Oregon State Bar

Elder Law Newsletter

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Estate planning issues for mandatory reporters of elder abuse

By Victoria Blachly, Attorney at Law

As of January 2015, attorneys joined the growing list of mandatory reporters of elder abuse, similar to being a mandatory reporter of child abuse. Lawmakers, attorneys, dentists, optometrists and chiropractors have been added to ORS 124.050(9), which already includes other professionals such as doctors, nurses, police officers, clergy, social workers, adult foster home licensees, and any public official who comes in contact with older adults in the performance of the official's duties.

As lawyers and advisers, we should be honored to assist our elderly clients. We are entrusted with the safety and security of a vulnerable population. With this in mind, one should appreciate the added responsibility of being a mandatory reporter is not a burden. But this new requirement is a good reminder not to inappropriately prepare a quick will or power of attorney form for an elderly client for an easy buck and then make things so much worse: not only worse for them, but worse for you when you get dragged into the subsequent litigation.

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Under ORS 124.060, if an attorney has reasonable cause to believe that any person 65 years of age or older has suffered abuse, or comes in contact with someone who has abused a person 65 years of age or older, that attorney must report or cause a report to be made in the manner required in ORS 124.065. But it is still important to maintain client confidentiality. An attorney is not required to make a report of elder abuse "by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client." See Section 6 at **http://legiscan.com/OR/text/HB2205/id/859873**.

Elder abuse is defined at ORS 124.105 and 124.110 and includes financial exploitation for wrongfully taking the assets, funds, or property belonging to or intended for the use of an elderly person or a person with a disability. In evaluating "wrongful," turn to *Church v. Woods*, 190 Or App 112 (2003).

Some have expressed concern that the requirement to report abuse requires attorneys to step into the quicksand of determining whether a client has capacity. For capacity, review *In re Cook's Estate*, 231 Or 133, 135-36 (1962):

> We have held that no particular degree of acumen will serve as a standard for mental capacity and that each case is to be decided upon its own facts and circumstances.

While "no particular degree of acumen" is not specifically helpful, there are some consistent factors the courts have looked at:

- Understanding the nature of the act in which he/she is engaged
- Knowing the nature and extent of his/her property

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Estate plannng and mandatory reporting

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Victoria Blachly's litigation experience has steadily evolved into a practice almost entirely focused on fiduciary litigation for individual trustees, corporate trustees, beneficiaries, and personal representatives, including trust and estate litigation, will contests, trust disputes, undue influence, capacity cases, claims of fiduciary breach, financial elder abuse cases, petitioning for court instructions, and contested guardianship and conservatorship cases.

- Knowing, without prompting, the claims, if any, of those who are, should or might be, the natural objects of his bounty
- Being cognizant of the scope and reach of the provisions of the document

"Evidence of incapacitation prior or subsequent to the time of the will's execution is relevant, but it lacks the probative value of evidence revealing his mental condition at the material time. Its value diminishes the more removed it is from the crucial date. Thus, the testimony of attesting witnesses and, next to them, of those present at the execution of the will is to be accorded 'great weight' in cases of this kind." *Spencer v. Hamit,* 24 Or App 897 (1976).

Accordingly, in order to properly represent vulnerable clients, delve deeper. Ask more probing questions about:

- Family harmony
- Medical history
- Anyone who may object or cause problems with the estate
- Any will created in the past and how the new will differs
- The client's current living situation and with whom the elder spends most of his or her time

You need to help your client and you need to document, document, document, which may include notes such as:

- At time of signing, have the witnesses interact with client and then write down their impression of the person, what they were wearing, demeanor, etc.
- Appreciation of the significance of the choice
- Ability to reason or rationally evaluate the choice
- Planning and sequencing
- Problem solving
- Flexibility of thinking and reasoning
- Self-awareness and regulation
- Intent to act

These are general reminders and guidelines to consider when assisting an elderly client, but the Oregon State Bar mandatory training will provide additional examples and insights for attorneys to be better prepared to see the warning signs and take steps to protect elderly Oregonians.

Attorneys must complete one hour of MCLE training every three years regarding their duties to report elder and child abuse, but note that if your reporting year is in 2015 or 2016, you will need to acquire this credit in that reporting year; you do not get three full years to wait. And while this article touches on elder abuse through potential financial exploitation, elder abuse is not so limited in its scope. Emotional abuse, physical abuse, abandonment, neglect, verbal abuse, sexual abuse, and seclusion and restraint are more of the unfortunate manifestations of elder abuse that must be considered and evaluated.

The standard you walk past is the standard you accept, so do not allow vulnerable Oregonians to be mistreated. Attend the trainings. Learn more about signs of physical and financial elder abuse, what is "reasonable cause" for reporting and who to report to and when to report. Speak up when you see signs of elder abuse. ■

Resources

Administration on Aging:

What is Elder Abuse?
www.aoa.gov/AoA_programs/Elder_Rights/EA_Prevention/whatIsEA.aspx

Prevention of Elder Abuse, Neglect and Exploitation program
www.aoa.gov/AoA_programs/Elder_Rights/EA_Prevention/index.aspx

Multnomah County Adult and Aging Services

Understanding and Dealing with Elder Abuse
www.oregoncounseling.org/Handouts/ElderAbuse.htm

Oregon Dept. of Justice Crime Victims' Services Division

www.doj.state.or.us/victims/pages/elder_abuse.aspx

Oregon Dept. of Human Services

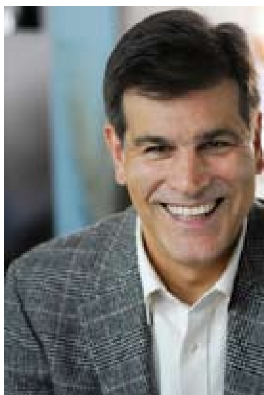
Mandatory Reporting
www.oregon.gov/dhs/abuse/pages/mandatory_report.aspx

Reporting Hotline: 1.855.503.7233

Update on elder abuse task force

By Representative Val Hoyle (D–West Eugene and Junction City) and Representative Vic Gilliam (R–Silverton)

Val Hoyle was first appointed to the Oregon State Legislature in 2009 to represent West Eugene and Junction City. As House Majority Leader, she has been leading the fight for middle-class families, quality public schools, and family-wage jobs in Oregon.



Vic Gilliam has represented House District 18 since 2007. He serves on the Rural Communities, Land Use and Water Committee and on the Rules Committee. He Co-chairs the House Elder Abuse Prevention Work Group.

In the coming years Oregon's elderly community is projected to make up nearly 25 percent of all Oregonians. As our elderly population continues to rapidly expand, our need for care will grow exponentially, as will the need for special attention to challenging issues, such as abuse and neglect. It is our hope that through strong preventive policy making and our continued advocacy for statewide care, our state will be able and ready to meet the needs of this growing population.

The Oregon Elder Abuse Prevention Workgroup was created in 2011 to address the concerning and dramatic increase in elder abuse. With representatives from across our state agencies, industries, and communities, the workgroup has successfully advocated for significant statutory reform over the past three legislative sessions. We've increased the list of mandatory reporters, enhanced penalties for convictions, and provided additional tools to help law enforcement officers investigate and ultimately prosecute suspected cases.

During the 2014 legislative session, our broad coalition worked together to pass legislation that took additional steps forward in the fight against elder abuse. **House Bill 4151** made the following changes:

- Requires the Oregon Department of Human Services to complete elder abuse investigations within 120 days of opening the investigation. This clear timeline provides consistency and reliability for the victims of elder abuse, their families, and also for care providers and healthcare facilities.
- Requires standardization of reporting tools and protocol, investigatory protocol, and DHS coordination with law enforcement agencies. Current practice regarding local agency coordination varies by jurisdiction, agency, and individual. This requirement to standardize tools and protocol will ensure all relevant agencies work in a harmonized and consistent manner to investigate, prosecute, and remedy all instances of suspected elder abuse.
- Modifies the statutory definition of "sexual abuse" to allow consensual sexual contact between elderly Oregonians and their paid caregivers. This technical fix decriminalizes sexual activity between consenting partners that would otherwise be subject to penalty or prosecution.

Also during the 2014 session, the workgroup supported the passage of two more significant bills:

- **House Bill 4114** created the Probate Appointed Special Advocate program, that specifically authorizes probate courts to appoint volunteer special advocates for elderly or vulnerable Oregonians. The Multnomah County Special Advocates for Vulnerable Oregonians (SAVO) was established following the passage of HB 4114, and was awarded $242,846 from the Aging and People with Disabilities Innovation Fund to pilot a program of volunteers to monitor guardianships of vulnerable adults. The bill allows jurisdictions all across our state to implement a similar program, and has proven tremendously successful by increasing safety and quality of life for many elders.
- **SB 1577** created Oregon's first "Silver Alert" program, requiring coordinated law enforcement efforts for missing elderly individuals, modeled after the successful "Amber Alert" notification program.

Since the conclusion of the 2014 session, the workgroup has met regularly to develop legislative concepts for the upcoming 2015 session. The workgroup's efforts, led by three subcommittees, focused on financial exploitation, quality of care improvements, and possible changes to Oregon's relevant statutory definitions. The subcommittees produced several legislative concepts which were introduced on January 12, 2015.

Over the past four years we've made significant strides in addressing the problem of elder abuse in our state. But the work isn't done yet. With the continued commitment from advocates, legislative leaders, private industries, and engaged professionals, we can keep moving Oregon and its citizens in the right direction. ■

Car dealers swindling elders: what can we do?

By Jeremiah Ross, Attorney at Law

Jeremiah Ross is a Portland solo practitioner who represents people in personal injury cases and auto-dealer fraud cases. Prior to starting Ross Law, Jeremiah worked as a prosecutor for several years and proudly served in the United States Marine Corps and the Oregon Army National Guard. He can be reached at 503.224.1658.

An elderly woman takes her old car to the dealership to get its oil changed. Six hours later she pulls up in her daughter's driveway in her newly purchased car. The daughter immediately notices the car is leaking oil, reviews the paperwork, and learns that her mother has agreed to a loan with a 28 percent annual percentage rate and $600 per month payments. The car payment will swallow half of her mother's monthly income. Her mother insists this is not a problem, because the dealer told her she could return the car if she did not like it.

The daughter calls the dealer and explains the situation. The manager says the dealer would never tell a customer she could return the car, and she must have misunderstood. However, the manager seems receptive and reviews the paperwork. He points out the woman signed all the documents, the car was bought "as is," and tells her that unfortunately there is nothing he can do.

The daughter later learns there is no "cooling-off period" or three-day right to rescission for vehicle purchases in Oregon. What this means is that there is no statutory right to return the vehicle. Therefore, the purchaser must figure out another way to "unwind" this deal.

Contacting government and private agencies may be of some assistance. The Oregon Department of Justice investigates and prosecutes dealer fraud cases and may assist.[1] The Oregon Department of Motor Vehicles investigates dealer issues on a very limited basis.[2] The Better Business may assist in some circumstances.[3] However, sometimes bringing an attorney into the situation is the only viable option.

At that point the client must decide what remedy he or she wants (i.e., get out of the deal, keep the car and sue for damages, or other relief). Once that is determined the client and attorney must decide whether to attempt to resolve the case by sending a demand letter prior to litigation—which is preferred—or simply filing a lawsuit.

Whatever route the consumer and attorney choose, Oregon law provides elders with a great arsenal to protect themselves. There are various claims for relief (contract, fraud, etc.) a plaintiff may allege. However, the following lesser-known laws should be considered when assisting an elder who may have been ripped off in a car deal.

Laws that may help elders get out of the deal

Unlawful Trade Practices Act (ORS 646.608)

The UTPA provides a laundry list of numerous laws a practitioner should review to determine which subsections apply to the client's fact pattern. There are specific laws relating to advertising, vehicle financing, titling issues, failing to disclose material defects, and the general catchall that allows a person to allege the dealer engaged in unfair or deceptive conduct. The UTPA list should be read in conjunction with the Oregon Administrative Rules that define unlawful trade practices. The UTPA is the preferred cause of action in any case involving a consumer and a dealer, because a plaintiff may recover costs, litigation expenses, and attorney fees.

Unlawful Trade Practices (OAR 137-020-0020 to 137-020-0050)

These administrative rules are a treasure trove of regulations that clarify many unlawful trade practices in which a dealer may be engaging. They cover everything from misrepresentations, advertising, what a material defect may be, and financing issues. These OAR sections are typically alleged in conjunction with a UTPA claim, so if you prove an OAR violation the plaintiff may recover costs, litigation expenses, and attorney fees.

Truth In Lending Act (Regulation Z, 15 U.S.C. §1601 *et seq* and 12 C.F.R §226, *et seq*)

The Truth In Lending Act (TILA) is a federal law that Oregon has incorporated into its Oregon Administrative Rules. TILA should be examined if there are any issues that may have arisen during the financing of the vehicle. TILA is powerful because it may allow for the consumer to obtain twice the amount of the financing charge, costs, and attorney fees. See 15 U.S.C. §1640.

Vehicle Financing (ORS 83.510 *et seq*)

This is Oregon's law as it relates to vehicle financing. It is similar to TILA in some respects. There are various provisions and requirements that you may find a dealer has ignored or failed to comply with. To my knowledge there is not a private right of action under these specific statues. However, a creative practitioner may use it as a basis for a UTPA violation or other claim for relief.

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Car dealers

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Magnuson–Moss Warranty Act (15 U.S.C §2301, *et seq*)

This federal law applies to consumer products sold with a written warranty. It is important to review this statute to determine whether or not a "warranty" exists under the statute. Additionally, the claim must be examined to determine if it is ripe for litigation. The Magnuson-Moss Act has an attorney fee provision. 15 U.S.C. §2310 (d) (2).

Civil Action for Abuse of Vulnerable Person (ORS 124.100)

This state law claim allows for certain folks to recover damages for financial abuse. This law may apply if your client is over 65 years old or has physical or mental impairments that make him or her susceptible to coercion, duress, and persuasion, and the dealer wrongfully took money from them. This is a very powerful law that exposes the dealer to treble actual damages and attorney fees.

Yo-Yo Financing or "Spot Delivery" (ORS 646A.090)

Yo-Yo financing occurs when the dealer finances the vehicle under certain financing terms and allows the consumer to take possession of the vehicle. The consumer usually has no idea the financing is in limbo, and believes it was approved. However, later the dealer calls and informs the consumer he or she cannot obtain financing for the vehicle. The dealer then offers a new contract with different terms. Spot delivery is legal in Oregon, but it is subject to the terms of ORS 646A.090 and OAR 137-020-0020. Various issues arise in any spot delivery situation, so these laws should be reviewed in each case. A violation of this statute should constitute a violation of the UTPA.

Lemon Law (ORS 646A.400 *et seq)*

This law only applies to cars that have less than two years or 24,000 miles on them. It should be examined if your client's new car is having mechanical, electrical, or other issues that adversely affect the safety or value of the vehicle. There are certain hurdles to overcome prior to filing a lawsuit, so it is important to review the law carefully. The lemon law allows for attorney fees and triple actual damages with a $50,000.00 cap.

Litigation costs and attorney fees

From the beginning you should start to think about whether or not it is worth the client's time and money to litigate the matter. In doing so you must determine how your client's costs and attorney fees will be paid. The obvious answer is to allege claims for relief with attorney-fees provisions. If you intend to write a letter, you must determine how it will be cost-effective for the client. You also want to ensure the dealer is not judgment-proof.

Collecting a judgment

Some dealers can be small operations and may go out of business once a lawsuit is filed. ORS 822.030 may assist your client in that situation. That statute requires vehicle dealers to have a bond to pay out in the event a person gets ripped off. These bonds make the bond company jointly and severally liable for certain dealer actions. The DMV keeps records that relate to which company holds the dealer's bond. A practitioner should consider filing suit against the bond company along with the dealer when initiating litigation.

I hope these practical tips may assist you if you are counseling an elder who was duped by a dealer. If you are facing a dealer fraud issue or have any questions, feel free to contact me. ■

Footnotes

1. Oregon Department of Justice
   1.877.877.9392 or
   www.doj.state.or.us/consumer/pages/index.aspx
2. DMV Dealer Complaints
   www.oregon.gov/ODOT/DMV/pages/dealers/complaints.aspx
3. Better Business Bureau
   503.212.3022 or complaints@thebbb.org

Latino community not immune from elder abuse

Like all other elders, Latinos become the victims of abuse. Exposure of abuse and intervention are often complicated by cultural and language factors. Several publications on the topic provide useful information for you and your clients.

A 2012 study by researchers from the USC Davis School of Gerontology published in the *Journal of the American Geriatrics* Society[1] found that elder abuse in low-income Latino communities goes largely unreported. Based on interviews conducted in Spanish in Los Angeles neighborhoods, the researchers found, among other things, that 10.7 percent of elderly Latinos had been physically abused and 16.7 percent of Latino elders said they had been exploited financially.

In all, more than 40 percent of Latino elders told interviewers they had been abused or neglected in the previous year. However, only 1.5 percent of victims said they had ever reported the abuse to authorities.

In its research brief *Mistreatment of Latino Elders*[2], the National Center on Elder Abuse reports:

> "Culture can be a protective or risk factor for Latino elders. It affects how they perceive abuse and seek help and so should also affect how professionals and authorities engage, assess, and intervene."

Some key points cited:

- *La familia* is emphasized over the individual in many Latino cultures, whch affects an elder's willingness to admit abuse or seek help.
- Latino elders may not perceive financial exploitation as abuse because interdependency is common in Latino families.
- Some reasons Latino elders may not want to seek help are: the shame it brings to their family; cultural or religious ideologies, lack of culturally competent services, language barriers, and lack of awareness of services.
- An elder's willingness to report abuse and understand the services available to them may be influenced by where they were born (U.S. vs. outside of the U.S.), English proficiency, and level of acculturation to U.S. society.

Limited English proficiency is a factor that contributes to the vulnerability of older Latinos. Nearly 1.5 million Latino elders—two of every five—have limited English language proficiency or speak Spanish only. Their limited access to trusted information and resources in Spanish hampers their ability to detect, respond to, and report abuse.

The Consumer Financial Protection Bureau has Spanish versions of two resources that can help elders, family members, caregivers, and the professionals and organizations that work with them:

- *Money Smart para Adultos Mayores* (Money Smart for Older Adults) – an educational program with the FDIC that teaches older adults and their caregivers how to spot scams and frauds and prevent financial exploitation. The translated guide can be used as a self-study guide or delivered as a training in a group setting.[3]
- *Cómo Administrar el Dinero de Otras Personas* (Managing Someone Else's Money) – a set of four guides for financial caregivers—government fiduciaries, agents under power of attorney, guardians of property, and trustees—to help them understand their duties, and how to prevent and respond to financial exploitation.[4] ■

Footnotes

1. "Determining prevalence and correlates of elder abuse using *promotores*: low-income immigrant Latinos report high rates of abuse and neglect" by Marguerite DeLiema, Zachary Gassoumis, Diana Homeier. *Journal of the American Geriatrics Society*; 2012 July 60(7):1333-39. **www.researchgate.net/publication/225373025_Determining_prevalence_and_correlates_of_elder_abuse_using_promotores_low-income_immigrant_Latinos_report_high_rates_of_abuse_and_neglect**
2. The research brief is available for download at: **www.ncea.aoa.gov/Resources/Publication/docs/NCEA_LatinoElders_ResearchBrief_508.pdf**
3. Download at: **http://files.consumerfinance.gov/f/201410_cfpb_msoa_es.pdf**
4. These resources are available for download at:
   http://files.consumerfinance.gov/f/201410_cfpb_lay-fiduciary-guides-representative_es.pdf
   http://files.consumerfinance.gov/f/201410_cfpb_lay-fiduciary-guides-agents_es.pdf
   http://files.consumerfinance.gov/f/201410_cfpb_lay-fiduciary-guides-guardians_es.pdf
   http://files.consumerfinance.gov/f/201410_cfpb_lay_fiduciary_guides_trustees_es.pdf

Advising a survivor of abuse on the most appropriate protective order

By Andrea Ogston, Attorney at Law

Andrea Ogston is a staff attorney at the Portland Regional Office of Legal Aid Services of Oregon. She specializes in issues that affect older adults.

There are four types of protective orders available under Oregon Law: Family Abuse Prevention Act orders (FAPA orders), Stalking Protective Orders, Elderly Persons and Person with Disabilities Abuse Prevention Act orders (EPPDAPA orders), and the most newly enacted protective order, Sexual Abuse Prevention Orders (SAPO). In order to qualify for each order, a petitioner must meet any qualifying relationship requirement and show that abuse or stalking contacts occurred in the relevant time period and that the petitioner is at risk for future abuse.

The primary purpose of protective orders is to allow abuse survivors to craft remedies that help protect their physical safety. Part of effectively representing a survivor is discerning what relief will provide the greatest degree of safety. This can be as individual as the survivor. All protective orders allow the survivor to request that the perpetrator not go to the survivor's school, workplace, home, gym, or daycare provider; and refrain from contact via email, phone, or text message. EPPDAPA provides expanded remedies, described below.

Statewide forms for all the protective orders can be found at: **http://courts.oregon.gov/OJD/forms/pages/index.aspx**. This website also provides information on supplementary local rules that specify the procedures in different counties. There are no filing or service fees for any protective order.

An individual survivor may be eligible for more than one type of protective order, and as advocates it will be our job to advise our clients on the order that will provide the appropriate remedies.

Is there a qualifying relationship?

The purpose of a FAPA order is to protect a petitioner from abuse perpetuated by "family or household members." ORS 107.705(3). Only those petitioners with a qualifying relationship are eligible to petition for a FAPA order. This is the only protective order that allows for custody and parenting-time provisions. When dealing with a survivor who needs a custody or parenting time order to remain safe, a FAPA order will be the only appropriate order.

A Stalking Protective Order, in contrast, has no relationship requirement. It is not uncommon for the identity of the stalker to be unknown to the petitioner. ORS 163.735 enables the police to issue a citation to an individual who is accused of stalking, which can be helpful in situations where the identity of the perpetrator is unknown. The police citation will begin the process for the civil action for a Stalking Protective Order. Individuals can also file a petition on their own, pursuant to ORS 30.866.

Neither EPPDAPA nor SAPO has a relationship requirement. However, SAPO was enacted to fill various gaps in protection for survivors of sexual abuse. An individual may not petition for a SAPO if he or she would otherwise be eligible for a FAPA order.

When did the abuse occur?

With the exception of a Stalking Protection Order, the qualifying abuse must have occurred within the previous 180 days. However, this time is tolled where the respondent is incarcerated or is living more than 100 miles away from the petitioner. The relevant period for a Stalking Protection Order is the prior two years, and there is no tolling.

Was there at least one incident of abuse or two stalking contacts during the relevant time period?

"Abuse" under FAPA is narrow. It requires evidence that the respondent placed the petitioner in fear of imminent bodily injury, caused bodily injury, or forced the petitioner to engage in sexual relations by force or threat of force. ORS 107.705. In contrast, EPPDAPA has a much broader definition of abuse that includes financial exploitation, as well as derogatory or inappropriate name calling.

A stalking order requires two or more unwanted contacts that reasonably alarm or coerce the petitioner. ORS 163.752.

FAPA orders, EPPDAPA orders, and SAPO are in effect for one year and can be renewed before the expiration of the order for an additional year. A stalking order has a lifetime duration. The burden of proof for all four orders is preponderance of the evidence.

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Protective orders

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Why EPPDAPA is generally the best route

If the individual you are working with is an adult over the age of 65 or a person with a disability, it will rarely be the case that any order other than an EPPDAPA order would be most appropriate.

A person with a disability is defined as a person with a physical or mental impairment that substantially limits one or more major life activity and is expected to last longer than six months. ORS 410.040 (7). For example, a person with significant depression or anxiety would be eligible for an EPPDAPA order.

There are several reasons why EPPDAPA orders are generally preferable. First, EPPDAPA orders do not require a showing of a qualifying relationship. This means that the respondent does not have to be related by marriage, blood, or in a sexually intimate relationship with the older adult. This becomes important where the abuser is a non-family caregiver. FAPA orders, on the other hand, require such proof.

Second, the definition of abuse under the EPPDAPA is more expansive (*cf.* ORS 107.705, ORS 124.005), recognizing a broader range of conduct that might be experienced as threatening or intimidating by an older adult. This allows a wider range of conduct to be considered when deciding whether the requirement of abuse has been met. For example, intimidating language is actionable abuse under EPPDAPA, as is the wrongful taking of property.

Additionally, a guardian *ad litem* or guardian can file an EPPDAPA on behalf of a protected person. The protected person must be served within 72 hours of the filing and will be given the opportunity to object if he or she chooses. However, an EPPDAPA order cannot be filed against a protected person's guardian or conservator or used to delegate control over a protected person's finances as a way to circumvent the conservatorship process.

Lastly, EPPDAPA provides for expanded remedies. For example, in addition to requesting that the perpetrator restrain from contact, the older adult or person with a disability can request that wrongfully taken property be returned, that the orders of a guardian or conservator be followed, or that money be returned. ■

Statewide Public Guardian appointed

S. Travis Wall has been appointed as Oregon's first statewide Public Guardian, a position created by the 2014 Oregon Legislature.

Mr. Wall comes to the position with broad guardianship experience. As a director, analyst, and advocate with rights protection and advocacy programs in California and Nevada, he served as an advocate and worked to reform guardianship practices and law. He both developed and directed the Utah Office of Public Guardian. Most recently, Mr. Wall was the policy and program manager for Oregon Vocational Rehabilitation, where he led cross-agency initiatives to increase inclusive and equitable employment of people with disabilities.

Background

Due to the lack of public guardian services across Oregon, adults who lack the capacity to make personal, medical, and financial decisions have had nowhere to turn. The legislature recognized that lack of a secure guardianship may result in repeat hospitalizations, commitment to psychiatric units, or even premature death. Without a trusted friend or family member to act as a fiduciary, those who face severe mental health conditions, developmental disabilities, and age-related conditions who cannot afford to hire a fiduciary go without this crucial protection. Prior to passage of this bill, only Multnomah County provided a public guardian option.

The statewide Public Guardian was created by SB 1553 and became effective April 1, 2014, in Chapter 117, Oregon Laws 2014.

SB 1553 had broad support from the advocacy community, including AARP, the Campaign for Oregon's Seniors & People with Disabilities, and Disability Rights Oregon. ■

"Permitting" the abuse of a vulnerable person: *Wyers v. American Medical Response Northwest, Inc.*

By Erin K. Olson, Attorney at Law

Erin K. Olson is a solo practitioner in Portland who represents crime victims in civil and criminal actions. She is the co-founder of the Oregon Crime Victims Law Center and past president of the National Crime Victim Bar Association. She wrote the amicus brief on behalf of the Oregon Trial Lawyers Association in Wyers v. American Medical Response Northwest, Inc.

In *Wyers v. American Medical Response Northwest, Inc.*, 268 Or App 232 (2014), the Oregon Court of Appeals held that the defendant ambulance company (hereinafter AMR) could "permit" the abuse of a vulnerable person within the meaning of ORS 124.100 if "the defendant acted or failed to act with knowledge that would lead a reasonable person to conclude that the plaintiff was being abused or would likely be abused in the manner alleged by plaintiff." *Id.* at 247. In so holding, the Court of Appeals rejected AMR's argument that it could not have "permitted" plaintiffs' sexual abuse by one of its employees because it did not know of the acts of abuse until after their occurrence.

Wyers involved the predatory actions of Lannie Haszard, a paramedic employed by AMR who sexually abused or exploited female patients while they were being transported by ambulance to the hospital. The plaintiffs submitted evidence that prior to the abuse of any of the six of them, AMR had received reports of sexual misconduct by Haszard from two other female patients, and that a third report was received prior to the abuse of five of them. In granting the defendants' summary judgment motion, the trial court concluded that because AMR had no knowledge "of the specific acts of abuse allegedly committed on each plaintiff" until long after the abuse occurred, it could not have "permitted" the plaintiffs' abuse within the meaning of ORS 124.100, and further, that even if AMR's acts were negligent, they did not fall within the protections of ORS 124.100 because "the legislature did not intend [that statute] to apply to corporate entities like AMR for alleged negligent conduct."[1]

In rejecting the trial court's conclusions, the Court of Appeals analyzed the meaning of the verb "permit" as used in ORS 124.100, beginning with the definition set forth in the statute itself: "An action may be brought under this section against a person for permitting another person to engage in physical or financial abuse if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical or financial abuse." ORS 124.100(5). After summarily rejecting AMR's argument that despite the plain language of ORS 124.100(5), each plaintiff was required to prove that AMR subjectively knew of Haszard's abuse of them at the time it was occurring, the court went on to distinguish its holding in *Miller v. Tabor West Investment Co.*, 223 Or App 700 (2008), *rev den*, 346 Or 184 (2009), the only other appellate decision to substantively apply, ORS 124.100(5).[2]

Miller v. Tabor West involved an off-premises assault by one tenant of an apartment complex on another tenant. The assailant was known by apartment management to have spent several years in the Oregon State Hospital for assaulting another person, and was also known to be on medication to "keep him mellow." *Miller*, 223 Or App at 702. Despite this knowledge, the Court of Appeals affirmed the trial court's grant of summary judgment in favor of defendants, concluding that there was no evidence in the record from which a jury could conclude that "defendants failed to act to prevent an assault that a reasonable person should, under the circumstances, have known that [the perpetrator] would commit." *Id.* at 718.

In distinguishing *Miller*, the Court of Appeals in *Wyers* first noted that in its opinion in *Miller*, it had observed "that evidence of facts regarding the general relationship between a plaintiff and an alleged abuser can serve as a basis from which a jury could conclude that a reasonable person should have known that the abuser 'would' commit the specific abuse alleged by the plaintiff." *Wyers,* 268 Or Ap at 250. Such circumstances can amount to knowledge of the substantial risk of abuse, which is what the Court concluded was intended by the legislature in imposing liability for "permitting" abuse under ORS 124.100(5). *Id.* The *Wyers* court concluded that the plaintiffs had met the burden intended by the legislature because they "produced evidence from which a reasonable juror could conclude that defendant knowingly failed to act regarding its knowledge of the risk that Haszard was a serial predator who would sexually abuse additional women, such as plaintiffs, if permitted to do so." *Id.* at 254.

The Court of Appeal also rejected AMR's argument that the treble damages provision within ORS 124.100 "denotes the legislature's intent to require a defendant to have a higher culpable

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mental state than negligence." *Id.* In doing so, the court noted that it had rejected a similar argument by the same defendant in *Herring v. American Medical Response Northwest*, 255 Or App 315, *rev den*, 353 Or 867 (2013).[3]

The Court of Appeals concluded its analysis by rejecting AMR's argument that ORS 124.100 was not intended to reach corporate defendants like AMR. After reviewing the legislative history of the statutory scheme of which ORS 124.100 is a part, the court observed that from the time of the law's introduction in 1995 through the last substantive changes to the law in 2005, the legislature has only extended the scope and reach of the scheme, and never limited or narrowed its protections. "That history indicates that, through ORS 124.100, the legislature intends to offer robust protection for vulnerable persons." *Id.* at 251.

The court also noted that the legislature had expressly exempted only a few institutional providers of care or services, and concluded from the limited list that "[t]he express inclusion of a closed universe of exemptees in ORS 124.115 indicates that any entity not included in that list is potentially subject to liability under ORS 124.100." *Id.* at 253.

The *Wyers* opinion implicates an issue that has been the subject of considerable discussion within the Bar because of the concern that attorneys can be sued for "permitting" the abuse of vulnerable persons by advising or assisting clients engaged in business or other transactions with persons who are "vulnerable" within the meaning of ORS 124.100(1)(e).[4] Indeed, attorneys *have* been sued under ORS 124.100(5) for just that,[5] and they are not among the persons or entities the legislature has exempted from liability. *See* ORS 124.115 (exempting financial institutions, heath care facilities, licensed long-term care facilities, and broker dealers unless those entities are convicted of criminal conduct amounting to physical or financial abuse).[6]

Some practitioners have also expressed a heightened concern from the recent extension of mandatory elder abuse reporting requirements to attorneys due to the possibility of civil liability for failing to make a mandatory report of financial abuse that involves the wrongful[7] taking,[8] appropriation,[9] or retention[10] of money or property from a vulnerable person. This concern arises from the possibility that an attorney who knowingly fails to make a report under circumstances in which a reasonable person should have known that financial abuse is occurring might be successfully sued under ORS 124.100(5). While such a claim is possible, the requirement that the attorney knew, or reasonably should have known, that the taking was "wrongful" serves to limit the liability under ORS 124.100(5) of an attorney who does not report. Moreover, the Court of Appeals noted in *Wyers* that "the knowledge requirement is more akin to the standard for reckless conduct than for negligent conduct." 232 Or App at 250.

If the decision of the Court of Appeals in *Wyers v. American Medical Response Northwest, Inc.*, is the final word on the meaning of "permitting" abuse of a vulnerable person,[11] it provides needed guidance concerning the application of ORS 124.100(5). While the abuse at issue in *Wyers* was physical abuse, the holding applies to financial abuse as well, and serves as a warning that persons in a position to take action to prevent financial abuse may be held accountable for failing to do so. ■

Footnotes

1. "Order Re: Defendant's Motions for Summary Judgment and Motion for Partial Summary Judgment," p 15, Multnomah County Case No. 0910-14750, June 30, 2011 (Dailey, J.).
2. In *Fadel v. el-Tobgy*, 245 Or App 696 (2011), the Court of Appeals rejected without discussion an appeal from a jury finding that a wife had "permitted" her husband to engage in financial elder abuse.
3. The *Herring* opinion is the subject of a case note by Prof. Leslie Harris that appeared in the April 2013 issue of the *Elder Law Newsletter*. In that opinion, the Court of Appeals concluded that: (1) a person who is only temporarily "incapacitated" can be "vulnerable" within the meaning of ORS 124.100; and (2) the cap on noneconomic damages imposed by ORS 31.710(1) does not apply to treble damages awards under ORS 124.100(2)(b).
4. ORS 124.100(1)(e) provides: "Vulnerable person means: (A) An elderly person; (B) A financially incapable person; (C) An incapacitated person; or (D) A person with a disability who is susceptible to force, threat, duress, coercion, persuasion or physical or emotional injury because of the person's physical or mental impairment."
5. While several attorneys have been sued for "permitting" abuse based on work done for clients, the only reported decisions of which the author is aware are *Fuentes v. Tillett*, 263 Or App 9, 26-28 (2014) (affirming dismissal of civil action against attorney for conservator because his actions were within the qualified privilege that attorneys have when representing fiduciaries) and *Evers v. Troutman*, 2004 U.S. Dist. LEXIS 31258, CV 03-145-BR (D.Or. February 6, 2004) (allowing amendment of complaint to plead statutory claim against attorney for former conservator, who could be found liable if he knowingly acted or failed to act under circumstances in which a reasonable person should have known of the financial abuse being perpetrated by his client).
6. While there has been some discussion of expanding the statutory exemptions to include attorneys who act in good faith on behalf of a client, no legislation has been introduced to create such an exemption. The author suggests that those who are primarily entrusted to use the law should not be the first to attempt to limit its scope for their own benefit

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when other protections for work done in good faith on behalf of clients already exist. *See Fuentes v. Tillett*, *supra* n. 5.

7. A Deschutes County jury found for the plaintiff in a claim alleging negligence for school officials' violation of ORS 419B.010 in *Shin v. Sunriver Prep. School*, 199 Or App 352, *rev den*, 339 Or 406 (2005), but the Court of Appeals did not reach the issue on appeal. Additionally, proposed legislation to eliminate any private right of action for violating ORS 419B.010 was vetoed by Governor Kitzhaber at the urging of the Attorney General in 1999. HB 2226 (1999). Finally, according to the Oregon State Bar General Counsel's Office, "[t]he Professional Liability Fund also has defended and settled two claims arising out of a lawyer's failure to report when there was no privilege or other exception to the duty to report." "Questions and (Some) Answers About Mandatory Child Abuse Reporting for Lawyers," Oregon State Bar General Counsel's Office, p. 13 (Last Updated April 2012).
8. *Church v. Woods*, 190 Or App at 117): "The ordinary meaning of 'take' is 'to transfer into one's own keeping [or to] enter into or arrange for possession, ownership, or use of[.]"
9. *See* ORS 164.005(1) (defining "appropriate" for purposes of the Oregon criminal code); *Hays v. Hallberg*, 247 Fed.Appx. 865 (9th Cir. 2007) (defendant could not "appropriate" real property that was already in foreclosure).
10. *Hoffart v. Wiggins*, 226 Or App 545 (2009) (whether defendants acted in bad faith in retaining monies invested with them by plaintiff was an issue of fact for the jury).
11. The *Wyers* opinion was issued December 31, 2014. At the time of the publication of this article, the deadline for the defendant to seek review by the Oregon Supreme Court had not yet passed.

The CFPB's *Managing Someone Else's Money* guides: a resource for your clients and community

As elder law attorneys know well, millions of Americans are managing money or property for a relative or friend who is unable to pay bills or make financial decisions. For a lay fiduciary, this can be overwhelming. It's important for these financial caregivers to understand their role and to protect the incapacitated person from scams and fraud.

The Consumer Financial Protection Bureau (CFPB) is a federal agency created by the Dodd-Frank Act in 2010. CFPB's Office for Older Americans is the only federal office dedicated to the financial health of Americans age 62 and over. To help family members and other laypersons with legal authority to handle an older person's money, the office worked with the American Bar Association Commission on Law and Aging to prepare four easy-to-understand booklets to help financial caregivers. CFPB released the *Managing Someone Else's Money* guides in October 2013.

The guides are for agents under powers of attorney, court-appointed guardians, trustees, and government fiduciaries (Social Security representative payees and VA fiduciaries.) The guides help fiduciaries in three ways:

- They walk them through their duties.
- They tell them how to watch out for scams and financial exploitation, and what to do if a relative or friend is a victim.
- They tell them where to go for help.

In the sections on fiduciary duties, the guides use plain language and examples to make the information accessible. The duties are described as:

1. Act only in a family member or friend's best interest
2. Manage the money and property carefully
3. Keep the money and property separate from yours, and
4. Keep good records.

The guides are not intended to provide legal advice or serve as a substitute for an individual's legal counsel. Elder law attorneys may find them useful in several ways:

- They can share them with clients when they assist them with advance planning, to help them understand the role of the fiduciary.
- They can share them with family members and friends of clients who are taking on the role of a fiduciary.
- They can distribute them at community legal education presentations or when working with other types of professionals, such as on elder abuse task forces or multi-disciplinary teams.

You can order free print copies (including bulk orders) online.

In the second phase of the *Managing Someone Else's Money* initiative, CFPB will release six sets of state-specific guides for Oregon, Arizona, Florida, Georgia, Illinois, and Virginia. CFPB and the American Bar Association worked with state experts to adapt the national guides for use in Oregon. The Oregon guides will be released sometime in 2015.

For more information and to discuss plans for disseminating the national and state guides, contact Naomi Karp at the CFPB at naomi.karp@cfpb.gov. ■

Nay v. Department of Human Services, 267 Or App 240, __ P3d __ (2014)

By Darrin Dooley, Attorney at Law

Darin Dooley is an attorney with the Portland Law Offices of Nay & Friedenberg. His practice includes estate, Medicaid, and special needs planning, and trust administration.

In the fall of 2008, the Department of Humans Services (DHS) amended OAR 461-135-0832(10)(b)(B)(viii) and OAR 461-135-0835(1)(e)(B)(iii) (the rules). The amendments, applicable to the estates of Medicaid recipients dying on or after October 1, 2008, expanded the category of assets potentially subject to Medicaid estate recovery to include assets that the Medicaid recipient conveyed to the recipient's spouse or others within five years of the date of the Medicaid application or anytime thereafter.

OAR 461-135-0832(10)(b)(B)(viii) provides a portion of the definition of *estate* for estate recovery:

> *Other similar arrangement, such as an interspousal transfer of assets, including one facilitated by a court order, which occurred no earlier than 60 months prior to the first date of request established from the recipient's and the recipient's spouse's applications, or at any time thereafter, whether approved, withdrawn, or denied, for the public assistance programs referenced in OAR 461-135-0835(2).*

*OAR 461-1*35-0835(1)(e)(B)(iii) applies that definition to the scope of estate recovery:

> *An interspousal transfer, including one facilitated by a court order, which occurs:*
> *(I) Before, on, or after October 1, 2008; and*
> *(II) No earlier than 60 months prior to the first date of request (see OAR 461-135-0832) established from the applications of the recipient and the recipient's spouse, or at any time thereafter, whether approved, withdrawn, or denied, for the public assistance programs referenced in section (2) of this rule.*

In 2012, Tim Nay, Law Offices of Nay & Friedenberg, filed a challenge to the rules, pursuant to ORS 183.400(1), in the Court of Appeals. Nay sought a judicial declaration that the rules, as amended, were invalid because they were unconstitutional and exceeded DHS's statutory authority. Nay argued that the rules exceeded the scope of both federal and state law because the challenged rules permit DHS to assert an estate recovery claim against assets transferred by the Medicaid recipient during life and that the Medicaid recipient had no legal interest in at the time of his or her death.

The scope of review was limited to a determination of whether the rules on their face complied with the applicable constitutional and statutory requirements.

In reviewing the federal statue governing estate recovery, 42 USC §1396p(b)(4), the court noted that it provides both mandatory and permissive definitions of *estate*. Paragraph (b)(4)(A) allows recovery from the deceased individual's probate estate, as defined by state law. Paragraph (b)(4)(B) is permissive, allowing states the ability to expand the definition of assets for estate recovery purposes. The court found that this permissive definition of estate "incorporates nonprobate assets that are transferred from the Medicaid recipient to a third party by operation of law or other mechanism, but in which the deceased Medicaid recipient retained legal title or "any" interest *at the time of his or her death.*" 267 Or App at 248 (emphasis in original).

The court next analyzed Oregon's property law principles and elective share rules under state domestic relations and probate law. The court concluded that a Medicaid recipient has no interest in property held separately by a spouse at the time of the Medicaid recipient's death.

On November 26, 2014, the Court held the rules invalid because they exceeded DHS's authority under both federal law and state law (42 U.S.C. § 1396p(b)(4), ORS 416.350) by subjecting assets not owned by the Medicaid recipient at the recipient's death to an estate recovery claim.

Because the court concluded the rules exceeded federal and state statutory authority, it did not reach Nay's constitutional challenges.

At the time this summary was written, DHS had filed a notice of appeal to the Oregon Supreme Court. Because of the appeal, the Court of Appeals has not issued a copy of the appellate judgment to DHS per ORAP 14(2)(b) and (3)(a) making the decision effective. The procedural posture of this case means attorneys and their clients cannot rely on the Court of Appeals decision. Nay has not received a copy of the DHS petition, so the basis of the appeal or assignment of error remains unknown. The timeline for the Supreme Court to reach a decision is also uncertain.

DHS is likely to continue to assert estate recovery claims against assets not owned by the Medicaid recipient at the time of his or her death. In the interim, if DHS asserts an estate recovery claim attorneys should continue to attempt to reach some type of agreement with the DHS Estate Administration Unit. Options include pending the matter until the outcome of the DHS appeal, withholding funds sufficient to satisfy the estate recovery claim and distributing any remaining assets per the Medicaid recipient's estate planning or operation of law, or some other type of settlement. ■

State of Oregon v. Cue stiffens notice requirements in probate proceedings

By Sarah Vaile, Attorney at Law

Sarah Vaile is an associate at the Ashland law firm of Robert W. Good, which filed the brief for the respondent in this case. Sarah handles primarily estate planning and administration matters. She earned her JD from Pace University School of Law in White Plains, New York. She joined the Oregon State Bar in 2007.

The Court of Appeals decision in *State of Oregon v. Cue*, 268 Or App 350 (2014) has important implications for elder law practitioners. Its effect is that any attorney handling a probate in which the decedent had Medicaid or spent any time at the Oregon State Hospital is now left without clear guidance on how to give notice to the Oregon Health Authority when the agency is a potential creditor.

The *Cue* case stems from a probate proceeding initiated after the death of Deane Cloud in August of 2011. Cloud was a disabled veteran who suffered from PTSD and other mental disorders and had spent time in the Oregon State Hospital following an arson case in which he was found "guilty except for insanity." Cloud had no heirs, and his will left his whole estate to his friend, Ronald Cue. His estate consisted solely of VA disability benefits in the amount of around $125,000.

Despite the relatively small size of Cloud's estate, it took three separate probate petitions, numerous objections, a handful of lawyers and 14 months to finally initiate the administration of his estate. Although Ronald Cue was Cloud's named personal representative in his will (with Cue's wife Lynda as the alternate) Cloud's VA payee Elaine King made multiple attempts to become administrator of the estate. Through her lawyers she stated numerous times that Cloud owed the state more than $666,000 for his care at the state hospital and that she would be assisting OHA in making that claim.

After many twists and turns, a hearing was held on November 1, 2012, in which the Jackson County probate judge denied King's petition for probate and appointed Cue's wife Lynda as personal representative in a new case. Through her attorney, Lynda Cue promptly published the probate notice and sent out the notices required under ORS 113.145 to heirs and devisees and to DHS/OHA. As required, these notices stated that the recipients' rights may be affected, and that if they did not take action within four months these rights may be barred.

Cue and her attorney were well aware of ORS 115.003, which requires that the PR make a diligent investigation into the financial affairs of the decedent in the first three months following appointment. They understood that any creditors they discovered must be sent a notice stating that any claims not presented within 30 days may be barred. The only potential creditor of the estate was Oregon Health Authority. Since OHA had already been sent the statutorily required notice, and the notice purported to give them four months to make a claim against the estate, Cue thought it unnecessary (and potentially confusing) to send a separate notice stating they had only 30 days to make any claim. (Also, OHA representatives were in the courtroom when Cue was appointed PR, so they knew that OHA was well aware of the probate proceeding.)

Cue and her attorney were certain that now that the probate administration was underway in earnest, OHA would immediately present a claim. They were prepared to finally address the substantive issue of the claim: that because of federal regulations regarding VA disability benefits, these benefits were immune from the state agency's claim. Surprisingly, the four-month period for making claims came and went without OHA ever making a claim. Cue and her attorney surmised that OHA realized on its own that the claim wasn't valid and not worth pursuing.

The final accounting was filed with the court on April 25, 2013. In another surprising turn of events, later that afternoon the PR's attorney received a fax from OHA presenting a claim in the amount of $666,187. There it finally was. Cue denied the claim as untimely, and the State of Oregon, through OHA, initiated a civil case against Cue. OHA's main argument was that OHA should have received a notice under ORS 115.003, and because it did not, OHA was allowed to file its otherwise untimely claim under ORS 115.005(3)(b).

Cue won in trial court on summary judgment, the judge determining that the defendant's argument that OHA already had notice under ORS 113.145 and therefore a notice under ORS 113.005 was not required was "well-taken."

On appeal the court sided with OHA, holding that the ORS 113.005 notice was in fact required, and that the judge erred in concluding otherwise. The trial court's decision was reversed and remanded.

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The thrust of the court's opinion is that the ORS 113.145 notice is "qualitatively different" from the ORS 115.003 notice, so that sending the ORS 113.145 notice does not satisfy the requirements of ORS 115.003. The court found the key difference to be that the ORS 113.145 notice is intended for *interested parties*, while the ORS 115.003 notice is intended for *creditors*. The court pointed out that recipients under the ORS 113.145 notice are told they have four months to contest the validity of the will. Recipients of the ORS 115.003 notice are, on the other hand, told that they have 30 days to make a claim or else it may be barred. The court found this to be an important distinction—a qualitatively different one.

ORS 115.005 lays out the statutory scheme for the presentation of claims. Under the statute, a claim is barred if not presented before the later of "four months after the date of first publication of notice to interested persons" or "If the claim was one with respect to which the personal representative was required to deliver or mail a notice under ORS 115.003, 30 days after a notice meeting the requirements of ORS 115.003(3) is delivered or mailed to the last-known address of the person asserting the claim." ORS 115.005(2)(a)-(b).

To practitioners familiar with ORS 115.005, this ruling doesn't make a whole lot of sense. Being familiar with this presentation of claims statute, Cue and her attorney understood it to mean that OHA had four months after receiving the notice of probate in which to make a claim.

According to this Court of Appeals decision, however, the notice that is statutorily required to be sent to OHA does not start the clock for making claims. Only an ORS 115.003 notice stating that the agency has 30 days in which to make a claim or else it may be barred will do the trick.

If that is true, what is the purpose of ORS 113.145(6), which requires that within 30 days of appointment, the PR send a notice to DHS and OHA? What purpose could there be other than to alert these state agencies to the probate proceeding and allow them the opportunity to make a claim against the estate?

The ruling in *State of Oregon v. Cue* is confusing and illogical. It also raises the issue that perhaps the probate code should be reexamined to clarify notice requirements for potential creditors, particularly where OHA is one. We are hopeful that the Oregon Supreme Court will review this case. In the meantime, attorneys handling probate proceedings in which the decedent had Medicaid assistance or was a patient at the Oregon State Hospital in their later years would be well advised to send not only the ORS 113.145 notice to OHA, but also the ORS 115.003 notice to avoid eleventh-hour claims. ■

Financial elder abuse in the news

October 15, 2014

Rachel Lee, 43, of Canby, who operated psychic shops in Portland, Bend, and other Oregon locations met Ralph Raines Jr. in 2004, became the caregiver to his ailing father, and soon gained control of bank accounts and assets. Over nearly a decade, prosecutors said, she acted as the mastermind of a scheme to plunder Raines's estate, taking control of his $20 million fortune and leaving him with about $200,000. She faces up to nine years in federal prison.

October 31, 2014

According to the state's 2013 study of financial exploitation, released in September, the majority of reported perpetrators in Southern Oregon were acquaintances of the victim. The average loss in substantiated cases was $26,868.

January 9, 2015

Janice Link, who lives in Vancouver and whose age is listed as over 65, claims a Pearl District gallery owner charged her more than $26,000 to appraise a coin collection worth less than $9,000. She is suing the gallery owner, claiming elder abuse.

January 13, 2015

An Idaho man pleaded guilty for his role in a scheme that skimmed at least $79,000 from 250 people, some of them aged or mentally disabled, who relied on him to manage their Social Security funds.

Golden W. Barrett faces up to 20 years in prison for his wire-fraud conviction. Barrett served as the executive director of Monytek Human Services, a consumer credit counseling business that managed funds for people who couldn't pay bills or manage money on their own. ■

VA proposes new rule for Aid and Attendance program

By Monica D. Pacheco, Attorney at Law

Monica D. Pacheco is an attorney with the Salem firm of Douglas, Conroyd, Gibb & Pacheco, PC. She has received her accreditation with the Veterans Administration, allowing her to represent veterans and their families in obtaining Aid and Attendance benefits for veterans or their surviving spouses.

On Friday, January 23, 2015, the Department of Veterans Affairs (VA) proposed a new rule that will affect the Aid and Attendance program. The VA states that it wants to maintain the integrity of the program and to implement statutory changes. The proposed rules would establish new requirements for the evaluation of net worth and asset transfers and would identify which medical expenses may be deducted from countable income for the VA's needs-based benefit programs. The summary of the proposed rule further states that the intended effect of the changes is to respond to recommendations made by the Government Accountability Office (GAO) last year to maintain the integrity of the programs and to address issues necessary for the consistent adjudications of pension claims, among others.

Comments about the proposed rule are due to the VA by March 24, 2015.

The *Summary of Major Provisions* created quite a stir upon reading. The new proposed rule attempts to redefine the asset limits, to define care, and establish a penalty for transfers made within a look back period. Below are the highlights:

- In 3.275, the proposed rule would establish a clear net worth limit. The VA proposes to change the asset limit to the maximum community spouse resource allowance established by Medicaid, currently $119,220, and to index for inflation, just like the Medicaid resource limits. This sounds great! This is certainly definitive, and greater than the previous "less than $80,000." However, the proposed rule continues to explain that "net worth" will include the claimant's annual income to be added to his or her assets. A claimant who has $2,000 in monthly income also would have $24,000 in net worth each year. This immediately drops the remainder of the net worth available to $95,220. For a claimant with $4,500 in monthly income ($54,000 annually), the net worth available drops to $65,220. It is unclear whether only the claimant's income will be added for the net worth, of if "claimant" is the veteran and his/her dependent spouse.
- Also in 3.275, a description of how the VA calculates assets will be included. Of course, it will not consider a claimant's primary residence, ***including a residential lot area not to exceed 2 acres***, as an asset (emphasis added). Currently, the VA assesses all available assets (a residence is excluded), regardless of how titled, for married couples. This limit on the size of the residence is new and may create difficulties for older farming families who have not previously encountered this issue with the VA. The rule will now state, similar to Medicaid, that if the house is sold, the proceeds will be assets, unless used to purchase another residence within the calendar year of sale.
- 3.276 will have new requirements for pre-application transfers of assets. Currently, there is no penalty for transfers made prior to application. This change is in direct response to the GAO recommendations, and will implement a penalty calculation for assets transferred within 36 months of application. The presumption will be that transfers made within the look-back period were for qualification purposes. The presumption can be rebutted with clear and convincing evidence. There is no defined penalty divisor, but the summary does state that the penalty will not exceed 10 years (120 months). This leads me to believe that the divisor may be defined by the benefit amount for which the claimant would qualify, but for the transfer (currently the maximum benefits are $1,149 for a surviving spouse receiving aid & attendance, or $1,404 for a healthy veteran paying for care for his spouse, $1,788 for a single veteran, or $2,120 for a married veteran, where the veteran needs care). The penalty period calculation will be based on the total assets transferred, to the extent that they would have made the net worth excessive (over $119,220 less annualized income?). However, it's unclear if only the amount over the $119,220 is used to calculate the penalty (if all assets are transferred) or if the total amount transferred would be used to calculate the penalty. The penalty would begin the first day of the month following the transfer. This sounds similar to the old Medicaid rule in Oregon.

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VA rule change proposal

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- 3.278 will clarify what the VA considers to be deductible medical expenses, to ensure that claims are processed fairly and consistently. They will define ADL's and IADL's and provide that custodial care requires the regular assistance with two or more ADL, or assistance because a personal has a mental disorder and is unsafe if left alone due to the mental disorder. As a general rule, fees from independent communities will not qualify as medical expenses, unless there was an exception for required health care services or custodial care. Finally, this rule will also place a limit on the hourly payment rate allowed for in-home attendants.

Becausethe VA has proposed this new rule on its own, not through Congress, implementation could be immediate after the March 24 deadline. This, of course, can have the effect of immediately disqualifying pending applicants, for a variety of issues created by the rule change and implementation.

The proposed changes will make obsolete some current planning tools, such as income-only annuities (income has not previously been used to calculate net worth). Use of long term care plans may now be considered "income" for VA purposes and subsequently added into net worth.

As of the time of this writing (two days after the proposal was published), there are several groups meeting and coordinating to share concerns, thoughts and ideas in preparing comments to the VA. Stay tuned!

The proposed rule change can be found at **www.federalregister.gov/articles/2015/01/23/2015-00297/net-worth-asset-transfers-and-income-exclusions-for-needs-based-benefits.** ■

Resources for elder law attorneys

Elder Law Discussion Group

Noon-1:00 p.m.
Legal Aid Services Portland conference room 520 SW Sixth Ave, 11th Floor, Portland. Coffee will be provided.

- February 12, 2015: Tim Nay from the Law Offices of Nay & Friedenberg will discuss his November 2014 Court of Appeals case *Nay v. DHS,* which ruled that DHS exceeded its statutory authority when it extended Medicaid recovery to resources/property that had been given to the community spouse prior to the Medicaid recipient's death.
- March 12, 2015: Julie Stevens from Legal Aid Services of Oregon will give an overview on grandparents' rights and recent cases that could significantly affect this area of law.
- May 14, 2015: Ed Johnson, Director of Litigation at the Oregon Law Center and housing expert, will present on "The Accidental Landlord" and options for dealing with this situation.
- June 11, 2015: Tax Attorney Matthew Erdman will present on "Tips for helping low income clients with tax controversies."
- July 9, 2015: No ELDG this month.
- August 13, 2015: David Koen from Legal Aid Services of Oregon will present on "Changes in Reverse Mortgage Rules."
- September 10, 2015: K Plan Rules and Updates. Speaker TBD. ■

Elder Law Discussion List

The discussion list provides a forum for sharing information and asking questions. To post to the list, enter **eldlaw@forums.osbar.org** in the *To* line of your email. ■

Publications

Stuff: Compulsive Hoarding and the Meaning of Things
By Randy O. Frost and Gail Steketee
2010: New York; Houghton Mifflin Harcourt

Severe hoarding by elders is often evidence of neglect. Children of hoarders are faced with figuring out what to do with an aging parent who is living in unsafe and unhealthy conditions. Forced clean-outs don't work; hoarders restock houses quickly, and the sudden loss of objects causes rage and anxiety.

The authors explore the compulsion to hoard through a series of compelling case studies that show us the psycholgical traits of hoarders. They explore the theories and research about causes of this disorder and discuss the options for treatment. The book provides perspective to those who have hoarders in their families. General readers will learn a lot about how we form and justify our own attachments to objects.

Adult Abuse Reporting

The Oregon Department of Human Services has a brochure about elder abuse reporting avilable online at: **apps.state.or.us/Forms/Served/de9373.pdf.** ■

More resources on page 17

Resources for elder law attorneys

Events

Elder Abuse Reporting
Multnomah Bar Association CLE seminar
Tuesday, February 3, 2015/12:00–1:00 p.m.
World Trade Center Mezzanine Room,
Building 2, 26 SW Salmon, Portland

Amber Hollister, Deputy General Counsel to the Oregon State Bar; Ellen Klem, Oregon Department of Justice; and Multnomah County Circuit Court Judge Katherine Tennyson will present this CLE seminar on the new elder abuse reporting requirement for attorneys, which took effect on January 1, 2015. This program is intended to inform lawyers of their legal responsibilities as mandatory reporters, while maintaining their ethical obligations to clients.

Estate Planning for Digital Assets
OSB Audio CLE Seminar
February 3, 2015/10 a.m. PT

Digital assets are an entirely new and rapidly growing asset class. Virtually every client has these assets and values them highly. Yet the rules for controlling digital assets and transferring them after a client's death are highly variable and largely undefined. Digital assets include everything from music, pictures, and video or text stored online, reward program points with a credit card company, airline, or hotel chain, digitally stored documents on third-party sites like TurboTax, user names and passwords for retirement and other financial accounts, and anything else a client has digitally created or stored or to which he or she has privileged access. This program provides you with a real-world guide to the nature of digital assets, how they are controlled by policy and law, and how you should think about them for planning purposes.

Involuntary Transfer and Discharge from Nursing Homes: Prevention, Advocacy, and Appeals
National Consumer Law Center Webinar
Feb 11, 2015/11:00 a.m. PT
www.nclc.org/webinars.html

Duress and Undue Influence in Estate and Trust Planning
OSB Audio CLE Seminar
February 19, 2015/10 a.m.

There is a subtle relationship between diminished mental capacity in its various forms, the physical condition of the client, and the presence and actual exercise of undue influence. Psychological and other "tells" not immediately familiar to lawyers nonetheless can have a determinative effect on the representation. Estate and trust plans can be invalidated on a finding of exercise of undue influence or coercion. There are also practical steps a lawyer must take when duress or undue influence is detected. This program provides you with a real-world guide to detecting undue influence in estate and trust planning and curbing its damage to preserve a client's true plans.
www.osbar.org

Elder Law Section unCLE Program
Friday, May 1, 2015
Valley River Inn; Eugene

Probate Mediation Training
May 14 and May 15

The seminar, sponsored by the Beaverton Dispute Resolution Center and Clackamas County Resolution Services, will be modeled after the Multnomah County probate mediation trainings that took place in 2009 and 2010. A few of the speakers will be Judge Tennyson, Josh Kadish, Meg Nightingale, and Steve Owen. There will be room for about 80 participants, and the training will be geared to Clackamas, Multnomah, and Washington County probate. The organizers are applying for CLE credits (general and ethics).

More information: Laura Swartz at lswartz@beavertonoregon.gov or 503.526.2244.

2015 NAELA Annual Conference
Thursday, May 14, 1:00 p.m. through Saturday, May, 16, 12:45 p.m.
JW Marriott Orlando Grande Lakes,
4040 Central Florida Parkway
Orlando, FLorida
www.naela.org ■

Websites

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

The National Council on Aging: Top 10 Scams Targeting Seniors
www.ncoa.org/enhance-economic-security/economic-security-Initiative/savvy-saving-seniors/top-10-scams-targeting.html

Financial scams also often go unreported or can be difficult to prosecute, so they are considered a "low-risk" crime. However, they're devastating to many older adults and can leave them in a very vulnerable position with little time to recoup their losses.

It's not just wealthy people who are targeted. Low-income older adults are also at risk of financial abuse.

National Academy of Elder Law Attorneys (NAELA)
www.naela.org
A professional association of attorneys who are dedicated to improving the quality of legal services provided to people as they age and people with special needs. ■

Important elder law numbers

as of
January 1, 2015

Supplemental Security Income (SSI) Benefit Standards	Eligible individual .... $733/month Eligible couple $1,100/month
Medicaid (Oregon)	Asset limit for Medicaid recipient .... $2,000/month Long term care income cap .... $2,199/month Community spouse minimum resource standard .... $23,844 Community spouse maximum resource standard .... $119,220 Community spouse minimum and maximum monthly allowance standards .... $1,967/month; $2,980.50/month Excess shelter allowance .... Amount above $590/month SNAP (food stamp) utility allowance used to figure excess shelter allowance .... $446/month Personal needs allowance in nursing home .... $60/month Personal needs allowance in community-based care .... $163/month Room & board rate for community-based care facilities .... $570/month OSIP maintenance standard for person receiving in-home services .... $1,233 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2010 .... $7,663/month
Medicare	Part B premium .... $104.90/month* Part D premium: .... Varies according to plan chosen Part B deductible .... $147/year Part A hospital deductible per spell of illness .... $1,260 Skilled nursing facility co-insurance for days 21-100 .... $157.50/day * Premiums are higher if annual income is more than $85,000 (single filer) or $170,000 (married couple filing jointly).

Elder Law Section

Newsletter Committee

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