

# THE BALTIMORE Barrister

FALL 2023

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## The Baltimore Barrister

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The Bar Association of Baltimore City  
Young Lawyers' Division Presents

**RISE & SHINE  
MORNING MINGLE**

November 29, 2023  
7:30 a.m. - 9:00 a.m.  
Au Bon Pain  
One South Street, Baltimore, MD 21202

Enjoy a little caffeine and something sweet  
while getting to know other YLD members  
in an informal setting.

RSVP to this FREE event at  
[www.baltimorebar.org/calendar](http://www.baltimorebar.org/calendar)

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# Why is your BABC Membership Important?

## The President's Report

*Jim Motsay, Esq., President, Bar Association of Baltimore City, Motsay and Lay*



The Bar Association of Baltimore City has been a very strong organization since its inception. Its strength comes internally from its members. Membership to this day is still a very important part of this organization's well-being. I too believe that the strength of any organization is in its membership. Any organization is only strong as its parts. Bar Associations provide development and connections with members in our practice areas and augment your business

and personal profile. Having the Bar Association of Baltimore City on your resume lets the reviewer know you are very committed to our profession and actively engage in its improvement.

So, of all the organizations available for you to join, why would someone want to be a member of an association? Studies have found that people join organizations for a variety of reasons. Some join for professional reasons, some join for collegiality, personal advancement, and because friends are involved. A list some of the reasons include: professional development, networking and collaboration, advocacy, community service, ethics and professional standards, legal publications, take charge of your career, build a better resume, leadership, become a mentor, stay inspired and motivated.

So, who are the members of the Bar Association of Baltimore City? Of course, as we know, lawyers make up the majority of the Association. However, did you know that law clerks, law students and our sponsors also make up the membership? We also have judges in our membership. I have been attending national conferences over the last two years and found that not all Bar Associations permit judges to be members. They say that having judges in the organization could create inappropriate access issues, potential bias issues, among others perceived conflicts, and the judges should have their own organization. Some Bar Associations that allow judges to be members prohibit them from being officers.

The Bar Association of Baltimore City has continually had judges as valuable members. In fact, we go to the fullest extent of allowing them to be involved in the Association. They can be members of the Association, members of the Executive Council and even officers. I personally like the idea of having judges be part of the organization that guides how the law affects the community we live in. These contacts in the Association setting bring us together as colleagues and opens dialogue for our efforts to fulfill our mission – Equal Justice under the Law.

More specifically, why would someone want to join the Bar Association of Baltimore City? High on the list is that membership brings you value, not just for your dues but for your practice/profession.

We offer a variety of CLEs each year, covering topics such as the view from the bench, how should I mediate, what does diversity mean

in this current day and age, and a number of other topics. An important part of our CLEs is not just the content but as a BABC member you always can attend our CLEs for free. We are currently offering our CLEs remotely, some in a hybrid format, and some in person.

CLEs offer more than learning and practice tips. It is a time to meet up with colleagues in a more casual setting. We can share ideas and experiences. As we continue to re-open after Covid, meeting in person provides a connection not found in other formats in delivering information. How many times have you seen an attorney that practices in a certain area and you approach him/her to ask a question or to discuss an upcoming case?

Additionally, events such as happy hours give us the opportunity to mingle with each other and to discuss more than just the law. We are able to meet a spouse, a partner, and even children of colleagues. This personal part of greet and meet is very powerful in building relationships for the betterment of our professional lives. Our events include the Crab Feast, Holiday Party, Bar Foundation Golf tournament, National Adoption Day, End of Summer Reception, and many more. A little less known value for your membership offers you Courting Arts Awards Program for Students, Museum of Baltimore Legal History Tours, group insurance, our own ethics hotline, Memorial Service Honoring Members of the Bench and Bar.

As attorneys, we are continuously asked to join various organizations and their boards, mostly for our legal insights. The Bar Association of Baltimore City is looking for you to join, become engaged, so you can participate not only for your benefit but the benefit of the Association.

The Bar Association of Baltimore City also has a Sustaining Member category. For your additional contribution, you are given a Bar Association of Baltimore City pin that is only given to sustaining member (you can always see me proudly wearing mine), invites to specialized programs and events, recognition in print, electronic communications, on our website, a special ribbon to wear at events, use of the Association's logo on your website, recognition at the Annual Meeting and acknowledgement at the End of Summer Member's Reception. This past year our highlight event was learning to cook pasta from a local renowned chef at her restaurant.

We are currently in our membership renewal phase, so please renew now. If you know of another attorney that is not a member, please encourage them to join. Your membership is an invaluable asset to you personally and professionally. I look forward to seeing you at one of our many events.



# Welcome Back!

## Young Lawyers' Division Update

*Sara El-Shall, Esq., YLD Chair, Law Office of Sara El-Shall*



Hope everyone is savoring the last few days of summer and family vacation. As students head back to school, the YLD hasn't missed a beat and our members are already hard at work. We already have a few upcoming events in the books. First, our YLD Executive Council Orientation is scheduled for The YLD Executive Council Orientation Tuesday, August 22, 2023, at 5:30 PM at Mick O'Shea's. Looking forward to bonding with this

year's council and discussing important policies and procedures for the upcoming year.

The YLD is excited and honored to be participating in both University of Baltimore and University of Maryland's Student Activity Fairs. We will have a booth at the University of Baltimore Law Student Activity Fair on Wednesday, August 30th from 4:00 – 6:00 p.m. and the University of Maryland Law School Student Resource Fair on Thursday, August 31st from 3:30 – 6:00 p.m. There are still volunteer slots if any of you would like to join, please contact Membership Co-Chair, Sarah Belardi at sarah.belardi@gmail.com. All representation is welcome even if you can only join us for a short period of time. And if you are a law student, please stop by our table for some fun giveaways!

Additionally, the YLD and BABC have joined multiple bar associations in the "Joint Bar Welcome Back Happy Hour" on Thursday, September 7, 2023 from 5:30 to 7:30 PM p.m. at the Maryland Club. The End of Summer Members' reception will be Thursday, September 2023 at 5:30 p.m. at the LB Skybar at Lord Baltimore Hotel.

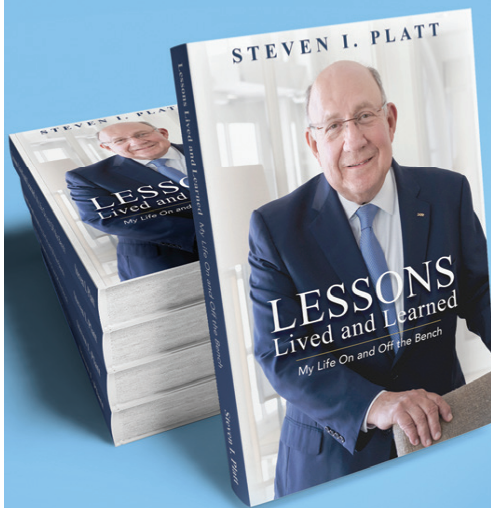
All these events are free to members, so please encourage non-members to attend and join. Please check the BABC Weekly Bar Review for updates and upcoming committee meetings as well as the join a YLD Committee Happy Hour – dates and times to be announced.

With all the bar association events starting back-up, now is also a good time to remember to pay your dues, if you haven't done so already. Please also consider becoming a sustaining member. Sustaining Membership provides an opportunity for BABC members to support the mission, growth, and success of the Association

by paying an additional \$175 above the regular dues amount. The good works of the BABC, serving both the legal community and the public, are not possible without the generous spirit and unwavering commitment our members have to the ideals of the Bar Association of Baltimore City.

I wanted to take an extra moment to thank our Executive Director, Karen Fast, who never seems to take a break. Thank you for your continued leadership and support. None of the bar association's activities and events would be possible without our fantastic and hard-working staff.

## Truth can sound stranger than fiction, but you really can't make this stuff up!



*"Judge Platt has done a masterful job in combining ... selected lore, history, and perception into a fine read."*

—Ron Bergman

*"The judicial history in this book reveals a judge who did not just preside over cases but devoted his time and expertise to improving the judicial system ..."*

—Robert Bonsib

*"Judge Platt's chronicle leads the reader to conclude that he is truly the 'Forrest Gump' of the Free State."*

—Bruce L. Marcus

From campaigning for RFK's presidential candidacy to representing a drug kingpin dubbed the "Vice President in Charge of Personnel" to mediating a claim by a "masseuse" accusing her "employer" of not paying her for "extra" services, *Lessons Lived and Learned: My Life On and Off the Bench* is chock full of history, humor, and behind-the-scenes politics.

Written by Steven I. Platt, a renowned retired judge of the PG County Circuit Court and a self-proclaimed political junkie, the book provides an inside look at what it takes to become a judge and how Platt used his position to make the court system work for everyone.

### GET YOUR COPY TODAY!

Visit <https://judgestevenplatt.com> for a list of places where *Lessons Lived and Learned* is sold.

# The Baltimore Bar Foundation Turns 50! (Well 53 Actually)

The Baltimore Bar Foundation Report

*Ryan Deitrich, Esq., President, Baltimore Bar Foundation, Office of the Attorney General of Maryland*



In 2020, as COVID was dominating everyone’s minds, the Baltimore Bar Foundation turned 50 years old. So, I hope you’ll excuse me in taking the opportunity to celebrate this fact three years later.

Let’s first take a step back. What is the Baltimore Bar Foundation? We are the charitable arm of BABC, and we were incorporated in 1970 with several laudable goals: “to foster and maintain the honor and integrity of the profession of the law; to improve and to facilitate the administration of justice, to enhance and improve the image of lawyers, and to promote the study of the law and research therein and the diffusion of knowledge thereof.”

But in short: We raise money, and then we give it away through a vetted grants process.

In fact, in our over 50 years, the Foundation has given away more than \$180,000 in funding grants to a wide range of worthy organizations, including the Pro Bono Resource Center, FreeState Justice, and the Homeless Persons Representation Project, just to name a few.

That brings me to another question: How do we raise money? Yes, we do ask that you donate to us when you renew your BABC membership. But, more importantly, we hold great fundraising events throughout the year.

The first is our “Spaghetti Opera” event, which will be in March. Held at Chiapparelli’s in Little Italy, the event includes a networking hour followed by a fantastic Italian dinner. The best part: the dinner is accompanied by short performances by professional opera singers and musicians. This event has become so popular, we have had to increase the event to two nights. You won’t find another event like it!

In May, we will hold our annual golf outing at Woodholme Country Club in Pikesville. With a scramble format, this excellent event is perfect for seasoned golfers and beginners alike, or for the person who, like me, plays only a few times a year. The golf is followed by dinner, awards, and a silent auction. We welcome you to come out and bring your clients.

By supporting these events, you not only have a lot of fun (and perhaps get some culture along the way), but you allow us to support the greater Baltimore community, and in doing so raise the profile of both the BABC and the legal profession generally.

Be on the lookout for more 50th anniversary special events as the year progresses!

You may have more questions about what we do. Perhaps you have suggestions about what we can do better? If that is the case, we’d love to hear from you.

The Bar Association of Baltimore City & Young Lawyers' Division invites you to

# YAPPY HOUR

**THURSDAY, NOV. 9**  
**5:30 PM - 7:30 PM**  
**PARIAH BREWING CO.**  
 1700 UNION AVENUE, STE. D  
 BALTIMORE, MD 21211

- Dogs are welcome and encouraged.
- Costume contest for the dogs, prizes for the winner
- Please bring an item to donate to BARCS

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This virtual CLE will include:

- Tips on how to handle a dog attack case,
- Navigating administrative procedures for the return of animals in Baltimore City,
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- Statutory limitations on compensatory damages for the loss of a pet, and exceptions to the law.

Speakers:  
 Samuel Pulver, Esq., The Yost Legal Group  
 Carey Hansel, Esq., Hansel Law  
 Derek Van De Walle, Esq., Baltimore City Law Department

**NOVEMBER 9, 2023**  
**12:30 - 1:30 PM**  
**ZOOM**

TO REGISTER: GO TO [WWW.BALTIMOREBAR.ORG/CALENDAR](http://WWW.BALTIMOREBAR.ORG/CALENDAR)



# Meet Jim Motsay, the 145<sup>th</sup> President of the Bar Association of Baltimore City

## *Why did you become a lawyer?*

I was exposed to the law from the time I was born. At that time, my father was practicing law in a two-man firm. From the time I was young, I was fascinated by my father's conversations and would ask to go to work with him. My trips to his office and to court with my father soon became a regular event. I spent a great deal of my time as a child with my father. He even had me attending political meetings, helping with his paperwork and he had me go with him to meet clients. As my interest continued to grow, I participated in many events that were law related through my schools. When I finished high school I was employed as a Deputy Clerk in the old Criminal Court Clerk's office. This really sealed my decision to become a lawyer. I am immensely proud of being a lawyer and helping clients.

## *How has your experience in private practice shaped you?*

Private practice shaped me into a somewhat different person than I would have imagined. As a child I was taught to be compassionate to everyone. I have seen people in difficult positions that have come to me for help. Some I was able to assist, while others I could not assist. I had to realize that there are limitations, beyond my control, that will prevent me from helping. I also learned that patience is very important in dealing with others. Not everyone understands information at the same speed. This brought about the necessity to know how to read people. I had a long time client that had me handle several different matters over the years. One day he came in and asked that I explain something he had to him. I asked him what his understanding was before we began. As he hemmed and hawed, I quickly realized he could not read. I am now more aware of these types of situations.

## *What are your top priorities as President of the Bar Association of Baltimore City?*

As Bar President, I am looking to increase our membership, improve the value our members receive from the Bar Association, and strengthen our community outreach.

## *How would your friends/colleagues/law partner describe you?*

That depends on who you are speaking with, but I think that most people would describe me as personable, friendly and honest. For example, I introduced one of my sons to someone I have known for a long time. He told my son that I am one of the few people he has met that makes you feel comfortable and appreciated.

## *What advice do you have for young lawyers?*

There will be times that you are frustrated and other times on top of the world with what you do and experience as a lawyer. Do not give up or become lost in your success. Do not be part of the case, or you will lose your objectivity. Clients need you to be that objective voice so you can give them sound advice.

## *Who is "Jim Mostay" outside of the lawyer?*

I tend to keep my private life low-key, but I am a very diverse person outside of practicing law. I am involved in community, religious and social organizations. For instance, I have been the Chairman and



long-time member of the Board of Trustees for the National Multiple Sclerosis Society, Maryland Chapter. I am a eucharistic minister (CCD) and confirmation instructor. I was a Little League umpire for many years and trained at the Little League Headquarters in Williamsport, Pennsylvania. My goal has always been to better the mission of the group and to meet people through my involvement in these organizations.

My wife and I are empty nesters so we spend our off hours raising a variety of animals. The peacefulness of being around these animals is the best part. The fun part is when they all come when called. I think they really come because they are looking to be fed. I also enjoy riding my motorcycle or spending time hunting.



# Death is only the Beginning: The Law of Sepulcher in Maryland

*Derek M. Van De Walle, Esq., Baltimore City Law Department<sup>1</sup>*

## Introduction

What happens when we die? While this question has likely entered your mind at some point, you may not have stopped to consider the legal framework dictating what happens to your actual remains. Whether they are to be buried, cremated, donated to science, or transformed into a living memorial as a tree, human remains are subject to a complex framework of laws governing those final arrangements that extend beyond the contents of a last will and testament.

As the Bar Association of Baltimore City takes its annual tour of Green Mount Cemetery, it is only fitting that we pause to explore and understand this intricate body of mortuary law in Maryland—more commonly known as the “law of sepulcher.”

The law of sepulcher is born of the common law and resides at the confluence of torts, contracts, constitutional law, and even land use. After all, cemeteries themselves are, in essence, a unique use of land, where the living provide the final resting place for the departed. This article is designed to serve as a concise restatement of the principles surrounding the law of sepulcher in Maryland.

## What is the Law of Sepulcher?

The law of sepulcher, or the “right” of sepulcher, is a person, or class of persons, right (1) to determine the place and manner of the disposition of such remains; and (2) to control the remains of a deceased individual.<sup>2</sup> Maryland’s law of sepulcher is codified at Md. Code Ann., Health-Gen. § 5-509 and provides that any individual 18 years or older may decide the disposition of their own body by executing a document; the document must be signed by the individual in the presence of a witness, who must also sign his or her name.<sup>3</sup>

*The right to decide what happens to human remains.*

If the decedent has not executed a document under Health-Gen. § 5-509, and the decedent otherwise does not make their intent known, then the surviving spouse or next of kin acquires a quasi-property right in the remains to determine their disposition.<sup>4</sup> The right is not a “property right” in the general meaning of the phrase, but exists solely to determine custody of the body and preparing it for burial.<sup>5</sup> Thus, there is no right to human remains in a commercial property sense, and “[t]he courts in the United States have refused to treat a dead body in a material sense.”<sup>6</sup> Rather, the “quasi-property” right to human remains is best described as “the right in the nature of a ‘sacred trust’ that a court will uphold as a result of natural sentiment, affection, and reverence.”<sup>7</sup> Interested persons, such as those related by blood or marriage to the decedent, as well as those having a “cultural affiliation” with the decedent, have a right to access the burial site.<sup>8</sup>

A person’s quasi-property right in human remains can be subject to rights under a contract. For example, in *Painter v. U.S. Fidelity and*

*Guaranty Co.*, the Court of Appeals of Maryland, now known as the Supreme Court of Maryland, held that an insurer’s right to conduct an autopsy under the terms of a life insurance policy superseded the family’s rights of sepulcher.<sup>9</sup>

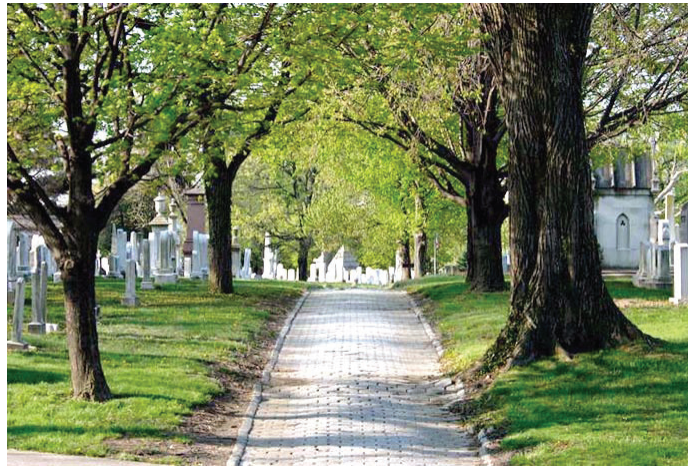
The following persons have the right of disposition of the body of the decedent, in order of precedence: (1) the surviving spouse of the decedent; (2) an adult child of the decedent; (3) a parent of the decedent; (4) an adult brother or sister of the decedent; (5) a person acting as a representative of the decedent under a signed authorization of the decedent; (6) the guardian of the person of the decedent at the time of the decedent’s death, if one has been appointed; or (7) any other person willing to assume the responsibility.<sup>10</sup>

If unclaimed, final disposition of a corpse is left to the State Anatomy Board.<sup>11</sup> Once the right of burial has been discharged, “the right of custody ceases and the body is thereafter in the custody of the law and disinterment or disturbance of the body is subject to the control of a court of equity.”<sup>12</sup> Generally, human remains may not be cremated until the body is identified by the next of kin; a medical examiner, or another person authorized to arrange for final disposition of the body by statute.<sup>13</sup>

Further, while a spouse or next of kin maintains the right of sepulcher over human remains, consent is required from a spouse, family member, or next of kin to perform an autopsy.<sup>14</sup> Consent to conduct an autopsy is not required when the State has a duty to conduct an autopsy in order to determine the cause of death.<sup>15</sup> The State Medical Examiner must take charge of a corpse to investigate the cause of death if the death occurs (1) by violence, (2) by suicide, (3) by casualty, (4) suddenly, if the deceased was in apparent good health or unattended by a physician, or (5) in any suspicious or unusual manner.<sup>16</sup>

A property interest in a burial lot or crypt is also limited. A purchaser of a burial lot in a cemetery does not acquire a fee simple interest in the lot.<sup>17</sup> Rather, a purchaser only holds ownership in the lot for the purposes of burial.<sup>18</sup> This right is best described as a license for interment in a burial lot exclusive of others.<sup>19</sup> Maryland does not have a statute *requiring* the recordation of certificates for cemetery plots.<sup>20</sup> However, a certificate, under seal, identifying ownership of a burial lot, “has the same effect as a conveyance of real property that is executed, acknowledged, and recorded as required by law.”<sup>21</sup> If a lot holder is required to remove remains because the land’s use ceases as a cemetery, then the lot holder is entitled to reimbursement only for the price paid for the burial lot.<sup>22</sup>

A gravestone, monument, or other memorial marker capable of being removed is considered personal property of the lot holder.<sup>23</sup> Generally, the owner of the burial lot is responsible for the care the marker, unless a different arrangement is made with cemetery owner.<sup>24</sup> If the land or lot ceases to be used as a cemetery, then the lot holder



has the right to remove the gravestone.<sup>25</sup> Depending on the terms of the contract, a cemetery owner may place reasonable restrictions on the types of monuments and memorials placed on a burial lot.<sup>26</sup> The power to restrict the types of monuments “concerns the unusual or the bizarre, the kind of structure which might be regarded as detrimental and improper by those who had buried their dead in adjoining and surrounding lots.”<sup>27</sup>

#### *The right to disinter human remains.*

Maryland does not recognize a right to disinterment.<sup>28</sup> In fact, disinterment is strongly disfavored because “cemeteries carry a cultural significance that argues traditionally for non-disturbance[.]”<sup>29</sup> Indeed, “[a] place for the burial of the dead has characteristics differing from those of an ordinary tract of land. To many it is sacred ground which should not suffer intrusion from mundane objects.”<sup>30</sup> As the Court of Appeals has observed:

Through the ages . . . peoples have considered the final resting place of their dead as hallowed and sacred ground. Hence the Courts and legislative bodies have almost universally recognized that the ‘property’ or ‘estate’ which one acquires when he purchases a cemetery lot or a crypt is a ‘qualified’ property or estate. It is generally referred to, even though conveyed by a deed absolute in form, as an easement, privilege, or license for the sole purpose of sepulture [sic] as long as the property remains a cemetery. And such estates are generally not held for the purpose of barter or sale; consequently, they seldom have any commercial connotation.<sup>[31]</sup>

The right to disinter human remains is subject to a court sitting in equity.<sup>32</sup> A court will grant a request for disinterment only for good cause,<sup>33</sup> typically when (1) the initial interment was intended to be temporary; (2) where a lack of room for the spouse to be buried alongside the deceased exists; and (3) the remains were wrongfully interred in the lot of plot owner.<sup>34</sup>

Disinterment may also be permitted in cases of public necessity; for example, when the cemetery is needed for a public improvement, when the cemetery has been abandoned as a place of burial, or when exhumation is necessary to ascertain the cause of death.<sup>35</sup>

Absent a public necessity, when considering disinterment, the court should consider: “(1) the wishes of the deceased, when they can be ascertained, and in connection with this, the influence of [the decedent’s] religious faith in the decision or request; (2) the wishes of the [surviving spouse], and next after them, next of kin, if near enough to have their wishes respected; (3) the agreement or regulation of the body maintaining the cemetery.”<sup>36</sup>

A cemetery owner has a right to oppose disinterment of remains,<sup>37</sup> and an action brought to disinter remains should name the cemetery owner as a party “so it will be bound by, have the protection of, any ultimate court order.”<sup>38</sup>

#### **An Abbreviated Statutory Framework**

The Maryland Cemetery Act, codified in Title 5 of the Business Regulations Article, governs licensing and regulations of cemeteries in the State.<sup>39</sup> Regulations require that cemetery owners and crematories abide by a code of ethics.<sup>40</sup>

The General Assembly has enacted laws protecting cemeteries. A cemetery, which derives from the Greek for “sleeping place,” is “land used or to be used for interment,” and includes a structure used for interment.<sup>41</sup> The land must be marked and distinguished from the area

around it as a place of burial.<sup>42</sup> A governmental or private entity is prohibited from opening of an alley, canal, road, or other public thoroughfare through property used for burial.<sup>43</sup> Baltimore City even has depth requirements for graves: each must be at least 4’ 6” deep.<sup>44</sup>

In order to sell certain types of burial grounds for a purpose other than burial, a seller must comply with a litany of statutory requirements found in Bus. Reg. §§ 5-505 and 5-506. These sections essentially act as “a quiet-title statute” and allows the sale to occur “free of the claims of the owner of the burial ground and the holders of the burial lots.”<sup>45</sup>

Title 5 of the Maryland Code Health-General Article concerns the office of the medical examiner.<sup>46</sup> Baltimore City established the first medical examiner’s office in the country in 1890.<sup>47</sup> Unlike a coroner, a medical examiner requires a medical degree.

#### **Civil Actions concerning Human Remains**

Generally, Maryland law imposes civil liability on an individual who intentionally, recklessly, or negligently interferes with another’s right of sepulcher.<sup>48</sup> Tort claims generally fall into three categories: (1) conduct prior to burial (*e.g.*, negligent autopsy, improper handling); (2) wrongful burial; and (3) conduct after burial (wrongful disinterment).<sup>49</sup>

Wrongful disinterment claims are generally limited to the surviving spouse, and if there is no spouse, by a parent or child.<sup>50</sup> Maryland does not have a separate and independent tort for wrongful disinterment. Rather, a wrongful disinterment claim is a form of general negligence or, depending on the circumstances, intentional infliction of emotional distress (IIED).<sup>51</sup> There exists a claim for mental and emotional distress for wrongfully and unlawfully taking charge of a corpse and mutilating it,<sup>52</sup> and an IIED claim for wrongful disinterment is based on Maryland’s common law concerning IIED.<sup>53</sup>

Because there is no personal property interest in human remains, an action in trover and trespass based on wrongful possession of remains or wrongful disinterment is not permitted.<sup>54</sup> Although a trespass claim cannot be made for interference with human remains,<sup>55</sup> an action for trespass can be maintained against a person who breaks and enters a burial lot.<sup>56</sup>

A breach of contract action will generally lie where a contract exists between the sepulcher-right-holder and a funeral or mortuary professional who violates the right of sepulcher.<sup>57</sup> In a recent, local case, a surviving spouse sued a funeral home for \$8.5 million for breach of contract. The spouse alleged that the funeral home held a sham funeral service for the decedent, who had already been cremated pursuant to a separate agreement with another woman claiming to be the decedent’s wife.<sup>58</sup>

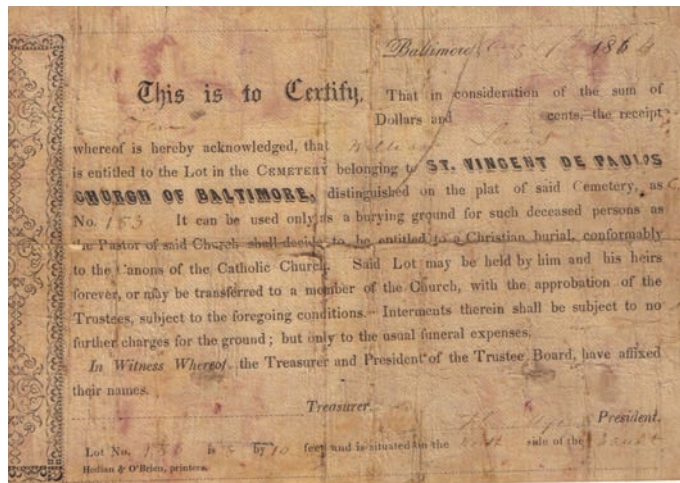
An action to quiet title may be brought to determine who, of various family members, has a right to be buried in the family mausoleum.<sup>59</sup>

For a violation of the right of sepulcher, remedies include injunctive relief (to regain control of the remains),<sup>60</sup> damages for increased costs of disposition due to delay and for emotional harm suffered by the sepulcher-right holder, and as well as potential punitive damages depending on the conduct.<sup>61</sup>

#### **Criminal Actions concerning Human Remains**

The General Assembly has enacted a series of criminal statutes, codified in Title 10, Subtitle 4 of the Criminal Law Article, concerning human remains.

It is a misdemeanor to “remove or attempt to remove human remains from a burial site.”<sup>62</sup> Penalties include imprisonment up to 5 years and/or a fine up to \$10,000.<sup>63</sup> However, a State’s Attorney, after providing notice, may authorize removal of human remains in their





jurisdiction “(1) to ascertain the cause of death of the person whose remains are to be removed; (2) to determine whether the human remains were interred erroneously; (3) for the purpose of reburial; or (4) for medical or scientific examination or study allowed by law.”<sup>64</sup> The State’s Attorney is thereafter required to reinter the remains in compliance with specific requirements.<sup>65</sup>

With several exceptions, it is a misdemeanor to knowingly buy, sell or transport for profit any unlawfully removed human remains or associated funerary objects.<sup>66</sup> Penalties include imprisonment not exceeding 1 year and/or a fine up to \$5,000.<sup>67</sup>

It is also a misdemeanor to willfully destroy, damage, deface, or remove any funerary object, structure in a cemetery, including a building, wall, fence, railing, or other work, for the use, protection, or ornamentation of a cemetery.<sup>68</sup> Penalties for violations of these provisions include imprisonment not exceeding 5 years and/or a fine up to \$10,000.<sup>69</sup> Willfully destroying, damaging, or removing a tree, plant, or shrub in a cemetery is a misdemeanor subject to imprisonment not exceeding 2 years and/or a fine up to \$500.<sup>70</sup> These provisions do not apply if removal of human remains from an abandoned cemetery is authorized by a State’s Attorney and the remains are reinterred in a permanent cemetery.<sup>71</sup>

Indecent and disorderly conduct is also prohibited in a cemetery, and is a misdemeanor that carries imprisonment not exceeding 2 years and/or a fine up to \$500.<sup>72</sup> A person found guilty for any of those provisions is required to pay restitution to the owner of the property or the owner of the cemetery to restore “any damaged or defaced real or personal property in a cemetery to the owner of the property or the owner of the cemetery.”<sup>73</sup>

Finally, the Maryland Cemetery Act contains penalties, such as civil fines and even imprisonment, for certain violations of the Act, and further permits the Attorney General to refer matters to the appropriate State’s Attorney for criminal prosecution.<sup>74</sup>

## Miscellaneous Issues in Maryland’s Law of Sepulcher

### Constitutional Issues

On occasion, the law of sepulcher has crossed-paths with constitutional rights. If an interference with human remains comes from a government actor, then a substantive due process action under 42 U.S.C. § 1983 may lie on the basis that the individual has a quasi-property right to the remains.<sup>75</sup> For example, the Court of Appeals for the Ninth Circuit has observed that a constitutionally-protected right of sepulcher exists:

The long-standing tradition of respecting family members’ privacy in death images partakes of both types of privacy interests protected by the Fourteenth Amendment. First, the publication of death images interferes with the individual interest in avoiding disclosure of personal matters. Few things are more personal than the graphic details of a close family member’s tragic death. Images of the body usually reveal a great deal about the manner of death and the decedent’s suffering during his final moments—all matters of private grief not generally shared with the world at large.

Second, a parent’s right to control a deceased child’s remains and death images flows from the well-established substantive due process right to family integrity. . . . A parent’s right to choose how to care for a child in life reasonably extends to decisions dealing with death, such as whether to have an autopsy,

how to dispose of the remains, whether to have a memorial service and whether to publish an obituary. Therefore, we find that the Constitution protects a parent’s right to control the physical remains, memory and images of a deceased child against unwarranted public exploitation by the government.<sup>176]</sup>

The Court of Special Appeals, now known as the Appellate Court of Maryland, has had occasion to address a First Amendment religious clause argument. In *Snyder v. Holy Cross Hospital*, an eighteen-year-old, who was otherwise in good health, died suddenly and unexpectedly in his home.<sup>77</sup> Given the circumstances of the boy’s death, the State Medical Examiner ordered that an autopsy be conducted in order to determine the cause of death. The boy’s father, a member of the Orthodox Jewish faith, sought an injunction to prevent the autopsy, citing his religious beliefs that prohibit any mutilation of the body after death. The circuit court denied the father’s request for injunctive relief, and the father appealed.

The Appellate Court affirmed, holding that the autopsy was mandated by law and that the State’s compelling interest in performing the autopsy outweighed the father’s religious beliefs. Because the hospital could not determine the cause of death, a death certificate could not be completed without an autopsy.<sup>78</sup> Given the son’s age, health, and his “sudden and unexplained” death, the State was obligated to take charge of the son’s remains pursuant to Md. Code, art. 22 § 6 and art. 43 § 20(a),<sup>79</sup> now codified at Health-Gen. § 5–309(a). Further, those statutes required the medical examiner to take charge of a corpse to investigate the cause of death if the death occurs (1) by violence, (2) by suicide, (3) by casualty, (4) suddenly, if the deceased was in apparent good health or unattended by a physician, or (5) in any suspicious or unusual manner.<sup>80</sup>

The Court rejected the father’s assertion that art. 22 § 6 and art. 43 § 20(a) were unconstitutional as applied to him under the First Amendment and Article 36 of the Maryland Declaration of Rights. Distinguishing between

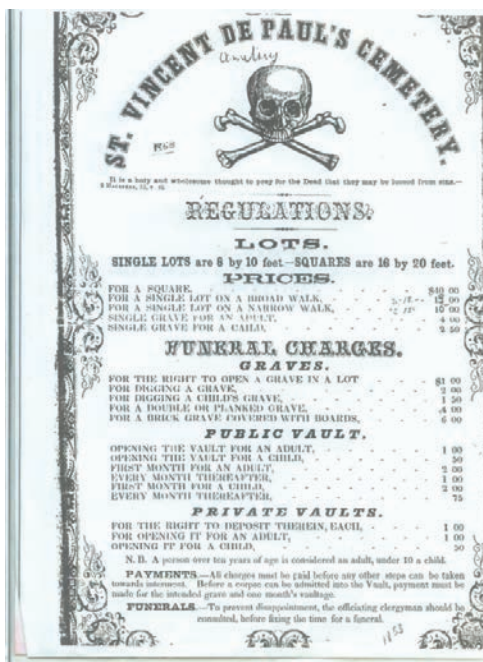
the freedom to believe (which is absolute), and the freedom to act (which is not absolute) under First Amendment jurisprudence, only the freedom to act was affected by the State.<sup>81</sup> Because the freedom to act is not absolute, it may be subject to a compelling state interest “to safeguard the peace, health, and good order of the community,” which necessarily includes determining whether a death was caused by a criminal act or by some other cause that may affect the health of well-being of the public.<sup>82</sup> Here, the State had a compelling interest to perform the autopsy in order to determine the son’s unexplained cause of death which outweighed the father’s religious beliefs.<sup>83</sup>

### Anatomical Gifts

The Anatomical Gift Act, codified in Est. & Trusts § 4-501 *et seq.*, was enacted in 2011 and is modified from the 2006 Revised Uniform Anatomical Gift Act.<sup>84</sup> “The Act extends to the activities of organ procurement organizations in recovering body parts for the purpose of completing the donation, which necessarily includes the packaging, preservation, and transportation of the body parts to their final destination.”<sup>85</sup>

An “anatomical gift” is defined as “the donation of all or part of a human body to take effect after the donor’s death for the purpose of transplantation, therapy, research, or education.”<sup>86</sup> Additional requirements concerning organ donation, procurement, and transplants are found in Section 19-310 of the Health-General Article. Organ procurement organizations are governed by federal law.<sup>87</sup>

The Act provides immunity for the organ procurement organiza-





tion, acting in good faith, for civil actions, criminal prosecutions, and administrative proceedings.<sup>88</sup> In *Scarborough v. Transplant Resource Center of Maryland*, the Appellate Court held that the immunity extends to actions required to complete the donation; *i.e.*, the packaging, preservation, and transportation of the organ after it is removed from the donor.<sup>89</sup> The Act also provides immunity for the donor and the donor's estate "for any injury or damage that results from the making or use of the gift."<sup>90</sup>

### Spoliation

In at least two cases, the Appellate Court of Maryland has held that disposing of human remains did not constitute spoliation of evidence. In *Hollingsworth & Vose Co. v. Conner*, the jury returned a verdict finding tobacco companies who produced cigarettes containing asbestos liable for the plaintiff's mesothelioma.<sup>91</sup> When the plaintiff died two months later, the tobacco companies requested that his lung tissue be preserved for testing. The family did not comply with their request and buried the remains, and the companies filed a motion to reopen and revise the judgment and to dismiss the claim. In the alternative, the companies requested that the plaintiff's body be exhumed so that the lung tissue could be obtained and tested.<sup>92</sup>

Then, in *Adventist Healthcare, Inc. v. Mattingly*, the decedent died from complications from a surgical procedure, and the family brought wrongful death and survival claims against the hospital and doctor who performed the surgery.<sup>93</sup> Because of her distrust of the defendants, the decedent's mother had a private autopsy performed "blindly" by an independent medical professional in order to determine the cause of death. The autopsy was not videotaped, none of the organs or tissue were preserved, and the defendants were not informed of the autopsy.<sup>94</sup> When the remains were cremated (per the mother's wishes), the defendants requested spoliation sanctions, a request denied by the circuit court. On appeal, the defendants compared the cremation of the decedent's remains to the destruction of a meter box after a dwelling a fire in *Cumberland Ins. Grp. v. Delmarva Power*, 226 Md. App. 691 (2016).<sup>95</sup>

In each case, the Appellate Court found the arguments concerning spoliation unavailing, reasoning that "a person holding authority over the disposition of . . . remains pursuant to Health-Gen. §§ 5-502 and 5-509(c) owed no duty to preserve 'evidence,'"<sup>96</sup> and that "[t]he lawful cremation of a family member's remains is not an 'act of destruction' in the spoliation context[.]"<sup>97</sup>

The Court was also critical of the defendants' positions in that they "astoundingly compare the burial of a loved one to the destruction of documents."<sup>98</sup> The *Mattingly* Court rejected the comparison to the *Cumberland* case concerning a home fire, stating that they were "entirely unpersuaded by the Appellants' attempt to compare a grieving mother's quest to obtain answers about the cause of her son's untimely death and decision to make appropriate final arrangements for her son's remains to a case involving the demolition of a home after a fire."<sup>99</sup> Conceding that "many dollars are contingent upon the outcome of this case" the Court stated that "we do not place cash before conscience."<sup>100</sup> Ultimately, the Court concluded that "the law recognizes a human corpse is not just another piece of physical evidence."<sup>101</sup>

### Conclusion

"We are but dust, and to dust we shall return," but there is a legal framework to that journey. In the mortuary law landscape, the interplay of common law, statute, torts, contracts, and constitutional rights demonstrates that the disposition of our remains is not solely a matter of personal choice but one that is regulated by the state. Yet, the law of sepulcher is more than a set of regulations; it is a testament to the reverence and care we owe to those who have gone before us and a testament to the respect we ourselves will receive in due time. In our shared human journey, the law of sepulcher is a guide that continues the bond between the living and the departed and ensures the dignity and harmony of our final resting places. It is also a reminder that even in death, we cannot escape the law.

<sup>1</sup>William & Mary Law School, J.D. (2017); University of Michigan, B.A. (2014). Mr. Van De Walle is an Assistant City Solicitor in the Baltimore City Law Department. The views expressed in this article belong solely to the author.

<sup>2</sup>See Restatement of the Law (Third) of Torts: Miscellaneous Provisions, Tentative Draft No. 2, § 48 D (March 2023).

<sup>3</sup>Md. Code Ann., Health-Gen. § 5-509(a)-(b).

<sup>4</sup>*Painter v. U.S. Fid. & Guar. Co.*, 123 Md. 301, 308 (1914).

<sup>5</sup>*Painter*, 123 Md. at 308.

<sup>6</sup>*Snyder v. Holy Cross Hospital*, 30 Md. App. 317, 328 n. 12 (1976).

<sup>7</sup>*Snyder*, 30 Md. App. at 328 (quoting Percival E. Jackson, *The Law of Cadavers and of Burial and Burial Places*, at 133 (2d ed. 1950)).

<sup>8</sup>Md. Code Ann., Real Prop. § 14-121(b).

<sup>9</sup>*Painter*, 123 Md. at 308.

<sup>10</sup>Md. Code Ann., Health-Gen. § 5-509(c).

<sup>11</sup>Md. Code Ann., Health-Gen. § 5-406.

<sup>12</sup>*Dougherty v. Mercantile-Safe Deposit & Trust Co.*, 282 Md. 617, 620 (1978) (action by surviving spouse to disinter husband's remains denied where spouse initially consented to location of interment); *Kline v. Green Mount Cemetery*, 110 Md. App. 383, 388 (1996) (trial court did not err in dismissing petition to disinter body of John Wilkes Booth where location of grave was unknown, grave was likely damaged by water, identification would be inconclusive, and other remains were buried above Booth grave).

<sup>13</sup>Md. Code Ann., Health-Gen § 5-502.

<sup>14</sup>Md. Code Ann., Health-Gen § 5-501.

<sup>15</sup>*Snyder*, 30 Md. App. at 330-31; *Young v. College of Physicians & Surgeons of Baltimore City*, 81 Md. 358, \*179 (1895).

<sup>16</sup>Md. Code Ann., Health-Gen. § 5-309(a).

<sup>17</sup>*Gallaher v. Trustees of Cherry Hill Methodist Episcopal Church of Cherry Hill, Inc.*, 42 Md. App. 186, 193 (1979) (remains of second purchaser of lot ordered to be disinterred where first purchaser had right and privilege to use lot).

<sup>18</sup>Md. Code Ann., Bus. Reg. § 5-503(a) ("Each burial lot and each crypt sold or conveyed in a cemetery shall be held by the owner only for the purpose of burial.").

<sup>19</sup>*Gallaher*, 42 Md. App. at 193.

<sup>20</sup>*Gallaher*, 42 Md. App. at 194 n. 5.

<sup>21</sup>Bus. Reg. § 5-504; *Trustees Catholic Cathedral Church v. Manning*, 72 Md. 116, 19 A. 599, 604 (1890); *Rayner v. Nugent*, 60 Md. 515, 518-19 (1883); *Partridge v. First Independent Church of Baltimore*, 39 Md. 631, 637 (1874).

<sup>22</sup>*Partridge*, 39 Md. at 638-39.

<sup>23</sup>*Partridge*, 39 Md. at 639.

<sup>24</sup>Md. Code Ann., Bus. Reg. § 5-503(e).

<sup>25</sup>*Partridge*, 39 Md. at 639.

<sup>26</sup>*Abell v. Proprietors of Green Mount Cemetery*, 189 Md. 363, 366 (1947) (prohibiting the placement of two stone lions on a family burial lot).

<sup>27</sup>*Abell*, 189 Md. at 368.

<sup>28</sup>*Unger v. Berger*, 214 Md. App. 426, 434 (2013) (plaintiff filed action for specific performance alleging that personal representative violated terms of decedent's will by burying decedent in lot different than location named in will); *Kline*, 110 Md. App. at 388.

<sup>29</sup>*Rhee v. Highland Development Corp.*, 182 Md. App. 516, 540 (2008).

<sup>30</sup>*Abell*, 189 Md. at 366; *see also Yome v. Gorman*, 152 N.E. 126, 129 (N.Y. 1926) ("The dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose."); *Dougherty*, 282 Md. at 621 ("where an interment takes place with the consent, express or implied, of those most interested, the interment is regarded in law as a final sepulcher.")

<sup>31</sup>*Diffendall v. Diffendall*, 239 Md. 32, 36 (1965) (cleaned up).

<sup>32</sup>*Unterstützung Verein v. Posner*, 176 Md. 332, 334 (1939) ("It has generally and long been recognized that Equity only affords an adequate remedy in cases involving the disposition of the bodies of the dead."); *Unger*, 214 Md. App. at 434 ("[o]nce a body has been buried, it 'is subject to the control of a court of equity.'") (quoting *Dougherty*, 282 Md. at 620). *Gallaher*, 42 Md. App. at 194 (equity action brought by cemetery to determine who is entitled to burial lot); Jackson, at 164-182 ("The power of a court of equity [over disinterment] is unquestionable . . .").

<sup>33</sup>*Unger*, 214 Md. App. at 434; *Browne v. Trustees of Methodist Episcopal Church in City of Baltimore*, 37 Md. 108, 123 (1872) (requiring appellant to show "by clear and unmistakable proof" that laches shouldn't bar appellant's claim for a prescriptive easement over cemetery because the "right of sepulture [sic] should not be disturbed, except on the most unequivocal legal grounds[.]"); *Gallaher*, 42 Md. App. at 191 ("[T]he quiet of the grave, the response of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is to be sanctioned.") (quoting *Currier v. Woodlawn Cemetery*, 90 N.E.2d 18 (N.Y. 1949)).

<sup>34</sup>*Dougherty*, 282 Md. at 620; *see, e.g., Gallaher*, 42 Md. App. at 197 (court ordered disinterment of remains wrongfully buried in a lot promised to another).

<sup>35</sup>*Posner*, 176 Md. at 336-37 (injunction sought to prevent cemetery from disintering remains).

<sup>36</sup>*Posner*, 176 Md. at 338.

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Veritext



# The REDEEM Act: What Does it Mean for Your Clients?

*Chris Sweeney, Esq., Maryland Volunteer Lawyers Service*

Criminal record expungement has steadily grown its footprint in Maryland's legal landscape over the past few years. What some might have called a niche legal issue has, in recent memory, gained the attention of legislators, journalists, and our current governor. Long a perennial subject among advocates for the formerly incarcerated, expungement has nearly entered the mainstream—locally and nationally—thanks to broad interest in criminal justice reform.

On October 1, 2023, the REDEEM Act became law in Maryland. Passed during the 2023 legislative session, the legislation shortens the waiting periods required for expunging certain convictions. The REDEEM Act brings Maryland in step with most other states that offer expungement, but it does not solve every issue with our state's expungement laws. On the whole, the Act is a major step forward in expungement reform that should significantly increase eligibility for those with non-violent convictions.

If your practice includes expungement, here are the basics you need to know. The REDEEM Act amends Criminal Procedure § 10-110, lowering the waiting periods for convictions that were already eligible under the statute's previous iteration (the exception being that a single crime—malicious destruction of property—was added to the list of eligible offenses). The Act does not alter the way waiting periods are calculated, nor does it add or remove any other prerequisite to expungement. Waiting periods still begin when a defendant has successfully completed their entire sentence. The “subsequent conviction rule” still applies: a new eligible conviction within the waiting period prevents expungement until the new waiting period has passed, and an ineligible conviction within the waiting period permanently bars expungement of the previous case.

The new waiting periods are as follows: Eligible misdemeanors have a 5-year waiting period (down from 10 years), with the exception of second degree assault, which carries a 7-year waiting period (down from 15). The felonies of CDS possession with intent to distribute and third degree burglary carry a 7-year waiting period. Felony theft, first degree burglary, and second degree burglary have a 10-year waiting period (all felonies were previously at 15 years). The provision that any crime classified as “domestically related” carries a 15-year wait remains intact.

Overlapping waiting periods for eligible convictions have previously placed expungement seekers in limbo for a decade or more. The significant reduction in waiting times will likely compound with fewer subsequent conviction violations, resulting in many more people eligible for expungement. Add to that the increased media attention following the REDEEM Act and recently-enacted cannabis expungement, and Maryland lawyers should see an influx of clients seeking expungement services. Furthermore,

any clients you may have previously advised on an expungement matter would be worth revisiting to re-assess eligibility.

Expungement is gaining prominence nationally, with organizations like the [Clean Slate Initiative](#) and the [Collateral Consequences Resource Center](#) elevating the topic amidst discussions of criminal justice reform. As we continue to see expungement expansion in Maryland, leading to increased eligibility, this is a practice area to become acquainted with.

Maryland Volunteer Lawyers Service offers expungement trainings and pro bono opportunities. More information can be found [on our website](https://mvslaw.org/volunteer/criminal-record-resources/). (<https://mvslaw.org/volunteer/criminal-record-resources/>).

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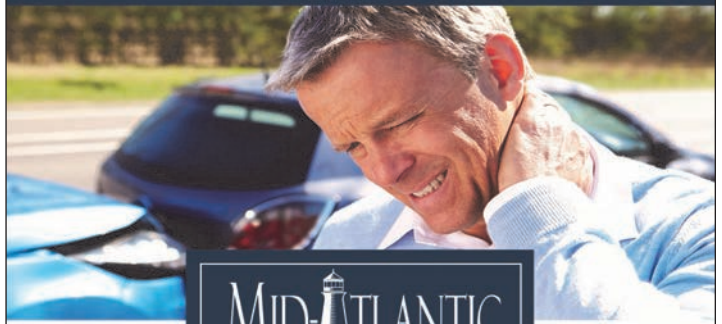
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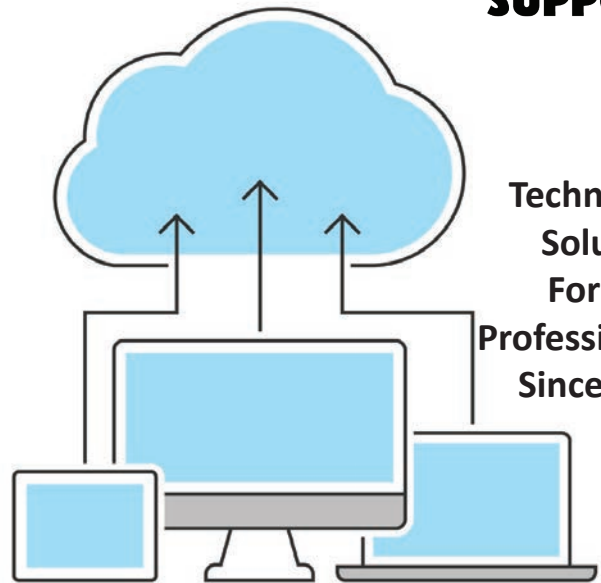
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# The Maryland SAFE Act: A New Tool for Attorneys to Help Prevent Financial Exploitation of the Elderly

*Robert M. Horne, Esq., The Penater Law Firm, LLC and Stephen J. Nolan, Esq., Smith, Gildea & Schmidt, LLC*

## A Little Background...

In 2021, the Maryland General Assembly unanimously passed the Maryland Statute Against Financial Exploitation Act of 2021, which is commonly known as the “SAFE Act.” The SAFE Act is codified in the Md. Code Ann., Estates & Trusts Article, § 13-601, *et. seq.*

In the abstract, everyone wants to protect other members of society from financial exploitation—especially the elderly and vulnerable adults. No one wants to see someone get ripped off, duped, or otherwise taken advantage of. So, the basic concept of the SAFE Act is easy to support. Indeed, a few years ago in Maryland, an informal public/private coalition of eighteen (18) public and private organizations initiated Project S.A.F.E. (Stop Adult Financial Exploitation), from which the momentum for the SAFE Act was generated. The scope of Project S.A.F.E. is broad, encompassing: tax return fraud; identity theft; mail, internet and telephone scams; unfair business practices; an individual (“friend”, relative, Caregiver, Neighbor, etc.) scam; insurance scams; home improvement scams; and investment scams.

The Maryland Department of Aging, citing the National Academies of Sciences, Engineering, and Medicine, estimates that ninety-three percent (93%) of elder abuse cases go UNREPORTED each year. Anecdotally, attorneys felt that there was only a loosely woven web of statutes and common law that could theoretically be utilized to remedy cases of financial exploitation – both criminally and civilly. However, in practice, local State’s Attorneys’ offices reportedly were unable to allocate resources to what were often seen as “family matters” and there were often insufficient funds remaining in the possession of the exploiter available to compensate private attorneys for the time it would take to attempt to obtain a judgment, and then collect. In short, there was a feeling that the laws on the books (and at common law) were not sufficient: (1) to dissuade would-be-exploiters, and (2) to provide an efficient remedy for the exploited.

Moreover, there is an expectation that the situation will get worse if nothing is done. It is no secret that the overall American population is aging, and the same is true for Maryland’s population. Every day, 10,000 people in the United States turn 65. And, it’s not just that the number of older Marylanders is increasing; they are also living longer. In Maryland, individuals aged 85 and older are the fastest growing segment of the population. As our aging population swells in numbers, unfortunately, so are the number of people suffering from dementia—thereby rendering them more susceptible to financial exploitation. In the United States, for the period from 1950 to 2020, the average life expectancy has increased by 14 years from 65 to 79 years. During that same time period, the number of people suffering from dementia has increased from 900,000 to 6 million. Taking all of that into consideration, it is no wonder that the Maryland Department of Aging estimates that 5 million older Americans are the victims of elder abuse every year, and approximately ten percent (10%) of Americans over the age of 60 has been the victim of some kind of abuse.

With that as the prelude, the Maryland SAFE Act was enacted to attempt to provide for more robust remedies and statutory clarity regarding financial exploitation.

## What is the SAFE Act?

With the abstract problem identified and understood, the challenge in drafting the SAFE Act, as with any new legislation, is in the details. Several basic questions had to be answered, such as: What is the scope of the SAFE Act? What constitutes “financial exploitation”? Who is being protected? Who can be sued? Who can’t be sued? What is the statute of limitations? What are the damages? Not all of these questions are completely answered by the SAFE Act, and over time, case law will help better clarify some currently ambiguous provisions. What follows in this article is a general summary of the SAFE Act’s statutory provisions, with some commentary and suggestions interspersed for the reader to consider.

### Purpose

The purposes of the SAFE Act are articulated in Estates & Trusts § 13-602. They include:

1. Establishing a separate cause of action by a victim of financial exploitation;
2. Providing a path to redress financial exploitation through the recovery of property and assets taken from victim while discouraging protracted litigation;
3. Providing Access to Justice for victims and their families who are otherwise unable or unwilling to retain competent legal assistance due to cost; and
4. Strongly deterring individuals seeking to take advantage of susceptible adults or older adults.

These are all noble, and laudable goals. But again, they are written in the abstract. The devil is in the details and to understand the SAFE Act, one must first understand the statutory definition of “financial exploitation.”

### Definition of Financial Exploitation

Estates & Trusts § 13-601 contains such definition. It is three (3) pronged, and it also contains a carve out for “...good-faith use of a susceptible adult’s or older adult’s assets....” The three prongs of financial exploitation are essentially:

1. Exploitation arising from a Confidential Relationship: If someone is: (i) in a position of trust and confidence with a susceptible (or older) adult and (ii) knowingly obtains or uses (or endeavors to do so) a susceptible (or older) adult’s funds, assets, or property (iii) with the intent to temporarily or permanently deprive the susceptible (or older) adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the susceptible (or older) adult, (iv) in such a manner that is not fair and reasonable.

OR

2. Exploitation the Old Fashioned Way, for which there are Generally Existing Common Law / Statutory Remedies:



Someone by deception, false, pretenses, false promises, larceny, embezzlement, misapplication, conversion, intimidation, coercion, isolation, excessive persuasion, or similar actions and tactics obtains or uses (or endeavors to do so) a susceptible (or older) adult's funds, assets, or property with the intent to temporarily or permanently deprive the susceptible (or older) adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the susceptible (or older) adult.

OR

3. Exploiting Someone's Lack of Capacity: Someone knows or should know that a susceptible (or older) adult lacks capacity to consent and who obtains or uses (or endeavors to do so) a susceptible (or older) adult's funds, assets, or property with the intent to temporarily or permanently deprive the susceptible (or older) adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the susceptible (or older) adult.

Additionally, specific examples of financial exploitation are provided for in the SAFE Act, including a breach of fiduciary duty resulting in an unauthorized transfer of property, unauthorized taking of personal assets, misappropriation of assets belonging to a susceptible adult from a personal or joint account, or the intentional failure to effectively use a susceptible (or older) adult's income and assets for necessities required for such adult's support and maintenance.

#### *Who Has Standing to Sue?*

Under Estates & Trusts § 13-604, a SAFE Act claim can be brought by 3 classes of people: (1) Susceptible Adult, (2) Older Adult, or (3) their respective representatives (described below).

Estates & Trusts § 13-605 identifies the representatives of a susceptible (or older) adult who can bring an action on behalf of such susceptible (or older) adult. It is a veritable laundry list of individuals and entities that might (or might not) have knowledge of the susceptible (or older) adult's financial dealings and mental state, in no particular order of priority, including:

1. Attorney-in-fact, guardian, trustee, or other fiduciary acting on behalf of the susceptible (or older) adult – or a successor named in an instrument providing such authorization;
2. Person authorized to make health care decisions for the susceptible (or older) adult (or successor);
3. Spouse, parent, or descendant of the susceptible (or older) adult;
4. Individual who would qualify as the presumptive heir of the susceptible (or older) adult;
5. Persona named as beneficiary to receive any property, benefit, or contractual right upon the death of the susceptible (or older) adult, including a person who would have been a beneficiary but for the financial exploitation;
6. Personal Representative or Special Administrator of the estate of the susceptible (or older) adult; and
7. A Government agency that otherwise has authority and jurisdiction, such as the Division of Consumer Protection or the Securities Commissioner (both of the Office of the Attorney General).

However, note that a SAFE Act claim cannot expressly be dismissed by anyone other than the person who filed it, which means that if an adult is over 68 years old and the estranged child of such adult, purportedly on behalf of such adult, files a SAFE Act claim against the older adult's new spouse, it is possible that only the child can dismiss the SAFE Act claim—even if the older adult is one hundred percent competent and a functioning member of society. To the extent that

the adult never wanted the child to have access to her or his financial information, this seems to be a significant deprivation of older adults' rights to financial privacy.<sup>2</sup>

Moreover, there is no statutory mechanism to address multiple, possibly conflicting, SAFE Act claims that could be filed by multiple members of the representative classes. That is, it is not hard to imagine a fact pattern where Heir A could sue Child B, and Child B could sue Power of Attorney C, and Power of Attorney C could sue Heir A, all ostensibly on behalf of the susceptible (or older) adult.

It bears noting that this broad class designation may deprive an allegedly susceptible (or older) adult of her or his privacy in financial matters. Perhaps a more balanced approach would be providing an order of priority starting with a financial agent designated by the susceptible (or older) adult or her or his Court-appointed Guardian of the Property (if the adult is still alive), or Personal Representative (if the adult is dead), with carve-outs for situations where the designated individual is the alleged exploiter?

#### *Who Can't Be Sued*

The SAFE Act does not apply to an act (but not an omission) taken by any state or federal bank, trust company, credit union, or savings and loan association; or a subsidiary or affiliate of any of the foregoing. Estates & Trusts § 13-603.

Notably missing from this exempt list are attorneys. Although the "good faith" exception to the definition of financial exploitation (described above) should give attorneys some degree of cover, it is by no means absolute. Of particular concern for readers of this article should be their respective malpractice insurance policies. In a situation where an exploiter has involved an unknowing attorney in the exploiter's scheme, it is possible that by the time the SAFE Act action is commenced, the exploited assets will have been dissipated, the exploiter will be judgment proof, and the only solvent individual involved will be the attorney (or other professional) and the attorney's malpractice policy. The cost of establishing "good faith" to avoid involvement in the matter (against the risk of significant damages, described below) may cause malpractice insurers to settle, thereby making attorneys (and other professionals) easy targets for plaintiffs' lawyers. These thoughts should cross your mind every time you meet with a client aged 68 or older or otherwise susceptible, and you should protect yourself accordingly.

Additionally, it is unclear whether an attorney could use otherwise privileged or confidential information to defend him or herself (or a third party) from a SAFE Act claim brought by a representative of the susceptible (or older) adult to whom the attorney-client privilege does not extend and has not otherwise been waived. Serious consideration needs to be given to exempting attorneys from the SAFE Act and limiting susceptible (and older) adults' rights against attorneys to existing malpractice standards.

#### *What's the Statute of Limitations?*

Good question. Generally, under Estates & Trusts § 13-607, it is five (5) years from discovery (or should have discovered through the exercise of reasonable diligence). Given that we are talking about potentially mentally impaired or incapacitated individuals, it is entirely possible that there is no time period for an action to be brought (because, if the susceptible adult lacks capacity, then (s)he can't reasonably be expected to discover the exploitation). Additionally, if a criminal prosecution is commenced (arising out of the same facts as an action under the SAFE Act), then the time period during which the prosecution is pending shall not be computed as part of the period within which the SAFE Act action must be brought. In such cases, the plaintiff has at least one (1) extra year after the conclusion of the criminal prosecution to bring the action. The language in the SAFE Act does not specifically address when a criminal action "commences" (investigation, formal charging, etc.), nor when it "concludes" (e.g. probation after incarceration could go out many years).



### *Burying the Lead – Damages –the Teeth of the SAFE ACT*

It's been stated anecdotally, and the statutorily enumerated purposes specifically address the intention to provide access to justice for victims otherwise unable to retain competent legal assistance due to cost: the SAFE Act provides plaintiffs' attorneys with significant tools to settle a case (and for a Court, if necessary, to make the victim whole and dissuade the exploiter from taking similar action in the future).

Specifically, the SAFE Act permits all of the following:

1. Compensatory damages cumulatively with other remedies available to a party; AND
2. Punitive Damages up to an amount not exceeding three (3) times the compensatory damages; AND
3. Prejudgment interest; AND
4. Victim's Attorneys' fees; AND
5. Injunctive relief without the requirement of a bond, among others.

Treble damages and an attorneys' fee shifting provision will receive a lot of attention, but prejudgment interest and injunctive relief without a bond (in the discretion of the court) are powerful tools and incentives to promptly resolve SAFE Act litigation.

Note that the fee shift to the defendant's favor is only effective if the SAFE Act action is brought in bad faith or is of a frivolous nature. Collectively, it seems that although the SAFE Act may encourage prompt resolution to litigation, it also seems to encourage additional litigation.

### *Conclusion???*

We are far from the end of possible, future amendments to the SAFE Act. The initial legislation is the beginning of a well-intended process to protect our aging and susceptible population from unscrupulous members of society. However, protecting someone has the potential of restricting that "protected" person's individual rights. As a result, the SAFE Act is imperfect, and revisions will be necessary. For now, it is important that you and your clients are aware of its existence, and that as members of the bar, we all think about ways to utilize and improve upon this significant legislation.

<sup>1</sup>Note that both "susceptible adult" and "older adult" have separate definitions under the SAFE Act. If you're 68 years old or older, in Maryland, for SAFE Act purposes, you are officially "older." The definition of "susceptible adult" is more involved, and means that someone (of any age): (1) cannot perform one or more activities of daily living, or (2) is unable to protect the adult's rights, or (3) has diminished executive functioning due to: (a) advanced age, (b) disability or disease, (c) impaired mobility, (d) habitual drunkenness, (e) addiction to drugs, or (f) hospitalization.

<sup>2</sup>Compare this concept with the Maryland General and Limited Power of Attorney Act (Estates & Trusts 17-103(b)), which provides a similar laundry list of individuals and entities who can bring an action on behalf of another person, but in relevant part provides "On 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."

## Historical Tour of the Clarence M. Mitchell, Jr. Courthouse

*On August 1, the BABC's own Derek Van De Walle led a tour of the Clarence M. Mitchell, Jr. Courthouse. The tour included the Museum of Baltimore Legal History.*

The Museum of Baltimore Legal History was founded on October 24, 1984 by the Honorable James F. Schneider and Brig. Gen. Philip Sherman. The room which houses the Museum was previously used as the courtroom for the Orphans' Court of Baltimore City from 1900 to 1977. Referred to as "a treasure within a treasure" and "one of the most beautiful courtrooms in Maryland," the Museum maintains its original elegance: the original parquet floor, carved mahogany bench, and wainscotting made of mahogany imported from Saint Iago, Jamaica remain in beautiful condition.

The Museum houses historical artifacts of Baltimore's bench and bar. The artifacts include a copper drum used to select jurors into the 1960s, the scarlet judicial robe of the Honorable Robert M. Bell, former Chief Judge of the Court of Appeals, and the original 1885 opinion that ruled African-American lawyers could not be denied the right to practice in the courts of Baltimore City.



A mural, "The British Surrender at Yorktown," hangs behind the bench. The mural was painted over three years by world-renowned French artist Jean-Paul Laurens at his studio in Paris, France, and shipped to Baltimore and installed in the courtroom in 1910. The mural depicts the capitulation of the British under Lord Cornwallis to General George Washington on October 19, 1781 on "Surrender Field" at Yorktown, Virginia.

The Museum is managed by the non-profit Baltimore Courthouse and Law Museum Foundation, Inc. In 2021, the

Museum was renamed in honor of the Honorable James F. Schneider, one of the founders of the Museum. Located in Room 243 of the Clarence M. Mitchell, Jr. Courthouse, the Museum is free and open to the public on weekdays from 12:30 to 1:30 p.m. when volunteers are available. Private tours of the Museum are also available. If you are interested in a tour of the Museum or would like to volunteer as a docent, please contact Derek Van De Walle ([vandewalle.derek.m@gmail.com](mailto:vandewalle.derek.m@gmail.com)).



## President's End of Year Party

July 26, 2023

On July 26, 2023 the BABC Executive Council met to celebrate Immediate Past President Myshala Middleton on a superb year at Guilford Hall Brewery. The Council presented her with luggage as she is an avid traveler. Thank you Judge Middleton for all your hard work.





THE HISTORICAL COMMITTEE OF THE  
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## Executive Council Orientation

August 18, 2023

The new BABC Executive Council met on August 18, 2023 to plan out the new year. The new MI24 Team led by incoming President James Motsay has some exciting plans.



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## BABC Visits Law Schools

August 30, 2023

On the 30th of August, the BABC & YLD Membership committees attended a fair at the University of Baltimore and signed up 31 new members. On the following day, they attended a fair at the University of Maryland and signed up an additional 20 members. Great job team!



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## End of Summer Reception

September 21, 2023

September 21 was the official kick off to the events season with the End of Summer Reception. Thank you to the Bar Association Insurance Agency for sponsoring again this year!





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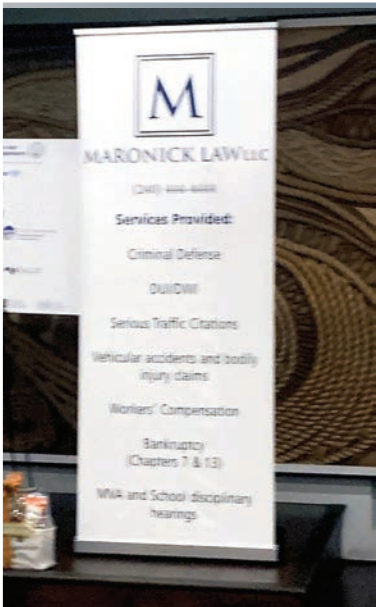
## Crab Feast

October 4, 2023

On October 4, 2023, the BABC had its official Crab Feast for the second time at Jimmy's Famous Seafood. The crabs were flowing, along with a full buffet. A special thanks to Maronick Law, LLC for sponsoring and allowing us to keep the price the same as last year. Tom, you're a class act!









## YLD Mix and Mingle

October 17, 2023

On October 17, the YLD held their Mix and Mingle. It was a great forum for not only YLD members but all members to come together. Remember, YLD events are open to all members, but we love when you bring an associate! Thanks to CRC Salomon for sponsoring.





## Green Mount Cemetery Tour

October 21, 2023

The Green Mount Cemetery Tour was held on October 21, 2023. Thanks to the Historical Committee for putting this sold out event together. This is an annual event, so if you missed it, we hope to see you next year.





## The Law of Sepulcher in Maryland *Continued from page 11*

<sup>37</sup>*Kline*, 110 Md. App. at 397.

<sup>38</sup>*Kline*, 110 Md. App. at 396.

<sup>39</sup>See also Md. Code Ann., Health-Occ. §§ 7-101 to 7-702. The licensing and permitting laws are not covered in this article.

<sup>40</sup>See COMAR 09.34.04 (Cemeteries); COMAR 09.34.09 (Crematories).

<sup>41</sup>Md. Code Ann., Bus. Reg. § 5-101(d).

<sup>42</sup>C.J.S., Cemeteries §§ 1-2.

<sup>43</sup>Md. Code Ann., Bus. Reg. § 5-502(a).

<sup>44</sup>Balt. City Health Code, § 18-101(a)

<sup>45</sup>*Housing Opportunities Commission of Montgomery County v. Adebayo*, 258 Md. App. 137, 144 (2023).

<sup>46</sup>See Md. Code Ann., Health-Gen. § Title 5.

<sup>47</sup>Tanya Mash, *THE LAW OF HUMAN REMAINS*, p. 37 (2016).

<sup>48</sup>*Walser v. Resthaven Memorial Gardens, Inc.*, 98 Md. App. 371, 384 (1993) (action for, *inter alia*, negligence, gross negligence, IIED, trespass, conversion against by mother against stepmother who had son disinterred).

<sup>49</sup>See, e.g., *Walser*, 98 Md. App. at 377.

<sup>50</sup>*Walser*, 98 Md. App. at 386-87.

<sup>51</sup>*Walser*, 98 Md. App. at 385.

<sup>52</sup>*Young v. College of Physicians & Surgeons of Baltimore City*, <sup>81</sup>Md. 358, \*177 (1895) (action for emotional damages against medical examiner and coroner who performed autopsy on decedent in order to determine cause of death).

<sup>53</sup>The Restatement of the Law (Third) of Torts: Miscellaneous Provisions, Tentative Draft No. 2, § 48 F (March 2023) acknowledges that damages for emotional distress can result from violations of a person's right of sepulcher.

<sup>54</sup>*Walser*, 98 Md. App. at 395.

<sup>55</sup>*Posner*, 176 Md. at 335 ("An action at law . . . in trespass will lie for the invasion of one's burial lot."). The Restatement of the Law (Third) of Torts: Miscellaneous Provisions, Tentative Draft No. 2, § 48 E(d)

(March 2023) also observes that because human remains are not property, an interference with the right of sepulcher cannot be a trespass to chattels or conversion.

<sup>56</sup>*Smith v. Thompson*, 55 Md. 5, 6 (1880) (action for trespass lied where defendant, without plaintiff's consent, dug a grave in plaintiff's burial lot and buried a corpse).

<sup>57</sup>See C.J.S., Dead Bodies § 30, 34.

<sup>58</sup>See, generally, Civil No. RDB-21-1970 (D. Md. 2021).

<sup>59</sup>*Quesenberry v. Meginniss*, 70 Md. App. 320, 321-22 (1987) (action to quiet title to determine which of living family members were entitled to be buried in remaining lots in family mausoleum).

<sup>60</sup>*Painter*, 123 Md. at 307 (injunctive relief sought to regain control of decedent's organs removed during an autopsy); *Ederly v. Ederly*, 193 Md. App. 215 (2010) (injunctive relief sought to prevent siblings from removing remains of deceased parent from the State of Maryland).

<sup>61</sup>The Restatement of the Law (Third) of Torts: Miscellaneous Provisions, Tentative Draft No. 2, § 48 E(g) (March 2023).

<sup>62</sup>Md. Code Ann., Crim. § 10-402(a).

<sup>63</sup>Md. Code Ann., Crim. § 10-402(g).

<sup>64</sup>Md. Code Ann., Crim. § 10-402(b)-(c).

<sup>65</sup>Md. Code Ann., Crim. § 10-402(d), (f).

<sup>66</sup>Md. Code Ann., Crim. § 10-403(b).

<sup>67</sup>Md. Code Ann., Crim. § 10-404(a).

<sup>68</sup>Md. Code Ann., Crim. § 10-403(c).

<sup>69</sup>Md. Code Ann., Crim. § 10-403(d)(1).

<sup>70</sup>Md. Code Ann., Crim. § 10-403(d)(2).

<sup>71</sup>Md. Code Ann., Crim. § 10-403(f).

<sup>72</sup>Md. Code Ann., Crim. § 10-403(d)(2).

<sup>73</sup>Md. Code Ann., Crim. § 10-403(e).

<sup>74</sup>See Md. Code Ann., Bus. Reg. §§ 5-610, 5-904, 5-905.

<sup>75</sup>See, e.g., *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995); *Brotherton v. Cleveland*, 923 F.2d 477

(6th Cir. 1991); but see *Arnaud v. Odom*, 870 F.2d 304 (5th Cir. 1989).

<sup>76</sup>*Marsh v. County of San Diego*, 680 F.3d 1148, 1154-55 (9th Cir. 2012) (cleaned up).

<sup>77</sup>30 Md. App. 317, 320 (1976).

<sup>78</sup>*Id.* at 321.

<sup>79</sup>*Id.* at 325.

<sup>80</sup>*Id.* at 323 (citing Md. Code, art. 43 § 20(a)); see Health-Gen. § 5-309(a).

<sup>81</sup>*Id.* at 326.

<sup>82</sup>*Id.* at 330.

<sup>83</sup>*Id.* at 331.

<sup>84</sup>See Md. Dept. of Leg. Servs., Fiscal & Policy Note Revised, S.B. 756 at 4 (2011). The 2011 Act replaced the 1968 Maryland Anatomical Gift Act.

<sup>85</sup>*Scarborough v. Transplant Resource Center of Maryland*, 242 Md. App. 453, 465 (2019).

<sup>86</sup>Md. Code Ann., Est. & Trusts § 4-501(c).

<sup>87</sup>42 U.S.C. § 273(b)(1).

<sup>88</sup>Md. Code Ann., Est. & Trusts § 4-514(a) ("A person that acts in accordance with this subtitle or with the applicable anatomical gift law of another state, or attempts in good faith to do so, is not liable for the act in a civil action, a criminal prosecution, or an administrative proceeding.")

<sup>89</sup>242 Md. App. 453 (2019).

<sup>90</sup>Md. Code Ann., Est. & Trusts § 4-514(b).

<sup>91</sup>136 Md. App. 91, 98 (2000).

<sup>92</sup>*Id.* at 136-37.

<sup>93</sup>244 Md. App. 259 (2020)

<sup>94</sup>*Id.* at 268.

<sup>95</sup>*Id.* at 275-76.

<sup>96</sup>*Id.* at 278.

<sup>97</sup>*Id.* at 278.

<sup>98</sup>*Hollingsworth*, 136 Md. App. at 137.

<sup>99</sup>*Mattingly*, 244 Md. App. at 276.

<sup>100</sup>*Hollingsworth*, 136 Md. App. at 137.

<sup>101</sup>*Mattingly*, 244 Md. App. at 279 (quoting *Walsh v. Caidin*, 232 Cal. App. 3d 159, 163 (1991)).



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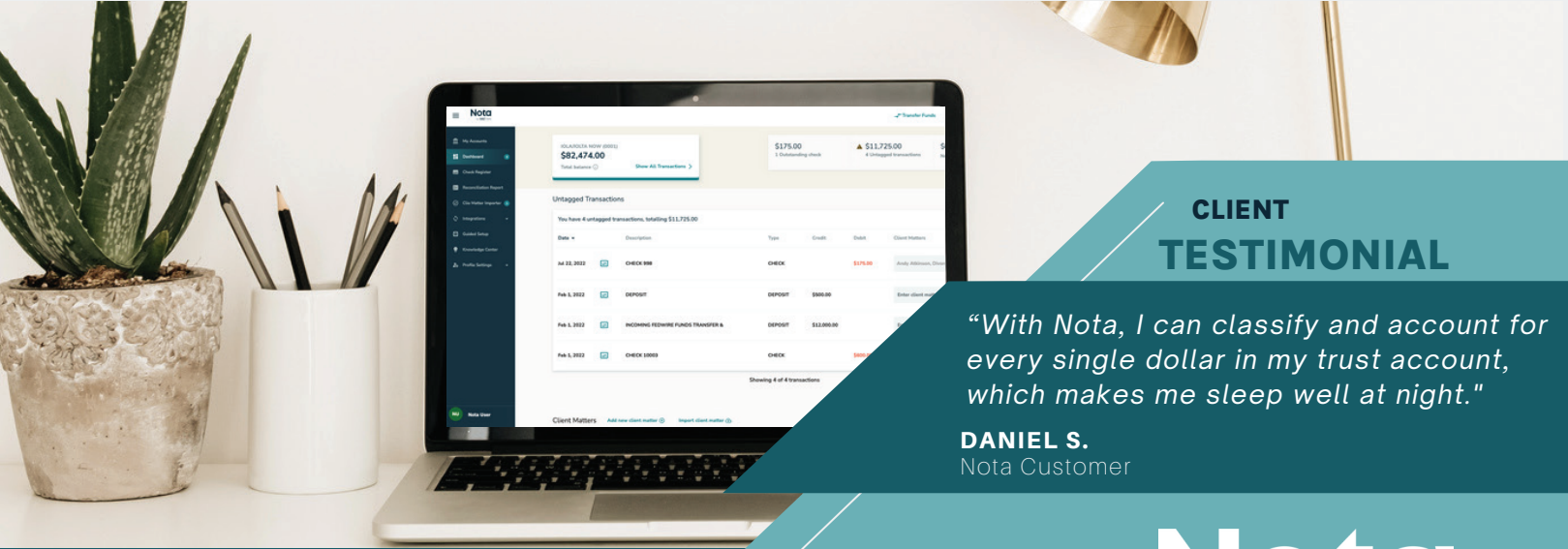
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# Member Spotlight

## Sarah Belardi



Sarah Belardi is an Assistant Attorney General at the Maryland Office of the Attorney General, Maryland Department of Health. She currently serves as a Co-Chair of the Membership Committee of the Young Lawyers' Division. Mrs. Belardi has been a member of the BABC since 2017, and has previously served as a co-chair of Continuing Legal Education and Public Service Committees of the Young Lawyers' Division.

### **Can you tell us why you became involved with the Bar Association?**

I relocated from Virginia to Maryland early in my legal career, and the Bar Association gave me a community of fun, smart attorneys who welcomed me with open arms. Some of my closest friends are from the Bar Association.

### **What are you most proud of from your involvement with in the Bar Association?**

I am incredibly proud to have been part of the team that converted the YLD's Annual Holiday Party for Children Living in Shelters to a remote event in 2020, ensuring that the children still received entertainment, presents, and coats, and that all of the shelters' residents received a catered dinner. The year 2020 was an uncertain time for everyone, but the BABC made sure to come together to give back to our community.

### **What is your favorite part of being involved with the Bar Association?**

I enjoy the networking and learning opportunities that bar membership provides – and there are many – but I absolutely love the numerous volunteer opportunities offered.

Through the Bar Association, I have volunteered at Believe in Tomorrow Children's House at Johns Hopkins Hospital, Cylburn Arboretum, Duncan Street Miracle Garden, Filbert Street Community Garden, Franciscan Center, Highlandtown Elementary Middle School Mock Trial Program, Maryland Food Bank, and Our Daily Bread. A highlight for me was mentoring middle school students through YLD Public Service's mock trial program, where attorneys met weekly with students in the lead up to a mock trial held in the Circuit Court for Baltimore City.



*Sarah Belardi (lower right, wearing antlers) and volunteers sorting gifts for the YLD's Annual Holiday Party for Children Living in Shelters (December, 2020).*

## Valda Ricks



Valda Ricks served the citizens of Baltimore in the Office of the Public Defender for 22 years, first as an Assistant Public Defender where she handled a variety of cases ranging from Children in Need of Assistance to serious felonies, and later as a Chief Attorney. Valda was also appointed as a faculty member to the Gideon's Promise Training Program, responsible for the training of all newly hired Assistant Public Defenders in Maryland.

After leaving the Public Defender's office, Valda joined the Baltimore City State's Attorney's Office as Deputy of Operations, where she was responsible for the operations of several divisions, including three District Courts, Juvenile, Central Booking and Intake Facility, Misdemeanor Jury Trial, the Specialty Courts, and training.

In January of 2023, Valda continued her commitment to public service Valda when she became a staff attorney at the Pro Bono Resource Center of Maryland, where she represents tenants in Baltimore City and Baltimore County.

Valda has also tutored students at Coppin State University and mentored law students and attorneys newly admitted to the Maryland Bar.

Valda is the recipient of several awards including the Margaret

Brent/Juanita Jackson Mitchell Award, which recognizes female lawyers who have surmounted substantial barriers to succeed in their profession; the Bar Association of Baltimore City Government & Public Interest Award; the Maryland Daily Record Top 100 Women Award; the Maryland Daily Record Law in Leadership Award; and, the Maryland Daily Record Lifetime Achievement Award.

Valda has remained a committed member of the Bar Association of Baltimore City for over 20 years and has remained active on various committees, including Judicial Selections, Government and Public Interest, Criminal Law; and is a member of the Executive Council.

### **Why did you join the Bar Association of Baltimore City?**

When I joined the BABC, I wanted to belong to a bar association whose mission aligned with my passion and deep sense of social responsibility, commitment to public service, legal education advocacy to attorneys and the general community, mentorship, leadership, and diversity and inclusion.

The BABC gave me the opportunity for leadership, personal and professional growth. Throughout the years, I have chaired the Judicial Selections Committee for four Bar Presidents, remained active in the Criminal and the Government and Public Interest Committees and have continued to mentor attorneys newly admitted to the Bar.

## AROUND THE OFFICE



**BRANDON WHARTON** has joined Gallagher Evelius & Jones LLP as an associate. His practice focuses on education, employment, investigations, and litigation.



**MARIA BERMUDEZ** has joined the Baltimore City State's Attorney's Office as an Assistant State's Attorney, with a practice focused in the District Court of Maryland.



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