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Elder Law Newsletter

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Attorneys can advocate for elders during the Oregon legislative session

By Senator Suzanne Bonamici

Every other January in odd-numbered years, the Oregon legislature convenes in Salem. Many of the new laws and changes to existing statutes considered by the legislature affect the lives of elders and the communities in which they live. For you to be an effective advocate for elders, it helps to know how the legislature works.

Legislative overview

Oregon has a citizen legislature consisting of 60 members of the House of Representatives and 30 members of the Senate. Ideas for laws come from many sources, including individuals and interest groups. Bills are drafted by a group of attorneys in the Office of Legislative Counsel and—with the exception of revenue bills, which must begin in the House—can be introduced in either chamber.

Once a bill is drafted and introduced, the Senate President or Speaker of the House assigns it to a committee. Committees meet during the interim, typically for informational hearings about issues that are likely to be considered in bill form during the next session.

Information about each bill and committee agendas are available on the legislature's Web site at **www.leg.state.or.us**. You can conduct a text search for bills by issue online at **www.leg.state.or.us/bills_laws**.

Some of the committees likely to hear bills that directly affect elders are: Senate Senior and Disabled Services Committee, Senate Health and Human Services Committee, House Health Care Committee, House Consumer Protection Committee, and House Human Services and Women's Wellness Committee.

Contacting a legislator

If you have an idea for a bill or would like more information about an existing bill, start with your own representative and senator. To find a list of your state and federal lawmakers, see: **www.leg.state.or.us/findlegsltr**. You can use email or send a hard copy of a letter; both are given equal consideration. Legislators receive mail from people all over the state and sometimes the country, but we make it a priority to respond first to our own constituents. If you are a constituent, make sure to let your legislator know that when you write, or include your mailing address.

If for some reason your own representative and senator are not interested in pursuing your idea, don't give up. Ask them or advocates in the policy area for names of other legislators who may be interested. It is also a good idea to contact members who serve on the committees most likely to hear the bill you would like to see enacted.

If your proposed bill is complex or controversial, this can be a challenging process. Be

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Legislative advocacy

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Senator Suzanne Bonamici represents Senate District 17 in NE Washington County and NW Portland. A graduate of the University of Oregon School of Law, she practiced at the Federal Trade Commission in Washington, D.C., and in private practice in Portland before taking a career break to raise her children. Suzanne represented House District 34 in the 2007 and 2008 sessions, and was appointed to Senate District 17 in May of 2008. Currently she serves on the Senate Interim Judiciary, Commerce and Labor, and Oregon Tort Claims Act Committees.

prepared to negotiate and compromise. Do your homework. Anticipate objections and plan how to counter them. Find interest groups that are aligned with your position and ask for their support.

If you are contacting a legislator about a bill or issue already under consideration, be sure to note the bill number and whether you are a constituent. Keep your message brief and personal. It should come as no surprise that cut-and-paste mass emails from interest groups are not as effective as individual stories.

How to provide effective testimony at a legislative committee hearing

After a bill is drafted and assigned to committee, the committee chair will determine whether and when the bill will receive a hearing. By tracking bills on the Web site, you can learn when the hearing will be held. If you are an advocate for elder issues, legislators will appreciate your testimony in support of or in opposition to a bill. Or, if the bill is basically sound but has some potential problem areas or ambiguities that could be corrected, your testimony on those issues is also very important. Often it is the testimony from citizens who have relevant stories to tell and experiences to describe that is the most persuasive and helpful. During a hearing about foreclosure rescue scams in the House Consumer Protection Committee, for example, we heard compelling testimony from a widower about what it was like to face the potential loss of his home that was in foreclosure. Citizen testimony is always welcome, and committee chairs will often give priority to people who have traveled a long distance to the capitol.

To prepare for giving testimony, consult the Web site page titled "How To Testify Before a Legislative Committee" at **www.leg.state.or.us/citizenguide**.

If possible, attend a committee hearing in advance to become familiar with the protocol. If you are not able to come to Salem, watch a committee hearing online by clicking "Audio/Video" on the legislative Web site, or on cable television on the Oregon Channel.

When you come to testify, it is helpful (but not necessary) to bring a copy of your written comments. Even though committee hearings are recorded, having the written testimony for the file will be useful, especially for committee members who may not be in attendance or who wish to refer to those comments later. If you bring written testimony, however, please do not read it verbatim. Be prepared for questions from committee members, but don't worry if you are not able to answer every question. You may offer to follow up by sending more information, if you wish.

Conclusion

Getting involved in the legislative process is easy and important. Advocates and individual citizens often shape decision-making by bringing real world experience and stories to policymakers. Our laws affect all of us, and we all can play an important role in making them as good as we can. We look forward to your participation, and we appreciate it. ■

Proposal would increase limits for small-estate affidavit

By William Brewer, Attorney at Law

The Estate Planning and Administration Section of the Oregon State Bar is proposing legislation to raise the limits for using the small-estate affidavit. Current law, ORS 114.515(2), allows the small-estate affidavit process to be used only if the decedent's assets subject to probate have a total value of less than $200,000. Of this amount, not more than $50,000 can be personal property and not more than $150,000 can be real property.

The Section's proposal will raise the total amount to $350,000, of which not more than $100,000 can be personal property and not more than $250,000 can be real property. The proposed legislation does not change any other aspect of the small-estate affidavit statutes or procedure, although it is possible the Legislative Assembly will want to change the filing fee from the current $23.

The purpose of the increase is to make the small-estate procedure available for more estates. The small-estate limits were raised to their present level by the 2005 Legislative Assembly (chapter 273), effective for decedents who died after January 1, 2006. Previously the limits had been $140,000, $50,000, and $90,000, respectively.

The small-estate procedure is appropriate for simple estates in which litigation is unlikely and the decedent died intestate, or in which the original will is available for filing with the court. The proposed increase in the limits is intended to make the small-estate procedure more useful in those simple situations. ■

The Department of Human Services budget: how do elders and people with disabilities fare in the legislative process?

By John Mullin

Some years ago I had the dubious honor of doing an interview with Oregon Public Broadcasting. The topic of conversation was explaining the difference between "continuing service level" budgeting and "zero based" budgeting. After hearing the broadcast later that day, I noted to my colleagues that the interview was "slightly more interesting than a pledge drive." But in fact, the budgeting process, and what it means for Oregonians, is vitally important and is a product of the work of professionals, citizen input, and the ultimate decision-making by the governor and the legislature.

The basic machinations

What are the mechanics of putting a budget together? In Oregon, budgeting authority springs from the constitution and the Oregon Revised Statutes. A biennial budget (July 1 of odd-numbered years to June 30 of the next odd numbered year) is the current practice, although there are some lawmakers who would like to move toward annual budgets and annual legislative sessions. At present, the sitting governor must produce a Governor's Recommended Budget (GRB) by December 1 in even-numbered years. A governor-elect has until February 1 to produce a budget, which, because of time constraints and complexity, usually has only slight changes to the preceding governor's draft. With the GRB as the reference point, the legislature comes into session and produces its own Legislatively Adopted Budget (LAB) by passing a series of budget bills. These bills are sent on to the Governor for consideration.

So by December 1, 2008, we will have Governor Kulongoski's proposed budget. However, a lot of discussion has gone on since the end of the 2008 Special Session.

The Department of Human Services budget process

The Department of Human Services (DHS) is the largest department in Oregon government. According to the *Oregon Blue Book,* the adopted 2005-07 budget was $9.8 billion. Technically speaking, DHS serves everyone in Oregon through public health programs. But in terms of those receiving direct services, the number exceeds 1 million through the work of its divisions, its local employees, and contracts with a variety of organizations and community partners. DHS has the administrative functions of the Director's Office, Administrative Services, and Finance and Policy. The other divisions are: Addictions and Mental Health, Children Adults and Families, Medical Assistance Programs, Public Health, and Seniors and People with Disabilities.

Under director Dr. Bruce Goldberg, DHS initiated a statewide process of community fora in April and May of this year. In those meetings, the budget process was reviewed with particular attention given to ideas about Policy Option Packages (POPs) **Note**: More detail on the POPs can be found on the DHS Web site.

At the beginning of the article I mentioned "continuing service level" budgeting. These days it's called the "essential budget level" (EBL), or in plain language, everything that was in the previous budget with updated factors such as population growth, inflation, etc. In other words, it's the cost of doing the same business in the next budget cycle. POPs, on the other hand, may be proposed restorations of reduced or eliminated programs, enhancements of existing programs, or totally new proposals. While these POPs may or may not appear in the GRB, this process is important for advocates. DHS listened to the input, and in July proposed a total of 120 POPs.

Seniors and People with Disabilities (SPD) budget

As readers of this newsletter know, Oregon has had a reputation for the creation of the "Oregon Model," as envisioned in ORS 410. Advocates for elders pushed for the passage of SB 955 in the 1981 legislative session. This statute became the basis for the creation of the model for long term care based on the advocates' mantra of "independence, dignity, and

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DHS budget

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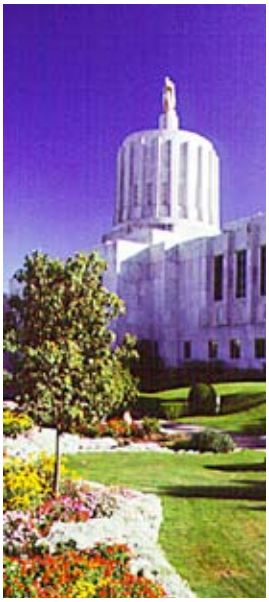

Lawmakers will review and scrutinize the proposed budget, agency by agency, in public hearings.

choice." Basically, along with waivers granted by the federal government that allowed a change in spending patterns for Medicaid, Oregon was able to emphasize community-based care, while reserving nursing home care for only the most impaired. This process has often been called a "win-win," since clients are happier living as independently as possible, while the taxpayers save money because community-based care is less costly.

To use a Clackamas County example, in 1982 I was involved in planning for taking responsibility for long term care services at the local level, as allowed by SB 955. The Medicaid nursing home client count in February of 1982 was 803. By the time I retired at the end of 2006, the count was below 350. And yet we served far more people than in 1982 because we were able to use Medicaid to pay for in-home services, adult foster care, residential care and assisted living facilities. If other states had accomplished what has been done in Clackamas County and the rest of Oregon, the savings in state and federal Medicaid outlays would have been billions of dollars.

The "model" also emphasized local decision-making at the Area Agency on Aging level, coordination of services ranging from transportation and nutrition to legal services and more, and the creation of a comprehensive system to meet the needs of elders and people with disabilities. But during the 2001–2005 biennia, an economic downturn hit Oregon and this leading-edge system fell on hard times. Service priority levels 14 through 17 (serving lesser impaired clients) were cut. The general assistance program (serving what has been termed the "poorest of the poor") and the medically needy programs were completely eliminated.

Although an economic recovery gave hope to advocates for the 2007 session, it's fair to say that little progress was made. Advocates, including the Oregon Law Center, banded together after the session to work on an omnibus bill for the 2008 Special Session. The resultant SB 1061 attempted to do three things: memorialize the past and the accomplishments of the system, deal with the immediate crisis in funding community-based care facilities, and prepare for the future of long term care through a planning process and costing out a variety of new programs and restorations to revitalize the system. The bill had bipartisan support and passed handily. And in preparing POPs for the 2009–2011 budget, SPD fashioned packages that meet the intent of SB 1061. Of the 23 POPs proposed by SPD, I would particularly note the following:

- Creating a new way of paying for care based on "acuity" in community-based settings
- Increasing fines in long term care, using the funds for quality improvement
- Adding new funding of non-Medicaid services such as information and referral, consistent with the vision of ORS 410
- Emphasizing "age appropriate" addiction and mental health services
- Adding a new federal waiver to serve special populations, such as those with traumatic brain injuries
- Restoring the general assistance program
- Continuing the Oregon Project Independence Program (OPI), which is the program for non-Medicaid in-home services for those sixty years of age and older, and modernizing the project to add younger people with disabilities. SPD is proposing additional funds for OPI for this purpose.

What's next?

At this stage, the budget deliberations are now technically embargoed. The Department of Administrative Services (DAS) reviews all the POPs presented by all of the state agencies. DAS will have conversations with the agencies and a number of POPs will quietly disappear. We won't know for sure what is in and what is out until the GRB is released in December. The 2009 legislative session begins in January. Lawmakers will review the GRB and scrutinize the proposed budget, agency by agency, in public hearings. DHS will be called to provide testimony, and advocates will have the opportunity to add their input.

The co-chairs of the budget-writing Ways and Means Committee will come up with a budget draft about midsession, and will use updated revenue forecast information to arrive at a balanced budget proposal. These quarterly forecasts are important to the process. The final revenue forecast that forms the underpinning for the LAB is in May. From the May forecast forward, there is a lot of work that goes on behind the scenes by the co-chairs, the legislative fiscal office, the governor's office, and his DAS staff. Meanwhile, advocates, lobbyists,

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DHS budget *Continued from page 4*

and the public continue to state their case. The final budget proposal is usually presented a matter of days before adjournment. Ways and Means must approve the budget bills and send them to the House and Senate for final action. The legislature adjourns and—assuming all the details have been worked out—the governor signs the bills. If the legislature adjourns before July 1 (as it did in 2007) the LAB can take effect with the start of the new biennium, July 1.

The effect of the economy

On a practical level, it is important to put all this in the context of how much revenue will be available for the next biennium. The last official projection released August 28 estimated a decline of nearly $117 million net from the previous forecast. It would seem we are going in the wrong direction, based on the present and expected continuance of the economic downturn. With that in mind, the governor's budget and management staff now estimates that given the recent forecast, the EBL will require $524 million more than what is expected in revenue (EBL Status draft report, 9-10-08.) In other words, we are already in a hole. Just doing what we have been doing will cost much more, and the revenue is not keeping pace.

Meanwhile, DHS programs are, as Bruce Goldberg notes, "countercyclical." In other words, as the economy contracts, the human-service need expands. That message reached the ears of legislators at the September meeting of the Emergency Board. DHS explained that because of the economy and some other budgetary conditions, costs and caseloads are running ahead of LAB. The projected shortfall is more than $70 million by the end of the *current* biennium. Even after management actions of curtailing spending, implementing a modified hiring freeze, and asking for additional funds from the Emergency Board, the gap is still more than $14 million. The net result of rising expenditures in the current biennium, compounded by a downturn in revenue for the 2009-11 biennium, spells trouble for DHS and its divisions.

But there's more to consider. The next revenue forecast will be a bit earlier than usual, slated for November 19. This forecast comes after the election, and will account for whatever voters decide regarding the 2008 ballot measures. Several measures this election cycle have an effect on revenue. The DAS office of Budget and Management estimates that if all of those measures with a fiscal effect pass, the effect could be as high as $2.1 billion for the next biennium. That's a staggering figure, representing more than 12 percent of the total combined state general fund and lottery fund. Put it all together—the EBL shortfall, the weak economy, and the potential effect of ballot measures—and it is obvious that lawmakers have a tremendous challenge ahead of them.

However, reduction in expenditures is not the only way to balance a budget. Legislative leaders will need to explore enhanced revenue options as well. Even though this will require a lot of political heavy lifting, groups such as the Human Services Coalition of Oregon are encouraging a bold approach to providing the revenue needed to ensure a balanced budget. Part of that revenue could be realized by tapping the Rainy Day Fund and the Educational Stability Fund, if the required triggers for their use are met.

In any case, we can expect controversy, as well as winners and losers, no matter what is ultimately decided about expenditure reductions and/or revenue increases.

In conclusion

I hope this article beats the "pledge drive" threshold. For most Oregonians, this complex process, including all the number crunching and voluminous reports, is a remote undertaking. But in real terms, the most vulnerable among us depend on what our decision makers do. I feel very fortunate to be working with the Oregon Law Center and likeminded colleagues to help ensure that our lawmakers have the information and the understanding of what is necessary to assist Oregonians in need. ■

As the economy contracts, the human-service need expands.

Estate Planning Section proposes changes to springing power of attorney

By Douglas Holbrook, Attorney at Law

Imagine a client comes to you for estate planning. She is healthy, but into her retirement years, widowed, with adult children. She remains fiercely independent. When you explain the usefulness of a durable power of attorney, and reach the point where you tell her it is legally effective when she signs it, she stops you in your tracks. The client does not want anyone to have this potential power over her finances —which she equates to freedom and independence —as long as she is competent. Enter from stage left the "springing durable power of attorney."

I am sure many practitioners have been presented with similar situations where a springing power would be even more useful. While the legality of the springing power has been debated, especially recently it seems, the concept and forms have been around for at least thirty years. As a result of some legal ambiguity in Oregon about the validity of a springing power, the Estate Planning Section has submitted a proposed change to ORS 127.005 and ORS 127.015 for the legislature to consider in the 2009 Session. The purpose of the proposed legislation is to expressly allow a signed durable power of attorney to be effective when a specified time or event occurs in the future.

The text of the legislation is as follows, where the **bold print in blue** is the proposed new language.

SECTION 2. ORS 127.005

When power of attorney in effect; accounting to conservator.

(1) When a principal designates another an attorney-in-fact or agent by a power of attorney in writing and the writing does not contain words that otherwise **delay or limit** the period of time of its effectiveness:

(a) The power of attorney **is effective when executed** and shall remain in effect until the power is revoked by the principal;

(b) The powers of the attorney-in-fact or agent are unaffected by the passage of time; and

(c) The powers of the attorney-in-fact or agent shall be exercisable by the attorney-in fact or agent on behalf of the principal notwithstanding the later disability or incompetence of the principal at law.

(2) A power of attorney may become effective at a specified future time or on the occurrence of a specified future event or contingency, including, but not limited to, the principal having become financially incapable.

(a) If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

(b) If a power of attorney becomes effective when the principal becomes financially incapable, and the principal has not authorized a person to determine whether that event has occurred, or the person authorized is unable or unwilling to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by a physician that the principal has become financially incapable.

(c) A person authorized by the principal in the power of attorney to determine that the principal has become financially incapable may act as the person's personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. § 1320d, and applicable regulations, to obtain access to the principal's health-care information and communicate with the principal's health care provider.

(d) As used in ORS 127.005, "financially incapable" has the meaning given that term in ORS 125.005.

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Springing POA

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(2) (3) All acts done by the attorney-in-fact or agent under the power of attorney during any period of disability or incompetence of the principal at law shall have the same effect and shall inure to the benefit of and bind the principal as though the principal were not disabled or incompetent.

(3) (4) If a conservator is appointed thereafter for the principal, the attorney-in-fact or agent, during the continuation of that appointment, shall account to the conservator rather than to the principal. The conservator has the same power that the principal would have, but for the disability or incompetence of the principal, to revoke, suspend or terminate all or any part of the power of attorney or agency.

(4) (5) This section does not apply to powers of attorney for health care executed under ORS 127.505 to 127.660 and 127.995.

SECTION 3. ORS 127.015

Power of attorney not revoked until death **or other terminating event** known.

(1) The death of any principal who has executed a power of attorney in writing **or other terminating event** does not revoke or terminate the agency as to the attorney-in-fact or agent who, without actual knowledge of the death of the principal **or other terminating event**, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and heirs, devisees and personal representatives of the principal.

(2) An affidavit, executed by the attorney-in-fact or agent stating that the attorney-in-fact or agent did not have, at the time of doing an act under the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death **or other event terminating the power of attorney**, is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

(3) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

While the proposed law is being submitted to the legislature, its success may depend upon practitioners' support. Your testimony at any hearings is welcomed to ensure its passage so that practitioners can be certain that this tool is both effective and legal in Oregon, as it already is in other states. ■

For an analysis of this proposed change in the law from the persepective of an elder law attorney, see Steven Heinrich's article on page 11.

Council on Court Procedures seeks comments on proposed amendments to Oregon Rules of Civil Procedure

At its September 13 meeting, the Council on Court Procedures unanimously approved publication of proposed changes to six of the Oregon Rules of Civil Procedure (ORCP). The proposed rule changes are published for review and comment on the council's Web site at **www.lclark.edu/~ccp/AmendmentsPublishedforComment.htm**

Changes are proposed to the following rules:

- ORCP 1G, a new enabling rule for future court rules allowing filing and service of documents, except for service of summons, by electronic means
- ORCP 7D(3), clarifying requirements for service on corporations, limited liability companies, limited partnerships, general partnerships, and limited liability partnerships
- ORCP 54E, clarifying when offers to allow judgment may be filed
- ORCP 55D, a housekeeping change adjusting several citations.
- ORCP 59B, requiring written jury instructions
- ORCP 69, addressing the form and filing of notices of intent to take a default.

To comment on the proposed rules, send written comments to the council's executive director, Mark Peterson, Lewis & Clark Legal Clinic, 310 SW 4th Ave., Suite 1018, Portland, OR 97204; fax them to Mark Peterson at 503.768.6540; or visit the council's Web site and click "Contact Us." Comments should be received on or before December 3, 2008 to enable the council to fully consider them.

At its December 13 meeting at the Oregon State Bar Center, the council will discuss the comments and promulgate the final rule amendments. The legislature may amend, repeal, or supplement any rule of civil procedure. If it does not, the new rules would go into effect on January 1, 2010. ■

Oregon Bankers Association supports slightly modified Uniform Power of Attorney Act

By Kenneth Sherman, Jr., Attorney at Law

Kenneth Sherman, Jr. has been in practice with the Salem firm of Sherman, Sherman, Johnnie & Hoyt, LLP since 1974. His practice is focused primarily on banking, real estate, land use, estate planning, and estate administration. He is a member of the Executive Committee of the Estate Planning and Administration Section.

The Oregon Bankers Association will seek the enactment of the Uniform Power of Attorney Act (UPOAA) by the 2009 session of the Oregon Legislative Assembly.

The OBA has worked with other interested parties during the last three regular legislative sessions to draft and pass power of attorney legislation in Oregon. These efforts have stalled over a number of critical issues, including:

- whether a statutory form of power of attorney would be useful or problematic, and whether use of such a form should be mandatory or optional
- the contents of the proposed statutory form
- the level of competence required to execute a valid power of attorney (POA)
- what formalities should attend the execution of a POA
- what measures should be included to thwart inappropriate uses of a POA
- the liabilities of agents and third parties in acting under POAs
- the liability of a third party in refusing to accept a POA

The National Conference of Commissioners on Uniform State Laws (NCCUSL) gave final approval to the UPOAA and sent it to the states for consideration and enactment in July 2006. The catalyst for the act was a national review of state power of attorney legislation, in which NCCUSL found growing divergence among states' statutory treatment of powers of attorney. Although many states (not including Oregon) had previously enacted the Uniform Durable Power of Attorney Act, a majority of states had also enacted non-uniform provisions to deal with matters on which the UDPOAA was silent. Significant disparity had developed among the states over issues such as the authority of multiple agents, the authority of a later-appointed fiduciary or guardian, the effect of dissolution or annulment of the principal's marriage to the agent, the activation of contingent powers, the authority to make gifts, and standards for agent conduct and liability.

The Joint Editorial Board for Uniform Trust and Estate Acts conducted a national survey to determine whether there was actual divergence of opinion about default rules for powers of attorney, or only the lack of a detailed uniform model. The survey was distributed to (among others) the probate and elder law sections of all state bar associations. Forty-four jurisdictions were represented in the 371 surveys returned.

The survey disclosed widespread agreement that a power of attorney statute should:

- provide for confirmation that contingent powers are activated
- revoke a spouse-agent's authority upon the dissolution or annulment of the marriage
- include a portability provision
- require gift-making authority to be expressly stated in the grant of authority
- provide a default standard for fiduciary duties
- permit the principal to alter the default fiduciary standard
- require notice by an agent when the agent is no longer willing or able to act
- include safeguards against abuse by the agent
- include remedies and sanctions for abuse by the agent
- protect the reliance of other persons on a power of attorney
- include remedies and sanctions for refusal of other persons to honor a power of attorney

Based upon this survey, the NCCUSL Drafting Committee sought to draft an act that codifies both state legislative trends and collective best practices, and strikes a balance between the need for flexibility and acceptance of an agent's authority, and the need to prevent and redress financial abuse.

While the act contains safeguards for the protection of an incapacitated principal, the act is primarily a set of default rules that preserve a principal's freedom to choose both the extent of an agent's authority and the principles to govern the agent's conduct. Among the act's features that enhance drafting flexibility are the statutory definitions of powers in Article 2, which can be incorporated by reference in an individually drafted power of attorney or selected for inclusion on the optional statutory form provided in Article 3. The national survey found that eighteen jurisdictions had adopted

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OBA proposal

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some type of statutory form power of attorney. The decision to include a statutory form in the act was based on this trend and the proliferation of power of attorney forms currently available to the public.

Provisions within Article 2 of the act address the problem of persons who refuse to accept an agent's authority, by providing protection from liability for persons that in good faith accept POAs, and by sanctioning refusal to accept an acknowledged statutory form POA unless the refusal meets limited statutory exceptions. The OBA draft augments the list of statutory exceptions to insure that financial institutions and other third parties will have appropriate flexibility to reject POAs if, for example, the third party reasonably suspects that the person presenting the POA is not the agent named therein, or that the action proposed by the agent would constitute a wrongful taking, diverting or withholding of the principal's money or property.

In exchange for mandated acceptance of an agent's authority, the act (consistent with current Oregon law) does not require persons that deal with an agent to investigate the agent or the agent's actions. Instead, safeguards against abuse are provided through heightened requirements for granting authority that could dissipate the principal's property or alter the principal's estate plan, and through provisions that set out the agent's duties and liabilities.

The act consists of four articles. The basic substance of the act is found in Articles 1 and 2. Article 3 contains the optional statutory form, and Article 4 consists of miscellaneous provisions dealing with general application of the Act and the repeal or revision of existing Oregon statutes on POAs.

Article 1: General Provisions and Definitions

Definitions are found in Section 2 of the OBA draft bill. The OBA draft adds definitions of "business day" and "conscious presence" because those terms are used in the act and are not elsewhere defined. The OBA draft departs from the NCCUSL definition of "incapacity" by stating that this term means the person in question is "financially incapable", as defined in ORS 125.005. The act uses the term "agent" rather than "attorney-in-fact" because the survey disclosed public confusion over the latter term.

Under section 3 of the OBA draft, the act will apply to all POAs except those for health care and certain specialized powers such as those coupled with an interest or dealing with proxy voting.

As under current Oregon law, section 4 provides that a POA is durable unless it contains express language to indicate otherwise.

Section 5 requires that a POA must be signed by the principal or in the principal's conscious presence by another directed by the principal to sign. An OSB workgroup that reviewed the draft has suggested that it may be appropriate to add certain (as yet undetermined) "formalities of execution," such as having the POA signed by one or more witnesses. There has also been discussion about adding a capacity requirement for the principal to execute a valid POA.

Section 6 provides that a POA executed in Oregon or elsewhere before the effective date of the act remains effective if its execution complied with the applicable law then in effect.

Section 8 describes the relationship of the agent to a later court-appointed fiduciary. The OBA version departs from the NCCUSL draft by recognizing the power of a conservator under other Oregon law to terminate a power of attorney created by the principal.

Section 9 grants express authority for the creation of "springing" POAs, which become effective on a future date or on the occurrence of a future event, such as the principal's incapacity.

Section 10 deals with the termination of a POA or an agent's authority. Existing ORS 93.670 provides that if a POA that contains the power to convey lands is recorded, it will not be deemed revoked unless an instrument of revocation is also recorded. The OBA version of section 10 continues this rule but only with respect to the power over real property.

Sections 11 through 18 address matters related to the agent, including default rules for co-agents and successor agents, reimbursement and compensation, an agent's acceptance of appointment (the OBA version provides for the agent to countersign the statutory form POA, thereby signifying acceptance of the power and providing a specimen signature), an agent's duties, the standard of liability for the agent, listing of persons who may petition for a review of an agent's conduct, and resignation of an agent.

Sections 19 and 20 address the problem of persons who refuse to accept a POA. Section 19 protects persons that in good faith accept a POA without actual knowledge that the POA is revoked, terminated, or invalid or that the agent is exceeding or improperly exercising the agent's powers. Section 20 imposes liability for refusal to accept an acknowledged statutory form POA.

Sections 21 through 23 address the relationship of the act to other laws. Section 21 clarifies that the act is supplemented by the principles of common law and equity to the extent those principles are not displaced by a specific provision of the act, and Section 22 further clarifies that the act is not intended to supersede any law applicable to financial institutions or other entities. With respect to remedies, Section 23 provides that the remedies under the act are not exclusive and do not abrogate any other cause of action or remedy that may be available under the law of the enacting jurisdiction.

Article 2: Authority

The act offers the drafting attorney enhanced flexibility whether drafting an individually tailored POA or using the statutory form.

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OBA proposal

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Article 2 sets forth detailed descriptions of authority relating to subjects such as "real property," "retirement plans," and "taxes," which a principal can incorporate in full into the POA either by reference to the short descriptive term for the subject used in the Act or to the section number, pursuant to section 25. Section 25 also states that a principal may modify any authority incorporated by reference.

Section 24 describes those powers which an agent may exercise only if the POA expressly grants the agent the authority to exercise such power. These include the power to create, amend, revoke, or terminate an inter vivos trust, to make a gift, to change rights of survivorship or beneficiary designations, and to exercise fiduciary powers that the principal may delegate.

Article 3: Statutory Forms

The optional form in Article 3 is designed for use by lawyers as well as lay persons. It contains plain language instructions to the principal and agent. Step-by-step prompts are given for designation of the agent and successor agents, and for the grant of general and specific authority. The OBA version revises the NCCUSL form to make it more difficult to alter the powers granted (and powers withheld) by the principal.

Article 4 - Miscellaneous Provisions. These provisions clarify the relationship of the act to other laws and to pre-existing POAs. The OBA version amends ORS 93.670 and 125.445 to make them consistent with the Act, and repeals ORS 127.005 - .045 (portions of which have been transplanted into corresponding sections in the act).

OBA position

The Uniform Power of Attorney Act, with the slight modifications incorporated into the Oregon Bankers Association draft, will provide Oregon with a solid, balanced body of statutory law governing powers of attorney. The act strikes a reasonable balance among the interests of principals, agents, and persons who are asked to accept POAs. ■

For an analysis of this proposed change in the law from the perspective of an elder law attorney, see Steven Heinrich's article on page 11.

Important elder law numbers

as of October 1, 2008

Supplemental Security Income (SSI) Benefit Standards

Eligible individual	$637/month
Eligible couple	$956/month

Medicaid (Oregon)

Long term care income cap	$1,911/month
Community spouse minimum resource standard	$20,880
Community spouse maximum resource standard	$104,400
Community spouse minimum and maximum monthly allowance standards	$1,750/month; $2,541/month
Excess shelter allowance	Amount above $525/month
Food stamp utility allowance used to figure excess shelter allowance	$379/month
Personal needs allowance in nursing home	$30/month
Personal needs allowance in community-based care	$144/month
Room & board rate for community-based care facilities	$494.70/month
OSIP maintenance standard for person receiving in-home services	$638.70
Average private pay rate for calculating ineligibility for applications made on or after October 1, 2008	$6,494/month

Medicare

Part B premium	$96.40/month*
Part B deductible	$135/year
Part A hospital deductible per spell of illness	$1,024
Part D premium: Varies according to plan chosen	average is $27.35/month
Skilled nursing facility co-insurance for days 21-100	$128/day

* A person whose income is more than $82,000/year will pay a higher premium

An elder law attorney comments on the proposed powers of attorney legislation

By Steven A. Heinrich, Attorney at Law

At least two bills relating to powers of attorney are likely to be introduced in the next legislative session. There are concerns with both of them.

Estate Planning Section proposal

The Estate Planning Section proposes the shorter bill. (See the article by Douglas Holbrook, included in this issue of the *Newsletter*, for the text and a brief commentary.) This bill would make it clear that a "springing" power of attorney that takes effect only upon a specific condition—including financial incapacity of the principal—would have the same force and effect as a power of attorney that is immediately effective.

Many skilled elder law attorneys have serious reservations about such an approach. If the principal does not trust the agent sufficiently to give the agent power immediately, there is a significant question whether it is wise to have the power spring into effect at some later date, when the principal is (allegedly) financially incapable, and can no longer monitor the actions of the agent, or protect himself or herself against financial abuse.

There is also a question as to the effectiveness of proposed language in this bill, which purports to grant the status of "personal representative" under HIPAA to the named agent in a springing power of attorney. Many commentators hold the view that, under the intersection of state and federal law, only a person who can direct the health care of another qualifies as a "personal representative" who can request protected health information, and that in Oregon the only person other than a patient who has this power is an agent under an advance directive for health care—and then only when the patient is unable to direct his or her own treatment.

In addition, of course, there are other privacy laws in state and federal statutes, as well as various ethical proscriptions against the release of patient information by a health care provider.

Oregon Bankers Association proposal

The other, larger bill that is expected to be forwarded to the legislature is sponsored by the Oregon Bankers Association (OBA). This bill, based on the Uniform Power of Attorney Act, is 48 pages long. For a link to the draft of the bill on which my comments are based, see: **www.osbar.org/_docs/sections/elder/newsletters/POA_OBA_072208.pdf**

This bill gives rise to very serious concerns.

Of particular concern are Sections 19 and 20. These sections will have the effect of fully and completely insulating any person or entity for accepting almost any power of attorney—or even any fax of any photocopy of any copy of any power of attorney, provided that the (purported) agent certifies that the power of attorney is valid or certifies any other factual matter concerning the principal, the agent, or the power of attorney.

Further, these two sections make it very clear that if a person or institution such as a bank chooses to try to protect a principal, they will either very quickly have to concede, or they will be subject to litigation, and will face significant penalties in terms of attorney fees for the other side in the event that the power of attorney is upheld in court.

In addition, since there is no reciprocal attorney fee provision, the person (or institution) challenging a power of attorney will, of course, have to bear its own attorney fees—win, lose, or draw.

The bank or other person or institution will therefore have every incentive to accept any alleged power of attorney or alleged copy of any alleged power of attorney. The bank or other person or institution will also have a strong disincentive to challenge any such alleged power of attorney or alleged copy of any alleged power of attorney.

The OBA bill also purports to allow springing powers of attorney. The comments above

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Steven Heinrich is a past Chair of the Elder Law Section. He practices in Corvallis. He has a Ph.D. from the University of Illinois, and a law degree from the University of Washington. His practice focuses on elder law, family law, and real estate.

Comments on proposed POA legislation

Continued from page 11

relating to the much shorter bill being advanced by the Estate Planning section apply here, as well.

The OBA bill would also allow attorneys and "appropriate" government officials to determine incapacity. Quite apart from the risks and liabilities that would accrue to any attorney who undertook to make this determination, there is a very real and serious question whether attorneys and government officials are qualified to make such determinations.

There is an even more serious concern whether a determination by someone such as the attorney for a person who is alleging that the principal is incapacitated carries with it any real safeguard of the rights of the principal.

We have well-recognized ways of both determining incapacity and safeguarding the rights of individuals, however. Guardianships and conservatorships are designed specifically for this purpose.

It is interesting to note that many of the things upon which a person or entity presented with a power of attorney would be expected to rely if the OBA's bill becomes law would not be admissible, or would be given extremely little weight, in a contested protective proceeding.

There are many other issues of concern with the bill currently being mooted by the OBA. There are a few improvements over past bills of this kind, as well. A full discussion of a 48-page bill is outside the scope of a short article. See below for a link to a more complete discussion.

In sum, the bill currently proposed by the OBA will give nearly perfect cover to any person or institution that accepts a power of attorney, absent ***actual*** knowledge that the power of attorney has been forged or revoked. Indeed, there is a concern that while in many circumstances a bank would be liable for paying out on a forged check, and would have to make the depositor whole, a bank which accepts a forged power of attorney under similar circumstances will have perfect cover and will not be liable to the depositor.

The proposed new legislation will likely force caring bankers and others to accept purported powers of attorney or the authority of purported attorneys in fact, despite serious and troubling concerns that these bankers and other individuals may have, and despite the earnest desire of these bankers and other individuals to protect their customers and members of their community. ■

The Elder Law Section has not sought nor been given authority by the Bar to take a position on the bill.

For a more complete discussion of this large and complex bill, see:
www.osbar.org/_docs/sections/elder/newsletters/Comments_POA.pdf

Court of Appeals ruling stands in conservatorship case

The Oregon Supreme Court has denied review in *Helmig v. Farley Piazza & Associates*. 218 Or.App. 622, 180 P.3d 749 (2008). The opinion of the Court of Appeals remains the law. As Professor Leslie Harris wrote in the April 2008 issue of the *Elder Law Newsletter*:

This specific holding in this case is significant, since it illuminates a path for challenging the trustee of a trust when the settlor/beneficiary has become incapacitated and thus unable to bring a breach of fiduciary duty action. The court may appoint a conservator to protect the beneficiary's interest in the trust, regardless of whether the settlor continues as trustee or the successor trustee has taken over. The question unresolved by the case is what the conservator does then. The language of the court's opinion implies that the conservator does not take over management of the trust assets, as that would effectively destroy the trust. Instead, the conservator brings the appropriate equitable action to cause the successor trustee to be named or to assert that the trustee has breached a duty.

Cases around the country are divided about whether the conservator could exercise the settlor/protected person's power of revocation if the trust is revocable. Under ORS 130.505(6), a conservator can amend or revoke a revocable trust only with approval of the court supervising the conservatorship. ■

Spending down and moving out: assisted living facilities withdraw from Medicaid

by Linda Gast, Attorney at Law

Oregon's home and community-based care waiver has for some time allowed the use of Medicaid to pay for alternatives to nursing homes. Assisted Living Facilities (ALFs) have been a popular alternative. ALFs are not required to accept Medicaid, but many did. That has changed—and not for the better.

At least 44 ALFs no longer accept any new residents on Medicaid. These ALFs entered into gradual withdrawal contracts with the state of Oregon in 2007. SPD Information Memorandum Transmittal SPD-IM 07-028. Current Medicaid residents can stay, and current private pay residents can transition to Medicaid and stay. However, new residents must be private pay, and once the private pay resource is spent, they cannot use Medicaid to stay.

But are residents really "safe" under a gradual withdrawal contract? No. The contracts between the state and the ALFs are two-year contracts. When the two years are up, the facility can choose to renew a Medicaid contract, renew a gradual withdrawal Medicaid contract, or not renew at all. Thus residents who are currently safe may find themselves looking for a new facility within a short time.

One national chain, Assisted Living Concepts, Inc. (ALCI) broadcast for over a year its new business model of dumping Medicaid and marketing to lower-need, private-pay residents. To that end, ALCI terminated one contract early (with the permission of the state) and entered into gradual withdrawal contracts for their other seventeen ALFs in Oregon.

These gradual withdrawal contracts expire on January 31, 2009. ALCI's CEO, Laurie Bebo, told *The Oregonian* that ALCI intends to withdraw totally from Medicaid by February 2009. The mechanism would be through non-renewal of the Medicaid contracts. According to SPD, ALCI has not confirmed the non-renewals. SPD Information Memorandum Transmittal SPD-IM-08-018.

The rumors, though, are starting at some of the facilities, and some residents are already leaving.

If residents must move, they may not have much time to look for a new placement amongst the shrinking inventory of Medicaid beds. Under OAR 411-054-0080(2), the facility must give a 30-day advance written notice to the resident. A resident who gets an involuntary move-out notice based on termination of a Medicaid contract is not entitled to a hearing. OAR 411-054-0080(7).

It is probable that some residents will be affected by the non-renewal but not know it. A private-pay resident may be spending down assets and anticipating Medicaid eligibility. That resident would not get a 30-day involuntary move-out notice until the resident was unable to pay and was transitioning to Medicaid. Unless the facility notifies *all* residents of the withdrawal from Medicaid, some private-pay residents may have no idea that they cannot remain in place after spending down.

Thirty years ago, nursing homes were withdrawing from Medicaid. Market factors were similar. Medicaid rates were too low and the industry had reached a level where many could fill beds without Medicaid.

Advocates at that time developed several litigation theories. Court cases were filed around the country based on theories of contract, tort (including breach of duty of care and invoking transfer trauma), unfair trade practices, or other state consumer law practices. In some cases, plaintiffs alleged obligations to serve low and moderate income people imposed by contract if government funds were used to build or buy the facility. This activity is discussed in *The Nursing Home Law Letter*, National Senior Citizens Law Center, Issue No. 51, August-September, 1981 (available from the author).

These cases settled, so we have no court opinions from that time period. What reversed the trend were changes in federal nursing

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Linda Gast is an attorney with Legal Aid Services of Oregon, working at the Lincoln County office in Newport. She graduated in 1986 from the Northwestern School of Law, and before that worked as a community advocate and community organizer in Cincinnati and Portland.

ALFs withdraw from Medicaid

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A resident who gets an involuntary move-out notice based on termination of a Medicaid contract is not entitled to a hearing.

home laws, including the prohibition on nursing home discharge for failure to pay if payment for current charges is available from Medicaid. 42 USC 1396r(c)(2)(F); 42 CFR 483.12(a)(2)(v); OAR 411-088-0020(2). The current federal home and community-based waiver program, in contrast, does not address admission or retention of beneficiaries of a Medicaid waiver.

Some states are responding to this emerging issue. New Jersey requires facilities to have ten per cent of assisted living beds available for Medicaid beneficiaries as a condition of state licensure. NJSA 26:2H-12.16.

In Washington State last year, ALCI gave an eviction notice to an elder two days before her 99th birthday. She had paid out more than $330,000 over the previous 10 years to live there, and now needed to convert to Medicaid. A great deal of publicity ensued, including a National Public Radio story. **www.npr.org/templates/story/story.php?storyId=93260987**

The Washington legislature responded with a new law signed by the governor in early 2008 that withdrawal from Medicaid be accomplished by attrition only. The facility must keep current Medicaid recipients and those who have been residents for the past two years and become eligible within 180 days of the date of withdrawal. The statute requires notice to residents and prospective residents. Finally, the law requires reasonable accommodation prior to discharge.

In Oregon, the legislature started to address the issue in the 2008 legislative session with House Bill 3626. That law lifts the current moratorium on building new assisted living facilities on December 31, 2008. DHS is also required to work with providers to implement policies that offer incentives to providers for entering into Medicaid contracts. The agency is directed to consider various factors prior to initial licensure of an assisted living and residential care facility. Those factors include the license applicant's willingness to serve underserved populations and to contract with DHS to provide services through the state medical assistance program. Finally, the law requires DHS to assess Medicaid capacity of residential care facilities and adult foster homes, establish capacity targets, and report to the legislature on its assessment. The Medicaid reimbursement rates were also raised.

Here are some ideas to consider when advising your clients. First, ALF applicants should ask for the ALF's *Uniform Disclosure Statement*, a form required by DHS. Look at the facility's answers to these two questions: Does this facility accept Medicaid as payment source for new residents? Does this facility permit residents who exhaust their private funds to remain in the facility with Medicaid as a source of payment? Examine the resident agreement. What does it say about Medicaid? Does it allow for transition to Medicaid only if there is an available Medicaid slot? Your client should ask the facility directly if he or she can remain after private funds are spent. The client should bring a witness. The client should ask that any promises or reassurances be put in writing.

Find out more about the facility. Some facilities that are withdrawing from Medicaid were built with state bonds and other government financing. An inventory is available on the Web site of Oregon Housing and Community Services, **www.oregon.gov/OHCS/HD/HRS/Recipients/StateInventory.xls**

The funding source may impose use restrictions. An example of such a restriction is a requirement that a percentage of facility residents be low or moderate income. Can the facility withdraw from Medicaid and still comply with such restrictions? A number of ALCI facilities were financed by bonds, but ALCI maintains that it will be able to meet the bond restrictions without Medicaid-eligible residents. The state is supposed to monitor compliance with funding requirements. Obtain compliance reports through a public records request to Oregon Housing and Community Services; ask for the latest management review and inspection reports for the facility in question.

For nationwide information, look at the Web site for the newly-formed Assisted Living Consumer Alliance at **www.assistedlivingconsumers.org**. The Alliance also sponsors free Web training. To check on the status of any particular facility's Medicaid contract, contact Seniors and People with Disabilities in Salem at 503.945.5811 or 800.282.8096, and ask for the quality assurance unit program analyst assigned to that facility. ■

Through the Fair Housing Looking Glass

Using the Fair Housing Act to defend against discriminatory discharges and transfers of assisted living and other long term care facility residents

By Holly Robinson, Attorney at Law

The Fair Housing Act (FHA) protects the housing rights of elders with disabilities, including those who reside in assisted living and other long term care facilities. Too often, however, the FHA is overlooked when a resident of an assisted living or other long term care facility is facing eviction, discharge, or other discriminatory acts. The FHA is a powerful tool to address these actions, and should be one of the first places lawyers and advocates look in their efforts to uphold the housing rights of their clients.

The Fair Housing Act (abridged)

The FHA was enacted as part of Title VIII of the Civil Rights Act of 1968 and targeted housing discrimination for reasons of race, color, religion, or national origin. 42 U.S.C. §§3601-3619. In 1974, Congress made it illegal to discriminate for reasons of gender. And in 1988, 20 years after the original act was passed, the Fair Housing Amendments Act (FHAA) outlawed discrimination for reasons of familial status and disability. The FHA created a powerful mechanism by which housing providers could be held liable for unlawful discrimination in housing sales and rentals, and classified a housing provider's refusal to grant a request for a reasonable accommodation or modification to a person with a disability as discrimination. Fast forward 20 years and far too few lawyers and advocates are aware how the disability provisions of the FHA can help them overcome discriminatory screening, occupancy, transfer, and eviction policies of residential care, assisted living, and nursing home providers.

The FHA applies to almost all housing activities and transactions, whether in the public or the private sector, to the provision of services connected with a dwelling, and to zoning, land use, and health and safely regulations. 42 U.S.C. §3601, 24 C.F.R. pt. 100, *et seq.* The FHA covers dwellings used or intended for use as a residence. The U.S. Department of Justice, the U.S. Department of Housing and Urban Development, as well as the courts, have routinely recognized that long term care facilities—including retirement communities, assisted living facilities, nursing homes, and continuing care retirement communities—are covered dwellings under the FHA.[1]

The FHA prohibits the following actions based on disability: discriminating in the sale or rental or otherwise making unavailable or denying a dwelling; setting different terms, conditions, or privileges for the sale or rental of a dwelling; refusing to make reasonable accommodations in rules, policies, practices, or services if necessary for the person with a disability to afford the person equal opportunity to use and enjoy the dwelling; and refusing to let tenants make reasonable modifications to their dwelling or common use areas, at tenants' expense (except in publicly financed housing), if necessary to afford the tenant full enjoyment of the premises. 42 U.S.C. 3604 (f).

Disability and aging

Age itself is not considered a disability, but aging increases the chances of developing a disability. According to the 2006 census, 41 percent of the population 65 years and over has a disability, while 12.3 percent of the population 16 to 64 has a disability. By 2030, there will be 70.3 million Americans who are 65 and older—nearly two times the 34.8 million alive today

The FHA defines disability as a physical or mental impairment that substantially limits one or more major life activities (seeing, hearing, walking, breathing, caring for oneself, learning, thinking, reading, and interacting with others), has a history of such an impairment, is perceived as someone with such an impairment, or is associated with someone who has such an impairment. 42 U.S.C. §3602(h). Covered conditions include physical or mental disabilities, hearing, mobility and visual impairments, chronic alcoholism, chronic mental illness, obesity, and dementia.

A person with a disability under the act may

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Holly Robinson is an associate staff director of the ABA Commission on Law and Aging, Washington, D.C., where she directs the Older Americans Act-funded National Legal Assistance Support Project and administers the Partnerships in Law and Aging Program mini-grant project in conjunction with the Borchard Foundation Center on Law and Aging. She is a member of the Oregon State Bar.

Fair Housing Act

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be a person with an age-related disability or a person who does not self-identify as having a disability. Generally, residents of assisted living and other long-term care facilities are protected under the act.

Advocating for facility residents using the Fair Housing Act

Residents of long term care facilities routinely experience certain types of discriminatory housing practices that are prohibited under the FHA: refusing to admit or evicting or discharging a person because of the person's disability, imposing discriminatory terms and conditions, asking applicants questions about their disability, and failing to provide reasonable accommodations or modifications. 42 U.S.C. §3604(f).

Let's use "Betty" as our first example. Betty lives in her own apartment in an assisted living facility. Betty, 75 years old, is getting more frail and her dementia symptoms are increasing. She is becoming more verbally combative and has lately been especially nasty to the housekeeping staff. She receives an eviction notice that states she must leave the premises in seven days, which is the facility's policy, and that she will be charged rent until the unit is re-rented. Betty, of course, is distraught because she likes her apartment of 14 years, doesn't want to leave her home, and has no place to which to move.

Through the fair housing looking glass, it appears that Betty may be experiencing unlawful disability discrimination. There are some steps she can take to protect her housing rights. The Fair Housing Act prohibits denial of a dwelling or refusal to rent or sell a dwelling to a person based on her or his disability. The act also makes failure to provide a reasonable accommodation to a person with a disability a prohibited discrimination.

When a person with a disability such as Alzheimer's is threatened with eviction and then requests a reasonable accommodation under the act in order to stay, the original eviction may be actionable under the FHA and the failure to provide the requested reasonable accommodation may also be actionable.

Advocates have begun to focus on the reasonable accommodation aspects of the FHA as a tool to address disability discrimination. While the original eviction may be a form of direct disability discrimination, there are few ways to redress it other than filing a complaint with HUD or filing a lawsuit. However, when a resident files a reasonable accommodation request, it also opens the door to possible negotiations which may result in the person being able to stay in the facility, which is usually the desired remedy.

A lawyer or advocate could assist Betty by making a number of reasonable accommodation requests "in rules, policies, practices, or services if necessary for the person with a disability to afford the person equal opportunity to use and enjoy the dwelling." The goal is to create a reasonable accommodation plan that eliminates or lessens the lease or contract violations leading to the eviction. The first request may be an extension of the seven-day notice period prior to eviction in order to develop a reasonable accommodation plan to address Betty's behaviors. The second reasonable accommodation request may be to determine if the housekeeping staff could enter Betty's apartment to do their work when she is not there or use different housekeepers if there are some to whom she reacts more favorably. The third reasonable accommodation request may be to develop a plan for Betty that addresses her behaviors and may include a medical assessment, staff training on working with people with dementia, medication management, and behavioral interventions. Accommodation requests must be reasonable[2], and a provider's failure to make a reasonable accommodation is another form of disability discrimination under the act.

A request for a reasonable accommodation is a powerful advocacy and negotiation tool that can be used to defend successfully against an illegal discharge or transfer. A request for a reasonable accommodation can be given verbally or in writing. It's almost never too late to request an accommodation and there are no special requirements or procedures for making one. The request only has to make clear that the resident is seeking an exception, change, modification, or adjustment to a rule, policy, practice, or service as an accommodation for a disability. Ideally, a request for a reasonable accommodation leads to an interactive process in which the facility and the resident discuss the resident's disability-related need for the requested accommodation and possible accommodations that do not pose an undue financial and administrative burden for the facility. Reasonable accommodation requests are fact-driven and can be as creative and innovative as necessary to maintain a resident's home.

Now, let's move Betty to a facility that primarily serves residents with Alzheimer's and other types of dementia. The facility wants to evict her because her symptoms have increased. All of the responses described above would apply here, including a discriminatory eviction due to her disability. One additional request for accommodations could be made: that the facility change its expectations regarding the range of behaviors it expects from residents with dementia to include those manifested by Betty, especially if the facility has a special license to serve residents with dementia, or markets and advertises itself as an Alzheimer's facility.

"Sara Jane," another assisted living facility resident, is also at risk of being evicted. Sara Jane has multiple sclerosis and depression. Recently

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Fair Housing Act

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her physical condition has deteriorated significantly, greatly increasing her care needs, and increasing her depression. The facility is claiming it can no longer meet her needs. Looking through the fair housing looking glass, it is questionable whether this eviction is legal, but a reasonable accommodation request would also be effective in defending against the eviction. For Sara Jane, the reasonable accommodation plan may include a new assessment of her physical and mental condition, medical and psychological interventions, moving her to a different room that makes care provision easier or cheers her up, providing extra staff time, and permitting the family to hire additional aides for night hours. Again, the goal of the reasonable accommodation plan is to eliminate or lessen the reasons for the eviction through reasonable accommodations that will permit Sara Jane to stay. A reasonable accommodation plan is also a highly effective negotiation tool since a provider's failure to make a reasonable accommodation constitutes discrimination under the act.

Prior to receiving her eviction notice, Sara Jane was informed that because she was using her motorized scooter more to get around the facility, she had to buy liability insurance. Maintaining liability insurance is not a requirement of living in the facility, and Sara Jane feels that she is being unfairly treated. Through the fair housing looking glass, it appears that Sara Jane is experiencing discrimination based on disability, that the facility is imposing "different terms, conditions, or privileges in rental property for individuals with disabilities" than for individuals without disabilities.

Conflicts between the FHA and state licensing laws

For many years, Oregon's law was not "substantially equivalent" to HUD regulations, which meant that all housing discrimination claims based on federal fair housing laws were routed to the HUD Regional office in Seattle. In March 2008, Oregon Fair Housing Law came back into line with federal fair housing laws.[3] This change in Oregon law means fair housing investigations can now be filed, investigated, and resolved in Oregon. These state laws can now be used to protect residents as well. HUD contracts with the Oregon Bureau of Labor and Industries to investigate housing complaints.[4]

It is possible that state licensing laws may violate federal fair housing laws, in which case, federal law would prevail. Evaluating whether state licensing laws are in conflict with the FHA is another way to use the fair housing looking glass on behalf of residents facing discriminatory discharges and transfers and other discriminatory housing practices.

Through the fair housing looking glass

Many residents of assisted living and long term care facilities unknowingly experience disability discrimination and the failure of housing providers to make reasonable accommodations. Using state and federal fair housing laws to challenge involuntary discharges and transfers and other discriminatory housing practices will enable residents to retain their housing, even if housing providers prefer that residents move to a higher level of care. Using the fair housing looking glass may mean that a resident can truly choose to age in place. ■

Using state and federal fair housing laws to challenge discriminatory housing practices will enable residents to age in place.

Footnotes

1. See *HUD v. Strawberry Point,* 2003 WL 1311336 (HUD ALJ March 5, 2003), *US v. Covenant Retirement Communities West, Inc.* Consent Order, Case No. 1:04-cv-067320AWI-SMS, August 27, 2007).
2. The Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations Under the Fair Housing Act,* May 14, 2004, described as follows a request as "not reasonable – i.e., if it would impose an undue financial and administrative burden on the housing provider or it would fundamentally alter the nature of the provider's operations." **www.usdoj.gov/crt/housing/jointstatement_ra.htm**
3. Chapter 903 (2007 Oregon Laws), effective date, January 1, 2008; Chapter 36 (2008 Oregon Laws), effective date March 11, 2008.
4. **www.oregon.gov/BOLI/TA/contact_us.shtml**

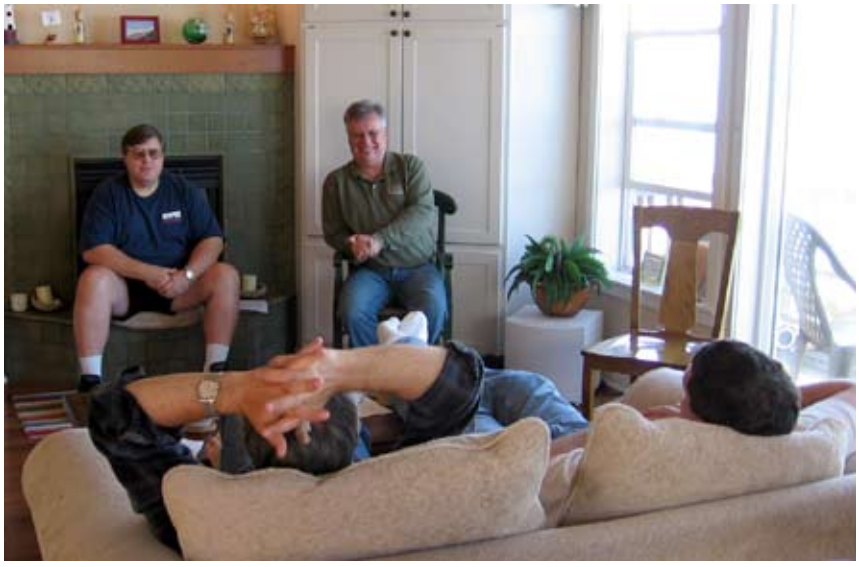
Recent Elder Law Section events

Elder Law Section Executive Committee retreat

at Bella Beach (near Depoe Bay) on September 27, 2008

Chair Ryan Gibb of Salem (L) and Past Chair Steve Heinrich of Corvallis

Susan Ford Burns of Portland



Brian Haggerty of Newport (L) and Daniel Robertson of Roseburg

Elder Law 2008: Advancing the Plan

(Left to Right) Don Dickman of Eugene speaks with panelists Jason Broesder of Medford, Timothy Marble of Forest Grove, and Dady Blake of Portland. About 165 people attended the October 3 OSB CLE program cosponsored by the Elder Law Section at the Oregon Convention Center in Portland. Video replays are scheduled around the state.

Photos courtesy of Penny Davis

Resources for elder law attorneys

Upcoming events

Planning the Taxable Estate
OSB CLE seminar
November 7, 2008
Oregon Convention Center, Portland
This seminar will explore charitable planning considerations—including income tax rules on lifetime gifts and split-interest gifts, various aspects of the unlimited marital deduction, the effect of pending tax law changes on inter vivos gift planning, how to handle transfers of closely held business or property interests, the impact of interest rate fluctuations, retirement plans and IRAs with a focus on planning for the surviving spouse, the separate share rule, Oregon income tax issues, Oregon's special marital property election and powers of appointment.
www.osbarcle.org/seminars.php

Representing Clients at the Oregon Legislature
OLI CLE seminar
November 14 , 2008
Oregon Convention Center, Portland
How do you get a bill introduced? How can you find information on bills, legislative committees, hearing schedules, and staff? How do you handle hearings, amendments, and opponents? When do you count votes, and for what reasons? How do you go about finding allies in the process?
http://law.lclark.edu/org/oli

National Aging and Law Conference 2008
Setting the Agenda: Advocating for Elders after the Election
December 3–6, 2008
Arlington, Virginia
www.abanet.org/aging/home.html

Undue Influence
2008 NAELA Telephonic Elder Law Training Program
December 17, 2008
Presented by Jean Galloway Ball, Esq.
www.naela.org

2009 NAELA UnProgram
January 23–25, 2009
Grapevine, Texas
www.naela.org

Web sites

Complimentary CLE programs from the American Bar Association
www.abanet.org/secondseason

- Annuities, White Paper Annuities, and DRA Promissory Notes
- Asset Protection Planning Update: Practical Strategies and Drafting Tips
- Elder Law: What You Need To Know: Meeting the Legal, Financial, and Social Challenges of Aging Clients
- Hardship Waivers, Transfer of Asset Penalties, Look-back Periods, Multiple Transfers, and Rounding Down
- Long Term Care Insurance, Including an Expansion of a State Long Term Care Partnership Program
- An Overview of the Deficit Reduction Act of 2005, Including Effective Dates and Citizenship Issues
- Purchase of Life Estates, Continuing Care Retirement Communities and the Homestead
- Spousal Allowances: Assets and Income, Refusal, and Income Cap Issues

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

Oregon Home Care Commission
https://www.or-hcc.org
Registry of qualified home care workers.

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.

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." ■

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