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# Elder Law Newsletter

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## Recent cases of interest to elder law practitioners

*By Matthew Whitman, Attorney at Law*

***Larisa's Home Care v. Nichols-Shields*** (April 27, 2016)

Larisa's Home Care, an adult foster care home, provided care to Isabell Prichard during the last years of her life, and was paid its Medicaid rate for that care by the Department of Human Services. After Prichard died, it was discovered that one of her sons had committed fraud in her Medicaid application, and that Prichard should not have qualified for Medicaid. Larisa's sued Nichols-Shields, the personal representative of Prichard's estate, and sought the difference between the amount it was actually paid by DHS and the higher "private pay" rate it charged non-Medicaid recipients. After a bench trial resulted in a judgment in favor of Larisa's, the personal representative appealed, and the Court of Appeals reversed.

Larisa's claim sounded in unjust enrichment, which requires "(1) a benefit conferred, (2) awareness by the recipient that she has received the benefit, and (3) it would be unjust to allow the recipient to retain the benefit without requiring her to pay for it." On appeal, the personal representative argued that the evidence could not support a finding of "injustice" under the holding of Jaqua v. Nike, Inc., 125 Or App 294, 298, 865 P2d 442 (1993), which requires that "(1) the plaintiff had a reasonable expectation of payment; (2) the defendant should reasonably have expected to pay; or (3) society's reasonable expectations of security of person and property would be defeated by non-payment." As to the first factor, the Court of Appeals held that under these circumstances, the facility's only expectation was to be paid what it contracted to be paid when it accepted Ms. Prichard as a resident, namely, the Medicaid rate. The facility had not relied on the second factor at trial. As to the third factor, "society's expectations," the court held that forcing a resident's estate to pay more than the Medicaid rate after the resident had been deemed Medicaid-eligible by the state–as the trial court's judgment in favor of the facility would have required–would defeat society's expectations.

***State of Oregon v. F.H.*** (June 8, 2016)

F.H. appealed a judgment of involuntary civil commitment after he was found at Portland International Airport, disheveled and confused, on a night of below-freezing temperatures. The Court of Appeals, reviewing the judgment on a standard of whether the evidence at hearing was sufficient as a matter of law to justify the "high standard" required for civil commitment, reversed. It held that while it was undisputed that F.H. had mental impairments–bipolar disorder, confusion, and mem-

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ory problems–the evidence could not justify a finding that those conditions made F.H. "unable to obtain some commodity (e.g., food and water) * * * without which he cannot sustain life." F.H. had testified to the trial court that he had adequate financial resources and if not committed, his plan would be to stay at hotels and eat at restaurants. As the Court of Appeals noted, the evidence was that F.H.'s mental impairments were of long standing, but there was no evidence that he had ever spent the night outside or missed a meal. Without such concrete evidence, the trial court had engaged in impermissible speculation that commitment was required. While the Court of Appeals was sympathetic to the trial judge's concerns, it emphasized that civil commitment is not a "paternalistic vehicle to save people from themselves," and that the required standard is that there is a likelihood, absent civil commitment, the respondent will not survive.

***Brush and Brush*** (June 22, 2016)

In this marital dissolution case, the wife appealed from the property division ordered by the trial court, which required her to pay the husband an equalizing judgment from money she had received by inheritance.

The key issue was the effective date of 2011 amendments to ORS 107.105(1)(f), the "Olesberg fix." Those amendments made it clear that money received by one spouse through inheritance is not subject to the presumption of equal spousal contribution, and therefore presumptively not "marital property" if it has been kept separate. The Brushes' dissolution trial started before the passage of those amendments, the trial concluded after their passage but before their effective date, and judgment was entered in mid-2012—after the amendments were effective.

The trial court concluded that the "pre-fix" version of ORS 107.105 applied, and divided the wife's inheritance accordingly. The Court of Appeals disagreed, holding that even though the court had ruled from the bench in December 2011, the matter was "pending" on January 1, 2012, the effective date of the statutory change, and remanded for reconsideration of the property division.

Practically, this case is likely a one-off due to the protracted nature of the case in the trial court. The dissolution case was filed in October 2009, the dissolution trial began in January 2011 but did not conclude until December 2011, the legislative amendments were passed in mid-2011, and the judgment of dissolution was not entered until July 2012. The entire legislative process started and finished while the trial was technically under way.

***State v. C.S.C.*** (June 22, 2016)

In this civil commitment case, the respondent challenged the 180-day maximum length of her civil commitment, arguing that it should have been at most 60 days. Because C.S.C. was actually discharged from her commitment after nine days, her appeal was moot: it would have "no practical effect on or concerning the rights of the parties." The appeal was therefore dismissed.

***Hinman v. Silver Star Group, LLC*** (August 3, 2016)

A storm damaged Hinman's roof, and she contracted for its repair with Silver Star Group, LLC. A dispute over payment ensued, and Hinman, an "elderly homeowner," filed a lawsuit in circuit court against Silver Star, including claims of fraudulent misrepresentation, negligent misrepresentation, unlawful trade practices, and elder abuse.

Silver Star contended that Hinman's lawsuit was subject to mandatory binding arbitration pursuant to a term in its contract with Hinman, moved to dismiss her lawsuit, and filed its own arbitration proceeding. The trial court ruled the contract containing the arbitration provision was unconscionable and unenforceable, and denied Silver Star's motion to compel arbitration. Silver Star appealed from the order.

Silver Star first argued that the trial court's role is limited to determining whether an arbitration clause is enforceable, and that the role of determining whether a contract overall is enforceable is left to an arbitrator, as contemplated in the Revised Uniform Arbitration Act. Reviewing the legislative history of Oregon's version of the Uniform Arbitration Act, the Court of Appeals concluded that Oregon had

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rejected that specific provision of the Revised Uniform Act, and intended for trial courts to speak to the validity of both contracts overall and arbitration provisions in those contracts. The trial court therefore acted within its power in ruling on the unconscionability question.

However, in so ruling, the trial court had taken the allegations in Hinman's complaint as true, rather than engaging in factfinding about the formation and terms of the contract, all of which were disputed. This was error, and the Court of Appeals remanded for a factual determination on the unconscionability issue.

***Bishop v. Waters*** (August 31, 2016)

Bishop, who was permanently disabled, sued the Waterses over disputes arising out of a land sale contract. She included an elder abuse claim under ORS 124.100. The Waterses moved for dismissal of the elder abuse claim because Bishop had failed to serve a copy of the complaint on the Oregon attorney general, as required by ORS 124.100(6). The trial court dismissed the elder abuse claim without prejudice, and Bishop appealed. The Court of Appeals affirmed, reasoning that the statute's use of the word "must" when describing the requirement of notice on the attorney general set out a mandatory requirement, and Bishop's failure to timely serve the attorney general mandated dismissal without prejudice.

***K.M.J. v. Captain*** (September 28, 2016)

After a contested hearing, K.M.J. sought and was granted an ORS 124.020 elder abuse restraining order against Captain. Captain appealed, arguing that the trial judge had not allowed him to cross-examine witnesses at the hearing, in violation of his right to due process under the Fourteenth Amendment to the U.S. Constitution.

The Court of Appeals reversed the trial court's order, but did not reach the constitutional question. It held that while Oregon Rule of Evidence 611 gives trial judges the power to "control the presentation of evidence and the examination of witnesses," that power does not extend to denying the right of cross-examination outright; to do so is a violation of the principle of "fundamental fairness." Because the Elderly Persons and Persons With Disabilities Abuse Prevention Act is subject to the Oregon Evidence Code, the trial judge committed "plain error" when he stated at the outset of the hearing that he would not permit the parties to cross-examine each other.

As a practical note, because the trial judge had simply made "no cross-examination" a rule for the hearing, the Court of Appeals specifically did not need to consider ORS 124.020(9)(d), which provides that in elder abuse restraining order hearings, "[t]he court shall exercise its discretion in a manner that protects the elderly person or person with a disability from traumatic confrontation with the respondent." If there is evidence that a petitioner is especially vulnerable, or that the relationship between the EPPDAPA petitioner and respondent is fraught or abusive, then a trial court can still exercise its discretion to strictly control the manner of cross-examination. However, such a discretionary decision must be justified by the record.

**For another analysis of this case, see page 9.**

***Husk v. Adelman,*** (October 5, 2016)

Husk and Adelman had co-parented Adelman's adopted child, and after their breakup Husk had parenting time with the child by agreement. When their relationship deteriorated further, she sought to enforce parenting time through ORS 109.119, the "psychological parent" statute. The trial court granted her relief, and Adelman appealed.

To avail herself of relief under the statute, Husk had to rebut the statutory and constitutional presumption that Adelman, as the legal parent, acted in the best interest of the child, and the trial court had to make findings on specific related factors set forth in ORS 109.119(4)(a)(A)-(E). Adelman argued that Husk's proof on the statutory factors relating the rebuttal of the presumption did not meet the "clear and convincing" standard. In rejecting Adelman's arguments, the Court of Appeals reiterated that where a claim is subject to the clear and convincing standard, not every element of the claim must be proved by clear and convincing evidence. Instead, each predicate element is subject only to a preponderance of the evidence standard, and "[t]he clear and convincing standard of proof simply refers to the 'degree of certainty that must exist in the mind' of the trial court regarding its ultimate determination."

***Grimstad v. Knudsen*** (December 21, 2016)

Madeline and Neal Grimstad were married, each having children from previous marriages. They owned a residence together, which Madeline came to own alone after Neal's death. Her children (the Knudsens) were the residuary beneficiaries of her will, and a codicil provided that the residence should go to Neal's children, (the Grimstads), if she owned it at the time of her death.

When Madeline became incompetent due to Alzheimer's disease, her children, acting under a power of attorney, sold the residence, and used much of the proceeds to pay for her three-year stay in a memory care facility They placed the remainder into an account they would come to own once she passed away. The Knudsens used Madeline's other income to maintain a different property, which would pass to them by right of survivorship.

After her death, the Grimstads sued the Knudsens, arguing that by selling the residence and spending the proceeds—rather than spending

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down other assets, which passed to the Knudsens— the Knudsens had tortiously distorted Madeline's estate plan in their own favor and to the Grimstads' detriment. In short, they contended that the Knudsens had shifted the cost of Madeline's end-of-life care onto "their" inheritance.

After a bench trial, the trial court entered a money judgment in favor of the Grimstads and against the Knudsens on theories of unjust enrichment and money had and received. The Knudsens appealed, and the Court of Appeals reversed.

As to the Grimstads' unjust enrichment claim, the Court of Appeals held that under the rule of *Tupper v. Roan*, 349 Or 211 243 P3d 50 (2010), a plaintiff must prove a that the defendant holds "property or a property interest that rightfully belongs to the plaintiff." Quoting Restatement (Third) of Restitution and Unjust Enrichment § 48 (2011), the Court held that "[p]roof merely that the defendant has received a windfall, that the claimant has been ill-treated, and *** the defendant's retention of payment as against the claimant * violates rules of good faith, basic fairness, or common decency" is insufficient. The plaintiff must show some "better legal or equitable right" than the defendant to prevail; it is not enough to show that defendants' conduct was "unfair in the abstract."

Here, Madeline's codicil specifically contemplated that the Grimstads would inherit only if she owned the residence at her death—a contingency—and she made no promise anywhere to maintain that property for them. Nothing gave them any right or expectancy in the proceeds of sale should the residence be sold during her life. If she had the absolute power to sell the property during her lifetime free of liability, reasoned the court, then the Knudsens, acting as her agents, had the same power, with the same freedom from liability. Nor did the specific terms of the power of attorney bar them from so acting: they were obligated to use her assets for her care (which they did) and the terms of the instrument did not constrain their discretion in how they marshaled her assets for her care.

For the same reason, the Grimstads' money "had and received" claim also failed: they were required to prove that the Knudsens held money to which they had a superior right, and the contingent and discretionary nature of their expectancy—subject to Madeline's whim—made it too ephemeral to be superior to the Knudsens' rights to the residue of Madeline's estate.

Last, the Grimstads also appealed the dismissal, on summary judgment, of their separate claim for intentional interference with prospective inheritance. The court rejected this assignment of error as well: to be "wrongful" within the meaning of Allen v. Hall, 328 Or 276, 974 P2d 199 (1999), the Knudsens' actions would have to be for an "improper purpose" or done through a "improper means." Because economic self-interest cannot be an "improper purpose" under Allen v. Hall and Top Service Body Shop v. Allstate Ins. Co., 283 Or 201, 209, 582 P2d 1365 (1978), the Grimstads would have to prove that the Knudsens were motivated by the "purpose" of inflicting injury upon the Grimstads, and the evidence was that the cost and duration of Madeline's care was unknown, and the sale of the residence to pay for that care consistent with the Knudsen's obligations to provide for Madeline. Nor was there any showing of "improper means," since the Grimstads acted within the circumscribed powers given by the power of attorney, and Madeline placed no constraints or guidance on the Knudsens' powers which they had violated.

***Nay v. Department of Human Services*** (December 15, 2016)

See Page 5 for analysis of this case . ■

### Social Security, SSI, Medicare in 2017

Based on the increase in the Consumer Price Index (CPI-W) from the third quarter of 2014 through the third quarter of 2016, Social Security and Supplemental Security Income (SSI) beneficiaries received a 0.3 percent cost of living adjustment for 2017.

However, Social Security increases were partially or completely offset by increases in Medicare premiums. The average premium for Part B—which covers physician services, outpatient hospital services, and medical equipment—rose to approximately $109.00 for most retirees, slightly more than the typical premium of $104.90, which had been in place for the last four years. Co-pays and deductbles have also increased

Some other adjustments that take effect in January of each year are based on the increase in average wages. Based on that increase, the maximum amount of earnings subject to the Social Security tax (taxable maximum) increased to $127,200 from $118,500. ■

# *Nay v. Department of Human Services* (360 Or 668 2016)

*By Darin Dooley, Attorney at Law*

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On December 15, 2016, the Oregon Supreme Court affirmed the Oregon Court of Appeals decision in Nay v. Department of Human Services (267 Or App 240 2014), which held OAR 461-135-0832(10)(b)(B)(viii) and OAR 461-135-0835(1)(e)(B)(iii), (2010) are invalid.

**Background**

In the fall of 2008, the Department of Human Services (DHS) amended OAR 461-135-0832(10)(b)(B)(viii) and OAR 461-135-0835(1)(e)(B)(iii) (the rules)[1] regarding the scope of estate recovery. The amended rules expanded the category of assets subject to Medicaid estate recovery to include assets that the Medicaid recipient conveyed to the recipient's spouse within five years of the date of the Medicaid application or anytime thereafter.

In 2012, attorney Tim Nay challenged the rules in a suit[2] at the Oregon Court of Appeals, seeking a judicial declaration that the rules were invalid because they were unconstitutional and exceeded DHS's statutory authority.[3] Nay argued that the rules exceeded the scope of both federal and state law because they permit DHS to assert an estate recovery claim against assets the Medicaid recipient had no legal interest in at the time of his or her death.

In reviewing the federal statute governing estate recovery, 42 USC §1396p(b)(4), the Court of Appeals noted that it provides both mandatory[4] and permissive[5] definitions of "estate." The Court of Appeals 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 248, emphasis in the original).

The Court of Appeals next analyzed Oregon's property law principles and elective share rules under state domestic relations and probate law. The Court of Appeals 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 of Appeals 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.

DHS appealed the Court of Appeals decision to the Oregon Supreme Court.

**Oregon Supreme Court decision** *Nay* (360 Or 668 2016)

The standard of review was whether the DHS exceeded its statutory authority. Specifically, "whether the rules depart[ ] from a legal standard expressed or implied in the particular law being administered, or contravene[ ] some other applicable statute." *Nay* at 681. The court first considered whether the rules were valid under state law.

DHS argued the Medicaid recipient had a legal title or interest at death in assets transferred to a community spouse within five years prior to a Medicaid application. DHS contended the basis for this title or interest stems from at least one of four areas of Oregon law: (1) the presumption of equal contribution to and common ownership of marital assets in a marital dissolution (ORS 107.105(1)(f)), (2) the right of a spouse to claim an elective share under probate law (ORS 114.600 to 114.725), (3) the ability to avoid a transfer made without adequate consideration (ORS 416.350(2)), or (4) the ability to avoid a transfer made with intent to hinder or prevent estate recovery. ORS 411.630(2).

After reviewing the legal standard for each respective area of law noted above and comparing them with the legal standards found in the rules, the court found that the rules created a very different legal standard and thereby departed from the legal standards expressed or implied in those sources of law. In a unanimous decision, the court held that the rules exceeded DHS's statutory authority and are invalid under ORS 183.400(4)(b). *Nay* at 694.

The court vacated the portion of the Court of Appeals' opinion regarding the rules being invalid under federal law, since the court found the rules are invalid under state law and there-

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## Nay v. DHS

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fore it was unnecessary to address their validity under federal law. *Nay* at 695.

The process for the court administrator to finalize the judgment must be delayed for a period of twenty-one (21) days after the decision.[6] This process should be completed by the time this article is published.

### Advising clients

The decision in *Nay* applies to an interspousal transfer of the home from the spouse needing care to the community spouse (CS) within five years prior to a Medicaid application. The institutionalized spouse (IS) then predeceases the CS and there is an estate recovery claim asserted against the CS's "estate" at the CS's death for benefits correctly provided to the IS.

For claims that were settled during the pendency of the Oregon Supreme Court case (approximately November 26, 2014 to December 15, 2016), the settlement agreement likely contained a provision stating the agreement was a full and final settlement of the claim, regardless of the outcome of *Nay v. DHS*. Attorneys should confirm agreements reached on behalf of their clients contain this provision.

For claims held in abeyance during the pendency of the Oregon Supreme Court case, DHS will withdraw its claim. If the claim is not withdrawn, the recipient, or the attorney for the recipient, should deny the claim as unfounded.

Claims that were settled prior to the Court of Appeals decision (approximately October 1, 2008 to November 26, 2014) should be reviewed now that the rules have been held to be invalid by the Oregon Supreme Court.[7] DHS had no legal basis or authority to assert an estate recovery claim against the home in the fact pattern above. If the state does not develop a policy for refunding the claims that were incorrectly paid, litigation will likely be necessary to pursue recovery and protect client rights.

Finally, the Oregon Supreme Court noted that DHS conceded that estate recovery claims are limited to the value of the Medicaid recipient's interest in an asset. The Court stated "[t]he existence of some fractional interest in an asset does not permit estate recovery of the full value of the asset." *Nay* at 673. In any estate recovery situation, attorneys should carefully review the Medicaid recipient's interest in assets to ensure satisfaction of the claim does not go beyond the value of the recipient's interest.

### Looking ahead

DHS should issue temporary rules reflecting the outcome of *Nay*. DHS will also need to follow the process for promulgating permanent rule changes to comply with the decision. Attorneys should be vigilant to review the rule changes and offer comments.

DHS may seek legislative assistance to amend ORS 107.105, ORS 114.600 to 114.725, ORS 416.350, or ORS 411.630 to align the legal standards in one or more of those laws with a future estate recovery rule amendment in an attempt to conform to the holding in *Nay* on state grounds. This would ignore the fact that, although the Oregon Supreme Court vacated the Court of Appeals decision regarding the rules being invalid under federal law as being unnecessary, the Court of Appeals has nonetheless already held that the rules in fact were invalid on those grounds as well. It would be unfortunate if any attempt to resuscitate estate recovery claims against interspousal transfers within five years prior to a Medicaid application did not take that into account. ■

### Footnotes

1. OAR 461-135-0832(10)(b)(B)(viii) provides a portion of the definition of 'estate' for estate recovery. OAR 461-135-0835(1)(e)(B)
   (iii) applies that definition to the scope of estate recovery.
   (viii) 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).
   (iii) 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.
2. ORS 183.400
3. *Nay v. Department of Human Services* (267 Or App 240 2014)
4. 42 USC §1396p(b)(4)(A)
5. 42 USC §1396p(b)(4)(B)
6. ORAP 14.05
7. Although the Oregon Supreme Court used the 2010 version of the rules in its review, the offending language from the October 1, 2008 amendment remained unchanged in the 2010 rules. See *Nay* at 671

# What does it take to "take"?

*By Stephen R. Owen, Attorney at Law*

*Stephen Owen is an attorney in private practice in Portland, Oregon. His practice emphasizes probate, trust and elder law litigation matters, including cases that involve contested conservator and guardian proceedings. He also acts as a neutral mediator in these types of contested cases.*

In 2016 the Oregon Court of Appeals decided two cases that address elder financial abuse in the criminal context. In each case the issue came down to what is the meaning of "take" under the crime of criminal mistreatment in the first degree. Both cases touch on issues that can come up in circumstances in which many clients may find themselves. The case holdings are also likely to be relevant in the prosecution of the civil tort of vulnerable person financial abuse under ORS Chapter 124. Both of the civil and criminal statutory schemes turn on a determination of whether a person unlawfully "takes or appropriates" property of a defined class of vulnerable persons.

The provisions of the criminal mistreatment statute that deals with elder abuse and the statutory tort of abuse of vulnerable persons were enacted within the last 20 years. As such, they do not have a long history of appellate opinions that define the prosecution and defense of the actions, and the legislature did not specifically define many of the terms it used. The cases therefore have turned on statutory interpretation, including review of the legislative history of such statutes. The two recent cases present an interesting look at the reasoning by the Court of Appeals in resolution of what conduct constitutes a crime in financial transactions with an elderly or vulnerable person.

In the earlier case, the issue was whether, under the criminal mistreatment statute, it was a criminal act for a caregiver to "take" from a person in their care what the trial and appellate court found to be gifts. *State v. Bevil*, 280 Or App 92 (2016). Mr. Bevil was hired to be a groundskeeper for a woman in her eighties. Over the next two years he became progressively more involved in her life, acting as her driver and her caregiver and assisting her with her financial affairs. During this period he also received cash transfers, outside of his salary, that totaled $260,000. At trial, the state had successfully argued that under the criminal mistreatment statute, a person who assumed the care of an elderly person was precluded from accepting any gifts from the elderly person, no matter whether the recipient acted unlawfully, which made the receipt of such funds a strict liability crime. The defendant argued that the state's position would have significant ramifications, for example a child caring for a parent would be guilty of a crime if he or she accepted a check for $100 from the parent as a Christmas gift. The trial court agreed with the state. It found the transfers were gifts, but the fact of receiving a gift while acting as a caregiver was unlawful under the statute because "he took money of hers for a purpose other than that related to her care. *Id*. at 99.

The pertinent portion of the statute in question reads: "A person commits the crime of criminal mistreatment in the first degree if ... having assumed the permanent or temporary care, custody or responsibility for the supervision of a dependent person or elderly person, intentionally or knowingly... takes the money or property for, or appropriates the money or property to, any use or purpose not in the due and lawful execution of the person's responsibility." ORS 163.205.

The Court of Appeals determined that whether the actions of the defendant constituted a crime came down to the meaning of the word "take" under the statute. The state argued that "take' under the common definition included the action of accepting any money from a dependent person for the caregiver's own benefit. The court noted that "take" could be a defined as broadly as the state suggested, but that in the context of criminal statutes the term "take" typically refers to transfers that are without the consent of the owner. The court went on to set forth criminal statutes that have been defined to use the term "take" to include only involuntary transfers of property. Therefore, they concluded that it was "at least plausible" that the legislature used the term only in the context of an involuntary transfer.

After a review of the legislative history of the amendment of the statute to include the crime at issue, the court went on rule that it was not only plausible that "takes" required an involuntary transfer, but that the legislature intended the statute to require such. The court noted that the legislative history made references to

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## *What does it take?*

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financial exploitation and diminished capacity victims who were deceived by false promises. The court also noted legislative testimony that reflected a sensitivity toward the free will of elderly persons to spend their assets as they saw fit and that the legislature rejected statutory terms that required "express voluntary consent" for a caregiver to take funds from the vulnerable person. Therefore the court concluded that under the criminal mistreatment statute the legislature used the word "takes" to refer only to a caregiver acquiring property without the elderly or dependent person's voluntary consent.

In November of 2016, the Court of Appeals decided another case regarding the same provisions of the criminal mistreatment statute and what "takes" means under a different set of circumstances. In *State v. Browning*, 282 Or App 1 (2016), the issue was whether the state had to prove the intent to permanently deprive the alleged victim of her property where the defendant claimed the transfers of money were only temporary loans. In this case the defendant was an agent under a power of attorney for his elderly mother and mother-in-law. Under his authority as agent, he had withdrawn funds from accounts that belonged to them. There was evidence that he had repaid some of the funds that were transferred. Through a pretrial motion, the state was successful in precluding the defendant from arguing at trial that the transfers were temporary and therefore not criminal under the statute. The basis of the trial court ruling was that the criminal mistreatment statute, unlike Oregon's theft statutes, did not require the state to prove the defendant intended to permanently deprive the elderly person of her property.

Here again the appeals court had to discern the intent of the legislature in using the term "takes" with regard to the transfers in question. In doing so, the court followed the Oregon procedure of examining the text and legislative history of the statute; and if that does not determine the issue, applying the rules of statutory construction. The court found that the ordinary meaning of "take" did not require a permanent deprivation, because most definitions and usage of "take" included transfers for "use," as opposed to permanent control.

Most notable for civil practitioners in this area, the justices cited *Church v. Woods*, 190 Or.App. 112 (2003), in stating that in the civil context they had already held that "use" was determined to be actionable in the civil tort under ORS 124.100. The court referred to the civil statute as being similar from its near identical language for the basis of bringing a civil action, "[w]hen a person wrongfully takes or appropriates money or property of a vulnerable person, …" ORS 124.110. This ruling likely takes away the defense in the civil context that a defendant intended to repay the funds taken.

However, the court still had to determine this issue in the criminal context. It turned to examination of the context of the criminal statute by reviewing related statutes that existed at the time the statute in question was enacted. Both the state and the defendant argued that the theft statute in place at the time gave the context the court needed to resolve this issue. In Oregon, theft does require the state to prove the intent to permanently deprive the victim of his or her property. The defendant argued that this context required the court to come to a similar result. The state argued that the different language in the theft statute showed a different result was warranted.

The court agreed with the state. It found that the language in the two statutes was substantively different from the language in theft statute that required proof of permanent deprivation. The amendment of the criminal mistreatment statute that added the provision regarding the elderly came much later in time than the theft statute, and the legislature omitted the language that required intent to permanently deprive. If the legislators wanted to add such a requirement they could have done so, and the court ruled that it could not insert a requirement that the legislature omitted. The court went on to support its ruling by reviewing the legislative history. The justices found that the legislature intended to craft a broad statute that would cover misappropriation of the assets of the elderly in many forms.

The two cases decided by the court last year are an interesting review of how the court resolves similar cases of first impression under different circumstances. The *Browning* court did cite the *Bevil* case in its discussion of the legislature's intent to capture a wide range of actions regarding the financial abuse of the elderly. It did so in the sense that there was a limit to the breadth of actions the legislature intended to address in these circumstances. There certainly can be debate about how the court reached these decisions, but there is little debate that it has given the Bar certain guidance in regard to what actions in transactions with the elderly are criminal or not. ■

# The parties in an EPPDAPA hearing have a right to cross-examination

*By Kristen Chambers, Attorney at Law*

*Kristen Chambers practices general civil litigation as an Associate at Kirklin Thompson & Pope LLP in Portland. She represents petitioners in EPPDAPA restraining order hearings and is interested in expanding her practice to include more elder law.*

In *K.M.J. v. Captain* III, 281 Or App 360 (2016), the Oregon Court of Appeals decided for the first time that in a hearing under the Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA), the parties retain the right of cross-examination.

It is well established that in hearings held pursuant to the Oregon Evidence Code, a trial court may control the presentation of evidence and discretion to limit cross examination, but it may not wholly deny cross-examination of an adverse witness. See ORS § 40.370; *Hemingway and Mauer*, 247 Or App 603 (2012) (FAPA hearing); *Miller v. Leighty*, 158 Or App 218 (1999) (SPO hearing); *State v. Haines*, 320 Or 414 (1994) (criminal case); *Howell-Hooyman and Hooyman*, 113 Or App 548 (1992) (civil case). EPPDAPA hearings are subject to the Oregon Evidence Code, see ORS § 40.015, but in addition, the act directs the court to exercise its discretion in EPPDAPA hearings to protect vulnerable petitioners. ORS § 124.020(9)(d).

Specifically, ORS § 124.020(9)(d) states "The court shall exercise its discretion in a manner that protects the elderly person or person with a disability from traumatic confrontation with the respondent." This provision was part of the original 1995 Elder Abuse Prevention Act. No similar provision exists in the similar domestic violence restraining order law—the Family Abuse Prevention Act. This may be because, as an elder law attorney Jennifer L. Wright testified to the Senate Judiciary Committee on March 23, 1995, "The kind of abuse suffered by a senior is frequently different in nature, and the effects of abuse on an elderly person are also different." She described a particular client who, when questioned about particular incidents of abuse, would cry, shake, repeat herself, and forget specific details. At the same hearing, Adult Protective Services investigator Cecilia Littleton Bonner emphasized that special protections were necessary because the level of "physical stress and strain of the existing restraining order process may actually pose a risk to some extremely frail elders." Clearly, the Elder Abuse Prevention Act recognizes the particular vulnerability of elders and is intended to protect them in the courtroom.

In *K.M.J.*, the respondent appeared pro se by telephone to contest an EPPDAPA restraining order granted in favor of the petitioner. The trial court set the hearing parameters from the outset. The parties would not be allowed to question each other directly. However, they would be permitted to "respond" to one another's testimony. The court allowed the parties to testify back and forth, but did not instruct the petitioner to answer the respondent's particular questions nor did the court pose any of the questions to the petitioner. At the close of the two-day hearing, the court upheld the restraining order.

The Court of Appeals found, under a plain error standard, that permitting the parties to "respond" only to each other's testimony was insufficient. It reasoned that cross-examination is "fundamental to a fair judicial proceeding" and that ORS § 124.020(9)(d) does not grant the court discretion to prohibit a party entirely from directly or indirectly cross-examining an adverse witness. Accordingly, the Court of Appeals reversed and remanded the case.[1]

The *K.M.J.* Court did not have occasion to resolve all questions regarding the interplay of ORS § 124.020(9)(d) and ORS § 40.370 because there was no evidence of attempted traumatic confrontation during the hearing—in fact, the court commended the respondent for behaving "very appropriately" during the proceeding. Thus, how far a court may go in limiting cross-examination where the respondent is acting abusively or confrontationally is yet to be determined. However the *K.M.J.* court opined that in such a case, ORS § 124.020(9)(d) "might allow for strict control over questioning." ■

### Footnote

1. Although the respondent raised constitutional due process as a basis for relief, the court did not address that argument because it was able to decide the case on statutory grounds.

# Spoon-feeding case weighed advance directive against Oregon law

*By Jason Broesder, Attorney at Law*

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A recent case in southern Oregon highlighted the issues raised by an advance directive and whether it covers spoon feeding an Alzheimer's patient.

Nora R. Harris is a former librarian. Nora married her husband Bill in 1977. Together they had a daughter Anne in July 1980. Nora spent the next fourteen years at home with Anne. In 1994, Nora went back to school to obtain her master's degree in library and information sciences. Within two years she became the head librarian for the Fairfax Library in the Marin County Library system. Nora had a gift of recalling almost all of the countless books she had read and retaining information from each.

Her early trip alone to Europe after high school instilled in Nora a love of travel and adventure. Nora and Bill enjoyed extensive overseas travel, including multiple trips to Antarctica. Their adventures and travels cemented the bonds of love between them. They enjoyed a rich and fulfilling life together. All of that changed in June 2009 when at the age of 56 Nora was diagnosed with early onset Alzheimer's Disease. This came as a crushing blow to both Nora and Bill.

After her diagnosis, Bill and Nora spoke at great length about the future, including financial issues as well as end-of-life decisions. They also spoke about these issues and concerns with friends. They joined Alzheimer's support groups and hired an attorney to assist them with their legal matters, including an advance directive that was prepared in California, their residence at the time. Nora was very clear that she did not want her life to be prolonged after her mind (ability to process) was gone, even if her body lived on.

Although Bill and Nora still lived in the Bay Area they were drawn to Ashland, Oregon, for several reasons. They had been attending plays in Ashland for about 30 years. The cost of long term care in Oregon was significantly less than in the Bay Area and given her relatively young age, they recognized that Nora's care needs might be protracted. Another reason Nora and Bill chose Oregon was because of Oregon's Death with Dignity Act. Prior to their move here, Bill and Nora did not understand that the law required Nora to be capable (defined as able to make and communicate health care decisions) of requesting the medication required under the act.

In January 2013 Bill made the difficult decision to place Nora in memory care at an assisted living facility because he was still working and unable to provide the significant amount of care she required. Bill chose Fern Gardens in Medford because of the design of the facility and the care they showed their patients.

Because of their multiple discussions and Bill's knowledge of Nora's desires regarding her care, upon placement at Fern Gardens, Bill advised that she was not to be given protein shakes because she had started losing weight. At the time of her placement Nora weighed 160 pounds. Within a year she was down to about 130 pounds. In December 2014, Nora was placed in hospice care, because she had dropped from 120 pounds to 100 pounds within about five to six weeks. After three months in hospice, she began to gain weight again. During the following year Nora again lost another 10 pounds and was again placed in hospice.

### VSED

Voluntarily Stopping Eating and Drinking (VSED) is a clinically validated "exit option" that enables a good quality death. Unfortunately, there has been very little legal analysis of a right to VSED by proxy. It is well established that an individual may refuse nutrition and hydration just as one may refuse other intrusions on her personal autonomy.

VSED entails deliberately ceasing the (self or assisted) oral intake of all food and fluids, except for those small amounts of fluids necessary for mouth comfort or for the administration of pain medication. See Boudewijn Chabot, A Hastened Death by Self-Denial of Food and Drink, page 11 (2008). For patients with the capacity to make health care decisions, the decision to stop eating and drinking can be made at any time and is completely voluntary.

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## Spoon feeding

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VSED applies only to patients who make the deliberate, contemporaneous or advance choice to stop eating and drinking in order to hasten death. VSED does not apply to a patient who ceases to eat or drink spontaneously due to a medical condition. VSED was highlighted in an article about Del Greenfield, formerly of Portland, in *The New York Times* on October 21, 2016.

VSED ensures a comfortable, natural, and dignified death. See "Pope and Anderson, Voluntarily Stopping Eating and Drinking: A Legal Treatment Option at the End of Life," *Widener Law Review*, Volume 17:363, 389 (2011). Death by VSED involves very little pain, if any. In fact, "the general impression among hospice clinicians is that starvation and dehydration do not contribute to suffering among the dying and might actually contribute to a comfortable passage from life." *Id* at 395 (internal citations omitted).

**Intervention by long term care ombudsman**

When Nora began to lose weight, Bill had a care conference with Nora's team at Fern Gardens. His consistent instructions to the facility were that Nora was not to receive protein shakes, but was to be offered finger foods. By all accounts Fern Gardens was receptive to his instructions and prepared finger-foods for Nora because she was able to eat sandwiches but appeared incapable of using utensils for feeding. Fern Gardens and Bill maintained a good working relationship regarding Nora's care and feeding.

Enter the long term care ombudsman. Fern Gardens had a newly trained ombudsman who had been working as such for a little over a month. On one of her first visits to the facility the ombudsman noticed that Nora was eating a sandwich at her table while everyone else enjoyed a warm meal. She insisted the facility begin spoon feeding Nora as an alternative to the finger foods her husband had requested.

The ombudsman's testimony later at a hearing was that she was familiar with advance directives from her training and her prior work in health care administration in California. The ombudsman went on to state that she never asked for nor had she ever seen Nora's advance directive or discussed her direction to spoon feed Nora with Bill.

Fern Gardens advised Bill that it was required to spoon feed as directed by the long term care ombudsman. The ombudsman's office took the position that OAR 411-054-0030(1)(e)(F) requires spoon feeding in Nora's case. OAR 411-054-0030(1)(e)(F) states that: "The residential care or assisted living facility must provide a minimum scope of services as follows: (e) Services to assist the resident in performing all activities of daily living, on a 24-hour basis, including: (F) Assistance with eating (e.g., supervision of eating, cuing, or the use of special utensils)."

**The hearing**

Bill requested a protective order, under ORS 125.650, which asked the court to require the facility to offer finger-foods only. The long-term care ombudsman objected, and was represented at the hearing by the Department of Justice.

At the hearing, Bill and long-time family friends testified that Nora's greatest fear upon learning of her diagnosis was to become dependent and incontinent, and to linger. A retired California elder law attorney was admitted as an expert regarding the California advance directive. She testified that she believed that Nora's specific advance health care directive gave sufficient authority for Bill to stop spoon feeding.

After three hours of testimony, the probate judge determined that the long term care ombudsman's interpretation of the OARs was correct. The judge held that the facility shall assist with feeding, including spoon-feeding, and that, despite her advance directive, Nora shall continue to be spoon fed until she either forgets how to swallow, becomes a choking risk, or dies from some other complications.

Bill contemplated an appeal but determined that the better course for him was to advocate for changes and clarification in the law regarding advance directives. State Senator Talbert and other legislative officials were able to produce a bill that made it to a senate judiciary work group. The work group involved representatives from health care, nursing homes, hospitals, and the long term care ombudsman, as well as medical ethicists. The work group was concerned that the bill would redefine a "medical instrument" to include a spoon, and since a spoon is considered palliative care it cannot be withheld by an agent such as a guardian or health care representative. The result from the work group is that there is likely no path forward for the bill. ■

**Nursing facility trade group wins preliminary injunction**

# Federal rule banning pre-dispute arbitration clauses suspended

*By Cynthia Barrett, Attorney at Law*

*Cynthia Barrett has practiced law in Oregon since 1976. Her practice focuses on elder law, special-needs planning, and same-sex-couple planning. She served as the president of the National Academy of Elder Law Attorneys (NAELA) and the Multnomah County Bar Association.*

Do not expect Oregon and Washington long term care (LTC) facilities to remove pre-dispute arbitration clauses from their admission contracts any time soon … and maybe never.

Lawyers for residents can continue to advise clients to reject the common pre-dispute arbitration clauses by crossing out the provisions and initialing that change.

The Center for Medicare and Medicaid Services (CMS) banned pre-dispute arbitration clauses in long term care facility admission contracts on October 4, 2016, as part of a massive re-write of federal LTC facility regulations. www.federalregister.gov/documents/2016/10/04/2016-23503/medicare-and-medicaid-programs-reform-of-requirements-for-long-term-care-facilities.

A "pre-dispute arbitration clause" is the contract provision which sends all future disputes (including future breach of care and negligence lawsuits) to arbitration. LTC facility residents give up the right to a jury trial. If a resident is injured or dies from bad care, the arbitrator's damage award is typically less than a jury's award, and the proceedings are kept confidential.

The CMS ban, set to take effect November 28, 2016, is now suspended because of a preliminary injunction issued November 7, 2016, in *Am. Health Care Ass'n v. Burwell*, No. 3:16-CV-00233 (N.D. Miss Nov. 7, 2016). (https://openminds.com/wp-content/uploads/110716injahcavburwell.pdf)

The American Health Care Association (AHCA), a national trade group for LTC facilities, partnered with its Mississippi affiliate and three Mississippi care facilities and filed suit in the Northern District of Mississippi federal court. They sought a declaratory judgment that the rule was unlawful, and an injunction to stop enforcement, under the Administrative Procedure Act, 5 USC § 500 *et seq*.

The plaintiffs' selection of this Mississippi forum ensured that the conservative Fifth Circuit would hear any appeal. CMS lawyers had until January 8, 2017, to decide whether to file an interlocutory appeal, and perhaps seek a stay of the injunction during the appeal. The federal judge's order is not limited geographically to his district, so it applies nationwide.

Because of the November 7, 2016, temporary injunction, LTC facilities are not removing pre-dispute arbitration clauses from their admission contracts. Oregon licensed facilities are also not yet removing the clause from their admission contracts, and the Oregon affiliate of the AHCA is following the issue closely.

The new Trump administration appointees (at Health and Human Services, CMS, and the Department of Justice) could be expected to support the nursing home industry's anti-ban position. I suspect that the Fifth Circuit case will be quickly settled and the ban withdrawn.

Northern District of Mississippi District Judge Michael P. Mills issued an unusual 40-page opinion describing both (1) the LTC facility admission process, and (2) his judicial experience with assertion of an arbitration clause as a defense in nursing home injury lawsuits. The fact-finding task for the court, to determine whether an injured resident had "competency" when signing the admission contract giving up his or her right to a jury trial, is intensive and difficult.

Judge Mills described years of delay in nursing home dispute resolution because of inevitable appeals of the competency determination, and would take judicial notice of that delay—if it were relevant (and he decided it was not) to an Administrative Procedure Act claim. Judge Mills (a former trial judge and justice of the Mississippi Supreme Court) went beyond the plaintiff's brief in describing his judicial experience, and declared that he "frankly, does not take issue with its [the federal rule's] wisdom." That is, he agrees that the better public policy might be to remove pre-dispute arbitration clauses from the nursing home contracts.

But when Judge Mills reached the federal question presented under the Administrative Procedure Act, 5 USC § 500 et seq., about the statutory authority of the agency to ban arbitration clauses, he concluded that the CMS agency duty to "protect and promote the rights of each resident." 42 USC 1395i-3(c) (1)(A) (xi), did not extend to banning arbitration provisions in admission contracts.

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## Arbitration clauses

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CMS would be unlikely to prevail at trial, Judge Mills found, because CMS exceeded its statutory authority. Legislation by regulation violates the separation of powers principles of our Constitution, Judge Mills concluded, noting unsuccessful attempts in Congress since 2008 to pass a ban on nursing contract pre-dispute arbitration clauses.

The long term care industry carefully chose both plaintiff and forum, and crafted this court challenge that invokes the principles of separation of powers and executive overreach. Their strategy was successful.

So here we are in our modest little elder law practices, representing LTC residents enmeshed in the political struggle. Congress refused to enact a law during the eight years of the Obama administration. The executive branch attempted to achieve the policy goal by regulation. A federal court smacked down the regulation. The recent election opened the door to another strategy for the industry to get rid of this undesired federal regulation that bans pre-dispute arbitration clauses.

Will the industry persuade the new Republican-controlled Congress and the Trump administration to overturn the entire October 4, 2016, CMS long term care facilities rule revision? The obscure Congressional Review Act, 5 USC § 801-808, is a "reset" mechanism described in a Nov. 17, 2016, *Congressional Research Service Memorandum*. The CRS memorandum listed vulnerable Obama administration rules, including the October 4, 2016, CMS long term care rule. U.S. Congressional Research Service "Major Obama Administration Rules Potentially Eligible to be Overturned under the Congressional Review Act in the 115th Congress," Maeve P. Carey, Christopher M. Davis, Casey Burgat, November 17, 2016.

Perhaps some version of the originally proposed CMS rule, greatly restricting circumstances where the pre-dispute arbitration rule can be used, will emerge. If the proposed ban rule is dropped as part of post-Obama litigation settlement (or the entire CMS long term care revision overturned by Congress using the little known Congressional Review Act), then advocates for injured facility residents might find it useful to review the original proposed CMS rule.

When the long term care rules revisions were initially published in 2015, CMS proposed a pre-dispute arbitration rule to limit the circumstances under which the provision could be valid (not a ban). See *Federal Register* / Vol. 80, No. 136 / Thursday, July 16, 2015 / Proposed Rules at p. 42264-42265:

"(n) Binding arbitration agreements. If the facility enters into an agreement for binding arbitration with its residents:

(1) The facility must ensure that: (i) The agreement is explained to the resident in a form and manner that he/she understands, including in a language the resident understands, and (ii) The resident acknowledges that he or she understands the agreement.

(2) The agreement must: (i) Be entered into by the resident voluntarily; (ii) Provide for the selection of a neutral arbiter; (iii) Provide for selection of a venue convenient to both parties.

(3) Admission to the facility must not be contingent upon the resident or the resident representative signing a binding arbitration agreement.

(4) The agreement must not contain any language that prohibits or discourages the resident or anyone else from communicating with Federal, State, or local officials, including but not limited to, Federal and State surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care Ombudsman, in accordance with § 483.11(i).

(5) The agreement may be signed by another individual if: (i) Allowed by state law; (ii) All of the requirements in this section are met; and (iii) That individual has no interest in the facility."

#### Practical suggestions for elder law attorneys regarding arbitration provisions

In our elder law "crisis intake" where facility admission is occurring, we could uncover the "hidden issue" of the pre-dispute arbitration provision—best not to ignore it. As a practical matter, the client fears that crossing out the arbitration provision may result in losing the placement, or contribute to a later discharge on some pretext.

But the lawyer who reviews the admission contract with the family or fiduciary might:

- Ask the client to bring in a copy of any admission agreement, so you can review who signed it and that person's authority.
- Review the admission contract with the client, and point out the (1) "responsible party" provision, (2) the point system used to trigger increased care charges, (3) any weird waivers of rights, and (4) the arbitration provision.
- Tell the ill elder and the family that if the elder suffers harm in the facility, the defense will try to keep the dispute away from a jury, and send the case to arbitration to reduce damage awards.
- Explain that the arbitration provision may be ruled invalid, on a variety of grounds, and that one potential defense is that the signer on the agreement did not have proper legal authority to give up the ill person's rights, but the safer course is to cross out the arbitration provision. ■

# New law affects special needs trusts

*By Melanie Marmion, Attorney at Law, and Emily Hogan, Attorney at Law*

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In December, President Obama signed into law the 21st Century Cures Act (HR 34). While the effects of this law are far reaching, one section–section 5007– caught the attention of the elder law and special needs communities. This section, entitled "Fairness in Medicaid Supplemental Needs Trusts," serves to amend 42 U.S.C. §1396p(d)(4)(A). This is a "game changer" for individuals who are experiencing a disability and wish to create a first-party (aka "payback") special needs trust.

### What is a first-party special needs trust?

A first-party special needs trust allows an individual (under age 65) with a disability to protect his or her individual assets for future use while remaining eligible for means-tested government benefits. In essence, an individual with disabilities who is currently enrolled in a governmental benefits program such as Supplemental Security Income (SSI) or Medicaid can continue to remain eligible for those benefits even if he or she receives assets from another source (personal injury settlement, inheritance, divorce, gift, etc.), if those assets are transferred to a first-party special needs trust. The trustee of the first-party special needs trust may spend the funds in the trust for the benefit of the individual for his/her expenses that supplement the public benefits that he/she is receiving.

### Before the Special Needs Fairness Act was created

Before the Act was passed, 42 U.S.C. §1396p(d)(4)(A) allowed a first-party special needs trust to be created only by "a parent, grandparent, legal guardian of the [disabled] individual, or a court...." An adult with disabilities who otherwise had capacity was unable to create a first-party trust even though the trust was being funded with that individual's assets. This requirement created a burden on many people who didn't have a living parent or grandparent and didn't need the protection of a conservator or guardian, but were nonetheless forced to turn to filing a protective proceeding to fit within the statutory requirements. In addition, the inconsistencies between this law and that governing the creation of a pooled special needs trust was troubling; 42 U.S.C. §1396p(d)(4)(C)(iii) does allow disabled individuals to create their own first-party funded pooled special needs trust.

### How the Special Needs Fairness Act changes federal law

The Special Needs Fairness Act inserts the words "the individual" into the first sentence of 42 U.S.C. §1396p(d)(4)(A), so the section now reads in relevant part as follows: "a trust containing the assets of an individual under age 65 who is disabled ... and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court .... " This change not only allows the disabled individual additional autonomy–the ability to create the trust himself/herself--but also saves the money, time, and hassle involved with using a relative or the court. Of note, this change does not allow an individual to serve as his or her own trustee, only to create the trust himself/herself.

### How the Special Needs Fairness Act changes Oregon law.

The passage of the Special Needs Fairness Act requires a technical change to Oregon Administrative Rule 461-145-0540(10)(a). Bill Brautigam, Medicaid policy analyst for the Oregon Department of Human Services, has drafted a proposed rule change to add a new subparagraph E to include the person with the disability (referred to as "client" in the Administrative Rules) in the list of individuals and entities allowed to establish a first-party special needs trust in Oregon. Because the change in the administrative rules is necessary to comply with federal law, Mr. Brautigam believes that the rule change will not need to go through the process and approval of the Rules Advisory Committee. But even the temporary rule will take some time to formalize. In the meantime, Mr. Brautigam confirmed that he can personally approve a trust established under the authority of the new act.

In practice, the law changes mean that Oregonians under age 65 and experiencing a disability, who otherwise have capacity to create a trust, can establish a first-party special needs trust on their own, without a parent, grand-

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## Special needs trusts

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*Oregonians under age 65 and experiencing a disability, who otherwise have capacity to create a trust, can now establish a first-party special needs trust on their own.*

parent, or most importantly, court process and expense. Up until now, these same individuals, who did not have parents or grandparents but who were willing or able to act, were forced to seek court intervention via the protective proceedings of Chapter 125.

### Other issues

While it is clear that the Special Needs Fairness Act alleviates many hardships previously faced by disabled individuals who hope to establish a first-party payback special needs trust, it also raises a number of lingering unanswered questions for planners.

For example, there is the issue of the interpretation of the meaning of "individual." In light of the Eighth Circuit's holding in *Draper v. Colvin* (No. 12-2757 (March 3, 2015), many attorneys questioned by these authors believe the Special Needs Fairness Act is broad enough to allow an agent under a power of attorney to establish a first-party special needs trust on behalf of the individual. In *Draper*, parents of a woman who received a personal injury settlement intended to establish a first-party special needs trust in accordance with 42 U.S.C. §1396p(d)(4)(A). Because the parents did not initially "seed" the trust with their own funds, Social Security took the position that the parents were not acting in their individual capacity as parents, but were in fact acting as the agents of the beneficiary under the authority of a power of attorney. After several appeals, the Eighth Circuit Court ultimately agreed with the position of Social Security. As the holding in this case occurred prior to the passage of the Special Needs Fairness Act, the law at that time did not recognize the authority of an individual to establish his/her own special needs trust. Thus, the trust did not meet the technical requirements of 42 U.S.C. §1396p(d)(4)(A) and the woman was terminated from her Social Security benefits. The take-away from *Draper* is that an agent acting under a power of attorney for an individual who establishes a special needs trust is the legal equivalent of the individual establishing the trust for himself/herself. With this in mind, practitioners may want to add language to their power of attorney forms that specifically permits the agent to establish a first-party special needs trust.

This raises the question of those first-party special needs trusts that are currently under court supervision only because, prior to this act, a conservator was appointed to establish the trust in order to comply with the technical requirements of 42 U.S.C. §1396p(d)(4)(A). That is, a conservator was appointed to establish the special needs trust and the conservatorship continues under court supervision, even though the protected person/trust beneficiary does not lack financial capacity. Can the conservatorship in those matters now be closed and the special needs trust administered privately?

There are also a number of ethical and liability concerns. From an ethical conflicts perspective, it seems clear that an attorney who represents the individual as the grantor and beneficiary of a first-party special needs trust may not also represent the fiduciary who will be serving as the trustee. However, it remains unclear whether the attorney has an ethical obligation to ensure that the designated trustee is an appropriate guardian of the trust funds. Further, while the new law does not require objective evidence of the person's capacity other than the establishment of the attorney-client relationship that exists in other estate planning matters, an attorney representing an individual with cognitive rather than physical disabilities should take appropriate measures to protect himself/herself from any claim of financial abuse of a disabled individual under ORS Chapter 124. Mr. Brautigam echoed these concerns by pointing out the lack of court or other third-party oversight in these cases. Attorneys who practice in special needs and represent individuals with disabilities who want to establish a first-party special needs trust under the new law should tread lightly to protect themselves and their clients from what will likely be increased scrutiny from the Department of Human Services in these cases.

Watch for guidance from the Social Security Administration, the Oregon Department of Human Services, and other sources to address these issues in the coming months. ■

# Oregon's ABLE program is up and running!

*By Kathryn F. Gapinski, Attorney at Law*

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In the October 2016 *Elder Law Newsletter*, Jonathan A. Levy of Cavanaugh Levy Bilyeu LLP and I co-authored "ABLE Accounts 101," in which we gave a general overview of ABLE accounts, a new tax-advantaged savings account available to individuals with disabilities.[1] This article covers the specifics of Oregon's ABLE program, which launched on December 6, 2016.

The Oregon ABLE program was established by House Bill 4025, which was signed by Governor Kate Brown on March 14, 2016, became effective June 2, 2016, and is codified in Oregon Revised Statutes ORS 178.300, ORS 178.375, and ORS 178.380, as amended.

The rules are established and the program maintained by the Oregon 529 Savings Board, which also oversees the Oregon College Savings Plan. The board is trustee of the Oregon 529 Savings Network trust and is made up of Oregon's state treasurer and four members appointed by the state treasurer. ABLE accounts themselves are administered by Sumday Administration, LLC, an affiliate of the Bank of New York Mellon. Sellwood Consulting, LLC is the investment manager.

Elder law and estate planning practitioners should spread the word about the Oregon ABLE program to their disabled clients and to their clients with disabled family members. Attorneys who practice estate and trust administration should take into account whether an estate or trust has a disabled beneficiary and if it would be appropriate to distribute that individual's share to an ABLE account, subject to ABLE account contribution limitations, discussed below.

Below are answers to questions that may come up as you are discussing the Oregon ABLE plan with clients. While some of this information is federal information and not Oregon specific, all of the information is relevant to the Oregon ABLE Savings Plan and ABLE For ALL Savings Plan.

### Who can open an account?

A disabled individual or an authorized legal representative can open an account. (An authorized legal representative is a parent or legal guardian of the beneficiary or a person who has the powers of an agent under a power of attorney.)

The account is owned by the disabled individual–the beneficiary. A disabled beneficiary is considered an eligible individual to open an ABLE account if he or she is (a) entitled to Supplemental Security Income, (b) entitled to Social Security Disability Insurance, or (c) if he or she obtains a letter of certification from a licensed physician stating that the individual has significant functional limitations from blindness or disability, as defined by the Social Security Act. The Oregon ABLE Savings Plan has a physician's form for this purpose, available here: http://oregonablesavings.com/assets/docs/oregon-able-physician-form.pdf.

The disability must have occurred before age 26, but the ABLE account can be opened at any time, regardless of the beneficiary's age. A beneficiary must recertify eligibility annually, unless he or she certifies during enrollment that the disability is permanent. If a beneficiary doesn't recertify, further contributions may be rejected until they are recertified.

### How do I open an account?

Disabled beneficiaries or their authorized legal representatives can go to http://oregonablesavings.com to open an account online, or download the enrollment (and other forms) here: http://oregonablesavings.com/forms.

Only one ABLE account is allowed per beneficiary (nationwide).

### Can I open an Oregon ABLE account for a disabled individual who lives in another state?

Oregon's ABLE program has two types of plans: (a) Oregon ABLE Savings Plan, for Oregon residents only, and (2) the ABLE For ALL Savings Plan[2], for all qualified beneficiaries nationwide: http://ableforall.com.

### What are the costs associated with the Oregon ABLE program?

The account maintenance fee is $22.50 per year for Oregon residents who open an account before December 31, 2017, $45.00 per year for Oregon residents who open an account after December 31, 2017, and $55 per year for nonresidents (the ABLE for ALL Savings Plan). There is a $10 annual fee for printing and mailing paper statements. A beneficiary may avoid this fee by choosing to receive statements and other documents electronically. There is also a paper-check disbursement fee of $2.50 per check.

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## ABLE accounts

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The current estimated fees for the underlying investments and state administrative fees total between 0.30% and 0.3810% annually, depending on asset allocation. These fees are not debited from the ABLE account like the account maintenance fees, but come out of earnings before they reach the ABLE account.

**How do I make contributions to my ABLE account or the ABLE account for my disabled relative or friend?**

Contributions can be made by: (a) checks made payable to "Oregon ABLE Savings Plan" from a US institution, (b) through an automatic contribution plan, (c) electronic funds transfer on a bank account linked to the Oregon ABLE Savings Plan, (d) or a rollover from another ABLE program. Cashier's checks are not accepted, nor are starter checks. The minimum initial contribution is $25, and the minimum is $10 for any contributions after the initial contribution.

The contribution form can be found here: http://oregonablesavings.com/assets/docs/oregon-able-contribution-form.pdf.

**If I make a gift to the Oregon ABLE Savings Plan or the ABLE For ALL Savings Plan, does it count against my federal lifetime combined gift and estate tax exemption?**

No. Contributions from third parties are gifts to the beneficiary for federal gift tax purposes.

**Are contributions tax deductible?**

Contributions are not tax deductible for federal income tax purposes. Contributions are tax deductible for Oregon state income tax purposes, but only up to $4,620 for taxpayers filing jointly and $2,301 for individuals, if (a) the contributor is a resident of Oregon, and (b) the beneficiary of the ABLE account is under the age of 21.

**Will having an Oregon ABLE account negatively affect my federal or state benefits?**

No, with some exceptions. ABLE accounts are excluded as a resource and as income for SSI (subject to limitations discussed below), Medicaid, the Supplemental Nutrition Assistance Program (SNAP), and all other Oregon state benefits. The Oregon 529 Savings Board has received confirmation from the NW Region director that ABLE funds will not count against Section 8 Housing (HUD) and Veterans Aid & Attendance benefits, but has not yet received federal confirmation.

**How much can I contribute?**

There are three numbers that are important to know regarding Oregon ABLE accounts: $14,000, $100,000, and $310,000.

- $14,000: The annual contribution from all sources is $14,000. The disabled beneficiary can contribute his or her own funds. Friends and family members can contribute, as well. If this increases, the Oregon ABLE Savings Plan will notify the beneficiary.
- $100,000: When the balance in an ABLE account reaches $100,000, the beneficiary's SSI benefits will be suspended until the account balance falls back below $100,000. An account balance of $100,000 or greater will not affect Medicaid benefits. An account balance of $100,000 or greater will not affect Oregon state benefits.
- $310,000: The current account limit for the Oregon ABLE Savings Plan and ABLE For ALL Savings Plan is $310,000. However, it's important to note that if an account reaches the limit $310,000, contributions can be made again once the account balance falls below $310,000.

The Oregon 529 Savings Board is responsible for establishing the limitations on contributions and can raise this limit at any time, by decision of the Board, without requiring input from the Oregon State legislature. The Oregon 529 Savings Board plans to raise this in the future. If this increases, the Oregon ABLE Savings Plan will notify the beneficiary.

**For what can the beneficiary use the funds?**

The disabled beneficiary can use the funds for qualified disabilities expenses. Qualified disability expenses include expenses for maintaining or improving the beneficiary's health, independence, or quality of life, including education, housing, transportation, employment training and support, assistive and technology related services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial, and other expenses approved by the Treasury Department. See the October 2016 *Elder Law Newsletter* "ABLE Accounts 101" article for a more detailed discussion of qualified disability expenses.

**How does a disabled beneficiary (or the authorized representative) make a withdrawal?**

Either the beneficiary or the authorized legal representative can make a withdrawal through the website or by filling out and submitting a withdrawal form: http://oregonablesavings.com/assets/docs/oregon-able-withdrawal-form.pdf.

Funds will be withdrawn in the allocation of cash-to-investment ratio of the account, or as close to the ratio as possible. Funds can be deposited into a bank account associated with the ABLE account or the Oregon ABLE Savings Plan can issue a check to the beneficiary or a third party (as stated above, there is a $2.50 fee per paper check). The Oregon ABLE Savings Plan will also be launching a prepaid card, with a $15 annual fee, and no transaction fees.

There are three types of withdrawals from the Oregon ABLE Savings Plan: (a) qualified (discussed above), (b) non-qualified, and (c) a rollover. A rollover can be made either: (i) into the Oregon ABLE Savings Plan from another state's ABLE program to the beneficiary's ABLE account or to the ABLE account of a sibling of the beneficiary, or (ii) out of the Oregon ABLE Savings Plan to another state's ABLE program to an ABLE account for the beneficiary or to an ABLE account for the sibling of a beneficiary.[3]

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## ABLE accounts

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**What happens if I make a non-qualified withdrawal?**

The earnings portion of the withdrawal is subject to federal and Oregon income tax at the beneficiary's tax rate, as well as an additional 10 percent additional federal tax. This penalty does not apply for non-qualified withdrawals paid to the beneficiary's estate, heir, or beneficiary after the beneficiary dies, or paid to Medicaid as part of Medicaid's recovery.

A non-qualified withdrawal could also negatively affect a beneficiary's means-tested benefits, to the extent it pushes them over a resource or income cap.

**How do I track my distributions? Do I have to prepare or file a report or annual accounting?**

The Oregon ABLE Savings Plan has online tools that will help track qualified and non-qualified distributions for tax reporting.

The Oregon ABLE Savings Plan will provide beneficiaries with quarterly and annual statements that detail contributions, withdrawals, and the account balance. The Oregon ABLE Savings Plan will also report this information to the IRS and provide the beneficiary with a copy of the report.

The Oregon ABLE Savings Plan will provide the beneficiary with a Form 1099-QA each year, which details the amount distributed that year and distinguishes which portion is earnings and which portion is from contributions.

The Oregon ABLE Savings Plan also sends monthly electronic reports to the Social Security Administration and will give them the following regarding each ABLE account: information regarding the beneficiary and the name of the authorized legal representative, if any, the balance of your ABLE account, and the date and amount of any distributions.

**How will my ABLE account be invested?**

A beneficiary can choose between a cash option and three investment options. In addition, a beneficiary can choose to direct all contributions to the cash option or direct contributions to be split between the cash option and one of the investment options (so long as at least 10 percent is allocated to the investment option). While a beneficiary can invest in both a cash option and one of the three investment options, a beneficiary cannot choose more than one investment option at a time. A beneficiary can change the allocation a maximum of twice per year. Here is more information on the cash option and three investment options:

- Cash Option: 100 percent of funds are held in an FDIC-insured (up to $250,000) account with The Bank of New York Mellon.
- ABLE Conservative Investment Option: Composed of approximately 20 percent equities and 80 percent fixed income. Smaller risk, shorter investment period.
- ABLE Moderate Investment Option: Composed of approximately 50 percent equities, and 50 percent fixed income. Medium risk, for a medium to uncertain investment period.
- ABLE Aggressive Investment Option: Composed of approximately 84 percent global public stocks, and 16 percent bonds. Higher level of risk, longer investment period.

**Are the earnings on the investments in my ABLE account taxed?**

No. Earnings are exempt from federal and state income tax. (As stated above, earnings on non-qualified withdrawals are subject to both federal and state tax, as well as an additional 10% tax.)

**What happens when the beneficiary dies?**

ABLE accounts are subject to Medicaid recovery. When a beneficiary dies, the personal representative should notify the Oregon ABLE Savings Plan. Burial and funeral expenses can first be paid from an ABLE account as a qualified distribution expense. The Oregon ABLE Savings Plan will pay remaining funds to the estate of the beneficiary, where they will be subject to Medicaid recovery. As of now, the Oregon ABLE Savings Plan does not pay Medicaid directly; rather, Medicaid is a creditor of the decedent's estate.

**Where can I find out more about the Oregon ABLE program?**

The Oregon ABLE Savings Plan website, www.oregonablesavings.com, and ABLE For ALL Savings Plan website: http://ableforall.com. The plan disclosure booklet is also a great resource for information: http://oregonablesavings.com/assets/docs/oregon-able-plan-disclosure-booklet.pdf . ■

**Footnotes**

1. The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act was signed into law on December 19, 2014, creating Section 529A of the Internal Revenue Code. Section 529A provides for tax-advantaged savings account for individuals with disabilities, much like 529 accounts for education.
2. For the purpose of this article, information regarding the Oregon ABLE Savings Plan is the same for the ABLE For ALL Savings Plan, unless indicated otherwise.
3. Under both scenarios, the sibling must be eligible for an ABLE account. For the purposes of the ABLE program, "sibling" includes full and half-siblings, as well as step-siblings. For more information about rollovers, see the Plan Disclosure Booklet and Participation Agreement.

***Many thanks to David Bell, Outreach Director for the Oregon ABLE Savings Plan for his helpful suggestions and feedback.***

# Planning considerations regarding the Oregon property tax deferral for elders and persons with disabilities

*By Rebecca S. Kueny, Attorney at Law*

*Rebecca Kueny is a Salem attorney who represents clients in estate planning, special needs planning, protective proceedings, and Medicaid and VA long term care planning. She is a board member for Oregon Women Lawyers Mary Leonard Chapter and Leave a Legacy Mid-Willamette Valley. She is active with the Marion County Indigent Guardianship Committee, Willamette Valley Estate Planning Council, Girls on the Run Willamette Valley, Marion County CourtCare, and the Willamette Valley American Inn of Court.*

The Oregon legislature has long understood the importance of allowing our disabled and elderly citizens to continue to reside at home. In 1963, the legislature created the Oregon Property Tax Deferral for Disabled and Senior Citizens program as a financial benefit for both the citizens and Oregon. Upon qualification for the program, the Oregon Department of Revenue (DOR) pays the property taxes of the applicant and imposes a lien against the real property, as described in ORS 311.673. The applicant may remain on the program until he or she no longer qualifies, has a disqualifying event, or does not recertify under the program.

### Who qualifies?

Every owner of the house must qualify as an applicant. To qualify, the applicant must:

- Be 62 years or older, or disabled under the Social Security Administration definition
- Be the only owner(s) of the property and have lived in the property for at least five years
- Have a household income of less than $43,400
- Have a net worth of less than $500,000 (not including the house)
- Have the real market value of the house qualify under the county's specific guidelines (ORS 311.668)

If an applicant was not residing in the house due to medical reasons, he or she might still qualify for the program if there is appropriate documentation from the medical provider that the applicant was unable to stay at home temporarily. A house that has a reverse mortgage does not qualify for the program unless the applicant was on the program prior to 2011.[1] If the applicant owes delinquent taxes prior to qualifying, the applicant may still be eligible. However, per ORS 311.691, the DOR will not pay the delinquent taxes.

### The lien

The DOR levies the lien. The property can only be released from the lien upon full repayment. According to ORS 311.674, the amount owed is the amount paid by the DOR on property taxes, plus six percent compounded interest per annum.

The applicant, applicant's spouse, or applicant's next of kin or heirs may voluntarily pay the lien. Upon a disqualifying event, the applicant or the transferee(s) must pay the lien. A transferee is defined as "an heir, legatee, devisee, distributee of an estate of a deceased individual, the assignee or donee of an insolvent individual or a person acting in a fiduciary capacity on behalf of a transferee," but not a "bona fide purchaser for value." ORS 311.666(10).

ORS 311.686 states that if the disqualifying event occurs prior to September 1, the DOR will not pay the upcoming year's property tax assessment. If the disqualifying event occurs on or after September 1 the DOR will continue to pay the taxes for that tax assessment year. Payment is due to the DOR by August 15 of the year following disqualification.

### Disqualifying events

A disqualifying event is defined under ORS 311.684 as the sale of the property, the transfer of ownership, the physical move of the applicant, or the death of the applicant. Upon disqualification, the applicant and/or transferee of the property must pay the DOR as described in the prior section. Transferees that are not eligible for the program are jointly and severally liable for payment of the lien according to ORS 311.695. If payment is not made in full by the August 15 deadline, foreclosure proceedings may begin on the property.

### A brief history

In 2011, the Oregon legislature had thorough discussions about the program due to budget concerns.[2] The program was financially successful in the late 1990s and early 2000s, averaging $7.5 million surplus per year.[3] In 2006, a large portion of the funding from the program's account was used to pay for other programs, mainly Oregon Project Independence. In conjunction with the market crash in the late 2008, the program's fund account began to diminish more quickly than the legislature anticipated. Subsequently, the need for the program increased dramatically and the ability to recover funds from applicants and/or transferees decreased.

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## Property tax deferral

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*It is essential for estate planning and elder law attorneys to know what potential pitfalls exist as a result of transferring ownership of a house.*

Therefore, in 2011, the legislature made numerous changes to the program to limit program participation and increase repayments on liens. The legislature introduced the limited net worth requirement, the five-year residency and ownership requirement, and a cap on the real market value of houses per the county's standards.[4] Additionally, the legislature imposed a six percent compounded interest rate instead of a six percent simple interest rate, a requirement for repayment the year following a disqualifying event, and a disqualification for applicants with a reverse mortgage.[5]

These drastic changes upset Oregonians, because no notice was given to program participants prior to disqualification. To rectify the situation, the legislature amended the program in 2012. These amendments allowed for some disqualified participants to be grandfathered in to the program.[6]

### The intersection with planning

It is essential for estate planning and elder law attorneys to know what potential pitfalls exist as a result of transferring ownership of a house. The program requires that all the owners must qualify as applicants. For example, John and Jane Doe must both qualify. If John and Jane add their daughter Mary to the deed as a co-owner, Mary would also need to qualify for the program. If Mary does not qualify, then the Does will be disqualified from the program and owe the DOR repayment by the following year.

Also, the house must actually be owned by the applicant(s). ORS 311.670 infers that if the house is owned by a life estate interest, corporation, irrevocable trust, or another entity, the applicant will not qualify for the program. Any transfer of ownership to an entity, excluding revocable living trusts, will disqualify the applicant from the program. This can greatly influence decisions on clients' long-term care or gifting plans.

The 2011 amendments also affect gifting, probates, and trust administrations. Heirs or beneficiaries were previously able to work with the DOR to make the repayment within a five-year period, but now heirs and beneficiaries who inherit a home encumbered by a DOR lien are required to pay by August 15 of the year following the disqualifying event. This can place a large burden on the heirs and beneficiaries.

### Conclusion

The program can be very helpful to our disabled and elderly clients who have the ability to live at home. However, it is our responsibility as attorneys to understand the qualification requirements and disqualifying events that may affect the client, or the heirs and beneficiaries. Since the consequences for a disqualifying event can affect the client more now than in the past, this must be a part of the equation when determining the best estate plan, long term care plan, or gifting plan for the client. ■

### Footnotes

1. There are additional provisions specific to manufactured homes in ORS 311.666-311.701.
2. See Relating to tax deferral programs; and prescribing an effective date: Hearing on HB 2543 before the H. Committee on Rev., 2011 Leg., 76th Leg. Assembly (Or. April 7, 2011).
3. Oregon Department of Revenue. Property Tax Deferral Programs Annual Report: Senior Citizen, Disabled Citizen, Special Assessment. 150-490-475 (Rev. 04-09), April 2009.
4. See Relating to tax deferral programs; and prescribing an effective date: Hearing on HB 2543 before the H. Committee on Rev., 2011 Leg., 76th Leg. Assembly (Or. April 7, 2011).
5. H.B. 2543, 2011 Leg., 76th Sess. (Or. 2011)
6. See H.B. 4039, 2012 Leg., 76th Leg. Assembly (Or. 2012).

# Tips for those interested in legislative issues

*By Anastasia Meisner, Attorney at Law, and Emily Clark, Attorney at Law*

*Anastasia (Stacie) Yu Meisner is Of Counsel at Samuels Yoelin Kantor LLP. Her practice focuses on estate planning, probate, trust and estate administration, guardian and conservatorships, as well as business transactions and formation.*

*Emily L. Clark is an associate with Samuels Yoelin Kantor LLP. Her passion is helping families navigate all the various obstacles they may face, and her practice focuses on domestic relations, probate, and business transactions.*

Oregon's legislature is called the Oregon Legislative Assembly. It is a bicameral system, which means there is an upper chamber called the Senate and a lower chamber called the House of Representatives. Senators serve four-year terms and Representatives serve two-year terms.

The members of the legislature generally have outside employment in addition to their legislative obligations. A number of legislators are lawyers. In 2011, the Oregon State Bar reported that 15 of the 90 legislators in the Oregon Legislative Assembly were active OSB members, inactive OSB members, or law-school graduates.

Prior to 2012, the Oregon Legislative Assembly met only in odd-numbered years. For example, new laws were promulgated only in 2007, 2009, etc. Starting in 2012, Oregon moved to an annual system. In even-numbered years, the Legislative Assembly meets for 35 days. In odd-numbered years, the Legislative Assembly convenes on the second Monday of January, and typically ends in July. The longest legislative session was in 2003. In that year the Legislative Assembly met for 227 days and ended on August 27, 2003. The last day of session is called Sine Die, which means adjourning without scheduling another day to meet.

### How a legislative bill becomes law

A law starts with an idea which can originate with concerned citizens, special interest groups such as Oregon State Bar sections, senators, or representatives. The idea is then sponsored by a senator or a representative or is pre-session filed. In general, pre-session filing is a process to expedite the legislative process. A pre-session filed bill is prepared and introduced before a legislative body convenes. According to the National Conference of State Legislatures, a majority of the states allow for this type of streamlining process.

Once a legislative idea has a sponsor or is pre-session filed, the attorneys in the Legislative Counsel's Office draft the bill. The bill is assigned a number. For example, in the 2013 legislative session the Oregon State Bar Elder Law Section proposed an amendment to ORS 125.095: attorney fees in protected proceedings. Legislative counsel drafted the bill language and the bill number was HB 2570. HB 2570 eventually became law.

In order for a bill to become law in Oregon, the process is similar to that described in the *Schoolhouse Rock* episode known as "I'm Just a Bill." Remember Bill sitting on capitol hill, stuck in committee, waiting to become a law? Some of you may seen the episode on Saturday morning cartoons. Others may have never seen it. The video can be found on YouTube at https://www.youtube.com/watch?v=tyeJ55o-3Elo.

HB 2570 progressed through the legislative session as follows:

- January 14, 2013: The bill had a first reading on the House floor. The first reading is the process of introducing a bill to the House chamber. Then the bill was referred to House Speaker's desk, and further referred to the House Judiciary Committee.
- February 6: The House Judiciary Committeheld a public hearing. This means the public was invited to testify on behalf of or against the bill, and the committee members could ask questions of the witnesses. In the case of HB 2570, testimony was provided by attorneys David L. Carlson, Steven A. Heinrich, Stephen R. Owens, Madelynne Sheehan, and Matthew Whitman. Information to access written testimony, audio recording of the proceedings, and voting records is addressed below.
- February 27: The House Judiciary Committee held a work session. Eight legislators voted to approve the bill and adopt an amendment. One legislator was excused from the vote. Since the bill was approved with an amendment, the bill, which was still moving through the legislature, was no longer the "Introduced" version of HB 2570. It became the "A-Engrossed" version of HB 2570. The committee's vote to move the bill further through the legislative process is known as a "do pass" recommendation.

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## Legslature

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- HB 2570, A-Engrossed, then had a second reading on the House floor. On March 6, the bill had a third reading, and the members of the entire House voted on the A-Engrossed version of HB 2570. A total of 56 members of the House voted *aye*, and four members were excused from the vote.
- March 7: The process started all over again, but this time in the Senate. The bill had a first reading on the Senate floor. It was referred to the Senate President's desk, then further referred to the Senate Judiciary Committee. On April 25, attorney Michael A. Schmidt provided written and oral testimony. The A-Engrossed version of the bill moved out of the committee with a "do pass" recommendation, with five senators voting in support and one senator excused from the vote. If the Senate had voted to pass the bill with another amendment, then it would have been known as the B-Engrossed version. The bill then had a second and third reading on the Senate floor.
- The full Senate voted on the bill: 25 *ayes*, two *nays*, and three excused votes. Next, the bill was signed by the house speaker, the senate pesident, and either the chief clerk of the House or Senate. The bill no longer was known as the A-Engrossed version of HB 2570. It was then known as the Enrolled version of HB 2570.

While the legislature is in session, the governor has five days to sign the enrolled version. If the legislature is no longer in session, the governor has 30 days to sign the bill. With respect to the enrolled version of HB 2570, the governor signed the bill and it became law. If the governor does not sign an enrolled bill, it still becomes law, unless the governor decides to veto it. A two-thirds vote in both chambers overrides a governor's veto.

Since 1999, the default effective date for laws is January 1 of the year following the bill's passage. Therefore, a bill that became law during the 2013 legislative year most likely took effect on January 1, 2014. Prior to 1999, many laws took effect immediately after the legislative session was concluded. In those days, it was difficult for practitioners to become aware of the recently enacted laws, let alone understand the application and impact of the new law. The idea to change this unnecessary legal minefield came from an OSB member.

#### How to find legislative information

If you are interested in legislative issues or you need to conduct legislative research, there are two very helpful websites: the Oregon State Legislature, www.oregonlegislature.gov and the Public Affairs section of the OSB website, www.osbar.org/pubaffairs.

The OSB website provides information specific to the legal profession's needs such as a list of OSB-sponsored legislative priorities and proposals, a list of legislative task forces and commissions, a web-based tool for lawyer groups to track bills, and information on how OSB lawyers can learn about or become involved in the legislative process.

The Oregon Legislature's website is the resource for legislative research. In addition to finding a bill or law, the website is very useful to research legislative intent. From the website you can use a search engine to find a particular bill by the bill number or by key words such as "guardian" or "protective proceeding." Once you find the bill, you can drill further down for more information such as the bill sponsor, fiscal or revenue impact, analysis from legislative staff, names of testifying witnesses, written testimony, audio recordings of oral testimony or legislative deliberations, and vote history.

The Oregon Legislature's website is also a source for finding senator and representative contact information, your particular political representative, and committee assignments. You can also find an array of information such as citizen involvement, history of the senate and house chambers, photos, and reports on legislative fact-finding missions.

#### Conclusion

Legislative research and political activity can be a fascinating subject, and is necessary to understand legislative intent. If you have questions about legislative processes and procedures, please feel free to contact the authors. ■

# Advance directive legislative update

*By Hilary A. Newcomb, Attorney at Law*

*Hilary Newcomb's Portland practice is exclusive to estates and trusts, with an emphasis on fiduciary litigation. Hilary is a member of the Executive Committee of the Estate Planning and Administration section of the Oregon State Bar and a member of the Estate Planning Council of Portland.*

A bill will soon be proposed to address Oregon's advance directive for health care. Senator Floyd Prozanski's legislative work group, charged with updating Oregon's advance directive form and statutes, has been meeting for some time to analyze this legislation. The proposed bill is expected to be amended further in February 2017, and a final version considered during the 2017 legislative session.

The bill is drafted to accomplish these goals:

- Establish a diverse, elected 13-member Advance Directive Rules Adoption Committee for purposes of adopting a standardized form that is proposed within the next couple of years. (This form will not take effect unless it passes the Legislative Assembly)
- Modify the present statutory form to, for example, make it simpler and provide that the principal's notarized signature is sufficient for execution.
- The new statutes and modified statutory form (in the bill, not from the Rules Adoption Committee) would become operative on January 1, 2018.

The modified statutory form in the bill sunsets on January 1, 2020, because the Rules Adoption Committee is expected to have a newly proposed form by that time.

A savings clause is included in the bill to address previously signed advance directive forms. The bill clarifies that as long as a prior advance directive form was executed under the laws that made it valid at the time of signing, it will remain valid.

You may remember an Oregon State Bar (OSB) survey generated in the early summer of 2015 that asked numerous questions about your practice, the statutory form, and your preferences in regard to the advance directive. All members of OSB's Estate Planning and Administration Section, Elder Law Section and Health Law Section were sent this survey.

Around the same time this OSB survey was sent to attorneys, a similar survey was distributed to Oregon's medical practitioners. The comprehensive results from these surveys were used to identify, frame, and propel the issues within the work group going forward. The consensus drawn from the survey results was that the advance directive form and statutes were unsatisfactory and in need of updating.

The survey consistently concluded among the legal and medical practitioners that:

- The current statutory form is confusing, inconsistent, and dated.
- One statutory form is preferred, as long as improvements are made to the form.
- Simplicity and ease of use in a new form are desired.

The Advance Directive Legislative Work Group, under the charge of Senator Floyd Prozanski, was formed in April of 2015 and continues to meet on the proposed legislation. The advance directive is a controversial topic and the work group experienced related challenges and obstacles. Compromise and concessions were necessary among the medical and legal professions, and only when this happened was the work group able to make progress with draft legislation.

Our OSB section's newsletters are a helpful source for information and updates on this advance directive legislation. For prior updates, see the articles written by attorney and work group member Stephanie Carter and myself, published in the Estate Planning and Administration Section newsletter in the March 2016 and September 2016 issues. Although the proposed legislation does not yet have a bill number as of the drafting of this article, look to the Oregon State Legislature's website for updates at www.oregonlegislature.gov.

Please email me directly at hnewcomb@hanlegal.com if you would like a current copy of the proposed bill. Future articles in our OSB newsletters are expected to cover further updates on this topic. ■

**For a list of members of the legislative work group, see page 24.**

## Advance directive work group

**Channa Newell,** Committee Counsel and Administrator
**Representative Knute Buehler**
**Bob Joondeph,** Disability Rights Oregon
**Amy Zubko,** OSB Public Affairs Legislative Attorney
**Angela Kienholz**, Departing Decisions
**Anne Greer**, Assistant General Counsel at Legacy Health Systems
**Jerry Cohen**, AARP
**Dale Penn**, CFM Senior Public Affairs Associate
**Danielle Sobel,** OMA Associate Director of Health Policy
**Theodore Falk**, Senior Assistant Attorney General, Department of Justice
**Fred Steele**, Oregon Long-Term Care Ombudsman
**Greg Van Pelt**, Oregon Chief Executive, Providence
**Gretchen Brauer-Rieke**, Coda Conversations
**Gwen Dayton,** OHCA Executive Vice President and General Counsel
**Hilary Newcomb**, Attorney, Executive Committee of the OSB T/E Section
**Jack Dempsey,** Oregon Nurses Association Lobbyist
**Janet Price**, Kaiser Permanente
**Jenn Baker**, Oregon Nurses Director of Health Policy and Government Relations
**Jeremy Vandehey**, Kaiser Permanente Health Policy Adviser
**Jessica Adamson**, Providence Director of Government Relations
**Joe Greenman**, OHCA and Providence
**Jon Bartholomew**, AARP
**Julie Hanna,** OHSU Associate Director of State Relations
**Katie Bullard,** Kaiser Permanente
**Kellie Lapp,** Oregon Health Decisions' Executive Director
**Kevin Dirksen**, Providence Senior Clinical Ethicist
**Kevin Mealy**, Oregon Nurses Communications Manager
**Kristen Downey**, Providence
**Liz Baxter**, Oregon Health Authority Consultant
**Mark Enker**, MD with PeaceHealth
**Martha Doyle**, Cambia Health Lobbyist
**Matt Shields**, Attorney, OSB Legislation
**Matt Whitman**, Attorney, Executive Committee of the OSB T/E Section
**Mike Schmidt,** Attorney, Executive Committee of the OSB Elder Law Section
**Nicolas Kockler, Ph.D, MS,** Providence Regional Director
**Robin Moody**, Director of Policy and Compliance for the National Rural Accountable Care Consortium
**Scott Pratt**, University of Oregon, Professor of Philosophy
**Stephanie Carter**, Attorney, OSB Elder Law Section member
**Susan Grabe**, Attorney, OSB Director of Public Affairs
**Dr. Susan Tolle**, OHSU Director of Center for Ethics in Health Care, Professor of Medicine
**Tom Holt,** Cambia Health Lobbyist
**Torrie Fields**, Senior Program Manager, Palliative Care, Blue Shield of California
**Woody English, MD**, retired from Providence and member of the Oregon POLST Task Force

# Resources for elder law attorneys

## Events

**Elder Law Discussion Group**
Legal Aid Services; 520 SW Sixth Ave, Portland
Coffee will be provided.

- February 9 from noon-1:00 p.m.:Mark Sanford from Multnomah County will be speaking about the public guardian and conservator program.
- March 9 from noon-1:00 p.m.: Mark Johnson Robert, OSB Deputy General Counsel, will be speaking about the elder abuse reporting requirement.

**2017 NAELA Annual Conference**
April 25 and 26: Advanced Elder Law Review
April 27 through 29: Annual Conference
Boston Marriott Copley Place
NAELA

**NAELA Summit**
November 15 - 17, 2017
Newport Beach, California
NAELA ■

## Websites

**Elder Law Section website**
OSB Elder Law Section
The website provides useful links for elder law practitioners, past issues of Elder Law Newsletter, and current elder law numbers.

**National Academy of Elder Law Attorneys (NAELA)**
www.naela.org
A professional association of attorneys dedicated to improving the quality of legal services provided to elders and people with special needs.

**OregonLawHelp**
www.oregonlawhelp.org
Helpful information for low-income Oregonians and their lawyers.

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

**Aging and Disability Resource Connection of Oregon**
www.ADRCofOregon.org
Includes downloadable Family Caregiver Handbook, available in English and Spanish versions.

**Big Charts**
http://bigcharts.marketwatch.com
Provides the price of a stock on a specific date.

**American Bar Association Elder Law Section**
www.americanbar.org/groups/senior_lawyers/elder_law.html

# Important elder law numbers

as of January 1, 2017

| Category | Item | Amount |
|---|---|---|
| Supplemental Security Income (SSI) Benefit Standards | Eligible individual | $735/month |
| | Eligible couple | $1,103/month |
| Medicaid (Oregon) | Asset limit for Medicaid recipient | $2,000/month |
| | Long term care income cap | $2,205/month |
| | Community spouse minimum resource standard | $24,180 |
| | Community spouse maximum resource standard | $120,900 |
| | Community spouse minimum and maximum monthly allowance standards | $2,003/month; $3,022.50/month |
| | Excess shelter allowance | Amount above $601/month |
| | SNAP (food stamp) utility allowance used to figure excess shelter allowance | $449/month |
| | Personal needs allowance in nursing home | $60/month |
| | Personal needs allowance in community-based care | $164/month |
| | Room & board rate for community-based care facilities | $571/month |
| | OSIP maintenance standard for person receiving in-home services | $1,235 |
| | Average private pay rate for calculating ineligibility for applications made on or after October 1, 2016 | $8,425/month |
| Medicare | Part B premium | $109.00/month* |
| | Part B premium for those new to Medicare in 2016 | $134.00/month* |
| | Part D premium | Varies according to plan chosen |
| | Part B deductible | $183/year |
| | Part A hospital deductible per spell of illness | $1,316 |
| | Skilled nursing facility co-insurance for days 21–100 | $164.50/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

The Elder Law Newsletter is published quarterly by the Oregon State Bar's Elder Law Section: Monica Pacheco, 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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