



Elder Law Newsletter

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Minimum capacity to consent or act: what's the standard?

By Michael Levelle, Attorney at Law

Lawyers must be prepared to deal with the issue of capacity when they attempt to counsel elderly clients and carry out their wishes. An understanding of the legal requirements for capacity is crucial for effective representation of elderly clients.

The question of a client's capacity may arise in a variety of contexts. The elder law attorney should understand the standard of capacity required to perform certain legal acts, be capable of performing a preliminary assessment of capacity, and know what steps can be taken to maximize a client's independence.

Determining legal capacity

The lawyer must form an opinion about the client's capacity separate from a clinical diagnosis or statements from family members. The

lawyer's opinion should be based on personal observations, contacts with friends, family, and – if appropriate – clinical examinations by medical professionals. Mezzullo & Woolpert, *Advising the Elderly Client*, 3.9 (1992 & Supp 1994).

Although elderly clients are more likely to be frail in health, subject to the deteriorations of old age, and dependent on others, they are not all confused and forgetful, nor do they all suffer from hearing and sight impairments. A lawyer should presume that the elderly client has the necessary mental competency to make legal choices and avoid the temptation to ask whether the client is competent. See ORS 126.098; *First Christian Church v. McReynolds*, 194 Or 68, 73-74 (1952). The presumption of competency can be relied upon until the contrary is shown. *Schaefer v. Schaefer*, 183 OrApp 513 (2002) (citing *First Christian Church v. McReynolds*, 194 Or 68,74, 241 P2d 135 (1952)).

Legal capacity is a flexible concept. For example, a clinical diagnosis of Alzheimer's disease or another condition that causes dementia suggests diminished capacity, but you should not assume that a person is incompetent to participate in or consent to a particular transaction because of such a diagnosis. Competency must be viewed in terms of the client's ability to perform a specific task. A person may be competent for certain tasks, but lack capacity for others. *Restatement (Third) of the Law Governing Lawyers* 35 cmt c (2000). Whether a person has the legal capacity to perform a particular act is examined at the time of the act. See *Uribe v. Olson*, 42 Or App 647, 651 (1979). Also, whether a client has capacity must be viewed as task-specific. Charles P. Sabatino, *Assessing Clients with Diminished Capacity*, Vol 22, No 4 ABA BIFOCAL 1 (Summer 2001). A widely accepted

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Minimum capacity to consent or act

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definition of *decision-making capacity* is that it requires the following:

- (1) Possession of a set of values and goals;
- (2) The ability to communicate and to understand information;
- (3) The ability to reason and to deliberate about one's choices. President's Commission for the Study of Ethical Problems in Medicine & Biomedical & Behavioral Research, *Vol. 1, Report: Making Health Care Decisions: The Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* 57 (1982).

Even if several signs point to mental incompetence, it is possible for a person to have lucid intervals during which he or she has the requisite capacity to enter into a contract, appoint an agent, or make a gift of property. *Gentry v. Briggs*, 32 Or App 45, 50 (1978). However, clear and convincing proof is required to show that a legal act is performed during a lucid interval. *Gentry v. Briggs*, 32 Or App at 50. Eccentricity or lack of prudence should not be confused with incapacity. *Id.* The lawyer's task when considering the legal standard of competency is to be able effectively to distinguish foolish, socially deviant, risky, or simply "crazy" choices made competently from comparable choices made incompetently. See A. Frank Johns & Rebecca C. Morgan, *Counseling Clients Who May Have Diminished Capacity* in 17 (ALI-ABA Conference 2002); Marshall Kapp, *Evaluating Decision-Making Capacity in the Elderly: A Review of Recent Literature*, 2 J ELDER ABUSE & NEGLECT 15 (1990).

If there is a question concerning the client's lucidity, the client's file should be clearly documented to establish that lucidity was present at the time of the particular act. There must be clear and convincing proof that the person's act was performed during a lucid interval in case the act is contested at a later date. If a client has questionable capacity, the attorney may want to consider suggesting a geriatric evaluation to assess the client's competence and to establish that the client possessed the requisite capacity to consent or perform an act at that time. However, consulting a mental health professional gives rise to other issues the lawyer should consider and address. For example, a client must have capacity to consent to such an evaluation, or any treatment recommended if the client is determined to lack capacity. See Smith, *Representing the Elderly Client and Addressing the Question of*

Competence, 14 J Contemp L 61 (1988); Tremblay, *On Persuasion and Paternalism: Lawyer Decision-making and the Questionably Competent Client*, 1987 Utah L Rev 515 (1987).

Testamentary capacity

For a will or revocable trust to be effective, a person must have the capacity to:

- understand the nature of the act
- know the nature and extent of his or her property
- know without prompting the claims of people who are or might be the natural objects of the person's bounty (e.g., spouse, children, friends, etc.)
- be aware of the scope and reach of the provisions of the document

Kastner v. Husband, 231 Or 133, 135-136, 372 P2d 520 (1962), ORS 130.500.

The lowering of the required legal capacity to execute a trust is a recent change with the adoption of the Oregon Uniform Trust Code. The determination of a person's capacity must be done at the time the person signs the will or trust. The same degree of mental capacity is required to revoke a will or trust as is required to execute one. *In re Dougan's Estate*, 152 Or 235, 253, 53 P2d 511 (1936).

Contracts, deeds, and lifetime gifts

A person can enter into a valid contract if that person's reasoning ability enables him or her to understand the nature and effect of the act. Lack of capacity is not established simply because a person is easily influenced, is a dependent person, or declares that he or she does not understand a contract. A person of below-average intelligence can enter into a binding legal contract. The relevant question is whether the person is capable of understanding the act. The same test applies to the making of a gift or creating a joint or survivorship interest with another person.

Power of attorney

A power of attorney is a written creation of an agency relationship. *Scott v. Hall*, 177 Or 403, 407, 163 P2d 517 (1945). The rule respecting the capacity to execute a power of attorney is the same as that to execute a conveyance. *Wade v. Northup*, 70 Or 569, 578, 140 P 451 (1914). If at the time of the execution of the document the grantor has mental capacity sufficient to comprehend the nature of the business in which the person is engaged, the

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power of attorney is valid. *Id.* This test focuses on the grantor's ability to understand the general nature of the document executed rather than the grantor's competency to perform the acts included in the power of attorney. Oregon law expressly authorizes the use of durable powers of attorney, which by their own terms survive the disability of the principal. ORS 127.005(1)-(2).

Decisional capacity in health care

Decisional capacity in health care is rooted in the concept of "informed consent." ABA Commn. On L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, 6 (2005). ORS 677.097 primarily sets the standard for obtaining informed consent and has been interpreted by Oregon courts as a two-part process. *Zacher v. Petty*, 312 Or 590, 593-594, 826 P2d 619 (1992); See *Principles of Consent to Health Care*, 1 Oregon Health Law Manual (Oregon CLE 1997) for an in-depth discuss of informed consent and the application of basic consent principles.

Capable adults may make their own health care decisions. ORS 127.507. Oregon law presumes that an adult has the necessary mental capacity to give valid informed consent even if the adult is a protected person for whom a guardian has been appointed. ORS 125.300. Minors in certain situations have legal capacity to give consent for medical treatment or diagnosis. See *Oregon Health Law Manual*, Chapters 1 and 2 (Oregon CLE 1997) for a full discussion of informed consent involving minors. The general standard for mental capacity is the ability to understand the basic information necessary for informed consent and to understand the nature and consequences of authorizing treatment. Fay A. Rozovsky, *Consent to Treatment, A Practical Guide* 21 (2d ed 1990).

Oregon law, rather than codifying a standard for determining when a person is "capable" of making health care decisions has codified a standard for determining when an adult is "incapable" of making health care decisions. A person is incapable of making health care decisions when in the opinion of the court in a proceeding to appoint or confirm the authority of a health care representative, or in the opinion of the principal's attending physician, a principal lacks the ability to make and communicate health care decisions to health care providers, including communication through persons familiar with the principal's manner of communicating if those persons are available. ORS 127.505(13).

Capacity to mediate

When referring a client to mediation or representing a client in mediation, The *ADA Mediation Guidelines* name several factors to be considered. The lawyer should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement. ABA Commn. On L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) citing Benjamin N. Cardozo School of Law, *ADA Mediation Guidelines* (2000). Also see Erica Wood, *Dispute Resolution and Dementia: Seeking Solutions*, *Georgia Law Review* 2, 785 (2001).

Guardianships and conservatorships

A lawyer who is assisting a person of diminished capacity or dealing with issues pertaining to guardianships and conservatorships must know the statutes defining *incapacitated person* and the case law interpreting those statutes. There are no clear rules for determining capacity. Each case must be evaluated independently. The lawyer must understand the statutes governing protective proceedings as well as evaluate the opinions of family, friends, and professionals trained in evaluating capacity.

CAVEAT: The statutes and case law, when taken in their entirety, are somewhat confusing, ambiguous, and contradictory. As a result, they create potential problems for the unwary lawyer and his or her client.

When a guardian (but not a conservator) is appointed for a person, the protected person is still presumed to be competent. ORS 125.300(2). The protected person retains all legal and civil rights except those expressly limited by court order or expressly granted to the guardian by the court. ORS 125.300(3).

The term *guardian* applies only to the "guardianship of the person" of a minor or otherwise incapacitated person. ORS 125.005(4). A guardian may be appointed for an adult only as is necessary to promote or protect the well-being of the protected person and the adult is incapacitated. ORS 125.300(1); ORS 125.305(1)(a). A guardian may be appointed for a minor person in need of a guardian. ORS 125.305(1)(a). The presumption of an adult having competency must be overcome by clear and convincing evidence. ORS 125.305(1). "Clear and convincing" evidence is evidence of "extraordinary persuasiveness." *Schaeffer and Schaeffer*, 183 Or App 513, 517, 52 P3d 1125 (2002) citing *State v. DeMartino*, 164 Or App 331, 335, 991 P2d 1093 (1999).

There is no prerequisite statutory condition that must be met before a court may decide to appoint a guardian for a minor. Guardianships, Conservatorships, and Transfers to Minors, § 3.2 (Oregon CLE 2004). If the person is under 18 years of age, the court may then determine whether the evidence shows the minor to be "in need of a guardian." ORS 125.305(1)(a).

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PRACTICE TIP:

A guardianship may not be imposed on a person without a judicial finding of incapacity. However, the court may appoint a conservator for a person at the request of the mentally incapacitated person. If a client is seeking comprehensive assistance with finances and a "voluntary" conservatorship seems like a solution, consider establishing a revocable living trust with appropriate accounting mechanisms instead.

PRACTICE TIP:

When the court has appointed a fiduciary for a client, the fiduciary must ratify the lawyer-client relationship with the protected person. If the fiduciary will not ratify the contract, seek court appointment as counsel or there will be no valid basis to seek lawyer fees.

Case law interpreting prior Oregon statute in this regard held that the court was to determine whether it was in the "welfare and best interests" of a child to have a guardian before making the appointment. Guardianships, Conservatorships, and Transfers to Minors, § 3.2 (Oregon CLE 2004). It is important to note that the "in need of a guardian" standard does not apply in child custody disputes and juvenile court guardianship proceedings. For further discussion concerning these proceedings see *Burk v. Hall*, 186 Or App 113, 121, 62 P3d 394, rev. denied, 336 Or 16 (2003) (contested probate proceeding for guardianship of a child) and *Kelley v. Gibson*, 184 Or App 343, 349-350, 56 P3d 925 (2002) (guardianship being considered in a juvenile court case).

The term *incapacitated* means that a person's ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety or to manage the person's financial resources. ORS 125.005(5). The term *meeting the essential requirements for physical health and safety* means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene, and other care without which serious physical injury or illness is likely to occur. ORS 125.005(5).

The definition of meeting the essential requirements for physical health and safety requires the proof of three things: (1) the person to be protected has severely impaired perception or communication skills; (2) the person cannot take care of his or her basic needs to such an extent as to be life-or health-threatening; and (3) the impaired perception or communication skills cause the life-threatening disability. *Schaeffer and Schaeffer*, 183 Or App at 517. Based on the necessity to prove the three elements, a person cannot be adjudicated incapacitated and subject to a guardianship because of physical deterioration; nor can a person who has trouble processing information if she can still take care of herself. *Id.* The key is the nexus between the inability to process and communicate information, on the one hand, and the inability to perform essential functions, on the other. *Id.*

Conservatorships

The term *conservator* embraces the functions of the traditional "guardian of the estate" and is defined as a person appointed to administer the estate of the protected person. ORS 125.005(1), 125.420. There is no requirement that a person lack legal mental capacity before being subject to the appointment of a conservator. ORS 125.005(3). A conservator may be appointed if the court finds by clear and convincing evidence that the respondent (1) is a minor or (2) is financially incapable, and that the respondent has money and property that require management or protection. ORS 125.400.

The term *financially incapable* means a condition in which a person is unable to manage his or her financial resources effectively for reasons including, but not limited to, mental illness, mental deficiency, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power, or disappearance. ORS 125.005(3). The term *manage financial resources* means the actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits and income. ORS 125.005(3).

Except for the language of the statute, there are no clear rules for determining capacity. Each case must be evaluated independently. The court places weight on the opinions of doctors, psychologists, public social workers, private case managers, family, and friends. In a contested matter, the court (or the court visitor) will attempt to contact all relevant parties to get an overall picture of the person's capacity.

A mentally competent person under the protection of a conservatorship may make wills, change beneficiaries of life insurance and annuity policies, and exercise a power of appointment or a right to share in a deceased spouse's estate. ORS 125.455(1). However, when a guardian or conservator has been appointed because of a person's lack of mental capacity, a rebuttable presumption of a lack of testamentary capacity arises. *Wood v. Bettis*, 130 Or App 140, 143, 880 P2d 961 (1994). Evidence about the testator's mental condition before and after a will is executed is admissible to determine the testator's mental state at the time the will is executed. *Wood, supra.*

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The lawyer's role in assessing capacity

The American Bar Association views the lawyer's role in assessing capacity as one where the lawyer fills a systematic role in capacity screening at three levels. The first level is that of "preliminary screening" of capacity, the goal of which is merely to identify capacity "red flags." The second level of involvement, if needed, involves the use of professional consultation or referral for formal assessment. The third level of involvement requires making a legal judgment that the level of capacity is either sufficient or insufficient to proceed with representation as requested. ABA Commn. On L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005).

The lawyer should use a "functional approach" to determine capacity. In this approach, the lawyer assesses capacity by observing the client's decision-making process as it relates to the substance of the act to be taken.

Six factors that can be applied in using the functional approach are:

- the client's ability to articulate reasoning behind the decision
- the variability of the client's state of mind
- the client's ability to understand the consequences of the decision
- the irreversibility of the decision
- the substantive fairness of the transaction
- consistency of the act or transaction with the client's lifetime commitments

Working with the elderly client

To empower the elderly client, meet privately with him or her, possibly after an introduction by a family member or trusted friend if that person set up the initial meeting. Create a relaxing and comfortable interview environment; converse about topics that interest the client. Conduct the interview at the client's best time of day. Encourage questions. Reassure the client that one purpose of the meeting is to become acquainted. Remind the client that the client's decisions, and not those of a family member,

will control the outcome of the meeting. Use indirect questions to assess capacity. Do not ask intimidating questions that put the client on the spot. Asking topical questions in the course of seemingly casual conversation can be just as helpful without unsettling an already defensive or uncomfortable older client. Take verbatim notes.

When preparing written materials for elderly clients, use short words, sentences, and paragraphs. Use active verbs; avoid passive voice. Avoid technical legal terms as much as possible; where unavoidable, define terms in nontechnical language when they first appear. Use the names of the parties in a contract or other document. Do not use legal role names to identify parties. Avoid double negatives. Use various type sizes and spacing, paragraphs, numbering, and bold facing or underlining to break the letter or document into easily read sections.

Be familiar with the community resources available to the elder client. If you conclude that a client may lack the capacity required to take the desired action, you should talk to the client about enlisting the help of a professional such as a social worker, gerontologist, nurse, family therapist, or similar practitioner with expertise and experience with the elderly. This course of action promotes the autonomy and safety of the client.

Conclusion

The lawyer who works with an elderly client will always be required to employ his or her traditional legal skills. However, with the aging of America's population and the significant transfer of wealth that will occur in the near future, the lawyer must also acquire a completely different set of skills to deal with the elderly client on a personal level.

To prepare to deal with questions of client competency the lawyer should:

- Know the legal standards governing competency.
- Understand his or her role in assessing a questionably competent client.
- Develop and use techniques designed to empower the elder client. ■

PRACTICE TIP:

A lawyer assisting a client under the protection of a guardianship or conservatorship should carefully document facts that show the client has the requisite capacity.

Evidence in contested guardianship and conservatorship cases

By Penny L. Davis, Attorney at Law, Portland

Contested guardianship and conservatorship cases are tried before judges rather than juries. Although judges tend to take a more relaxed view about some of the evidentiary rules when they are the triers of fact, the Oregon Evidence Code and the Oregon Rules of Civil Procedure do apply to guardianship and conservatorship proceedings.¹

The petitioner has the legal burden of persuading the court that the standards for appointing a fiduciary have been met by clear and convincing evidence. Oregon Evidence Code, Rule 305; ORS 125.305(1) and 125.400. Most cases that involve adult respondents are not contested. However, it is hard to predict when a respondent or another interested person will object. A practitioner who considers the potential evidence before filing the petition will be better prepared to respond to an objection.

Evidence of inability to function

The appointment of a guardian or a conservator for an adult requires proof of the person's inability to function. *In the Matter of Grimmert*, 193 Or App 427 (2004) (Appointment of a conservator based on the respondent's inability to recall her assets or explain her finances upheld). Presenting evidence that the respondent has a particular diagnosis or a mental or physical disability is not sufficient. As the court stated in *Schaefer v. Schaefer*, 183 Or App 513, 517 (2002) (Appointment of guardian overturned when the evidence was that a respondent with some memory loss and confusion had made a conscious decision not to take medication for edema due to the side effect), the petitioner in a guardianship case must prove that the respondent has "severely impaired perception or communications skills," and that the impairments render the respondent unable to provide for basic health and safety. See ORS 125.005(5). The petitioner in a conservatorship case has to demonstrate that the respondent cannot manage his or her income and property effectively. ORS 125.005(3); *In the Matter of Baxter*, 128 Or App 91 (1994) (Denial of conservatorship petition upheld because there was no evidence that the respondent's physical incapacity made him unable to handle his finances).

Dealing with objections

The court must hold a hearing if an ob-

jection is filed, and may hold a hearing in other circumstances. ORS 125.080. The petitioner is responsible for paying the hearing fee prior to a hearing on an objection.

The petitioner is usually the principal witness at a hearing if someone objects to the appointment of a guardian or conservator. The factual allegations in the petition come from the petitioner's own observations and from other people "who have information that would support a finding that an adult respondent is incapacitated or financially incapable." ORS 125.055(2)(g). Contacting those people before listing their names, addresses, and telephone numbers in the petition gives the lawyer the opportunity to assess them as potential witnesses and to prepare them for being contacted by the court visitor and others involved in the case.

Someone may object on the basis that the proposed fiduciary is not the most suitable person to serve in that role. The proposed fiduciary should be prepared to testify about his or her background and qualifications, relationship with the respondent, and plans for carrying out the duties of a guardian or conservator. Other evidence will depend on the specific grounds for the objection, and may be more appropriately reserved for rebuttal. If an alternate fiduciary will be proposed as a possible solution, due process requires that the parties be given notice and the opportunity to object. *Spady v. Hawkins*, 155 Or App 454 (1998).

Role of the court visitor

The court visitor must be present at the hearing on a contested petition² and is often a key witness. While the court visitor's written report may well contain inadmissible hearsay, the court visitor can testify about his or her observations, statements that are not hearsay (such as admissions against interest), and anything that would qualify as a hearsay exception.³ The court visitor is likely to be accepted as an expert witness and allowed to testify about his or her opinions and recommendations. The parties can expect a judge to give great weight to that testimony because of the court visitor's neutral position, experience, and ongoing relationship with the court. Attacking the court visitor's qualifications and credibility is rarely a good strategy. A party who disagrees with the findings and recommendations in the court visitor's report should plan to present expert testimony or other evidence that supports the party's position.

Preparing for a hearing

The attorney for the petitioner should be prepared to present his or her case even if the objecting party is not expected to appear at the hearing. If the petitioner plans to call the respondent as a witness to provide evidence of incapacity, financial incapability, or the suitability of a proposed fiduciary, the preparation should include subpoenaing the respondent and ensuring the respondent has transportation to the courthouse.

The attorney for an objecting respondent will have to decide whether to offer the respondent's testimony and how to prepare a respondent who may have significant physical or mental impairments for the stress of the hearing. An elderly or disabled respondent who is able to testify about his or her objections and the reasons for those objections can make an excellent impression on a judge. An attorney who conducts an

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Evidence in contested cases

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insensitive or overbearing cross-examination of such a respondent may ultimately regret doing so. On the other hand, testimony by an impaired respondent who denies needing any help or who is delusional will tend to support the petitioner's case.

The issues in the case will determine what testimony and physical evidence are likely to be persuasive. If the issue is whether the respondent's living conditions pose a serious danger to health and safety, photographs of the respondent's home may be helpful. If the allegation is that the respondent's perceptions are so impaired that he or she is refusing necessary services, letters that the respondent has written to the petitioner and other witnesses accusing multiple people and organizations of conspiracy and theft may demonstrate the degree of the impairment. Documents such as bank records showing multiple bounced checks or debit card use by other people are relevant to the respondent's ability to keep track of his or her finances. An advance directive for health care naming someone other than the proposed guardian as the health care representative may convince a judge that a guardian is not needed because there is a less restrictive alternative or that the proposed guardian is not suitable. If the respondent wants to remain in his or her home, testimony from an expert witness who has evaluated the respondent and the home may lead a judge to limit the guardian's authority.

The procedures in ORCP 55 for subpoenaing people and documents apply to protective proceedings. The practitioner should provide the required authentication for documents and other physical evidence to keep them from being excluded under Oregon Evidence Code, Rule 901. If a witness cannot attend the hearing in person, the practitioner can file a motion pursuant to ORS 45.400 asking the court to allow the person to testify by telephone. The attorney should also contact the court staff in advance to make arrangements for the appropriate telephone equipment and to pay any costs involved.

Medical information

The admissibility of medical information is the most-discussed evidentiary issue in protective proceedings. While evidence of the respondent's medical condition and treatment is often relevant and may be crucial in some cases, information from the respondent's physicians and psychotherapists about his or her diagnosis, treatment, and test results are protected from disclosure by evidentiary privilege.⁴ The respondent may waive the privilege by voluntarily disclosing or consenting to the disclosure of the protected information. Oregon Evidence Code, Rule 511. However, the fact that the petitioner has obtained a copy of a privileged document does not waive the respondent's privilege. Oregon Evidence Code, Rule 512. Sharing medical information with family members who are assisting with the respondent's care or treatment also does not waive the privilege. Oregon Evidence Code, Rule 504-1(a). A lawyer who represents a respondent may be able to keep confidential medical records from being admitted by asserting the physician-patient privilege or by objecting to the method by which the information was obtained.⁵

Respondents' lawyers who assert the privilege, together with increased awareness by health care providers of the importance of protecting personal health information as a result of HIPAA⁶, have led to fewer letters from doctors being used in protective proceedings. A petitioner who believes that medical evidence is critical to proving the need for a guardian or a conservator can ask the court to order a physical or mental examination of the respondent under ORS 125.025(3)(j) and ORCP 44.

The results of a court-ordered examination are not privileged, and the examining physician or psychologist may be called as a witness.

Temporary fiduciaries

A temporary fiduciary can be appointed with little or no advance notice. ORS 125.605(2). Local practice may require the attorney to schedule a hearing time when filing a petition or presenting an order for the appointment of a temporary fiduciary. In some counties, judges expect a petition seeking the appointment of a temporary guardian or conservator to be accompanied by exhibits such as medical reports or affidavits that describe the emergency.⁷ If the respondent is being held in a psychiatric unit pursuant to a Notice of Mental Illness, a doctor who has examined the respondent as part of the commitment process may provide a statement regarding the risk to the respondent's health and safety and the need for a temporary guardian as an alternative to commitment.⁸ Neighbors, caregivers, landlords, adult protective services workers, and others may be willing to sign affidavits recounting their experiences with the respondent and describing the immediate and serious danger. ■

Footnotes

1. ORS 125.050 was adopted as part of the 1995 guardianship and conservatorship legislation because some lawyers and judges expressed a different view.
2. ORS 125.155(5). The lawyer should notify the court visitor of the hearing date, time, and location. However, no subpoena is necessary.
3. Hearsay is defined in Oregon Evidence Code, Rule 801. The exceptions are listed in Rule 803.
4. The privileges for various types of practitioners are in Oregon Evidence Code, Rule 504 *et seq.*
5. The complex procedure for subpoenaing individually identifiable health information is set out in ORCP 55H.
6. The Health Insurance Portability and Accountability Act of 1996, P.L. 104-191.
7. For example, *see* Multnomah County SLR 9.075(3).
8. This limited disclosure appears to be allowed under HIPAA. *See* 42 CFR §164.512(j)(1)(i).

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Guardian may be liable for acts of protected person

By Erin Evers, Attorney at Law



Erin Evers is a Hillsboro attorney and Certified Public Accountant whose practice focuses on fiduciary relationships.

While Oregon law is clear that incompetents remain primarily liable for their own acts,¹ a guardian's liability to third parties is less than clear. About all we have for guidance in Oregon is a statute that says a fiduciary is not personally liable to third persons for acts of the protected person solely by reason of being appointed fiduciary. ORS 125.235. However, it can be inferred from the general body of tort law that a guardian may be held liable under a negligence theory if it is established that there exists a special relationship, that the guardian owed a duty to the third person, that the guardian knew or should have known of the risk of harm, and that the guardian's acts or failure to act was unreasonable.

Is the guardian's duty defined?

The first step is to establish whether a special relationship, particular status, or rule of law defines the defendant guardian's duty. See *Buchler v. Oregon Corrections Div.*, 316 Or 499, 853 P.2d 798 (1993). In *Buchler*, the Supreme Court adopted §319 of the Restatement of Torts (Second) 1965, which is a special relationship exception to the general concept of no liability to third persons. Section 319 has been held to define a custodian's duty in Oregon, and ORS 125.315(1)(a) provides that a guardian is custodian of the protected person. It would seem then that a special relationship per se is established by application of the statute and §319. The court in *Buchler*, however, did not automatically extend the custodian's duty to an injured third party when the actor was outside of the custodian's control and had escaped custody. A guardian who is actively acting as custodian of the protected person would have a special relationship with the protected person per se, but a guardian would not have such a relationship if the guardian is not exercising custodial control over the protected person.

The "special relationship" construct adopted by the Oregon courts encompasses more than just custodial relationships. It also encompasses any relationship established by status or by a particular standard of conduct that creates, defines, or limits a defendant's duty. See *Bertram v. Malheur County*, 204 Or. App. 129, 129 P.3d 222 (2006). In the *Bertram* case, the county had a statutorily defined duty to investigate sex abuse charges brought against

a youth in its care. Even though the county had a special relationship with the youth, that relationship, and the duty of care, did not automatically extend to protect all other children because the scope of the particular relationship is limited to harms that were reasonably foreseeable. See also *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 336 Or. 329, 83 P.3d 322 (2004). Based on the existing case law, it appears that before a guardian would be held liable to a third person for the protected person's acts, the guardian must have a legally recognizable special relationship with the protected person. Unless otherwise decided by the law, the nature of the relationship must be decided on a case-by-case basis and is dependent on the facts.² In the absence of a special relationship, the defendant guardian may prevail on summary judgment.³ Once a special relationship with the protected person is established, however, the question then becomes whether the defendant guardian's duty extended to the injured party. See *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1, 17, 734 P.2d 1326 (1987).

For better or worse, the "special relationship" the courts discuss is sometimes a relationship established between the defendant guardian and the protected person and other times a relationship established between the defendant guardian and the injured third person. In extending the relationship to the injured third person the courts seem to be employing a shorthand strategy for declaring that the scope of defendant's duty extended to the third person because defendant's conduct was unreasonable in light of foreseeable risk of harm. The courts have admittedly employed the special relationship rule to avoid difficult foreseeability questions.

Whether a guardian owes such a duty to an injured party or the extent of such a duty is undecided in Oregon. Other jurisdictions have also left this specific issue undecided. It does seem that the courts are weighing in favor of the need for guardians and only extending liability based upon really egregious facts. The courts have, however, shown reluctance to simply dismiss cases upon a finding of no duty and have allowed some cases to proceed to the analysis of whether the risk of harm was reasonably foreseeable.⁴

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Guardian may be liable

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Can the risk of harm be foreseen?

In general, a person who foresees or should foresee risk of harm to others must exercise reasonable care for the protection of those others.⁵ The standard of care is measured by what a reasonable person of ordinary prudence would or would not do in the same or similar circumstances.⁶ Then the defendant may be held liable for foreseeable harm only if his conduct was unreasonable in light of the foreseeable risks.⁷ The likelihood of harm and the severity of possible harm must be examined when determining the reasonableness of the defendant's conduct. In *Fazzolari*, the court stated that the character and probability of the occurrence of the claimed risk of harm weighs into the extent of measures the responsible party should undertake. For example, in *Fazzolari*, the defendant school had a special relationship with its student body and undertook a duty to supervise the students. This relationship was a significant factor in testing the reasonableness of the school's conduct when a student was assaulted and raped on the property. The *Fazzolari* court stated that a history of youth violence around a school might call for extensive security measures, while providing precautionary warnings may be satisfactory when there are only occasional assaults at dispersed locations.⁸ In *Buchler*, a prisoner escaped from the jailer's care while on a work camp and two days later shot two people. The court found that the jailer had a special relationship as custodian of the prisoner. The controlling question before the court in *Buchler* was whether it was likely the escaped prisoner would cause bodily harm to others if not controlled. The court in *Buchler* held that the jailer was not negligent when his prisoner escaped because he had no reason to know that the prisoner, who was being held for property crimes, would commit a violent criminal act subsequent to his escape.

In other cases invoking special relationship status, the courts have tested the reasonableness of the defendant's conduct solely by the definition of the special relationship as limited by existing law.⁹ The courts, however, have been inconsistent in analyzing these special relationship cases. Sometimes, the limitation of the relationship or the law is used to define the duty owed and the reasonableness of the defendant's conduct. Other times, the courts allow the case to proceed under a general foreseeability analysis despite an existing limitation in the relationship and/or law.¹⁰

Under a general foreseeability analysis, a guardian could be found negligent in his supervision of the protected person when, in light of the [protected] person's criminal history, the defendant guardian could reasonably foresee the likelihood of specific criminal activity by the [protected] person based on that person's criminal history, and that, if inadequately supervised, he would engage in the kind of criminal conduct that ultimately harmed the injured party.¹¹

In *Buchler*, Oregon adopted §319 of the Restatement (Second) of Torts (1965), which provides that one who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.¹² A line of cases has developed after *Buchler*, each dealing with the custodian's duty and application of §319. Although this line of cases deals with criminal conduct occurring as a result of the custodian's alleged negligence, it could be applied to a guardian who by law and in fact has cus-

tody and control of the protected person. The *Buchler* line of cases provides that under §319 a custodian "takes charge" of another when a custodial relationship exists,¹³ and to prove a claim under §319 the plaintiff must plead facts as to three elements:

- 1) defendant had "taken charge" of the actor;
- 2) defendant knew or should have known that the [actor] was likely to cause bodily harm to others if not controlled; and
- 3) defendant failed to exercise reasonable care to control the [actor] to prevent him from doing harm to others.¹⁴

Having said that, nothing in *Buchler* or any of its progeny suggests that its reasoning can, or should, be extended to cases other than those involving intentional criminal conduct.¹⁵

Should the guardian warn others?

A guardian could also be negligent for failure to warn another of danger if the guardian knows or should know that the other will predictably be exposed to danger if no warning is made.¹⁶ In the absence of such knowledge, there is no duty to warn.¹⁷ If there is such knowledge, two types of warnings may be required: 1) a specific warning and 2) a general duty to warn the public.¹⁸

Generally in the special relationship cases, the courts seem to apply a "one-bite" rule, i.e., the guardian is not liable to an injured third person if the protected person has never before caused this kind of injury. For example, when the protected person has never before acted on his threatening speech, a guardian is not be liable when that protected person physically assaults a third person, even though the protected person did employ threatening speech. After that first attack, however, the guardian could reasonably foresee that the protected person might act on his words, and the guardian should make reasonable attempts to prevent future harm. Similarly, a guardian would not be liable to third persons when the protected person, who does not have a driver's license, surreptitiously took the car keys, went joy riding, and damaged a parked vehicle. However, after that first "sneak" of the keys, the guardian should consider taking measures to prevent a recurrence.

The guardian must always act reasonably in light of the known facts. A guardian who

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Guardian may be liable

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knows that her protected person has lost his driver's license would likely be liable if she handed a set of car keys to the protected person. Similarly, a daughter-guardian whose father with moderate Alzheimer's seeks the car keys and drives off would be liable if all she did was hide the keys, because it would be foreseeable that such action is insufficient to prevent dad from driving off. However, if she disabled the distributor, any foreseeable risk of harm is reasonably limited, and therefore the guardian is not liable.

Although there are untested hurdles and a fair amount of uncertainty as to a guardian's liability to third persons, a prudent guardian may assume a duty to third persons exists and act reasonably in light of the foreseeable risks. The practical advice is different in each case because these matters are so fact specific, but the basic advice is the same:

- act reasonably, even carefully
- consider risks
- take precautions
- be wary
- identify potentially harmed third persons
- take steps to prevent the harm ■

Footnotes

1. *Schumann v. Crofoot*, 43 Or App 53, 602 P.2d 298 (1979)
2. *Lewis-Williamson v. Grange Mutual Ins. Co.*, 179 Or App 491, 39 P.3d 947 (2002)
3. *Nofziger v. Kentucky Cent. Life Ins.*, 91 Or App 633, 758 P.2d 348 (1988) rev. den'd.
4. *Fuhrer v. Gearhart By the Sea, Inc.* 306 Or 434, 760 P.2d 874 (1988)
5. *Fazzolari* and its line of cases
6. *Woolston v. Wells*, 297 Or 548, 687 P.2d 144 (1984)
7. *Torts*, Oregon State Bar §8.9
8. *Fazzolari*
9. *Torts*, Oregon State Bar §8.15
10. *Torts*, Oregon State Bar §8.15
11. *Washa* 159 Or App 207, 979 P.2d 273 (1999)
12. Restatement (Second) of Torts §319 (1965) as adopted by Oregon in *Buchler*
13. *Buchler*
14. *McAlpine v. Multnomah County*, 166 Or App 472, 999 P.2d 522 (2000)
15. *Knepper v. Brown*, 182 Or App 597, 50 P.3d 1209 (2002)
16. *Buchler*
17. *Buchler*
18. *Buchler*

Advising a client who becomes a guardian

By Theresa Hollis, Attorney at Law

An attorney's responsibilities do not end when the court signs the limited judgment that appoints his client as guardian for another person. An equally important part of the attorney's job involves counseling the guardian about his or her fiduciary duties to the protected person and responsibilities to the court.

The sooner the better

It is very important to instruct the guardian about fiduciary duties early in the process. Do not wait until something goes wrong. In my experience, simply sending a detailed letter to the client is not enough. The guardian may already be dealing with an overload of paperwork and is unlikely to take the time to study the letter. The guardian may also be faced with immediate decisions about placement and medical care.

Schedule an hour-long fiduciary-duty meeting as soon as the letters of guardianship arrive from the court. At this meeting give your client these documents and review a fiduciary duty letter with him or her. Encourage the guardian to ask questions during the meeting. With out-of-state clients or those with difficult work schedules, mail the fiduciary duty letter in advance, and schedule an appointment to go over it by telephone. When the guardian also serves as conservator for the protected person, I recommend the use of a separate letter that details the conservator's responsibilities.

Limits on a guardian's powers

The guardian should be familiar with the specific powers listed in the limited judgment and in ORS 125.315. He or she should also be aware of the statutory limitations on the guardian listed in ORS 125.320. The statute precludes a guardian from authorizing sterilization of the protected person. It also requires the guardian to obtain prior court approval before the protected person's funds can be used to pay for room and board provided by the guardian or the guardian's spouse, parent, or child. It requires the guardian to file a statement with the court that is served on specified persons before the protected person is placed in a mental health treatment facility, a nursing home, or any other residential facility.

The fiduciary duty letter

On the next few pages is a sample fiduciary duty letter for a guardian. ■

Theresa Hollis is an associate attorney with Fitzwater & Meyer, LLP in Clackamas, Oregon. Her practice emphasizes the representation of fiduciaries as guardians, conservators, trustees and personal representatives. She is a frequent volunteer for Legal Aid Service Senior Law Project.



The fiduciary duty letter

Theresa Hollis has provided this sample fiduciary duty letter for a guardian.

Dear Guardian:

Now that the court has appointed you the guardian of another person, you have the responsibility for making decisions regarding that person's life. These decisions, much like those a parent would make for a minor child, include where the protected person will live, who will take care of the protected person, and what type of medical treatment the protected person will receive.

The court issued letters of guardianship to certify that you are appointed as guardian, and these documents include a certified copy of the limited judgment signed by the judge. If you ever must prove to someone that you are the guardian, you should furnish a photocopy of these documents. Always keep the original for yourself. If you lose or misplace your original, we can obtain a new one from the court for a small fee.

We value your commitment to caring for this person. Our goal is to equip you with the information and resources you need to provide proper care and fulfill your responsibilities to the court. Here we set out detailed guidelines about your duties, and we offer helpful suggestions for carrying them out. Keep this letter with your other important guardianship documents. Refer to it when questions arise. You might also mark your calendar to review this letter every few months to refresh your understanding of your duties and to make sure that you comply with them.

Step 1: Take custody of the protected person.

The first thing you must do is *take custody* of the protected person.

This means you must take measures to

- a) control that person's activities
- b) determine where he or she will live
- c) provide for his or her safety.

To begin with, if the protected person is in a care center, hospital, foster home, or other facility, take a photocopy of your letters of guardianship to the facility and have them placed in the protected person's file.

Step 2: Make necessary health care decisions.

The limited judgment should detail whether or not you are responsible for making health care decisions for the protected person. Find out if the protected person has signed an advance directive for health care or otherwise expressed guidelines for health care. The person's care facility or doctor may have such documents on file, or the person may keep them in a safe deposit box or other secure place.

If the protected person has appointed a health care representative, this appointee will make medical decisions if the protected person is incapable. Give a copy of the signed document to the health care representative, the protected person's doctor, and any health care facility to which the protected person is admitted.

If no health care representative has been appointed, one of your most crucial roles as guardian is to make health care decisions for the protected person. When doing so, you must always seek to carry out the person's known wishes. Of course you must first learn what those wishes are. The person's care doctor may have that information on file. The person's minister, priest or rabbi, and family are also good sources of information.

Take a photocopy of the letters of guardianship to the protected person's doctor, and ask him or her to place them in the person's file. This allows you to make decisions by telephone, if necessary.

After you know the person's desires and have established a relationship with the person's doctor and care provider, you must evaluate the degree and nature of care the person requires on a daily basis. Compare this to the care he or she currently receives, and make adjustments to ensure that all the person's needs are met. If you are not familiar with the care plan or needs of the protected person, you can hire a geriatric care manager to make a one-time assessment for you. Check with your attorney for more information and/or a list of people who perform these services.

Also, keep in mind that if the protected person receives in-home care, you should consult with a CPA about your responsibilities to fulfill payroll, insurance, tax, and worker's compensation requirements.

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The fiduciary duty letter

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Step 3: Take reasonable care of personal effects.

(This duty does not apply to you if the person already has a conservator.)

Many times when a protected person is moved to a care facility or other living situation, the person believes very strongly that he or she will soon return home, and the care and condition of possessions become very important. Sometimes the person will return, but often he or she will not. If the home will be rented or sold, you must sort through all household items for later sale, storage, or distribution. In the meantime, take steps to protect the person's property. Do this either by arranging for someone to live at the house, or by asking family members and/or neighbors to check regularly on the home.

If the court has *not* appointed a conservator, you must take several steps to ensure that you fulfill your duty to care for personal property.

1. **Locate a copy of the protected person's will, if any.** This will tell you which items the person specifically wishes to give away upon death. You have a duty to take extra care of these items, including safeguarding them, insuring them, and preserving them for later distribution to the protected person's heirs.
2. **Take inventory of valuable items in the protected person's home.** Do this by listing valuable items in the home with a description of their condition. Some people find that a videotaped walk-through of the home and its contents is a useful and efficient method for taking inventory.
3. **Take photographs of valuable items for insurance purposes.** If you are not sure of the value of an item, consider obtaining an appraisal. This is especially important for items listed in the person's will. Many firms perform these services for a fee, but before you hire someone, you need to be certain that the firm is bonded.
4. **Take inventory of the person's safe deposit box.** Again, make a list of the contents, describe each item, and follow up on anything that might be missing. Verify that valuable items are properly insured, and obtain an appraisal of any item you are unsure about.
5. **Verify that all items are properly insured.** Consult the homeowner's or renter's insurance policy. Modify any values determined through professional appraisal and add any items that you deem necessary.
6. **Check with family members.** Inquire about any items that may have been taken from the home, especially if you do not find something specifically mentioned in the person's will.

Step 4: Make advance funeral and burial arrangements and control disposition of the remains of the person at the time of death.

Find out if the person has already made arrangements for his or her funeral and burial or cremation. The person's will is a good place to look for this information. If the person has already made arrangements, you will be responsible for these duties only if those persons designated are not available when the time comes. If no arrangements have been made, take time to meet with the protected person to discuss his or her wishes.

Note: If the person already has a funeral and burial plan AND the person is receiving Medicaid benefits, it is very important that you consult an attorney to evaluate the funeral plan.

Step 5: Receive money and personal property for the person, and apply that to his or her support, care, and education.

This duty lies primarily with the protected person's conservator if one is appointed. It includes monitoring the person's mail, and reviewing and paying each bill in a prompt manner. It may also require becoming the person's "Representative Payee" for purposes of handling Social Security and/or pension payments.

However, even if the person has a conservator, you have a duty to keep the conservator informed about needs for support, daily care, past debts, current expenses, and current and future medical care, and what funds are necessary. If, for example, the person needs a medical test or procedure that is not covered by insurance, as guardian you have the duty to communicate with the conservator to make the needed arrangements.

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The fiduciary duty letter

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Responsibilities to the court

The court requires you to furnish information of your guardianship activities on three occasions.

1. You must file an annual report.*

When? This is *due 30 days after each anniversary* of your appointment as guardian, so you need to mark your calendar for each anniversary. Your guardian's report is due before _____ each year. You can complete this one-to-four-page fill-in-the-blank form yourself, or we can complete it for you. Many clients prefer to have us assist with preparing the first report and then are comfortable completing the reports themselves for following years. If the report is not filed on time, the court may issue you a citation to appear before the judge to explain why no report was filed. The court is very strict with deadlines, so it is important that you complete this report on time each year.

What? In the guardian's report, you will describe the current mental and physical condition of the protected person, where he or she currently resides, the kind of services offered to the person, the activities the person participates in, and how often you visit him or her.

If the court has not appointed a conservator and you have been in charge of any of the protected person's money, you must also account for all receipts and disbursements of the protected person, down to the last penny.

* If you are guardian for a minor the court may waive the annual guardian's report. Your attorney will instruct you on whether or not a guardian's report is required.

2. You must file a *statement giving notice in advance of any intention to place the person in a residential care facility or mental health treatment facility.*

The court requires you to file a statement before moving the person to a new facility. Therefore, you should contact us if you intend to change the person's place of residence. We can assist you in the preparation of the forms and with the decision about who must receive notice. If placement is an emergency, the protected person's life and safety are always more important than the paperwork. In such a situation, give any required notice as soon as possible. (Note: Brief hospitalization for medical care or a brief respite stay in a care facility does not require notice. "Brief" is anything less than a month.)

3. You must officially *close the guardianship upon the death of the protected person.*

When the protected person dies, you must:

- a) Notify the court directly by letter and include a copy of the death certificate
- b) Notify our office by telephone
- c) Send us a copy of your letter to the court along with a copy of the death certificate

If the court requests anything else from you, contact your attorney for assistance.

By now you probably realize that your responsibilities as guardian are not to be viewed lightly. Please feel free to call upon us whenever you are unclear about something or you begin to feel overwhelmed. We are here to answer your questions. We can also refer you to care providers, care managers, consultants, in-home providers, and other resources that offer valuable services and information.

Sincerely,

Elder Law Attorney

Elder Law Attorney

The role of professional fiduciaries

By Gary Vigna, Attorney at Law

Gary L. Vigna is a partner in the Portland firm of Harris & Vigna. His practice focuses on guardianships, conservatorships, and probate. He represents a number of professional fiduciaries.

Under Oregon law, a “professional fiduciary” is any person who is acting simultaneously as fiduciary for three or more protected persons who are not related to the fiduciary. ORS 125.240(5). The information in this article relates to professional fiduciaries that are neither financial institutions nor trust companies.

The professional fiduciary plays an important role in guardianships, conservatorships, trusts, probate, and estate planning. A variety of situations may bring a professional fiduciary into play:

- There are no family or acquaintances to serve as the fiduciary.
- There are family or acquaintances, but they prefer not to serve as the fiduciary because they do not wish to implement the difficult decisions that could damage their relationship with the family member or friend.
- There are family or acquaintances, but none are suitable to serve as the fiduciary.
- Family or acquaintances are in dispute over who should serve and a professional fiduciary, a neutral third party, is the means of resolving the dispute.
- The court appoints a professional fiduciary following its removal of an existing fiduciary.
- A nonprofessional guardian or conservator hires the professional fiduciary to provide case management services.

Choosing a professional fiduciary

When choosing a professional fiduciary it is important to identify the situation that creates the need. Common situations are:

- Alzheimer’s or some other form of dementia
- mental illness – e.g., bipolar disorder or schizophrenia
- alcoholism or drug addiction

Each situation presents different challenges and issues. Make sure the professional fiduciary has experience in dealing with the specific situation and is willing to take on that type of case.

Once the decision is made to use a professional fiduciary, provide the client with the names of two or three to contact and interview. The best method for finding a professional fiduciary is word of mouth. For referrals, contact attorneys who practice in the areas of guardianships and conservatorships. Another resource is the Guardianship & Conservatorship Association of Oregon, Inc. Its telephone number and Web site are 503.241.6009, www.gcaoregon.org. Another Web site to check is www.guardianship.org.

Because a person or entity attains the status of “professional” fiduciary under ORS 125.240(5) regardless of educational background, training, or experience simply by serving as a fiduciary for three or more protected persons who are not related to the fiduciary, the interview process should include questions about experience, background, and training. Encourage the client to include other family members or interested persons in the interview process. The professional fiduciary is a complete stranger who is coming into their lives to make important decisions. You want the client and other concerned persons to be comfortable with the chosen fiduciary. Your client should make the ultimate selection. Emotions often run high in protective proceedings, given the nature of the decisions. If the client becomes unhappy with the professional fiduciary and it was your selection, the client will be the first to remind you of that.

A petition that seeks to appoint a professional fiduciary (with the exception of financial institutions and trust companies) must contain the information required under ORS 125.240. Professional fiduciaries do business in a variety of forms, i.e., as sole proprietors, partnerships, and limited liability companies. The petition and the limited judgment must correctly identify the professional fiduciary. If the professional fiduciary is a partnership or limited liability company, identify the professional fiduciary as the entity, not one or more of the partners or members.

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The role of professional fiduciaries *Continued from page 14*

Professional fiduciary may fill other roles

In addition to the common roles of guardian and conservator, the professional fiduciary is frequently asked to serve in a variety of other fiduciary roles.

Agent/Attorney-in-fact under power of attorney

Professional fiduciaries should be cautioned about serving as an agent/attorney-in-fact under a power of attorney. That arrangement does not provide the same safeguards for the professional fiduciary or the principal as does a protective proceeding. There is no bond requirement, there are no court-approved accountings, there is no procedure for fiduciary fees to be approved by the court, and there is no procedure for decisions or actions of the professional fiduciary to be approved by the court. Often, the suggestion that a professional fiduciary serve as an agent/attorney-in-fact under a power of attorney occurs when the principal has questionable capacity and there is an effort to avoid the cost of establishing a conservatorship. This raises the issue of the validity of the power of attorney executed by the principal. Another issue that often arises is the scope of the professional fiduciary's authority under the power of attorney. This is not always clear. A principal with questionable capacity can, by comments that may change daily, create the issue of whether the power of attorney has been revoked, leaving the professional fiduciary to act or not act at its own peril. These issues and the lack of the safeguards previously noted make the professional fiduciary vulnerable to claims by the principal or others. In addition, if a professional fiduciary serving as an agent/attorney-in-fact needs to sell real property, it raises the issue of whether the professional fiduciary is exempt under ORS 696.030 from the licensing requirements for a person engaged in professional real estate activity.

Healthcare representative under advance directive

ORS 127.550 provides some safeguards for a professional fiduciary that is willing to serve and make decisions as a health care representative under an advance directive. If questions or concerns arise with regard to a decision of a professional fiduciary that serves as a health care representative, he or she should consider filing a petition under ORS 127.550 for judicial review of the decision.

Case management services

The use of a professional fiduciary to provide case management services can arise in several contexts. An out-of-state guardian may want someone local to monitor the protected person's care needs and living situation.

A third party might raise concerns about the guardian being out of state, and the disclosure that the proposed guardian intends to use a

local professional fiduciary to provide case management services may alleviate those concerns. An in-state guardian may want the help and expertise of a professional fiduciary to address the protected person's care needs. Whatever the situation may be, the case management services should be provided by a professional fiduciary pursuant to a written contract that identifies the scope of the services being provided and the charges for the services.

Personal representative

The probate laws provide safeguards and a structure for a professional fiduciary serving as a personal representative. Rarely is a professional fiduciary that is not a financial institution or trust company nominated as personal representative under a decedent's will. Typically, the professional fiduciary is appointed as a result of the person or entity nominated in the decedent's will having declined to serve. Persons or entities that decline to serve should be advised that they are forgoing a statutory personal representative's fee, and even if the will provides that the personal representative is not required to file a bond, the professional fiduciary will likely be required to do so, which will be an additional cost to the estate.

Trustee

A topic of some discussion has been whether a professional fiduciary (apart from financial institutions and trust companies) can serve as trustee without being a licensed trust company under the Bank Act, ORS Chapters 706-716. One interpretation of OAR 441-505-4030 is that it creates an exemption from trust-company licensing for a court-appointed trustee. Therefore, before a professional fiduciary undertakes the role of trustee, a petition/motion should be filed under the Oregon Uniform Trust Code, ORS Chapter 130, for an *Order or Limited Judgment* appointing the professional fiduciary as trustee. ■

An interview with Heather Gilmore

Protective proceedings may fail the mentally ill person

By Ellyn Stier, Attorney at Law

Heather Gilmore is a former member of the Elder Law Section Executive Committee, for which she chaired the Continuing Legal Education Subcommittee. At the Elder Law Section's unCLE program in May 2006, Heather and Mark Williams facilitated the session on the complex topic of the pros and cons of guardianship and civil commitment proceedings to protect mentally ill persons.

Heather Gilmore's passion for the rights of vulnerable individuals is deeply rooted. Her aunt, whose son was born with Down Syndrome, was an advocate for persons with disabilities, and was intensely involved in the court-ordered closure of the Polk Home in Pennsylvania, where "retarded" children were housed in cages and treated like animals. Heather witnessed not only her aunt's activism, but also the harassment she sometimes suffered as a result.

Heather graduated from Willamette University law school in 1990. While a student, she clerked for the Oregon Advocacy Center. She also excelled in estate planning and tax coursework, and landed a job working for Professor Valerie Vollmar, who became a mentor.

Heather's practice is located in Salem and emphasizes taxable estate planning and administration and adult protective proceedings. She recently shared some of her thoughts on the subject of guardianship and civil commitment proceedings to protect mentally ill persons.

With ever-decreasing public funding for mental health treatment and increasing due process standards for guardianship and civil commitment proceedings, Heather foresees a crisis on the horizon. For example, when there is a question about whether the legal standard for commitment can be met, and at the same time state treatment resources have been cut back, case workers may be more likely to take the position that the standard is not met and commitment is unnecessary.

Civil commitment

Heather cites the recent case of *State v. Judd*, 206 Or App 146, 135 P3d 397 (2006), a civil commitment case decided by the Oregon Court of Appeals on May 17, 2006. The court held that the state did not prove by clear and convincing evidence that the appellant's mental disorder created a situation likely to result in harm. In defining harm, the court stated that harm must involve serious physical

injury or be life-threatening in the near future. Despite the fact that appellant had to be taken to the floor by security guards and placed in restraints at the hospital, the court concluded that there was no indication that he was likely to provoke violence, or that he suffered any harm. The state had already conceded that appellant's failure to take prescribed medication and his bizarre behavior — including wearing underpants on his head to church — did not support a "basic needs" commitment. (Basic needs were defined as those things necessary to sustain life.)

Guardianship

Heather says that persons concerned for the welfare of their mentally ill friends or family members often see no recourse other than pursuit of a guardianship. Though a guardianship petition, like a commitment, also requires clear and convincing evidence, the standard is different. Or is it? Heather explains that the protected person must lack the capacity to meet the essential requirements for his or her health or safety, meaning that serious physical injury or illness is likely to result. ORS 125.005(5). "Is a mentally ill person's refusal to take medication and the consequent behaviors serious enough to meet the standard for a guardianship?" asks Heather. "How serious does the risk have to be for the mentally ill person? Does the injury or illness need to be only physical or can it be mental as well? If so, how does the guardian perform medication management for an unwilling patient? What liability do guardians incur if they don't hospitalize a person who becomes more and more unstable?"

The consequences, goals, and interested persons in civil commitment and guardianship proceedings are different. Heather is convinced that there should also be a difference between the two standards, and it is important to keep the two types of proceedings distinct, even though some of the same language is used in both.

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A case in point**Schaefer v. Schaefer** 183 Or App 513, 517 (2002)

Coenia Schaefer, an 86-year-old woman, successfully appealed an order that appointed her son Roger as her legal guardian.

Coenia had lived alone in her home for more than two decades. She handled her own food preparation and housekeeping, and cared for a dog and many cats. She used a walker and took a taxi when she needed to go to the grocery store or the bank. She did occasionally experience memory lapses and mental confusion. Her doctor had prescribed medication for edema, but because she didn't like having to go to the bathroom frequently, she stopped taking it. As a result, she sometimes suffered from swelling and severe blisters on her feet that required emergency room treatment. Over the years, she had occasionally told people that rather than move out of her house, she would have the pets put to sleep and shoot herself.

In 2001, her son Roger applied for guardianship, alleging that she was "incapacitated and there is an immediate or serious danger to [her] life or health." Coenia filed the objection form with the court. She checked the boxes next to "I do not want anyone else making any of my decisions for me," and "I do not want [Roger] making any decisions for me." She added that she did not want him deciding "where I live, who are my friends, who I see, what I do or anything else. In fact after this I don't want to see him again. From this day he is no longer welcome in my home." (Underscoring in original.)

When she learned that her son planned to move her into a care facility, she again said that she would rather have her pets put to sleep and kill herself. She took no steps to carry out that threat.

The court visitor found that Coenia had memory loss but that she was in no immediate danger with respect to food, clothing, and shelter. Her report recommended appointing a guardian because Coenia "refuses to take doctor's advice and medications that are vital to her life and threatens suicide if she's moved from her home. She is unable to reason with [sic] because of her dementia." The Linn County Circuit Court granted the petition for permanent guardianship after a hearing, determining that Coenia could not meet the essential requirements for her own health and safety due to "suicidal ideation;" "unsanitary conditions, primarily the cat urine smell and whatnot, in the house;" and "unwillingness to take prescribed medications or unwillingness to cooperate with Home Health."

The Court of Appeals reversed the trial court's decision, concluding that Coenia's statements about committing suicide were "just talk" and that the evidence showed Coenia kept a clean, neat, and orderly house except for the unpleasant odor of cat urine, which was not a health hazard. The court found that her unwillingness to take the medication due to its side effects was based on a conscious cost-benefit analysis and stated "we cannot find it to be the result of an inability to process information, nor can we find that she is unable to communicate either the decision or its rationale." The court concluded:

In short, we agree that appellant shows some signs of impaired mental functioning and that she has made some decisions that appear to threaten her health. But no evidence whatsoever, much less clear and convincing evidence, supports the conclusion that those decisions are the result of impaired mental functioning. That connection is what the legislature has deemed to be the necessary prerequisite for establishing a guardianship.

Protective proceedings and the mentally ill

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State payment for care

What if there are no private funds or insurance to pay for the necessary mental health hospitalization? The Department of Human Services Office of Medical Assistance Programs (OMAP) will pay for inpatient psychiatric services for Medicaid recipients, but only if the mentally ill person has a Diagnostic and Statistical Manual Axis I or II diagnosis¹ and the person poses an imminent danger to himself or others, or is unable to care for himself. Inability to care for oneself is evidenced by

- (1) an inadequate level of functioning outside of an inpatient setting; and
- (2) impaired judgment, impulse control, and/or perception indicating the need for hospital-level continuous monitoring and intervention.

Although this definition of inability to care for oneself seems rather vague, Heather believes it leaves room to argue that OMAP should pay for inpatient psychiatric services for a mentally ill person subject to a guardianship.

Criminal commitment

The sad reality is that many chronically mentally ill persons who do not get protection or treatment do eventually end up harming others or themselves, and wind up in the criminal system. The irony of this, Heather points out, is that the criminal court may then order mental health treatment which, finally, the state will fund. However, by the time the criminal system becomes involved, the mentally ill person has suffered such a serious setback that he or she may be unable to return to a higher level of functioning. ■

Footnote

1. The *Diagnostic and Statistical Manual of Mental Disorders* (DSM) is published by the American Psychiatric Association and covers all mental health disorders for both children and adults. The book is the primary reference on psychiatric diagnoses. The DSM uses a multiaxial approach to diagnosis. Axis I—Clinical Syndromes—includes all the mental health conditions except personality disorders and mental retardation. Axis II includes autism, mental retardation, and personality disorders.

Judgments and orders in probate court

Summary prepared by Philip Jones of Duffy Kekel LLP. Reprinted with permission from the Estate Planning and Administration Newsletter, April 2006

Sections (§) refer to HB 2359 (2005 Oregon Laws Ch. 568) that will be codified as part of ORS Chapters 116 (probate estates) and 125 (protective proceedings).

ORS 112.205(4) states that the probate court operates through orders and judgments. Sections 33 and 36(2) provide that limited judgments may be used only in certain enumerated situations. ORS 111.275 and 125.030. In estates, section 34 states that a general judgment will be used to approve final accountings and direct the distribution of assets. In protective proceedings, section 37 states that a general judgment will be used to terminate the proceeding. The statutes do not authorize limited or general judgments in other situations. Accordingly, this chart indicates that an order should be used in all situations where the statute is silent as to the type of document to employ. For the same reason, court decisions should be in the form of orders in situations not described in this chart.

This is a summary of relevant provisions, prepared by Philip Jones of Duffy Kekel LLP. It is a summary only; please review the text of the statutes regarding the application of the law to particular situations. Statutes not cited here may also be relevant.

Court Action	Probate Estates	Conservatorships	Guardianships
Appointment of fiduciary	Limited judgment. §33; ORS 111.275*† Usually also admits will to probate	Limited judgment. §36(1); ORS 125.030*† See ORS 125.400	Limited judgment. §36(1); ORS 125.030*† See ORS 125.305
Admitting will to probate	Limited judgment, if it also appoints personal representative. §33; ORS 111.275*†		
Removal of fiduciary	Limited judgment. §33; ORS 111.275*	Limited judgment, because it usually appoints a new fiduciary. §36(1); ORS 125.030*†	Limited judgment, because it usually appoints a new fiduciary. §36(1); ORS 125.030*†
Decisions in will contests	Limited judgment. §33; ORS 111.275*		
Placement of a protected person			Limited judgment. §36(2); ORS 125.030*
Sale of residence of protected person		Limited judgment. §36(2); ORS 125.030*	
Declaratory judgment decisions	Limited judgment. §33; ORS 111.275*	Order	Order
Approving an interim accounting without objection	Order	Order. ORS 125.480	
Decisions on interim accountings after objection	Limited judgment. §33; ORS 111.275*	Limited judgment. §36(2); ORS 125.030*	
Decisions awarding attorney fees without objection, or if no accounting involved	Order‡	Order‡	Order‡
Decisions awarding fiduciary fees without objection, or if no accounting involved	Order‡	Order‡	Order‡
Decisions awarding attorney fees after objection to an interim accounting	Limited judgment. §33; ORS 111.275*	Limited judgment. §36(2); ORS 125.030*	
Decisions awarding fiduciary fees after objection to an interim accounting	Limited judgment. §33; ORS 111.275‡	Limited judgment. §36(2); ORS 125.030*	
Decisions on petitions for final accounting and distribution	General judgment. §34(1). ORS 116.113; ORS 18.005(7)	Order approving final account and general judgment closing the proceeding. §37(3); ORS 125.090; ORS 125.480; ORS 18.005(7)	
Termination of a protective proceeding		General judgment. §37(3); ORS 125.090; ORS 18.005(7)	General judgment. §37(3); ORS 125.090; ORS 18.005(7)
Discharging fiduciary after general judgment on final account	Supplemental judgment. §4(16); ORS 116.213; ORS 18.005(17)		
Additional decisions after entry of general judgment	Supplemental judgment. §4(16); ORS 18.005(17)	Supplemental judgment. §4(16); ORS 18.005(17)	Supplemental judgment. §4(16); ORS 18.005(17)

* Sections 33 and 36(2) both require that the court must determine “that there is no just reason for delay” before entering a limited judgment under those sections. ORS 111.275(2); ORS 125.030(3). However, the limited judgment document need not reflect that determination. The safest practice would be to include that representation in the petition and then to include that determination in the limited judgment.

† The use of the phrase limited judgment may be confusing to financial institutions and others dealing with a fiduciary operating pursuant to an appointment under a limited judgment. To clarify that the fiduciary has full powers to act as fiduciary, it is suggested that both the caption and the body of the limited judgment reflect those full powers.

‡ Sections 33 and 36(2) provide that limited judgments may be used only in certain enumerated situations, one of which is approval of an accounting after objection. ORS 111.275 and 125.030. If the accounting included a request for attorney fees or fiduciary fees, and an objection was filed, then a limited judgment may be used to award those fees. If no objection was filed, or if fees were requested in a situation not involving an accounting, then the fees should be awarded by an order, not a limited judgment.

The Deficit Reduction Act of 2005 and Oregon Medicaid rules

By Sam Friedenber, Attorney at Law

The Deficit Reduction Act of 2005 (DRA)¹ signed into law on February 8, 2006, has the most significant impact on long term care Medicaid law since 1993. In order to implement DRA in Oregon, the Department of Human Services of Oregon (DHS) worked with a group of advocates² to prepare relevant Oregon Administrative Rules (OARs). This article summarizes the most important proposed regulations.

It must be noted that the interpretation of DRA will be challenging, and the following are caveats:

- This article is based on *proposed* rules and all references are to those rules proposed with a May 22, 2006, hearing date.³
- CMS is expected to issue an interpretive Transmittal and we can expect changes arising from that policy statement.
- DHS changes regulations with great frequency, even in nontransitional periods.
- DRA and the proposed rules are textually unclear. Unless otherwise stated, all rules are effective July 1, 2006.

Look-back period

The look-back period is the period just before the Medicaid application request, during which the agency can ask about transfers of assets by the client or his/her spouse. The object of the rule is, of course, to find disqualification. OAR 461-140-0210(2). Transfers on or before June 30, 2006, are unchanged and have the look-back period of 36 or 60 months that was established by OBRA 93.⁴ OAR 461-140-0210 (5)(a). However, transfers on or after July 1, 2006, are all subject to a 60-month look-back period. OAR 461-140-0210 (5)(b).

A small change applies to all transfers. Pre-DRA the look-back period was determined from the "date of application." That has been changed to the "date of request." OAR 461-140-0210 (5)(a) and (b). For Medicaid, that is identified in OAR 461-115-0030 as the date that a request is received for Medicaid by the agency. This is often the call for an application.

The consequence of the change is that clients who are considering divestment of assets face a greater risk of having to spend down. Sadly, the most affected will be the clients with more modest assets and clients who wait until they need paid care. Another consequence will be that many clients will be pushed into an earlier divestment in order to beat the longer 60-month look-back period. Before DRA these clients might have waited, knowing that a divestment at the last moment would incur a palatable 36 months of expensive care.

Beginning the period of ineligibility

For disqualifying transfers on or after July 1, 2006, DRA mandates a new method for determining when the period of ineligibility begins. If the client is living in a "standard living arrangement," the penalty begins "the month following the month of the first asset transfer." OAR 461-140-0296 (3)(c). However, if the client lives in "nonstandard living arrangements," the penalty begins the later of (1) the "month following the month of the first asset transfer" or (2) the "date of request...for medical benefits as long as the client submits an application, and would otherwise be eligible but for the disqualification period." OAR 461-140-0296 (3)(d).

OAR 461-110-0110 (21) redefines "standard living arrangement" as "a location that does not qualify as a nonstandard living arrange-

ment." OAR 461-110-0110 (13)(a) redefines a "nonstandard living arrangement" as a nursing facility, an intermediate facility for the mentally retarded, a psychiatric institution for persons under 21 and over 65 (Oregon State Hospital), and a waived community-based care setting. The determination is made when the client is applying for or receiving services. OAR 461-110-0110 (13)(a). In summary, a standard living arrangement is a home in which the client is not receiving benefits and a nonstandard living arrangement is everywhere else.

Hence, a disqualifying transfer by a client living at home will launch a period of ineligibility more or less in the same manner as before DRA. This should also apply to a client at home who receives private care. For clients in a care setting, the period of ineligibility will begin only when the application is made, assuming they are otherwise eligible but for the disqualifying transfer. Needless to say, DHS is expecting an increased number of applications for the purposes of beginning the period of ineligibility. Clients who plan properly will have to make sure that other Medicaid qualification rules are met: spend-down of all available assets, disability requirements of the service priorities, Medicaid participation by the facility, and income limits.

This distinction in treatment based on whether the client is at home or in a facility reflects a policy of stiffer penalties for people who purposely plan for Medicaid rather than who make gifts for other purposes. The classic scenario, of course, is the transfer of the family farm to the next generation.

Calculating the period of ineligibility

For disqualifying transfers on or after July 1, 2006, DRA also mandates a new way to calculate the disqualification period. The basic approach is still that the agency will compute a disqualification period with a formula, called the "quotient." It "is the number of months equal to the uncompensated value...for the transfer divided by the following dollar amount..." OAR 461-140-0296 (1). That amount for transfers after October 1, 2004, is still \$4,700. It is scheduled to change in October 2006.

However, DRA now requires that multiple transfers be grouped and that they include *de*

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minimis transfers. OAR 461-140-0296 (3)(a). Most important, there is no rounding-down of partial months. OAR 461-140-0296 (3)(a) and (b). To the extent that there is a decimal or fraction in the quotient, it "is converted to an additional number of days by multiplying the decimal or fraction by the number of days in the last month of the disqualification period." The good news is that fractions of a day are not counted! OAR 461-140-0296 (3)(b).

Annuities

DHS has spread out the annuity rules in several sections with the bulk in OAR 461-145-0022. Readers will recall that DHS has changed the annuity rules four or five times in the last two years.

DRA specifically excluded retirement and pension funds from annuity treatment. OAR 461-145-0022 (1)(a). Retirement plans are described broadly at OAR 461-145-0380 (1). This is an important exclusion because pension assets can often be annuitized.

Annuities that are not in pay-out status are considered a resource. OAR 461-145-0022 (2). This covers the typical investment with an insurance company.

The client and spouse must disclose annuities at application and recertification. OAR 461-145-0022 (3). "By signing the application for assistance, a client and the spouse of a client agree that the Department...becomes a remainder beneficiary...unless the annuity is included in the community spouse's resource allowance under OAR 461-160-0580 (2)(c)." OAR 461-145-0022 (4).

The types of annuities that Medicaid planners use to convert resources into income are defined as "commercial annuities" and most of the rules refer to that term. OAR 461-145-0022 (1)(d). It is the purchase of commercial annuities that has been the object of DHS and DRA attention.

Annuities – complying, transfers, or resources

To approach the labyrinth of DRA and DHS annuity rules, one must know whether the client lives in a "standard living arrangement" or "nonstandard living arrangement" (see above for definitions) and when the annuity was purchased.

The rules for commercial annuities purchased by the client or spouse (1) living in

"nonstandard living arrangements," purchased after January 1, 2006, and before July 1, 2006; and (2) living in "standard living arrangements" and purchased after January 1, 2006, are addressed at OAR 461-145-0022 (7) to (9). The annuity will be counted as a resource unless it meets certain requirements:

- If the client is the annuitant, the death beneficiary must be either (1) DHS up to the amount of medical benefits paid or (2) the client's minor, blind or disabled child. OAR 461-145-0022 (8)(a).
- If the spouse of the client is the annuitant, the death beneficiary must be either (1) the client or – if he or she does not survive – DHS up to the amount of medical benefits paid; or (2) the spouse's minor, blind, or disabled child and – if he or she does not survive – the client. OAR 461-145-0022 (8)(b).

Further, all annuities must be irrevocable, pay out principal and interest in equal monthly installments within the actuarial life of the annuitant (using a CMS table), and be issued by a commercial annuity business. OAR 461-145-0022 (8)(c). If the requirements are met, the payments of the annuity are not a resource and will be considered unearned income. OAR 461-145-0022 (9). If the requirements are not met, the annuity will be a resource. OAR 461-145-0022 (9). The formula for calculating the value of the resource is in the rule.

Commercial annuities purchased by clients in "nonstandard living arrangements" on or after July 1, 2006, will be counted as a resource unless they meet the requirements of OAR 461-145-0022 (10). Regarding the named death beneficiary, the annuity must meet one of the following three options: (1) The first remainder beneficiary must be the spouse of the client (and if she transfers any portion of the remainder, DHS must be the beneficiary up to the amount of medical benefits paid). OAR 461-145-0022 (10)(a)(A). (2) The first remainder beneficiary must be the annuitant's minor or disabled child (and if the child or representative of the child transfers any portion of the remainder, DHS must be the beneficiary up to the amount of medical benefits paid). OAR 461-145-0022 (10)(a)(B). (3) DHS must be the beneficiary up to the amount of medical benefits paid. OAR 461-145-0022 (10)(a)(C). Further, the annuity must be "irrevocable and nonassignable," pay out principal and interest in equal monthly installments within the actuarial life expectancy of the annuitant (using a CMS table), and be issued by a commercial annuity business. OAR 461-145-0022 (10)(b) to (d). Interestingly, there is no rule stating that if the requirements are met, the payments of the annuity will be unearned income. If the requirements of the rule are not met, the annuity may be a resource or a disqualifying transfer. OAR 461-145-0022 (12) and (13). This seems difficult to reconcile.

Note that the transfer rules at OAR 461-140-0220 address annuities but are unclear. They state that if the client lives in the "standard living arrangement" and the client or spouse uses resources to purchase an annuity on or after January 1, 2006, the purchase is not a disqualifying transfer so long as the client or the spouse is the annuitant. OAR 461-140-0220 (9). The same is true if the client lives in a "nonstandard living arrangement" and the annuity is purchased between January 1, 2006, and June 30, 2006. OAR 461-140-0220 (10)(a). What the rules do not state is that the annuity must also meet all of the requirements of OAR 461-145-0022 mentioned above.

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If the purchase of an annuity is determined to be a transfer, the disqualification period rules can be found at OAR 461-140-0296 (5) and (6). If the annuity is noncomplying because the term exceeds the actuarial life expectancy of the annuitant, the transferred portion is the period beyond the life expectancy. OAR 461-140-0296 (6). If the reason is some other factor, the disqualification is based on "uncompensated value" calculated according to OAR 461-140-0250 (2)(a)(B). OAR 461-140-0296 (5). The confusion here is that the annuity is also supposed to be a resource.

Hardship waiver for transfers

DRA transfer rules will disqualify clients and cause "an undue hardship;" hence, DRA includes new mandates for waivers of the disqualification period. If the conditions for a hardship waiver are met, the agency "may waive the disqualification." OAR 461-140-0300 (3). The client must have "no other means for meeting his or her needs," and the "disqualification would deprive the client of...medical care such that the client's health or life would be endangered...or...food, clothing, shelter, or other necessities of life without which the health or life of the client would be endangered." OAR 461-140-0300 (3)(a) and (b). The proposed rules require the client to prove that no other means for meeting his or her needs exist by "[e]xploring and pursuing all reasonable means to recover the assets to the satisfaction of the Department, including legal remedies and consultation with an attorney; and ...[c]ooperating with the Department to take action to recover the assets." OAR 461-140-0300 (3)(a).

Home as a resource

For clients who began receiving services after January 1, 2006, a home with more than \$500,000 in equity becomes a countable resource. Exceptions apply if the home is occupied by the spouse, minor, blind, or disabled child, or the equity cannot be converted to cash (presumably because the home is jointly owned with another person) or income-producing property under OAR 461-145-0250 (presumably a farm). OAR 461-145-0220 (2)(a). It should be noted that working farms may be excluded as income-producing property under OAR 461-145-0250. Note that the traditional rule that allows the home to be excluded if the client is making a good faith effort to sell the property does not apply if the equity is over \$500,000. OAR 461-145-0420 (4)(a). It is expected that this will affect few Oregonians, but for those who are affected the consequences are dire.

Purchase of life estate

The client who purchases a life estate interest in the home of another on or after July 1, 2006, may have that purchase considered a disqualifying transfer. The purchase is considered not disqualifying if the client "resides in this home for at least 12 consecutive months after the date of the purchase." OAR 461-145-0310 (3)(b).

Loans

DHS has entirely rewritten the rules governing loans. OAR 461-145-0330. DRA addressed the client who makes a loan in order to convert assets into income. If a client or spouse on or after July 1, 2006, "uses funds to purchase a promissory note, loan or mortgage" the loan is considered a disqualifying transfer unless the loan is to be repaid within the person's actuarial life expectancy (pursuant to CMS tables), payments are equal over the term of the transaction, there are no balloon payments, and the loan is not cancelled at death. OAR 461-145-0330 (7). This is an attempt to make a loan fit into the limitations of an annuity. The

odd choice of words—"uses funds to purchase a promissory note"—is probably an attempt to differentiate a loan from the sale of an asset on an installment contract.

If the loan complies, then the "interest payment is unearned income," and the "payment of principal is excluded." OAR 461-145-0330 (7). The state assumes that all the loan payments received are for interest only, and they will be counted as part of the client's monthly income. The principal will not be counted as an asset.

Community Spouse Resource Allowance—income first

Perhaps the most significant impact of DRA on couples is the codification of the "income first" rule for spouses institutionalized after February 8, 2006, who seek court-ordered spousal support. DHS will now require that the institutionalized spouse's income be applied to the support of the community spouse before allowing an award of assets. OAR 461-160-0580 (2)(c)(C). Previously this had been the rule only in agency determinations. Unfortunately this rule harms the community spouse because if the institutionalized spouse predeceases him or her, the awarded retirement income frequently does not survive the death. An award of assets would still be there to provide income. It is critical to inquire when the institutionalization began.

Other transfers

The "exempt transfer" rules of OAR 461-140-0242 have been almost completely rewritten. Of particular note is OAR 461-140-0242 (1), which addresses transfers of resources to a spouse, minor, or blind or disabled child. This change is not driven by DRA. DHS is trying to limit what that recipient of the transfer can then do with the transferred asset. Generally, the proposed rule prohibits the recipient from taking any action that would benefit any other person, requires a spend-down during his life, and restricts further transfers. The Elder Law Section has commented that these limitations exceed federal law. ■

Footnotes

1. PL 109-171
2. The Elder Law Section was represented by Tim Nay, Cinda Conroyd, and Donna Meyer.
3. The author also had the opportunity to review the proposed rules after edits and just before final enactment, but there may very well be changes. Thanks to Joanne Schiedler for providing the most current version.
4. PL 103-66

U.S. Supreme Court clarifies anti-lien provision of federal Medicaid law and DHS responds

By Michael J. Edgel & Donna R. Meyer. Fitzwater & Meyer, LLP

In *Arkansas Dept. of Health and Human Services v. Ahlborn*, 574 U.S. ____ (2006), No. 04-1506, 126 S.Ct. 1752, which was decided on May 1, 2006, the United States Supreme Court held that the anti-lien provision of the federal Medicaid law bars states from asserting liens against personal injury awards or settlements in amounts that exceed the portion of such awards/settlements allocable to reimbursement for medical expenses. Early indications suggest that Oregon's Department of Human Services (DHS) is developing new policies in response to the *Ahlborn* opinion.

In 1996, Heidi Ahlborn, who was then a college student, suffered permanent brain damage as a result of a car crash. Lacking the resources necessary to pay for her medical care, Ahlborn applied for Medicaid through the Arkansas Department of Health and Human Services (ADHS). She was deemed eligible, and ADHS ultimately paid \$215,645.30 to providers on her behalf.

Ahlborn filed suit against the alleged tortfeasors in state court, seeking damages for past and future medical costs; permanent physical injury; past and future pain, suffering, and mental anguish; and past and future loss of earnings.

Ahlborn's case was settled out of court in 2002 for the sum of \$550,000. The parties agreed that this sum represented approximately one-sixth of the total value of her claim. Initially, no allocation was made between categories of damages, but the parties later stipulated that only \$35,581.87 of the total settlement represented compensation for medical expenses. ADHS did not participate (or ask to participate) in the settlement negotiations. Instead, acting pursuant to Arkansas statutes, ADHS asserted a lien against the settlement proceeds for the full \$215,645.30 it had paid on Ahlborn's behalf.

Ahlborn challenged the lien in federal court, arguing that the anti-lien provision of the Medicaid Act limited ADHS's lien to that portion of the settlement proceeds representing reimbursement for medical expenses (in this case, \$35,581.87). The Supreme Court ultimately agreed. Addressing the arguments put forth by ADHS, the court recognized that the anti-lien provision of the federal Medicaid law cannot be read in isolation, because such a reading would bar even liens against settlement proceeds earmarked for medical care. The court noted various provisions of the Act specifically authorize liens for medical expenses, including the provision that requires applicants to assign certain third-party reimbursements to the state as a condition of eligibility. However, the court emphasized that those provisions are exceptions to the general rule:

To the extent that the forced assignment [of settlement proceeds] is expressly authorized by the terms of [the Medicaid Act], it is an exception to the anti-lien provision....

But that does not mean that the State can force an assignment of, or place a lien on, any other portion of Ahlborn's property. As explained above, the exception... is limited to payments for medical care. Beyond that, the anti-lien provision applies.

The court thus invalidated the Arkansas statute, which had specifically allowed liens on any settlement, judgment, or award received from a third party.

To the state's concern that parties to personal-injury actions might manipulate settlements and allocate away the states' interests, the court responded that the risk of manipulation can be avoided, either "by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision."

The effect on Oregon cases

In a recent letter to a Portland personal-injury lawyer, a representative of DHS's Personal Injury Liens division indicated that, in light of the *Ahlborn* opinion, DHS now intends to involve itself in all settlement negotiations involving benefits recipients. The letter also stated that DHS is authorized to intervene in an action, and will do so if necessary to protect its interests.

The *Ahlborn* decision and the quick response by Oregon's Department of Human Services underscore the importance of notifying DHS immediately when a Medicaid benefits recipient (or applicant) makes a claim for payment from an insurer or commences an action to enforce a claim against a potentially liable third party. The letter from DHS indicated that when these notification requirements are not met, the department intends to pursue all legal means for challenging any settlement agreement. ■

The case of Anna Nicole Smith and the probate exception to federal jurisdiction

By Leslie Harris, Dorothy Kliks Professor, University of Oregon School of Law

Why did the Supreme Court hear a case about former *Playboy* centerfold Anna Nicole Smith (aka Vickie Lynn Marshall)? And why would you be reading about her in the *Elder Law Newsletter*? The decision in *Marshall v. Marshall*, 126 S.Ct. 1735 (2006), clarifies the circumstances in which federal courts that would otherwise have jurisdiction must decline to exercise it under the “probate exception” to federal jurisdiction. This judicially-created doctrine dates to the early 20th century and serves to prevent jurisdictional conflicts between state and federal courts. *Markham v. Allen*, 326 U.S. 490 (1946); *Sutton v. English*, 246 U.S. 199 (1918); *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909). In *Marshall* the scope of the exception determined whether a federal bankruptcy court could resolve a conflict between a bankrupt person (Vickie Lynn) and her creditor or whether that dispute had to be resolved in the state probate proceedings. The doctrine could also be important in other cases where federal courts were exercising federal question or diversity jurisdiction and an issue affecting the disposition of a decedent’s estate arose.

Vickie Lynn Marshall dropped out of her Texas high school in ninth grade and made her way to Houston, where she worked in a strip club called Gigi’s Cabaret. In 1992 oil billionaire J. Howard Marshall, who was then 87 and mourning the death of his long-time mistress, came into the club, and sparks flew. With J. Howard’s backing, Vickie/Anna Nicole became the 1993 *Playboy* Playmate of the Year and then a Guess? jeans model. In 1994 at age 26, she married J. Howard, age 89.

J. Howard died after 14 months of marriage. His trust and pour-over will left the entire estate to his younger son, Pierce, omitting Vickie and his older son. Vickie asserted that he intended to take care of her by amending the living trust, in fulfillment of his promise to give her half his estate if she would marry him. J. Howard did not make these amendments, and a Texas probate court jury found that he had not made that promise to her.

While the Texas probate was pending, Vickie, who was facing an unrelated tort judgment, filed for bankruptcy in California. Pierce Marshall filed a proof of claim in the bankruptcy proceeding, that said Vickie had defamed him by alleging he had engaged in forgery, fraud, and overreaching to gain control of his father’s assets. He wanted a declaration that the claim was not dischargeable in bankruptcy. Vickie counterclaimed for tortious interference with an expectancy.

The bankruptcy court granted Vickie summary judgment with regard to Pierce’s claims against her and, after a trial on the merits, entered judgment for her on her counterclaim. Vickie promptly voluntarily dismissed her claims in the Texas probate proceeding. The bankruptcy court awarded her more than \$449 million in compensatory damages and \$25 million in punitive damages.

Pierce appealed the bankruptcy court decision to federal district court, which upheld the order in Vickie’s favor. The district court found that “Pierce conspired to suppress or destroy the trust instrument and to strip J. Howard of his assets by backdating, altering, and otherwise falsifying documents, arranging for surveillance of J. Howard and Vickie, and presenting documents to J. Howard under false

pretenses.” 126 S. Ct. at 1744.

The Ninth Circuit reversed, ruling that the probate exception to federal jurisdiction prevented the bankruptcy court from hearing Vickie’s claim. The Supreme Court reversed the Ninth Circuit.

Just as the Supreme Court had interpreted the domestic relations exception to federal jurisdiction narrowly in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (applies only to divorce, alimony, and child custody decrees), the court here interpreted the probate exception narrowly. The court said that the exception only prevents federal courts from taking jurisdiction over “the probate or annulment of a will and the administration of a decedent’s estate” and from “endeavoring to dispose of property that is in the custody of a state probate court.” 126 S. Ct. 1747. Vickie’s conflict with Pierce did not concern the validity of J. Howard’s will and did not seek to affect property in the custody of the state probate court. Instead, she sought a tort judgment that would impose personal liability on Pierce. Therefore, the court said, the case was not within the probate exception to federal jurisdiction.

An amicus curiae brief filed by the National College of Probate Judges argued that the probate exception should be interpreted much more broadly. The probate judges pointed out that as a practical matter many claims outside the narrow limits that the Supreme Court accepted deal with the same subject matter and issues that probate cases do. Examples include suits concerning the validity and interpretation of will substitutes such as inter vivos trusts, as well as claims of tortious interference with an expectancy, which can raise the same issues as challenges to wills based on undue influence or fraud. Therefore, the judges argued, the probate exception should apply to any “ancillary” action that raised the same kind of issues as those that can be raised in probate.

Other amici argued that parties disappointed in probate proceedings are increasingly filing bankruptcy petitions to avoid the effects of the probate decision and that, therefore, the probate exception should be applied broadly to prevent this kind of forum shopping.

Continued on page 24

Anna Nicole Smith

Continued from page 23

The Supreme Court rejected these arguments, leaving parties free to go to federal court if they satisfy the diversity or federal question requirements.

Justice Stevens concurred in the judgment, arguing that there is no such thing as a separate probate exception to federal jurisdiction. He argued that earlier cases purporting to recognize the exception can be explained by other rules. He cited a number of examples, including *Waterman*, 215 U. S. at 46, reaffirming the *in gremio legis principle*. 126 S.Ct. at 1752. Bouvier's Law Dictionary 1856 edition defines *in gremio legis* as "In the Bosom of the law. This is a figurative expression, by which is meant, that the subject is under the protection of the law."

The Supreme Court's decision does not automatically give Vickie the more than \$474 million awarded by the bankruptcy court. The Supreme Court remanded the case to the Ninth Circuit to determine whether her claim in bankruptcy is foreclosed because she litigated and lost the same issue in the Texas probate court. The bankruptcy court decision was rendered before the probate decision, while the federal district court issued its decision afterwards. It is likely that the earliest effective decision will prevail under *res judicata* principles. And which was earliest? It depends on whether Vickie's claim was a "core" bankruptcy issue as a matter of bankruptcy law. If it was, the bankruptcy court decision was rendered first and prevails over the probate court decision. If it was not, the bankruptcy decision was not final but merely a recommendation to the federal district court, which would then have issued the actual decision – after the probate judgment against Vickie was rendered.

Pierce Marshall, J. Howard's son who took the bulk of the estate under the will and trust, died unexpectedly in June from a "brief and extremely aggressive infection." (Associated Press, June 23, 2006) How this will affect the litigation between him and Vickie was not immediately apparent.

Interesting side notes: J. Howard was a 1931 magna cum laude graduate of Yale Law School. After graduation he was an assistant dean at Yale, where he taught trusts and estates. He also wrote a law review article about bankruptcy! Shortly after the Supreme Court issued its decision in her favor, Anna Nicole announced that she is pregnant. But she hasn't claimed that the child is J. Howard's posthumous heir. ■

Section proposes two bills

By Ryan E. Gibb

Chair, Elder Law Section Legislative Subcommittee

The Elder Law Section has proposed two bills for the upcoming legislative session. These proposals, which do not yet have a legislative number designation, will go to Legislative Counsel at the legislature, where they will be converted from proposals into actual bills. From there they will head to the legislature for consideration as Senate or House bills.

The first proposal amends ORS 723.466 and 708A.430, which relate to the use of affidavits of heirship at financial institutions. The proposed amendment clarifies when and by whom these affidavits can be used to gain access to the account of a decedent. Under current law, even if the heir is a surviving spouse, financial institutions may balk at allowing an heir to use such an affidavit until the Estate Administration Unit has had its opportunity to file. The proposed amendment makes it clear that a surviving spouse has the right to use the affidavit at any time after the death of the decedent. The Estate Administration Unit or a child over the age of 18 can use the affidavit only after a 45-day period following the death of the decedent, and only if there is no surviving spouse. The proposed amendment retains the current cap of \$25,000.

The second proposal amends ORS 125.440(2), with regard to the termination of a conservatorship. The current statute does not allow a conservator to create a trust that would have the effect of terminating the conservatorship. Therefore, if a conservatorship is established to create and fund a trust, the conservatorship must stay open, adding to the expense of administration. However, in common practice these conservatorships are used to establish supplemental needs trusts to maintain eligibility for some public benefit program. These trusts often cannot bear the administrative costs involved with a full conservatorship. The proposed amendment would give the court authority to terminate such a conservatorship if certain criteria are met:

- (a) the trust is created for the purpose of qualifying the protected person for needs-based government benefits or maintaining the protected person's eligibility for needs-based government benefits;
- (b) the value of the conservatorship estate, including the amount to be transferred to the trust, does not exceed \$50,000.00;
- (c) the purpose of establishing the conservatorship was to create such a trust; or
- (d) other good cause is shown to the court.

The two legislative proposals, including the proposed language, is available on the Elder Law Section's Web site at www.osbar.org/sections/elder/legislation.html. If anyone is interested in either of these bills, or would like to discuss other pending legislation, please contact me at 503.364.7000 or by e-mail at ryan@dcm-law.com. Anyone who would like to participate in the legislative process still has the opportunity to be involved.

My thanks to Brian Thompson, David Nebel, and the rest of the Legislative Subcommittee for their assistance with these proposals. ■

Elder law attorneys share information at popular unCLE conference

By Tim McNeil



Unleash 75 elder law attorneys from the formal structure of a continuing legal education seminar and witness the result: the sold-out, fourth annual “unCLE” held at the Valley River Inn in Eugene on May 5, 2006. For some, the free form of the conference took some getting used to. One attorney speaking during a group discussion heard a watch alarm and assumed that she was out of time. Other attorneys required no such acclimation period and paid heed to no cut-off signs, inadvertent or otherwise.

The unCLE format is particularly appropriate for elder law education. Elder law issues often fall between the lines of statute, case law, and CLE materials. Sometimes, the only on-point resource is the experience of attorneys who have faced similar circumstances.

The unCLE gathers attorneys from around the state for a day of loosely moderated discussion. The day is broken into four discussion periods. During each discussion period, four separate meetings occur around general topics. The participants choose the topic of highest interest for each discussion period, and take part in a roundtable discussion rich with the diverse experience of elder law attorneys. This year, the topics included:

- Surcharging Beneficiaries and Dealing with Problem Beneficiaries
- Getting Paid
- Medicare Part D
- Medicaid Changes Arising From the Deficit Reduction Act of 2005
- Temporary Guardianships and Civil Commitments

- Office Technology
- Notice Requirements and Advising Trustees under OUTC
- Filing Lawsuits for Elder Abuse (ORS 124.100)
- Representing Elders When Adult Children Are Involved
- Drafting Trusts under the New Oregon Uniform Trust Code (OUTC)
- Documenting Incapacity After HIPAA

All this and a complimentary package of Valley River Inn mints were at the fingertips of discussion participants.

But that’s not all. A “farmer’s market” of legal forms awaited unCLE participants when they emerged from breakfast. Guardianship and conservatorship forms, probate forms, and trust forms of all varieties were available for the taking—home grown by generous Oregon attorneys, certified organic, and perfectly suited for recycling.

The unCLE program is a collaborative effort, and sufficiently instructive to earn CLE credits. The format is effective not only because of the nature of elder law, but also because of the character of elder law attorneys. As one person remarked upon leaving a discussion, “They’re all so nice and friendly.” ■



Save the date

**CLE Program:
The Elder
Law
Experience**

*Friday,
October 6, 2006
8:30 a.m. to
4:45 p.m.*

*Oregon
Convention Center
Portland*

This fall, the Elder Law Section and the Oregon State Bar will present a daylong CLE program that will cover a variety of issues of concern to attorneys who advise elders, persons with disabilities, and their families. Emphasis will be on practical tips and strategies for experienced elder law attorneys, although those new to the field will also find the information useful.

In a session entitled "Prescription for Guardianships," we are fortunate to have as featured speakers Maureen C. Nash, M.D., and the Honorable Rita Batz Cobb. Dr. Nash is a psychiatrist who treats patients at the 21-bed acute geriatric psychiatry inpatient unit at the Tuality Hospital in Forest Grove. This unit is the only dedicated acute geriatric psychiatry unit in Oregon. The Honorable Rita Batz Cobb is a Washington County Circuit Court Judge Pro Tem, a position that she has held for the past 17 years. She oversees the probate department and presides over most of the hearings that involve guardianships and conservatorships, which includes ruling on petitions that ask the court to appoint a temporary guardian in an emergency. She has spoken at a number of CLE programs, often as part of a panel of probate judges. Judge Cobb and Dr. Nash will address the interplay between the medical and legal worlds as they relate to mental health issues and the need for guardianships.

Another timely panel discussion will provide an overview of the federal Deficit Reduction Act of 2005, the revised state administrative rules, and the effect of recent changes on Medicaid eligibility.

Other topics planned are:

- Advising Fiduciaries
- Special Trust Needs
- Representing Clients in Administrative Hearings
- Ethics: Referrals and Responsibilities

The program will provide attendees with 5.5 general CLE credits and 1 ethics credit.

In addition to the CLE sessions on October 6, the Elder Law Section will hold its annual meeting at 1:00 p.m. The Bar will send out a flyer later this summer with further details and registration information. ■

**Important
elder law
numbers**

as of July 1, 2006

Supplemental Security Income (SSI) Benefit Standards	Eligible individual.....\$603/month Eligible couple\$904/month
Medicaid (Oregon)	Long term care income cap.....\$1,809/month Community spouse minimum resource standard. \$19,908 Community spouse maximum resource standard\$99,540 Community Spouse Minimum and Maximum Monthly Allowance Standards.....\$1,650/month; \$2,488.50/month Excess shelter allowance Amount above \$495/month Food stamp utility allowance used to figure excess shelter allowance\$292/month Personal needs allowance in nursing home.....\$30/month Personal needs allowance in community-based care\$136/month Room & board rate for community-based care facilities..... \$468.70/month OSIP maintenance standard for person receiving in-home services..... \$604.70 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2004\$4,700/month
Medicare	Part B premium \$88.50/month Part B deductible \$124/year Part A hospital deductible per illness spell\$952 Skilled nursing facility co-insurance for days 21-100\$119/day

Resources for elder law attorneys

EVENTS

NAELA 2006 Elder Law Basics and Beyond

August 18 to 20, 2006

Nashville, Tennessee

This program, co-sponsored by the Tennessee Bar Association and the National Academy of Elder Law Attorneys (NAELA), covers the breadth of elder law. The distinguished faculty for this program includes past NAELA presidents and authors of several national treatises on elder law. Level of instruction is basic and intermediate. A unique aspect of this program is its focus on a case study, in which participants will develop a long-term care plan under the tutelage of experienced elder law attorneys. The course provides 15.75 hours of general and one hour of dual/ethics CLE credit.

www.tba.org/onsiteinfo/elderlaw_2006.html

The Elder Law Experience

OSB CLE Program

Friday, October 6, 2006/8:30 a.m. to 4:45 p.m.

Oregon Convention Center, Portland

See page 24 for details

Oregon Law Institute 19th Annual Family Law Seminar

Friday, October 6, 2006/8:30 a.m.

Oregon Convention Center, Portland

law.lclark.edu/org/oli

NAELA 2006 Advanced Elder Law Institute: "Re-Visioning the Practice"

November 2 to 5, 2006

Salt Lake City, Utah

www.naela.com

Estate Planning: Defective Trusts, Family Limited Entities, and Other Ways to Get into Trouble with the IRS

MBA CLE Seminar

Tuesday, November 7, 2006/3:00 to 5:00 p.m.

World Trade Center/ Auditorium, Building 2

26 SW Salmon, Portland

www.mbabar.org

This seminar on estate and business succession planning is designed to identify techniques and provide an update for the general and advanced estate planner.

Estate Planning

OLI Seminar

Friday, November 10, 2006

law.lclark.edu/org/oli

INTERNET

Elder Law Section Web site

www.osbar.org/sections/elder/elderlaw.html

The Web site has useful links for elder law practitioners, past issues of the *Elder Law Newsletter*, and current elder law numbers.

Elder Law Section Electronic Discussion List (listserv)

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."

Newsletter Board

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

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