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Marriage has financial consequences

By Kay Hyde-Patton, Attorney at Law

When a couple gets married, the financial consequences are not always obvious. Remarriage adds to the list of issues a client needs to consider, including how marriage may affect estate plans, estate taxes, income taxes, disability plans, access to benefits, and payments received based on a prior marriage—such as spousal support, Social Security, and retirement benefits. By being aware of these issues, an attorney can assist clients to determine how remarriage will affect them.

No estate plan

If a client has no estate plan but has assets to probate, ORS 112.035 states how those assets will be distributed when he or she has remarried. If there are no children, the whole estate is distributed to the surviving spouse. If a person has children who are not from this marriage, the deceased spouse's probated estate will be divided one-half to the surviving spouse and one-half equally among the children.

Wills

If a person marries, his or her will is automatically revoked unless the will was written in anticipation of the marriage or under circumstances showing that it was not intended to be revoked by marriage. There are provisions that can be included in the will to express intent not to revoke the will on subsequent marriage. If provisions are included, the will continues to be valid after the wedding ceremony.

Spousal elective share

Under ORS 114.600, a spouse has a right to elect a spousal share in the deceased spouse's augmented estate. The augmented estate includes probate and nonprobate assets. If a person is married, proceeds from a life insurance policy are part of the deceased spouse's augmented estate under the spousal elective share.

The size of the share the surviving spouse can elect to receive is determined by how long the couple has been married. If married fewer than two years, the surviving spouse has a right to five percent of the deceased spouse's augmented estate. If 15 years or more, the surviving spouse can claim 33 percent of the estate. The spousal share is an election. To elect, the decedent must have been domiciled in Oregon, and the spouse must survive the decedent and have made the election before his or her death. If a motion or petition is filed within the time specified in ORS 114.610, and the surviving spouse dies before payment of the elective share, the personal representative for the estate of the surviving spouse may take all steps necessary to secure payment of the elective share.

A prenuptial agreement is a vital estate planning tool for engaged persons. Under the Uniform Premarital Agreement Act, prior to marriage, both parties can enter an agreement that determines their rights, duties, interests in each other's estates, and liabilities, and waive rights to spousal share. ORS 108.700. *Note:* Rights in a Qualified Retirement Plan (QRP) cannot be waived in a prenuptial agreement.

Estate taxes

For 2014 an individual is entitled to an exclusion of $5 million from the federal estate and gift tax. A spouse has the right to portability, an elec-

Continued on page 2

In this issue...

Financial consequences of marriage *Continued from page 1*

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tion made by a surviving spouse to increase his or her gift and estate exclusion by the deceased spouse's unused amount. To receive the increase by portability, the surviving spouse must file an estate-tax return.

Federal gift tax

Each spouse can give up to $14,000 for a combined total of $28,000 per year per person. If a gift to an individual is more than $14,000, the spouses can also elect to "gift-split," meaning each spouse gives one-half of the gift.

Unlimited Marital Deduction (UMD)

The UMD is allowed for the value of property included in a decedent's gross estate that passes to the surviving spouse. This is an effective tool to defer estate tax until the surviving spouse dies. Most transfers to a spouse are tax-free. However, money that a person receives from a deceased spouse is included in his or her estate for estate tax purposes unless it was consumed during life. UMD does not have to be a direct transfer. A transfer may qualify as a UMD if the surviving spouse is a beneficiary of a marital trust or the decedent's property is transferred to a Qualified Terminable Interest Property (QTIP) trust.

Marital trusts are good tools for married couples with assets. On the death of the first spouse, a marital trust and UMD can equal no tax.

The Oregon estate transfer tax is imposed on the transfer of property for a resident or nonresident decedent with interest in Oregon property. If the person was married, a taxable estate can be adjusted using the Oregon special marital property election to reduce or eliminate the Oregon estate transfer tax.

Disability plans

Neither an advance directive nor a power of attorney is affected by remarriage.

Income taxes

As of 2013, married couples must file their income tax returns as "married filing jointly" or "married filing separately." To determine whether a marriage will be a bonus or a penalty requires an analysis of differences in income taxes. Combining spouses' income can result in being taxed at higher rates. Also, tax provisions that directly influence remarried taxpayers and income made by couples include earned income credit, child tax credit, and education tax credits.

Spousal support

Remarriage may affect a spouse's access to benefits or payments based on a prior marriage. Spousal support does not automatically stop if a person remarries. It depends on the language of the final divorce judgment. It is subject to negotiation and can be terminated if the marriage constitutes a "substantial change in circumstances after entry of original judgment."

Social Security

To qualify for spousal benefits, a couple must be married at least one year. The income-tax thresholds on Social Security benefits differ for single and married taxpayers and should be considered. If a person is married for ten years and then divorces and does not remarry, at age 62 she or he can collect Social Security benefits based on up to half of the ex-spouse's earnings or on the basis of his or her own earnings—whichever is greater.

A divorced spouse of a worker who dies could get benefits just the same as a widow, provided the marriage lasted ten years or more. A widow can collect an ex-spouse's benefits at age 60, allow his or her own benefits to grow until age 70, and then switch to her or his own full benefits.

Effect on retirement benefits

A new spouse will automatically be entitled to substantial inheritance rights under any Qualified Retirement Plan (QRP) the client participates in under the 1984 Retirement Equity Act (REA). If a client does not want the soon-to-be-spouse to have such rights, then the client should consider taking benefits out of the QRP and rolling them into an IRA. As for lifetime distributions, a spouse has more options. If a client does not want benefits to be left to the spouse, the client must obtain spousal consent. IRAs are subject to state-law spousal inheritance rights. These rights can be negated in a prenuptial agreement.

Medicare access

If one spouse has fewer than 40 quarters from a work career, he or she can enroll in Medicare programs based on the other spouse's earning history, and may not have to pay a premium.

Access to Medicaid

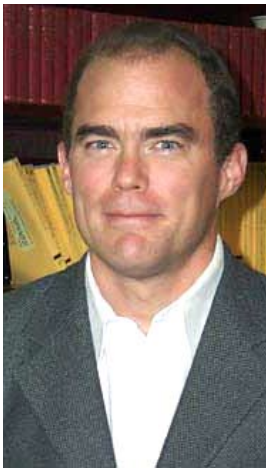
All resources for a married couple are reviewed in the determination of approval of Medicaid for the ill spouse.

In conclusion

The above points should be considered for all new marriages, including same-sex marriages. Same-sex couples also need to be aware of the recognition rules of the state and government agencies. If the marriage is recognized, they will experience the same effects—"for better or worse." ■

Working with professional fiduciaries

By Tim McNeil, Attorney at Law



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.

The true power of elder law rarely reveals itself in pleadings or courtrooms. Rather, it arises from a guardian making contact with a protected person—perhaps isolated, demented, and abused— and reinvigorating that person's life with attention and care. Professional fiduciaries, perhaps more than anyone in elder law, receive opportunities to exercise this power. The best elder law attorneys know which protective proceedings to steer toward professional fiduciaries and, once the professional fiduciary has the case, how to stay out of the way.

Certain circumstances cry out for the assistance of a professional fiduciary, even before the elder law attorney hears the entire story. When siblings vie for control of a parent's care and finances, appointment of a professional fiduciary is often an appropriate resolution. Allegations of elder financial abuse and denials of those allegations often require the assembly and interpretation of financial records, and a professional fiduciary experienced in providing such forensic accountings is often the best agent for this task. An elderly person who has lived alone for years, but whose ability to care for herself has dangerously eroded, may not have a friend or family member who can serve as her fiduciary. A friend or family member exercising an incapacitated elderly person's power of attorney may be overwhelmed by the stress of this responsibility, making the appointment of a professional fiduciary as conservator a welcome relief. These are some of the common circumstances in which an attorney turns to a professional fiduciary for resolution.

These circumstances play out so often in protective proceedings, and professional fiduciaries are so often appointed to address them, that an elder law attorney can be lured into a dangerous state of apathy. His client, the professional fiduciary, has been appointed so many times in such similar circumstances, that the attorney may provide no counsel at all. After all, the seasoned professional fiduciary surely doesn't need to be told that he or she can't surrender a life insurance policy without court approval, or that the court may remove a guardian who doesn't comply with statutory notice requirements prior to moving a protected person. The attorney makes such assumptions at his and his client's peril.

The attorney may avoid such peril by replacing assumptions with a mutual understanding of some guardianship/conservatorship fundamentals. At some point in the attorney's representation of the professional fiduciary, the attorney should establish these basics:

- **Calendaring**: Identify deadlines for all required pleadings, as well as responsibility for deadline adherence.
- **Bond**: Decide who will order it, and monitor it until it is filed.
- **Billing**: Review ORS 125.095 factors for determining reasonableness of attorney fees.
- **Court Approval:** For guardians, review ORS 125.320, and for conservators, review ORS 125.440 to make certain that the fiduciary understands which actions require prior court approval.
- **UTCR 9.160:** For conservators, share this blueprint for accountings which "must be accepted by all judicial districts."
- **Firing offenses:** Guardians should be aware that they can be removed for failing to file notice requirements prior to moving a protected person (125.225(3)) and conservators should be aware that they can be removed for failure "to use good business judgment and diligence in the management of the estate." (125.225(2)
- **Conflict of interest/Disclosure:** The importance of disclosing conflicts or mistakes was recently emphasized in the case of *Tillet v. Fuentes* (326 P.3d 1263, OR App 2014) when the court ruled that even when an annual account is approved by court order, matters that are not fully disclosed in the annual account may still expose the conservator to liability.

If an attorney represents a professional fiduciary in a number of cases, she does not have to review these fundamentals with her client in every case. Early on in this relationship, however, this foundation must be established.

Once this has been done, the attorney should do his best to get out of the way. While it may be perilous to assume that the professional fiduciary needs no counsel, it is wasteful for the attorney to assist too much. For example, a professional fiduciary can draft a guardian's report and arrange for its filing and notice. A professional fiduciary is quite capable of drafting an inventory

Continued on page 4

Working with fiduciaries

Continued from page 3

and, with UTCR 9.160 as a guide, assembling the exhibits to an annual account. Most professional fiduciaries can draft a compelling fee statement to cover an invoice. A professional fiduciary who takes responsibility for issuing a move notice is more likely to be aware of the statutory requirements for a move notice. An experienced professional fiduciary can develop a template for a disclosure statement that can be tailored on a case-by-case basis.

Attorney review of the professional fiduciary's work prior to the filing of these documents is wise. However, attorney production of these documents often occurs at twice the cost and no added benefit. Costs undermine the professional fiduciary's capacity to support and protect a vulnerable client. In a routine and stable case, a professional fiduciary may need to consult legal counsel no more than two or three times per year. Although such cases generate negligible attorney fees, they often reflect the competence of the fiduciary, and the attorney's understanding of the true purpose of the protective proceeding. When routine and stable cases managed by an experienced professional fiduciary annually generate excessive attorney fees, the value of the representation should be weighed against the benefits that it provides to the protected person.

The legal costs that arise from a high-conflict case, which often is tailor-made for the appointment of a professional fiduciary, require a different analysis. The cost of litigation is always substantial. The degree of injury that these costs inflict depends upon the size of the estate they drain and the prospect of recovery. Additionally, the stress of constant conflict on the protected person may generate an even greater cost. When a conservator sues the relative or friend of a protected person, the protected person is often aware of the conflict and pained by it. While the purpose of a protective proceeding is to conserve or improve the quality of a protected person's life—and litigation initiated by a fiduciary may be based upon that purpose—the financial and psychological costs of the litigation make it a risky venture. An attorney should weigh carefully these costs with the professional fiduciary before filing suit.

Whether a professional fiduciary is appointed to serve in a high-conflict case or a case in which no one but the protected person is entitled to notice, the opportunity to lift a vulnerable person to a higher quality of life constantly recurs. The most effective elder law attorney positions his client to take that opportunity without undermining its promise. ■

Important elder law numbers

as of
October 1, 2014

Supplemental Security Income (SSI) Benefit Standards	
	Eligible individual $721/month
	Eligible couple $1,082/month
Medicaid (Oregon)	
	Long term care income cap $2,163/month
	Community spouse minimum resource standard $23,448
	Community spouse maximum resource standard $117,240
	Community spouse minimum and maximum monthly allowance standards $1,967/month; $2,931/month
	Excess shelter allowance ..... Amount above $590/month
	SNAP (food stamp) utility allowance used to figure excess shelter allowance $446/month
	Personal needs allowance in nursing home $60/month
	Personal needs allowance in community-based care $160/month
	Room & board rate for community-based care facilities $561/month
	OSIP maintenance standard for person receiving in-home services $1,221
	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 $1,216
	Part D premium: ..... Varies according to plan chosen
	Skilled nursing facility co-insurance for days 21-100 ..... $152/day

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

Bankruptcy can intersect with elder law

By Kara H. Daley, Attorney at Law

Kara H. Daley manages a Corvallis law firm that concentrates on elder law, estate planning, and special needs planning. With more than 16 years of experience, the assistance of a top-notch staff, and the company of office cat Justice (aka "Chief"), Kara provides clear explanations for complex legal issues and helps clients plan for their future.

Unlike many solitary fields of law, elder law often intersects with other legal practice areas, and clients are described not by socio-economic factors, but by age. Apparently, getting older can happen to anyone. When talking to clients aiming toward the Medicaid side of the spectrum rather than the A/B trust side, there are a few lessons I learned from my 15 years as a bankruptcy practitioner that continue to be useful in my elder law practice.

We have all met elderly clients in financial distress. Those who live on Social Security benefits or carefully meted-out retirement accounts can suddenly be tipped over the edge of financial solvency through an unexpected event.Often the comforting words "judgment proof" are offered up to address these situations. The older client is told that he or she does not have any income that can be attached by creditors and is therefore freed from the expectation of repayment. However, sometimes that is not the best answer.

Why would judgment-proof clients seek bankruptcy, a more costly and far reaching alternative? If the elderly couple owns a home, they may wish to pass this resource to their children. Once the couple has passed on and it comes time to transfer the house to the children, that medical debt that was sitting quietly as a judgment lien is awakened. At that time, the creditor holds out the proverbial hand and says, "Time to pay up." Suddenly, the home's value is diminished, and the bereft heirs are scrambling to find resources to pay off the home they may have moved into with the assumption of ownership. Many are unable to secure even a small loan to clear this debt, and as a result they lose the family home.

How can this loss be avoided? An elderly couple may instead seek the protection and relief afforded by the bankruptcy court. A Chapter 7 bankruptcy, known as a simple bankruptcy, has its own income and resource test. Social Security income is exempt and it is not counted on the income side of the bankruptcy equation. Similarly, the debtor has a resource exemption of $40,000 in home equity for a single individual and $50,000 in home equity for a married couple. In Oregon, an IRA is considered an exempt resource as well and not counted in determining bankruptcy eligibility. A Chapter 7 filing can discharge medical debt, credit card debt, and car loans.

Should a judgment have been previously rendered against the debtor, it is important to look at the possibility of stripping the lien from the house in a separate proceeding. A lien can only be stripped when there is no additional equity in the home outside the above-stated exemptions.

Alternatively, a Chapter 13 repayment plan typically lasts three to five years and can allow debtors with greater equity to pay off only the portion of their debts equal to the nonexempt equity.

For a very few, petitioning to discharge student loan debt in either chapter is possible, though it is a very high bar. It is worth noting:

- There has been an increase in the number of grandparents co-signing student loans, who wind up being pursued for the entirety of the loan upon default of a grandchild who failed to complete a co-signer release.
- The bankruptcy or death of the grandparent can also trigger that same default and/or acceleration for the grandchild's student loan.

The moral of this story, as we all know, is to take care in co-signing.

How else may bankruptcy affect estate planning? Recent changes in law have made inherited IRAs subject to creditors' claims in other states. Oregon has its own state-mandated protection. However, although the elderly clients are judgment proof, a long look down the road may show they hope to preserve an IRA for a child who also has debts, or perhaps after one spouse passes away, the surviving spouse plans to move to another state to live with the children. In this case, the surviving spouse's election to treat the IRA as an inherited IRA may suddenly be subject to a creditor's claim.

Bankruptcy during the lifetime of both spouses may resolve the matter for the surviving spouse, or a few words of advice to the surviving spouse when filing to claim their deceased spouse's IRA may prevent future hardship. In planning for the children, however, the couple may need to be more proactive, and place the IRA into an IRA trust to protect against the creditors of an inheriting child. Although IRA trusts have often been used to protect the retirement assets for a special-needs child, recent changes in law may make the IRA trust more common as a type of credit protection trust.

Continued on page 6

Bankruptcy Continued from page 5

In this same vein, we look at the economic status of the child. Although bankruptcy may be the salvation for the child teetering on the edge of financial failure, the parents may be less than thrilled to have their carefully husbanded legacy go toward payment of the child's debts. Under the bankruptcy code, an inheritance may become part of the bankruptcy estate and thus subject to creditors' claims before the child ever receives it. Because a creditor's claim depends on the child's date of acquisition of the legal interest in inheritance, the key to defusing this situation may rest in limiting or eliminating the child's claim during that timeline. The nature of this bankruptcy claim may last from 180 days of the acquisition or date the child becomes entitled to the asset in a Chapter 7, to the entire time the child is in a Chapter 13 payment plan, which can last up to five years. A complete discussion of recent case law and the complexities of the bankruptcy code is beyond the scope of this article and most likely outside the interests of its readers. However, we can say for certain that leaving an inheritance to a child contemplating bankruptcy presents a danger.

Various fixes for such a situation may include disinheriting that child until after the bankruptcy discharge is received and then revising the estate planning documents. Some practitioners may try to craft vesting language within the will or trust itself as a boilerplate rule, though the success of this in the Ninth Circuit is uncertain. Other practitioners may counsel parents to assist with addressing the child's debt and avoiding bankruptcy. While bankruptcy itself may be a useful tool for the elderly client, awareness of its consequences—sometimes unintended—is useful for the elder law practitioner. ■

Attorneys added to list of mandatory reporters of elder abuse

Section 5 of House Bill 2205—passed during the 2013 legislative session—amends ORS 124.050 to add lawyers to the list of mandatory reporters for elder abuse.

Section 7 of HB 2205 requires the Oregon State Bar to "…adopt rules to establish minimum training requirements for all active members of the bar relating to the duties of attorneys under ORS 124.060 and 419B.010."

Beginning with the 2015 reporting year, all active Oregon State Bar members in a three-year reporting period must complete an elder-abuse-reporting CLE credit.

For reporting periods ending 2015, 2016, or 2017, this credit will be required instead of a child-abuse-reporting credit.

After that, the requirement will alternate every time you report. You will need a child-abuse-reporting credit in your next reporting period (in 2018, 2019, or 2020), elder abuse in the next period (in 2021, 2022, or 2023), child abuse in the next one, and so on.

If you have questions about the MCLE requirement, contact the Oregon State Bar MCLE Department at 503.620.0222, ext. 368, or email mcle@osbar.org. ■

The Oregon Department of Human Services has a brochure about elder abuse reporting avilable online at: **apps.state.or.us/Forms/Served/de9373.pdf** .

Paperless practice becomes mandatory

By Orrin Onken, Attorney at Law

Admitted to the bar in 1982, Orrin Onken has practiced probate and elder law since 2003. He is also an elder law mediator and author of the Oregon Elder Law blog: **http://blog.orolaw.com**

As of December 1, 2014, lawyers will no longer be allowed to file paper documents in most cases. Paperless practice, which has been a good idea for a long time, becomes mandatory. Electronic filing (e-filing) has been optional since mid-summer and the probate coordinators have seen enough filings to offer some suggestions for those of us who do protective proceedings and estate administration.

The basics

The rule that governs e-filing is UTCR 21. There is no substitute for reading the most current version of the rule. It is changing as problems are ironed out, so always check for amendments.

E-filing requires that lawyers sign up for two online services. For filing itself, we sign up at the Oregon Judicial Department e-filing web portal. Sign up as a firm, even if you are a sole practitioner and provide a business credit card that can be used to pay filing fees. For viewing filed documents we sign up at the Oregon Judicial Case Information Network (OJCIN). This is the new version of OJIN. Signing up with these services is much like opening an account at Amazon or Powells. Simply fill out the form. OJCIN costs twenty-five dollars a month. E-filing is free. Documents for e-filing must be searchable Portable Document Format (PDF) files. A document that is exported in PDF or printed to PDF from your word processor is automatically searchable. A scanned document is generally not, and you should use the built-in text recognition capabilities of your PDF software to make your scanned documents searchable.

Documents can be electronically signed with something like "/s/ John Q. Attorney" at the top of your signature block. This is simple, but most lawyers will create a picture file of their handwritten signature and then use existing PDF software to place the picture of the handwritten signature on PDF documents. Detailed directions on how to do this can be found on the Internet. A document signed by someone other than the attorney must be scanned. Attorneys must keep the paper originals of documents signed by clients or third parties for thirty days.

The e-filing website uses "breadcrumb" navigation with four screens in the filing process. The screens are Case Information, Parties, Filings, and Summary. When you have your PDF documents ready to file, use a Web browser to go to the e-filing site and fill in the information on each screen as requested. If it is a new case, click on "New Case." If you are filing into an existing case, fill in the case number.

The probate clerks beg you to check and double-check your case numbers. You must file into the correct case and your filed documents must have the correct case number in the caption. Filing into the wrong case must be fixed on the court's end and it is not easy.

When you start an e-filing, you create an electronic envelope. The envelope can hold one or several documents. Put all related pleadings in one envelope. If you want to file a motion, verified statement, and proposed order all at one time, put all pleadings into the same electronic envelope. Do not create a new envelope for each document.

Exhibits to a pleading should be made part of the document that you file. A rule of reasonableness applies. If you would have made an exhibit a numbered exhibit to a paper filing, it should be part of a single PDF document for e-filing. If, however, the document has its own court caption, such as a verified statement or professional fiduciary disclosures, it should be filed as a separate document in the electronic envelope. Thus, an annual account a conservatorship can be a single document with spreadsheets and bank statements made part of the document as an exhibit. Statements of attorney fees, statements of fiduciary fees, and other documents that have separate captions should be submitted as separate documents, but in the same envelope. If the exhibit is very large or oversized, refer to the rule.

Once you have reviewed your filing in the summary page, you file the document by hitting the button at the bottom right. Within a few minutes you will receive an email for each document in the envelope which states that the document has been submitted. Anywhere from a few minutes to a few days later, depending on the

Continued on page 8

Paperless practice

Continued from page 7

court and a lot of other factors, you will be sent an email that the document has been accepted. Your filing is now complete. When you do a lot of filing, these emails will clog your mailbox. Create a filter to send them to a special folder or to the client folder, depending upon your preferences.

If there is something deficient about your filing, you may receive a notice from the court telling you what is wrong. You address the problem in essentially the same way you would have in the old days when those notices came by mail.

Special issues for elder law attorneys

Petitions

When seeking the appointment of a fiduciary, you must enter party information for the petitioner, the respondent, and the fiduciary. Enter information for both the petitioner and the fiduciary, even if they are the same person. In conservatorships and estates, select the filing fee that is appropriate for the size of the estate. Once you file, the fee will be deducted from the account you designated when you signed up.

Visitors

We need to follow the local practice for appointing visitors. For most counties that is not a problem, but there is currently no way to pay the visitors fee required by Multnomah County online. You will have to file the petition and then call the court with your credit card number to pay the fee. The procedure for producing a "visitor's packet" has not yet been firmly established, but it appears that a lawyer can email the pleadings to the appointed visitor. Good communication between the lawyer, the court, and the appointed visitor will go a long way toward making the process work smoothly.

Confidential information under ORS 125.012

If DHS has provided you with confidential information under ORS 125.012, you should make the information an exhibit to a confidentiality order—UTCR Form 9.410.1—and check the "confidential" box when you file the document. You will ordinarily be submitting this with a petition of some sort. Put the petition and the order in the same electronic envelope.

Emergency relief

There is no practical reason why the pleadings necessary to support emergency relief cannot be e-filed. You will need to comply with local practice. In Multnomah County you should contact the court and make your appointment to appear *ex parte* at the same time you file the petition and supporting documents. If you need the court to consider an e-filed document immediately, use the words "EXPEDITED CONSIDERATION REQUESTED." If you put that on all your filings, the court staff will, of course, hate you.

Proof of personal service

Your process server is probably not authorized to e-file. The process servers doing work in federal court return the proof of service to the lawyer for e-filing. That is now the best practice in state court.

Objections, notices of mediation, and fees in contested matters

Objections create a contested matter. Currently, the system cannot charge the first appearance fee for an objector in a protective proceeding. You can file the objection, but you should call the court to pay the first appearance fee. If you don't call the court, court staff will call you. If you are in Multnomah County and filing an objection, you might as well include your notice of mediation with the objection. You will be required to mediate under the local rule or obtain a waiver. There is no reason not to start that process when you file the objection.

Bonds and wills

Bonds can be e-filed. Keep the original in your office until the bond is replaced or exonerated. When opening a testate probate proceeding, file the petition and the will as separate documents in the same envelope. In the comments section of your filing, advise the court that you will file the original of the will within seven days. Then do so. When you file the original of the will, advise the court that a PDF version of the will was filed with the e-filed petition. Your filing date is the date of e-filing.

Orders, judgment, and copies

Motions and orders must be submitted as separate documents. There is currently no way for the court to notify you when an order or judgment is signed. You have to check OJCIN every couple of days until you see it. If it doesn't show up within a reasonable time, call the probate department. Once the order or judgment is signed, you can download a copy for your file. There is currently no way to order certified copies online. You must do it in the traditional way. Similarly, you cannot order conformed paper copies online. The probate coordinators have a hard time understanding why anyone wants conformed copies when lawyers can now instantly download copies of judgments with the electronic signature of the judge affixed, but the requests for them continue to come in.

Conclusion

Those in the field who have been paperless for a long time can no longer use the court system as their personal paper disposal system. Those with an affection for paper may go through a grieving process for a time, but in the end, the new system is where all courts will be within a few years. ■

Guardian and ombudsman clash in court

By Bernard Vail, Professor, Lewis & Clark Law School

State v. Symons: 264 Or.App. 769 (2014) deals with a conflict between the duties of a guardian under ORS chapter 125 and the duties of a Long Term Care Ombudsman (LTCO) under ORS chapter 441.

A protected person was a resident of an adult foster care home. As a result of a severe stroke in 2002 she was unable to communicate except on a very basic level. In 2009 her guardian (a family member) was unable to continue to serve in that capacity. A new guardian was ultimately appointed after some disagreement as to who the new guardian should be. In 2010 the protected person, through her attorney, filed objections declaring that she wanted a new guardian. The protected person thereafter vacillated between asking for a new guardian, asking to retain her current guardian, and asking to terminate the guardianship entirely. Ultimately no new guardian was appointed. During the discussions about the guardianship between the protected person's attorney, the care facility, and the guardian, the LTCO became involved and ultimately opened an investigation that involved some complaints made by the protected person. The involvement of the LTCO, largely because of the protected person's inability to process information and communicate, caused agitation and stress to the protected person.

The operators of the care facility contributed to the confusion and upset by attempting to intervene on behalf of the protected person, mistakenly believing that she was being abused. Conflict between the guardian, the protected person, and the operators, as well as emotional upset caused by the intervention of the LTCO led the guardian to decide to move the protected person to another care facility. The protected person's doctor and the court-appointed visitor supported this decision. With little if any advance notice, the guardian arranged to move the protected person to another facility, but the operators of the original care facility interfered with the move and caused stress to the protected person. The guardian notified the court that the move had occurred as required by statute, but did *not* notify the LTCO, which the statute also requires, although the statute does not require disclosure of the *location* of the protected person. The LTCO discovered the move by other means and attempted to discover the protected person's whereabouts. Neither the guardian nor the protected person's attorney would provide the requested information. The LTCO then filed a petition that requested the court to order the guardian to disclose the location of the new care facility.

The LTCO's position at the hearing on the petition was based on the duty of the LTCO under ORS 441.109(1). It provides that the LTCO *"shall* investigate and resolve complaints made by or for residents of long term care facilities." The LTCO is also required to "report, either verbally or in writing, opinions and recommendations to the ... affected parties." OAR 114-005-0020. The LTCO read the statute to *require* that the guardian facilitate the LTCO's attempt to communicate with the protected person by providing information on her whereabouts, even though not required by statute, and to do so *even if* providing the information would cause harm to the protected person. Not surprisingly, this absolutist position did not find an appreciative audience in a protective proceeding, where the paramount concern is the best interest of the protected person.

The guardian's position was that, given that the protected person was incapable of understanding the information provided by the LTCO because of the severe communication deficits involved, contact by the LTCO served no useful purpose and merely caused emotional upset. The guardian therefore refused to supply the requested information.

The state office of Long Term Care Ombudsman is established pursuant to the Older Americans Act, 42 USC § 3001. State compliance with the Older Americans Act is required in order to receive federal funding, and there is some hint in the LTCO's appellate brief that fear of loss of federal funding may have been a driving force behind this litigation.

The trial court upheld the guardian's refusal to provide the address of the new care facility, and ruled that the decision to withhold the address was in the best interest of the protected person. The protected person's attorney and the court-appointed visitor both supported the guardian's assertion that disclosing the protected person's address would *not* be in her best interest.

The appellate court, in a carefully crafted opinion, upheld the trial court ruling. It drew a distinction between the duties of the guardian and the LTCO. According to the court, the office of LTCO is established to further the best interests of residents of long term care facilities. The statutory duties of the LTCO have no independent purpose, but are only intended to *indirectly* serve those best interests. The duties of a guardian, on the other hand, are intended to *directly* promote and protect the welfare of the protected person. When the two duties come in conflict, the direct duty of the guardian takes precedence over the indirect duty of the LTCO.

Although at first glance this case seems to say that a guardian has the ability to determine whether the LTCO is allowed to perform its statutory duties, I suggest that this is not the situation. The case deals with a unique set of facts unlikely to ever be replicated. As James Cartwright, the attorney who tried the case for the guardian, put it, "This is a one-off case." The decision does not grant a guardian any authority to interfere with the performance of the duties of the LTCO; rather, it admonishes the LTCO to ensure that performance of its statutory duties complies with its underlying duty to act in the best interest of a protected person, the same duty imposed on a guardian. ■

Bernie Vail has taught at Lewis & Clark Law School since 1972. He is the law school representative to the Oregon Law Commission and vice-chair of the commission.

Scenes from the October 2 Elder Law Section CLE program

The annual CLE program sponsored by the Elder Law Section took place in Portland on October 2, 2014. This year's theme was *Emerging Challenges*.

Speakers were Penny Davis, Monica Pacheco, Kay Hyde-Patton, Sam Friedenberg, Heather Gilmore, Mark M. Williams, Amber Hollister, and Ellen Klem.

Don Dickman chaired the planning committee, which included Geoff Bernhardt, Victoria Blachly, Penny Davis, Heather Gilmore, Steven Heinrich, Kay Hyde-Patton, Ellen Klem, S. Jane Patterson, J. Thomas Pixon, Sylvia Sycamore, Mark M. Williams, and Whitney Yazzolino. ■

Don Dickman introduced Monica Pacheco and Penny Davis, who spoke on "Medicaid After the Affordable Care Act.

Attorneys from all over the state attended the program: 142 at the Oregon Convention Center and 37 via live webcast.

The Bend contingent: *(l to r)* Andrea Malone, Lisa Bertalan, and Linda Ratcliffe.

(*l to r)* Garvin Reiter, Sam Friedenberg, and Mark Williams

Executive Committee Chair Michael Schmidt.

Kay Hyde-Patton: ready to present the topic of marriage and older couples.

(*l to r)* Michael Edgel, Melanie Marmion, and Penny Davis

Resources for elder law attorneys

Events

Elder Law Discussion Group
Legal Aid Services Portland conference room
520 SW Sixth Ave, 11th Floor, Portland
November 11, 2014/Noon–1:00 p.m.
Andrea Ogston will be presenting on Protective Orders in Oregon, giving a brief overview of FAPA, EPPDAPA, SAPO, and stalking petitions.
RSVPs appreciated, but not required.
Contact: Andrea Ogston:
andrea.ogston@lasoregon.org; 503.224.4086

Estate Planning for Pets
OSB audio seminar
November 10, 2014/10:00–11:00 a.m.
www.osbar.org

Estate Planning
OSB New Lawyers Division seminar
November 13, 2014/12:00–1:00 p.m.
Multnomah County Courthouse, Portland
www.osbar.org/onld/upcoming.html

Estate Planning for MDs, JDs, CPAs, and Other Professionals
OSB audio seminar (2 parts)
November 17 & 18, 2014/10:00–11:00 a.m.
www.osbar.org

Basic Estate Planning and Administration
OSB seminar
November 21, 2014/8:30 a.m.–4:45 p.m.
DoubleTree Portland, 1000 NE Multnomah St.; or live webcast
www.osbar.org

Nontraditional Law Practices: The New Frontier
Multnomah Bar Association seminar
December 9, 2014/3:00–5:00 p.m.
World Trade Center, Portland
www.mbabar.org

NAELA Advanced Elder Law Review
January 27 & 28, 2015
Newport Beach, California
www.naela.org

NAELA Summit
January 29–31, 2015
Newport Beach, California
www.naela.org

NAELA 2015 Annual Conference
May 14–May, 16, 2015
Orlando, Florida
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.

DHS/OHA form for authorization of use and disclosure of medical information
apps.state.or.us/Forms/Served/de2099.pdf

OregonLawHelp
www.oregonlawhelp.org
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
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
This is a free service to help people learn about public and privately paid options to address aging or disability needs, or to help families and caregivers. Includes downloadable *Family Caregiver Handbook*, available in English and Spanish versions. Your clients can also call 1.855.673.2372, enter their ZIP codes, and get connected with the nearest ADRC office.

BigCharts
bigcharts.marketwatch.com/historical
Provides the price of a stock on a specific date.

Department of Veterans Affairs Advance Directive
www.va.gov/vaforms/medical/pdf/vha-10-0137-fill.pdf

Department of Veterans Affairs HIPAA Release form
www.va.gov/vaforms/medical/pdf/vha-10-5345-fill.pdf

"The Thin Edge of Dignity"
www.youtube.com/watch?v=UciTFCPCivI
Dick Weinman, retired professor of broadcast communications at Oregon State University, author, and former radio personality, delivers a moving presentation about his experience in an assisted living facility. ■

Elder Law Discussion List

To post to the list, enter **eldlaw@forums.osbar.org** in the *To* line of your email. The discussion list provides a forum for sharing information and asking questions. ■

Index to Volume 17 of the Elder Law Newsletter

No. 1:
January 2014
No. 2:
April 2014
No. 3:
July 2014
No. 4:
October 2014

At the October 2 annual meeting, the Elder Law Section elected the 2015 Executive Committee.

Chairperson: Erin Evers
Chairperson-elect: Kay Hyde-Patton
Past Chairperson: Michael Schmidt
Treasurer: Monica Pacheco
Secretary: Jan Friedman

Members:
Victoria Blachly
Kathryn Belcher
Jason Broesder
Don Dickman
Darin Dooley
Tim McNeil
Anastasia Meisner
J. Thomas Pixton
Whitney Yazzolino ■