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Medicaid-funded services for adults with developmental disabilities

By Julia Greenfield, Staff Attorney, Disability Rights Oregon

For decades, adult Oregonians with developmental disabilities could receive long term care services only in an institutional setting such as the Fairview Training Center. People who requested community-based services languished for years on wait lists, and most were never transferred to community-based care. Individuals with developmental disabilities and their families fought for years for the right to receive services in their communities in non-institutional settings. In 2000, individuals with developmental disabilities sued the state for the right to receive community-based services. The class action Staley v. Kitzhaber lawsuit was settled in 2001. The Staley settlement increased the availability of comprehensive residential services, established the statewide brokerage service system, and ultimately eliminated the wait list for community-based services. In 2009, Oregon closed its last institution for people with developmental disabilities.

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Focus on adults with developmental disabilities

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Oregon now provides Medicaid-funded long term care services to adults with developmental disabilities via two Medicaid home and community-based services waivers: the comprehensive waiver and the support services waiver (also known as the brokerage waiver). Comprehensive services are residentially based services in a licensed setting—most often, in a foster home or group home. Comprehensive services also include intensive in-home supports for which the annual cost exceeds $21,562 per year. New enrollment in comprehensive services is typically limited to individuals who are experiencing a crisis.

Enrollment in brokerage services, by contrast, is available to any Medicaid-eligible individual who meets the eligibility criteria for developmental disability services. Brokerage services are services and supports provided to individuals with developmental disabilities who live in their own homes or with family or friends in non-licensed settings. Brokerage services are brokered and coordinated by brokerage organizations. Brokerages assist individuals in creating and implementing individual plans for supports and services to help them successfully remain at home and participate in their communities.

How can an individual apply for brokerage services?

Contact the Community Developmental Disability Program (CDDP) in the county in which the individual resides to request an application. A county-by-county listing of CDDPs is available at **www.oregon.gov/dhs/DD/pages/county/county_programs.aspx**.

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Julia Greenfield is a staff attorney at Disability Rights Oregon. Her practice focuses on representation of people with developmental disabilities and people with brain injuries, primarily with regard to Medicaid-funded benefits and services. Prior to joining DRO in 2006, Julia was a staff attorney in the public benefits unit of the Multnomah County Office of Legal Aid Services of Oregon.

How is eligibility for brokerage services determined?

The CDDP must determine that the individual has a qualifying developmental disability. In addition, the county Aging and Disability Services office must determine that the individual is financially eligible for Medicaid long term care services.

What is a qualifying developmental disability?

An individual may qualify for developmental disability services on the basis of having either intellectual disability (formerly known as mental retardation) or another developmental disability. "Developmental disability" is defined as a neurological condition that:

- manifests during the developmental years (prior to age 18 for intellectual disability; prior to age 22 for other developmental disabilities)
- originates in and directly affects the brain
- constitutes a significant impairment in adaptive behavior
- is not primarily attributed to other conditions, including but not limited to mental or emotional disorder, sensory impairment, substance abuse, personality disorder, learning disability, or ADHD

Intellectual disability means an IQ pattern under 70. Individuals of borderline intelligence (IQs of 70–75) can also be considered to have intellectual disability as long as there is a significant impairment in adaptive behavior.

Other developmental disabilities include, but are not limited to, cerebral palsy, Down syndrome, fetal alcohol effects/syndrome (FAE/FAS), other fetal neurological disorders (lead, drugs, disease), acquired brain injury (ABI), traumatic brain injury (TBI), epilepsy, pervasive developmental disorders (autism, Asperger's syndrome, Rett's syndrome, PDD NOS), fragile X syndrome, Tourette's syndrome, Prader-Willi syndrome, and Klinefelter's syndrome.

Adaptive behaviors are everyday living skills such as self-care, communication, mobility, self-direction, community use, socialization, self-sufficiency, and functional academics. A significant impairment in adaptive behavior means that on a standardized adaptive behavior evaluation, the individual scores two or more standard deviations below the norm on either the overall composite or on two or more areas of functioning.

What are the financial eligibility criteria for receipt of brokerage services?

The individual must meet the OSIPM financial eligibility criteria set forth in OAR Chapter 461. Generally speaking, the individual must have countable income at or below 300 percent of the full SSI standard for a single individual, or have a qualifying income-cap trust. A full examination of financial eligibility for Medicaid long term care is beyond the scope of this overview.

What are brokerage organizations?

Brokerages help adults with developmental disabilities to develop individualized plans for community living and find supports to implement those plans. Brokerages develop and expand community resources available to meet the needs of people with developmental disabilities in their communities. Brokerages can also serve as fiscal intermediaries for support-service funds. They make payments on behalf of enrolled individuals for goods and services purchased with plan funds.

Brokerages assign a personal agent to provide case management services to each individual enrolled with the brokerage (the brokerage "customer"). Personal agents help brokerage customers:

- develop an individual support plan
- determine the individual budget for the plan
- obtain available resources to implement the plan
- hire/select people or organizations to provide support services
- monitor and evaluate the services delivered
- fulfill their roles and obligations as employers of support staff

Can an individual select his or her brokerage?

An individual can choose his or her own brokerage, as long as there is more than one brokerage in the geographic area and the desired brokerage has openings for new customers. Each Community Developmental Disability Program (CDDP) can provide a list of the brokerages in its county.

How is service planning conducted for individuals enrolled in brokerage services?

Support services for individuals enrolled in brokerages are developed through an annual team-based person-centered planning process.

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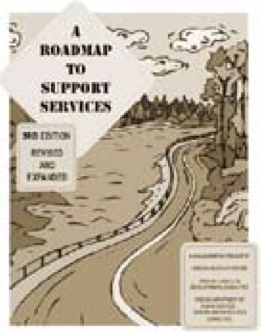

A helpful handbook for brokerage customers engaged in service planning is the "A Roadmap to Support Services," available on Disability Rights Oregon's website at www.droregon.org (Click on "Publications")

All individuals who receive Medicaid long term care services must have an individualized plan of care. In Oregon, the developmental disability plan of care is called an "individual support plan," or ISP. An ISP team—a group consisting of the brokerage customer, her or his chosen family and friends, and certain professionals—develops the ISP. The ISP team functions as the individual's "circle of support," and helps the individual determine and implement her or his choices. The ISP team meets to discuss the individual's personal choices and preferences in all aspects of life: education, employment, home life, social and leisure, transportation, medical and health, communication, finances, and long-term vision, goals, and dreams. The team documents the individual's needs in particular areas (e.g., health, mental health, behavioral, support and maintenance), and identifies skills and risks in other areas (e.g., health and safety, financial). The ISP team translates this information into written goals and objectives and identifies needed services and supports. This written document becomes the individual support plan.

How is the amount of the individual budget for a person's brokerage services determined?

All individuals enrolled in brokerage services have access to a minimum "base" individual budget amount to purchase needed services and supplies. Individuals with extraordinary long-term needs may qualify for annual support services funds in excess of the base benefit level. Eligibility for the "base plus" individual budget level depends on the individual's score on the Basic Supplement Criteria Inventory (BSCI), an assessment completed by the individual's personal agent to evaluate the individual's needs in the areas of long-term health, behavior, caregiver circumstance, and caregiver ability to provide care.

Are individual budget funds considered income or resources for Medicaid or SSI purposes?

No. For Medicaid and SSI purposes, a brokerage customer's individual budget funds are not income or resources. Once the individual budget amount is determined, the brokerage receives the money that will be used to pay for the services identified in the individual service plan. Individual budget funds are never held by or paid directly to the disabled individual. Rather, these funds are expended on the individual's behalf to purchase certain allowable disability-related services that are needed due to the individual's disability.

What are the supports and services that can be purchased for an individual with the support service funds in the person's individual budget?

Allowable supports and services covered by the support services (brokerage) Medicaid waiver include:

- Community living supports:
  - Personal skills
  - Socialization
  - Communication
  - Household skills (meals, budgeting, laundry, housekeeping)
- Employment and community inclusion supports
  - Job exploration, job development, job coaching, on-the-job support
  - Support for social and recreational activities and programs to promote integration with friends, neighbors, and others
- Specialized supports: the services of
  - a behavior consultant
  - a nurse consultant
  - a social/sexual consultant
- Family training
- Respite care
- Special diet
- Homemaker or chore services
- Transportation

Who provides these services to brokerage customers?

Individuals, service organizations, or general businesses may provide services. In some circumstances, family members can be paid individual service providers. Individual service providers must pass a Department of Human Services criminal background check, and all providers must meet specific provider qualifications established by the state. The state has identified usual and customary rate ranges and rate policy for each type of service that can be purchased with individual budget funds.

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Who is the employer of a brokerage customer's individual service providers?

The brokerage customer—not the brokerage itself—is considered the employer of any individual service provider who is not affiliated with a service provider organization or general business. The brokerage customer's personal agent will assist the brokerage customer with hiring and retaining staff and fulfilling her other obligations as an employer.

In addition, the brokerage customer can receive fiscal intermediary services from the brokerage or another organization that makes payments to service providers, reports payments to the state Medicaid program, and handles other fiscal obligations.

Are there other Medicaid benefits and services covered by the brokerage waiver?

Individuals enrolled in the support services (brokerage) waiver may access certain Medicaid "extended state plan" benefits and services in addition to any similar benefits and services covered by the Oregon Health Plan. Extended state plan benefits and services include specialized medical equipment and supplies, physical therapy, occupational therapy, and speech, hearing and language services. For example, the Oregon Health Plan generally covers only two physical therapy sessions per year for adults (except in the first three months following an acute injury). However, an individual enrolled in brokerage services who needs additional physical therapy services beyond those two sessions may qualify for additional PT sessions under the extended state plan benefit of the brokerage waiver.

What happens if brokerage services are insufficient to allow the individual to safely reside at home?

A brokerage customer who is determined to be in crisis qualifies for crisis services. These may be short-term services provided on a one-time basis for up to 90 days to address the crisis. If the crisis is expected to be long term, the individual can be transferred from the Support Services (Brokerage) Medicaid waiver to the Comprehensive Medicaid waiver, in order to be placed in residential services or to receive intensive in-home services.

A crisis is a situation that could result in civil commitment and imminent risk of the loss of the individual's community support system. An individual is considered to be in crisis when one or more of the following risk factors are present:

- The individual is not receiving necessary supports to address life-threatening safety skill deficits, or to address life-threatening health and safety issues that result from complex behavioral or medical conditions.
- The individual currently engages in self-injurious behavior serious enough to cause injury that requires medical attention.
- The individual experiences a loss in caregiver due to the caregiver's inability to provide supports, or a loss of home due to a protective service action.
- The individual is not receiving the necessary supports to address significant safety risks to others (e.g., serious physical aggression, fire-setting, sexual inappropriateness).

What are the appeal rights of brokerage service applicants and brokerage customers?

Like all Medicaid recipients, an individual applying for or enrolled in the Support Services (Brokerage) Medicaid waiver has the right to a Medicaid fair hearing if she or he is determined ineligible for services, or if services are denied, reduced, suspended, or terminated. Medicaid waivers also provide for a right to a Medicaid fair hearing when an individual enrolled in the waiver wants to contest a denial of the type of service requested or denial of the service provider of choice. In Oregon, a Medicaid fair hearing is a contested case hearing conducted by an administrative law judge of the Office of Administrative Hearings. A form to request an administrative hearing for Oregon's developmental disability programs can be accessed at: **https://apps.state.or.us/cf1/FORMS** (search for Form 0443, then click on "SPD/DD Administrative Hearing Request").

A brokerage customer who has a dispute or is dissatisfied with a service provider, brokerage, or county CDDP can file a complaint with the brokerage or CDDP. If the complaint is not resolved satisfactorily by the brokerage or CDDP, the individual can request review by the state Office of Developmental Disability Services. Developmental disability complaint forms can be found at **https://apps.state.or.us/cf1/FORMS.** (Search for Form 0946, then click on "Developmental Disabilities Services Complaint Form.")

Where can I find the Oregon Administrative Rules regarding brokerage services?

See OAR Chapter 411, Division 340: "Support Services for Adults with Developmental Disabilities." Eligibility criteria for developmental disability services are found at OAR 411-320-0080.

Who can advise attorneys who need additional information about Medicaid-funded developmental disability services in Oregon?

Disability Rights Oregon provides free technical assistance to attorneys in certain disability-related legal matters. To request technical assistance, contact DRO by phone at 503.243.2081, or by e-mail at welcome@droregon.org. ■

Social Security benefits for individuals with an intellectual or developmental disability

By Jenny Kaufmann, Attorney at Law

Jenny Kaufmann is an active pro bono attorney with the statewide public benefits hotline run by Legal Aid Services of Oregon and the Oregon Law Center.

The transition from childhood to adulthood is difficult for anyone, but it is even more difficult and confusing for individuals with an intellectual or developmental disability and their families. Many individuals with an intellectual or developmental disability need assistance from federal and state governments during childhood and on throughout adulthood. The benefits and services provided by the government include cash assistance, medical care, housing, and a wide variety of other support services. The Social Security Administration (SSA) Title II retirement, survivors, and disability programs are fairly well known because anyone who has worked as an employee or filed taxes has paid into the system through payroll taxes. What are not as well known or understood are Title II Disabled Adult Child (DAC) benefits and Title XVI Supplemental Security Income (SSI) benefits, and how they can work together to increase the quality of life for individuals with intellectual or developmental disabilities.[1] Individuals with an intellectual or developmental disability may receive cash assistance from Social Security based on parents' earnings records or their own earnings records, through the Supplemental Security Income (SSI) program or a combination of the programs in addition to health care benefits from Medicaid and Medicare.

Social Security Title II benefits are paid to a wage earner who has worked long enough and recently enough to have sufficient credits. This is generally known as insured status. A wage earner born after 1929 must have 40 quarters of credits to be eligible for retirement benefits. The number of credits required for disability benefits depends on how recent the work is and the age of the individual. Most workers must have at least 20 credits of recent work to be eligible for disability benefits. For individuals under age 31, the number of required credits varies because they were less likely to have a work history; it was assumed they were attending school or learning a trade.[2] The amount of a worker's monthly retirement or disability benefit is based on his or her earnings history. In 2013 the average monthly benefit for a single wage earner is about $1,100 per month. The maximum benefit in 2013 for someone who retires at his or her full retirement age is $2,533 per month. A chart is available at **www.ssa.gov/oact/cola/examplemax.html** that lays out sample benefits for a worker with steady maximum taxable earnings.

A wage earner can retire as young as age 62, but a penalty is assessed for electing to retire prior to one's full retirement age. As the full retirement age increases, so does the penalty, which has a detrimental effect not only on the wage earner's benefits but also those of his family members or survivors. The penalty for early retirement ranges from 20 to 30 percent and from 25 to 35 percent for family members. (See **www.socialsecurity.gov/retire2/agereduction.htm**.) For this reason, it is sometimes advisable for a wage earner to pursue disability benefits if there is a medical reason for retiring prior to the full retirement age.

There are two basic types of benefits that may be paid to a wage earner's eligible dependents under Title II: family benefits or survivor benefits. The difference between them is essentially the amount of the monthly benefit. Eligible family members may receive a monthly benefit while the wage earner is alive and entitled to a monthly retirement or disability payment. The family benefit is about half of the wage earner's benefit and is divided equally among eligible family members. 20 CFR 404.403-406. The total amount of benefits paid to a wage earner and all eligible family members can be anywhere from 150 to180 percent of the basic benefit rate. Eligible family members include spouses, dependent unmarried children under age 18 (biological, adopted, and some step children and grandchildren), and disabled adult children. There are special rules regarding divorced spouses, but the most important to remember is that benefits paid to an eligible divorced spouse do not affect the benefit rates for other eligible family members or the family maximum.

A wage earner's eligible survivors may also receive Title II survivor benefits. Benefits are provided for a wage earner's unmarried children and the surviving spouse who provides care for unmarried children under age 16. 20 CFR 404.330, 335, 350.

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The number of credits needed to provide benefits for a wage earner's survivors depends on the age of death, but it is never more than 40 credits. The younger a person is, the fewer credits are necessary. There is a special rule that allows survivor benefits to be paid to surviving unmarried children and a surviving spouse providing care to children under age 16, if the wage earner has six credits in the three years prior to his or her death. The maximum amount a surviving spouse is eligible to receive is limited to what the wage earner would have received if he or she were still alive. 20 CFR 404.338. The maximum amount a surviving unmarried child under age 18 or disabled is allowed to receive is 75 percent of the wage earner's monthly benefit. 20 CFR 404.353.

Social Security also pays benefits to wage earners who are no longer able to work because of a medical condition. SSA defines disability, for adults or children, as "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment, which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 USC 423(d)(1)(A). A five-step sequential process is used to determine whether or not someone is disabled. Social Security also requires that the wage earner be insured as explained above. Once a wage earner is found disabled and entitled to payment, eligible family members, a spouse, and unmarried children up to age 18 or disabled, may be entitled to family benefits up to the family maximum. These family maximum rules are similar to those for retirees.

Unmarried dependent children remain eligible for family or survivor benefits only until they reach age 18 (or 19 if they are attending primary or secondary school full time) or if the child is disabled prior to age 22. Disabled adult child benefits (DAC) are payable only to unmarried adult children. There are some exceptions to this rule, including marriage to someone who is also a disabled adult child. In addition, termination of the marriage may entitle the individual to reinstatement. In addition, an individual may be entitled to some DAC benefits in addition to the benefits received on his or her own earnings record.

The disability determination for disabled adult children is the same as that for any adult. Individuals with an intellectual or developmental disability often meet the Social Security disability definition but are not eligible for benefits on a parent's wage record until a parent retires, dies, or becomes disabled. This may mean they will have to wait until they are in their 40s or 50s to begin receiving benefits. It is important that parents or other family members keep medical and school records for a very long time so that they can prove their adult child or a sibling meets the definition for a disabled adult child. This record keeping is becoming easier as more and more records are stored electronically. In the interim, individuals with an intellectual or developmental disability who are not eligible for cash benefits on a parent's earnings record may be eligible for SSI benefits, even if they continue to attend school and live with a parent or parents.

Supplemental Security Income (SSI) is a federal income maintenance program for any US citizen who is blind, disabled, or aged and who has income and resources below the statutory limits. The maximum monthly federal benefit rate (FBR) is set by law. In 2013 it is $710. (See 20 CFR 416.401 *et seq.* for how to calculate the monthly FBR for an individual or couple.) Some immigrants may also be eligible to receive SSI depending on their date of entry into the US and their immigration status. For a chart that explains immigrant eligibility for various programs, go the website for the National Immigration Law Center at **www.nilc.org** and click on the link "overview of immigrant eligibility for federal programs."

SSI benefits do not require that someone have a work history or meet the insured status rules for the Title II program. The regulations that govern the SSI program are found at 20 CFR 416. The definition and sequential process for what constitutes a disability for individuals older than 18 is the same as that for any adult applying for Social Security disability benefits. However, the process for determining whether an individual under age 18 is disabled is slightly different, because children do not have a work history and the listing of impairments for children include some conditions that are not present in adults. It is important to note that many children who meet the disability definition for SSI are in-

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Individuals with an intellectual or developmental disability may be eligible for Title II benefits on their own earnings record.

eligible for benefits because of deeming rules regarding their parents' income and resources or because a noncustodial parent is paying child support. The parental income deeming rules do not apply, however, once the child reaches age 18. Any other income the child has— whether it is earned, unearned, or in-kind—will reduce any monthly benefit payment. The income rules are found at 20 CFR 416.1100 *et seq*. Note that the in-kind support rules include payments made for food and shelter by a third party. These rules provide for a reduction of benefits up to a maximum of one-third of the monthly benefit. 20 CFR 416.1147 *et seq*.

Finally, the resource limit for an individual receiving SSI is $2,000. Any non-exempt resources in excess of that amount will result in eligibility for SSI until the non-exempt resources are reduced below the statutory limit. Exempt resources include a person's home, one vehicle, a burial fund, and special needs trusts. See 20 CFR 416.1201 *et seq*.

It is important that an application for SSI be filed for children over age 18 who are still living with their parents, even if they do not need the cash benefits. The reason for this is that once an individual is determined eligible for SSI and is receiving at least the minimum benefits payable, that individual is also eligible for state medical assistance (e.g., Medicaid) benefits. 42 USC 1396a(a)(10)(A)(i)(I).

While adult children may be carried on a parent's private health insurance policy, this coverage does not affect eligibility for the medical assistance program. The private health insurance will still be the primary source of healthcare coverage. Medicaid rules vary from state to state because it is a federal-state program, but Medicaid is always considered to be a secondary or tertiary insurer after private insurance or Medicare/Tricare.

Eligibility for Medicaid as an SSI individual becomes even more important as the individual ages and may lose eligibility for health insurance through a parent. It is also important to establish Medicaid eligibility as an SSI recipient because of the protected status that it is given when an individual becomes ineligible for an SSI payment because he or she is now eligible for benefits as a disabled adult child or is now working despite his or her medical condition. 42 USC 1619b and 42 USC 1383c. An individual must have received at least one month of SSI benefits to receive this protection. While a disabled adult child will be eligible for Medicare after he or she receives those benefits for two years, health insurance through Medicaid remains important. Ultimately, this means that an individual who was disabled prior to age 22 can have a much higher monthly income, based on a parent's wage record, and still retain eligibility for Medicaid.

Other considerations

The opportunities for individuals with an intellectual or developmental disability are far greater than in the past thanks to federal statutes like the Americans with Disabilities Act, 42 USC 12101 *et seq*., and court decisions such as *Olmstead v. L.C. and E.W*., 527 US 581 (1999). Work opportunities and community support services have expanded. Individuals with an intellectual or developmental disability may be eligible for Title II benefits on their own earnings record in addition to eligibility on a parent's earnings record. But under current law, it still critical to apply for and receive at least one month of SSI benefits to obtain the protected status afforded for Medicaid benefits.

There are other benefits that may be available to individuals with an intellectual or developmental disability, including benefits paid through the federal Office of Personnel Management, the Department of Defense, and the Veterans Affairs Office. The definition of who is a disabled adult child differs depending on the program, and SSA does not always adopt the disability decision made by another agency, although it is supposed to defer to those decisions. This article does not address those benefits or any private benefits that may be payable. But careful record keeping and planning are critical to maximize the benefits a person may receive. ■

Footnotes

1. Title II and Title XVI refer to titles found in the Social Security Act, 42 USC 401 *et seq.* and 1601 *et seq*.
2. For a more comprehensive discussion of insured status, please see SSA Publication 05-10029, which can be found at **www.ssa.gov/pubs/10029.html#a)=1**.

Testamentary trusts for clients with special-needs children

By Marcus R. Whitney, Attorney at Law

Marcus Whitney is an associate at Douglas, Conroyd & Gibb, P.C., a Salem law firm. He is an accredited attorney with the VA and his areas of practice include VA benefits, elder law, protective proceedings, estate planning, and business law.

When planning for clients who have special-needs children, the clients' goal often is to ensure that the children have the means to acquire goods and services that would not otherwise be available to them from government programs. This is a key purpose of a supplemental needs trust (SNT). SNTs generally come in two categories: first-party SNTs and third-party SNTs. As the labels suggest, the distinction between the two turns on the source of the funds. A first-party SNT is one that is funded with the disabled person's own property. An SNT is a third-party SNT only if it is created by and funded with property not owned by the disabled person. Third-party SNTs should always be considered by the estate planning attorney, especially if the attorney knows that the clients have special-needs children or other disabled persons they intend to benefit.

Typical scenarios

Proper planning can have a significant effect on a disabled beneficiary's supplemental support. Imagine that Client A and Client B are identical clients with the exception of one thing: Client B's parents took into consideration Client B's disability benefits by creating a testamentary SNT, while Client A's parents did not.

Client A is a disabled individual under 65 years old and is on SSI and Medicaid. She has just received news that she is to inherit about $250,000 from her mother, who recently passed away. Unfortunately, receiving the money will disqualify Client A for SSI and Medicaid. SSI law counts the inheritance as income in the month it is received and a resource every month thereafter. See POMS SI 00810.010. So Client A will be disqualified in the month she receives the inheritance and every month thereafter until Client A spends or protects all but $2,000 of her resources. *Id.*; 42 U.S.C. §1382(a).

While she was grateful for the inheritance, Client A did not want to lose her SSI income and Medicaid benefits and have to spend her inheritance on living expenses until she would once again qualify for SSI. She would much rather use the money for things she had not been able to afford when living on her limited SSI income. She cannot disclaim the property or give it away because SSI law penalizes such transfers. See 42 USC 1382b (c)(1).

Fortunately for her, SSI law makes an exception for transfers to first-party SNTs. See 42 USC 1396p(d)(4)(a). By using the money to fund a first-party SNT for her benefit, Client A's inheritance will no longer be an available resource to her under SSI law, and no penalty will be imposed for the transfer. However, the laws for such a trust are restrictive, requiring that the individual be under the age of 65 at the time of creation, that the trust be for the sole benefit of the individual, and that the trust settlor be a parent, grandparent, guardian, or the court. *Id*. Moreover, upon the trust termination, the rules require the trust to use any remaining trust funds to pay the government back for the amount of benefits the individual received—a result Client A's mother likely would have wanted to avoid if she had known. *Id*.

Imagine the same facts for Client B, except Client B's parents did not leave the $250,000 to her outright. Rather, they created a testamentary third-party SNT for the benefit of Client B. Because she never receives the funds and because the third-party SNT is not a countable resource, Client B does not lose any benefits. The SNT is not subject to the restrictions imposed on first-party SNTs, and so even if Client B is more than 65 years old, her SNT is still allowed.

Additionally, when Client B passes away, or is no longer in need of government benefits, the trust can terminate and distribute to whomever Client B's parents designated without being subject to a claim by the state. Moreover, because her SNT need not be for her sole benefit, Client B's SNT can pay for things that will enhance her quality of life that would not be allowed under a first-party SNT. For instance, the SNT can pay for family members to visit her; it can purchase holiday presents for her family and friends; and it can pay for family, friends, or caregivers to go with her on vacation.

Historically, first-party SNTs were allowed to pay for family members to visit the disabled beneficiary and for caregivers, including family

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members, to go on vacation with the beneficiary if the disabled individual needed it. However, examples were added to POMS SI 01120.201(F) in June, 2012, which stated that paying for a family to visit would not be for the sole benefit of the disabled person. The examples left unclear whether paying for a family member to go on vacation as a caregiver would be allowed, but suggested it might not.

Recently, in response to criticism from the special-needs-planning community, the SSA has removed the 2012 changes to the POMS pending further consideration. At this point, uncertainty remains regarding SSA's future position on the issue. Also, SSA's policy regarding caregivers recently has changed to require both family and non-family caregivers be medically trained, without providing guidance on what that means. See Kenneth M. Coughlin, "At Post-Election Institute, Palpable Relief But No Time to Rest for Practitioners," *The ElderLaw Report*, Jan. 2013, at 1.

A third-party SNT can be created even after the beneficiary is 65 years old,. Anyone can create it, and the government has no right to the funds upon trust termination—meaning the settlor has the control to provide for the distribution of the funds when they are no longer needed for the disabled beneficiary. For a third-party SNT not to be a countable resource for SSI purposes, the disabled beneficiary cannot control the amount or frequency of distributions, nor revoke the trust and use the funds for the beneficiary's personal benefit. POMS SI 01120.200(D)(2). If those elements are met, then the trust funds will not be a countable resource and will not interfere with the disabled beneficiary's government benefits by virtue of its existence.

Advantages of a testamentary SNT

As illustrated above, a third-party SNT provides a disabled beneficiary a much richer provision of his or her supplemental needs compared to a first-party SNT. Because distributions from the trust need not be for the sole benefit of the beneficiary, the trust can pay for any number of things that would enhance significantly the quality of life for the beneficiary, but may incidentally or directly benefit others. The requirement that a first-party SNT grant a claim to the state for benefits paid on behalf of the disabled beneficiary means that a first-party SNT cannot pay for burial or funeral expenses of the disabled beneficiary when the beneficiary dies. POMS SI 01120.203(B)(3)(b). However, no such restriction exists for a third-party SNT.

Often the need for an SNT does not arise during the parents/clients' life because the parents/clients provide for the special needs of their disabled child directly. But when the parents die, there may be no one with the resources or inclination to provide for the disabled child. A testamentary SNT is an effective way for a client to pass the baton, ensuring that one or more people are charged with managing resources for the special-needs child. A testamentary SNT can be incorporated into a will or a revocable living trust. Because, as a third-party SNT, there is no requirement that the trust be for the sole benefit of the disabled child, the testamentary SNT can be a sub trust, or a pooled trust for all the children that provides for SNT distribution provisions for the disabled child. However, as a practical matter, it is much easier to manage a single beneficiary SNT. The only exception may be where there is more than one disabled beneficiary in need of an SNT, in which case, a pooled trust may be preferable.

Preparing the testamentary SNT

It is beyond the scope of this article to discuss in detail the specific drafting points of a third-party SNT, but because of the broad flexibility afforded people who plan ahead for their disabled child (or relative, or friend), there are a number of factors one should consider in crafting a trust appropriate for the specific situation. One important factor is the specific benefits the special needs beneficiary is receiving or is expected to receive in the future. SSI and Medicaid are governed by similar but not identical laws. It is important to become familiar with the specific requirements of each regulatory scheme to be sure that the trust meets the relevant requirements so the trust is not a disqualifying resource.

The estate planning attorney should take care in drafting the distribution standards. Generally, it is best to give the trustee full and sole discretion in making distributions, guided only by SNT rules which prohibit distributions for food and shelter without a reduction or loss of benefits. See POMS SI 00835 et seq. Also, any distribution of cash or cash equivalent (such as a gift card) is considered unearned income to the beneficiary and can reduce his or her benefits. See 20 CFR 416.1120.

Also, recently, the SSA has taken the position that reimbursements from the trust to someone who has paid for expenses are unearned income to the beneficiary, even if the expenses could have been paid by the trust directly. Trust distributions should be limited to direct payments for expenses. See Kenneth M. Coughlin, "At Post-Election Institute, Palpable Relief But No Time to Rest for Practitioners," *The ElderLaw Repor*t, Jan. 2013, at 1.

However, there are times when it is in the best interest of the disabled child to make distributions that would temporarily decrease or eliminate government benefits. In some circumstances, you would want to give the trustee authority to make such distributions. Under current SSI law, such a provision does not destroy the SNT's exclusion as a resource. Medicaid rules are unclear whether the trustee's discretion to use the trust for food and shelter if it is in the best interest of the beneficiary would cause the entire SNT to be a countable resource. Because an SSI recipient is categorically qualified for Medicaid, such a provision in the SNT for that beneficiary would not affect the SSI recipient's Medicaid eligibility. However, if a beneficiary receives Medicaid, but not SSI, there is a risk that the discretionary

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Supplemental needs trusts

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A supplemental needs trust is an excellent tool to provide for the ongoing care of clients' special needs children.

provision would make the SNT a countable resource under Medicaid rules. The drafter should give careful consideration before incorporating such a provision.

When drafting the SNT distribution provisions, the drafter also should consider the specific goals of the settlor in providing for the disabled beneficiary. During the settlor's life, the settlor likely is the disabled child's primary advocate and case manager. When the settlor is no longer there to perform that role, the child's care may suffer. It may be that the client would like the trust to hire a case manager to work with and advocate for the disabled beneficiary. If so, it is important that the trust communicate that to the trustee and give the trustee authority to hire a case manager.

The client may also want to create a separate document, a memorandum, that sets out information the client feels is important for a successor case manager to know, such as medical history and expected medical needs, family dynamics regarding the disabled child, and recreational, vocational, spiritual, and other needs. This document should be a living document updated frequently throughout the client's experience caring for the disabled beneficiary.

The inter vivos SNT

This article has focused on testamentary SNTs, but it is worth mentioning that the third-party SNT can also be created during the life of the settlor. However, the need to do so is uncommon. Generally, there is no need for an SNT during the life of the parents of a disabled child. The parents can provide for the supplemental needs of the child without the trust, though they must still avoid paying for food and shelter to preserve benefits. Even when a parent loses capacity, an integrated estate plan will include an agent's power to continue a pattern of giving and a power to make expenses for a dependent in a power of attorney or revocable living trust. These provisions should ensure the settlor's resources are still available to meet the disabled child's supplemental needs.

Because laws change, as do the needs of the child and the availability of successor trustees, creating an inter vivos trust is contraindicated as it would require amendment of the trust, which can become an issue if the trust is irrevocable. An *inter vivos* SNT could also be revocable, which would ease the administrative burden. However the settlor would owe tax on the trust income and the property would be a part of the settlor's estate. Even if the SNT is irrevocable, the trust can provide that the trustee has authority to make certain amendments. But, unless there is a fact-specific advantage to an inter vivos trust, generally there is no compelling reason to hassle with the added expense and administration.

Notwithstanding, there are some circumstances where an i*nter vivos* SNT would be appropriate, even if the settlor does not fully fund it until after the settlor passes. For instance, if there are several people who intend to benefit the disabled child, either by testamentary or lifetime gift, it would be more efficient to have one trust to which each can contribute. When creating an SNT, the client will want to coordinate with other family members and friends to advise them not to leave property to the disabled child directly, but to the SNT.

The SNT as a part of an estate plan

An SNT is an excellent tool to provide for the ongoing care of clients' special needs children. A third-party SNT is free of the many onerous restrictions of the first-party SNT and provides clients with a significant amount of flexibility to craft a trust to meet the specific circumstances of the special needs child and the rest of the family. Even where a client is not known to have any disabled children at the time his or her estate plan is created, the drafter should consider a provision in the will or trust to give the personal representative or trustee the authority to distribute a child's share to an SNT, if a direct bequest would disqualify a beneficiary from government benefits. ■

The ARC Oregon: a pooled trust program

By Paula Boga and Marcie Ingledue

Paula Boga recently joined The Arc Oregon as the Program Director for the Oregon Special Needs Trust (OSNT) Program. Paula has an extensive background in regulatory compliance and program management.

Marcie Ingledue is the executive director of The Arc Oregon. Marcie has been involved with disability issues since the birth of her own son with intellectual disabilities. Using her business background and experience, she began her disability advocacy work as a volunteer and now works full time in the field of intellectual and developmental disabilities.

One of the most important tools in estate planning is the use of a special needs trust, also known as supplemental needs trust, to help provide for family members with disabilities while protecting their eligibility for governmental benefits. In Oregon, one of the easiest ways to facilitate this type of trust is through the Oregon Special Needs Trust (OSNT) Program of The Arc Oregon. The OSNT is a pooled trust established in 1999 and administered by The Arc Oregon, a nonprofit organization for people with intellectual and developmental disabilities. Although The Arc Oregon's mission provides advocacy for individuals with intellectual and developmental disabilities and their families, the pooled trust serves any person with a disability as defined by the Social Security Administration, including intellectual, developmental, mental, or physical disabilities.

Supplemental needs are defined as those needs over and above basic items such as food and shelter, which are not otherwise covered by any public benefits and which may serve to improve the quality of life of individuals who are dependent upon government support. This might include excess medical expenses (e.g., co-payments), clothing, personal care, entertainment, or travel.

A pooled trust is one in which a single master trust is used to serve many individuals enrolled in the trust. Individuals enroll in the OSNT master trust by establishing their own trust sub-account, which is individually monitored and administered for the beneficiary's sole benefit. The money deposited by or on behalf of an individual is pooled with the money from other account holders for fund investment and management purposes. This provides a cost-effective and accessible option for individuals with account balances too small to warrant a private trust.

Advantages of a pooled trust

The OSNT offers several advantages for families planning for a loved one's financial future, or for individuals with a disability who find themselves in receipt of a lump sum of money that jeopardizes their eligibility for public benefits.

One such advantage is a low minimum. Most banks require a sizeable balance in order to establish a private trust. Most pooled trusts have either a very low or no minimum requirement for establishment of a sub-account. For individuals who have a small pool of money from a Social Security back payment or legal settlement, or even family members who plan to leave a small inheritance, a private trust held through a bank is not an option.

Another advantage is that the fees associated with the establishment and administration of the OSNT sub-accounts are usually significantly lower than they would be with a bank trust and/or private trustee. Because the OSNT is administered by a nonprofit organization, the fees are determined based on the amount of money needed to administer the program effectively and not on potential profit.

Additionally, the rules and regulations that must be adhered to in the administration of a trust specifically established to maintain eligibility for government benefits are often too cumbersome for individuals who are not experienced in this area, such as friends or family members. The OSNT offers professional trust administration by experienced staff well-versed in government compliance requirements, for a fraction of the cost of a professional trustee.

Establishing an OSNT

The OSNT accepts applications for both first-party and third-party trust sub-accounts.

First-party trust accounts are funded with the beneficiary's own money. A first-party OSNT sub-account may be established by a person with a disability under the age of 65, a parent, a grandparent, a guardian, or the court. If the beneficiary is financially incapable as defined in Oregon Revised Statutes (ORS 125.005(3)), a court order is required in order to establish and fund the sub-account. This applies even if the beneficiary has a guardian or conservator. Likewise, representative payees and caregivers may not enroll on behalf of a beneficiary unless specifically authorized to do so through a court order.

Third-party trust accounts are those established and funded by a beneficiary's parent, grandparent, or guardian (referred to as the "donor"). A third-party (or donor-funded) trust is typically the result of advanced estate plan-

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The ARC Oregon

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ning, wherein the donor leaves an inheritance to the trust for the benefit of the beneficiary, rather than directly to the beneficiary. By transferring assets in this manner, the beneficiary is not in danger of receiving excess funds that would affect his or her government assistance because the assets move directly from the estate of the donor to the trust.

In the case of a first-party account, pursuant to the Omnibus Budget Reconciliation Act of 1993, the OSNT may retain any funds remaining after the death of the sub-account holder if the account was established with that person's own money. Typically, the remainder funds retained by a pooled trust are used for the benefit of sub-account holders who have depleted their funds and/or other individuals with a disability who need assistance in providing for their own supplemental needs. Funds not used to benefit the OSNT must be provided as a Medicaid payback provision to satisfy the Medicaid lien with the state of Oregon. Pooled trust program policies regarding remainder funds, and their respective agreements with state Medicaid programs concerning the amount of funds retained, vary from state to state.

In the case of a third-party account, the donor gets to name the remainder beneficiaries. There is no Medicaid payback requirement.

The OSNT Program currently serves more than 750 individuals with disabilities and holds over $11 million in assets. The Arc Oregon works with individuals and families statewide in exploring the possibilities of a special needs trust in planning for the future. The OSNT Program is currently making great strides in updating the trust program in order to offer more efficient, customer-oriented trust administration. This includes the introduction of new trust administration software, new branding for publications, downloadable forms, and online access to account statements for account holders.

More information about the OSNT, including fees and the enrollment process, is available online at **www.TheArcOregon.org** or by contacting its office in Salem directly by calling 503.581.2726. ■

Volunteer for the May unCLE program

If you usually participate in the Elder Law Section's UnCLE program in May, please consider facilitating a session.

We normally have two sessions in the morning and two sessions in the afternoon, with a choice of four topics during each session. Each session lasts approximately 90 minutes.

There is no particular structure, but we request that a facilitator take on the responsibility of providing very basic written materials designed to generate discussion (and for CLE credit), and moderate a discussion if any "moderation" is needed.

Most of the sessions are very informal and the discussions are generally informative and helpful.

If this is something you would like to do, your participation as a facilitator would be greatly appreciated. Please contact Don B. Dickman at 541.485.6767 or donbdickmanpc@gmail.com. ■

Who will be the guardian for a developmentally disabled adult?

By Amy Davidson, Attorney at Law

Amy Davidson is an attorney with the Law Offices of Nay & Friedenberg in Portland. Amy guides her clients through the process of making decisions not only about leaving a legacy, but also about how health care and financial decisions will be handled if one is incapacitated by age or accident. Before the arrival of her daughter, Amy's only "child" was her dog, so she understands how important pets are in the lives of many people. She reminds her clients to include them in their planning and has special expertise in this area. In the absence of advance planning, she helps concerned family members decide when and how to make provisions for managing health care and financial matters for those who can no longer do this for themselves.

At some point, an elder law attorney will likely have to address the question of who will be the guardian for a developmentally disabled adult. Parents often seek an attorney's advice about guardianship as their disabled child's eighteenth birthday approaches. Elder law attorneys frequently assist an estate planning client who wishes to plan ahead for the care of a developmentally disabled child after the client's death. Or, in the case of a developmentally disabled person who appears to be "lost in the system," the attorney may be asked to step in and do something.

Guardianships are not always necessary for a developmentally disabled adult. As always, when alternatives to guardianship are available, those options should be explored first. This article assumes that a guardianship is necessary. Even when a guardianship is necessary, it is not always possible due to financial or other constraints, so a discussion of what might happen in that situation is in order.

Considerations for choice of guardian

Only a court can appoint a guardian, but parents may express their preference, and their preference is one of the factors the judge must consider. ORS 125.200. Attorneys can help guide their clients with making a decision about nomination of the most appropriate guardian. The ideal guardian will understand the disabled adult's medical and emotional needs sufficiently and have the ability to advocate effectively. In addition, taking into account practical considerations such as physical proximity, availability, age, and health of the proposed guardian may avoid problems later. If the client is fortunate enough to have more than one qualified candidate for the job, naming an alternate in estate planning documents is always a good idea.

Nominating a guardian is often an emotionally charged task. When no family member or trusted friend is willing or able to serve as guardian, tensions run even higher. Attorneys can provide guidance and alleviate the client's anxiety. Following are some options for clients in this situation to consider.

Oregon is fortunate to have many skilled professional fiduciaries who can assist families in this situation. The Oregon Guardianship/Conservatorship Association, Inc., is an excellent resource for information about professional guardians in the area. As with any professional service, professional guardians charge for their time and skills. Generally, they charge on an hourly basis. Therefore, the professional fiduciary's services are not usually available to those who lack the means to pay for them. In some cases, the professional fiduciary's fees are paid by a trust established for the benefit of the protected person (only with the approval of the court) or by a third party.

A few nonprofit agencies in Oregon try to fill the need for low-cost professional fiduciary services. These include the Guardianship, Advocacy and Planning Services (GAPS) program of The ARC Oregon. Impact NW also has a Guardianship Assistance Program (GAP) program. These nonprofits provide low-cost guardianship services. However, they have a limited capacity and cannot serve all. Contact the agencies directly for more information on their programs.

Even when a suitable guardian is found, the attorney fees and court costs can make the process prohibitively expensive for private parties. Upon court approval, the protected person's funds may be used to reimburse the petitioner for expenses, but in many cases, no one has sufficient resources to pay.

The Multnomah County Public Guardian's office serves as guardian for the most vulnerable people in Multnomah County at no cost. The Multnomah County Attorney's office files the petition on behalf of the Public Guardian. The Public Guardian's resources, however, are extremely limited and can serve only a tiny fraction of those who need their services. The Governor's Public Guardian and Conservator Task Force has been working for years to promote a statewide public guardian and conservator, but nothing has come to fruition yet.

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Selection of a health care representative to make decisions

Clearly, not all persons who need a guardian will be able to have one. For developmentally disabled individuals who live in licensed care facilities, however, the Oregon Department of Human Services (DHS) has an alternative. DHS notes that "Access to health care is essential to individuals' health and safety and inability to give informed consent as required by ORS 430.210 is a major barrier to that access." OAR 411-365-0100(2)(a). These rules allow a health care decision maker to be appointed even when the individual lacks the capacity to do so. This health care representative has much of the same powers as a guardian, with some notable exceptions.

All developmentally disabled persons under the purview of DHS (i.e., developmentally disabled persons living in licensed care facilities) have an individual support plan (ISP) team that meets regularly. The ISP team consists of the individual, current service providers, legal guardian (if there is one), the services coordinator, family, an advocate, and others deemed appropriate by the individual. The ISP team must have at least three people in addition to the disabled individual. In the ISP team meetings, the individual's health and emotional well-being are discussed and goals are set.

If the disabled individual has the capacity to appoint a health care representative, the rules empower the individual to do so. OAR 461-365-0120(12)(a). Even if a person has been found "incapable" of making health care decisions by a judge or treating doctor, the individual may still have sufficient capacity to make a decision about the appointment of a health care representative. The ISP team determines whether or not the individual has such capacity. OAR 411-365-0160(2).

When the person is incapable of making health decisions and incapable of appointing a health care representative, then someone else may do so. The rules provide the process by which a person other than the disabled individual can make an appointment. The rules allow the following people to make the appointment, listed in order of priority: spouse, guardian "who lacks the power to make health care decisions," adult children, parents, and adult siblings. OAR 411-365-0200(1). When no such person exists in the disabled individual's life, or one cannot be found through reasonable efforts, the ISP team has the power to appoint a health care representative. Certain persons are prohibited from serving as health care representative, namely the individual's attending physician and care providers. OAR 411-365-0220.

The health care representative's authority continues one year, unless there are sufficient reasons to terminate the authority sooner. OAR 411-365-0200(3). The authority includes access to medical records. The rules grant the health care representative "all the authority over the individual's health care that the individual may have" yet subject to limitations. OAR 411-365-0240(2). Such limitations include the inability to make decisions about convulsive treatment, psychosurgery, sterilization, abortion, and end-of-life care, including tube feeding and life support. The same rule also renders any decision made by the health care representative null and void if the disabled individual objects to it. OAR 411-365-0260.

The disabled individual (or another person on the individual's behalf) may appeal any determination or decision made under these rules by writing to the Director of DHS. The Director shall respond in writing within 15 business days and the Director's decision is final. OAR 411-365-0320.

The rules confirm the rights of "capable" developmentally disabled persons in licensed care facilities to make their own health care decisions. OAR 411-365-0100, 411-365-0160(1). According to the definitions under the rule, the individual is considered "capable" when he or she has the ability to make and communicate decisions. OAR 411-365-0120(12). The "capable" developmentally disabled individual may also appoint a health care representative under an Advance Directive for Health Care pursuant to ORS 127.505 to 127.660. OAR 461-365-0160(2).

Jan Friedman of Disability Rights Oregon recently reported that no one has complained to that office of these rules being used inappropriately since they were implemented in March 2012.

For developmentally disabled individuals in private homes and not in licensed care facilities, these rules do not apply; therefore, no one else may appoint a health care representative in this situation. When a guardianship is needed but the circumstances make it impossible, the care providers, family, and friends have to find other ways to meet the individual's needs without a guardianship. In most cases, this arrangement works well enough, but without any oversight, there is potential for abuse.

The challenges

Planning for a developmentally disabled child can be the most difficult challenge a parent can face. While many options exist, there are not enough to fit every situation. In the future, more options may become available and it is important for the attorney to keep abreast of all of them. ■

An overview of Oregon's sterilization laws

By Maryam Azizi, Attorney at Law

Maryam Azizi is a licensed California and Oregon attorney. As an Iranian-American immigrant passionate about civil and human rights, Maryam has spent her career volunteering as pro bono counsel in the public-interest arena. She volunteered for The Esperanza Immigrant Rights Project, where she defended an indigent client in federal deportation proceedings. She currently volunteers at Disability Rights Oregon, advocating for clients with disabilities.

To the layperson, the concept of eugenics might bring to mind futuristic technologies and omniscient governments. It might bring back passages from literature read during teen years, and images from suspenseful films probing the question, "What if...?" However, to the lawyer this is not something that exists solely in literary tropes that warn of the dangers of differing political ideologies. Nor does it come from some blockbuster screenplay illustrating the perils of becoming too technologically advanced. This was the twentieth-century United States of America. Today, eugenics is discredited and the civil rights of individuals have become a concern of society.

Historical context of sterilization laws

In the yet-to-be-overruled Supreme Court Case *of Buck v. Bell*,[1] Justice Holmes's opinion epitomized the rationale behind the burgeoning eugenics movement of the late nineteenth and early twentieth centuries. Stating that the welfare of society may be promoted by the sterilization of mental defectives, the opinion invalidated both substantive due process and equal protection claims made against Virginia's sterilization statute. This allowed for the forcible sterilization of a woman living in a state institution (at the time known as the State Colony for Epileptics and Feeble Minded), because she and her mother were deemed to be of below average intelligence—as was her illegitimate child at just one month of age. According to Justice Holmes, "Three generations of imbeciles are enough."

But how could that be? Did our Supreme Court actually hold that a state could sterilize people it deemed inferior? It did. The idea of the state controlling reproductive rights was not limited to the realms of contraception or abortion but went, rather willingly, into the realm of sterilization. Between 1900 and 1925, 33 states enacted laws providing for forced sterilization. Oregon was no exception.

Two major social developments occurred after the 1890s that allowed for the rise in sterilization laws: the eugenics movement advocating the elimination of inferior or defective characteristics in order to refine the genetic pool, and the invention of the vasectomy for males and tubal ligation for females—less intrusive and lower risk sterilization methods.[2]

In 1923, Oregon established the Oregon State Board of Eugenics, later named the Oregon State Board of Social Protection. Supporters saw the law as being nonpunitive and therapeutic for both the patient and society. The law permitted the sterilization of "persons, male or female, who are feeble-minded, insane, epileptic, habitual criminals, moral degenerates and sexual perverts, who are, or … who are likely to become, a menace to society." ORS 436.030 [Amended by 1955 c.651 §11; 1955 c.660 §30; 1961 c.173 §1; repealed by 1965 c.264 §12].

During the sixty years in which the practice was permitted, more than 2,600 Oregonians underwent forced sterilization. Most were patients in state-run institutions, persons with mental and developmental disabilities, criminals, and sexual minorities. Some were children.

A shift in attitude in the late twentieth century

Following World War II, however, attitudes toward forced sterilization began to change. Revelations of Nazi abuse of sterilization and the discrediting of key premises of the eugenics movement led the changes. Society's views regarding disability were also changing. Where once labels such as "feeble minded", "insane" and "imbecile" were used, now descriptions such as "people with mental illness" and "persons with disabilities" took their place.

Then, with the 1960s and 1970s, came the historic line of case law that established the constitutional right to privacy. It started with marital privacy and the right of married persons to utilize contraceptives. which soon expanded into a right held by all adults regardless of marital status.[3] This in turn led to the highly controversial yet legally established woman's right to choose.[4] With this recognition of the fundamental right to privacy came an attitudinal change that began to respect the privacy rights of people with disabilities.

The end of the Board of Social Protection

In 1983, Oregon abolished its Board of Social Protection. It also enacted laws governing involuntary sterilization. The determination of whether or not an individual is capable of

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In order for a person to give informed consent, he or she must do so knowingly, voluntarily, and intelligently.

making her or his own sterilization decisions was, therefore, taken away from the State Board of Social Protection and given to the courts.

On December 2, 2002, nearly two decades after the change in law, Governor John Kitzhaber apologized on behalf of the state to the thousands of Oregonians who underwent forced sterilization during the 60 years in which the practice was permitted.

The current law: informed consent

A new statute was enacted to ensure that adequate safeguards were in place to prevent adults with disabilities from being indiscriminately and unnecessarily sterilized. ORS 436.215 [1983 c.460 §4]. The law prohibits the performance of a hysterectomy solely for the purpose of sterilization or for the purpose of hygiene and sanitary care of a female's menses. ORS 436.325 [1983 c.460 §14]. Furthermore, the law prohibits the sterilization of children less than 15 years of age and mandates that a parent, guardian, or conservator *may not* give consent for sterilization of a minor child or protected person. ORS 436.225 (3) [1983 c.460 §5; 1995 c.664 §98]. A person over the age of 15 may consent to sterilization, but, if the person is not capable of giving "informed consent," sterilization cannot proceed until the age of 18. ORS 436.205–436.335. Even then, it is allowed only in limited circumstances as determined by court order that it is in the best interest of the individual. ORS 436.225 (3) [1983 c.460 §5; 1995 c.664 §98].

In order for a person to give informed consent, he or she must do so knowingly, voluntarily, and intelligently. Oregon's revised statute actually lists in detail what is required of physicians in order to obtain informed consent knowingly. Not only must the physician answer any questions the individual to be sterilized may have, but under ORS 436.225 (1)(a)-(f) [1983 c.460 §5; 1995 c.664 §98] the physician must also provide all of the following:

- Advice that the individual is free to withhold or withdraw consent to the procedure at any time before the sterilization without affecting the right to future care or treatment
- A description of available alternative methods of family planning and birth control
- Advice that the sterilization procedure is considered to be irreversible
- A thorough explanation of the specific sterilization procedure to be performed
- A full description of the discomforts and risks that may accompany or follow the performing of the procedure, including an explanation of the type and possible effects of any anesthetic to be used
- A full description of the benefits or advantages that may be expected as a result of the sterilization

In order for consent to be given voluntarily, it must be given without excessive influence or unnecessary pressure. This means that informed consent may not be obtained while the individual to be sterilized is: in labor or childbirth, seeking to obtain or obtaining an abortion, or under the influence of alcohol or other substances that affect the individual's state of awareness. ORS 436.225 at (4)(a)-(c).

Finally, to be intelligently given, informed consent must be given when the individual understands the right that he/she is waiving and its probable consequences. This requires the individual to be competent to make such a decision about sterilization and fully understand the information given to him/her by the physician. Competency may be determined based on the individual's age, specific situations, and physical or mental capacity as determined in another court proceeding. To determine capacity to give informed consent, the individual, his/her physician, or any interested person concerned with the individual's health and well-being, may file a petition in state court within the county in which the individual resides. ORS 436.235 [1983 c.460 §6].

ORS 436.245 [1983 c.460 §7] even provides the content to be included in such petition. The petition must be executed under oath setting forth:

- the name, age, and residence of the individual
- the names and residences of the individual's parents, spouse, legal guardian or conservator
- the facts describing whether or not the individual can give informed consent
- facts indicating the likelihood or unlikelihood that the individual will be able to make an informed decision about sterilization in the foreseeable future
- the reasons for seeking sterilization
- the name, position, and interest of the

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The hearing will determine whether the individual is capable of giving informed consent, and if not, whether sterilization is in the individual's best interest.

person initiating the petition or any person assisting the individual with a self-initiated petition.

Hearing on the capacity to give informed consent

Once the petition is filed, the court will schedule a hearing to determine capacity within 30 days of the filing date. ORS 436.255 (1) [1983 c.460 §8; 1991 c.249 §36; 2003 c.14 §247; 2005 c.498 §10]. The court may hold the hearing someplace other than the courthouse if the individual is unable to attend a hearing at the courthouse. The court must then serve a copy of the petition and give notice of the hearing date and place at least 14 days prior to the hearing date to the individual, the individual's parents, guardian and/or conservator, or spouse, the individual's sibling(s) if there are no living parents, Disability Rights Oregon, and others the court determines to have an interest in the individual. ORS 436.255 (2)(a)-(d) [1983 c.460 §8; 1991 c.249 §36; 2003 c.14 §247; 2005 c.498 §10]. The court must appoint an attorney if he or she requests one or does not have one and seems incapable of asking for one. If the individual cannot afford the attorney, the court will compensate the attorney as well as pay an attorney to conduct an appeal. ORS 436.265 [1983 c.460 §9; 2001 c.962 §75].

At the hearing, the individual whose sterilization is being considered must be present. The only exception is if the individual, or the individual's attorney waives the right to be present at the hearing because his or her presence would greatly interrupt the hearing or is medically unadvisable. ORS 436.285 [1983 c.460 §11; 1991 c.67 §117].

Finally, the hearing will determine whether the individual is capable of giving informed consent, and if not, whether sterilization is in the individual's best interest.

The court must determine the individual's capacity to give informed consent by the "clear and convincing evidence" standard. If the court determines that the person is capable of giving consent, the individual can then give written informed consent to his or her physician for the sterilization. If the court determines that the person has the capacity to consent and the person does not wish to do so, the court will forbid sterilization unless the individual chooses to pursue that option in the future, and then only after a rehearing of the issue under the same procedure. If the court determines by clear and convincing evidence that the person is unable to give informed consent, then the hearing continues into the issue of the individual's best interest. ORS 436.295 [1983 c.460 §12; 2001 c.255 §2].

Ability to give informed consent

In the first step of the hearing, the person who filed the petition must present evidence that includes reports by a team of at least three professionals with at least two different areas of expertise. All three of these professionals must have experience with people who have disabilities similar to the disability of the individual being considered for sterilization. ORS 436.275 (1)(b) [1983 c.460 §10; 2001 c.255 §1]. The reports submitted by these professionals must contain information about the individual's ability or lack of ability to give consent and the reasons for their opinions. ORS 436.275 (1)(b)(A)-(C) [1983 c.460 §10; 2001 c.255 §1].

The individual being considered for sterilization must testify, unless doing so would be unsafe, and may present his or her own evidence as well as cross-examine witnesses (of course, this can be done by the attorney). ORS 436.275 (3) [1983 c.460 §10; 2001 c.255 §1]. If necessary, witnesses can be subpoenaed. Finally, it is important to note that the court must inquire into the types and effects of any medications taken by the individual. ORS 436.285 [1983 c.460 §11; 1991 c.67 §117].

At the conclusion of this step, the court will have determined whether the evidence makes it highly probable that the individual is capable of giving informed consent. If so, the individual can then choose to give his or her physician written informed consent to the procedure or refuse to consent to the procedure. If the individual refuses at this stage but wishes to pursue sterilization in the future, there must be a rehearing of the issue of capacity before sterilization can occur. If, however, the court determines the person lacks the capacity to consent, the court must then determine whether the procedure is in the individual's best interest.

Best interest of the individual

If the court determines that the individual is incapable of consenting to sterilization, then it continues into the second inquiry: Is sterilization

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Sterilization laws

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More information

Sterilization of Individuals: A Handbook for Parents, Guardians & Advocates 3rd Edition. Disability Rights Oregon, 2011.

Curry, Linda Lorraine. *The Oregon Eugenic Movement: Bethenia Angelina Owens-Adair*. Oregon State University, 1977. **http://hdl.handle.net/1957/8301**.

in the individual's best interest? It is important that we remember the age of the individual at this stage. If the individual is at least 15 but not yet 18 years old, the court must determine that he or she has the capacity to give informed consent in order for sterilization to occur. If the court deems the individual lacks the capacity to give informed consent, sterilization cannot occur until the individual reaches 18 years of age. Even then, sterilization can only occur if the court deems it to be in his or her best interest.

In determining the best interest of the individual, the court will hear evidence from everyone involved, including—but not limited to—a doctor, a psychologist, and a social worker. The court must find by clear and convincing evidence that **each** of the following five factors is true:

- The individual is physically capable of producing children;
- The individual is likely to have sex now or in the near future that will likely result in pregnancy;
- All less drastic contraceptive methods, including supervision, education, and training have not worked, are inapplicable, or are not medically advisable;
- The sterilization method to be used is consistent with standard medical practice, is the least intrusive method available, is appropriate, and does not create an unreasonable risk to the individual's life and health; and
- Due to the nature and extent of disability, the individual is permanently incapable of taking care of a child, even with reasonable assistance.
  ORS 436.205 (1)(a)-(e) [1983 c.460 §3; 1991 c.67 §116].

It is important to note that the statute makes clear that the determination of being incapable of caring for a child is not to be based on standardized tests, such as IQ tests. It is to be based on empirical evidence that considers the nature and extent of a disability as evidenced through experience, experiment, and/or observation.

If the judge determines that sterilization is not in the individual's best interest, an order prohibiting sterilization will be issued which gives the reasons for that decision. The judge's decision can be referred to the Oregon Court of Appeals and an attorney will again be appointed for those individuals who are financially eligible. If the judge has permitted sterilization, the individual who wishes to appeal may ask that the order be delayed until the appeal process is completed. ORS 436.315 [1983 c.460 §16; 1985 c.502 §27; 2001 c.962 §76].

The future

The revised Oregon statute also implemented a procedure to review all cases under this rule. The statute requires all cases heard in courts under the statute to be reported to the State Court Administrator. The system is to review biennially all cases pertaining to sterilization under the statute and to be reported to the Legislative Assembly with its assessments of the needs for any changes in standards or procedures. ORS 436.335 [1983 c.460 §15; 1985 c.309 §1; 1987 c.158 §83; 2003 c.14 §248; 2005 c.498 §11]

Undoubtedly Oregon, like many of its early twentieth-century counterparts, had much to apologize for. It seems, however, the rights of the individual, with or without disability, are finally beginning to take precedence.

Lately some "news" blogs, political pundits, and ill-informed advocates are claiming that Oregonian parents should fear "Obamacare's" free sterilization for 15 year olds.[5] However, as we have seen, Oregon's revised sterilization statute has placed many safeguards to avoid the risks of needless and indiscriminate sterilization. This may not remedy the harms done in the past, but it certainly is a step in the right direction. ■

Footnotes:

1. *Buck v. Bell*, 274 U.S. 200, 208 (S. Ct. 1927). For an interesting analysis of the facts behind *Buck v. Bell see* Lombardo, Paul A. "Three Generations, No Imbeciles, New Light on *Buck v. Bell*," 60 *N.Y.U. L. Rev*. 30 (1985).
2. Menninger, Karl A. *Proof of Qualification for Sterilization of a Person with a Mental Disability*. 49 AMJUR POF 3d 101, §6
3. *Griswold v. Connecticut,* 381 U.S. 479 (S. Ct. 1965) right to marital privacy; *Eisenstadt v. Baird,* 405 U.S. 438 (S. Ct. 1972), right of unmarried couples to contraception.
4. *Roe v. Wade,* 410 U.S. 113 (S. Ct. 1973)
5. *The Oregonian*'s Politifact deemed such claims false. **www.politifact.com/oregon/statements/2012/sep/07/cnsnews/oregon-do-15-year-olds-have-complete-control-over-/**

Addressing concerns about lawyers who are also elders

By Mike Long, Attorney Counselor, Oregon Attorney Assistance Program
and Chris Mullmann, OSB Assistant General Counsel, Client Assistance Office Manager

Concerns among colleagues, clients, judges, and others about the competence of older attorneys are typically triggered when their professional performance falls below the level expected. Examples of events or incidents that trigger concerns include:

- Deteriorating work performance:
  - Being poorly prepared (inattention to details and not keeping current on developing law)
  - Missed appointments/appearances
  - Making mistakes on files/cases
  - Difficulty/inability to effectively represent or articulate a client's interest/position
  - Difficulties managing one's practice
  - Committing ethical violations
- Memory / cognitive difficulties:
  - Exhibiting confusion
  - Short-term memory problems; forgetting conversations, details of cases, events
  - Frequently repeating questions and requests for information
  - Problems with comprehension and verbal expression
- Failures to communicate or respond to clients, opposing counsel, or the courts:
  - Failure to return telephone calls
  - Voicemail full
  - Failure to reply to email or respond by mail
  - Failure to produce promised work product that has been promised
- Irregular office hours
- Appearance: Inappropriately dressed; poor grooming or hygiene

There are many potential causes for declining or impaired performance, including:

- Medical/health challenges: facing medical challenges such as cancer with its corresponding treatments (surgery, chemo, radiation, etc.), heart conditions, stroke, Parkinson's, MS and other neurological disorders
- Taking time off to face a medical challenge and after returning to practice can't catch up or regain control of the practice
- Substance abuse/dependence or other addictions
- Age-related cognitive decline/impairment
- Caregiving responsibilities: Assuming a caregiving role for an aging parent, or an ill spouse, life partner, or family member can drain one's energy and emotional resources and be extremely disruptive to one's practice.
- Grief: Grieving the loss of a spouse, life partner, child or loved one; or, the loss of one's health and physical capacity.

Age-related cognitive decline or impairment

Some instances of cognitive decline/impairment are reversible. This can be the case when the cause is an independent medical condition, alcohol or drug use, or a situational stressor. Age-related cognitive decline or impairment typically is not reversible. These are the most difficult situations to attempt to address because the likely resolution is for the older lawyer to stop practicing. Some of the factors that make these situations difficult:

- the lawyer's continued subjective perception and belief that he or she is still functioning at a high enough level to continue to practice. The attorney often can't see what he or she can't see. We have found this even in cases when the lawyer has been formally diagnosed with dementia or Alzheimer's.
- the older lawyer's self-identification as a lawyer. Being a lawyer has not just been a job or career but a significant part of the person's personal identity and social network. The attorney may have no way to imagine what to do if unable to practice.
- a real or perceived financial need to continue to practice. Other family members may work for or be financially dependent on the lawyer's ability to continue to practice.

Loyal staff can be very protective of an older attorney with whom they have a long-term work relationship and make great efforts to cover for the older lawyer's deficits, not recognizing the potential harm to clients and the public that the lawyer's continued practice of law poses.

Assessment of cognitive impairment and cognitive decline

Most professionals with attorney assistance programs and lawyers in general do not have the requisite training and expertise to formally assess and definitively diagnose cognitive impair-

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Lawyers who are also elders

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ment or cognitive decline.

Formal assessment and evaluation of cognitive impairment and cognitive decline would be referred to neuropsychologists, neuropsychiatrists, geriatric psychiatrists, and neurologists.

However, a checklist of the "red flags" can alert us to the possibility that a colleague's cognitive functioning has dropped below the level that is required to practice law effectively. In 2005, the American Bar Association Commission on Law and Aging and the American Psychological Association published *Assessment of Older Adults With Diminished Capacity: A Handbook for Lawyers.* We have adapted the *Capacity Worksheet for Lawyers* contained in this publication to serve as a worksheet and guide to LAP professionals called on to assess or assist a lawyer who exhibits signs of cognitive impairment or cognitive decline. (See pages 21 & 22.)

Options and resources

In Oregon, both the Oregon Attorney Assistance Program (OAAP) and the Oregon State Bar Client Assistance Office (CAO) receive inquiries regarding older lawyers who appear to need assistance or whose behavior has raised concerns. The determining factors with regard to which of these resources concerned persons contacts can be their relationship to the lawyer, their need for confidentiality and anonymity in the communication of their concerns and that those concerns remain confidential for the lawyer they are concerned about, their perception of the cause of the lawyer's problems, their perceived ethical obligations, and the action or result they believe needs to be pursued, and the harm that might result.

OAAP: The OAAP is a confidential, voluntary personal assistance resource that serves Oregon law students, lawyers, judges, and the greater Oregon legal community. No information will be disclosed to any person, agency, or organization outside the OAAP without the consent of the lawyer or judge who accesses the program. The OAAP can assist someone who is concerned about a lawyer by:

- serving as a sounding board to assess and discuss concerns about the lawyer
- suggesting potential options for approaching the lawyer with those concerns
- participating in/facilitating a meeting with the lawyer and those concerned about him or her, to discuss the concerns
- identifying/suggesting resources for addressing those concerns, including referrals to medical and mental health professionals and the PLF practice management advisors where appropriate.

The OAAP is also available to reach out to a lawyer, either anonymously or with permission, to identify the concerned person(s) who contacted the OAAP, and offer to meet confidentially with the lawyer to discuss how he or she is doing and determine how the OAAP can be a resource or provide assistance. The OAAP does not provide financial assistance. The Oregon Lawyers Assistance Foundation is a potential resource for limited assistance to Oregon lawyers for emergency mental health and chemical dependency treatment, but not for neurological or neuro-psychological assessments.

Communications with the OAAP are confidential with the usual mandatory reporter exceptions (child/elder abuse, intent to hurt self or others). As a voluntary program, the OAAP has no authority to require a lawyer to do anything. If the lawyer rebuffs the OAAP's outreach, the OAAP will remain in a holding pattern until it receives a subsequent call of concern regarding the lawyer, which it almost always does.

CAO: CAO is the intake point of the Oregon State Bar (OSB) for all complaints, concerns, and inquiries about Oregon lawyers. It has the responsibility to investigate and determine if there is sufficient evidence to support a reasonable belief that a lawyer has engaged in ethical misconduct. If there is insufficient evidence of misconduct, the complaint is dismissed. If there is sufficient evidence of misconduct, the complaint is referred to Bar discipline for further investigation. CAO written records are public and open to inspection upon request to the OSB.

In Oregon, a lawyer or judge who knows another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the Oregon State Bar Client Assistance Office. ORPC 8.3(a), JR 2-104(A). In rare cases where a lawyer's impairment or incapacity is so advanced that he or she is no longer capable of competently representing clients, the Bar can petition the Supreme Court to place the lawyer on inactive status (BR 3.2) or seek the involuntary assumption of the lawyer's practice pending resolution of the disciplinary proceedings (ORS 9.705-ORS9.755). Again, this rarely occurs.

With few exceptions, clients with concerns about a lawyer are directed to the CAO. Many lawyers and judges also contact the CAO with their concerns about lawyers. In many instances, the concerns about lawyers that other lawyers and judges communicate/report to the CAO lack sufficient evidence that misconduct has occurred. They may, however, raise sufficient concerns about the lawyer's health and level of cognitive functioning. CAO may contact the lawyer to see if he or she is dealing with any challenges or problems that are negative affect the ability to practice law. CAO regularly informs the OAAP and PLF of lawyers that have been brought to its attention and it is concerned about, so the OAAP and PLF can reach out to these lawyers confidentially.

Those who care about an older lawyer and the legal profession want a colleague to transition from practice before his or her reputation is tarnished and before clients are injured or negatively affected. It has been our experience that most older lawyers initially resist attempts by others to raise and discuss the concerns they have about the older lawyer's performance, even when those concerns are communicated respectfully by others they trust. (Suggestions for how to broach the subject are found on page 23.) It's important to anticipate that assisting an older lawyer in the transition from practice is typically a process, not a single event. ■

Cognitive Impairment Worksheet for Atorney Assistance Programs

Attorney Name: ______________________ **Date of Interview:** ________________ **Place of Interview:** ____________________

Observational Signs & Symptoms:

Behavioral Functioning at Work	**Observations**
Practice management • Deteriorating performance at work • Making mistakes on files / cases • Difficulties functioning without the help of a legal assistant / other lawyers • Committing obvious ethical violations • Failing to remain current re changes in the law; over-relying on experience • Exhibiting confusion re timelines, deadlines, conflicts, trust accounting	
Appearance / dress • Inappropriately dressed • Poor grooming/hygiene	
Interpersonal disinhibition • Making sexually inappropriate statements that are historically uncharacteristic for the lawyer • Engaging in uncharacteristically sexually inappropriate behavior • Uncharacteristic difficulties inhibiting anger	
Self awareness • Denial of any problem • Exhibits/expresses highly defensive beliefs • Feels others out "to get" him/her, organized against him/her	
Significant changes in characteristic routine at work	

Cognitive Functioning	**Observations**
Short-term memory problems (reduced ability to manipulate information in ST memory) • Forgets conversations, events, details of cases • Frequently repeats questions and requests for information	
Executive functioning (slower and less accurate in shifting from one thought or action to another) • Trouble staying on task / topic • Trouble following through and getting things done in a reasonable time	
Lack of mental flexibility Difficulty adjusting to changes Difficulty understanding alternative or competing legal analysis, positions	

Language related problems
• Comprehension problems
• Problems with verbal expression
  • Difficulty finding the correct word to use
  • Circumstantiality (providing a lot of unnecessary details; taking a long time to get to the point)
  • Tangentiality (getting distracted and never getting back to the point)	

Disorientation • Confused about date or time-sensitive tasks • Missing deadlines for filing legal documents	

Cognitive Impairment Worksheet (continued)

Attention / concentration (problems with dividing attention, filtering our noise and shifting attention) • Lapses in attention • Overly distractable	

Emotional functioning	**Observations**
• Emotional distress • Emotional lability (rapidly changing swings in mood and emotional affect)	

Other Observations/Notes of Functional Behavior

Mitigating/Qualifying Factors Affecting Observations

Stress, Grief, Depression, Recent Events affecting stability of client:

Medical Factors / medical conditions:

○ Sensory functioning (hearing / vision loss)
○ Family history of dementia
○ Substance abuse / dependence
○ Hypertension
○ Stroke history
○ Thyroid disease
○ Chemotherapy
○ Sleep apnea
○ Prescription medications
○ High cholesterol
○ ____________________
○ ____________________
○ ____________________

PRELIMINARY CONCLUSIONS ABOUT COGNITIVE FUNCTIONING

☐ **Intact** – No or very minimal evidence of diminished cognitive functioning.

☐ **Mild problems** - Some evidence of diminished cognitive functioning.

☐ **More than mild problems** - Substantial evidence of diminished cognitive functioning.

☐ **Severe problems** – Lawyer lacks cognitive capacity to practice law.

Adapted from the Capacity Worksheet for Lawyers, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, by the ABA Commission on Law and Aging and the American Psychological Association (2005).

Intervening with the lawyer who exhibits cognitive impairment/decline

Adapted from the Texas Lawyer Assistance Program's "The Senior Lawyer In Decline: Transitions With Dignity—ABCs of helping the senior lawyer in need."

A. Approaching the impaired/declining Lawyer

1. Partner with one or more individuals the lawyer trusts, and who have firsthand observations of the lawyer's behavior that is raising concerns about the lawyer's continued competence to practice law.
2. Consider utilizing the Cognitive Impairment Worksheet to gather and organize concerns regarding the impaired/declining lawyer.
3. Have a non-confrontational meeting with lawyer and the concerned individuals; actively avoid confrontation.
4. Starters/icebreakers
    - *I am concerned about you because…*
    - *We have worked together a long time. So I hope you won't think I'm interfering when I tell you I am worried about you…*
    - *I've noticed you haven't been yourself lately, and am concerned about how you are doing…..*
5. Get the lawyer to talk; listen, do not lecture.
6. While listening, add responsive and reflective comments.
7. Express concern with gentleness and respect.
8. Share firsthand observations of the lawyer's objective behavior that is raising questions or causing concerns.
9. Review the lawyer's good qualities, achievements, and positive memories.
10. Approach as a respectful and concerned colleague, not an authority figure.
11. Act with kindness, dignity and privacy, not in crisis mode.
12. If the lawyer is not persuaded that his/her level of professional functioning has declined or is impaired, suggest assessment by a specific professional (in most instances, a neuropsychologist) and have contact information ready.
13. Offer assistance and make recommendations for a plan that provides oversight (e.g., a buddy system or part-time practice with co-counsel).
14. Remember that this is a process, not a one-time event.

B. Do and Don't

1. Do
    - Be direct, specific, and identify the problem.
    - Speak from personal observations and experience; state your feelings.
    - Report what you actually see.
    - Be respectful and treat the lawyer with dignity.
    - Act in a non-judgmental, non-labeling, non-accusatory manner.
    - Offer to call the lawyer's doctor with observations.
    - Refer for evaluation, have resources at hand.
    - Suggest alternatives: inactive status, disability leave.
    - Suggest the potential consequences for inaction: malpractice or disciplinary complaints.
2. Don't
    - Do not ignore and do nothing.
    - Do not include family, unless requested.
    - Do not insist or threaten if lawyer directs you to back off. (Attempt to discuss again at a later date.) ■

Resources for elder law attorneys

Events

CLE: Ethics Update
OSB Quick Call seminar
Tues., Feb. 5 & Wed., Feb. 6, 2013 • 10-11 a.m.
www.osbar.org

Liquidity Planning in Estates and Trusts
OSB CLE audio seminar
February 8, 2013 • 10–11 a.m.
www.osbar.org

Ethics and Email in the Law Office
OSB CLE audio seminar
February 22, 2013 • 10–11 a.m.
www.osbar.org

The Solo Practitioner and Small Firm's Guide to the New Frontier in Estate Planning
American Bar Association webinar & teleconference
February 27, 2013 • 10–11:30 a.m.
www.americanbar.org

Disability and Aging: Senior Lawyers and Senior Clients
American Bar Association webinar & teleconference
February 28, 2013 • 10–11:30 a.m.
www.americanbar.org

ABCs of Decedents' Estate Administration
Oregon Law Institute CLE seminar
March 15, 2013 • 8 a.m.–4:30 p.m.
Ambridge Event Center • Portland
http://law.lclark.edu

All Born (In) Cross-disability Inclusion Conference
Northwest Down Syndrome Association symposium
April 13, 2013
Holiday Inn Airport • Portland
http://allbornin.org

NAELA Annual Conference
May 2–4, 2013
Atlanta, Georgia
www.naela.org

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

Publication

Use Your Home to Stay at Home™
The official reverse mortgage consumer booklet approved by the U.S. Department of Housing & Urban Development (HUD). The guide is designed to help elders understand the pros and cons of a reverse mortgage. Reverse mortgages allow homeowners who are 62 or older to convert home equity into cash while remaining in the home. Download at **www.ncoa.org/news-ncoa-publications/publications/ncoa_reverse_mortgage_booklet_073109.pdf** ■

Websites

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

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

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

Elder Law Section electronic discussion list

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

How to use the discussion list

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

Guidelines & Tips

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

Important elder law numbers

as of
January 1, 2013

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

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

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Newsletter Advisory Board

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