Elder Law Newsletter

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What Medicaid covers if the beneficiary is at home

By Kit Morgan, Attorney at Law

Given the choice, most elders prefer to continue to live at home, rather than move to a long term care facility. Oregon's Home and Community Based Services program and the State Plan Personal Care services are two Medicaid programs that make this possible for many. A person who is eligible for Medicaid may also be eligible for the state's special needs program.

Home and Community Based Services program (HCBS)

Home and community based services include in-home support services, residential care facility services, assisted living facility services, adult foster care services, home-delivered meals (when provided in conjunction with in-home foster care services), specialized living services, spousal pay program services, and adult day services. OAR 411-030-0020(24). We will focus primarily on in-home services and the spousal pay program.

In-home support services

In-home support services enable an individual to remain in his or her own home by providing assistance with household tasks and activities of daily living. The extent of the services may vary from a few hours per week to full time. Live-in services may be an option depending on the program. OAR 411-030-0033(1).

Assuming all other Medicaid eligibility requirements are satisfied, in-home support services may be provided to individuals who meet the established priorities for service as described in OAR 411-015 and have been assessed to be in need of a service provided in OAR chapter 411-030.

Payments for in-home support services are not intended to replace the resources available to an individual from his or her natural support system. Service plans are based upon the least costly means of providing adequate care. OAR 411-030-0040(1). The client hires a caregiver who is approved by the Oregon Department of Human Services (DHS) and DHS pays the caregiver $9.90 per hour—or $4.30 per hour if the caregiver is a live-in care provider.

Generally speaking, single individuals with monthly income in excess of $624.70 must pay toward the cost of their in-home support services according to OAR 461-160-0610. However, a disabled adult child, widow, widower, or Pickle Amendment[1] client may be exempt from paying income in excess of $624.70 toward his or her care. The required payment can be reduced for some medical costs. For example, in the Oregon Supplemental Income Program Medical (OSIPM), medical deductions are allowed for costs not covered under the state plan. These deductions include health and hospitalization insurance premiums and coinsurance, long term care insurance premiums, dental care, psychotherapy, rehabilitation services, prescription drugs and over-the-counter medications, the annual fee for a drug prescription card, medical supplies and equipment, den-

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Kit Morgan is a staff attorney at Legal Aid Services of Oregon. He has handled a variety of cases, including those that involve Medicaid. He is located in the Legal Aid office that serves Umatilla, Union, Wallowa, Morrow, Sherman, and Gilliam counties.

tures, hearing aids, prostheses, and prescribed eyeglasses. I know of one case where the medical deductions were interpreted to include food and food supplements prescribed by the client's doctor.

An individual who receives home and community based services must be assessed at least annually by a case manager to determine the extent of the need for in-home services. In some cases, a registered nurse may conduct the assessment to evaluate the nursing care of the recipient, review medication, or assign basic care tasks of nursing care to a homecare worker. OAR 411-030-0050(2)(a). The evaluation looks at how the individual functioned during the thirty days prior to the assessment date and how the person is likely to function in the thirty days following the assessment date. OAR 411-015-0008(2)(b).

The case manager uses the Client Assessment and Planning System (CA/PS) to document the level of need, calculate the individual's service priority level[2], calculate the service payment rates, accommodate client participation, and develop a service plan. The assessment process identifies an individual's ability to perform activities of daily living and self-management tasks. It also determines the individual's ability to address health and safety concerns. OAR 411-030-0050(1)(a).

Activities of daily living (ADL) include eating, dressing, grooming, bathing, personal hygiene, mobility (ambulation and transfer), elimination (toileting, bowel, and bladder management), and cognition and behavior. OAR 411-015-0006 defines each ADL and indicates the level of need that requires either an "assist" or "full assist." A full-assist evaluation means the person will get more hours of care than with an assist determination. An assist is further divided into "minimal assistance," meaning the individual is able to perform the majority of an activity, but requires some assistance from another person, and "substantial assistance," meaning the individual can perform only a small portion of the tasks that comprise the activity without assistance from another person. If the person is determined to be capable of handling the activity without assistance, he or she is classified as "independent," and no hours are authorized for that ADL.

Self-management tasks consist of housekeeping tasks—including laundry, shopping, transportation, medication management, and meal preparation. Like ADLs, each task is divided into independent, assist and full assist, according to OAR 411-015-0007(1).

OAR 411-030-0070 (2) and (3) indicate the hours authorized for each level of assistance. In cases where the homecare worker does not live in the recipient's home, the hours in the service plan may exceed the authorized hours for an extraordinary service need or with approval by the Seniors and Peoples with Disabilities (SPD) central office. OAR 411-030-0070(9).

In some limited cases where the client requires assistance with tasks at unpredictable times, DHS will approve a live-in care provider to provide twenty-four-hour availability. These cases would include clients who require assistance with ambulation and transfer, individuals who require full assistance in transfer or elimination, and individuals requiring full assistance with at least three of the eight components of cognition/behavior. The maximum number of paid hours allowed for a live-in caregiver is 389 hours, but the SPD central office may approve a service plan for additional hours. OAR 411-030-0070.

DHS may approve an allowance to assist a client who must obtain a new residence with an additional bedroom to accommodate a live-in homecare worker, according to OAR 461-155-0660(3)(b). For such a case, the amount of the accommodation allowance is one-third of the monthly rental cost or one-third the cost of the monthly payment on an original purchase money mortgage, plus the limited standard utility allowance for the food stamp program provided in OAR 461-160-0420.

Nonmedical service-related transportation may be prior-authorized for reasons related to an eligible individual's safety or health, in accordance with a plan of care. Medical transportation costs are usually reimbursed through Division of Medical Assistance Programs (DMAP) and cannot be reimbursed through service-related transportation, according to OAR 411-030-0055.

Spousal pay program

The spousal pay program is another live-in service option. An individual may be eligible for this program if, following a pre-admission screening, he or she meets in-home support service program requirements, requires full assistance in at least four of the six ADLs,

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would otherwise require nursing facility services, and has a "medically-diagnosed, progressive, debilitating condition that will limit additional activities of daily living, or has experienced a spinal cord injury or similar disability with permanent impairment of the ability to perform activities of daily living." OAR 411-030-0080(3). The pre-admission screening is a second independent assessment conducted using the CA/PS. Additionally, the caregiver spouse must demonstrate the capability and health to provide the care hours and must meet all requirements for enrollment as a homecare worker in the client-employed provider program as described in OAR 411-031-0040.

State Plan Personal Care services (SPPC)

The State Plan Personal Care services program is a Medicaid program available to mental health, developmentally disabled, and SPD clients. OAR 411-034-0020(1) defines personal care services as essential services performed by a qualified provider which enable an individual to move into or remain in his or her home. The extent of the services may vary, but the number of hours is limited to a maximum of 20 hours per month per eligible individual. To be eligible, a client must be a recipient of one of the specific Medicaid programs (OAR 411-034-0030), including OSIPM, and require personal assistance services in one or more of the following areas: basic personal hygiene; toileting, bowel, and bladder care; mobility, transfers, repositioning; nutrition; medication and oxygen management; or delegated nursing tasks. The recipient may also receive additional support services for such tasks as housekeeping, arranging for necessary medical appointments, and cognitive assistance. The state plan personal care services do not include shopping, transportation, mileage, or home-delivered meals. OAR 411-034-0020.

To be financially eligible, a client must receive a full medical card and generally cannot have income in excess of 100 percent of the SSI standard or between 100 and 185 percent of the federal poverty guidelines. A client would never have a pay-in, since all SPPC clients are SSI eligible or under the SSI standard. There is no minimum age to receive services. However, a client cannot receive routine care commonly needed by a child or infant and typically provided by a parent. Services are billed under a medical card. SPPC does not use service priority level or ADL definitions to determine eligibility. Instead, clients must have a personal care need that is unmet by natural supports. Providers are paid under the same collective bargaining agreement as providers in the in-home services program.

Special needs program

DHS will authorize payment for one-time special needs as follows: home adaptations to accommodate a client's physical condition, home repairs, moving costs, property taxes, transportation costs, and community transition services. To be eligible for a special need item, clients must not be eligible for the item through Medicare, Medicaid, or any other medical coverage. Payment for a one-time special need will be authorized if providing for the need will sustain the client's independence and stability. This includes payments to prevent foreclosure resulting from the nonpayment of property taxes and payments for adaptations to the home for reasonable accommodation of physical needs. DHS will authorize payment for ongoing special needs, in accordance with administrative rules, as follows: food for guide dogs and special assistance animals, laundry allowances, restaurant meals, room and board, shelter exceptions for the client to keep his or her home while temporarily in a nursing facility, special diet allowances, and telephone allowances. Ongoing special needs are to be provided to enhance the client's ability to meet a need such as telephone allowance in lieu of additional service hours or because the person lives in a rural setting. OAR 461-155-0500(7). ■

Footnotes

1. The "Pickle Amendment" is section 503 of Public Law 94-566. Effective July 1, 1977, this law says that if a person had SSI but later lost it due to the receipt of Social Security benefits, he or she may eventually be eligible for Medicaid again.
2. Service priority level is the order in which DHS and Area Agency on Aging staff identifies individuals eligible for the various care programs. A lower service level priority level number indicates greater or more severe functional impairment. OAR 411-015-0005(22).

Housing Options for Older Adults: A Guide for Making Housing Decisions

This new guide gives consumers an overview of the types of housing available to older adults and highlights both personal and legal issues to consider in making housing decisions. Written for the *Eldercare Locator* by Holly Robinson of the ABA Commission on Law and Aging and produced by the National Association of Area Agencies on Aging, the guide outlines the benefits and challenges, personal considerations, and primary legal issues for each option. The guide also includes questions to consider when making a housing decision and key resources. The 24-page guide includes chapters discussing "Owning a Home," "Renting a Home," "Living in a Group Setting," "Living in a Nursing Home," and a glossary and list of additional resources. Copies are available without charge, while they last. E-mail your request to the ABA Commission on Law and Aging at **abaaging@abanet.org**.

What happens when a facility can "no longer meet the needs" of a resident?

By Jenny Kaufmann, Attorney at Law

Carol is an 83-year-old woman with severe cerebral palsy. She moved into an assisted living facility more than 20 years ago with her mother when they could no longer take care of each other. After her mother died, Carol remained at the ALF because that is where her only friends live. The administrator of the ALF gave Carol an involuntary move-out notice, allegedly because the facility was unable to provide the staff to help her with her transfers from bed to chair. Carol weighs less than 120 pounds.

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Jim is a 58-year-old stroke victim who has not recovered his ability to speak and still has some behavioral problems. He suffers from insomnia and tends to be awake most of the night. During the day, he falls asleep on the couches in the common area. He gets easily frustrated because people cannot always understand him or what he needs. The ALF where he was living issued him a 30 day move out notice saying that it could not provide the care that he needs.

As many of our clients are finding out, the discharge and transfer rules for assisted living and residential care facilities in Oregon provide little protection for residents from loss of their home once the facility decides it no longer wants them there.[1]

Background

In the past, twenty-four-hour care was generally provided in a facility because very few people could afford to be cared for at home. Facility care was mainly provided in institutional settings such as nursing homes and state hospitals that unnecessarily segregated the most vulnerable members of society from the rest of us. Over time, our societal beliefs have evolved, and there has been a push toward providing long term care and other support services at home or in community-based care settings. This shift was solidified for everyone in 1999 when the U.S. Supreme Court ruled that the Americans with Disabilities Act may require states to provide community-based care for persons with disabilities rather than limiting them to care in institutional settings. *Olmstead v. L.C.*, 527 US 581 (1999). However, the shift from institutional care to community-based facility care brought with it problems that still remain unaddressed—including resident rights, especially as they relate to involuntary discharges and transfers. While residents of community-based care facilities are informed of their rights when they move into the facility, many are completely unaware that those rights are less protected than the rights of individuals residing in a private residence or nursing facility.

In response to a study conducted in 1986 by the Institute of Medicine, the federal government enacted the Nursing Home Reform Act as part of the Omnibus Budget Reconciliation Act (OMBRA) of 1987. 42 USC 1395i-3, *et seq*; 42 USC 1396r, et seq; 42 CFR 483. The study was requested by Congress to respond to charges that residents in nursing homes were being mistreated. The act established minimum standards for all nursing facilities, including very rigid rules to protect a resident from involuntary discharge or transfer. The act did not, however, set any standards for other long term care facilities, including assisted living facilities and residential care facilities, which were not in wide use at the time. The regulation of those facilities was left to the states and remains so today.

New rules from DHS

The Oregon Department of Human Services, Department of Seniors and Persons with Disabilities (SPD), is responsible for regulating all long term care facilities in the state. It recently enacted significant changes to the regulations governing assisted living and residential care facilities that became effective on November 1, 2007.[2] The old rules were repealed in their entirety and replaced by new chapters in the Oregon Administrative Rules.

Advocates have long recognized that while the initial move from one's home to a long term care facility is stressful, a subsequent move from one facility to another can be even more traumatic. Oregon has regulatory protections in place to protect the rights of residents from abusive practices by long term care facilities, including involuntary move-outs. Every resident must be given a copy of these rights when they move into a facility. The bill of rights (BoR) for residents of assisted living facilities (OAR 411-054-0027) was revised during the rule change, and facilities were required to give all residents the updated version. Arguably, the most important of the protections found in the BoR are those regarding an involuntary move-out or transfer from a facility.

An involuntary discharge notice issued by an assisted living or residential care facility must be in writing, on an SPD-approved form, SDS form 0567 (**dhsforms.hr.state.or.us/Forms/Served/SE0567.pdf**) at least 30 days before the proposed move-out date, with three exceptions (discussed below). OAR 411-054-0080(2). The written notice must be provided to the resident and to the resident's legal representative ***and*** case manager. The notice must be faxed to SPD's central office in Salem. OAR 411-054-0080(5). If the resident lacks capacity and has no legal representative, the notice must be sent to the long term care ombudsman. The long term care ombudsman has the authority to act on behalf of a resident who

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Facility can "no longer meet the needs" of resident

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lacks capacity.

An assisted living or residential care facility can only issue an involuntary discharge notice under one of the following:

a) Needs of resident exceed the level of activities of daily living services provided
b) Behavior of resident *repeatedly and substantially* interferes with the rights, health or safety of others
c) Resident has a complex, unstable, or unpredictable medical or nursing condition that exceeds the level of health services provided
d) Resident exhibits behavior that poses a danger to self or others
e) Resident engages in illegal drug use or commits a criminal act that could harm himself or others
f) Facility is unable to evacuate residents as required by OAR 411-054-0090 (Fire and Life Safety)
g) Nonpayment of charges
OAR 411-054-0080(4).

An assisted living or residential care facility *must* show through the resident's service plan that it has attempted to resolve any reason for the notice before issuing a 30-day notice. OAR 411-054-0080(3). A resident who receives a 30-day move-out notice has ten working days to request an administrative fair hearing except when a facility has lost its license or terminated its Medicaid contract. OAR 411-054-0080(7). SPD must be notified of any hearing request that is filed. An informal conference may be held prior to the administrative hearing (but is not required) in an attempt to resolve the reasons for the move-out notice.[3] The rules do not, however, state how an administrative fair hearing is to be conducted, nor do they state that it will be conducted "in accordance with the Administrative Procedures Act" as a contested case hearing under ORS Chapter 183.

Less than 30 days notice may be given under limited circumstances. A 30-day notice is not needed when a resident leaves the facility to "receive urgent medical or psychiatric care" and a re-evaluation by the facility has determined that the resident's needs exceed the level of care the facility can provide. OAR 411-054-0080(6). A facility can also give less than 30 days notice when the health and safety of the resident or others is at risk. A written notice must be provided under either circumstance on SDS form 0568. If the notice is because the resident left the facility for treatment, it must contain the specific reasons the facility is no longer able to meet the resident's needs. If the notice was issued for health or safety reasons, the facility must consult with SPD's central office and review alternatives before issuing the notice. Under either circumstance, the resident has the right to request an administrative hearing, but only has five working days to file the request. SPD must be immediately informed of the hearing request, and an expedited hearing will be scheduled. A hearing request will not delay the proposed move-out date, nor is the facility required to readmit the resident. A resident's room or unit must be held if a hearing is requested. A facility may charge room and board payments if it refuses to readmit a resident, but it may not charge when it is forcing a resident to move because of health or safety concerns.

The only time an assisted living or residential care facility can involuntarily move a resident without advance notice is if a resident admitted after January 1, 2006 did not notify the facility prior to admission that he or she was on probation, parole, or post-prison supervision after being convicted of a sex crime and the facility then learns of the criminal matter and documents that there is a current risk of harm to another resident, staff member, or visitor in the facility. OAR 411-054-0080(8). The facility must contact SPD's central office before taking action, and SPD must respond within one workday of contact. The appropriate Department of Corrections officer must be consulted if available.

The rules for involuntary move-outs and transfers for nursing facilities are based on federal law and contain far more protections for the resident. One major difference in the transfer rules that is often overlooked is that a nursing facility must obtain written consent for a voluntary transfer. The consent must be on a DHS approved form that is found on the back page of the DHS brochure *Leaving the Nursing Facility*. OAR 411-088-0007. A resident with substantial cognitive impairments cannot give consent. This protection is not provided to residents of community-based care facilities.

A resident of a nursing facility can only be transferred for medical and welfare reasons, nonpayment of charges, or conviction of a sex crime (if admitted after January 1, 2006). OAR 411-088-0020. Medical and welfare reasons are similar to those for assisted living facilities, but include provisions that require written documentation and identification of a new facility before an involuntary transfer can take place. OAR 411-088-0020(1). If a nursing facility wants to transfer a resident involuntarily for behavior that imposes an immediate threat to others, it must show that "all reasonable alternatives to transfer (consistent with the attending physician's orders) have been attempted," and those attempts are documented. OAR 411-088-0020(1)(c). The transfer rules for residents with criminal convictions for a sex crime are identical to those for an assisted living facility. OAR 411-088-0020(3).

Unlike the rules for involuntary transfers from an assisted living facility, a nursing facility must consider a number of factors, including the availability of alternatives to transfers, ties to family and community, duration of stay, the availability of a facility to meet the resident's needs, the effect of transfer trauma, and the type and amount of preparation for the move. OAR 411-088-0030. Involuntary transfers are prohibited if the physical or emotional

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Facility can "no longer meet the needs" of resident

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Federal and State Laws

Nursing facilities and long term care facilities are licensed by DHS under ORS 441.015 et seq. The protections against involuntary transfers by facilities appear in ORS 441.605(4) as well as in 42 USC 1395i-3(c)(2) [Medicare], 42 USC 1396r(1)(c)(2) [Medicaid], and 42 CFR 483.12 [Medicaid].

Residential care facilities and assisted living facilities are licensed by DHS under ORS 443.400 et seq. There is a reference to transferring residents who require nursing care in ORS 443.445.

The relevant sex crime statute is Sections 13 and 16, chapter 671, Oregon Laws 2005. It appears in the compilation of statutes after ORS 441.096, but is not numbered.

trauma significantly outweighs the risk to the resident or if it would present a substantial risk of harm or death to the resident. OAR 411-088-0040. Involuntary transfers for nonpayment are prohibited if payment for current charges is available through Medicaid, Medicare, or another third party. OAR 411-088-0020(2). Other protections that are afforded to nursing facility residents that are not available to residents of community-based care facilities include the right to return from a hospital (OAR 411-088-0050) and the right of readmission within 180 days if certain other conditions are met (OAR 411-088-0060).

A notice of involuntary transfer must be written and provided at least 30 days before the proposed transfer, with limited exceptions for emergencies and facility closures. OAR 411-088-0070(1). The notice must be sent to the resident (or former resident), all persons required to be listed in the resident's medical record, SPD, or Area Agency on Aging (unless resident is private and the stay is 30 days or fewer), and the long term care ombudsman if there is no one designated by the resident. The notice must be on a department-approved form (no form number) and accompanied by a copy of *Leaving the Nursing Facility*. OAR 411-088-0070(4). Unlike the resident of an assisted living facility, the resident of a nursing facility is entitled to an informal conference **and** a hearing. OAR 411-088-0080. The request for an informal conference must be mailed to DHS within ten days of service or delivery of the notice unless good cause exists for failing to make a timely request. There are very specific rules on how an informal conference will be conducted, and if a facility wishes to proceed with the transfer, SPD must ask the resident or his representative if he or she wants to request a hearing. OAR 411-088-0080(3)(c).

Finally, the rules clearly lay out the procedures to be followed for the hearing, including that it is to be conducted as a contested case hearing following the APA, ORS Chapter 183. OAR 411-088-0080(4). The hearing must be held no later than 30 days after the informal conference. Notice of the hearing must be personally served on all parties or by registered or certified mail. The facility has the burden of proving that the transfer or denial of return or readmission is permitted under the regulations. The decision must include specific findings and an order that contains a transfer plan if the transfer is approved. No hearing prior to a transfer is permitted, however, if a resident is involuntarily transferred because of governmental actions (including the termination of a facility's license). OAR 411-088-0080(5).

In conclusion, the rights of a resident in a long term care facility depend on the type of facility. Residents of nursing homes are afforded the greatest protection in large part because federal law dictates the minimum protections that must be afforded. Residents of community-based care facilities have minimal protection from involuntary move-outs, especially if they have no advocate acting on their behalf. Arguments have been raised in the past that residents of community-based care facilities should have the same rights as tenants protected by Oregon's Residential Landlord Tenant Act. Amendments to the RLTA during the 2007 legislative session may have foreclosed that argument, but there is an effort to extend the protections found in federal law to all long term care facilities, regardless of the type of license that is held. ■

Footnotes

1. This article addresses move-out notices regardless of payment source, but does not address the involuntary discharge of residents when a facility decides it will no longer accept residents who rely on Medicaid to pay for their care. That issue will be addressed in a future issue of the newsletter. This article also does not discuss the discharge and transfer rules for adult foster homes that provide care for five or fewer elderly or disabled residents.
2. Although the rules became effective on November 1, 2007, DHS delayed enforcement until January 1, 2008, in order to provide additional training for the facilities.
3. This is not found in the administrative rules but rather is noted on the SDS 0567.

Jenny Kaufmann is a staff attorney with the Multnomah County office of Legal Aid Services of Oregon.

Remodeling may be the answer to aging in place

By Barbara Murphy, Certified Aging in Place Specialist

Eighty percent of homeowners surveyed by AARP wish to remain in their homes through the duration of their lives. Since most homes are not built to function well for residents facing physical challenges due to aging or illness, the National Association of Home Builders created the Certified Aging in Place Specialist (CAPS) program to address this need. The goal of the CAPS designer is to convert today's home to be either immediately capable of housing elderly or injured occupants or ready to be easily converted at a later date when needs may suddenly change.

The company I work for receives calls every week about an aging member of the caller's family who is now dealing with a broken hip, a stroke, or other debilitating condition. The family is bringing their loved one home from the hospital or rehabilitation center later in the week. They need an accessible bathroom, bedroom, hallway, shower, or a ramp to the front door and they need it now. Unfortunately, this is an impossible situation. The remodeler needs time to fully assess the immediate and expected long-term needs, create the appropriate design, determine the project's total cost, secure agreement with the homeowner, obtain permits, order materials, and then oversee construction of the project. A bit of planning would have made the home either completely ready for such an event or, at the least, ready for rapid implementation of the necessary changes.

A call to a CAPS designer today will allow these design and structural elements to be in place when needed. CAPS remodelers are trained to assess the home and offer specific recommendations applicable to the homeowners' preferred lifestyle. They will consider not only the common changes in agility but also in hearing, sight, touch, and grip.

Conducting a home safety check is the first step. The CAPS designer can assess the entire home environment and offer a variety of easy recommendations, such as the removal of throw rugs and other trip hazards or instructions to override cooking controls for those with cognitive impairment. An assessment of the home and the homeowner's current and anticipated physical condition may result in additional recommendations to physically change the structure, such as adding in-wall bracing to support anticipated wall-mounted handgrips.

Next, attention is given to improving accessibility throughout the home. CAPS designers begin this process with an assessment of entries to the home. Steps at the entry may require either a lengthy ramp or the installation of sturdy handrails on both sides of the steps. (Consider this: If someone has had a stroke or has another condition with weakness on one side, a single handrail is on the wrong side half of the time.)

Next, the bathroom is assessed. Widening of doorways, installing backing for current or future grab bars, leaving the area under a sink open for a seated user, and perhaps constructing a shower without a step-over threshold will allow easy access for almost anyone regardless of physical condition. Features like these are often a treat for aging or ailing visitors as well. If a bathroom is being remodeled anyway during a healthy phase of life, smart planners can build in these accommodations at a small additional cost and save the family from a forced, stressful, and hasty remodel later.

The cost to create an accessible bathroom varies. In a small (5 foot by 8 foot) bathroom, replacing the tub with a shower, updating the other fixtures, adding grab bars, surfaces and paint will typically cost between $15,000 and $50,000 depending on the level of accessibility desired, the homeowner's taste and the materials selected. The added benefit of a true "roll-in" shower with nothing to step over often requires some framing work and might add a thousand dollars or more to the cost of the project.

Minor kitchen modifications to accommodate a seated user may require cabinet modifications, including roll-out shelves, a lowered counter and/or sink, and a single lever faucet. These enhancements should be considered during any kitchen remodel at any time and may not add to the overall cost of an already planned remodel.

For many older adults, these modifications may allow them to remain in their home for many years. Consider the cost comparisons.

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Barbara Murphy was the first Certified Aging in Place Specialist in Oregon. She is also recognized by the National Association of Home Builders as a Certified Graduate Remodeler and by the National Kitchen and Bath Association as a Certified Kitchen and Bath Designer. Barbara is a design consultant with Neil Kelly Company.

Oregon Project Independence helps elders remain at home

Oregon Project Independence (OPI) is a state-funded program that provides supplemental support services to help people remain in their homes. The statute and rules that govern the program are found at ORS 410.470 and OAR 411-032-0000 *et seq.*

The services available through OPI include personal care, homemaker/home care services, chore services, assisted transportation, adult day care, respite, case management, registered nursing services, and home-delivered meals. These services are provided throughout the state and are administered by local Area Agency on Aging offices.

To qualify, a person must be 60 years or older or have been diagnosed with Alzheimer's Disease or other dementia. OAR 411-032-0020. He or she cannot be receiving financial assistance (except for food stamps) or Medicaid (except for the Qualified Medicare Beneficiaries (QMB) or Supplemental Low Income Medicare Beneficiary (SLMB) programs). The person must need in-home help with the activities of daily living, and his or her needs must meet one of the service priority levels 1 through 18 of OAR 411-015-0010. Authorized services are provided in accordance with the in-home service rules. OAR 411-030-0002.

OPI recipients must reside in their own homes. All individuals who receive OPI services pay an annual fee of $5. Case managers assess the person's ability to pay toward services. People with net incomes above the federal poverty guidelines also pay monthly charges. Those with net incomes between 100 and 200 percent of the federal poverty guidelines pay part of the cost of their services on a sliding fee scale. Those with net incomes above 200 percent pay the full hourly rate for the services provided. There are no resource limits. ■

Remodeling

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In-home care is typically available, when needed, for $60 to $75 per three-hour visit. The cost of living in an assisted living or other care facility typically ranges from $3,000 to $6,000 per month, not counting the emotional expense incurred by the person being moved from the familiar home he or she loves.

To help keep in-home care viable for a homeowner with limited funds, a reverse mortgage may be an option. This financial arrangement allows the homeowner to use earned home equity to pay the bills while staying at home. In addition, tax deductions may be available if the homeowner's physician orders the home modifications. An accountant or tax advisor should be consulted on the specifics of this option. Finally, grants or other programs may be available from various communities, churches or other organizations such as Habitat for Humanity or Christmas in April.

To learn more about the CAPS program, including a listing of CAPS designers by location, visit **www.NAHB.org**.For expertise in complete kitchen and bath design, the National Kitchen and Bath Association Web site **www. NKBA.org** lists individuals with specific training. ■

New estate recovery rules delayed

In order to give elder law representatives and clients a little longer to review fully the available options, the Department of Human Services has withdrawn the changes to the estate recovery rules (OAR 461-135-0832 and 0835) that were scheduled to become effective April 1. DHS will refile them July 1 for an October 1, 2008, effective date. There will be no substantive changes to the prior text, other than to change the effective date and collateral reference dates in the rules to October 1, 2008, rather than April 1, 2008. There will be no reopening of the public comment period. ■

Are manufactured home parks a good choice for elders?

By John VanLandingham, Attorney at Law

Some 65,000 Oregonians live in 1,300 manufactured home parks scattered throughout Oregon. Many of these residents are elderly. Someone may ask you whether buying a manufactured home and becoming one of those 65,000 park residents is a good idea. There is no simple answer. Like every other choice of residence, there are advantages and disadvantages.

Under Oregon law, people who own a manufactured home and rent a space for it in a park with at least four such spaces are a special kind of residential tenant, covered generally by the Oregon Residential Landlord and Tenant Act, ORS chapter 90. However, they have their own special provisions within the act, found at ORS 90.505 to 90.840. These provisions also mostly apply to floating homes—houseboats—in marinas with four or more moorage spaces.

Manufactured home residents who rent both the home and the space on which it sits, whether in a park or elsewhere, are treated by the law like any residential tenant, e.g., an apartment tenant.

Folks who own a manufactured home and rent space for it on a parcel of land without three other manufactured homes have only one special provision: unlike apartment tenants with month-to-month tenancies who can be evicted with a 30-day no-cause termination notice, tenants who own their manufactured home but rent land outside a park can be evicted only with a 180-day notice. ORS 90.429.

If a person owns both the manufactured home and the land, he or she is like any owner of residential real estate. In fact, ORS 197.314 requires local governments to allow manufactured homes to be placed on single-family residentially zoned lots, like "stick built" homes.

The advantages of manufactured home park living

For many elderly people, living in a manufactured home park offers a chance to downsize and to retain the benefits of homeownership while ditching the responsibility of maintaining a big yard and house.

Manufactured home park living also offers the security of being part of a physically and emotionally tight community, where everyone looks out for everyone else. Neighbors notice if you don't pick up your morning paper by the usual time. There's the weekly poker game at the community room, or Saturday morning pancake breakfast. It is similar to some forms of retirement living, but with more autonomy over your private living space. These are gated communities, but still affordable. Federal and state fair housing laws allow certain parks to allow only residents who are 55 and older. For an example of this "community-lifestyle" marketing concept, see the Web site for a Eugene park at **www.songbrook.com**.

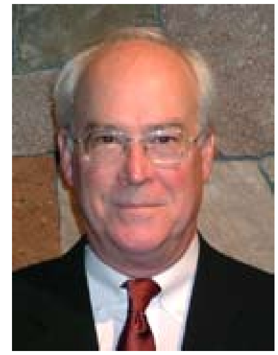
Modern manufactured homes are very well built, will last a long time, and in some parks will appreciate in value.

Manufactured home park living is generally more affordable than buying a single family home—both in terms of purchase price and space rental, which ranges from $250 to $500 per month, depending on location, quality, and amenities.

Many park landlords live among the residents and treat them like family. Apartment landlords don't do this.

There is a statewide advocacy organization that helps residents fight for their rights: the Manufactured Home Owners of Oregon/Oregon State Tenants Association (MHOO/OSTA).

Finally, manufactured home park residents have greater protections than regular tenants—primarily that they can be evicted only for cause, even with a month-to-month tenancy, and that cause can be cured during the 30-day notice period. ORS 90.630.



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Manufactured home parks

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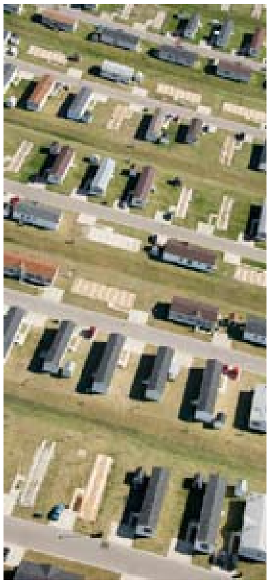

The disadvantages of manufactured home park living

As the last point above suggests, manufactured home park residents *can* be evicted.

A resident has the right to sell his or her manufactured home in the park, even after voluntarily or involuntarily leaving, but the landlord has the right to approve or reject the buyer, and sometimes there are conflicts over that. The homeowner also has the right to take the manufactured home to a new location, but as I'll explain further below, that's not easy to do.

The landlord can raise the rent with 90 days notice, at any time and for any reason (except illegal discrimination or retaliation). In extreme cases, rent increases may force a resident out of the park, and smaller increases have a negative effect on the value of a manufactured home. There is a trend in the industry for "mom and pop" landlords to sell their parks to corporate owners, some of whom are interested in maximizing their investment by raising rents.

The landlord or on-site park manager can be unreasonable or incompetent—although MHOO/OSTA got a law passed in 2005 that requires landlords and managers to get a certain number of hours of training every two years, similar to the MCLE requirement for lawyers.

Lenders treat manufactured homes on rented land as personal property, like autos, which means they will only give three to five year mortgages with a higher interest rate.

Finally, and most significantly during recent years, a manufactured home park can close or convert to a subdivision, forcing everyone to move.

Park closures

It used to be that bad management and rent increases were the greatest fears of a manufactured home park resident's life. Now the fear is over park closure.

In 2005 and 2006, 31 parks closed in Oregon, representing some 1,500 spaces. The closures were mostly in the red-hot real estate markets of metro Portland and central Oregon.

Under Oregon law, a manufactured home park landlord can close a park to convert it to another use—even when residents have fixed-term rental agreements or leases that extend beyond the closure date.

A closure is very bad news for park residents. It is both costly and difficult to move a manufactured home. Most are not mobile: they move only once—from the dealer's lot to the park or site. Some manufactured homes are too old and fragile to be moved. For those that can be moved, there are big hurdles. It costs between $15,000 and $25,000 to move a manufactured home, depending on its size (single, double, or triple wide). There are also shortages of park spaces to move to, especially in those red-hot markets. And some landlords won't take homes that are older than ten years. Obviously, if you can't move the home and selling it is next to impossible, except at deeply discounted prices, you lose any equity. And, perhaps most significantly for elders, you lose your community—the people who look out for you, who play canasta with you, who take you to your doctors' appointments.

Why are closures happening?

Some parks were always destined to close. Before the early 1980s, many manufactured home parks were placed on land zoned for industrial or commercial uses. The parks were viewed by local governments as an undesirable and temporary use, and it was expected that someday the land would be used for a nice lumber mill or convenience store. Obviously, moving into one of these parks has great risks.

But it was a surprise to manufactured home resident advocates when, in 2005, nice, newer, post-1980 parks on residentially zoned land started to close and redevelop as higher-end residences. Many of those parks were built on the fringes of cities, and those cities have now grown out to them, driving up land values and creating the market for redevelopment. Parks tend to be low-investment uses, with low financial returns. They also tend to be large, flat, and on major streets. As a result, they are prime targets for redevelopment. During the boom closure years, park owners were getting cold calls from Seattle developers offering them buckets of money for their land. Some took that money—or tried to. In 2006 the residents of an 11-acre manufactured home park in West Linn, built in 1990, offered their owner $5 million, He refused their offer, hoping to get $10 million, and closed the park.

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Certainly, Oregon's land use program had some bearing on all this. Developable land within our cities' urban growth boundaries is limited and therefore worth a lot of money. But this phenomenon is playing out all over the country, wherever people want to live badly enough to be willing and able to pay a lot of money—Washington, Idaho, Nevada, Arizona, California, Florida—and most of those places don't have land-use planning.

To minimize the harm from park closures, advocates for manufactured home residents pursued several routes in the 2007 legislative session. None of these involved outright prohibition because that would be an unconstitutional taking, and given the value of land, no local government can afford to buy the closing parks. The routes taken fall into two categories: (1) encouraging sales of at-risk parks to the residents (as a co-op) or to a nonprofit or housing authority, through public subsidies and incentives, and (2) requiring the closing landlord to provide some financial assistance to displaced tenants. The latter changes the law on a landlord's duties in a closure, so that, effective January 1, 2008, a closing landlord must give at least one year's written notice and must pay each tenant between $5,000 and $9,000, depending on the size of the manufactured home.[1] There are some additional protections for tenants. See ORS 90.645. There is also a $5,000 refundable state tax credit, even if no taxes are owed.

But as you can see by doing the math, financial assistance of $10,000 to $14,000 doesn't cover the moving cost, much less the loss of value if one cannot move the manufactured home.

The 2007 legislation (HB 2735) that created the tenant protections and did some other things related to closures also preempts local governments from regulating park closures. Six local governments had local park closure ordinances and are grandfathered in, although they cannot amend them: Eugene, Wilsonville (on appeal from a Circuit Court finding that it is unconstitutionally burdensome), Bend (also in litigation), Oregon City, Forest Grove, and Clackamas County. They each add something to the state tenant protections, ranging from a little to a lot.

One variation on park closures is a conversion to a subdivision. In such a case, the converting landlord must offer the individual lots to the park residents for purchase. ORS 92.830 to 92.845.

The outlook

The recent real estate collapse has had one silver lining: park closures have all but stopped. However, the economy may improve in another year or so, the real estate market will recover, people will be willing and able to pay lots of money to live in Oregon, and park closures will come back.

In the meantime, advocates hope to find ways to enable more resident and nonprofit purchases of parks, following a model created in New Hampshire, where more than 80 manufactured home parks have been purchased by resident-formed co-ops over the past 25 years. Resident-owned park communities (ROCs) have security, stable rents, equity appreciation, and are treated like real estate by lenders.

The safest bet, then, for manufactured home park living is a ROC or a park with a local landlord who is committed to maintaining his property as a park for the long term. ■

Housing advocates hope to find ways to enable more resident and nonprofit purchases of manufactured home parks.

Footnote

1. Prior to January 1, 2008, a landlord need only give a park resident one year's written notice, with no financial assistance. The landlord could give less notice, but not less than 180 days, if he also paid the resident $3,500.

Keeping a primary residence in trust can be tricky

By Amy Davidson and Hilary Newcomb, Attorneys at Law

Amy Davidson (top) and Hilary Newcomb practice together as associates at the Law Offices of Nay & Friedenberg in Portland. Both practice in the areas of estate planning, estate and trust administration, estate and trust disputes, and guardianships and conservatorships.

Revocable living trusts are a common if not integral component of personal estate planning. A revocable living trust is just what the name implies—a trust created during an individual's life that can be changed or terminated at any time as dictated by the terms of the trust. A trustor's personal residence is often held by his or her revocable living trust. Yet the trustor may find it inconvenient to transfer a residence into the trust and/or maintain it in trust. This article will examine the implications of transferring a primary residence located in Oregon into an Oregon revocable living trust (RLT).

Mortgage lender

There are many lending institutions, and each has its own internal operating procedures for its treatment of an RLT. Although a residence held in trust can legally secure a loan, the lender has the prerogative of not lending money if it does not like the way the property is titled. This issue often arises in the refinance of a home loan.

Refinancing

A larger institution, e.g., Wells Fargo, will generally allow the residence to be held in trust during the escrow process. While a lender such as Wells Fargo is rarely if ever going to review the RLT, it will often require the trustor(s) to complete an internal checklist that details the relevant terms of a trust, similar to a certification of trust. However, a smaller lender, such as E-loan, Inc., does require the home to be transferred out of trust. This is primarily because, although E-loan, Inc. is a lender, it operates like a broker and typically sells its loans to investors. Because some investors have guidelines that tell them what to look out for so their lenders are not negatively affected by certain types of trusts and they are fully secured as a lender, these investors may be reluctant to add the additional layer of a trust entity. Because the trust is a legally binding document, the lender may prefer to make a loan to an individual rather than an entity. Thus, it is a blanket policy for E-loan, Inc. to require all homes to be titled in the individual owner's name(s) instead of dealing with an RLT. Implementing additional procedures, such as a trust checklist and additional trust forms, would result in extra work, time, and possible liability to the lender. Therefore, the specific lender the homeowner uses determines whether the home may remain in or must be removed from trust.

If the home is removed from trust for refinancing, the lender or title company must be instructed to reconvey the home into the trust. If this does not happen, the residence will not be held in trust, will not be distributed pursuant to the terms of the trust, and will probably require a probate that could have been avoided. The client can avoid this problem, as can the attorney, *if* he or she knows about the refinance. Of course, the estate planning attorney can also draft and record a deed that transfers the residence back in trust.

The bottom line here is the lender is the lender, and you are at its mercy if you want it to fund your loan. The lender's guidelines must be complied with, or the owner must find a different lender. You can shop for a specific lender that will keep title to the home intact, but often this is not a top priority for someone shopping for the best loan.

Due-on-sale clauses

A due-on-sale clause forces immediate payment of the entire balance of a loan. A transfer to a trust can trigger the due-on-sale clause if the trust does not meet certain requirements.

Federal law expressly prohibits a lender from exercising its option pursuant to a due-on-sale clause in the case of a transfer of one's "principal residence" into his or her "inter vivos trust." The Garn-St Germain Depository Institutions Act, 12 U.S.C. §§ 1464, 1701. To qualify for this protection the borrower must be a beneficiary of the trust and an occupant of the property. Traditional RLTs meet these criteria.

This law pre-empts any state law to the contrary. The corresponding administrative rule, 12 CFR 591.5, allows lenders to require notice of transfers into trusts. The notice should conform with the lender's instructions. Some lenders will review the trust to assure the borrower that the trust meets the standards outlined above. For example, the Veterans Administration (VA) will most likely review the trust. If your client is concerned about the transfer to a trust, contact the lender for a

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Residence in trust

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review. Many clients with taxable estates take advantage of favorable marital deduction planning. They often use A/B trusts, which create sub-trusts known as a credit shelter trust or a marital trust. The transfer of part or all of a house into a credit shelter or marital trust does not trigger a due-on-sale clause. A transfer that unintentionally forces the loan to come due or the loss of a loan with favorable terms, such as a VA loan, could cause great financial distress for your client.

Life insurance

Many clients purchase "loan cancellation" life insurance. This kind of life insurance policy will pay off the balance of a mortgage loan upon the insured's death. The lender is the primary beneficiary up to the amount of the balance on the loan.

A transfer of the home out of the insured's name could cancel this type of insurance. However, an RLT with the borrower as a beneficiary of the trust should not cause any problems for your client.

Title insurance

Nearly all institutional lenders require title insurance to protect their interest in their loan investment secured by real estate. Title insurance generally insures against losses caused by defects in title. This often results in the curing of title defects or the elimination of adverse interests from the title before a transaction takes place.

A title company insures title for the lender, so it follows the escrow instructions distributed to it by the lender. Once again, the lender's rules take precedence regarding whether the property must be taken out of trust before funding takes place. However, a title company may have internal procedures that always require the residence to be transferred out of trust to accommodate the lenders that require the property to be held by an individual owner.

Again, it is critical to instruct the title company to re-title the residence back into trust if it it was removed from the trust for financing.

Transfer tax

Oregon counties vary as to whether they impose a transfer tax for transfers of real property. However, a transfer of property into an RLT is typically exempt from transfer tax provided:

- the consideration given, if any, is the assumption of the loan
- the sole collateral is property being transferred in exchange for the property
- the seller has unrestricted power to revoke the trust
- the transfer does not cause any change in the beneficial ownership of the property
- upon revocation of the trust the property transfers back to the beneficial seller.

Property tax reassessment

Property subject to property taxation in Oregon includes all privately owned real property. A property owner or other person who holds an interest in property, including the trustee of an RLT, is obligated to pay the taxes imposed on the property. However, there is no property tax reassessment for the transfer of a residence into an RLT.

Homeowner's insurance

A homeowner's policy will be affected minimally, if at all, by having the home titled in trust. After all, the insurance company is primarily concerned with the real ownership, not the legal title of a look-through entity. The insurance company will most likely add the trust as an additional insured on the policy, and the premiums will remain unchanged. Any payout on such a policy will go to the owners of the trust, who are also insured. However, typically a trust cannot be added as an additional insured under an umbrella policy because an umbrella policy will not extend to an entity.

Homestead rights

A homestead exemption is a legal device to protect some equity in the home from creditors. If you qualify for a homestead exemption, your home is protected against a forced sale by creditors (other than secured creditors) if your equity is below the statutory limit. ORS 18.395(1) allows the homestead exemption to protect up to $30,000 in equity, except as otherwise provided by law. When two or more household members are debtors, their combined exemptions under the statute cannot exceed $39,600. The statute requires that the homestead be "the actual abode of and occupied by the owner, or the owner's spouse, parent or child… ." Transferring a home into trust generally does not affect the protection offered by Oregon's homestead laws. Drafters may consider, however, including a specific statement in the trust that the trustor intends to remain eligible for the state homestead exemption he or she would be entitled to as an individual owner of the residence.

Home mortgage interest deduction

Under IRC section 163(h)(2), a taxpayer may deduct any qualified interest on a qualified residence, which includes the principal residence owned by the taxpayer for the purpose of deductibility for the tax year the interest is paid. The IRS views the taxpayer as the trustor of an RLT, so a residence held in an RLT allows the trustor this deduction. The taxpayer must itemize deductions in order to do this, which means total deductions must exceed the IRS's standard deduction. The IRS allows the deduction of home mortgage interest only if

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the mortgage is a secured debt. A mortgage is a secured debt if the home was used as collateral to protect the interests of the lender.

Principal residence capital gain exclusion

A person has a right to exclude $250,000 from capital gains for the sale of his or her residence if the residence was owned and used as his or her principal residence for periods of time aggregating two years or more during the five-year period ending on the date of the sale or exchange of the home. IRC section 121(a). Joint owners such as a husband and wife can exclude gains up to $500,000. IRC section 121(b). Homeowners retain this right to exclusion even if they have transferred their residences into an RLT, pursuant to IRC section 121 (9)(D). Under a new law for sales on or after January 1, 2008, surviving spouses can take advantage of the full $500,000 personal residence exemption if they sell the home within two years of the deceased's date of death and if the requirements for joint filers relating to ownership and use were met immediately before date of death. Previously, the surviving spouse had to sell the house within the tax year of the spouse's death to receive the full exclusion.

Medicaid

Under the current rules, a home is considered an exempt asset if the Medicaid applicant and/or the applicant's spouse lives in the home. The rule is the same if the house is owned by the applicant or spouse's RLT where the applicant and/or spouse is a beneficiary.

Transferring the home to the "community spouse" has traditionally avoided estate recovery upon the Medicaid recipient's death. An asset owned by a Medicaid recipient at the time of his or her death is subject to a claim by the state for assistance provided. The Medicaid recipient should think first, however, before making the transfer. Although transfers to spouses are "exempt" (i.e., they do not impose a penalty from the Medicaid program), there are other issues to consider. Federal law prohibits a transfer to a spouse to force the mortgage to come due. However, the law is unclear as to whether or not transferring the home to a spouse's revocable living trust triggers the due-on-sale clause. 12 USC 1701j-3(d)(6).

If the Medicaid applicant does not have a spouse, other exempt transfers should be considered. Good Medicaid planning may include a transfer of the home to a disabled child, a caregiving child, a child under age 21, or a sibling with an equity interest. OAR 461-140-0242. These are all "exempt" transfers under the current Medicaid rules. The federal law prohibits a lender from enforcing a due-on-sale clause when the home is transferred to a child of the borrower, but does not prohibit it for inter vivos transfers to a relative. Furthermore, it is not clear whether or not transfers to a child's or sibling's revocable living trust can trigger the due-on-sale clause.

In addition, if the home is owned by an RLT, the trustee must have the power to make gifts in order for any transfer to take place. Many RLTs are drafted to limit the trustee's power to make gifts when the trustor is not acting as trustee. If a transfer to a community spouse needs to be made and the trustee does not have the requisite authority to make the gift, the trust will have to be amended or revoked.

A problem arises when the individual who set up a trust is incapacitated and no longer has the capacity to amend or revoke it. The drafting attorney can avoid this problem by including certain provisions in the trust. A properly drafted trust will allow either trustor of a joint trust to amend and revoke the entire trust in the event the other trustor is incapacitated. It will also allow a trustor to delegate the power to amend the trust if necessary. This delegation can be limited to allow this power to amend only for the purpose of public benefits planning. The prudent estate planning attorney will have the trustor(s) sign a power of attorney with this power at the same time the trust is signed.

If those provisions are not included in the RLT, it may not be possible to make the transfer to the community spouse. A pending change in Oregon administrative law, OAR 461-135-0832, however, may make this discussion moot. A rule change will allow the state to make a claim against a community spouse's estate for assistance provided to an impaired spouse who received Medicaid. This right to recovery will be allowed for transfers that were made to a spouse within 60 months of the first date of request for Medicaid assistance. The rule was to have taken effect on April 1, 2008, but the date of implementation has been postponed until October 1.

Conclusion

Although the obstacles that may arise in transferring a residence into an RLT may discourage a homeowner from executing an RLT as part of a personal estate plan, these obstacles are minimal compared to the numerous benefits offered by an RLT. Financial institutions and governmental bodies are also making an effort to accommodate their customers who own an RLT, even if that means possible expense and/or liability for the organization. The drafting attorney who considers the perspective of the financial institutions and other organizations in their treatment of an RLT will more fully understand the transfer process and therefore better assist clients. ■

Uniform Law Commission develops transfer-on-death deeds

By Susan N. Gary

Although Oregon does not yet have transfer-on-death deeds, other states already provide for them. Oregon lawyers should be familiar with the deeds and be ready to use them, with the assumption that the Oregon legislature will adopt the legislation in 2011 and the statute will take effect in 2012. This article provides a look at transfer-on-death deeds: how they work, when they should be used, and when they might not be helpful.

Background

In 2006 the Uniform Law Commission appointed a drafting committee to develop a uniform act that creates transfer-on-death (TOD) deeds. The committee has developed a draft of an act and expects to present the act for final approval in the summer of 2009. The committee includes practicing lawyers and academics, and the active observers and advisors include representatives from title companies, the AARP, the American Bar Association's Commission on Law and Aging, the American Bankers' Association, and the American Bar Association. I am an advisor from the Real Property, Trust, and Estate Law Sections of the ABA.

Before the act becomes final, the committee working on the uniform act will discuss and address many issues and questions involved with TOD deeds. The final version of the act will have taken into consideration the concerns of elder advisors, title companies, and lawyers. Although some of us in Oregon began looking at legislation to permit TOD deeds several years ago, with the uniform project nearing completion, waiting for that uniform act will mean better legislation. Oregon will not be ready to consider the uniform version until 2011, but the quality of that act should be worth the wait.

General information

A TOD deed, known in some states as a beneficiary deed, allows the owner of real property to execute a deed that names the beneficiary who will succeed to ownership at the owner's death. Ten states (Arizona, Arkansas, Colorado, Kansas, Missouri, Montana, Nevada, New Mexico, Ohio, and Wisconsin) have passed TOD deed statutes.[1] California is considering a bill this session.

At death, a person's probate property transfers to his or her beneficiaries by will or through intestacy if the decedent left no will. These days, much property transfers outside the probate process, through trusts or contractual arrangements. Insurance proceeds transfer to the person named as beneficiary under the policy, bank accounts and stock accounts may designate beneficiaries, and revocable trusts have become a popular will substitute. Many people prefer to avoid the probate process because of concerns about delays and cost or a desire for privacy.

If a person owns real property, he or she can avoid probate by using a revocable trust, but a revocable trust may not be appropriate if the person's only significant asset is a house. The only other option for an Oregon property owner is to transfer the title of the property into a form of joint ownership with a right of survivorship. In Oregon, husbands and wives use tenancy by the entirety to create joint ownership with survivorship. Persons other than a married couple use joint tenancy with right of survivorship, which creates a tenancy in common with cross-contingent remainders. In either case, by adding the other person to the title, the original property owner makes an irrevocable gift of half the property. The irrevocable nature of the gift means that if the original owner later changes his or her mind, undoing the transaction will be difficult if the other owner does not agree. Further, the transfer will be a completed gift for gift tax purposes and may generate a gift tax. Finally, because the person added to the title has rights in the property, the creditors of the added person may be able to reach the asset.

To facilitate the transfer of property on death, many states, including Oregon, have enacted transfer-on-death statutes for bank accounts and stock accounts. The statutes permit

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Transfer-on-death deeds

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The owner of property can revoke a transfer-on-death deed at any time by execution and recording of a subsequent deed or an instrument of revocation.

A will cannot revoke the designation of a beneficiary on a transfer-on-death deed.

a person to designate a beneficiary to take the account at death without giving the named beneficiary any current rights in the property. The ten states identified above now use TOD deeds to accomplish the same end for real property. TOD deeds allow a property owner to designate a beneficiary without making a current gift of the property. The designation is subject to revocation by the owner, but if the owner records the deed and does not revoke it, on the owner's death the beneficiary will be able to obtain title to the property without going through probate. For persons of modest means, the TOD deed will reduce the cost of estate planning and administration.

Specifics of a TOD deed statute

Statutes that authorize TOD deeds vary in some respects, although states apply many of the same rules to the deeds. The description that follows tracks rules set forth in the Uniform Act, the likely source of statutory language for an Oregon TOD. statute.

Recording requirement. To be effective, a TOD deed must be recorded before the death of the owner.

Multiple deeds. If multiple TOD deeds are recorded, the most recently executed and acknowledged TOD deed controls, regardless of the order of recording.

Owner's rights. During the owner's lifetime, the owner retains full power and control over the property. The owner owes no duties to the beneficiary and need not provide notice to or obtain consent from the beneficiary for any actions taken with respect to the property.

Revocation. The owner of property can revoke a TOD deed at any time by execution and recording of a subsequent TOD deed or an instrument of revocation. A will cannot revoke the designation of a beneficiary on a TOD deed. If a creditor of the owner executes a claim on the property and acquires it, the TOD designation is revoked.

Capacity for execution. The level of capacity required to execute a TOD deed is the same as the level of capacity required to execute a will.

Tax considerations. The execution of a TOD deed has no tax consequences. It is not a completed gift and remains revocable. The full value of the property remains in the estate of the owner for estate tax purposes.

Beneficiary's interest. The beneficiary has no interest in the property until the death of the owner. The creditors of the beneficiary cannot reach the property while the owner is alive. The owner need not notify the beneficiary when the owner creates or revokes the deed. Delivery and acceptance of the deed by the beneficiary are not required. If foreclosure is initiated against property, the beneficiary is not entitled to notice.

Interest contingent on survival by beneficiary. The beneficiary must survive the owner in order to take the property. In Oregon, the beneficiary must survive by 120 hours. The anti-lapse statute, which provides a substitute gift to the descendants of a beneficiary who is related to the owner, does not apply to TOD deeds.

Omitted spouse or child. A spouse or child unintentionally disinherited by a TOD deed is not protected. Marriage or the birth of a child after the execution of a TOD deed does not affect the validity of the TOD designation.

Multiple beneficiaries. If the deed names multiple beneficiaries, the deed should indicate how the beneficiaries will take title to the property. If the deed does not indicate, then tenancy in common will be presumed unless the beneficiaries are married to each other, in which case tenancy by the entirety will be presumed.

Contingent beneficiaries. The deed may provide for an alternate beneficiary if the first-named beneficiary predeceases the owner.

Vesting of ownership. Title vests in the beneficiary on the death of the owner. The beneficiary takes the interest subject to all encumbrances, mortgages, liens, and other interests to which the property was subject at the owner's death.

Proof of death. The beneficiary establishes proof of death in the same manner that a surviving tenant by the entirety establishes the death of the decedent tenant.

Multiple owners. Owners who hold property as joint tenants with right of survivorship or as tenants in the entirety can use a TOD deed to transfer the property on the death of the last owner to die. If only one of the owners executes the deed, the deed will be effective only if that owner is the last to die. If two owners execute a TOD deed and one owner then

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Transfer-on-death deeds

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revokes the deed, the revocation will be effective only if that owner is the last to die. If two owners execute a TOD deed and one owner dies, the surviving owner can subsequently revoke the TOD deed.

Owners who hold property as tenants in common without survivorship rights can also use TOD deeds. Each owner can use a TOD deed to convey that owner's individual property interest.

Creditors of the owner. The execution and recording of a TOD deed does not affect any rights the creditors of the owner may have during the owner's lifetime. After the owner's death, if other assets of the probate estate are insufficient to pay all claims and all statutory family allowances, the claims may be brought against the property. A creditor must bring the claim in a proceeding to administer the estate within one year after the owner's death.

Creditors of the beneficiary. If the beneficiary files for bankruptcy, the automatic stay in the bankruptcy proceeding does not bar the owner from revoking the deed. A lien creditor of the beneficiary cannot execute a claim on the beneficiary's interest in the real property until after the owner's death.

Limitations on actions against beneficiaries. Claims of a creditor of the owner are barred one year after the owner's death. A proceeding to contest the TOD deed is barred at the earlier of three years after the owner's death or one year after proof of the owner's death is established in the manner it would be established in connection with a deed in joint tenancy with right of survivorship.

Medicaid recovery. If a person who has received medical assistance dies with a TOD deed in effect, the beneficiary's interest will be subject to a claim by the state for recovery of any medical assistance payments made on behalf of the owner.

Bona fide purchasers. A bona fide purchaser who purchases property from the beneficiary after the owner's death takes title free of the rights of persons interested in the owner's estate.

Planning ideas

Small estate. An owner whose estate consists primarily of a house may use a TOD deed to avoid the expense of probate.

Unmarried partner. A couple that has not married or registered as domestic partners may want to use a TOD deed as part of an overall estate plan. The deed does not convey current rights and therefore avoids gift tax problems. (And gift tax will be a concern even if the couple is registered, because the federal gift tax does not provide a deduction for persons who are registered but not legally married.) If the couple ends their relationship, the owner can revoke the TOD deed.

Parent and child. Sometimes a parent puts a child on a deed to avoid probate and ensure that the child inherits the property. If the deed creates a joint tenancy with a right of survivorship, the parent has made a lifetime gift, the parent cannot later revoke the gift, and creditors of the child can reach the asset. A TOD deed avoids those difficulties.

Revocable trust. An owner may have created a revocable trust for other property but may not want to transfer title to real property into the name of the trustee. The owner may be planning to sell the property soon and may find a sale easier if the property remains in the owner's name. A TOD deed transferring the property to the trustee of the revocable trust provides a back-up plan in case the owner does not sell the property before death.

Reasons not to use a TOD deed

Complicated estate plan. If a property owner has multiple beneficiaries who may share in the owner's probate and nonprobate estate, naming one beneficiary to take the real property may result in unintended consequences if the beneficiary predeceases the owner or if other assets are sold or change in value. Naming multiple beneficiaries on the deed is possible, but may be difficult to implement. For example, an owner may have three children and may want grandchildren to take a share if a child predeceases the owner. Providing for various contingencies in the deed will be difficult.

Need to sell quickly. If the owner expects that the beneficiary will want to sell the house quickly, a TOD deed may not be the best choice. An interested person may contest the deed for a year after the beneficiary establishes the owner's death. Creditors can reach the property for a year, and in some circumstances longer. These uncertainties mean that a title company may be reluctant to issue title insurance until these periods have run or may issue

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Transfer-on-death deeds

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the insurance subject to an exception and require a higher premium.

Undue Influence

After a state adopts TOD legislation, TOD deed forms will be readily available. That availability raises concerns about undue influence. A neighbor or relative might influence a property owner to execute a TOD deed leaving the property to the neighbor or relative. While the risk of undue influence is always a concern with a disposition taking effect at death, a TOD deed should be no more likely to be used by someone with improper motives than the other forms of transfer. Indeed, a TOD deed provides an alternative that requires more formalities than a power of attorney and is safer during lifetime than a joint tenancy deed.

A TOD deed requires the same execution formalities as other deeds—typically notarization and recordation. Thus, someone seeking to take advantage of a property owner might find a power of attorney or even a will an easier route. Also, a TOD deed takes effect at death and has no effect during the owner's lifetime. Someone who engages in financial abuse might use a power of attorney or even a revocable trust to obtain control over assets. The owner might suffer the loss of assets during his or her lifetime, creating financial difficulties for the owner as well as undermining the owner's estate plan.

If the undue influencer's goal is specifically control of the house, a different kind of deed is already available. A joint tenancy deed has potential lifetime consequences for the owner and does not permit revocation if the owner changes his or her mind. A TOD deed, in contrast, will not affect control of the property during the owner's lifetime and can be revoked if the owner emerges from the bad influence of the person trying to reach the assets. The undue influencer will have no rights to the property until the owner dies.

If someone does unduly influence a property owner to execute a TOD deed, the personal representative of the owner's estate or an interested person may contest the validity of the deed on the basis of fraud, undue influence, or other causes that invalidate dispositive documents. The advantage of a contest of a TOD deed after the owner's death, in contrast with the contest of a power of attorney, is that the property will likely be easy to find. The current draft of the act provides that the person who contests the deed may record a notice of lis pendens to protect the property while the contest proceeds.

Although a wrongdoer could use a TOD deed to take advantage of a property owner, other tools are just as easy to use. The use of TOD deeds will not likely lead to increased abuse.

Looking ahead

Because ten states have experience with a TOD statute, the drafters of the uniform act have the benefit of knowing how the statutes have been used in those states and have addressed concerns expressed by title companies and creditors that have experience in states where TOD deeds have been used successfully. The current draft of the *Real Property Transfer on Death Act* is posted on the Uniform Law Commission's Web site**, www.nccusl.org**. Comments can be sent to the reporter, Tom Gallanis, at gallanis@umn.edu. After the Uniform Law Commission approves the uniform act, Oregon should consider adoption. ■

Footnote

1. See Ariz. Rev. Stat. § 33-405; Ark. Code Ann. § 18-12-608; Colo. Rev. Stat. § 15-15-401(1); Kan. Stat. Ann. § 59-3501; Mo. Rev. Stat. § 461.025; Mont. Code Ann § 72-6-121; Nev. Rev. Stat. § 111.109.1; N.M. Stat. Ann. § 45-6-401; Ohio Rev. Code Ann. § 5302.22; Wisc. Stat. § 705.15.

Economic stimulus payments will not be counted as income

OAR 461-145-0530, which addresses the treatment of tax refunds in the Department of Human Service's public assistance, medical, and food stamp programs has been temporarily amended to make the rule consistent with the provisions of the Economic Stimulus Act of 2008. A federal income tax rebate will not be counted as income in the month that it is received. Any unspent balance of the tax rebate will not be counted as a resource for two months after that. The temporary rule is effective April 1, 2008, through September 26, 2008. ■

Apellate court rules on conservatorship issues

By Leslie J. Harris, Dorothy Kliks Fones Professor of Law, University of Oregon

A staple of planning for incapacity is establishing an inter vivos (living) trust that names the settlor as trustee and includes provisions for a successor trustee to take over if the settlor/trustee becomes incapacitated. Alternatively, the settlor may name a third party as trustee from the outset. If disputes arise about management of the trust assets, the ordinary way of seeking judicial review would be for a beneficiary to file an equitable action, claiming that the trustee had breached a fiduciary duty.[1] Two recent decisions from the Oregon Court of Appeals consider issues that may arise when an interested party seeks to resolve the problem by filing a conservatorship and alleges that the settlor is financially incapable and has property in need of management under ORS 125.400.

The substance: use of the conservatorship proceeding to resolve a dispute over trust management

At first glance, it might seem that the very existence of a living trust would preclude establishment of a conservatorship because the would-be protected person does not have property in need of management. Either the assets no longer belong to him or her, or the trust itself provides the necessary management. However, if the settlor is also a beneficiary, he or she owns a beneficial interest in the trust, which is itself property. In the first of the two recent cases, the court held that if the evidence shows that this property interest needs management, establishing a conservatorship is proper. In the second case, the petitioner argued that the living trust was not valid, which, if true, would mean that the assets would need management. This issue was not litigated; instead, the parties settled, and the appellate case concerns the scope of the court's authority to issue orders consistent with the settlement.

Helmig and the authority of a conservator to protect beneficial interests in trusts

In *Helmig v. Farley, Piazza & Assoc.,* — Or App —, — P3d – (Mar. 19, 2008), Lea had placed most of her assets in a revocable trust, naming herself as trustee and her son Lester as the alternate trustee. She and her children were beneficiaries. By 2004 Lea was in a care facility and unable to manage her finances, but no steps had been taken to remove her as trustee. Instead, Lester had her checkbook and was responsible for paying her bills. He was repeatedly late in paying the care facility, resulting in late fees, and her telephone had been disconnected for nonpayment. The care facility reported the situation to Clackamas County Adult Protective Services, which ultimately asked Farley, a professional fiduciary, to file a conservatorship petition. The court granted the petition, and Lester appealed.

Lester argued that the evidence did not support appointment of a conservator because the living trust controlled the management of Lea's assets in the event of her incapacity. The court rejected the argument and stated:

> [T]he provisions of the trust regarding Lea's capacity as trustee cannot preclude a statutory proceeding under ORS chapter 125 for the protection of Lea as an individual. There is clear and convincing evidence that Lea's beneficiary interest in the trust was not being properly managed….
>
> … Contrary to the appellant's suggestion, appointment of a conservator did not affect the terms of Lea's revocable trust, which remains intact, or her estate plan. We therefore affirm the trial court's appointment of [Farley] as conservator.

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 quoted above 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.

Haley and settlements of conservatorship proceedings

In *Haley v. Haley,* 215 Or App 36, 168 P3d 305 (2007), Helen and Duane established an irrevocable trust, that named their four daughters as co-trustees. The parents and the daughters were beneficiaries. After Duane's death, a dispute arose about whether to sell the family home. Helen filed a conservatorship petition for herself that alleged she was financially incapable and that there was a dispute about whether her residence and other assets were subject to a valid trust. At Helen's request, the court ordered a settlement conference. Notice of the conference was served on all the trustee daughters except Tamera, who had not filed an objection to the conservatorship or asked to receive copies of future filings in the matter.

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Conservatorship cases

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However, Tamera knew about the conference, since she brought her mother to it, and she participated in the conference without her attorney but with the knowledge that she could have had her attorney present. At the end of the conference, Helen's attorney read a settlement into the record, which included withdrawal of the conservatorship petition, modifications to the terms of the trust, and an order to Tamera to submit an accounting of Helen's bank accounts.

Helen appealed, arguing that the court lacked authority to enter the order to modify the terms of the trust. The appellate court rejected her argument and applied ORCP Rule 23 B. The court said:

> ….[O]rdinarily a court does not have authority to grant relief beyond what was pleaded…However, issues outside the pleadings commonly may be addressed in a settlement agreement or tried by consent of the parties…..
> 215 Or App at 42, 168 P3d at 308.

The court's holding on this issue is a straightforward application of ORCP Rule 23 B. The court does not address whether the trial court could actually have litigated the validity of the trust had the case gone to trial and that been the determinative issue, though there seems no reason that it could not have done so.

Procedural issues

Helmig and *Haley* also resolve a variety of procedural issues worth mentioning. The most important ones concern statutory rights to notice and the due process right to a hearing, which *Haley* addresses.

Procedural safeguards when a party does not object or request notices of future actions

In *Haley*, the daughter, Tamera, appealed, and argued that the court could not enter the order based on the settlement because it lacked personal jurisdiction over her, and that to the extent the order obliged her to take actions, it violated due process. Her argument was that the court lacked personal jurisdiction over her because she did not receive notice of the settlement conference, and that the assertion of authority to order her to render an accounting violated due process for the same reason. The court rejected the arguments because she had actual notice and participated fully in the discussions and agreed to the settlement—an unsurprising holding.

The more interesting question is whether the court could have asserted jurisdiction to enter these orders if Tamera had not participated in the settlement negotiations. The court's analysis suggests that she could not successfully have asserted that her statutory right to notice would have been violated. The court said,

> Tamera contends that one becomes subject to the personal jurisdiction of the court only on filing and serving objections to the petition pursuant to ORS 125.075 or by filing a request for notice in the proceedings pursuant to ORS 125.060(3)(b), (4), and (5). … Tamera received the notice required for the court to acquire jurisdiction over her when she was served with statutory notice of the proceedings under ORS 125.060(2)(b). We reject the suggestion that the court did not acquire personal jurisdiction over Tamera until she elected to appear and participate in the proceedings.
> 215 Or App at 44, 168 P3d at 309.

The larger problem is whether due process is violated if a court enters an order that affects the rights of a person who elects not to receive notice of proceedings in the conservatorship case when that order goes far beyond the scope of the pleadings and imposes personal obligations on that person. In footnote 7 the court said:

> ORS 125.025(1) provides that a trial court having jurisdiction over a protective proceeding may act on its own authority "at any time and in any manner it deems appropriate to determine the condition and welfare of the respondent or protected person* * *. *We do not assume that due process required that Tamera receive notice and an opportunity to be heard before being ordered to provide an accounting* and need not decide that question here, given that Tamera received actual notice and agreed to that portion of the order.
> 215 Or App at 44, 168 P3d at 309 (emphasis added).

ORS 125.025(3)(f) authorizes a court in a conservatorship action to "require immediate delivery of a protected person or property of the protected person, including records, accounts, and documents relating to that property, to the court or to a place it designates." However, this is not the same as ordering a person to take the additional action of rendering an accounting. Whether due process would require that she be given notice of the court's intention to issue such an order and to be heard is an open question. In such a case, the court clearly could order her to appear personally—ORS 125.025(3)(a)—which would be the prudent thing to do under the circumstances.

Tamera's real objection, it seems likely, it that she may have been unwise to participate in the settlement conference without the assistance of counsel. The *Haley* holding certainly indicates that attorneys should caution clients about the importance of seeking advice before they appear at settlement conferences unrepresented.

Standing to file a conservatorship

In *Helmig* the county adult protective services asked a professional fiduciary to file the conservatorship petition, which is a common practice, at least in some counties. The court rejected the claim that the fiduciary lacked standing as an "interested person" under ORS 125.010. The Court interpreted "interested person" broadly to include anyone "involved" in the case, including someone brought in by APS.

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Resources for elder law attorneys

Upcoming events

May 9, 2008
OSB Elder Law Section unCLE program
Valley River Inn, Eugene
See page 22 for details.

May 14–18, 2008
NAELA Symposium
Hyatt Regency Maui Resort, Kaanapali Beach
www.naela.org

May 16, 2008
Guardian/Conservator Association of Oregon Annual Conference
Abernethy Center, Oregon City
www.gcaoregon.org

Online CLE programs

The ABA Commission on Law and Aging is now offering free online CLE programs from the 2007 National Aging and Law Conference.

These downloads include the audio file in MP3 format, the accompanying written course materials in PDF, and the self study CLE certificates for the program.

The programs are available at **www.abanet.org/aging/podcast/2007/national_aging_and_law_conference.html**.

These podcasts are made available in part with support from the ABA Standing Committee on Continuing Legal Education, with a grant award from the Underserved Lawyers Fund.

Web sites

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.

Network of Care
oregon.networkofcare.org

Comprehensive database of county-by-county community resources for elders, people with disabilities, and their families, caregivers, and service providers. Articles about medical, financial, legal, long term care, and caregiving issues. Services directory for in-home care, housekeeping, transportation, assistive devices, respite care, medical help, legal advice, housing, mental-health care, support, groups, etc. Includes both free and fee-for-service options. Website is joint project of Oregon Asociation of Area Agencies in Aging and Department of Human Services.

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." ■

Conservatorship cases

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Appeal of conservatorship order survives death of the protected person

The woman who was the subject of the conservatorship in *Helmig* died while the appeal was pending, and the appellate court originally dismissed the appeal as moot. On reconsideration, the court held that the appeal was not moot because the conservator, if validly appointed, had a number of obligations after the death of the protected person:

While death terminates the authority of the conservator to act as a fiduciary, the conservator is discharged only by order of the court after a final report and accounting is approved by the court. ORS 125.230(2). The conservator must pay claims against the estate, account to the court for the administration of the estate, and deliver the assets of the estate to the decedent's personal representative. ORS 125.495, 125.475, 125.530. ■

Footnote

1. Of course, if the trust is revocable and the settlor retains the capacity to revoke, revocation may be the best solution. In one of the two cases discussed here, the trust was irrevocable, and in the other the trust was revocable but the settlor lacked capacity to revoke.

Topics set for unCLE program

By Mark M. Williams, unCLE Program Chair

On Friday May 9, 75 elder law attorneys will gather in Eugene for the Section's fifth annual unCLE program. After breakfast, attendees can choose from among four discussion tracks, led by members of the Section: protective proceedings, public benefits planning. estate planning, and practice and office management. The day will end with a social hour.

Schedule

Session I: 9:00–10:15

- Special Needs Trusts: tba
- G/C Task Force: Ryan Gibb
- Reverse mortgages/deferred taxes: Steve Heinrich
- Planning for attorney retirement: Jane Patterson

Session II: 10:45–12:00

- LTC partnership polices: Matthew Mullaney
- Contested protective proceedings: Dady Blake, Maggie Biondi,Steve Owen
- Estate planning & the protected person: Sylvia Sycamore
- Attorney billing practices: Whitney Yazzolino

Lunch: 12:00–1:30

Session III: 1:30–2:45

- Estate recovery: tba
- Alternatives and limits to G/C: Wes Fitzwater
- Trust review & administration—non-tax issues: Brian Thompson
- Technology: Data storage/security: Susan Ford Burns

Session IV: 3:15–4:30

- Eligibility planning options: Mark Williams
- G/C administration: Penny Davis
- Trust review & administration: tax issues: Brian Haggerty
- Open issues forum: Kristianne Cox

Reception: 4:30-6:00 ■

Newsletter Board

The *Elder Law Newsletter* is published quarterly by the Oregon State Bar's Elder Law Section, Ryan E. Gibb, Chair. Statements of fact are the responsibility of the authors, and the opinions expressed do not imply endorsement by the Section.