments suggest but do not require a training program. If bank staff has the authority to freeze accounts, significant training will need to be done to allow front line bank tellers to **identify** exploitative behaviors and to help back office bank administrators to **respond** appropriately to suspicious activities.
2. The amendments provide for significant delay in accessing the principal's funds (15 business days, with possible addition of 10 more days). A distinction exists between infrequent, often larger, securities transactions that occur in the investment firm setting viz-a-viz daily, usually

- smaller, banking transactions. The FINRA rules do not translate 100% to daily banking situations.
3. Definition of “financial exploitation” – Refers to acts by guardians for which other highly developed statutory provisions (prohibitions, penalties, etc.) already exist.
 4. Definition of “financial exploitation” – Ordinary business transactions by an agent under power of attorney acting under exigent circumstances may involve large amounts and irreversible transactions, but these transactions may very well be clearly within the scope of a legally enforceable grant of authority under the Power of Attorney. We have concern that a front line employee of a bank or credit union will substitute his or her judgment for that of the agent, impinging on the legal rights of customers to privacy and self-determination. Given that the monthly private pay cost of care in a skilled nursing facility can be upwards of \$12,500, significant transactions can occur in the context of obtaining health care, including accessing and depleting accounts to fund long-term care.
 5. Immunity provided to financial services providers is overly broad in that financial services providers face no civil or criminal liability whatsoever for identification of, or failure to identify at all, financial exploitation.^v In contrast, an agent under a power of attorney who is incorrectly flagged by a financial services provider for financial exploitation runs the risk of having his personal accounts frozen for up to 25 days. Regarding this later point, will the risk of frozen personal accounts deter potential agents from being willing to serve as agents? See §301.3(a).
 6. Section 301.3(b) indicates that an agency or law enforcement official provides information to the financial services provider demonstrating that it is reasonable to believe that financial exploitation of an older adult may have occurred; the financial services provider may refuse to disburse funds. Issues unaddressed are:
 - a. What is the definition of agency?
 - b. What if information comes from another source (not an agency or law enforcement official)?
 - c. What about trust accounts for multiple beneficiaries?
 - d. What if an agent engages in gifting clearly authorized under a General Durable Power of Attorney for purposes of income tax, death tax or other planning?

We offer for additional consideration the following activities that financial services providers could perform in their efforts to assist AAA's and law enforcement to protect vulnerable seniors:

1. AAA's currently engaged in investigations report great difficulty in obtaining financial records from financial institutions. Financial services providers could expedite documentation requests from AAA's and provide documents to investigative personnel at no or reduced cost.
2. Extend the FINRA rule for trusted contact concept to financial services providers by allowing older account holders to consent to information sharing with trusted third parties.

3. Financial services providers might also offer opt-in, age-friendly services to enhance protections against financial exploitation such as cash withdrawal limits, geographic transaction limits, alerts for specified account activity, and view-only access for authorized third parties.

Guardianship Reform in Pennsylvania

April 30, 2018

Those of diminished mental capacity, whether caused by the infirmities of age or otherwise, may at some point need assistance with financial and healthcare matters. Many times, a valid power of attorney exists which enables a trusted family member or friend to act on behalf of an incapacitated person. However, there are situations where there is no valid power of attorney, or the named agent is not acting in the person's best interest.

Pennsylvania courts are often called upon to appoint a legal guardian in these cases. A court-appointed guardian is tasked with managing the welfare and financial well-being of an incapacitated person. Guardians can either be family members or unrelated, independent guardians. Independent guardians are often professionals appointed where there is no suitable family member or significant family dysfunction.

Those in need of guardianship are among the most vulnerable in our society and should be afforded the utmost protection by the Pennsylvania legislature and legal system. Guardians must be trustworthy, capable, and subject to ongoing supervision in order to prevent cases of financial exploitation, neglect, and abuse.

PAELA supports steps that can be taken to improve procedures and oversight of the guardianship process. We must have certain fundamental safeguards in place:

1. **Definite Need.** Guardians must not be appointed unless there is clear and convincing evidence of incapacity, and the definite need for guardianship.
2. **Protect the Civil Rights of Alleged Incapacitated Persons.** We need to protect the self-determination, dignity and civil rights of an alleged incapacitated person by making certain that a guardian is not appointed where a less restrictive alternative exists, such as a valid power of attorney. PAELA believes legal representation is appropriate for all non-emergency initial hearings where the alleged incapacitated person is not physically present or participating by video conference, and also when upon being provided the option, the incapacitated person requests a lawyer. Further, legal counsel should be appointed if the incapacitated person objects to a proposed action that requires court approval, such as the sale of the person's home. Incapacitated persons should participate as fully as possible in all decisions which affect them. Every effort should be made to enable the alleged incapacitated person to be seen by the judge, participate in hearings, and object to proposed actions. PAELA recommends careful study of the [Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act](#) (hereinafter, "Uniform Act") drafted by the National Conference of Commissioners on Uniform State Laws, and approved and recommended by them for enactment in all 50 states, November 1, 2017. Section 305 of the Uniform Act recognizes the split of opinion among experts as to whether legal counsel should be appointed in every case. PAELA recognizes that stakeholders will debate whether appointment of legal counsel in every case is necessary or feasible. PAELA recommends enactment of "Alternative A" of Section 305 (a) of the Uniform Act, with the following supplemental language, as underlined below:

SECTION 305. APPOINTMENT AND ROLE OF ATTORNEY FOR ADULT.

Alternative A

(a) The court shall appoint an attorney to represent the respondent in a proceeding for appointment of a guardian for an adult, regardless of the respondent's ability to pay, if:

(1) upon being provided the option, the respondent requests an appointment;

(2) a court-appointed independent medical evaluator recommends an appointment; or

(3) the court determines the respondent needs representation.

3. **Court Supervised Compensation.** Compensation of guardians must be on a modest scale and court-approved, but sufficient to reasonably compensate guardians for work properly performed. Without adequate compensation, high quality individuals, particularly independent guardians, will not be willing to take on this position of responsibility and potential liability.
4. **Oversight.** Adequate oversight of guardians must be in place in order to prevent financial exploitation and neglect.

Although rare, incidents involving alleged financial exploitation of incapacitated persons by independent, professional guardians have occurred. Certain sensible reforms should be considered. Specifically, PAELA suggests discussion and refinement of the following ideas:

- a. **Bonding of Guardians.** As a general rule, guardians should be bonded unless the court finds good cause to waive the bonding requirement. Would you want an unrelated third party to be put in charge of your assets who was not bonded? Section 5515.3 of [SB 884](#) provides detailed provisions for bonding, while still permitting the court to waive bond when it determines bond is not necessary or warranted, as is often the case for modest estates where bonding may be too expensive. Bonding provides an important safeguard to protect the incapacitated person's estate. Further education about bonding procedures could make the practice easier and more widespread.
- b. **Criminal Background Checks.** PAELA supports [HB 2247](#) to the extent it subjects proposed guardians to criminal background checks and would prevent felons convicted of financial crimes from serving as guardians of the estates of incapacitated persons. We express concern, however, that this proposed law casts too wide a net, and believe the ultimate fitness of a proposed guardian should be determined by the court after evaluation of the facts. The court should have the discretion to determine whether a given crime renders a proposed guardian unfit to serve. PAELA opposes HB 2247's requirement that the proposed guardian must provide validation that he or she is eligible to legally work in the

United States because this could impede the court's ability to appoint a person, with appropriate bonding, who might otherwise be entirely fit to act in the incapacitated person's best interests.

- c. Credit Check. Would you want to put a person with bad credit in charge of paying your own bills? The proposed guardian to be placed in total control of another person's financial affairs should be encouraged by the court to provide documentation of their current credit score in order to verify that they are managing their own financial matters with responsibility. This information is readily available online. Alternatively, if a bonding requirement were to be incorporated into the guardianship process, the bond agency automatically runs a credit check in the normal course of their due diligence before issuing a bond.
- d. Certification of Guardians. Professional guardians in other states are required to be certified. The [National Guardianship Association](#), headquartered in Pennsylvania, provides a certification process and sets forth high [standards of practice](#) for its membership. PAELA does not believe certification should be legally required, but supports certification in concept and believes such a credential should be among the factors considered by the court.
- e. Online Education Course for Non-Professional Guardians. Non-professional guardians should complete an online education course before being appointed. This course would inform guardians of their legal duties, including their responsibilities to maintain accurate records, to ask the court for approval before expending principal, and to seek legal advice as needed. Such an online course should warn non-professional guardians of the civil and criminal consequences of breaching their fiduciary duties. A website could serve as a portal for such certification, and provide a resource with free and accurate content supplied by interested stakeholders, including but not limited to orphans' court judges and practitioners.
- f. Ongoing Oversight. The following oversight options are offered by PAELA for discussion and refinement:
 - i. Review of Guardianship Reports. There should be regular review of guardianship reports by the court, officers of the court, or court-appointed auditors. These reviews should be followed-up with appropriate inquiry, especially in cases where there appears to be a marked decline in assets, or disbursements made without court authorization. PAELA firmly supports [HB 1886](#) which requires the orphans' court clerk to regularly provide the court with lists of guardians who are late by 30 days or more in filing required reports, and provides further that the court shall take appropriate enforcement action against noncompliant guardians. Additionally, [HB 1886](#) makes clear that the court must develop a procedure for the examination of the annual

reports in order to help make sure guardians are acting in the best interests of incapacitated persons. PAELA urges that there should be near automatic review hearings scheduled for those guardians who do not respond to the court's enforcement actions.

- ii. Courtesy Contact. Non-confrontational courtesy phone calls, e-mail, or other communications should be directed to guardians confirming receipt of required reports. Such routine contact would remind guardians of the presence of court supervision, confirm basic legal duties, and recommend that guardians seek legal guidance if they need advice. Guardians should know that their actions are actually being monitored and reviewed. Simple phone calls could reveal "at risk" situations and uncover cases where a review hearing would be in the best interests of an incapacitated person.
 - iii. Limited audits. Random "limited audits" of financial statements could catch problems not evident on annual reports. The limited audit could be something as basic as an officer of the court asking for the last year's worth of checking account statements. A simple request would remind the guardian that their actions are being watched. Section 751(7) of [Senate Bill 884](#) provides for such court-appointed examiners, by general rule or specific order, empowering them to make periodic or special examinations of expenditures, disbursements and withdrawals of a guardian of the estate of an incapacitated person, and require the guardian to present financial records for examination.
 - iv. Failure to Submit Required Reports. Guardians who, after notice, fail to submit required reports should be summoned to a review hearing, subject to audit, and potentially removed.
 - v. Consequences for Unauthorized Disbursements. Guardians who make improper disbursements of funds should be denied compensation and surcharged in appropriate cases.
 - vi. Public and Private Partnership. Courts should work with local bar associations to generate oversight solutions that would be appropriate and cost-effective for their local jurisdiction.
- g. Criminal Prosecution. Guardians who steal from their wards should be subject to criminal prosecution.
 - h. Guardianship Recovery Fund. Other industries, including the legal profession, have a recovery fund so that those financially victimized by an unscrupulous professional can seek recovery. A guardianship recovery fund could be created to provide some payment to those incapacitated persons who have been victimized

by a court-appointed independent guardian. Such a fund might encourage families to be more accepting of independent paid guardians, and result in a smoother running, professional, and trusted guardianship process in Pennsylvania. Since instances of financial exploitation by professional guardians are rare, and if court-appointed guardians are also required to be bonded in all cases, then the need to access this fund would be limited.

- i. PA Legislature Needs to Fund Guardianship Oversight. Unless legislative efforts to implement ongoing oversight are funded they will not happen, and despite the best efforts of the court system, incapacitated persons will remain systemically vulnerable to financial exploitation by the very people appointed to protect them. Funding is needed for the following:
 - i. To support a system to issue certifications and re-certifications for professional guardians.
 - ii. To create and maintain a statewide informational website and an online education course for non-professional guardians.
 - iii. To pay for random partial audits of financial statements.
 - iv. To potentially pay for in depth audits where the court believes good cause exists and funds are not otherwise available.
 - v. To support pro bono legal service organizations in providing lawyers for incapacitated persons who cannot afford legal counsel, and to represent guardians of modest means who need legal advice.
 - vi. To create a recovery fund where those who have been the victims of financial abuse by a court-appointed independent guardian can make a claim.

GUARDIANSHIP VISITATION LEGISLATION ACROSS THE COUNTRY & IN PA

April 30, 2018

Guardianship actions often occur in the context of complex family dynamics where family members or friends simply do not agree as to management of the financial and personal issues of the incapacitated person. In recent years, two prominent public figures, Peter Falk and Casey Kasem, have been the subject of contentious guardianship actions where visitation rights by adult children of a first marriage are restricted or even cut off by a second spouse, as appointed guardian. Restrictions created by the 2nd spouse acting as guardian extended to death notification and funeral/burial arrangements. Currently the adult children of Messrs. Falk and Kasem are pursuing legislative solutions to acknowledge rights and mandate processes for the resolution of future cases. Is it possible to legislate an appropriate balance between first, and second, family visitation rights and protection of an incapacitated person from predatory first, and second, family members?

PA Senate Bill 113 (SB113) is Pennsylvania's version of what is commonly referred to as the Peter Falk Law and provides that unless specifically authorized by court order, no guardian may restrict visitation. Rather, a guardian is required to file a petition and show good cause to obtain a court order to limit ability to communicate or visit or interact with a person adjudicated to be incapacitated.

In comparison, New York's Peter Falk Law incorporates visitation issue conflicts in the initial guardianship proceeding. Under current NY law, the court, when appointing a guardian, identifies person(s) entitled to receive notice of the alleged incapacitated person's death, intended disposition of remains, funeral arrangements and resting place. Further, the court order MAY identify persons entitled to visit the alleged incapacitated person, if the incapacitated person chooses to participate in a visit.

Under current provisions of Pennsylvania law, broad statutory provisions set forth general guidance regarding visitation issues. Probate Estate and Fiduciary Code §5521 requires a guardian to consider the expressed wishes and preferences of an incapacitated person and respect these wishes to the extent possible. Further, the guardian is to encourage the incapacitated person to participate to the maximum extent possible in all decisions which affect him, to act on his own behalf whenever he is able to do so, and to develop or regain, to the maximum extent possible, his capacity to manage his personal affairs. Unfortunately, these general provisions do not adequately address intra-family control issues when a guardian, rightly or wrongly, feels that his ward is subject to undue influence or coercion by a potential visitor and does not believe the ward's best interests are served by allowing visitation.

If Pennsylvania is to proceed with its consideration of such legislation, PAELA offers the following recommendations:

1. Structure the legislation to address these personal controversies at the beginning of the guardianship action.
2. Require identification of person(s) entitled to receive notice of the alleged incapacitated person's death, intended disposition of remains, funeral arrangements and resting place. Specifically, how are we to define terms such as "family," "immediate family," "parties in interest," etc.

3. Permit identification of persons entitled to visit the alleged incapacitated person if the alleged incapacitated person chooses to participate in the visit. One mechanism to address the likely ongoing scheduling and monitoring of visits could be to require the guardian to employ a licensed social worker to manage the likely continuing dynamics of the family without court intervention.
4. Are first, and second, family visitation rights a problem in Pennsylvania? Legislators would do well to ask the members of the Orphans' Court Bench regarding their perceptions as to best practices useful in resolving these thorny issues. Changes to the law should be made only after receiving input from the stakeholders affected by the legislation, especially the judges who would be charged with implementing such a new law.

ⁱ In 2010, the Adult Protective Services Act of October 7, 2010, P.L. 484, No 70 was enacted to provide protective services to adults between the ages of 18-59.

ⁱⁱ <http://www.pacourts.us/assets/files/page-543/file-4023.pdf?cb=1524152425055>

ⁱⁱⁱ The proposed legislation also includes important provisions that expand the definition of facilities to include assisted living necessitated by the enactment of Pennsylvania law and regulations creating this additional category of facility.

^{iv} See <http://www.finra.org/newsroom/2018/new-finra-rules-take-effect-protect-seniors-financial-exploitation>.

^v See Section 301.3.(g) of proposed legislation.