

Financial Elder Abuse

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Private Causes of Action

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Guardianship: What it Does and Doesn't Do

- What guardianship does do:
 - Conveys legal standing to the guardian to sue (or be sued) on behalf of the ward. Md. Rule 2-202.
 - Gives constructive notice of the ward's inability to enter into legal contracts. *Seaboard Surety Co. v. Boney*, 135 Md. App. 99 n.3 (2000). "[G]uardianship proceedings are treated as giving public notice of the ward's incapacity and establish his status with respect to transactions during guardianship even though the other party to a particular transaction may have no knowledge or reason to know of the guardianship"
 - Subordinates any agent serving under a power of attorney to the guardian. Estates & Trusts ("E&T") § 17-105(e)
- What guardianship does not do:
 - Remediate past misuse of funds
 - Set aside changes to asset titling
 - Restore assets to the guardianship estate

Threshold Issue: Standing

- All suits must be prosecuted by the real party in interest. Md. Rule 2-201
- Md. Rule 2-202 ("Capacity"): "An individual under disability to sue may sue by a guardian or other like fiduciary or, if none, by next friend, subject to any order of court for protection of the individual under disability." An "individual under disability" means an individual under the age of 18 years or an individual incompetent by reason of mental incapacity. Md. Rule 2-202(b).
- Key threshold question: whether an individual has the right to file a claim, either of his or her own accord or on behalf of the alleged disabled

Causes of Action on Behalf of Victim

- Assuming you have standing, either via guardianship, power of attorney, or other means, can bring claims on behalf of the victim
- Misappropriation of Personal Property
 - Trespass to chattels, trover and conversion (note: Conversion extended to “segregated or identifiable funds” *Lasater v. Guttman*, 194 Md. App. 431, 447 (2010), cert denied 417 Md. 502)
 - Replevin and detinue
- Breach of fiduciary duty (provided there is a specific fiduciary duty that can be identified)
- Contract
 - Declaratory judgment
 - Rescission
- Equitable claims
 - Unjust enrichment and constructive trust
 - Breach of confidential relationship and constructive trust
 - Accounting

Post-Mortem Causes of Action

- Caveat
- Unjust enrichment/breach of confidential relationship and constructive trust
- Declaratory judgment
- Actions brought on behalf of the estate

Living Victim / Non-Vicarious Causes of Action

- Actions brought on behalf of victim and post-mortem causes of action are virtually unlimited
- The instances where third parties have legal standing to make a claim based on harm to the victim are more limited
- Several major sources of law
 - Maryland General and Limited Power of Attorney Act
 - Trust law and Maryland Trust Act
 - Declaratory judgment statute (maybe)

Maryland General and Limited Power of Attorney Act

- Statute enacted in 2010
- Several major features
 - Standardized powers of attorney
 - Imposed fiduciary-like duties on agent purporting to act under power of attorney
 - Created statutory remedies for misuse of funds

Maryland General and Limited Power of Attorney Act

- Duties imposed upon "an agent that has accepted appointment."
- Duties include (E&T § 17-113(a))
 - Act in accordance with principal's reasonable expectations, to extent known, or otherwise in principal's best interest;
 - Act with care, competence, and diligence for the principal
 - Act only within the scope granted in the power of attorney
- Unless the power of attorney "opts out," duties also include:
 - Act loyalty and for principal's benefit
 - To not create a conflict of interest that impairs agent's ability to act impartially
 - Attempt to preserve the principal's estate plan, to the extent known

Maryland General and Limited Power of Attorney Act

- Petition to Enjoin Agent (E&T § 17-102): A principal or an interested person may seek injunction to enjoin an agent to comply with requirements relating to disclosure of receipts, disbursements, or transactions by the agent.
 - Problem: "Interested person" is not defined under Title 17
 - Problem: Petition filed in Circuit Court for the county in which the power of attorney is "recorded"
- Petition to Construe Power of Attorney or Review Agent Conduct (E&T § 17-103): Permits certain persons to "petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief"

Maryland General and Limited Power of Attorney Act

- Standing Issue: Petition under E&T 17-103 may be filed by
 - The principal's spouse, parent, or descendant
 - "An individual who would qualify as a presumptive heir of the principal,"
 - 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."
- Court must dismiss the petition on motion by the principal unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney

Maryland General and Limited Power of Attorney Act

- One published Maryland decision interpreting these statutes: *Ibru v. Ibru*, ___ Md. App. ___, 2018 WL 4624918 (2018)
- Holding of *Ibru*: A principal's descendant has the right—in the descendant's individual capacity—to bring a Circuit Court civil action to review the conduct of the agent. *Ibru*, 2018 WL 4624918 at *13
 - In *Ibru*, a complaint for declaratory judgment to invalidate a power of attorney based on fraud, duress, and lack of capacity—was brought while the principal was alive
 - The complaint was later amended, after the principal's death, to include claims for constructive trust and an accounting

Maryland General and Limited Power of Attorney Act

- *Ibru* Court held that a descendant has a civil cause of action in his or her own individual capacity (as opposed to bringing the civil action in a representative capacity on behalf of the principal) under E&T § 17-103.
- Principal's estate was not an indispensable party, even though the requested relief (nullifying transfers into joint bank accounts; imposition of a constructive trust) would potentially result in a claw-back of funds into the estate.
- Related issue: Would Dead Man's Statute apply? Cts. & Jud. Proc. § 9-116

Maryland Trust Act

- Enacted in 2014; has been subject to several revisions since
- Does not completely supplant common law and equity; the common law of trusts and principles of equity supplement the MTA. E&T § 14.5-106
- Codifies certain common law duties of the trustee and clarifies who is eligible to intervene in administration of a trust. Certain duties, such as the duty of loyalty, are codified. E&T § 14.5-802.

Maryland Trust Act

- Judicial Intervention: On invocation of the court's jurisdiction by an interested person, on the court's own motion, or as otherwise provided by law, the court may intervene actively in the administration of a trust, fashioning and implementing remedies as the public interest and the interests of the beneficiaries may require. ET § 14.5-201(a).
- Vested in the courts “having equity jurisdiction,” i.e. the Circuit Courts

Maryland Trust Act

- Revocable Trusts - Standing
 - Rights of the beneficiaries are subject to the control of the settlor and the duties of the trustee are owed exclusively to the settlor. ET § 14.5-603
 - The fact that the settlor becomes incapacitated or loses the capacity required to create a will does not convert a revocable trust into an irrevocable trust. E&T § 14.5-601
 - If the settlor of a revocable trust becomes incapacitated, a beneficiary to which distributions may be made during the lifetime of the settlor shall have the right to enforce the trust as if it were irrevocable. E&T § 14.5-603(b)
- Disabled settlor can be represented by other individuals in trust dispute: a guardian, an agent having specific authority to act with respect to trust matters, and parents and other ancestors. E&T § 14.5-303

Maryland Trust Act

- The Maryland Rules permit an "interested person" to petition a court to assume jurisdiction over the fiduciary estate of a minor or disabled person. Md. Rule 10-501. "Interested person" has a broad definition, and includes the disabled person's heirs at law. Md. Rule 10-103.
- A court supervising a trust administration may act on its own accord to compel the trustee to perform his duties under the trust. Restatement (Second) of Trusts § 200(h)

Declaratory Judgment

- Authorizes a court to determine "rights or legal relations in respect to the trust or the estate of [a] decedent, minor, disabled person, or insolvent" by ordering a fiduciary to do or to abstain from doing something, or to determine "any question" arising in the administration of the estate or trust. Cts. & Jud. Proc § 3-408
- Permits intervention by "[a]ny person interested as or through a personal representative, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or beneficiary of a trust, in the administration of a trust, or in the estate of a decedent, a minor, a disabled person, or an insolvent. Cts. & Jud. Proc § 3-408