Elder Law Newsletter

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Choosing a fiduciary

By Richard A. Pagnano

The selection of a suitable fiduciary is one of the most important decisions our clients make in the guardianship and conservatorship arena. In this article, I explore that decision and offer some advice about the factors that should be weighed by elder law and estate planning practitioners.

Considerations

Is a fiduciary chosen by a third party necessary? Has the elderly, disabled, or incapacitated person already nominated a fiduciary to serve as trustee, health care representative, or attorney-in-fact in a consensual manner under a trust instrument, Oregon advance directive for health care, or durable financial power of attorney? If so, is the nominated individual capable and willing to serve? If not, is an alternate named by the elderly, disabled, or incapacitated person available for service? Remember, a protective proceeding will not necessarily govern trust assets or supercede the authority of a health care representative. See ORS 125.420 and ORS 127.550. If the individual acting under a consensual appointment is using his or her position to steal or otherwise take advantage of the elderly, disabled, or incapacitated person, then a protective proceeding should be brought with the goal of removing or voiding any consensual appointment and replacing that appointment with a court-appointed fiduciary.

If the elderly, disabled, or incapacitated person has not appointed a fiduciary to manage his or her health care and finances, and a manager is necessary, then appointment efforts should proceed with a caveat. One other alternative here is that if a health care or financial manager is necessary, and the elderly or disabled person is capable of overseeing his or her own care manager, there are many reputable health care management firms which will agree to provide these services directly to the principal without the involvement of a fiduciary. These include Skoog Cohen & Pierce in Lake Oswego; Resource Connectors Inc. in Portland; and Northwest Senior Management Services Inc. in Portland.

Planning

When clients come to see you to do their estate planning, you will advise them on the selection of a fiduciary. They will likely choose a personal representative, attorney-in-fact, health care representative, and possibly a trustee. They might also sign an instru-

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ment which nominates a fiduciary, in the event they are later unable to express a preference. Most elderly clients will choose their spouse, then children as their fiduciary. However, this is not always the case. Sometimes, they don't want to put their children in this position. Reasons range from not wanting to place a child in a potentially adverse situation with siblings to plain old distrust of their children ("Johnny will rob me!").

When clients do choose children, a typical question is whether two can serve together. While this choice has a certain "checks and balances" aspect to it, since one joint fiduciary is not usually able to act without the consent of the other, it may not always be the best course of action. As any lawyer knows, it is hard to get two lawyers to agree. Often, it is just as difficult to get two fiduciaries to agree. For this reason, the Multnomah County courts, for example, will not agree to appoint joint fiduciaries. The factors to be weighed in consensual appointments include the need for one fiduciary to check the actions of the other versus the likely or potential disagreements between joint fiduciaries that could lead to litigation, or increased expenses to the estate. An alternative is to draft estate planning documents to include protections, such as required accountings, that allow the principal and any successor agents to monitor a fiduciary's actions.

There are many professional fiduciaries who are willing and able to accept appointment. Professional fiduciaries are a good choice when the client doesn't trust his or her children, does not want to put his or her children in a potentially adverse situation, or has no children or other trusted relatives available to serve. Before memorializing any nomination in the client's estate planning documents, the lawyer or client should check with the proposed fiduciary to determine its fees and whether there are other limitations or problems (for example, a limitation based on the size of the estate) which could prevent the professional fiduciary from accepting the appointment.

Although cost is a factor in the selection of a fiduciary, the choice of a lay fiduciary does not necessarily result in great savings. It is increasingly common for children to charge for the work that they do for their parents. While most courts allow a professional to charge a higher rate than a lay fiduciary, which can be a factor in the decision process for some, I find that the higher degree of professionalism shown by most professional fiduciaries is well worth the added cost.

Administration

A professional guardian generally will be in a better position than a lay guardian to evaluate a protected person's care and placement needs. A professional will also have a better feel for which facilities in the community have available beds, and will have connections with facilities and facility administrators that can help at time of placement. Professionals deal with these issues every day. Many are nurses and have made contacts in the community which can help their clients, whereas the typical family member has never had to deal with care and placement issues. He or she will need a crash course on types of facilities and services available to a protected person. A lay guardian, like a lay health care representative, will likely have to hire some professional care manager to help along the way. This is not to underestimate the importance of the relationship that the lay guardian may have with the protected person. A dedicated lay person can do a wonderful job of overseeing the care necessary to a protected person's well-being. Many of the same factors apply in conservatorships. Professional conservators generally have a great deal of expertise at managing money. Lay people generally have little or none. A professional conservator is less likely to make inappropriate expenditures of a protected person's funds, to act without required court approval, or to keep inadequate or erroneous financial records. Lay conservators require a complete education about the fiduciary duties that go along with the job. I believe the letter my firm sends that lists a lay person's responsibilities and duties has grown to well over four pages. For some reason, lay conservators have a very difficult time keeping their canceled checks and providing you with originals of the opening and closing balances of the bank and investment accounts. This translates to more work for the lawyers when nonprofessional fiduciaries serve. This is good or bad depending on your perspective. I do find that professionals require a lot less hand holding to get the job done. Professionals with whom our office has had good experiences include Laura Aust; Nancy Doty Inc.; Farley, Piazza & Associates; and Tiffany & O'Shea.

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Some fiduciary acts require prior court approval

By Deborah Keller and Wes Fitzwater

The authority of a conservator, guardian, or personal representative comes from the court. Although the powers of a trustee usually come from the trust instrument instead of from the court, the trustee may turn to the court for authority to take actions not contemplated by the trust instrument. Some fiduciary actions require the prior approval of the court. Some actions require prior disclosure to the court. Most fiduciary actions, however, are performed without the need for prior approval or disclosure. That said, there are times when the prudent fiduciary finds it necessary to seek the approval and/or instructions of the court to resolve disputes or to obtain clear instructions for the management of a protected person's affairs (ORS Chapter 125), the administration of an estate (ORS Chapter 114), or the administration of a trust (ORS Chapter 128).

Acts that require prior court approval

When does the fiduciary client cross the line between ordinary duties and those requiring prior court approval? Elder law practitioners and their clients should maintain a keen awareness of this distinction. Is your fiduciary aware that the following actions require prior court approval?

Payment of fees of visitor or physician when related to an objection

A fiduciary must obtain court approval before using a protected person's funds to pay a visitor or physician for services related to an objection to a petition or motion. ORS 125.095(2).

Any compensation to a fiduciary or the attorneys for a fiduciary

All payments from a protected person's funds for services performed by fiduciaries and their attorneys must have prior court approval. ORS 125.095(3).

An exception allows payment to a conservator who is a trust company under ORS 709.030. A fiduciary may reimburse expenses without court approval if paid for the support, education, care, or benefit of the protected person and the protected person's dependents. ORS 125.425.

Payment for room and board furnished by the guardian or guardian's spouse, parent, or child.

A guardian (and arguably a conservator) must have prior court approval to use a protected person's funds to pay room and board furnished by the guardian or the guardian's immediate family. ORS 125.320(2).

Sale of protected person's residence

A conservator may only sell a principal residence after obtaining prior court approval, with required notices. ORS 125.430.

Gifts of more than $250 to one person, and more than aggregate of $1,000 for all gifts

The conservator must have prior court approval for gifts to one person of more than $250 in a calendar year, or exceeding an aggregate of $1,000 for all gifts in a calendar year. ORS 125.435.

Convey or release contingent or expectant interests in property

These include marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety. ORS 125.440(1).

Create revocable or irrevocable trusts

ORS 125.440(2).

Elect options or change beneficiaries to insurance and annuity policies, or surrender the policies for cash value

The conservator who takes any of these actions must obtain prior court approval. ORS 125.440(3).

Caution: *All conservators must exercise due caution when simply "taking possession" of these types of assets under the initial fiduciary duties of ORS 125.420. A zealous or ignorant fiduciary may unwittingly alter titling or beneficiary designations, which could interfere with the protected person's estate plan (see ORS 125.460), and/or trigger unfavorable tax consequences.*

Disclaim any interest the protected person may have by testate or intestate succession or by inter vivos transfer

ORS 125.440(4).

Authorize, direct or ratify any annuity contract or contract for life care

ORS 125.440(5).

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Legislative Update

Senate Bill 35 (passed both House and Senate with amendments) will require prior court approval for the payment of compensation to a person who is a spouse, parent, or child of the fiduciary, or to a business entity in which the spouse, parent, or child of the fiduciary has an ownership interest, and that is employed by the fiduciary to provide direct services to a protected person. For a copy of the bill see ***http://landru.leg.state.or.us/03reg/measures/main.html***

Some fiduciary acts require prior court approval

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Practice Tip: Expenditures of more than $5,000

The authors are aware of at least one court in Oregon that now requires a conservator to obtain prior approval for any expenditure of more than $5,000. If your fiduciary is planning a major expenditure, it may be wise to contact the court and inquire about the need, if any, for prior court approval.

Acts that require prior disclosure

Employment of another person in which the fiduciary has a pecuniary or financial interest

This includes any ownership interest, business association, or financial involvement between the fiduciary and the person, or any relationship that could compromise the fiduciary's decisions. Before the fiduciary employs such a person, the fiduciary must give a full and accurate disclosure of:

- the pecuniary or financial interest,
- the services to performed, and
- the anticipated costs to the estate.

The court may require additional disclosures as it deems appropriate. ORS 125.221.

Placement of an adult protected person in a facility

Before placing a protected person in a care facility or moving a protected person to a new care facility, a guardian must file a statement with the court and give the required notices. The facility may be a nursing home, a mental health treatment facility, an assisted living facility, a residential care facility, a residential treatment facility, or an adult foster home. Most of the time this statement is filed after the fact. Practitioners should strive to give notice in advance, whenever possible. ORS 125.320(3).

When to seek court approval

ORS Chapters 114 and 125 grant fiduciaries the authority to take many, if not most, actions without prior approval of the court. However, at certain times, the fiduciary may find that he or she is still unable to act without the court's further involvement. The authors have achieved favorable results from seeking court approval or instructions in cases described in the following examples.

Preserving the nature of joint accounts

A conservator must take into account the estate plan of the protected person, including "joint ownership arrangement with provisions for payment or transfer of benefits or interests at the death of the protected person to another." ORS 125.460.

A conservator does not have discretionary rights to a joint account and may not change the nature of the account. The conservator may, however, use joint account funds for the essential care, support, and maintenance of the ward. *Strain v. Rossman*, 47 Or. App. 57, 614 P.2d 102 (Or. App. 1980).

Case example: A conservator had an inventory of three different accounts, in three different amounts, with three different beneficiaries. The account with beneficiary A had $50,000, the account with beneficiary B had $30,000, and the account with beneficiary C had $20,000. There were no other assets and the monthly care expenses were high. The obvious question was how to use each account equally, while still preserving the joint nature of the accounts and the transfer of benefits at death.

After filing the appropriate motion, with notices to all interested (and affected) parties, the court allowed the conservator to liquidate the investments and combine them into one account. The money was then used to pay for the ongoing expenses of the protected person. Upon death, and after payment of the final conservatorship expenses, the court allowed the remaining account balance to be distributed, without probate, to the beneficiaries as follows:

Beneficiary A = 50%
Beneficiary B = 30%
Beneficiary C = 20%

This distribution was consistent with the beneficiaries' respective interests in the estate at the time the conservatorship was created.

Approving a spending plan

Again, ORS 125.460 requires a conservator to take into account the known estate plan of the protected person, "including the Will of the protected person," when "selecting assets of the estate for distribution … for the support of the protected person."

Case example: A conservator had an inventory that included (a) cash (comprising the residue of the protected person's estate plan), (b) real property (a named specific bequest in the protected person's Will), and (c) a joint account (non-probate assets). Again, the conservatorship had no other assets and high monthly care expenses. Which assets should be spent first?

After the conservator filed a *Motion to Approve a Spending Plan*, with notices to all interested (and affected) parties, the court approved a specific plan for spending the

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Interstate transfer of protected person and assets requires care

By Sylvia Sycamore

Given the mobility of the population in general, it should come as no surprise that parties to protective proceedings frequently change their place of residence. Guardians and conservators move to follow the job market (and sometimes take the protected person along). Protected persons are moved to be closer to family members, or to find more appropriate care and treatment or simply better benefits in another jurisdiction.

Protective proceedings themselves and the authority they convey are typically not portable across a state line. Without appropriate procedures in the new state, a change of residence for the protected person can leave that person without the protections so carefully obtained in the initial state.

When you help a client transfer a protected person in or out of state, you should work closely with an attorney in the other state who is familiar with that state's protective proceedings.

Names and rules differ

In order to assist your client in seeking the correct proceeding, it is important to know the other state's terminology. For example, an Oregon guardianship is analogous to a Washington *guardianship of the person*, but only roughly analogous to a California *conservatorship of the person*. A California resident who comes to Oregon may say: "I want a conservatorship for my mother," and actually need, in Oregon, a guardianship. In California, guardianships are for minors only.

An Oregon conservatorship is the equivalent of a Washington *guardianship of the estate*, and a California *conservatorship of the estate.*

Guardianships

Moving into Oregon

First, does your client have authority to move the protected person out of the original state? Make sure that your client obtains legal advice in the original state, and does what is required.

Because Oregon does not recognize protective authority granted in another state, your client who wishes to move a protected person to Oregon and retain protective authority must apply for an Oregon guardianship. The protective proceeding must commence in the county where the respondent lives, unless the respondent has been institutionalized by court order. ORS 125.020 (1) and (2). In other words, the person to be protected will have to reside or be present in Oregon before the new guardianship can be granted.

The appointment of a court visitor is mandatory in Oregon adult guardianship proceedings. ORS 125.150(1). Your client will need to make sure the person to be protected is available for the court visitor's interview. It may be possible to substitute for the visitor's report a recent equivalent report prepared in the foreign state, using the authority of ORS 125.150(2) which allows the court to appoint a special appointee of the court.

The petition for appointment of guardian includes a disclosure by the petitioner of any fiduciary appointed by any other state. ORS 125.055(2)(e). Attach as an exhibit a copy of the foreign order granting fiduciary authority to your client. Consider whether documents filed in the other state, including any recent medical information or recent visitor's report, should be included as part of the petition.

It may be advisable to keep the foreign state protective proceeding open until the Oregon protections apply. Be sure your client does eventually close the other state's proceedings.

Moving out of Oregon

Unless an Oregon guardian's authority has been limited by court order, the guardian may establish the protected person's place of abode within or outside of this state. ORS 125.315(1)(a).

However, if your client plans to transfer a protected person out of Oregon and continue the protection in the new state, advise him or her first to engage the services of an attorney in that state who is experienced in protective procedures. Neither California nor Washington, for example, will recognize the authority of an Oregon guardian. There are no transfer-in provisions, and a new protective proceeding is required.

It may be advisable to keep the Oregon proceedings open until your client's protective authority has been established in the new state.

The guardian, in accordance with ORS 125.320(3)(a), must file a statement with the court informing it if the guardian intends to place the protected person in a care facility in another state. Notice of the statement of intent must be given in accordance with ORS 125.065 and 125.060(3), allowing for objections to the transfer. If there are objections, the court will schedule a hearing. If there are none, the guardian may move the protected

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The effect of a judicial record of a sister state, the District of Columbia or a territory of the United States is the same in this state as in the place where it was made, except: ...
(2) The authority of a guardian, conservator, committee, executor or administrator does not extend beyond the jurisdiction of the government under which the guardian, conservator, committee, executor or administrator is invested with authority.

ORS 43.180.

Interstate transfers *Continued from Page 5*

person without further court order. ORS 125.320(3)(e). If the guardian's authority does not include the right to establish the protected person's abode, the guardian must apply to the court for the necessary additional authority.

Tell the Oregon court in the statement of intent to move that the guardian has made advance arrangements for suitable new placement, and has taken steps to initiate legal protective proceedings in the new state. ORS 125.015(2) states:

> *If an Oregon court exercising probate jurisdiction becomes aware that a protective proceeding has been commenced in another state, the Oregon court shall notify the court in the other state of the proceedings in this state. After consultation with the court of the other state, the Oregon court shall determine whether it is in the best interests of the respondent or protected person for the Oregon court to continue to exercise jurisdiction in the matter or whether it would be in the best interests of the respondent or protected person to terminate the Oregon proceedings and transfer the matter to the other court.*

Once the new protective authority has been established, close the Oregon proceedings.

Conservatorships

A conservatorship established in one state does not necessarily have to be transferred just because the protected person moves to a new residence. Keep in mind the best interests of the protected person and the value of cost-conscious estate administration.

Moving out of Oregon

When a protected person leaves the state, it may not be necessary to transfer a conservatorship to the new state of residence. Unlike a guardianship, venue for a conservatorship does not require the respondent to live in Oregon. A conservatorship may commence in any county where the *property* of the respondent is located. ORS 125.020(3). Presumably, a conservatorship may be continued without the presence or residence of the protected person.

If the Oregon conservatorship includes the protected person's home, the conservator may intend to sell the property to provide funds for the protected person in the new state. ORS 125.430 governs the sale of a protected person's residence.

A conservator who closes the Oregon proceeding and transfers a real property asset to a foreign court's jurisdiction risks being unable to sell or dispose of that asset later. In the opinion of an Oregon title company official I contacted about this, an out-of-state conservatorship would not be sufficient authority for Oregon real property transactions. Other states may have similar requirements in regard to real property transactions.

The conservator may want to sell the property before closing the Oregon conservatorship. If not, he or she may want to maintain the Oregon proceedings (at least for that asset) indefinitely, even with a new conservatorship in place in the new state. That may, however, mean accountings and costs in both states.

Assuming that a conservatorship in the new state is warranted, advise your client to retain legal counsel in that state to begin protective proceedings. Establish the new authority before closing in Oregon. The most recent Oregon annual accounting may be useful to establish a baseline for the new proceeding. Keep the local court fully informed regarding the foreign state proceedings. Once the out-of-state fiduciary has been appointed, have that fiduciary sign a receipt for all Oregon conservatorship assets to be transferred and file that receipt with the Oregon court. Then, if all assets have been transferred, ask the court to close the proceeding, discharge the fiduciary, and exonerate the conservator's bond.

Moving into Oregon

In deciding whether to transfer conservatorship authority from a foreign state, consider where the conservator lives, the nature of the assets, and the ease of caring for the protected person's assets and reporting to the court that maintains jurisdiction. If your client intends to close the foreign state proceeding, again, seek legal advice in that state regarding any move-out requirements. Keep that proceeding open until the Oregon proceeding is in place, so that assets do not lose protection during the transfer. File a receipt in the Oregon proceeding stating that the Oregon conservator has received the assets from the fiduciary of the other state. Keep good notes so that you can easily prepare the narrative portion of the annual accounting a year later.

Questions to consider

When one evaluates whether to move a conservatorship into or out of state, ask the following questions:

- Is there also a guardianship, and if so, are guardian and conservator the same or different persons?
- Is the property subject to conservatorship real or personal property?
- If personal property, in what form: family heirlooms that cannot be sold and will move with the protected person? Bank or brokerage accounts accessible through any local office?
- If real property, will it be sold or retained?

Reminder to fiduciaries

Oregon does not require a fiduciary to be an Oregon resident, but the court does have personal jurisdiction over any person who accepts appointment as a fiduciary for the purpose of any matter relating to the protective proceeding, whether the person is a resident or nonresident of the state. ORS 125.215(3). Whenever a fiduciary changes residence, the fiduciary must promptly inform the court of the change of address. ORS 125.215(2).

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Should you restrict estate or conservatorship assets?

By Hon. Elizabeth Welch and Alice Wheeler

The court has long insisted on protection for estate or conservatorship assets. This can be accomplished by (1) posting a surety bond in the amount of the total assets, or (2) securing a court order that places the asset(s) into a restricted bank or brokerage account, not to be withdrawn except by specific court order or—as is often seen with settlements secured on behalf of a minor—distributed directly to the minor on or after his/her eighteenth birthday. A combination of these options may be the best approach to securing the estate prior to the delivery of any asset into the hands of a fiduciary.

The decision to bond or restrict an asset should not be made lightly. Unless a bond is specifically waived in a testamentary instrument, the court generally insists on securing protection of those assets, not only for the ultimate beneficiaries in the estate or conservatorship, but for the protection of known and unknown creditors as well. Counsel should decide which method to use based upon an understanding of the individual case file and circumstances.

For example, consider an estate or conservatorship made up of the following:

Mortgaged property	$ 225,700
Brokerage account	$ 45,250
Vehicle	$ 6,000
Several bank accounts . .	$ 18,500
Personal items	$ 2,100
Total	$ 297,550

In this case, the court would typically require a surety bond to be posted in the amount of $298,000, which is the total asset value of $297,550 rounded upward to the nearest $1,000.

Let's assume, however, that the fiduciary could qualify for only slightly more than a minimal bond. To reduce the cost and secure a bond in an amount accessible to the fiduciary, counsel could seek an order that, by restricting some of the assets, requires a lesser bond. A bond of $17,000, for example, would protect the $2,100 of personal items, the $6,000 vehicle, and about $8,500 of the cash in the bank. Meanwhile, the order restricts the real property from sale or other encumbrances and restricts the brokerage account from any withdrawals (but allows intrabank transfers, sales, and purchases to accommodate market needs). It also restricts the $10,000 remaining in the bank account. The fiduciary now has full access to the vehicle, the personal items, and approximately $8,500 in cash at a minimal cost to the estate. Most fiduciaries do not need immediate access to all of the assets, particularly if there are minimal ongoing expenses or creditors to pay. If it later becomes necessary to sell the real property, it may be listed on the open market subject to the release of the restrictions by an order from the court that allows the sale upon posting the additional bond. A certified copy of that order generally satisfies the requirements of most title companies that would distribute or hold the funds as directed.

The drawback of asset restriction occurs when an estate is cash poor or when large unexpected claims arise, and—although funds are on deposit in the bank—the fiduciary cannot gain access to those funds without going through the legal process to release a restriction. Due to the requirements and costs of securing an order to change the original arrangement, this is often more costly to the estate than posting the surety bond in the full amount at the beginning of the proceedings.

There are many occasions when restricting an asset is a positive and cost effective plan, such as when funds are received on behalf of a minor child after securing a personal injury settlement offer. The simple process of a "three-in-one" petition mirrored in an order appoints a conservator, allows that conservator to accept a settlement offering, and provides for a current and/or final distribution of the funds. The order should also waive the filing of the bond, inventory, and annual or final accountings. In lieu of the accounting requirement, the order can be structured to provide that a copy of an annual bank statement is due on the anniversary of appointment rather than require filing of a formal accounting. The last provision of the order should allow distribution directly to the minor "on or after" his or her eighteenth birthday (and specify the date).

A word of warning: make certain the bank or brokerage firm you have selected to receive the restricted funds is willing to accept the terms imposed upon the account by the court. It is probably best to seek preapproval of the form of verification acknowledgment to prevent the need to return to the court for an amended order for a different depository.

Each estate or conservatorship is different and courts are leaning toward more protections when fiduciaries are involved. When considering the choice of posting a bond or restricting an asset, plan ahead and attempt to determine any possible need to gain access to the assets before imposing restrictions on your fiduciary.

Judge Elizabeth Welch is the Chief Judge of the Family Court, on which she has served since l989. She became the Probate Judge in l995. Judge Welch is a graduate of the University of Chicago and the University of Chicago Law School. She is a member of the Board of Directors of the Oregon Law Institute, chairs the Family Law Advisory Committee for Multnomah County and the Juvenile Justice Council.

Alice Wheeler recently retired as Multnomah County Probate Court Administrator. She plans to establish a fiduciary support service.

Responsibilities of trustees of special needs trusts

By Donna R. Meyer and Karen Adams

Elder law attorneys are familiar with the fiduciary obligations that apply to all trustees, including the duty to invest prudently and to comply with the requirements of taxing authorities. However, a trustee of a special needs trust, also known as a supplemental needs trust, has unique responsibilities.

Most often, a special needs trust is used to enhance the quality of life of a person who receives needs-based public assistance, by providing funds to pay for items and services beyond the basic needs of food, clothing, and shelter.

Trust spells out how funds can be used

A trustee must follow the rules set out in the trust in regard to the circumstances under which distributions can and cannot be made. Special needs trusts do not all have identical distribution provisions. Some special needs trusts specifically prohibit any distribution for food, clothing, and shelter. Other special needs trusts allow distributions for basic needs under some circumstances. Therefore, the trustee should become very familiar with the distribution provisions of the special needs trust. Depending on the specific wording in the trust, a trustee who pays for food, clothing, or shelter may be breaching his or her fiduciary duty, even if the beneficiary is not receiving public assistance. On the other hand, if the trustee refuses to pay for shelter costs when it might be allowed by the trust and very helpful to the beneficiary, the beneficiary may not have the best quality of life available under the circumstances.

Even if a distribution for a basic need such as shelter is allowed under the trust, the trustee must be familiar with the effect of the distribution on the beneficiary's public assistance. If the trust pays for shelter under the in-kind support and maintenance rules, the benefits will be reduced. However, there is a maximum amount that can be deducted. In some situations it is possible to receive a large monthly distribution for shelter and still maintain substantial benefits. The rules regarding in-kind support and maintenance are tricky, and the elder law attorney should suggest that the trustee seek advice before making distributions for basic needs, to ensure that a distribution does not cause unforeseen problems.

Because most special needs trusts are written for the sole benefit of the lifetime beneficiary, a question arises in regard to a distribution made on behalf of the beneficiary when it will in some way benefit another person. For example, can a family member be paid to accompany the beneficiary to the beach? The answer is *yes*, if the distribution provisions allow it and it is necessary for the beneficiary to have companion care. The answer is *no* if the beneficiary does not need a companion or attendant to take a trip to the beach. What about paying for cable television when there are other people in the home? The answer to this, and many similar questions, is unclear, and will depend on the circumstances. A wise trustee will look at the entire situation, including such factors as the importance and advisability of cable television in this particular person's life, the number of other people who also benefit from having cable television in the house and the amount of money in the trust.

Disbursing funds

If the beneficiary receives needs-based public assistance, in most cases the trustee should directly pay the third party providing goods and services to the beneficiary. This is because the beneficiary must report the receipt of any asset, including cash, to the agency that is providing assistance. The receipt of cash may cause an interruption in public benefits because the beneficiary had cash available to pay for food, clothing, or shelter—even if the beneficiary did not use the cash for a basic need. Therefore, in most situations the trustee will pay directly for a public transit pass, computer, or other item the beneficiary can use. The trustee may arrange for regular bills, such as cable television, Internet subscription, and phone bills, to be mailed directly to the trustee.

When beneficiary dies

Most special needs trusts funded with the beneficiary's own assets name the State of Oregon as the first remainder beneficiary. This is called a "payback" provision. At the death of the lifetime beneficiary, certain administrative costs may be paid. However, payment of burial expenses is not allowed. Therefore, it is important for the trustee to consider the purchase of a pre-paid burial plan. Whether this is an issue in a trust funded with third party assets will depend on the wording of the trust.

The role of the attorney

There is increasing pressure on attorneys to properly select and advise SNT trustees. Lawyers representing these trustees should be aware of the special duties of the trustees and advise their clients, in writing, of their obligations.

Because of the difficulty of administering a special needs trust, it is no wonder that many people choose to have a professional fiduciary serve in the role of trustee. If the family is not prepared to monitor the issues outlined above, the lawyer should consider recommending a professional.

Donna R. Meyer is a partner in the firm of Fitzwater & Meyer. A substantial number of her cases involve creation and administration of special needs trusts.

Karen Adams is an associate in the firm of Fitzwater & Meyer. Her practice emphasizes long term care planning for seniors and people with disabilities.

Is it safe to leave an inheritance to a disabled child through a revocable inter vivos trust?

By Jonathan A. Levy

Revocable inter vivos trusts, also known as living trusts, are a popular will substitute. These trusts can avoid probate and assure continued management of the assets of a grantor who becomes incapacitated. In other cases, parents of a disabled child often wish to leave the child's inheritance in a discretionary special needs trust that preserves the child's Medicaid eligibility. Until recently, most lawyers believed that the inter vivos trust and the discretionary special needs trust could be combined into a revocable trust with the child's share retained in a special needs trust after the parent died. However, some Oregon elder lawyers now suggest that the only safe way to qualify a child's inheritance for Medicaid is through a *testamentary* special needs trust. Their caution is based on anecdotal reports that some caseworkers view inter vivos special needs trusts as "available"assets under the Medicaid rules.

This article is intended to encourage elder lawyers not to abandon inter vivos special needs trusts to meet the mistaken concerns of some caseworkers. As the following points show, an inheritance left by a parent to a disabled child[1] through a properly-drafted[2] inter vivos special needs trust, is not an available asset under established principles of Medicaid law.

The case for the revocable inter vivos trust

- Courts in other states have ruled that inheritances left to disabled children through inter vivos special needs trusts are not available assets for Medicaid purposes.[3] I am aware of no reported decision to the contrary.
- Leading commentators have recognized that special needs trusts for disabled children may be established either by will or through inter vivos trusts.[4]
- The general rule in Oregon is that income and resources are "available" to a Medicaid applicant only if he or she has a legal right to compel distribution.[5] This Oregon rule is mandated by federal law.[6] In addition, Oregon regulations specifically provide that assets of an irrevocable or restricted trust are not available if they cannot be used to meet the basic monthly needs of the child's household.[7]
- Additional Medicaid rules apply in Oregon to trusts established on or after October 1, 1993.[8] Notably, under OAR 461-145-0540(5), a trust is considered to have been established by the applicant—thus potentially triggering a transfer-of-assets period of ineligibility—if (i) the "financial group" (essentially, the benefit recipient and his or her spouse and children[9]) "used their resources" to establish the trust and (ii) the trust was established by, or on behalf of, the applicant "other than by will." This *other than by will* phrase has apparently led some caseworkers to conclude that inter vivos special needs trusts, funded by third parties, are available assets. But the conclusion ignores the preceding phrase: "used their resources." Inheritances from inter vivos special needs trusts are funded with the assets of the grantor parent, not the beneficiary child (or the child's financial group). OAR 461-145-0540(5) simply does not apply here.
- OAR 461-145-0540(5) and its related rules were prompted by the Omnibus Budget Reconciliation Act of 1993 (OBRA), which amended federal Medicaid law. The text and legislative history of OBRA also make clear that the post-1993 rules apply only to trusts funded at least in part with an applicant's own assets.[10]
- In its Social Security manual, the U.S. Department of Health and Human Services has determined that trust principal is not "available" to a recipient who is a beneficiary of a third-party trust without the legal right to demand disbursements or to direct the use of the trust assets.[11]

In conclusion, lawyers should recall what the U.S. Supreme Court has written about the availability principle: it "serve[s] primarily to prevent the States from conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it or by overvaluing assets in a manner that attributes nonexistent resources to recipients."[12] The

Continued on page 14

Jonathan A. Levy is a partner of Cavanaugh Levy Twist LLP in Portland. His practice emphasizes estate planning and administration, elder law, and planning for retirement benefits. He is a member of the executive committee of the Estate Planning and Administration Section.

Some fiduciary acts require prior court approval

Continued from page 4

assets consistent with abatement in a probate case (ORS 116.133), spending first from the residue; second—if necessary—from the specific bequests; and third—if necessary—from non-probate assets. For more information, see W. Fitzwater, *Preserving the Estate Plan, Chapter 4, Guardianships and Conservatorships*, OLI CLE, September 28, 2001.

Motivating others to cooperate

Fiduciaries often depend on the cooperation of others in order to fulfill their duties. What happens when ordinary efforts to obtain information fail?

A personal representative may apply to the court for authority, approval, or instructions on any matter concerning the administration, settlement, or distribution of an estate, and the court, without hearing or upon such hearing as it may prescribe, shall instruct the personal representative or rule on the matter as may be appropriate. ORS 114.275.

In a conservatorship proceeding, the court may order any person to appear and give testimony by deposition if it appears probable that the person has knowledge or information that is necessary to the administration of the affairs of the protected person. ORS 125.465.

Case example: A personal representative needed to furnish the court with information about the assets and debts of a partnership in which the decedent had served as a general partner. The personal representative also needed to verify the filing of all required tax returns on the decedent's behalf. The surviving business partner refused to provide the personal representative with any financial information. The surviving partner also refused to file required income and payroll tax returns for the partnership for the year ending at the partner's death. The personal representative tried unsuccessfully for more than a year to obtain the information.

The personal representative filed a *Motion and Order To Show Cause* and the court set a date for hearing under the authority of ORS 114.275. At the hearing, the court ordered the business partner to produce the requested financial data and tax returns. The individual produced the required information and filed the tax returns.

Dueling trusts

An increasingly common problem is presented when two (or more) trusts exist for the benefit of the same life beneficiary, but with different remainder beneficiaries. Multiple issues arise, including insuring that each trust bears the same financial burden for the life beneficiary's needs.

ORS 128.135(2) provides that any beneficiary of a trust or the trustee thereof may petition the court to, among other things, "[obtain] authority, approval or instructions on any matter concerning the interpretation of the trust or the administration, settlement or distribution of the trust estate," and, "make any modification of the trust that the parties could make by agreement under the provisions of ORS 128.177."

Case example: John was the life beneficiary of two trusts, one established by his mother and one established by his aunt. Both trusts provided for John's support and maintenance. However, each had different remainder beneficiaries upon John's death. To make matters worse, Mom's trust owned the house John was living in, and held no cash. Aunt's trust had cash. For John to continue to live in the home would exhaust all cash from Aunt's trust (to the detriment of its remainder beneficiary), in favor of Mom's trust (and the benefit of its remainder beneficiary).

A petition was filed for modification and instructions for both trusts. After notices to all interested and affected parties (including the remainder beneficiaries), the court approved a specific plan for spending the assets during lifetime and distributing the funds equally to the remainder beneficiaries upon death.

Deborah Keller is an associate attorney at Fitzwater & Meyer LLP whose practice includes the establishment and administration of guardianships and conservatorships. She received her J.D. from Willamette University College of Law in Salem in 1999.

Wes Fitzwater is a partner in the law firm of Fitzwater & Meyer LLP. His practice emphasizes legal and crisis issues faced by the elderly and their families, including incapacity, guardianship, long term care, and end of life concerns. He is Chair of the Executive Committee of the Elder Law Section of the Oregon State Bar.

CLE seminar on Special Needs Trusts

The Oregon State Bar and the Estate Planning Section will sponsor a half-day seminar on Special Needs Trusts. The program is intended to be a comprehensive overview of Special Needs Trusts, whether third-party funded or self-settled.

The CLE event will take place Friday, July 18, 2003, at Portland's DoubleTree Hotel Lloyd Center, 1000 NE Multnomah. It will begin at 8:30 a.m. and conclude at 12:30 p.m. Specific topics include:

- Interviewing the client (what you need to know)
- Overview of public benefit programs
- Third party funded trusts (discretionary support trusts, special needs trusts, distribution and flexibility provisions, coordinating assets with a special needs trust)
- Beneficiary funded trusts; d(4)(A) trusts and special issues
- Setting up a Special Needs Trust

Seminar leaders will also provide forms to help with the initial interview, drafting, implementation, and administration of the trust.

To register, call OSB CLE at 503-684-7413, or 800.452.8260, ext. 413.

HIPAA privacy rule goes into effect

By Penny L. Davis

The Health Insurance Portability and Accountability Act (HIPAA) of 1996, Public Law 104-191, required the federal Department of Health and Human Services (HHS) to adopt standards for electronic health care transactions, including privacy protections for individually identifiable health information. The HIPAA privacy rule was promulgated as 45 CFR Part 160 and Subparts A and E of Part 164. Most health care providers, health plans, and health care clearinghouses had to comply with the HIPAA privacy rule by April 14, 2003.

The new national standards limit the use and release of protected health information, require covered entities to inform patients about when their health information can be used or disclosed, and give patients the right to get access to their own health information. Entities covered by the HIPAA rules are making major changes in their policies and practices to safeguard the confidentiality of health information. Those who violate the privacy rule can face civil and criminal penalties.

As a general rule, covered entities must get consent before using or disclosing a patient's health information. However, there are numerous exceptions. Health care providers can use or disclose health information in emergency treatment situations without consent. The rule also permits disclosure without the patient's consent if the disclosure is required by law, if the patient is a victim of abuse or neglect, if there is a court order or qualified subpoena authorizing the disclosure, or if disclosure is necessary to prevent a serious and imminent threat to the person's health or safety. 45 CFR 164.512. Only the minimum necessary information can be disclosed, and there are requirements for notifying the patient about the disclosure. 45 CFR 164.502(b) and 164.520.

The HIPAA privacy rule creates procedures for people who want to see their own health records or who want a copy of their health records. Patients also have the right to correct erroneous health information in their records. 45 CFR 164.524 and 164.526.

Giving someone else permission to review a health record has become more complicated. An individual can authorize someone else to have access to his or her protected health information by signing an authorization that includes the elements set out in 45 CFR 164.508. The elements are:

- a specific description of the information to be disclosed
- specific identification of the person(s) or class(es) authorized to make the disclosure
- specific identification of the person(s) or class(es) to whom disclosure is authorized
- an expiration date or event
- a statement of the right to revoke and description of how to revoke the authorization
- a warning that the information may be redisclosed by the recipient
- signature
- the date

If someone other than the patient is signing the authorization, the rule requires a description of that person's authority.

A "personal representative" can also get access to the patient's health information. 45 CFR 164.502(g) defines a personal representative as a person who is authorized to make health care decisions for the patient. Under Oregon law, most guardians would meet that criterion, but conservators would not. A health care representative who is acting under an advance directive for health care signed by the patient would meet that criterion, but an agent under a typical financial power of attorney would not. For a deceased patient, the personal representative would be the "personal representative."

HHS has generated extensive materials on the HIPAA privacy rule to help health care providers, health plans, and health care clearinghouses comply with the new standards. Many of those materials are available at **www.hhs.gov/ocr/hipaa**. Although much of the information is geared to providers, there are fact sheets and summaries written for consumers and links to other helpful Web sites.

The Oregon Department of Human Services (DHS) obtains protected health information on applicants and recipients in order to determine eligibility for benefits, establish service priority levels for long term care, and calculate provider payments, among other purposes. The efforts of DHS to comply with the HIPAA privacy rule, including ten new downloadable forms, can be found at **www.dhs.state.or.us/admin/hipaa.**

Also of interest is the lead article in the June 2003 issue of *In Brief*, published by the OSB Professional Liability Fund (PLF). It is an in-depth analysis of how the HIPAA privacy rule affects lawyers.

Penny L. Davis is a shareholder in Davis & Pagnano, P.C., The Elder Law Firm. She has litigated physician-patient privilege issues in protective proceedings and is a past chair of the OSB Health Law Section.

News from the IRS

Taxpayers and practitioners may now apply for employer identification numbers online. Once the taxpayer has completed all necessary fields on the online form, preliminary validation is performed and an EIN issued after the successful submission of the completed Form SS-4 online.

IRS Form SS-4:
https://sa1.www4.irs.gov/sa_vign/newFormSS4.do

Update from the Elder Law Section Agency and Professional Relations Subcommittee

By Sam Friedenberg, Attorney at Law, Portland

The APR Subcommittee met May 9, 2003 with representatives of the Oregon Department of Human Services (DHS).

Medicaid Service Priorities

Elizabeth Lopez of DHS reported on the state of the budget and responded to our inquiries about Medicaid and other programs. The current biennium expires on June 30, and it is unlikely there will be a budget in place by July 1. Three proposed budgets all include coverage for Service Priority levels one through nine, but one of the budgets includes Service Priorities 10 and 11. It is expected that the new budget will have additional provider cuts and staff layoffs. It is unclear what will happen after July 1 if no budget is in place.

The option of making long term care eligibility contingent on SSI eligibility is still being considered but is not likely to be enacted.

Ms. Lopez reported that 163 hearings had been scheduled based on the level of services. Of the 54 cases heard so far, five resulted in reversals. DHS is reviewing why so many clients were reassessed at a lower level of Service Priority. The intuitive explanation is that when all levels were eligible for benefits there was not a lot of effort to distinguish between the levels. However, DHS is looking at details of the review process.

It appears that there will be no pre-intake mini assessment form for Service Priorities. Intake workers will do an informal assessment. The Service Priority level assessment will be done after the financial assessment, because clients may benefit from programs which do not depend on their Service Priority rating.

There is no training certification process for the Client Assessment/Planning Subsystem (CA/PS). The State will provide training for people who are interested in learning how to do a CA/PS assessment. Right now space is limited because so many agency workers need to be trained. DHS's Nancy Talbot is the person to contact about this.

OHP and other programs

It is likely that the Oregon Health Plan will be significantly modified. It appears that Standard OHP will come to an end, and there will be no reinstatement of the mental health and other services that have already been cut. No cuts are planned to the Employed Persons with Disabilities program.

The next biennium may see a very scaled-down version of the Medically Needy program. We have no details, and requested that the agency let us know as soon as they have an idea what programs and what coverage will continue into the next biennium.

Proposed legislation

The State dropped its legislative attempt to make court ordered spousal support contingent on an administrative process and other requirements. However, some DHS staff members have made it clear that they will continue to pursue the matter. It is noted that this Section has fought DHS attempts to weaken spousal support for several years.

Rick Mills of DHS reported on proposed estate recovery legislation. An attempt to put a 60-day hold on joint accounts at death was headed for defeat, as was the attempt to give the Estate Recovery Department standing in personal injury actions. The bill allowing Estate Recovery to record a notice lien in the property records when a person is on public benefits appears unlikely to survive. The bill allowing the state two years from date of filing rather than date of death to file its claims appeared to be successful.

Revocable trust

In a recent case, a community spouse moved her share of resources into a revocable trust, and DHS denied benefits, stating that this was a disqualifying transfer. Our committee strongly objected, noting that there was no transfer since the community spouse retained all rights to the resources and the revocable trust was a will substitute. We noted all the instances where community spouses make gifts without disqualifying the institutionalized spouse. Joann Schiedler of DHS agreed to contact Centers for Medicare & Medicaid Services (CMS) to get some authority on this issue.

Estate recovery from life estates

We had inquired about a case in Josephine County where the agency was prohibited from recovering from a life estate. This is case 01CV0211, *State of Oregon v. Ryan*. DHS's Roy Fredericks handed out material regarding the case. According to Fredericks, this is a unique case because an agency worker had clearly articulated to the client that a transfer with a retained life estate would not be subject to estate recovery. Fredericks' position is that this was an estoppel case and not a life estate case. DHS does not intend to change its policy for recovery against life estates, regardless of their date of creation or whether the life estate was retained or granted.

Estate recovery from community spouse

Mr. Fredericks reported that he has been in communication with CMS about the possibility of recovering at the death of the community spouse, property that had once been owned by the institutionalized spouse, but not titled in his name when he died. This is currently prohibited by federal law. However, a trend began with a North Dakota case and has been found valid in two Minnesota cases.

Gift of equity loan proceeds

DHS requested and received authority from CMS on the issue of gifts of home equity loan proceeds and reverse mortgage income streams. Roy Fredericks shared a letter from CMS dated March 7, 2003, in which CMS concludes that transferring funds from a home equity loan or reverse mortgage proceeds is a transfer of resources for less than fair market value and would be subject to penalty.

Five stars (★★★★★) to Elder Law Section's first unCLE

By Alexis J. Packer, Attorney at Law, Ashland

On Saturday, May 3, 34 attorneys attended the Elder Law Section's first "unCLE" program at the Valley River Inn in Eugene. Judging from the written evaluations completed by the attendees, and the follow-up comments on the Internet discussion list, the first unCLE is unlikely to be the last.

Here are some of the comments from attendees:

"I was able to ask specific questions germane to topics of concern and receive input from many different practitioners. I loved the informal debate forum. Great topics. One of the most enjoyable CLEs I have attended! More, More!!"

"Enough structure to be useful, enough informality to give and receive great feedback. Great balance."

"This sort of sharing is one of the best forms of lawyer education."

"Great exchange of experience, practical tips, forms and ideas and…good mix of attorneys from around the state."

The idea for an unCLE originated with one Section member's positive experience at a similar program sponsored by the National Academy of Elder Law Attorneys (NAELA). The unCLE planners, with assistance from Section members, identified broad topics of current interest to elder law practitioners, including *Bright Ideas for Practice Management*, *Medicaid Service Levels*, *Estate Recovery*, *HIPAA*, *Administering Guardianships and Conservatorships*, and *Powers of Attorney and Document Drafting Issues.*

Each of the day's four sessions offered two topics. Attendees were free to choose the topic they were most interested in, and, true to the informal nature of an unCLE, were free to move between the two discussion groups. The sessions had no formal speakers, but rather a facilitator who simply began the small-group discussion and intervened only when necessary to pose a question or to assist the process.

Each person was asked to bring 20 copies of a useful form, letter, or document to exchange with others. As a result, participants left the unCLE with both a satisfying experience and a wealth of helpful written materials.

The Bar granted 3.75 general and 1.25 ethics MCLE credits to all those who attended the sessions.

Although the Section has yet to make formal plans for its second unCLE, you can rest assured that if you didn't attend the May 3 unCLE, you will have the opportunity to participate in a future one. The consensus seems to be that it is more a matter of *when*, not *if*, it will take place.

Many thanks are due to Mark Williams, unCLE Program Chair.

Member News

Jennifer Wright has resigned as chair of the Elder Law Section. She is moving to Minnesota to teach an elder law clinic at the University of St. Thomas Law School in Minneapolis. The law school opened only two years ago, and "is dedicated to integrating faith and reason in the search for truth through a focus on morality and social justice." Says Jennifer, "I am looking forward to helping my fellow clinical professors develop a new interdisciplinary clinical program with the graduate schools of psychology and social work. I have already been invited to serve on the executive committee of the Elder Law Section of the Minnesota State Bar. I will maintain my Oregon Bar membership, and my Section membership, and plan to keep in touch with the listserv."

Wes Fitzwater is the new Chair of the Elder Law Section Executive Committee.

Mark M. Williams received the Senior Law Project Outstanding Volunteer Award at the Multnomah Bar Association's 97th Annual Dinner and Judges' Reception on May 22, 2003.

Publications about Special Needs Trusts

Steve Dale, Esq., "Designating a Special Needs Trust: A Three Step Approach to Maintain Benefits and Reduce Taxes," *NAELA Quarterly*, Spring 2002.

G. Mark Shalloway, CELA, "Selecting and Advising Trustees of Special Needs Trusts," *NAELA Quarterly*, Spring 2002.

Roger M. Bernstein, Esq., LLM, "Special Needs Trust: Administration and Compliance," *NAELA Quarterly*, Summer 2001.

Robert Fleming, CELA, and Stuart Morris, CELA, "Taxation of Special Needs Trusts," *NAELA Quarterly*, Summer 2001.

Cynthia L. Barrett, "The Taxation of Special Needs Trusts: Considerations for Trustees," *The ElderLaw Report*, Vol. XII, Number 8, March, 2001.

Donna R. Meyer and Wesley D. Fitzwater, "Special Needs Trusts: Working with a Disabled Beneficiary," *Administering Trusts in Oregon*. Oregon State Bar CLE, October 19, 2000.

Wesley Fitzwater and Richard Pagnano, "Special Needs Trusts," Oregon State Bar looseleaf publication, *Administering Trusts in Oregon.*

List courtesy of Donna R. Meyer

Challenge to LTC cutbacks scheduled for hearings

A preliminary injunction hearing was set for June 12 in Federal District Court in Portland in a legal challenge to the State's termination of Medicaid service payments to low income individuals who live in 24-hour care settings. Legal Aid Services of Oregon, the Oregon Law Center, Lane County Law and Advocacy Center, and the National Senior Citizens Law Center filed the case, alleging that the termination of the services violates federal Medicaid law. The termination of Medicaid service payments was a part of the wave of budget cutting measures taken by the legislature and state agencies earlier this year to balance the 2001-03 budget.

A hearing set for summary judgments will take place on July 28.

Providing for child through revocable inter vivos trust

Continued from page 9

specter that some caseworkers might overlook this principle is not a sound reason to limit inheritances for disabled children to testamentary special needs trusts. To do so will unnecessarily deprive many clients and their families of the benefits of revocable inter vivos trusts.

Footnotes

1. This article does not cover gifts in trust between spouses or from a parent to a child while the parent has a legal duty to support the child. In these settings, the eligibility rules are more restrictive and the case for using a testamentary trust is more compelling.
2. This article assumes that the trust is properly drafted with a distribution standard that causes trust assets to be deemed unavailable to the beneficiary. For detailed treatments of drafting issues, see Clifton Kruse, *Third-Party and Self-Created Trusts*, ch. 3 (3d ed. 2002); Donna Meyer, "Special Needs Trusts: Recent Changes and Common Conundrums," in *Problem Prevention in Elder Law*, 5A-6 to 5A-12 (OSB CLE 2001).
3. E.g., *Matter of Leona Carlisle Trust*, 498 N.W.2d 260 (Minn. App. 1993); *Hecker v. Stark County Social Service Bd.*, 527 N.W.2d 226 (N.D. 1994).
4. Kruse, *supra* note 2, at 52; Lawrence Frolick & Melissa Brown, *Advising the Elderly or Disabled Client*, ¶ 17.06[2][c][ii] (2d ed. 2003); Sterling Ross, "The Special Needs Trust: A New Wrinkle No More," *Heckerling Institute on Estate Planning* ¶ 1602.2 (2002); see also John Regan, Rebecca Morgan, & David English, *Tax, Estate & Financial Planning for the Elderly* § 10.13[1] (2002) ("Special needs trusts created by third parties from their own assets are not affected by OBRA 1993 and remain valid to the extent that they are recognized by state law.")
5. See ORS 414.025; 414.038-414.042; see ORS 413.005(3) & (4); OAR 461-140-0020(1) & (2); OAR 461-140-0040.
6. 42 U.S.C. §1396a(a)(17)((B) (state may take into account only income and resources that are "available" according to standards prescribed by federal regulations); see 20 C.F.R. §416.1201(a)(1) (resource is unavailable for Social Security purposes if individual cannot liquidate it or convert it to cash); ORS 409.040 (federal Medicaid law supersedes contrary Oregon law).
7. OAR 461-140-0020(2)(e); OAR 461-145-540(2)(b).
8. See OAR 461-145-0540(4) - (11).
9. See OAR 461-110-530 (defining "financial group").
10. See *H.R. Conf. Rep. No. 103-213, 103rd Cong., 1st Sess. 834* (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1523; *Skindzier v. Com'r of Social Services*, 784 A.2d 323, 330-31 (Conn. 2001); Kruse, *supra* note 2, chs. 1-3; HCFA State Medicaid Manual, Part 3 – Eligibility, HCFA Transmittal No. 64 §§ 3259.2 – 3259.4 (Nov. 1994) (post-1993 trust restrictions apply only to the extent trust assets are attributable to the applicant).
11. See Programs Operation Manual System (POMS) SI 01120.200.D.
12. *Heckler v. Turner*, 470 U.S. 184, 200 (1985).

Resources for elder law attorneys

Events

Pet Trusts: Providing for Fido and Fluffy
OSB Seminar
July 16, 2003
9:00 a.m. to 12:30 p.m.
Oregon State Bar Center, 5200 SW Meadows Rd., Lake Oswego
Web site: **www.osbar.org/3cle/programs/2002seminars.html**

Pet Legal Issues: More Than Just Fur and Feathers
July 16, 2003
1:30 p.m. to 4:30 p.m.
Oregon State Bar Center, 5200 SW Meadows Rd., Lake Oswego
Web site: **www.osbar.org/3cle/programs/2002seminars.html**

Special Needs Trusts
OSB Estate Planning Section Seminar
July 18, 2003
8:30 a.m. to 12:30 p.m.
DoubleTree Hotel, Lloyd Center, 1000 NE Multnomah, Portland
This program will cover the different types and purposes of Special Needs Trusts, related planning and drafting considerations, and sample forms. A comprehensive overview of Special Needs Trusts, whether third party funded, or self-settled.
See page 10 for more details.

Understanding and Making Long Term Care Decisions
OSB Elder Law Section Seminar
July 18, 2003
1:30 p.m. to 4:00 p.m.
DoubleTree Hotel, Lloyd Center, 1000 NE Multnomah, Portland
See page 16 for details.

National Alzheimer's Disease Education Conference
July 20 to 23, 2003
Chicago
Web site: **www.alz.org/educationconference/overview.htm**

15th Annual Elder Law Institute
Aug. 14 and 15, 2003
Practising Law Institute
New York
Web site: **www.pli.edu**

Elder Law Essentials
Friday, October 3, 2003
Oregon Convention Center, Portland
The Elder Law Section's annual fall CLE program will cover the essentials that attorneys need in order to practice elder law. For attorneys who are new to the area, there will be presentations and materials that focus on the basics, including planning documents, eligibility requirements for programs that pay for long term care, and everyday ethics advice. More experienced practitioners will be fortified with the latest information on the impact of state budget cuts, administrative rule changes, and new legislation. Video replays will be available from Ashland to Astoria and from Coos Bay to LaGrande.

National Aging and Law Conference 2003
October 15 to 18, 2003
Hilton Crystal City
Arlington, Virginia
Contact: Ada Albright, NALC, AARP Foundation, 202.434.2197 or aalbright@aarp.org
Conference e-mail address: NALC@aarp.org
Web site: **www.aarp.org/ntltrpro/nalc.html**

2003 NAELA Advanced Elder Law Institute
November 13 to 16, 2003
Dallas, Texas

Monthly Elder Law Discussion Group

Meets second Thursday: Legal Aid Services, Downtown Portland
Details: Cathy Keenan 503.224.4086

Elder Law Internet Discussion List

All Section members who supply an e-mail address to the Oregon State Bar are subscribed to the Elder Law Section's electronic mail distribution list. The purpose of the distribution list is to facilitate communication among members of the Section.

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.**

Change in Important Elder Law Numbers

Effective July 1, 2003, the community spouse minimum monthly maintenance needs allowance will increase to $1,515 per month and the excess shelter allowance will be the amount above $455 per month.

Understanding and Making Long Term Care Decisions

A free public service of the Oregon State Bar
and Elder Law Section

A seminar for clients, social workers, care providers, accountants, insurance agents, and other non-lawyers

Friday, July 18, 2003
1:30 p.m. to 4:00 p.m
DoubleTree Lloyd Center Hotel
1000 NE Multnomah • Portland

Topics include:

What is Long Term Care?
Long Term Care Housing and Care Options
Paying for Long Term Care
- Private pay; Long term care insurance
- Medicaid; Medicare
- Other government benefits

Qualifying for Medicaid
Planning for Medicaid
- Eligibility
- Asset transfers
- Income cap trusts

How to apply for Medicaid
Disability trusts
Special needs trusts
Third party trusts

To register: Call OSB CLE at 503.684.7413, or 800.452.8260, ext. 413.

Newsletter Board

The *Elder Law Newsletter* is published quarterly by the Oregon State Bar's Elder Law Section, Wesley Fitzwater, 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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