Oregon State Bar Elder Law Newsletter

Volume 19
Number 4
October 2016

The interplay of estate planning and protective proceedings

By Sibylle Baer, Attorney at Law

In general, a conservator is necessary if an individual is financially incapable as defined in ORS 125.005(3) and has money or property in need of management (ORS 125.400). A guardian is necessary if an individual is incapacitated as defined in ORS 125.005(5). Not every person who is financially incapable or incapacitated necessarily needs a guardianship or conservatorship. This is, in large part, due to the execution and use of estate planning documents. At times, however, a protective proceeding becomes necessary even though estate planning documents were executed. The interplay between an individual's estate planning and a protective proceeding can be complicated and result in problems down the road if potential issues are not identified and addressed at the time a protective proceeding is initiated. Any court-appointed fiduciary must also be vigilant during the administration of a protective proceeding to ensure a protected person's estate plan is honored. ORS 125.460.

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When initiating a protective proceeding, the practitioner should keep ORS 125.200 in mind. ORS 125.200 provides, "[t]he court shall appoint the most suitable person who is willing to serve as fiduciary after giving consideration to the specific circumstances of the respondent, any stated desire of the respondent, the relationship by blood or marriage of the person nominated to be fiduciary to the respondent...." Previously executed estate planning documents are an expression of the respondent's desire and should be given great deference in a protective proceeding.

Power of Attorney

A power of attorney (POA) designates an individual (an agent) to conduct business on behalf of another (the principal) when the principal is no longer able to do so. The type of business an agent is authorized to conduct on behalf of a principal is identified in the POA. Most POAs authorize an agent to manage bank accounts and investments. Some go so far as to allow an agent to buy and/or sell real property. If a POA was validly executed, the agent is competent and managing the assets appropriately, and the agent is able to conduct necessary business on behalf of the principal, a conservatorship is not necessary. However, circumstances may arise that necessitate the initiation of a protective proceeding. For example:

- The principal may become angry at the agent for "taking control" and revoke the POA, leaving no one with the authority to manage the principal's assets.
- The principal may be influenced by a third party to revoke the POA and execute a new one in favor of a questionable agent.

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- The agent may mismanage the principal's assets.
- The POA may not grant the agent the authority to conduct necessary business.

In all of these circumstances, the initiation of a protective proceeding is appropriate. However, it may not be necessary to impose a conservatorship in each situation. For example, if the POA does not grant an agent the authority to sell real property, it makes the most sense to file a petition pursuant to ORS 125.650 which governs "Other protective orders." ORS 125.650 requires the statutory criteria for a protective proceeding be met but is designed for situations limited in scope and duration. In the foregoing instance, one can petition to have an agent appointed for the limited purpose of selling a residence. Once the sale is complete and the proceeds deposited into an account managed by the agent pursuant to a POA ,the proceeding can be closed.

When petitioning for the appointment of a conservator, it often makes sense to ask the court to revoke any powers of attorney. If a specific POA is known, it is prudent to reference that specific document. If there are a series of POAs, or if it is unknown whether or not a POA exists, simply request a general revocation of prior POAs. It is important to give notice of the petition to the agent so he is on notice that you are seeking to set aside the POA. The agent may object to both the appointment of a conservator and the revocation of the POA. The agent can argue the appointment of a conservator is unnecessary since there is a duly executed POA. In the event a conservator is appointed and no request was made to revoke a POA, the conservator has the authority to do so pursuant to ORS 127.005(5).

Advance Directive

A strong argument can be made that a guardian is not necessary if an appropriate Health Care Representative (HCR) has been designated in an advance directive. However, a HCR does not have the authority to place a person or limit visitation, which are two issues that may necessitate the appointment of a guardian depending on the circumstances. The HCR should be given priority when considering whom to nominate as guardian.

An HCR has the potential to wreak havoc in a guardianship if the HCR is not the same person as the guardian. ORS 127.545(6) provides: "Unless the power of attorney for health care provides otherwise, valid appointment of an attorney-in-fact for health care supersedes: (a) Any power of a guardian or other person appointed by a court to make health care decisions for the protected person...." Therefore, a guardian has no legal authority to make medical decisions on behalf of a protected person in the face of an HCR. The guardian retains the legal authority to place a person but, as a practical matter, care facilities and medical providers are reluctant to take direction from two (potentially) adverse individuals. The guardian is therefore in the position of having all the liability associated with being guardian while having no authority to manage care or make medical decisions. This is unacceptable for most professional guardians. Unless the HCR agrees to resign, the only recourse for the guardian is to file a petition for judicial review of advance directive pursuant to ORS 127.550 and seek its revocation. This can be a litigious, lengthy, and costly process simply to grant the guardian the decision-making authority she needs to do her job. This can be avoided at the outset by asking the court to set aside any prior designations of an HCR in the guardianship petition. The balance of the advance directive can and should remain in effect.

Trusts

If a financially incapable person's assets are held in a trust, an argument can be made that a conservatorship is unnecessary because there are no assets in need of management. However, if a trustee is not managing trust assets appropriately, a conservatorship may be appropriate. See *Helmig v. Farley, Piazza & Associates*, 218 Or App 622, 180 P3d 749 (2008).

The circumstance of a financially incapable beneficiary of a trust raises a serious question as to who should monitor the trustee's administration of the trust to ensure the financially incapable beneficiary is protected. This can be done in the trust itself through the designation of a trust adviser pursuant to ORS 130.735. In doing so, it is important to clearly articulate the duties of the trust adviser in this instance; i.e., to monitor the administration of the trust by the trustee when the beneficiary becomes financially incapable.

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Another option is to file a petition for the appointment of a special representative pursuant to ORS 130.120. The special representative would be tasked with monitoring the trustee and protecting the financially incapable beneficiary. In the event a financially incapable individual has both trust and non-trust assets a conservatorship may be necessary. While it might seem in keeping with the proposed protected person's estate plan to nominate the trustee as the conservator, serious consideration should be given to nominating someone else so the conservator can not only manage non-trust assets but also monitor the trustee. This responsibility should be included in the petition as well as the limited judgment appointing the conservator so as to make the conservator's responsibility clear.

Wills and payable on death beneficiary designations

Wills and payable on death beneficiary designations (PODBD) do not usually come up during the initiation of a protective proceeding. However, once appointed, a conservator must be familiar with a protected person's will and PODBD to ensure she administers conservatorship assets in a manner consistent with the protected person's estate plan.

In conclusion

When evaluating whether or not to initiate a protective proceeding, it is important to keep in mind that the imposition of a guardianship and/or conservatorship over a person is a significant infringement on his or her independence and liberty and should not be undertaken lightly. Assess what goals you and your client hope to achieve through the protective proceeding. If those goals can be accomplished with existing estate planning documents that is ideal. If not, consider the least restrictive options available. Throughout the process it is important to keep the individual's previously stated desires at the forefront whenever possible. ■

The public guardian option

A public guardian or conservator program serves persons with age-related neurocognitive issues, serious and persistent mental health issues, or intellectual or developmental disabilities, when they have no one to act on their behalf.

Compared to many other states, Oregon has very limited public guardian services. In 2012, the Public Guardian and Conservator Task Force estimated that between 1,575 and 3,175 adult Oregonians are incapacitated and need but lack services.

In answer to the need, the legislature created the Oregon Public Guardian and Conservator Program (OPG). OPG serves as a court-appointed, surrogate decision-maker for adults incapable of making some or most decisions about their persons and affairs, and who have no one else to serve as their guardian or conservator.

The Oregon Public Guardian Program is housed in the Office of the Long-Term Care Ombudsman, and at this point, staff and resources are limited. As a result, OPG services are available only in certain areas of the state, and the focus is on individuals most at risk and incapable of making decisions. OPG prioritizes cases, with first priority given to severe and current abuse or neglect and profound self-neglect with life threatening issues.

Multnomah County operates a public guardian and conservator program. Due to budget constraints, space and availability are extremely limited, so the program must limit its clientele to only the most vulnerable citizens.

In Jackson County, the Center for NonProfit Legal Services is not a government agency, but a private non-profit law firm that provides guardianship services for low-income persons.

Another option is the Arc Oregon's Guardianship, Advocacy and Planning Services (GAPS) program, the only statewide corporate guardianship program in Oregon. However, because of budget limitations, it is able to accept only three to four new clients each year for guardianship services. ■

Oregon Public Guardian Program
3855 Wolverine St. NE, Suite 6
Salem, OR 97305
503-378-6848 or 1-844-656-6774
https://www.oregon.gov/LTCO/Pages/Oregon-Public-Guardian.aspx

Multnomah County Public Guardian Program
421 SW Oak St., Suite 510
Portland, OR 97204
503.988.4567
https://multco.us/ads/public-guardian-program

Center for Nonprofit Legal Services
225 W Main St.; Medford, OR 97501
541-779-7291
http://cnpls.org

The Arc Oregon
2405 Front St. NE, #120; Salem, OR 97301
503.581.2726
http://www.thearcoregon.org/what-we-do/gaps

Considerations in choosing to nominate a professional fiduciary versus a family member as guardian

By Darin Dooley, Attorney at Law, and Brett Callahan, Attorney at Law

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A guardian plays an important role in the protected person's life. Deciding on a suitable fiduciary is one of the most vital and difficult decisions our clients make in a guardianship matter. There are pros and cons to having a professional fiduciary versus a family member serve as guardian. Several factors need to be considered, as outlined below.

Suitability

In general, the proposed guardian must be the most *suitable* person who is *willing* to serve, given the specific circumstances. ORS 125.200. Further, the proposed guardian cannot have been convicted of a crime, filed for bankruptcy, or had a professional license revoked or canceled, unless the nominee informs the court of the circumstances of those events before being appointed. ORS 125.210.

Courts will often look to a family member to serve as guardian. A trusted family member will already have a relationship with the respondent, understand the respondent's values and beliefs, desire to act as an advocate, and look out for the respondent's well-being. The court will also take into consideration the "stated desire" of the respondent. ORS 125.205. When counseling clients, the prudent attorney will consider the wishes of the respondent as expressed in estate planning documents.

A family member may not be able to meet the statutory requirements to be appointed guardian if incapacitated, financially incapable, etc. The disclosures required in the petition must explain any of these conditions to the court's satisfaction. ORS 125.055(2)(d). There may be other factors that would disqualify a family member in the court's eyes, such as lack of sophistication, age, health, or lack of ability to fulfill the guardian's duties due to distance or inability to travel. (Required training for guardians, provided by Guardian Partners, can help in this regard.)

Family dynamics

Consideration also needs to be given to family dynamics when proposing a family member as guardian. The family member may not be as willing to serve if the petition is likely to lead to family conflict and/or objections by other family members. For example, friction between family members may arise if there is a perception that the court is choosing one family member over another. Even if the family is likely to rally around the proposed family member, the nominee may be hesitant to change the relationship with the respondent. Clients sometimes express a desire to go back to "just being a son/daughter/spouse," as in the past. The nominee needs to have the character and fortitude to be the "bad guy" if required. The guardian may be called on to limit access to the protected person or change the protected person's lifestyle. These actions may have a negative effect on family relationships. Finally, the initial desire to do the right thing may fade over time. The attorney should gauge the nominee's willingness to serve and whether other family members or other well intended outsiders are forcing the issue.

Professional fiduciaries

Professional fiduciaries are highly specialized and may have backgrounds in health care, finance, estate planning, social work, business, etc. Professional fiduciaries are required by law and the courts to use their knowledge, experience, and training to manage the guardianship adequately.

If the client/petitioner has decided that a professional fiduciary is the best option, the attorney should provide several referrals and suggest the petitioner meet with them. If the respondent is able and appropriate, consider having him or her meet with the fiduciary, as well. A good fit is important, especially in cases where the fiduciary is being appointed as a result of—or to avoid—family conflicts. To this end, it is essential for the attorney to have a good working relationship with professional fiduciaries and understand each one's strengths and approach to conflict resolution. The attorney should consider whether the values, politics, and religious beliefs of the professional fiduciary align with those of the respondent.

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Choice of guardian

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Consideration should also be given to the size of the professional fiduciary's firm. If the protected person will need weekly transport to doctor's appointments, for example, a sole practitioner may not be the best fit. The professional fiduciary's fees should also be weighed. If the family will be paying for the guardianship, there must be a commitment and resources available for the long term. If the protected person's funds will be used, will care needs exhaust those funds over time and will the professional fiduciary be able to be paid? Although cost is a central consideration when deciding whom to nominate, selecting a family member or friend does not always correlate with greater savings. It is not uncommon for the lay person to charge a fee. It may be that the professional fiduciary's higher fee rate may be worth the corresponding greater experience and/or professionalism.

Managing long term care costs

Take into consideration the posibility that the guardian may need to apply for public benefits as the protected person's resources are spent down, and whether the guardian is able to manage the application process. It may become imperative that the guardian pursue public benefits for the protected person, as well as explore county-based social programs and other services for which the protected person may be eligible. The guardian may need to be creative and engage in problem solving, looking at less restrictive and less expensive alternatives to meet the protected person's needs. While some family members are able to take on these important tasks, many may need extensive guidance or hand holding from the attorney, which may result in greater costs.

Making the choice

An adversarial protective proceeding is full of emotional and legal peril, and the decision to seek a guardianship often divides families. For situations in which there are extreme conflicts or complicated issues, or when the respondent does not have close relatives and does not want to burden friends with the responsibility, a professional fiduciary, as a neutral party, may be the best option to assure the court that the guardian is competent to handle the job. ■

Important elder law numbers

as of
October 1, 2016

Supplemental Security Income (SSI) Benefit Standards	Eligible individual ..... $733/month Eligible couple $1,100/month
Medicaid (Oregon)	Asset limit for Medicaid recipient ..... $2,000/month Long term care income cap ..... $2,199/month Community spouse minimum resource standard ..... $23,844 Community spouse maximum resource standard ..... $119,220 Community spouse minimum and maximum monthly allowance standards ..... $2,003/month; $2,980.50/month Excess shelter allowance ..... Amount above $601/month SNAP (food stamp) utility allowance used to figure excess shelter allowance ..... $449/month Personal needs allowance in nursing home ..... $60/month Personal needs allowance in community-based care ..... $163/month Room & board rate for community-based care facilities ..... $570/month OSIP maintenance standard for person receiving in-home services ..... $1,233 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2016 ..... $8,425/month
Medicare	Part B premium ..... $104.90/month* Part B premium for those new to Medicare in 2016 ..... $112.80/month* Part D premium ..... Varies according to plan chosen Part B deductible ..... $166/year Part A hospital deductible per spell of illness ..... $1,288 Skilled nursing facility co-insurance for days 21–100 ..... $161/day

* Premiums are higher if annual income is more than $85,000 (single filer) or $170,000 (married couple filing jointly).

ABLE Accounts 101

By Jonathan A. Levy, Attorney at Law and Kathryn F. Gapinski, Attorney at Law

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The authors thank Cynthia Barrett and Garvin Reiter for their helpful suggestions.

On December 19, 2014, the Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act was signed into law. The ABLE Act created Section 529A of the Internal Revenue Code, which provides for tax-advantaged savings accounts for individuals with disabilities (much like college or health savings accounts). For the first time, individuals with disabilities can save more than $2,000 without becoming ineligible for Supplemental Security Income or Medicaid. The additional saving can help people with disabilities to maintain greater autonomy and independence, and fund disability-related expenses that will supplement but not supplant private insurance, public benefits, and the beneficiary's employment.[1] This article is an overview of the eligible beneficiaries, features, effect on other public benefits, choice of state programs, and pros and cons of ABLE accounts.

Eligible beneficiaries

An ABLE account can be opened by a blind or disabled individual or a family member or friend, for the benefit of a blind or disabled individual.[2] The blindness or disability must have started before 26.[3] This age cutoff was intended to limit the cost of the ABLE program to the federal government.[4]

A recipient of Supplemental Security Income (SSI) and or Social Security Disability Income (SSDI) is automatically eligible to establish an ABLE account. An individual who is not receiving SSI or SSDI is still eligible if he or she obtains a letter of certification from a licensed physician that the individual (i) has significant functional limitations from blindness or disability, as defined by the Social Security Act, and (ii) the blindness or disability occurred before age 26.[5] The individual need not deliver the required physician's letter to the ABLE program or IRS at the time of opening the account; it is sufficient to certify that he or she holds the letter and will provide it if later requested.[6]

A state's ABLE program must establish rules for a beneficiary's periodic recertification of eligibility.[7] If a beneficiary becomes ineligible, the account will no longer be permitted to receive contributions, and distributions will no longer be qualified disability expenses,[8] discussed below. This does not prohibit continued distributions, but means at least part of each distribution will be subject to income tax and an additional 10 percent tax.

Features of ABLE accounts

In general

Contributions may be made to an ABLE account by any person – the beneficiary, family members, or friends.[9] Only one ABLE account can be opened per eligible individual.[10] The beneficiary of the account, the disabled individual, is the account owner.[11] The person with the signature authority must be either the beneficiary, the beneficiary's agent under the durable power of attorney or, if none, the beneficiary's parent or legal guardian.[12] Distributions may be made only to or for the benefit of the designated beneficiary.[13] An ABLE account may not be used as security for a loan.[14]

Income tax

Contributions are made to ABLE accounts with post-tax dollars and are not deductible for federal income tax purposes. Depending on the state, contributions may be deductible for state income tax purposes. Oregon's ABLE program, which is expected to launch in December, allows a state income tax deduction for contributions made before the designated beneficiary turns 21.[15] For 2016, the Oregon deduction may not exceed $2,320 for single tax filers and $4,620 for joint tax filers.[16]

The income earned and retained in an ABLE account is not taxed, nor are distributions for qualified disability expenses.[17] A "qualified disability expense" (QDE) means any expense related to the designated beneficiary as a result of having a life with disabilities.[18] These include expenses for "maintaining or improving" the beneficiary's "health, independence, or quality of life."[19] More specifically, QDEs include:

- education
- housing
- transportation
- employment training and support
- assistive technology and related services
- health
- prevention and wellness
- financial management and administrative sevices
- legal fees
- expenses for oversight and monitoring
- funeral and burial
- other expenses approved by the Treasury Department.[20]

The proposed regulations take an expansive view of QDEs, which "include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit a disabled individual."[21] This is arguably a broader approach than the Social

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Security Administration has taken for first-party special-needs trusts.[22]

Distributions that are not for QDEs are includable in gross income under the rules that apply to annuity distributions.[23] Thus, part of each distribution may qualify as a nontaxable return of contributions to the account. There is also an additional tax equal to 10 percent of the includable income.[24]

If an ABLE account beneficiary is in a low tax bracket, taxes may not be a deterrent to non-qualified distributions. However, non-qualified distributions may jeopardize a beneficiary's eligibility for public benefits.

Gift tax, generation-skipping transfer tax, and estate tax

Contributions by persons other than the account beneficiary are treated as completed gifts to the beneficiary. If those contributions (plus other gifts to the beneficiary) do not exceed the annual gift-tax exclusion, now $14,000, the contribution is not subject to gift tax or generation-skipping transfer tax.[25]

A contribution by the beneficiary is not a gift unless the designated beneficiary is later changed. In that event, the portion of the fair market value of the ABLE account attributable to the old beneficiary's contribution (plus earnings on that contribution) amounts to a gift to the new beneficiary, and the usual gift and GST tax rules apply.[26] This is discussed further below.

Distributions from an ABLE account to or for the designated beneficiary are not treated as taxable gifts.[27]

The balance of an ABLE account at the beneficiary's death is includable in his or her gross estate for estate tax purposes. Payment of outstanding QDEs and the state's Medicaid recovery claim may be deductible under section 2504 of the tax code.[28]

Contribution limits

Total annual contributions from all sources to an ABLE account are limited to the annual gift exclusion of IRC §2503(b)—currently $14,000.[29] Aggregate contributions over time to an ABLE account are subject to state limits for education-related 529 savings accounts.[30] Oregon's total contribution limit is $310,000.[31]

Status of account at beneficiary's death

On the beneficiary's death, the remaining funds in the ABLE account are subject to Medicaid recovery.[32] The amount of the state's claim is limited to medical assistance paid for the beneficiary after the account was established. The state's claim is also reduced by (i) premiums previously paid by or for the beneficiary to a Medicaid buy-in program (called Employed Persons with Disabilities or EPD in Oregon[33]) and (ii) outstanding payments due for QDEs.

It is not clear (i) what happens if funds are left in the account after payment of the state's claim, or (ii) whether other claims, such as administrative and funeral expenses, take priority over the state's claim under ORS 115.125. On (i), it seems that the account must either permit the payment of remaining balances to pass to named beneficiaries, as with payable on death accounts as provided in ORS chapter 708A, or become part of the deceased beneficiary's estate. Otherwise, the remaining funds will end up in limbo.

On (ii), Section 529A(f) does not mention the types of claims listed in ORS 115.125. However, there is some legal basis to honor the ORS 115.125 priorities. Section 529A(f) declares that the state is a creditor, not a beneficiary, of an ABLE account. The proposed tax regulations contemplate that the state will file its claim either with the person with signature authority over the ABLE account or the statutory executor of the beneficiary's estate as defined in IRC § 2203.[34] If the account is a probate asset, the probate statutes would normally apply. Other types of assets, for which the state ostensibly has a first claim for Medicaid recovery, are nevertheless paid only after higher-priority claims under ORS 115.125 are satisfied.

It would help if both issues (i) and (ii) are clarified by each state's ABLE Act program. For now, individuals with ABLE accounts should consider prepaying funeral and burial expenses, which are QDEs that come ahead of the state's claim by the language of Section 529A(f) itself.

Changing account investments and ABLE plans

ABLE accounts are not for day traders. An ABLE account may permit the beneficiary to direct the investment of contributions no more than twice in any calendar year.[35] This follows the rule for qualified tuition accounts under Section 529.[36]

As we note below, one may open an ABLE account outside the beneficiary's home state. From time to time, it may pay to switch between states' ABLE plans for better investment choices or lower fees. Section 529A permits a rollover between different ABLE accounts once every twelve months.[37] A rollover, like rollovers involving IRAs and qualified plans, involves withdrawing funds from the old account and, within 60 days, depositing the funds in the new account.[38] However, unlike retirement plans, partial rollovers are not permitted for ABLE accounts. If there are two ABLE accounts at the same time, the second account will be disqualified.[39]

The proposed tax regulations also permit a "program-to-program transfer" between ABLE accounts.[40] This is much like a "direct rollover" or "trustee-to-trustee transfer" between retirement accounts. It involves a payment from one account to another without an intervening distribution to the beneficiary. It is safer than a rollover, because it avoids the risk that the payment to the new ABLE account will be delayed past the 60-day limit, disqualifying that account.

The annual contribution limit does not apply to rollovers or program-to-program transfers.[41]

Before opening an ABLE account, confirm that it permits program-to-program transfers. Some states' ABLE accounts may not.

Changing account beneficiaries

An ABLE account must permit a change in the designated beneficiary, but only during the life of the old beneficiary.[42] If the new beneficiary is an "eligible individual" (who meets the ABLE Act's blindness or disability requirements)[43] and a "member of the family" (a sibling, half-sibling, or step-sibling)[44] of the previous beneficiary, then the account continues

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to qualify as an ABLE account[45] and the change of beneficiary is not treated as generating taxable income to the old beneficiary[46] or as a taxable gift or generation-skipping transfer by the old beneficiary to the new one.[47] However, if the new beneficiary is not an eligible beneficiary or is not a member of the family, then these happy results will not apply.

Keeping records of account disbursements

The IRS has announced it will not require ABLE programs to establish safeguards to distinguish between distributions used for QDEs and those that are not qualified.[48] Beneficiaries still need to track qualified and non-qualified distributions for tax reporting.

Effect of ABLE accounts on eligibility for other public benefits

Federal programs, in general

In general, ABLE-account contributions, balances, and distributions for QDEs are disregarded for eligibility for means-tested Federal programs.[49] Thus, ABLE accounts are excluded both as an income and resource for the purpose of Supplemental Nutrition Assistance Program (SNAP) eligibility.[50] Unfortunately, this has not yet been confirmed for Section 8 Housing (HUD) and Veterans Aid & Attendance.[51]

SSI

For SSI benefits, there are two exceptions to the general rule: account balances in excess of $100,000 and distributions for housing expenses. Whenever an ABLE account balance exceeds $100,000, the beneficiary's SSI cash benefit is suspended, but not terminated, until the balance drops below $100,000. This suspension has no effect on Medicaid eligibility.[52]

The exception for housing QDEs creates a trap for the unwary. The Social Security Administration has announced that: (i) distributions from ABLE accounts are not income, but are conversions of a resource from one form to another; (ii) distributions for non-housing QDEs are excluded as resources, even if retained by the beneficiary beyond the month received by the beneficiary; and (iii) distributions for housing QDEs are counted as resources if retained by the beneficiary into the month after the month of receipt.[53] If a beneficiary receives funds from an ABLE account in May, deposits the funds into his or her checking account, but does not write the check for the housing expense until June, those funds are included as resources on June 1. Housing expenses include payments for mortgages, real property taxes, rent, heating and fuel, gas, electricity, water, sewer, or garbage removal.[54]

Fast footwork may avoid this problem for housing QDEs: the beneficiary can arrange to withdraw funds from the ABLE account and write and mail the check for the expense during the same month. Presumably, this would be either at the end of the month before rent or other payments are due, or the start of the month when those payments are due (but within grace periods for late payment). Or, if the ABLE program so permits, the beneficiary can arrange to have the payment go directly from the ABLE account to the payee of the housing expense.

Medicaid

Distributions for QDEs should not impair Medicaid eligibility, at least in Oregon. Funds in ABLE accounts are excluded as resources, and all funds withdrawn from ABLE accounts for QDEs, including housing, are excluded as income.[55]

Contributions to ABLE accounts from special-needs trusts

There is no published guidance on whether a special-needs trust can contribute to its beneficiary's ABLE account. However, the contributions from third-party special needs trusts should be permitted. QDEs from ABLE accounts, including properly timed housing distributions, should not impair eligibility for federal need-based benefits, as a matter of federal law and policy. That should not change if the original source of the funds was a third-party trust.

Contributions from (d)(4)(A), first-party payback trusts are a closer question. The Social Security Administration (SSA) has arguably set tighter limits under the sole-benefit rule for (d)(4)(A) trusts than the IRS has proposed for ABLE accounts.[56] The SSA may argue that contributions from (d)(4)(A) trusts to ABLE accounts circumvent the SSA's limits and are therefore improper. Counterarguments are that ABLE accounts are specifically approved by federal law and that the gap between the sole-benefit standards for (d)(4)(A) trusts and ABLE accounts is more theoretical than real. At any rate, contributions from (d)(4)(A) trusts face some risk until this point is clarified.

State and private benefit programs

The ABLE Act does not prevent state and private benefit programs from considering ABLE account balances and distributions for eligibility.

Choice of State ABLE Accounts

An ABLE account can be opened in any state with an ABLE program, regardless of where the beneficiary lives.[57] As with 529 accounts, it may pay to shop around. ABLE account programs are currently available in Florida, Nebraska, Ohio, and Tennessee. As stated above, Oregon's ABLE account program is expected to launch in December 2016.[58] Washington and California have passed legislation and their programs are in development.

A useful clearinghouse of information about ABLE accounts is the ABLE National Resource Center: http://ablenrc.org. The website for the Oregon ABLE Savings Plan is: http://oregonablesavings.com.

Pros and Cons

ABLE accounts should be part of every lawyer's toolbox. However, they are not the right tool for every job.

Pros

ABLE accounts can enhance a beneficiary's autonomy and self-expression. Beneficiaries with capacity can set up the accounts and manage their own savings in excess of $2,000. Outside trustees are not needed. In contrast, beneficiaries cannot serve as trustees of their own special-needs trusts.

ABLE accounts can hold small inheritances, including balances of terminating UTMA accounts under $14,000, while preserving eligibility for need-based benefits.

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ABLE accounts

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ABLE accounts can receive regular contributions from a beneficiary's friends, family, and trusts, to improve the beneficiary's quality of life. This can include paying for housing. Do keep in mind that housing payments may reduce some public benefits, and that it is not yet clear whether all special-needs trusts can safely contribute funds to ABLE accounts.

QDEs and properly-timed distributions from ABLE accounts for housing costs do not reduce SSI benefits.

ABLE accounts cost less to set up than special needs trusts, because they do not require a lawyer to draft them.

Retained earnings in ABLE accounts are tax-deferred, and distributions for QDEs are tax-free. In contrast, special-needs trusts have steep tax brackets for undistributed income, and distributions are taxable to the beneficiaries.

A beneficiary over 65 who otherwise qualifies can open an ABLE account. The same is not true for (d)(4)(A) payback trusts.

Cons

The requirement that the onset of disability must be by age 26 disqualifies many disabled individuals from opening an ABLE account.

ABLE accounts, unlike third-party special-needs trusts, are subject to Medicaid estate recovery.

ABLE accounts may have a narrower distribution standard than supplemental needs trusts. (For example, a special-needs trust can pay for travel and entertainment; it is unclear that improving a beneficiary's "quality of life," as permitted by the proposed ABLE regulations, includes these expenses.)

Contributions to ABLE accounts are limited to $14,000 per year, as opposed to unlimited contributions to special-needs trusts. Thus, a terminating trust or estate could not distribute a beneficiary's inheritance in excess of $14,000 to an ABLE account.

There is a limit on total contributions over the beneficiary's life ($310,000 in Oregon).

Contributions must be made in cash. No in-kind or securities contributions can be made.

The asset cap before the ABLE account is countable as a resource for SSI is $100,000.

ABLE accounts will require careful tracking of qualified and nonqualified distributions. For many beneficiaries, this will still require help from outside professionals.

ABLE accounts may impair eligibility for state and private need-based benefits, and the effect on some federal benefits has not yet been confirmed, despite the helpful language in the ABLE Act itself. Thus, you should evaluate your client's actual benefits before the client sets up an ABLE Act account. ■

Footnotes

1. See Pub. L. 113-295, Div. B, § 101, 128 Stat. 4056; Michael Morris, Christopher Rodrigues & Peter Blanck, ABLE Accounts: A Down Payment on Freedom, INCLUSION, Vol. 4, No. 1, at 21-22, 26 (2016).
2. Internal Revenue Code (IRC) § 529A(b)(1)(A); Prop. Reg. § 1.529A-2(c)(1). Proposed Treasury regulations referred to in this article were, except as noticed, released in 80 Fed. Reg. 35602 (June 22, 2015).
3. IRC § 529A(e)(1)
4. See H. Rep. 113-614, at 24 (Nov. 12, 2014)
5. Prop. Reg. § 1.529A-2(e).
6. IRS Notice 2015-81, § V (Nov. 20, 2015)
7. Prop. Reg. § 1.529A-2(d)(2)
8. Prop. Reg. § 1.529A-2(d)(3)
9. Prop. Reg. § 1.529A-2(a)(4)
10. IRC §§ 529A(b)(1)(B) & 529A(c)(4)
11. IRC § 529A(e)(3)
12. Prop. Reg. § 1.529A-2(c)(1)
13. Prop. Reg. §§ 1.529A-2(a)(5) & (c)(3)
14. IRC § 529A(b)(5)
15. ORS 316.699(1)(b)
16. Hessel, K. (July 25, 2016). Oregon ABLE Savings Plan to launch in December [Press Release].
17. IRC §§ 529A(a) & (c)(1)(B)(i)
18. IRC § 529A(e)(5)
19. Prop. Reg. § 1.529A-1(b)(16)
20. IRC § 529A(b)(5); Prop. Reg. §1.529A-2(h)
21. Prop. Reg. § 1.529A-2(h)(1)
22. See POMS SI 01120.201F
23. IRC §§ 529A(c)(1)(A), (B) & (D); see Prop. Reg. § 1.529A-3(a)
24. IRC § 529A(c)(3)
25. Prop. Reg. §§ 1.529A-4(a)(4)(1) & (2); see Prop. Reg. § 25.2503-3
26. Prop. Reg. § 1.529A-4(a)(3)
27. Prop. Reg. § 1.529A-4(b)
28. Prop. Reg. § 1.529A-4(d)
29. IRC § 529A(b)(2)(B)
30. IRC § 529A(b)(6).
31. Hessel, K. (July 25, 2016). Oregon ABLE Savings Plan to launch in December [Press Release].
32. IRC § 529A(f)
33. See W*hat Happens to SSI and Medicaid When I Work?* http://www.oregon.gov/dhs/employment/VR/WIN/Resources/Medicaid%20Fact%20Sheet.pdf ; OR Dept. of Human Services, Employed Persons with Disabilities (rev. 1/2012), https://apps.state.or.us/Forms/Served/de9029.pdf
34. See 80 Fed. Reg. 35609 (June 22, 2015); Prop. Reg. § 1.529A-2(p)
35. IRC § 529A(b)(4)
36. See IRC § 529(b)(4)
37. IRC § 529A(c)(1)(C)
38. Prop. Reg. § 1.529A-1(b)(17)
39. IRC § 529A(c)(4)
40. Prop. Reg. § 1.529A-1(b)(14)
41. Prop. Reg. § 1.529A-2(g)(2)
42. Prop. Reg. § 1.529A-2(f)
43. Prop. Reg. § 1.529A-1(b)(9)]
44. Prop. Reg. § 1.529A-1(b)(13)
45. Prop. Reg. § 1.529A-2(c)(3)
46. Prop. Reg. § 1.529A-3(b)(3)
47. Prop. Reg. § 1.529A-4(c)
48. IRS Notice 2015-81, § III (Nov. 20, 2015)
49. Pub. L. 113-295, Div. B, § 103(a), 128 Stat. 4063 (codified at 26 USC § 529A note)
50. Silbermann, L. (April 4, 2016). *Treatment of ABLE accounts in Determining SNAP Eligibility[*Memorandum]. Alexandria, VA: USDA Food and Nutrition Service
51. Mark Worthington & Annette Hines, "The Pitfalls, Potentials, and Unknowns of ABLE Accounts," *The ElderLaw Report,* Oct. 2016, at 5. Portland attorney Eric Kearney has confirmed informally that ABLE accounts will not impair Section 8 eligibility in Oregon.
52. Pub. L. 113-295, Div. B, § 103(a)(1) & (2), 128 Stat. 4063 (codified at 26 USC § 529A)
53. POMS SI 01130.740C & .740D. Distributions for nonqualified expenses also count as resources when the funds are spent. The solution for this problem, for clients who rely on SSI, is to avoid nonqualified distributions.
54. POMS SI 01130.740B.8
55. OAR 461-145-0000(1) & (2)
56. See supra nn. 20-21 & accompanying text.
57. The original ABLE Act required an individual to open an account in his or her state of residence. This requirement was eliminated in 2015. Protecting Americans From Tax Hikes Act of 2015, Pub. L. 114-113, Div. Q, § 303, 129 Stat. 2087 (2015). Florida, however, does not allow out-of-state residents in its ABLE program.
58. For Oregon's enabling legislation, see 2015 Or Laws ch. 843 (codified at ORS 178.300-178.380 and various other conforming sections)

Resources for elder law attorneys

Events

Elder Law Discussion Group
Legal Aid Services; 520 SW Sixth Ave, Portland
Coffee will be provided.

- November 10 from noon-1:00 pm- Sarah Lora, Supervising Attorney from Legal Aid Services of Oregon, Statewide Tax Clinic will present on common tax issues affecting seniors.
- December 8 from noon-1:00 pm- Mark Sanford from Multnomah County will present on the Public Guardian & Conservator program.

Postmortem Estate Planning
OSB Audio Seminar
Tuesday, November 8, 2016/10:00–11:00 a.m.
Oregon State Bar

Ethics and Identifying Your Client: It's Not Always 20/20
OSB Audio Seminar
Friday, November 11, 2016/10:00–11:00 a.m.
Oregon State Bar

Effective Strategies for Representing Your Client in Mediation
ABA Webinar
Wednesday, November 16, 2016/10:00–11:00 a.m.
American Bar Association

2016 Attorney-Client Privilege Update
OSB Audio Seminar
Thursday, November 17, 2016/10:00–11 a.m.
Oregon State Bar

Basic Estate Planning and Administration 2016
OSB Live Seminar and Webcast
Friday, November 18, 2016/8:30 a.m.–4:30 p.m.
Oregon Convention Center; Portland
Oregon State Bar

2017 NAELA Annual Conference
April 25 and 26: Advanced Elder Law Review
April 27 through 29: Annual Conference
Boston Marriott Copley Place
NAELA

NAELA Summit
November 15 - 17, 2017
Newport Beach, California
NAELA ■

Websites

Elder Law Section website
OSB Elder Law Section
The website provides useful links for elder law practitioners, past issues of Elder Law Newsletter, and current elder law numbers.

National Academy of Elder Law Attorneys (NAELA)
www.naela.org
A professional association of attorneys dedicated to improving the quality of legal services provided to elders and people with special needs.

OregonLawHelp
www.oregonlawhelp.org
Helpful information for low-income Oregonians and their lawyers.

Administration on Aging
www.aoa.gov
This website provides information about resources that connect older persons, caregivers, and professionals to important federal, national, and local programs.

Aging and Disability Resource Connection of Oregon
www.ADRCofOregon.org
Includes downloadable Family Caregiver Handbook, available in English and Spanish versions.

Big Charts
http://bigcharts.marketwatch.com
Provides the price of a stock on a specific date.

American Bar Association Elder Law Section
www.americanbar.org/groups/senior_lawyers/elder_law.html

National Elder Law Foundation
http://www.nelf.org
Certifying program for elder law and special-needs attorneys ■

Publications

The Consumer Financial Protection Bureau (CFPB) has Oregon-specific guides for financial fiduciaries. The guides are intended not only to educate agents with financial fiduciary requirements, but focus on prevention of financial exploitation. All four guides come with the title *Managing Someone Else's Money*. Four separate guides—all available free through CFPB—were developed for conservators, trustees, representative payees/VA fiduciaries, and agents under a power of attorney.

The American Bar Association's ***PRACTICAL Tool for Lawyers*** is a new resource to help lawyers identify and implement decision-making options for persons with disabilities that are less restrictive than guardianship. A 22-page *Resource Guide* expands on the steps and includes links to key resources.

PDF and Word versions of both publications are available at no cost Download at http://www.ambar.org/practicaltool. ■

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Change to Medicaid divisor for asset transfers

The Department of Human Services, Office of Self-Sufficiency Programs, has issued a temporary rule that affects the length of disqualification time for benefits in the Oregon Supplemental Income Program (OSIP) and Oregon Supplemental Income Program Medical (OSIPM) because of a disqualifying asset transfer, i.e., the transfer of an asset for less than its fair market value to become eligible for program benefits.

The divisor used to calculate the number of months of ineligibility due to a disqualifying transfer of assets is calculated by using the average monthly cost to a private patient of nursing facility services in Oregon.

The divisor, which was $7,663 per month, is now $8,425 per month for applications made on or after October 1, 2016. The last increase was October 1, 2010.

Oregon State Bar

Elder Law Section