Oregon State Bar **Elder Law Newsletter**

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Update:
Court cases involve elder law issues

By Tim McNeil, Attorney at Law

In the April 2007 *Elder Law Newsletter*, attorney Julie Cline summarized Oregon guardianship and conservatorship case law.

Since then, the Section newsletter has reviewed two other cases which touched upon elder law issues (*King City Rehab, LLC v. Clackamas County, et. al.*, 214 Or App 333 (2007)—Interpretation of long term care lien law (ORS 87.503)—and *In re Hartfield*, 349 OR 108 (2010)—Oregon Supreme Court approved bar discipline of attorney for handling of conservatorship case.

Since the April 2007 newsletter many Oregon cases have grappled with the core elder law issues of guardianship, conservatorship, long term care planning, elder abuse, and estate planning and administration. Following is a reference list and synopsis of 25 of these cases.

In this issue...

Guardianship and conservatorship cases

Helmig v. Farley, Piazza & Associates, 218 Or App 622 (2007)

Professional fiduciary's right to petition for its appointment as conservator; appointment of conservator when all assets in trust

A professional fiduciary solicited by adult protective services petitioned for its appointment as conservator, and was appointed over objection of the protected person's son. On appeal, the court confirmed that because the professional fiduciary was solicited by adult protective services to serve in this case, the professional fiduciary was a "person interested in the affairs and welfare," with authority to petition for its appointment. In addition, the court confirmed that the protected person's beneficial interest in a trust was a property interest sufficient to warrant a conservator's protection, even if the protected person owned no non-trust assets.

Haley v. Haley, 215 Or App 36 (2007)

Probate court's jurisdiction over trust in conservatorship proceeding

In a conservatorship proceeding, a hearing on the objection to a conservatorship petition resulted in a settlement agreement in which the conservatorship petition was withdrawn and respondent's trust was amended, and a trust accounting was required. The respondent's daughter, from whom accounting was required, objected and asserted the court had no personal jurisdiction over her and that she was deprived of constitutionally guaranteed due process. The respondent objected, asserting that the settlement went beyond the pleadings, which pertained to conservatorship, not trust. The court rejected these arguments.

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Tim McNeil is a partner in The Elder Law Firm in Portland. Tim was honored for his outstanding volunteer work with the Senior Law Project Volunteer of the Year Award in 2005. Tim also volunteers to represent children in family court cases and served on Pro Bono Committee of the Oregon State Bar.

Derkatsch v. Thorp, Purdy, Jewett, Urness & Wilkinson, P.C., 248 Or App 185 (2012**)**

Attorney fees in protective proceedings; interpretation of ORS 125.095

The appellate court interpreted ORS 125.095(1) as authorizing payment to the attorney who provides services in a protective proceeding or on behalf of the protected person. Fees generated prior to appointment of a guardian or conservator are not authorized by ORS 125.095(1). Fees generated after appointment of a guardian or conservator must be rendered on behalf of the protected person, but need not confer a benefit on the protected person. The appellate court concluded that a financial-abuse lawsuit was conducted on behalf of the protected person, and benefited the protected person. ORS 125.095(1) authorizes payment of fees generated in the financial abuse claim *after* appointment of a guardian or conservator.

Medicaid planning case

Dorzynski v. Department of Human Services, 238 Or App 285 (2010)

Medicaid spend-down; payment of fiduciary fees, attorney for fiduciary fees to attorney's trust account prior to court approval of fees is available asset

The attorney was a court-appointed conservator. The protected person received a lump-sum VA benefit. Receipt of the benefit caused her to exceed the Medicaid eligibility limit. The attorney paid a portion of the benefit to repay the state for services provided to the protected person, and paid $5,000 to his trust account as deposit on future services to be provided. The court concluded that because attorney-conservator's fees had not been approved by the court, the $5,000 was still technically available to the protected person; she could ask for its return. In addition, the funds were not in a qualified trust and they were not exempt for any reason.

Elder abuse cases

Hoffart v. Wiggins, 226 Or App 545 (2009)

Elder financial abuse; definition of wrongful conduct under ORS 124.100

The plaintiff invested funds with the defendant, with the understanding that the plaintiff could get money back upon request. When the plaintiff requested return of the money, the defendant returned some but not all. The appellate court ruled that the law prohibits wrongful retention of funds that belong to a vulnerable person, as well as wrongful taking of funds. An initial wrongful taking is not required.

Fadel v. El-Tobgy**,** 245 Or App 696 (2011)

Elder Financial Abuse; liability of "innocent bystander"

A jury found the son and ex-wife of an elder liable for elder abuse—the ex-wife under "bystander liability" (ORS 124.100(5)). With treble damages, the judgment was $795,000 against the son and $375,000 against the ex-wife. The appellate court affirmed.

Herring v. American Medical Response Northwest, Inc., Filed 02/21/2013, A144168

"Vulnerable person" under ORS 124.100; treble damages

A woman sexually assaulted in an ambulance prevailed in the argument that she was a "vulnerable person" under the law—although she was neither elderly nor permanently disabled—and entitled to treble damages, despite a statutorily mandated cap on noneconomic damages. (See page 10 for details of this case.)

Trust cases

Howard v. Howard, 211 Or App 557 (2007)

Trustee's duties to present beneficiaries and to remainder beneficiaries

In a dispute between the income beneficiary (trustor's wife) and the remainder beneficiary (trustor's son), the court ruled that "although a trustee owes a duty to any remainder beneficiaries as well as to the life income beneficiary, the trustee must carry out those duties in light of any preference expressed in the trust instrument." The trust instrument in question expressed the trustor's intent to support his spouse during her lifetime, which is a higher priority than the interest of remainder beneficiaries. For this reason, the trustee should invest trust assets to provide income to the spouse, without regard for the spouse's other resources.

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***Brown and Albin*,** 219 Or App 475 (2008)

Dissolution of marriage; trust interest subject to division

Under the "just and proper" standard, the court concluded that the trust interests of the husband had been "completely integrated into the financial planning of the parties" during their marriage. Relying on the trust interests, the parties made major purchases, retired from their jobs, and moved residence. Due to the duration of the marriage, the appellate court was more concerned with an equal separation than with the relative contributions of the parties.

***In the Matter of Marriage of Githens*,** 227 Or App 73 (2009)

Dissolution of marriage; trust interest not subject to division

The court labeled a spouse's beneficial interest in the trust an "expectancy" rather than property subject to division. The revocability of the trust was the key factor. Like a will, the revocable living trust established an expectancy, not property.

***Kennett v. Herriott*,** 223 Or App 437 (2008)

Right to attorney fees in trust dispute

When one co-trustee petitioned for fees to be paid from the trust, the other co-trustee objected, citing ORCP 68, which requires a party seeking attorney fees to allege the basis for the award in a prior pleading. The court ruled that the settlement agreement in dispute among co-trustees precluded ORCP 68 attorney fee requirements.

***Olson v. Howard*,** 237 Or App 256 (2010)

Award of attorney fees in trust dispute

The successor trustee prevailed in a trust dispute and was awarded attorney fees. The court overturned the attorney fee award, indicating that factual evidence was introduced for the plaintiff's claim. Fees had been awarded under ORS 20.105(1) (no objectively reasonable basis for asserting the claim). The appellate court also considered a release which the plaintiff had signed regarding the trustee's administration and distribution of the trust. The court indicated that the release was against trustee, not the defendant (buyer of the property), so the existence of the release did not make the plaintiff's claim objectively unreasonable. Attorney fees should not have been awarded to defendant.

***Frakes v. Nay*,** 247 Or App 95 (2011)

UTC; trust interpretation and reformation

The court examined the application of Uniform Trust Code to a trust dispute and concluded that the UTC applied because, although the trust was created prior to Oregon's adoption of the UTC, the claim commenced after 01/01/2006 (ORS 130.910(1)(a,b)). ORS 130.220 permits a court to reform a trust if the party seeking reformation proves by clear and convincing evidence that the terms of the trust were affected by a mistake of fact in expression. In this case, clear and convincing evidence existed that the trustors intended that there be two rounds of distributions, not three. Accordingly, the trial court's reformation of the trust was proper.

Frakes v. Nay, Filed December 19, 2012, A138032

Application of the no-contest clause in trust; attorney fees in trust matter; party's right to bring negligence claim for financial loss against attorney who prepared will which allegedly did not carry out testator's intent.

Hope Presbyterian Church of Rogue River v. Presbyterian Church (USA) and Presbytery of the Cascades, Filed November 29, 2012, SC S059584

Application of Uniform Trust Code to determine if real property was held in trust and, if so, whether the trust was revoked. (See page 6 for details of this case.)

Probate cases

Roley v. Sammons, 215 Or App 401 (2007)

Court's authority to enforce testator intent in will; criteria for removal of personal representative

The appellate court indicated that even though a will gives personal representative (PR) full authority to settle disputes arising from estate distribution, the will cannot short-circuit the court's statutory duty to determine and enforce the testator's intent. In this case, the PR interpreted the will in a manner contrary to the testator intent, so the court required distribution to potential beneficiary. The court also indicated that removal of the PR by the trial court was improper. ORS 113.195(1) establishes criteria for mandatory removal. These did not apply. ORS 113.195(2) establishes criteria for the discretionary removal of PR: past conduct of unfaithfulness or neglect of trust, or interests of the PR conflict with substantial interest of the beneficiary. The appellate court ruled that these conditions had not been proven and the PR should be reinstated.

***Sollars v. City of Milwaukie*,** 222 Or App 384 (2008)

Probate; right of estate to undiscovered funds in house that was sold

The plaintiff purchased a house from an estate. Eighteen months later, the plaintiff's contractor found $122,000 in cash bundled and hidden in the house. The police seized the money. The estate filed a motion to recover the money. (Handwriting on the bundles indicated that it was hidden by the deceased). The trial court awarded the funds to the estate, reasoning that the sale agreement was for the transfer of the property and transfer of the funds was not part of the bargain. The appellate court reversed, indicating that the language in the sales contract was unambiguous: "The estate shall remove all personal property that is not a part of this

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Many Oregon cases have grappled with the core elder law issues of guardianship, conservatorship, long term care planning, elder abuse, and estate planning and administration.

transaction and deliver possession of the property to plaintiff." The fact that the parties did not intend to include all personal property of substantial value, the existence of which was unknown to them, was unpersuasive to the appellate court.

***In re Estate of McIntire*,** 241 Or App 518 (2011)

Claim against estate for failure of deceased to fulfill obligation to purchase life insurance payable to ex-spouse for support of child

In a stipulated dissolution judgment, the spouses agreed to purchase life insurance policies. Each spouse was to insure his or her own life for $250,000. The death beneficiary was the surviving ex-spouse as trustee for their child. Both ex-spouses purchased policies. The wife's policy lapsed and she later died without a will. The ex-husband filed a claim against the woman's estate. The personal representative accepted the claim. The surviving spouse of the deceased, an intestate heir, contested the claim, arguing that the obligation to purchase the life insurance policies was not enforceable. The probate court disagreed, allowing the claim, allowing constructive trust over the estate to secure payment of the insurance benefit. The Oregon Court of Appeals affirmed the probate court's judgment.

State v. Patton, 237 Or App 46 (2010)

Limitation on an estate's right to collect on restitution judgment payable to deceased

A granddaughter stole $18,800 from her grandfather. She was convicted of first-degree theft. The plea agreement called for restitution to be paid to grandfather. The grandfather died before the restitution order was entered. The trial court ordered restitution to be paid to the grandfather's estate. The appellate court reversed, ruling that under ORS 137.106, a victim is entitled to restitution, and a victim is a person. ORS 161.015(5) states that a person is a human being, a corporation, an unincorporated association, or a government. An estate doesn't qualify as a person entitled to restitution.

Tilton v. Lee, Filed 02/13/2013 A147058

Attorney fees in administration of intestate estate

Examination of ORS 116.183, specifically its standard of "the customary fees in the community for similar services," led the court to reduce attorney fees from $23,000 to $9,500, due in part to the attorney's practice of handling non-legal matters and billing his standard hourly rate.

Estate planning cases

***Robison v. Robison*,** 226 Or App 96 (2009)

Gift of joint real property interest and gift of interest in jointly-owned account

The plaintiff, his wife (since deceased), and the wife's son (the defendant) executed and recorded the deed to a ranch, conveying "one-third [to] each, [as] joint tenants with the right of survivorship." The parties also each signed a joint account agreement for an investment account, establishing rights of survivorship. The stepfather sought a declaratory judgment that he owned the ranch and the account, free of his stepson's claims. The trial court granted summary judgment in his favor. On appeal, the court reversed and remanded the matter with regard to ranch, indicating that the essential elements of an inter vivos gift appeared to be present when viewed from a perspective most favorable to the defendant, making summary judgment inappropriate. With regard to the investment account, the court upheld the summary judgment, finding that an inter vivos gift had not occurred. The joint-account agreement is not intended to be for benefit of a donee signatory until donor's death. The donee is merely a trustee until the death occurs.

Connall v. Felton, 225 Or App 266 (2009)

Effect of probate avoiding deed

Mom conveyed property to the defendant, reserving a life estate. Mom had six children. Mom's spouse, who predeceased her, was not the father of the six children, but had one child from a previous relationship. That child was the defendant. The deed of conveyance stated that "the true and actual consideration paid for this transfer is $-0-; estate planning." Mom died, and her personal representative sued to quiet title to the property, asserting that the deed and extrinsic evidence indicate that the woman's intent was simply to avoid probate, and for the defendant to hold the property in trust, so that it could be shared equally among all seven children. The court ruled that the deed on its face was unambiguous, and made no reference to a trust. The court held that the trial court inappropriately considered extrinsic evidence such as mom's conversations with family members and her will which did not occur at the same time as deed execution. Only evidence contemporaneous with

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the execution of the deed should be considered, and none was offered at trial.

***Olson and Olson*,** 218 Or App 1 (2008)

Dissolution of marriage; inherited property subject to division

While married, the husband inherited property from his father. He kept the property in his own name. Upon dissolution of the marriage, the trial court split the property equally between the spouses. The husband appealed, arguing that the property should not have been subject to division. The appellate court considered the value of the property at the time the husband inherited it and the appreciation of the property post-inheritance. The appellate court awarded the wife only 25 percent of the value of the property upon inheritance because she did not influence the making of the bequest, she was not the object of the donative intent, and commingling of the land occurred minimally. However, the wife made uncompensated contributions to the family (child raising) and direct contributions to the property (fence building, blackberry removal, recreational use, etc.), that entitled her to an equal split of the post-inheritance appreciation of the property. The appellate court considered a "just and proper" standard prior to making this ruling.

***Briggs v. Lamvik*,** 242 Or App 132 (2011)

Estate planning documents of deceased conflict with survivorship interest created by deceased

A father added his son's name to his bank accounts. The father then created a living trust. His son and daughter were co-trustees and equal beneficiaries. He transfered his house to the trust. Later, he executed a deed that conveyed the house into joint ownership involving the trust and the son, with right of survivorship. Dad died, and his son took the bank accounts, transferring funds from them into his own name. The daughter sued, claiming 1) rescission, 2) financial elder abuse, 3) conversion of trust assets, 4) removal of trustee, 5) money had and received, 6) intentional inheritance with prospective inheritance, and 7) constructive trust.

The court affirmed that claims based upon undue influence—elder abuse, intentional interference with inheritance, and rescission—did not survive summary judgment, because no evidence was introduced to create a dispute regarding undue influence. However, with regard to the claims based upon father's intent—conversion, removal of trustee, money had and received—evidence sufficient to create triable issues of fact was introduced, and they survived.

***Hammond v. Hammond*,** 246 Or App 775 (2011)

Deed interpretation; Joint ownership and survivorship interests

A woman executed a deed that conveyed her real property to one of her three sons "as a survivor." Mom continued to live on the property. The son paid a portion of the property taxes and did some maintenance work. Fifteen years later, the woman executed a will conveying her real property to her three sons in equal shares. She died, and more than eight years later one of the sons petitioned to probate her will. He then requested declaration that the deed was invalid and he was entitled to an interest in the property, either as heir or devisee. The court concluded that the deed did not contain the necessary statutory elements to create a tenancy in common or a right of survivorship. In addition, the deed was ambiguous on its face and the trial court should have accepted evidence regarding the mother's intent when she signed the deed. ■

New 2013 Medicare Qualified Medical Beneficiary (QMB) resource limits

Countable resources below $6,940 for an individual and $10,410 for a couple.

Program helps pay for:

- Part A premiums
- Part B premiums
- Deductibles, coinsurance, and copayments

Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)

Court rules on property held in trust

By Barbara Smythe, Attorney at Law

Barbara Smythe is a Lake Oswego attorney. Her practice focuses on estate planning, estate administration, and meeting the challenges of incapacity. She serves on the Oregon State Bar public service advisory committee, the executive committee of the OSB Nonprofit Organizations Law Section, and the Elder Law Section newlsetter committee.

Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.) (Or., 2012) is the first case in which the Oregon Supreme Court has applied a provision of the Oregon Uniform Trust Code (UTC), which was enacted in 2005. In its opinion, the court affirmed a Court of Appeals ruling that a Rogue River Presbyterian church intended to and did place real property into a trust for the benefit of its governing presbytery by its adoption of specific church documents despite the absence of a deed or other formalities usually associated with real property transactions.

Hope Presbyterian Church of Rogue River (Hope Presbyterian) had operated in the Rogue River area since 1901 and, until 2007, had always been a member of the Presbyterian Church in the United States of America (PCUSA) or one of its predecessor denominations. When the PCUSA was formed in 1983, Hope Presbyterian's minister and an elder were present at a meeting of the presbytery during which it adopted the PCUSA Book of Order. The Book of Order specifies that all property of local congregations "is held in trust...for the use and benefit of the Presbyterian Church (U.S.A.)." *Hope Presbyterian* at 5.

Shortly thereafter, Hope Presbyterian amended its bylaws to confirm its membership in the PCUSA and stated explicitly that it was "governed in all its provisions" by the PCUSA Constitution. *Hope Presbyterian* at 6. Perhaps most relevant to this case, Hope Presbyterian also amended its articles of incorporation to recite that it "holds all property as trustee for the Presbyterian Church (U.S.A.)." *Id*. The amendment to the articles was approved at a congregational meeting as well as a meeting of the church board of trustees and was signed by the congregational president and secretary as well as by a third person. However, the amended articles were never filed with the Secretary of State, and no deed was ever executed in favor of a trust or of the PCUSA.

In 2007, Hope Presbyterian voted to separate from the PCUSA, and litigation over the ownership of the church property soon followed. Both sides moved for summary judgment quieting title, which raised questions about the church's ability to create a trust through nontraditional means such as by the language contained in its articles of incorporation.

The case provided the Oregon courts with the opportunity to choose among differing approaches to resolving church property disputes while neither dictating nor enforcing church doctrine. The trial court refused to consider the pronouncements of the PCUSA Book of Order on the basis that doing so constituted a violation of the First Amendment and ruled for Hope Presbyterian on the basis of its title to the property. The Court of Appeals analyzed both the traditional "hierarchical deference" test first used by the U.S. Supreme Court in 1871 and followed by the Oregon Supreme Court as recently as the 1970s, and the "neutral principles" approach followed by the trial court. The "hierarchical deference" methodology allows courts to decide church property disputes involving congregations of hierarchically organized denominations by deferring to the stated rules of the highest authority of the church-wide organization. The "neutral principles" approach seeks to avoid basing decisions on church doctrine on First Amendment grounds.

In reversing the ruling of the trial court, the Court of Appeals found that, under either methodology, Hope Presbyterian was a mere trustee of the church property, holding it for the benefit of the PCUSA Presbytery of the Cascades. In its affirmation of the appellate result, the Oregon Supreme Court adopted the "neutral principles" approach but clarified that doing so did not prohibit the court from examining ecclesiastical documents for evidence of the intent of the parties.

The court's next step was to analyze whether the relevant documents demonstrated that Hope Presbyterian had intended to create a trust in favor of the PCUSA and, if so, whether that trust was irrevocable. The court first clarified that the mere existence of express trust provisions in a denominational constitution does not necessarily create a trust and that the existence of a trust in Oregon is based on compliance with Oregon

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Property in trust

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law. Analyzing the question under state law, the court applied both ORS 130.150(1)(b)—which states that trusts may be created where a property owner has declared that it holds identifiable property as trustee—and *Winters v. Winters,* 165 Or. 659, 67, 109 P.2d 857 (1941), which held that "a trust may be created without transfer of title to the property." Based on these authorities, the court found that Hope Presbyterian's amendment of its bylaws and especially of its articles of incorporation demonstrated intent to create a trust in favor of PCUSA.

Perhaps the most interesting question in this opinion relates to the interoperation of state trust law and the statute of frauds. Hope Presbyterian claimed that, even if the amendment to its articles of incorporation demonstrated the intent to create a trust, the trust would nonetheless fail under the statute of frauds, because the amended articles did not meet the requirements of ORS 93.020(1), which requires that interests in real property be evidenced by a writing that has been "executed with such formalities as are required by law." In response, the court relied on *Heitkemper v. Schmeer*, 130 Or 644, 656, 275 P 55, on reh'g, 281 P 169 (1929) which asserted that the only formalities required to form a trust prior to adoption of the UTC were a "complete statement of the trust" and the signature of the trustor. *Hope Presbyterian* at 32. Because Hope Presbyterian's documents met these requirements, the court held that the "formalities" requirement of the statute of frauds had been met.

Hope Presbyterian's final argument was that any trust created was revocable under the UTC because ORS 130.505(1) makes every trust revocable absent an express statement that the trust is irrevocable. However, the court pointed out that, unlike most provisions of the UTC, this particular rule was made applicable only to trusts created after its 2005 adoption. *Hope Presbyterian* at 33, quoting *Oregon UTC & Comments*, 24 Willamette L Rev at 307. Because the trust in this case was created in 1983, the applicable law was the pre-UTC common law rule that a trust was irrevocable "unless the settlor reserve(d) the power of revocation." *Hope Presbyterian* at 33, quoting *Stipe v. First National Bank*, 208 Or 251, 268, 301 P2d 175 (1956). Hope Presbyterian did not reserve a right to revoke the trust, and the court refused to apply the UTC default position of revocability to a pre-UTC trust. It further found that there was no evidence that PCUSA had agreed to any modification or revocation of the trust. *Hope Presbyterian* at 34. ■

The Oregon Department of Human Services (DHS) issued an Administrator Alert for community-based care facilities (assisted living facilities, residential care facilities, memory care, etc.) on March 6, 2013, informing providers with Medicaid contracts that they should not require residents to agree to pay privately for a some period of time before applying for Medicaid assistance. The text of the letter is at right.

Date: March 6, 2013

Dear Providers:

It has come to our attention that a number of Assisted Living and Residential Care providers who participate in the Medicaid program attempt to require prospective residents to contract to pay a private rate for a minimum period of time as a condition of admission or continued stay in the facility. This practice is commonly referred to as duration of stay agreement.

The requirement of duration of private pay may not violate a specific Medicaid law because Medicaid does not regulate community based care. However, the enforcement would require Medicaid-eligible residents to pay more than the Medicaid rate for services and would also deter private pay residents who may be eligible for Medicaid from applying. Both of these acts violate the law. Regardless of the legality, the practice of requiring duration of stay agreements offends the public policy underlying Medicaid law.

The Department is therefore requesting that providers who have Medicaid contracts refrain from requiring the duration of private pay agreements. The Office of Licensing and Regulatory Oversight will monitor facilities for this practice and take appropriate regulatory action as needed. ■

Another hidden issue:

Arbitration clause in facility contract

By Cynthia L. Barrett, Attorney at Law

Cynthia Barrett has practiced law in Oregon since 1976. Her practice fccuses on elder law, special-needs planning and same-sex-couple planning. She served as the President of the National Academy of Elder Law Attorneys (NAELA) and the Multnomah County Bar Association.

Add another hidden issue to the usual elder law new-client "crisis" intake, where a facility admission is contemplated, and the anxious spouse or child wants to "ask a few questions."

The usual issues in a crisis intake

You know the drill – in the long hour-and-a-half meeting, no matter what brought that family to your office, you have a lot of issues to cover. Care payment sources, potential spend down, spousal protections, effect on Medicaid of gifts in last five years, income cap, and whether the right documents are in place to permit management of resources and income. Where the declining elder lacks the advance directive, for medical decisions, and a financial power of attorney for medical and residential decisions, you launch into the explanation of conservatorship and guardianship.

You usually touch on relative responsibility laws, and counsel against signing the "responsible party" line on the facility admission agreement.

Then you turn to probate avoidance techniques and likely disputes among heirs —if there is anything left.

Arbitration clause in admission agreement

The furthest thing from most clients' minds in a fraught facility-admission situation is suing the facility. No one completely absorbs the admission documents (with the arbitration clause) presented for signature. In my opinion, these contracts are typical contracts of adhesion.

Admission agreements always contain a pre-dispute binding arbitration clause, designed to push any later dispute (including personal injury and wrongful death claims) out of court and away from a jury. This "choice of forum" problem in facility admission negligence disputes is a very open legal issue.

Personal injury and wrongful-death claims

The arbitration clause is asserted as a defense to later personal injury or wrongful-death lawsuits—and the trial bar has hotly litigated these cases in recent years. Many litigants find ways around the binding arbitration clause; and the facts surrounding admission and signing the agreement are critical.

The plaintiff's bar persuaded the West Virginia Supreme Court to simply hold that arbitration agreements are unenforceable in claims for personal injury and wrongful death against nursing homes. The United States Supreme Court rejected West Virginia's consumer-friendly simple approach in *Marmet Health Care Center Inc. et al v. Clayton Brown et al*, 565 U.S ___ (2012).

Is the arbitration provision a disfavored "condition of admission?" Is giving up the right to jury trial for injury claims simply unconscionable under the circumstances of a fraught nursing home admission? Is the signer, often an agent under the elder's power of attorney, authorized to give up the elder's right to a jury trial? The plaintiff's lawyer will eventually consider all these theories to avoid the arbitration, and push for a jury trial.

In Oregon, the plaintiff's lawyer will also examine how the facility admission contract was executed in excruciating detail, See *Drury v. Assisted Living Concepts Inc.*, 245 Or App 217 (2011) where the Oregon Court of Appeals affirmed Multnomah County Circuit Judge Youlee You's order denying the facility's petition to compel arbitration of a wrongful death claim. Judge You found enforcement of the arbitration provision unconscionable. The Oregon Court of Appeals did not address unconscionability, but affirmed Judge You on other grounds, concluding that the demented elder was not bound by the residency agreement, to which she never assented.

In *Drury*, the demented elder's son, Eddie Drury, signed the admission agreement, but had no power of attorney, conservator's letters, or other legal authority to bind his mother. The parties presented evidence about who signed the admission agreement, whether the signer had actual or apparent authority, whether the demented confused elder could grant authority, how the elder (as a third party beneficiary of

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Arbitration clauses

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the contract) might be bound—or not—by the arbitration provision. All details of the transaction, including medical records from before and after the admission, were relevant to the Oregon court's contract analysis.

Practical suggestions re arbitration provisions

In our elder law "crisis intake" matters, we could uncover the "hidden issue" of the arbitration provision. Will the client object to being billed for review of a contract obligating them to pay $40,000-$75,000 a year? You might:

- Ask the client to bring in a copy of any admission agreement, so you can review who signed it and that person's authority.
- Review the admission contract with them, pointing out the (1) "responsible party" provision, (2) the point system that is usually used to trigger increased care bills, (3) any weird waivers of rights, and (4) the arbitration provision.
- Tell the ill elder and the family that if the elder suffers harm in the facility, the defense will try to keep the dispute out of court to reduce damage awards.
- Explain that the arbitration provision may be ruled invalid, on a variety of grounds, and that one potential defense is that the signer on the agreement did not have proper legal authority to give up the ill person's rights.
- Review with the client the pros and cons of fixing this. A contract signed by the right person (duly authorized agent, conservator) relieves the unauthorized signer's personal liability, but prevents the "unauthorized signer" *Drury* defense in case of a later injury/wrongful death claim. As a practical matter, the client knows that crossing out the arbitration provision may result in losing the placement, or contribute to a later discharge on some pretext.

By uncovering this "hidden issue" of the arbitration provision in facility contracts, the elder law attorney at least has the opportunity to help protect the nursing home resident's rights. But the advice we offer is not the final word on the facility admission arbitration provision. The plaintiff and defense bar will battle out this issue case by case, and that battle will set the rules for our clients.

Future developments in the facility injury law "choice of forum problem" are not predictable. The "boomer" age wave means more elders, with more facility-care needs, and thus more injuries from neglect and abuse. Will the facility injury/abuse disputes play out in traditional courts, with juries and judges, or in less transparent, cheaper private arbitration/mediation settings? ■

Upcoming Elder Law Discussion Groups

Legal Aid Services of Oregon hosts an elder law discussion group from noon to 1:00 p.m. in the Legal Aid Services Portland Conference room at 921 SW Washington Street, Suite 500.

If you would like to call in and listen to the talk, please call: 866.625.9936 and enter participant number 5478398. If you let Andrea Ogston know in advance that you are exercising this option, she can get any handouts to you in advance of the talk. Contact her at andrea.ogston@lasoregon.org or 503.224.4086.

Upcoming programs

May 9: Elder law attorney Steven Heinrich will present on "Resolving Conflicts in Estate Planning."

June 13: The Honorable Katherine Tennyson will present on the program "Special Advocates for Vulnerable Oregonians" and how you can get involved in this important effort to create a greater safety net for protected persons.

July: No ELDG

August 8: Foreclosure expert David Koen will present on "Protecting Clients from Reverse Mortgage Abuse."

September 13: Housing specialist Christina Dirks who will address issues unique to seniors in housing rentals.

October 10: Gerontologist Lisa Wallig, Director of Medical Programs at the Oregon Department of Transportation, will present on "Oregon's Medically At-Risk Driver Program."

November 14: Elder law attorney Cynthia Barrett will present on "LGBT Caregivers and Surviving Partners—Suggestions, Medicaid Protections (at Application and in Estate Recovery) for Partners, And Other Issues for the poor and middle class." ■

Defining "vulnerable person"

By Leslie Harris, Professor of Law

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In *Herring v. American Medical Response Northwest, Inc*., 255 Ore. App 317 (2013), the Oregon Court of Appeals held that a person can be "incapacitated" and therefore entitled to damages for abuse of a "vulnerable person" under ORS 124.100 when the incapacity lasts only for a brief time.[1] The case has implications beyond its specific facts because its holding is also likely to apply to abuse of "financially incapable" people, even if their incapability is transitory, and to financial as well as physical abuse of some "vulnerable" people. Further, the court's interpretation of "incapacitated person" will apply in guardianship proceedings, although the decision is likely to have less effect in that arena.

In *Herring,* a paramedic sexually touched the plaintiff without her consent while they were in an ambulance on the way to the hospital. The plaintiff had fallen ill suddenly, and she testified that at least part of the time while she was in the ambulance she was unable to see, move, or speak. She successfully brought several tort claims against the paramedic and his employer, American Medical Response Northwest, Inc., including a statutory action for physical abuse of a vulnerable person under ORS 124.100. Under that statute, a "vulnerable person " includes a person who is "incapacitated" as that term is defined in the Oregon guardianship statutes in ORS 125.005.[2]

The corporate defendant appealed, basing his arguments on how "incapacitated" should be interpreted for purposes of guardianship proceedings. The Court of Appeals agreed that the legislature intended "incapacitated" to mean the same thing in guardianship and elder abuse proceedings but rejected the defendant's claim that the term does not include temporary or episodic disability. The court observed that "[p]eople completely but briefly lose consciousness in any number of situations," *id.* at 320, and concluded that the legislature intended the term to cover "fleeting" incapacity because the statutes allow for termination of a guardianship if the protected person regains capacity. *Id.*, discussing ORS 125.090(2)(b). The court rejected the defendant's claim that incapacity "can apply to a temporary condition, but not to one that is so temporary that it could not endure for the time necessary to establish a protective order" as "unworkable, far-fetched, and supported by anything in the statutory text." *Id*. Moreover, the court said, the elder abuse statute expressly authorizes causes of action for acts that "can be accomplished during a 'fleeting' period of a person's impaired ability to protect his or her health and safety," including sexual abuse. *Id.*, discussing ORS 124.105(1)(a)-(i).

Finally, the court focused on the statutory definition of "incapacitated person" as one unable to receive and evaluate information effectively or to communicate decisions to the extent that the person *presently* lacks the capacity to meet the essential requirements for the person's physical health or safety. ORS 125.005(5). In the context of the elder abuse statute, the court said, "presently" refers to the time that the abuse occurs. The court concluded:

> Thus, ORS 124.100 plainly establishes that a person is incapacitated if, *while being abused,* her self-protecting ability is significantly impaired…We conclude that … ORS 124.100 protects, among others, persons who are only temporarily and fleetingly unable to protect their own health and safety from abuse inflicted, at least in part, during that temporary and fleeting period. 255 Ore. App. at 321 (emphasis in original).

The direct result of this decision is that victims of physical abuse who are temporarily incapacitated, as from illness or an accident, will be able sue using the statutory civil action for abuse, which provides remedies that are not available for other kinds of torts, including treble economic and noneconomic damages and attorney fees. ORS 124.100(2). While some might question why the civil remedies available to a victim of physical abuse, including a sexual assault, should vary depending on whether that victim is incapacitated, the legislature's intent to make this distinction is apparent in the civil abuse statutes. The distinction could be justified simply on the basis that, while any abuse is

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wrong, it is more reprehensible to harm an incapacitated person who is likely to be less able to protect him or herself. Further, these remedies encourage attorneys to take cases on behalf of incapacitated plaintiffs, which tend to be more risky because the plaintiffs are often less able to remember and communicate about what happened to them and to withstand the rigors of trial.

The logic of the decision also appears to support the conclusion that the statutory cause of action and its remedies are available to people who are victims of abuse when they are temporarily as well as permanently "financially incapable" as defined in the conservatorship statute[3] and for financial abuse as well as physical abuse. See ORS 124.100. Financial abuse consists of 1) wrongfully taking or appropriate money or property of a vulnerable person or 2) refusing to return money or property of a vulnerable person at that person's request if the refusal is in bad faith and the actor knew or should have known that the vulnerable person had a right to the money or property. ORS 124.110(1).

In *Hoffart v. Wiggins*, 226 Ore. App 545 (2009), the court held that an action under the second prong of the financial abuse statute does not require proof that the money was originally acquired wrongfully and that it can, therefore apply to ordinary business relationships, such as those between financial advisors and their clients. Under *Hoffart* and *Herring* together, a business person holding money of a client could be liable under this statute if the client was ordinarily competent but experienced a period of incapacity or financial incapability at the time of the dispute about returning the money.

Finally, *Herring* in principle means that a court might award guardianship over a person who was "fleetingly" incapacitated or and conservatorship over a person who was briefly financially incapable. As a practical matter, however, this extension is probably not significant because courts already have authority to grant temporary guardianships and conservatorships that last up to 30 days based on a streamlined procedure. ORs 125.600-125.610. ■

Footnotes

1. The court also rejected the defendant's arguments that the triple damages provision of the civil action for elder abuse statute is 1) subject to the general cap on noneconomic damages imposed by ORS 31.710(1), 2) equivalent to a punitive damages award and so subject to statutory provisions heightening substantive and evidentiary protections for defendant, and 3) excessive in violation of due process.
2. A "vulnerable person" who can bring an action under the elder abuse statute can also be a person who is 65 years old or older or a person with a physical or mental disability that (A) is likely to continue without substantial improvement for no fewer than 12 months or to result in death; and (B) prevents performance of substantially all the ordinary duties of occupations in which an individual not having the physical or mental impairment is capable of engaging, having due regard to the training, experience and circumstances of the person with the physical or mental impairment." ORS 124.100(1). The requirement that the condition last at least 12 months applies only to "person with a disability" and not to a person who is "financially incapable" or " incapacitated."
3. "Financially incapable" is "a condition in which a person is unable to manage financial resources … effectively for reasons including, but not limited to, mental illness, mental retardation, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance. 'Manage financial resources' means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income.'" ORS 125.005(3).

Resources for elder law attorneys

Events

OSB Elder Law Section unCLE Program
May 3, 2013
Valley River Inn • Eugene

Estate Planning for Education and Gifts to Minors
OSB CLE Audio Online Seminar
May 14, 2013
www.osbar.org

Inspiring Minority Attorneys Toward Growth and Excellence
May 17, 2013
Clackamas County Hilltop Campus
2051 Kaen Rd., Oregon City
Program designed to build skills, network and leadership for racial and ethnic minority attorneys as they begin their legal careers.
www.oregonminoritylawyer.org

Ethics and Billing and Collecting Fees
OSB CLE Audio Online Seminar
May 23, 2013
www.osbar.org

Health Care Reform Act: What's Next?
OSB Webcast
June 11, 2013
www.osbar.org

Investment Portfolio and Brokerage Statement Danger Signals: Red Flags for Claims of Negligence, Breach of Fiduciary Duty, and Securities Violations
OSB Webcast
July 16, 2013
www.osbar.org

Oregon Minority Lawyers Association's (OMLA) 14th Annual Summer Social and Fundraising Auction
August 1, 2013 • Portland
www.oregonminoritylawyer.org

NAELA Annual Council of Advanced Practitioners Conference
August 16 & 17, 2013
Chicago, Illinois
www.naela.org

NAELA Fall Institute and Advanced Elder Law Review
November 5–9, 2013
Washington D.C.
www.naela.org ■

Websites

Elder Law Section website
www.osbar.org/sections/elder/elderlaw.html
The website provides useful links for elder law practitioners, past issues of *Elder Law Newsletter,* and current elder law numbers.

OregonLawHelp
www.oregonlawhelp.org
This website, operated by legal aid offices in Oregon, provides helpful information for low-income Oregonians and their lawyers. Much of the information is useful for clients in any income bracket.

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

Alzheimers Navigator
www.alzheimersnavigator.org
When facing Alzheimer's disease, there are a lot of things to consider. Alzheimer's Navigator helps guide you to answers by creating a personalized action plan and linking you to information, support, and local resources. ■

Elder Law Section electronic discussion list

All members of the Elder Law Section are automatically signed up on the list, but your participation is not mandatory.

How to use the discussion list

Send a message to all members of the Elder Law Section distribution list by addressing it to: **eldlaw@lists.osbar.org**. Replies are directed by default to the sender of the message *only*. If you wish to send a reply to the entire list, you must change the address to: **eldlaw@lists.osbar.org**—or you can choose "Reply to all."

Guidelines & Tips

- Include a subject line in messages to the list, for example, "lawyer referral needed" on the topic line.
- Try to avoid re-sending the entire message to which you are replying. Cut and paste the relevant parts when replying,
- Sign your messages with your full name, firm name, and appropriate-contact information.
- In the interest of virus prevention, do not try to send graphics or attachments. ■

Important elder law numbers

as of
January 1, 2013

Supplemental Security Income (SSI) Benefit Standards	
Eligible individual	$710/month
Eligible couple	$1,066/month
Medicaid (Oregon)	
Long term care income cap	$2,130/month
Community spouse minimum resource standard	$23,184
Community spouse maximum resource standard	$115,920
Community spouse minimum and maximum monthly allowance standards	$1,892/month; $2,898/month
Excess shelter allowance	Amount above $567/month
Food stamp utility allowance used to figure excess shelter allowance	$401/month
Personal needs allowance in nursing home	$30/month
Personal needs allowance in community-based care	$157.30/month
Room & board rate for community-based care facilities	$552.70/month
OSIP maintenance standard for person receiving in-home services	$710
Average private pay rate for calculating ineligibility for applications made on or after October 1, 2010	$7,663/month
Medicare	
Part B premium	$104.90/month*
Part B deductible	$147/year
Part A hospital deductible per spell of illness	$1,184
Part D premium:	Varies according to plan chosen
Skilled nursing facility co-insurance for days 21-100	$148/day

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

Oregon State Bar

Elder Law Section