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## Symposium

### Capacity, Conflict, and Change: Elder Law and Estate Planning Themes in an Aging World

#### Introduction

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The 2012-13 Symposium Issue of the *Penn State Law Review* arose out of collaboration between two sections of the Association of American Law Schools (AALS) for the Annual Meeting in January 2013 in New Orleans. The leadership of the Section on Trusts and Estates and the Section on Aging and the Law recognized the potential for differing views on common problems, views that could influence our teaching of separate courses on wills, trusts, and estates; estate tax planning; and elder law. The leaders encouraged a dialogue among our members, both during the annual meeting and through a call for papers for this issue of the *Penn State Law Review*. We are thankful to John Marshall Law School Professor Barry Kozak, chair of the Section on Aging and the Law, and New York Law School Professor William LaPiana, chair of the Section on Trusts and Estates, for collaboration that has produced a rich compendium of thought.

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The need for careful consideration of legal issues in post-retirement planning begins with recognition of demographic changes in both the absolute numbers of elders and the proportion of populations who are older. In his seminal work on what he terms the “Age of Aging,” London economist George Magnus,<sup>1</sup> provides a detailed portrait of the changing world expectations about length of life, summarized with this paragraph:

In North America and most of western Europe, males can expect to live to about 75-76 and females to about 81. By 2050 life expectancy will have risen to about 80-81 for men and 85 for women. In Asia and Africa, increases in life expectancy are forecast to be even sharper. Asian males and females today have life expectancy of 67 and 71 years respectively, but by 2050, it is expected to have risen to 77 and almost 80 respectively. In Africa, male and female life expectancy is forecast to rise from 49 and 50 years to almost 64 and 67, respectively.<sup>2</sup>

As the number of older persons increases, the relative proportion of older to younger persons is also changing, “which in turn will have enormous economic and financial consequences.”<sup>3</sup> In Western nations, the increase in life span and the decrease in the number of younger workers or family members able to provide care or supportive services raise the level of concern about potential physical or mental disability, including cognitive changes associated with age, such as Alzheimer’s disease or other forms of dementia.<sup>4</sup> Some believe that, “as life is extended and death occurs at older ages, individuals are more likely to spend greater time in disabled or severely restricted states with mental impairment before they die.”<sup>5</sup>

At the outset of this issue, we present the transcript of our AALS discussion, and do so with great appreciation for the talents and patience of the editors who helped to finalize the written record of the presentations, including Executive Articles Editor, Sarah Ann Hyser; Managing Editor, Jacqueline Marie Motyl; Articles Editor, Shauna D.

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1. GEORGE MAGNUS, *THE AGE OF AGING: HOW DEMOGRAPHICS ARE CHANGING THE GLOBAL ECONOMY AND OUR WORLD* (2009).

2. *Id.* at 310.

3. *Id.* at xxiii (describing the impact of changing “dependency ratios,” defined as “the number of old or very young people as a percentage of the working age population, that is those aged 15-64”). The author opines that “[w]estern countries . . . have completed the decline in youth dependency and now face a rapid increase in old-age dependency.” *Id.*

4. Edward L. Schneider & James F. Fries, *Will Future Persons Experience More Years of Disability*, in *CONTROVERSIAL ISSUES IN AGING* 209-20 (Andrew E. Scharlach & Lenard W. Kaye eds., 1997).

5. GEORGE P. SMITH, *LEGAL AND HEALTHCARE ETHICS FOR THE ELDERLY* 9 (1996).

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Manion; and Editor-in-Chief, Mark McCormick-Goodhart. These oral presentations were loosely structured as three panels of speakers, supplemented by comments and questions from the audience of very informed and engaged people.

With the implications of the aging world on our minds, the AALS panelists began with pedagogical concerns, including the need to explore more deeply with our students the capacity issues, often subtle or variable, that can be inherent in drafting and executing planning documents, such as wills, trusts, and powers of attorney.<sup>6</sup> During this first session, recently retired New York County Surrogate Court Judge Kristin Booth Glen—now Dean Emerita at City University of New York School of Law—offered her real world observation that guardianships for incapacitated elders are frequently used to accomplish “pre-mortem planning” by aspiring transferees of the disabled ward, a disturbing development worthy of future research.<sup>7</sup>

Without abandoning the pedagogical theme, the second set of speakers examined the potential for conflicts of interest that occur when working across generational lines, or with older adults or disabled persons.<sup>8</sup> These “conflicts” can occur in several ways, including the potential for conflict between joint account holders, fiduciaries and beneficiaries, and lawyers and clients.<sup>9</sup> University of Illinois Law Professor Richard Kaplan provided practice-based exercises for the classroom in the form of two planning scenarios that pose the potential for conflicts of interest, which are captured as appendices to the transcript in this issue.<sup>10</sup> A sobering additional observation about the “surge in intra-family conflict/abuse cases” was offered by Lenore Davis, Esq., from her perspective as a private attorney with an estate practice in New York and New Jersey, thus emphasizing the conflict potential among family members struggling to make sense of their care-giving and care-receiving roles.<sup>11</sup>

Finally, in the third segment of the AALS program, University of Pittsburgh Law Professor Lawrence Frolik focused on the use of “trust protector clauses,” language that anticipates the possibility of concerns about capacity, conflict, and change in estate planning documents. Thus, he provided an important supplement to our pedagogy for classrooms in

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6. Susan E. Cancelosi et al., *Teaching Trusts & Estates and Elder Law: Pedagogy for the Future*, 117 PENN ST. L. REV. 987, 989 (2013) [hereinafter *Transcript*].

7. *Id.* at 1006.

8. *Id.* at 1007.

9. *Id.* at 1013.

10. *Id.* at 1035-36 (Exhibits 1 and 2).

11. *Id.* at 1008.

the “Age of Aging.”<sup>12</sup> Professor Frolik also cautioned wisely that, in elder law, we may have to “pull back” from what was once a dominant focus on Medicaid planning and instead concentrate on the larger issues of protection, including the best interests of the older adult.<sup>13</sup>

Turning to the formal articles in this issue, we begin with Linda Whitton’s article *Understanding Duties and Conflicts of Interest—A Guide for the Honorable Agent*.<sup>14</sup> This article brings to bear Professor Whitton’s deep experience with the laws of third-party decision making<sup>15</sup> and highlights the need for express standards to reduce the likelihood of disabling conflicts of interest for agents, often operating under what are otherwise “cryptic labels” used to describe authority granted under powers of attorney.<sup>16</sup>

A long held question is whether the law demands or permits recognition of different levels of threshold capacity for principals in order to complete legally binding documents or transactions.<sup>17</sup> Robert Whitman offers a compelling case for applying a uniform standard for mental capacity for what many recognize as core planning documents, including wills or trusts and powers of attorney.<sup>18</sup> In his article, *Capacity for Lifetime and Estate Planning*, Professor Whitman also provides historical context for the alternative standards that may otherwise apply.<sup>19</sup>

One of the hot themes in the larger world of academic research is the need to better understand how fully capacitated people make judgments, as documented by Professor Daniel Kahneman in his internationally best-selling book *Thinking, Fast and Slow*.<sup>20</sup> Similarly, Mary Helen McNeal’s article in this issue, *Slow Lawyering: Representing Seniors in Light of Cognitive Changes Accompanying Aging*,<sup>21</sup> recognizes the need for deeper scholarship and better lawyering

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12. See *Transcript*, *supra* note 6, at 1027.

13. *Id.* at 1033.

14. Linda S. Whitton, *Understanding Duties and Conflicts of Interest—A Guide for the Honorable Agent*, 117 PENN ST. L. REV. 1037 (2013).

15. Professor Whitton has served as the reporter for Uniform Law Commissions in the United States and Canada. See, e.g., Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J.L. REFORM 739 (2012).

16. See Whitton, *supra* note 14, at 1059.

17. Bruce A. Green & Nancy Coleman, *Forward: Ethical Issues in Representing Older Clients*, 62 FORDHAM L. REV. 961, 981 (1994).

18. Robert Whitman, *Capacity for Lifetime and Estate Planning*, 117 PENN ST. L. REV. 1061, 1061 (2013).

19. See *id.* at 1063-72.

20. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

21. Mary Helen McNeal, *Slow Lawyering: Representing Seniors in Light of Cognitive Changes Accompanying Aging*, 117 PENN ST. L. REV. 1081 (2013).

tools to assess the capacity of clients. Professor McNeal addresses an important but potentially under-recognized component of planning, the role of “memory” in deciding why a particular beneficiary or agent may be chosen or excluded from a plan.<sup>22</sup>

While several articles in this issue look closely at responsibility, both legal and moral, for third parties in making decisions for disabled adults, Nina Kohn, Jeremy Blumenthal, and Amy Campbell offer another perspective by examining the movement to recognize “supported” decision-making, where the third party operates not as an agent, attorney, or substitute decision-maker, but “merely” in an assistive capacity to the principal.<sup>23</sup> The article by Professors Kohn, Blumenthal, and Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, sounds a note of caution about this emerging alternative and outlines important questions to address in future research.<sup>24</sup>

Michael Perlin provides an international, comparative perspective on planning in his article, “*Striking for the Guardians and Protectors of the Mind*”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*.<sup>25</sup> Professor Perlin reminds us that the potential for third-party representation is not necessarily or exclusively a phenomenon of growing old.<sup>26</sup> At any age, an order of guardianship can eviscerate the legal rights of the individual, thus affecting core human rights for all persons with disabilities; this observation highlights the potential importance for the Convention on the Rights of Persons with Disabilities (CRPD) to “restructure guardianship law around the world.”<sup>27</sup>

James Pietsch and Margaret Hall offer further international, comparative perspectives on legal representation of vulnerable adults in their article, “*Elder Law*” and *Conflicts of Interest in the United States and Canada*.<sup>28</sup> In noting that lawyers on both sides of the border may call themselves “elder law” specialists, despite fundamental differences in the two countries’ health care systems, Professors Pietsch and Hall deal directly with the tension that can accompany such labels, pointing to

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22. See *id.* at 1091-98.

23. Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111 (2013).

24. See *id.* at 1154-57.

25. Michael L. Perlin, “*Striking for the Guardians and Protectors of the Mind*”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN ST. L. REV. 1159 (2013).

26. See *id.* at 66-71 (discussing guardianship practices in different nations).

27. See *id.* at 1189.

28. James H. Pietsch & Margaret Hall, “*Elder Law*” and *Conflicts of Interest in the United States and Canada*, 117 PENN ST. L. REV. 1191 (2013).

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dangers that arise when the academy ignores or marginalizes any emerging field of practice.<sup>29</sup>

Avoidance of conflict, both in the sense of confrontation and behind-the-scenes conflicts of interest, is an important goal for any estate plan. In her article, *Why Marriage is Still the Best Default in Estate Planning Conflicts*, Lynne Marie Kohm revisits the concept of marriage as a traditional means of establishing legal safeguards and protecting vulnerable parties in relationships where death or incapacity intervenes.<sup>30</sup> Professor Kohm thus offers a timely opportunity to consider the significance of the Defense of Marriage Act (DOMA) to same-sex couples or nontraditional, marriage-like relationships.<sup>31</sup>

The question of core conflicts takes on a different dimension in Reid Weisbord's important article, *Social Security Representative Payee Misuse*.<sup>32</sup> Professor Weisbord points to a need for better empirical documentation regarding the incidence of institutional or commercial financial abuse while also proposing incentives for greater participation by family members as representatives.<sup>33</sup>

Our final article is a *tour de force*. Professor and Associate Dean Stacey Tovino uses her deep background in interdisciplinary work in health law and bio-ethics to examine the legal and health implications of impaired decision-making capacity in clinical and experimental medicine.<sup>34</sup> How does one accomplish effective scientific study and cutting-edge medical treatment of Alzheimer's-impaired individuals who may have little ability to provide informed consent?<sup>35</sup> Her article, *Conflicts of Interest in Medicine, Research, and Law: A Comparison*, examines federal law and the laws of three illustrative states in the search for potential models of surrogate decision-making.<sup>36</sup> Dean Tovino's statement, that thoughtful legal planning, even in the face of conflicting interests, "is almost always superior to the lack of planning," is an encouraging conclusion for both her article and this Symposium Issue.<sup>37</sup>

As we prepare to finalize this Symposium Issue, another milestone is reached at Penn State Dickinson School of Law. Professor Louis Del

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29. *See id.* at 1196.

30. Lynne Marie Kohm, *Why Marriage Is Still the Best Default in Estate Planning Conflicts*, 117 PENN ST. L. REV. 1219 (2013).

31. *See id.* at 1235-47.

32. Reid K. Weisbord, *Social Security Representative Payee Misuse*, 117 PENN ST. L. REV. 1257 (2013).

33. *See id.* at 1259-61.

34. Stacey A. Tovino, *Conflicts of Interest in Medicine, Research, and Law: A Comparison*, 117 PENN ST. L. REV. 1291 (2013).

35. *See id.* at 1294 n.6.

36. *Id.* at 1293-1326.

37. *Id.* at 1334.

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Duca, who for more than 50 years has graced our classrooms and inspired faculty colleagues to pursue satisfying lives as internationally aware scholars, is retiring from full-time teaching. We are happy to report that Professor Del Duca has *no* need for a law review issue so comprehensively concerned with diminishing capacity. It is with sincere affection and respect that everyone at Penn State Dickinson School of Law wishes him well. Law Librarian and Legal Research Professor Mark Podvia has drawn upon his skills and creativity as a legal historian to compose a colorful tribute to Professor Del Duca.<sup>38</sup>

In the “Age of Aging,” both as educators and as practitioners of law, we are constantly confronted with the need to adapt to change, to recognize the implications of diminishing decisional capacity, and to reduce the potential for conflicts. The nationally, and often internationally, recognized speakers and writers who are represented in this issue appreciate the opportunity provided by Penn State Dickinson School of Law’s team of hard-working and talented student-editors to present our latest research and analysis.

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38. See Mark W. Podvia, *Dedication: Louis F. Del Duca*, 117 PENN ST. L. REV. 1337 (2013).