

## Elder Law Insights Future of the Elder Law Practice

**Bernard A. Krooks**  
J.D., CPA, LLM (in taxation)  
CELA, AEP® (Distinguished)  
Littman Krooks LLP  
[www.littmankrooks.com](http://www.littmankrooks.com)



LITTMAN KROOKS  
LLP

1

---

---

---

---

---

---

---

---

## Future of Elder Law

- Has the ship already sailed
- OBRA 1993
- Granny goes to jail
- Granny's lawyer goes to jail
- DRA 2005
- Block grants
- No crystal ball

LITTMAN KROOKS  
LLP

2

---

---

---

---

---

---

---

---

## LBJ - 1965

- "Every citizen will be able, in his productive years when he is earning, to insure himself against the ravages of illness in his old age. No longer will illness crush and destroy the savings that they have so carefully put away over a lifetime so that they might enjoy dignity in their later years"

LITTMAN KROOKS  
LLP

3

---

---

---

---

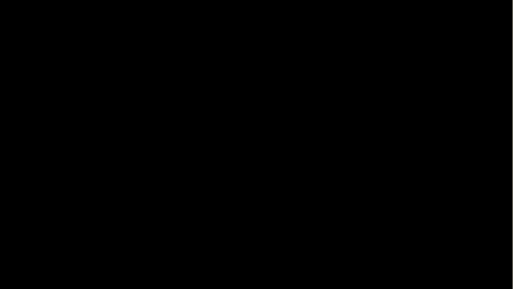
---

---

---

---

**LBJ Video**



LITTMAN KROOKS LLP

4

---

---

---

---

---

---

---

---

**Future of Elder Law**

- Tip of the iceberg
- Aging population
- 40 million Americans over age 65
  - 13% of the population
  - 25% of these people will live past age 90
  - 10% will live past age 95
  - Over 10,000 people turn 65 every day

LITTMAN KROOKS LLP

5

---

---

---

---

---

---

---

---

**Graying of America**

- By 2050, over 65 population expected to increase to 88.5 million
  - 20% of the population
  - Fastest growing segment is age 85 and older
- Average life expectancy is 79 years
  - Higher for most of our clients
  - 46 years in 1900
- Quantity of years/quality of life
  - Live long enough and eventually the body fails

LITTMAN KROOKS LLP

6

---

---

---

---

---

---

---

---

### Alzheimer's Disease

- Over 5.7 million Americans have Alzheimer's disease
  - By 2050, this number will triple
- 200,000 people under age 65
- Every 65 seconds, someone in the U.S. gets Alzheimer's disease
  - By 2050, every 33 seconds
- Deaths from Alzheimer's disease have more than doubled in past two decades while deaths from other diseases have declined

LITTMAN KROOKS LLP

7

---

---

---

---

---

---

---

---

### Alzheimer's Disease

- Most expensive disease in the nation
- Current annual cost of care is \$277 billion
  - Cancer costs \$96 billion annually
  - Cost projected to rise to \$1.2 trillion in 2050
  - Government picks up about 68% of the cost
- 20% of all Medicare dollars spent is on people with Alzheimer's disease or dementia
- Cost of health care may impact ability to gift or create family legacy

LITTMAN KROOKS LLP

8

---

---

---

---

---

---

---

---

### Elder Law Myths

- It won't happen to me
- I'm never going into a nursing home
- Medicare will pay for cost of my care
- Long-term care is not that expensive
- I am not responsible for my spouse's care
- I can and will make my own decisions

LITTMAN KROOKS LLP

9

---

---

---

---

---

---

---

---

### Baby Boomers

- Largest inter-generational wealth transfer in history
  - Over the next 25 years
  - More than \$68 trillion
    - More than \$9 trillion held in IRAs
      - SECURE Act
- Beneficiaries not prepared to manage this inherited wealth
  - Values
  - Family discussion
  - Trusts

LITTMAN KROOKS LLP

---

---

---

---

---

---

---

---

10

### Trusts

- Increased use of trusts
- Non-tax reasons
  - Death
  - Divorce
  - Spendthrift
  - Creditor protection
  - Non-traditional families
  - Special needs
- Longer duration
  - Drafting issues/statement of intent
  - Trust administration

LITTMAN KROOKS LLP

---

---

---

---

---

---

---

---

11

### Beneficiaries with Special Needs

- More than 40 million Americans living with a disability
  - Intellectual
  - Physical
  - 12% of U.S. population
  - As many people as entire state of California
- One in 6 children ages 3 to 17 have one or more developmental disabilities
- One in 59 children have autism

LITTMAN KROOKS LLP

---

---

---

---

---

---

---

---

12

### Estate Taxes

- Federal estate taxes not a concern for most
  - Approximately 1,800 estate tax returns showing a tax due were filed last year
  - Raises less than \$15 billion annually
  - Less than .1% of the 2.7 million people who died
- Estate tax planning less important

LITTMAN KROOKS LLP

---

---

---

---

---

---

---

---

13

### Shift in Practice Areas

- Shift in focus to state estate taxes, income tax and long-term care planning
  - PA inheritance tax
  - Other states have state estate taxes
  - Greater focus on lifetime planning instead of death planning
  - Clients will need more help and advice re: long-term care issues

LITTMAN KROOKS LLP

---

---

---

---

---

---

---

---

14

### Shift in Practice Areas

- Guardianship/contested
- Estate litigation
- Fiduciary litigation
- Capacity/ethical issues
- Elder abuse
- Special needs planning
- Retirement planning
- Medicaid planning
- ACTEC

LITTMAN KROOKS LLP

---

---

---

---

---

---

---

---

15

**Challenges**

- Competition
  - Elder law attorneys
  - Non-elder law attorneys
  - Other professionals
    - Care managers
    - Financial advisors
    - Accountants
- Commoditization

LITTMAN KROOKS  
LLP

16

---

---

---

---

---

---

---

---

**Challenges**

- Quick question
- Free advice
- Forms/internet
- Attorney and counselor at law
  - Not scriveners
  - Resist temptation to go bottom fishing
  - Ideal client

LITTMAN KROOKS  
LLP

17

---

---

---

---

---

---

---

---

**Elder Law Insights**

- Identify client
- Eye contact
- Connect with client
  - Share personal experiences
  - Career path
  - Humanize yourself
- No interruptions
  - Be present; feet on the ground
- Be a good listener

LITTMAN KROOKS  
LLP

18

---

---

---

---

---

---

---

---

**Elder Law Insights**

- Explain in plain English
- Client not interested in your tools; just how they help
  - Don't spend too much time on details
  - Client may get confused
- Set expectations and then exceed them
- Be honest with client even if they don't want to hear it

LITTMAN KROOKS LLP

---

---

---

---

---

---

---

---

19

**Elder Law Insights**

- Meet alone
  - ABA pamphlet
  - Why am I left in the waiting room?
- Helps family members understand relationship between attorney and client
- Four C's of elder law ethics
  - Client identification
  - Conflicts of interest
  - Confidentiality
  - Competency

LITTMAN KROOKS LLP

---

---

---

---

---

---

---

---

20

**Elder Law Insights**

- Family lawyer
- ACTEC Commentaries
- NAELA Aspirational Standards
- Permission to speak
- Conflict waiver
  - Married couple
  - Adult children

LITTMAN KROOKS LLP

---

---

---

---

---

---

---

---

21

### Elder Law Insights

- Take good notes
  - Handwritten
  - Computer/iPad
- Not all clients are created equal
- Prioritize
- Client for life
  - Relationship with adult children

LITTMAN KROOKS  
LLP

22

---

---

---

---

---

---

---

---

### Elder Law Insights

- Engagement letter
  - Billing policies
  - Email response time
  - Snail mail
  - Responsibility to update
  - Quick question after matter is concluded
  - Fee dispute
    - Arbitration
  - File retention policy
  - Electronic storage

LITTMAN KROOKS  
LLP

23

---

---

---

---

---

---

---

---

### Elder Law Insights

- Draft estate plans that work
  - Provide for possible contingencies
    - Life is fluid; estate plan should also be
- Anticipate potential changes in lives of clients and beneficiaries in the planning process
  - Carry out the wishes of the client
  - Incorporate client's goals
  - Avoid litigation

LITTMAN KROOKS  
LLP

24

---

---

---

---

---

---

---

---



### Choice of Fiduciaries

- Key to proper estate plan
  - Not enough time spent on this
- Perfectly drafted estate planning documents will likely fail without proper fiduciary
- Trustee
  - Corporate v. individual
  - Powers
  - Successor trustee

LITTMAN KROOKS LLP

25

---

---

---

---

---

---

---

---

### Choice of Trustee

- Depends on several factors
  - Duration of trust
  - Value of trust assets
  - Type of assets in trust
  - Beneficiaries of trust
    - Special needs/spendthrift
  - Distribution standards
    - Discretionary distributions are more complicated to administer

LITTMAN KROOKS LLP

26

---

---

---

---

---

---

---

---

### Revocable Trusts

- Incapacity of Settlor
- Removal of trustee for incapacity
  - How to determine incapacity
    - Sensitive issue for clients
    - Difficult to confront one's own mortality or incapacity
    - Concern that a third-party will too quickly judge them incapacitated and they will lose control of their own assets
  - Failure by trustee to cooperate/HIPAA waiver

LITTMAN KROOKS LLP

27

---

---

---

---

---

---

---

---

**Sterling v. Sterling**

- L.A. Clippers owned by revocable trust
- Donald and wife Rochelle were co-trustees
- NBA imposed lifetime ban on Donald resulting in need to sell team
- Trustees both agreed to sale of team
- Donald later changed his mind
- Trust provided that any individual deemed incapacitated shall cease to serve as trustee
- Rochelle attempted to remove Donald

LITTMAN KROOKS LLP 28

28

---

---

---

---

---

---

---

---

**Sterling v. Sterling**

- Definition of incapacity
  - Two licensed physicians examine the trustee and certify in writing that he is incapacitated
  - Regularly called upon in their practice to determine capacity of others
  - Neither related by blood or marriage to any trustee or beneficiary
- Donald removed as trustee and team sold

LITTMAN KROOKS LLP 29

29

---

---

---

---

---

---

---

---

**Amend Trust**

- Can someone other than settlor make modifications in event of incapacity
  - Are these powers reserved solely to the Settlor
  - Agent under power of attorney
  - Guardian
  - Trustee
  - Trust protector
  - Proper hierarchy
  - Conflict resolution provision

LITTMAN KROOKS LLP 30

30

---

---

---

---

---

---

---

---

### Doyle v. Hood

- Doyle hired Hood to prepare SNT f/b/o wife
- Trust to be funded upon Doyle's death
- Wife had Alzheimer's disease
- Hood drafted SNT in revocable living trust
- After Doyle's death, wife entered nursing home
- Assets in SNT were considered available
- Trustee of SNT filed malpractice claim
- Statute of limitations had expired

31

---

---

---

---

---

---

---

---

### Trust Distribution Standards

- Wholly discretionary
- Ascertainable standard
  - HEMS
- Mandatory distribution of income or principal
  - Unitrust
- Special needs trust
  - Contingent SNT

32

---

---

---

---

---

---

---

---

### Support v. Discretionary

- Support trusts are usually available since a beneficiary can compel trustee to make distributions
- Discretionary trusts are not usually available since a beneficiary cannot compel trustee to make a distribution
- Settlor's intent
  - Supplemental language expressly stated
  - If not specifically stated, then factual determination must be made

33

---

---

---

---

---

---

---

---

### Distribution Standards

- Provides a level of entitlement to beneficiaries
  - Income
  - Unitrust amount
  - Ascertainable standard
    - Health, education, maintenance, support
- Reduce flexibility
  - Harder for trustee to deal with future issues

LITTMAN KROOKS LLP 34

---

---

---

---

---

---

---

---

34

### Ascertainable Standard

- Caveat Emptor
  - Boilerplate language
- HEMS
  - What does it mean
    - PhD or adult education class on meditation
    - Ferrari or Ford
  - Discuss with client
  - Principal invasion in case of need
  - Eliminate conflicting provisions
  - Consider other resources

LITTMAN KROOKS LLP 35

---

---

---

---

---

---

---

---

35

### Consider Other Resources

- Trust is silent
  - Restatement (Third) of Trusts §50
  - Other resources are generally considered but trustee has some discretion
  - Consider beneficiary's income and other periodic receipts
- Drafting issue
  - Specify whether other resources should be considered and which ones

LITTMAN KROOKS LLP 36

---

---

---

---

---

---

---

---

36

### Consider Other Resources

- Other income v. other sources of income
  - Convert non-income producing property to income-producing property
- Other assets
  - Must some or all be liquidated
- Accustomed standard of living
  - Restatement (Third) §50
  - At time irrevocable trust is created

LITTMAN KROOKS LLP

37

---

---

---

---

---

---

---

---

### Medicaid Trusts

- Five-year look-back for outright gifts
  - Increased use of trusts
- Control
  - Sprinkling provision
  - Limited power of appointment
    - Testamentary
    - Lifetime
- Power to change trustee

LITTMAN KROOKS LLP

38

---

---

---

---

---

---

---

---

### Medicaid Trusts

- Creditor protection
  - Death, divorce, litigation
- Income payable to settlor
  - Or not
  - Shift in investment focus prior to applying for Medicaid
  - Tax exempt bonds
  - Growth stocks
- Trust tax rates

LITTMAN KROOKS LLP

39

---

---

---

---

---

---

---

---

### Medicaid Trusts

- Grantor trust
  - Over income
  - Over principal
    - Section 121 exclusion
  - Substitute property of equivalent value
  - Lifetime power of appointment
  - Power to lend
    - Not to grantor
  - Medicaid concerns

LITTMAN KROOKS LLP

40

---

---

---

---

---

---

---

---

### Medicaid Trusts

- Basis step up
- Real property exemptions
- Life interest
  - Life estate
- Right to occupy
  - Enter nursing home
  - Right to sell
  - Sales proceeds considered principal
- Who pays maintenance expenses

LITTMAN KROOKS LLP

41

---

---

---

---

---

---

---

---

### Medicaid Trusts

- Funding issues
- Highly appreciated assets
- Income producing assets
  - Pre-nursing home
  - Post-nursing home
- Trustee discretion to determine income or principal

LITTMAN KROOKS LLP

42

---

---

---

---

---

---

---

---

### Long-Term Care Insurance

- Fewer choices
  - Fewer products
  - Fewer companies
- Pays for only 7% of all long-term care costs
- 8 million policy holders
  - Sales relatively flat past 10 years
  - New policy sales are way down from 2002
  - Speak to adult children

LITTMAN KROOKS LLP 43

43

---

---

---

---

---

---

---

---

### Long-Term Care Insurance

- Prices continue to rise
- Low interest rates
- Claims rose more than projected
- Lapse rate
- Life expectancies
- Health care costs
- High capital requirement

LITTMAN KROOKS LLP 44

44

---

---

---

---

---

---

---

---

### Long-Term Care Insurance

- More conservative underwriting
- Tougher approval process
- Higher costs for women
  - Responsible for 67% of all claims (\$\$)
  - Own 58% of all policies
- Hybrid products
- Partnership policies
- One size does not fit all
- Fewer choices of companies

LITTMAN KROOKS LLP 45

45

---

---

---

---

---

---

---

---

### Deductibility of LTCI Premiums

- Age 40 or less \$430
- Over 40-50 \$810
- Over 50-60 \$1,630
- Over 60-70 \$4,350
- Over age 70 \$5,430
- State tax credit or deduction
- 7.5% medical expense threshold

LITTMAN KROOKS LLP 46

46

---

---

---

---

---

---

---

---

### Deductibility of LTCI Premiums

- C corporation
  - Executive benefit
  - Fully deductible as a business expense
  - Not imputed income
  - Not subject to ERISA
  - Receipt of LTCI benefits are tax-free to the executive

LITTMAN KROOKS LLP 47

47

---

---

---

---

---


---

---

---

### Tax Treatment of Benefits

- Benefits received under a qualified LTC policy are not considered taxable income
- Tax-free cap of \$380/day applies to indemnity policies



LITTMAN KROOKS LLP 48

48

---

---

---

---

---

---

---

---



### Long-Term Care Insurance

- Work with reputable agents
- Financial stability of insurance company
- Determine payment source
- Third party lapse notification
- Still makes sense for some
- Insure part of the cost
- Avoid family disputes

LITTMAN KROOKS  
LLP

49

---

---

---

---

---

---

---

---

### Long-Term Care Insurance

- Evaluate existing policies
  - Premiums can increase
- Suggest health clients/family consider
- Is LTCI really insurance?
  - Risk management strategy
- Short-term care insurance
  - Typically provides coverage for one year or less
  - No elimination period

LITTMAN KROOKS  
LLP

50

---

---

---

---

---

---

---

---

### Short-Term Care Insurance

- Declined for LTCI
- Less expensive than LTCI
- Easier underwriting than LTCI
- Over age 80
- Pricing is not gender-based
- You have LTCI and want to cover the elimination period

LITTMAN KROOKS  
LLP

51

---

---

---

---

---

---

---

---

**SECURE Act**

- No surprise; been discussed for more than 5 years
- IRA never intended to be wealth transfer vehicle
- \$15.7 billion raised over 10 years by restricting stretch
- Lifetime RMD now age 72
- No post death RMDs
- 10-year rule

LITTMAN KROOKS LLP

52

---

---

---

---

---

---

---

---

**SECURE Act**

- Exceptions:
  - Spouse
  - Disabled or chronically ill individuals
  - Individuals who are not more than 10 years younger than IRA owner (sibling)
    - 10-year rule at death
  - Minor children
    - Lasts only until majority (18 or 21)
    - Then 10-year rule kicks in
    - Not step-children or grandchildren

LITTMAN KROOKS LLP

53

---

---

---

---

---

---

---

---

**SECURE Act**

- Disabled as defined by IRC§72(m)(7)
  - Unable to engage in substantial gainful activity
  - IRS definition; not SSA
- Chronically ill within meaning of IRC§7702(B)(c)(2)
  - 2 ADLs or cognitive impairment
- Determination made on death of owner
- Caveat re: pot trusts

LITTMAN KROOKS LLP

54

---

---

---

---

---

---

---

---

**SECURE Act**

- Use separate trusts and leave retirement benefits to SNT
- Poison pill provision
- Trust termination provision
- Create trust in tax-friendly state
- Age of oldest beneficiary no longer matters on accumulation trust
- Conduit trusts
  - Second marriage

LITTMAN KROOKS  
LLP

55

---

---

---

---

---

---

---

---

**SECURE Act**

- More flexibility to take distributions not in prime earning years
  - Can take at end of tenth year
- Take a fresh look at Roth conversion
  - Pay taxes outside of IRA
  - Possible increase in tax rates
- Charitable remainder trusts
- Life insurance trusts
- No regulations

LITTMAN KROOKS  
LLP

56

---

---

---

---

---

---

---

---

**SECURE Act**

- Review existing estate plans for people who didn't die before 1/1/20
- Roth converters who already paid the tax
- What's next
  - End back door Roth
  - RMDs for Roth
  - Scale back deductions for IRA and 401k
  - Cap the size of retirement plans
    - Current proposal \$3.4M (index for inflation)

LITTMAN KROOKS  
LLP

57

---

---

---

---

---

---

---

---

### Choice of Agent under POA

- One agent v. multiple agents
- Successor agent
- Co-agents
  - Act together or separate
- Monitor
- Compensation
- Springing v. immediately effective
- Revocation of prior powers of attorney

LITTMAN KROOKS LLP

58

---

---

---

---

---

---

---

---

### Power of Attorney

- Take steps to ensure POA will be honored
- Send to financial institutions
- Execute their own form in addition to yours
- Hot powers
  - Gifting
    - Annual exclusion
    - Unlimited
    - Prior pattern
    - Gifts to agent

LITTMAN KROOKS LLP

59

59

---

---

---

---

---

---

---

---

### POA Hot Powers

- Exercise power of appointment
- Disclaimer
- Waive elective share
- Replace trustee
- Waive arbitration
- Deal with IRS
- Hire counsel/waive attorney client privilege

LITTMAN KROOKS LLP

60

60

---

---

---

---

---

---

---

---

### Digital Assets

- Need to access this info/property upon incapacity or death
  - Must act quickly, some information gets automatically deleted after a period of time
  - Many bills/statements delivered by email, not snail mail
  - Services exist that will locate digital assets for a fee

LITTMAN KROOKS LLP

61

---

---

---

---

---

---

---

---

### Digital Assets

- Update list of digital assets and passwords
  - Discuss with digital asset fiduciary
- Maintain list in accessible place
  - Consider online storage of list
- Terms of service agreement
- Digital asset fiduciary
- Digital asset fire drill

LITTMAN KROOKS LLP

62

---

---

---

---

---

---

---

---

### Elder Financial Abuse

- Crime of the 21<sup>st</sup> century
- Underreported crime
  - Approximately 1 in 15 cases are reported
- Affects 1 in 10 people over age 60
  - Costs seniors more than \$3 billion annually
- Difficult cases to prosecute
  - Victim often reluctant to testify
  - Not many cases make it to trial; plea bargain

LITTMAN KROOKS LLP

63

---

---

---

---

---

---

---

---

### Elder Financial Abuse

- Internet and phone scams
  - IRS
  - Lottery winner
  - Grandparent scams
  - Facebook connections to see family
- Two-thirds of financial elder abuse is committed by family members

LITTMAN KROOKS  
LLP

---

---

---

---

---

---

---

---

64

### Elder Financial Abuse

- Senior Safe Act
  - Enacted on May 24, 2018
  - Reporting suspicions made easier
  - Provides immunity to investment advisors, bankers and others who act in good faith to report elder abuse and financial exploitation to a regulatory or law-enforcement agency
  - Does not require disclosure
  - To qualify for immunity, employees must receive training; balance privacy interests

LITTMAN KROOKS  
LLP

---

---

---

---

---

---

---

---

65

### Elder Financial Abuse

- New FINRA rules
  - Requires brokers to ask clients for trusted person to contact if abuse is suspected
  - Client does not have to provide; broker must ask
  - Confidential information is not disclosed
  - Safe harbor rule allows for 15-day hold on disbursements if abuse is suspected
  - Can be extended by 10 days if necessary
  - No guidance on what should be done

LITTMAN KROOKS  
LLP

---

---

---

---

---

---

---

---

66

### Trusted Contact Person

- Ask clients and advisor if they have a TCP
- TCP could be the abuser
  - Alerted to more accounts
- Incorporate into estate planning documents
  - Conflict if TCP is different from POA agent
  - Should lawyer be contacted if broker suspects abuse or if TCP is changed
    - Sign of exploitation
    - Change EP documents to avoid conflict

LITTMAN KROOKS  
LLP

---

---

---

---

---

---

---

---

67

### Elder Financial Abuse

- Revocable trust
  - Successor corporate trustee
- Bifurcate responsibilities
- Caregiver background checks
  - Work with agency
- Communication among advisors
  - Team approach

LITTMAN KROOKS  
LLP

---

---

---

---

---

---

---

---

68

### Elder Financial Abuse

- Role of attorneys
  - Model rule 1.14
  - Attorney/client privilege
  - If you are complacent, are you complicit
  - Permission in retainer agreement to speak to others/APS
- Outside services
  - Monitor bank and investment accounts for unusual activity
  - Bill-paying service for seniors

LITTMAN KROOKS  
LLP

---

---

---

---

---

---

---

---

69

**Thank You!**

**Bernard A. Krooks**

**Littman Krooks LLP**

JD, CPA, LL.M, CELA, AEP (Distinguished)  
[www.littmankrooks.com](http://www.littmankrooks.com)

LITTMAN KROOKS  
LLP

70

---

---

---

---

---

---

---

---

70