



Volume 17
Number 3
July 2014

**Elder Law Section
Executive
Committee**

Chair

Michael A. Schmidt
Aloha

Chair-elect

Erin M. Evers
Hillsboro

Past Chair

Whitney D. Yazzolino
Portland

Secretary

Kay Hyde-Patton
Springfield

Treasurer

Tim McNeil
Portland

Members

Kathryn M. Belcher
Salem

J. Geoffrey Bernhardt
Portland

Victoria D. Blachly
Portland

Jason C. Broesder
Medford

Don Blair Dickman
Eugene

Jan Friedman
Portland

Stephen R. Owen
Portland

Monica D. Pacheco
Salem

Thomas Pixton
Lake Oswego

Madelynne Sheehan
Scappoose

Oregon eCourt transformation project

By Susan Evans Grabe, OSB Public Affairs Director

The Oregon eCourt program is a business transformation project that is fundamentally changing the way that the Oregon Judicial Department interacts with the legal profession and with Oregonians. When completed, the project will fulfill the Oregon eCourt vision: “Oregon eCourt will give courts and judges the tools they need to provide just, prompt, and safe resolution of civil disputes; to improve public safety and the quality of life in our communities; and to improve the lives of children and families in crisis.”

Oregon eCourt seeks to 1) enable the courts to quickly resolve disputes; 2) improve access to court functions for all users; 3) improve data sharing for public safety and the criminal justice community; 4) streamline the business functions of the court system; 5) provide information for criminal, juvenile, and family judicial dispositions; 6) provide decision support for court management; 7) provide data to measure and manage performance; and 8) create a paper-on-demand solution. Meeting these objectives will enable the courts to make better decisions and improve Oregonians’ lives.

The Oregon eCourt program has several major components. The first is statewide enterprise/ electronic content management: an electronic document repository that currently allows subscribers remote access to electronic versions of

most court documents in 11 counties. Additionally, nonsubscribers are able to obtain basic scheduling information and certain payment information online. The second major component is e-filing in the courts, which allows electronic remote Web-based filing of court documents. The third component is a replacement for the department’s current case management system, the Oregon Judicial Information Network (OJIN), with a new, electronic case-management system. This serves as a “virtual case file” that will allow judges to access case information from any location and eliminate the need to maintain a paper case file.

In May, Multnomah County was the eleventh of 36 circuit courts to “go live” with Oregon eCourt and transitioned to a new case management system (Odyssey or OECl), followed by e-filing in July. This is a notable accomplishment and will continue to improve the efficiency of the court system and its ability to serve Oregonians. All circuit courts in the state are scheduled to be online by the middle of 2016.

Nonetheless, with a business transformation of this size, some bumps along the way are to be expected. The Judicial Department, under the leadership of Chief Justice Thomas A. Balmer, and the Oregon State Bar have been actively monitoring the transition and tackling issues as they arise through the Oregon State Bar/ Oregon Judicial Department Task Force on Oregon eCourt Implementation.

OSB/OJD Task Force on Oregon eCourt Implementation

In 2008, the Oregon State Bar in coordination with the Oregon Judicial Department created the OSB / OJD Task Force on Oregon eCourt Implementation. The task force was established to assist the Oregon Judicial Department’s eCourt implementation by providing feedback from Oregon lawyers.

In this issue...

Current topics in elder law	
eFiling.....	1
Case law on censervatorships.....	3
Mortgage lending rules clarified	4
Plus	
Book review.....	5
Resources	6
Important elder law numbers	7

Oregon eCourt *Continued from page 1*



Susan Grabe has served as the Director of OSB Public Affairs Program since 2003. She graduated from Willamette University College of Law, and clerked for Chief Judge Joseph at the Oregon Court of Appeals. She is the former Chair of the National Association of Bar Executives Government Relations Section, and is a past president and board member of the St Andrew Legal Clinic. She is the author of a regular column in the Oregon Women Lawyers newsletter **Capitol Update**.

The task force was charged with:

- assisting in implementation of Oregon eCourt
- providing input and feedback from Bar members
- developing a strategy to communicate with and educate Bar members about Oregon eCourt
- updating the Board of Governors

The task force, chaired by Mark Comstock (an attorney at Garrett Hemann Robertson PC in Salem), has assisted the OJD by providing feedback on business transitions, document conventions, and use of consistent nomenclature when referring to types of filings in the Oregon eCourt system, as well as filing fees, document access fee amounts, and levels and types of access.

The task force has also solicited feedback from Bar groups and provided guidance on the new UTCR 21, *Filing and Service by Electronic Means*, (http://courts.oregon.gov/OJD/docs/programs/utcr/2013_UTCR_ch21.pdf) and the proposed UTCR 22, regarding electronic content management.

Second look at UTCR 21.120

Recently the task force brought UTCR 21.120 to the OJD's attention. A number of Bar members contacted the Oregon State Bar with concerns about this rule. As it is currently written, if a scanned image of an original document containing an original signature of someone other than the filer is eFiled, the original copy with the original signature must be retained by the filer for 10 years.

On June 24, 2014, the Joint OSB/OJD Task Force on Oregon eCourt Implementation met and discussed UTCR 21.120. The task force agreed to review UTCR 21.120 in light of the concerns raised by Bar members.

Summary of concerns discussed at task force meeting

I want to take this opportunity to thank the Elder Law Section, the Estate Planning and Administration Section, and the Family Law Section for providing feedback and possible solutions for the task force to consider as this issue is addressed. Below is a summary of concerns from bar members presented to the Task Force for consideration.

- The scope of UTCR 21.120 is too broad and may discourage use of the eFiling process (although, eFiling will soon be mandatory for OSB members)
- Many law offices have already moved to electronic document retention. The requirements

of UTCR 21.120 impose a significant burden on practitioners, which the courts are mitigating for themselves by transitioning to a paperless system. This seems particularly unbalanced, since the court maintains the "official record" and that record is electronic.

- It can be difficult and time consuming to search through files for specific documents, and storing hard copies can be expensive.
- This rule may create a potential malpractice trap for attorneys. While the PLF encourages lawyers to go paperless, UTCR 21.120 requires lawyers to retain original hard copy documents. This inconsistency between the PLF and the OJD guidance could lead to malpractice claims.
- The rule raises liability concerns over the security of information contained in the document, destruction by flood and/or fire, and storage protocols.
- It may be preferable to centralize document storage with the courts, as it will reduce costs and result in consistent document protection practices.
- There are varying opinions about the utility of maintaining the documents. While access to the original signature may be useful if the authenticity is contested, it is rarely necessary.
- It is unclear what will happen when a lawyer retires and who will be responsible for the documents.
- There are concerns regarding document management in the dissolution of a law firm. If more than one lawyer worked on a file, it is unclear who will be responsible for maintaining and producing the original document.
- It may be preferable to have the official record be the electronic record already maintained by the court.
- While UTCR 21.120 does not apply to original wills as they are not filed with the court, it will apply to many documents from probate and family law cases.
- When a probate petition is filed, the original will, if one exists, must be filed with the court under ORS 113.035 (10)

The OSB/OJD task force will continue to work to address concerns raised by Bar members in a constructive manner to ensure a smooth and successful transition to Oregon eCourt. We welcome your feedback and comments regarding problems associated with Oregon eCourt implementation. Feel free to contact me at pubaff@osbar.org ■

Fuentes v. Tillett ruling on conservatorships

By Brooks Cooper, Attorney at Law



Brooks Cooper earned his JD from Northwestern School of Law of Lewis and Clark College. He joined the Oregon State Bar in 1994 and the Washington State Bar in 2002. He represents litigants in trust, estate, and fiduciary duty matters in Oregon and Washington. He is a partner in the firm Draneas & Huglin PC in Lake Oswego.

In *Fuentes v. Tillett*, 263 Or App 9, 326 P3d 1263 (2014), the Court of Appeals gave helpful guidance regarding conservatorships and the accountings filed in them.

Tillett was the conservator for Fuentes, who was a minor. Tillett served from 1999 until 2008. In each year Tillett filed and the court approved accountings as required by the statute.

Tillett was Fuentes's aunt. Fuentes's mother died because of drug complications relating to the drug combination Fen-Phen. The conservatorship was funded with \$600,000 of wrongful-death proceeds from an action brought against a manufacturer of the drug.

For the next eight years Fuentes lived with Tillett, who cared for her as her court-appointed guardian. Tillett sought court approval to pay herself a monthly salary for caregiving, and to receive a further "allowance" from the funds to defray living expenses for the minor. The court approved this and for the next eight years while Tillett was the conservator she received a salary and the allowances. In 2008 Fuentes's older sister reached the age of majority and became successor conservator for Fuentes.

The successor conservator filed an objection to each of the eight annual accountings that had been filed by Tillett and approved by the court. The Circuit Court dismissed those objections as untimely.

The successor conservator then filed a civil action for money damages alleging the same facts and circumstances as presented in the objection. The Circuit Court dismissed that matter and held that the probate court overseeing the conservatorship was the exclusive venue in which these claims could have been made. The successor conservator also, in a civil action, brought a claim against Tillett's attorney who had represented her in her capacity as conservator. The Circuit Court dismissed the claims against the attorney holding that no attorney-client relationship existed between him and Fuentes and that he had a qualified privilege with respect to the advice he gave Tillett.

The successor conservator then returned to the probate court and filed a petition to surcharge Tillett, arguing the same facts as in the dismissed civil action. This was dismissed on the

basis that the allegations had been adjudicated previously, when the objections in the conservatorship were denied as untimely.

This was the posture in which the matter was appealed.

The allegations of the successor conservator were that Tillett had failed to pay her share of the joint living expenses, relied instead on the conservatorship funds to effectively pay her share of them, failed to account for and repay loans she had been allowed to take from the conservatorship funds, and continued to receive an allowance and salary from the conservatorship after she no longer resided with and cared for the minor.

The Court of Appeals affirmed in part, and reversed in part.

As to the claims against the attorney, the court held that they were properly dismissed. The court applied the rule announced by the Supreme Court in *Reynolds v. Schrock*, 341 Or 338, 142 P3d 1062 (2006) and held that the attorney's conduct in advising and representing the conservator, even if negligent, does not give rise to a direct claim by the protected person.

As to the successor conservator's objection to the first through eighth annual accountings the successor conservator made two arguments.

First, the successor conservator argued that the notice and hearing requirements in ORS 125.480 were not satisfied, and thus the orders approving the interim accountings could not be final as to the protected person's rights and that the objections related to things not disclosed in the accountings.

As to the notice argument, it was undisputed on the facts of the case that notice was mailed by the conservator's attorney to every person entitled to it pursuant to ORS 125.475(5). Instead the successor conservator argued that because the statute speaks of "notice and hearing" the orders were not final because the probate court never held evidentiary hearings on the accountings before it approved them.

The court reviewed the first two sentences of ORS 125.480, compared them to ORS 125.080, and concluded that the language regarding a

Continued on page 4

Fuentes v. Tillett

Continued from page 3

“hearing” is operative only when a timely objection is filed. Stated another way, the common practice in Oregon that accountings are filed, and orders entered after the time for objections has run, without a hearing, comports with the statutory scheme and is proper.

The court did however agree with the successor conservator that if the objections relate to matters not disclosed in the accountings, the orders approving the accountings cannot cut off the protected person’s rights to complain about those undisclosed matters.

Specifically, the court agreed with plaintiffs that the intermediate accounting orders were final only as to the conservator’s liability regarding the matters that were actually presented to, and considered by, the probate court when it approved the interim accountings. *Fuentes*, 263 Or App at 19.

The court analogized the preclusive effect given to orders on intermediate accountings in

conservatorships to the principles of issue preclusion. An objection is untimely only if it relates to matters actually disclosed by the accounting, and thus presumptively considered by the court in approving the accounting.

The court also affirmed the dismissal of the civil action. The court held that because the issues had been litigated in the conservatorship matter, the later-filed civil action was barred by claim preclusion. Interestingly, the court could have ruled that the sole venue for challenging the conservator’s conduct was within the conservatorship proceeding and not in a separate civil action, but did not do so.

Counsel representing a conservator should be sure that each interim accounting is full and complete, especially as to things that could look problematic.

Without full disclosure, the accounting and the order approving it will not actually cut off the conservator’s liability for misdeeds not disclosed in the accounting. The Court of Appeals did not give any direct guidance as to how specific and clear such disclosure must be, but obviously, the more clear and specific the disclosure the more likely it is that the order will have the preclusive effect that we all would expect it to have.

The Court of Appeals remanded the matter for consideration of the objections insofar as they did not relate to things disclosed in the interim accountings. The matter remains pending in the trial court. ■

CFPB clarifies mortgage lending rules for heirs

Reverse mortgages, which allow homeowners 62 and older to borrow money against the value of their homes that need not be paid back until they move out or die, have sometimes created problems for heirs. In a move that will help heirs, especially those who inherit homes with reverse mortgages, the Consumer Financial Protection Bureau (CFPB) on July 8 issued an interpretive rule to clarify that when a borrower dies, the name of the borrower’s heir generally may be added to the mortgage without triggering the bureau’s ability-to-repay rule. This clarification will help surviving family members who acquire title to a property to take over the mortgage, and to be considered for a loan workout, if necessary, to keep their home.

When property legally transfers from family members to their heirs and there is still an outstanding loan on the property, there can be significant consequences if an heir is not able to add his or her name to the mortgage. For example, if the heir seeks a modification to ensure they can retain the home, the creditor may refuse to modify the debt on the grounds that the heir is not officially named on the mortgage. Lenders may insist on repayment of the whole

amount of the mortgage and the heirs may not be able to come up with the money, triggering a foreclosure.

In January 2013, the CFPB finalized several mortgage rules, most of which took effect in January 2014. Among these rules, the ability-to-repay rule protects consumers from irresponsible mortgage lending by requiring that lenders generally make a reasonable, good-faith determination that prospective borrowers have the ability to repay their loans.

However, the CFPB’s July interpretive rule explains that because an heir has already acquired the title to the home, adding the heir as a borrower on the mortgage does *not* trigger the ability-to-repay requirements.

The rule does not require the creditor to determine the heir’s ability to repay the mortgage before formally recognizing the heir as the borrower. As the named borrower, the heir may more easily be able to obtain account information, pay off the loan, or seek a loan modification.

The interpretive rule can also apply to other transfers, including transfers to living trusts, transfers during life from parents to children, transfers resulting from divorce or legal separation, and other family-related transfers.

The interpretive rule is available at: http://files.consumerfinance.gov/f/201407_cfpb_bulletin_mortgage-lending-rules_successors.pdf.

The CFPB maintains a regulatory implementation website, which consolidates all of the new 2013 mortgage rules and related implementation materials. It is available at: www.consumerfinance.gov/regulatory-implementation. ■

Book review

Life: The Next Phase

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



Helen Hempel, who practiced elder law in Eugene from 1991 to 2001, has a solo practice in Salinas, California, the county seat of Monterey County and hometown of John Steinbeck. She is a Certified Elder Law Attorney (CELA) and a member of National Academy of Elder Law Attorneys, the Alliance on Aging Board, Alzheimer's Association Local Program Committee, and the California Advocates for Nursing Home Reform. Her firm's website is www.hempellaw.com.

Helen Hempel, a very active member of the Elder Law Section during the 1990s, has co-authored a book for family members and friends who are caring for people who need varying levels of assistance and for people planning ahead for their own possible incapacity. The book, which does not focus on the law or programs of any particular jurisdiction, would be a good addition to an elder law attorney's library of materials for clients. It includes some suggestions that might even help attorneys themselves.

The book, entitled *Life: The Next Phase*, is organized by the types of situations that readers might face: loved ones needing part-time assistance, those needing full-time help, crises, and planning for one's own future needs.

Each section of the book discusses financial and legal issues, as well as sometimes more difficult topics such as how to talk with the person being cared for about his or her needs and how to coordinate the wishes and efforts of family members. It also emphasizes how to take care of oneself in the process of caring for another.

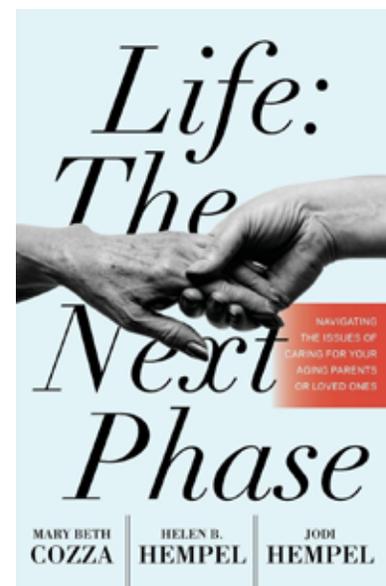
According to Hempel, "The biggest challenge facing caregivers, no matter at what level, is information. Clients come to me describing what is happening to their parents, for example, with the tag line: 'I don't know what to do.' Having a guide, knowing what the component parts of the plan should be, gives clients (and others) comfort and confidence that they have a step-by-step plan by which to address the problems."

She added, "My co-authors had the idea for a book. In particular, Mary Beth Cozza was dealing at long distance with her uncle and aunt's declining physical and cognitive abilities. She and Jodi Hempel (my stepdaughter) were former colleagues in the corporate world and friends and discussed the problems Mary Beth was encountering. Jodi shared the struggles she had in providing care for her mother and later her experiences when Val (her father, my husband) had a terminal illness. Because neither of them could find a satisfactory or practical resource, they decided to explore writing a book. They turned to me to provide situational, legal and resource information."

Grace Lebow, co-author of the book *Coping with Your Difficult Older Parent: A Guide for*

Stressed-Out Children, praised the book, saying, "The underlying philosophy of stepping in (together with), not stepping over your aging parents' desires underlies this practical book's roadmap through the important areas of concern for your loved ones' present and future wellbeing."

The book was published by Authority Publishing and is available from Amazon.com, Barnes and Noble, and Powell's Books. The authors have also created a website with additional information and resources, www.lifethenextphase.com. ■



"You go home for the holidays and notice that things are not like they usually are; you are only there for a few days and you feel pressure to "fix" everything before you leave. You are concerned that your loved one is having difficulty on his or her own. Or you call your sister on the phone and she sounds confused; you panic thinking she has had a stroke. Or your close friend mentions that he forgot to turn off the stove and left it on all night; you are thankful the house did not burn down. These are just some of the ways it becomes clear our loved ones may need assistance. "

Resources for elder law attorneys

Events

Elder Law Discussion Group

Legal Aid Services Portland conference room
520 SW Sixth Ave, 11th Floor; Portland
August 14, 2014; Noon–1:00 p.m.
Penny Davis will present on “Medicaid
Developments after the Affordable Care Act.”

September 11, 2014; Noon–1:00 p.m.
Julie Nimnicht of Geoff Bernhardt’s office
will update the group on the SAVO (Special
Advocates for Vulnerable Oregonians) program
in Multnomah County and introduce its new
director, attorney Tracy Connor.

RSVPs appreciated, but not required. To listen to
the talk via phone, call 716-273-1257 and enter
access code 13865088.

Contact: Andrea Ogston:
andrea.ogston@lasoregon.org; 503.224.4086

Trust Alternatives

OSB Audio Online Seminar
August 14, 2014/10:00–11:00 a.m.
www.osbar.org/cle

Guardianships and Conservatorships

Oregon Law Institute Seminar
October 24, 2014
Ambridge Event Center; Portland
http://law.lclark.edu/continuing_education

National Adult Protective Services Association Conference

October 29–30, 2014
Portland Marriot Downtown Waterfront Hotel
<http://www.napsa-now.org>

Fifth Annual Summit on Elder Financial Abuse

October 31, 2014
Portland Marriot Downtown Waterfront Hotel
www.napsa-now.org

EstatePlannig

OSB New Lawyers Division seminar
November 13, 2014/12:00–1:00 p.m.
Multnomah County Courthouse, Portland
www.osbar.org/onld/upcoming.html ■

Websites

Elder Law Section website

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

DHS/OHA form for authorization of use and disclosure of medical information

<https://apps.state.or.us/Forms/Served/de2099.pdf>

Aging and Disability Resource Connection

<https://adrcforegon.org>
Information about long-term supports and services. Includes download-
able *Family Caregiver Handbook*, available in English and Spanish versions.

OregonLawHelp

www.oregonlawhelp.org
Helpful information for low-income Oregonians and their lawyers. Much of
the information is useful for clients in any income bracket.

Administration on Aging

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

SSA benefit verification letters online

Local Social Security offices will stop
providing benefit verification letters to
recipients as of October 1, 2014. The Social
Security Administration is asking those whose
clients need proof of their Social Security or
Supplemental Security Income benefits to
refer them to a website.

Your clients can get a benefit verification
letter online instantly through “my Social
Security account” at www.socialsecurity.gov/myaccount.

They can view, print, or save an official
letter that includes proof of their benefit
amount and type, Medicare start date and
withholding amount, and age.

The fact sheet, *How To Create An Online
Account* (Publication No. 05-10540), provides
step-by-step instructions and explains how to
get a benefit verification letter. It can be found
at www.ssa.gov/pubs/EN-05-10540.pdf.

If your clients are unable to go online, they
can call the Social Security Administration toll-
free to request a letter by mail.

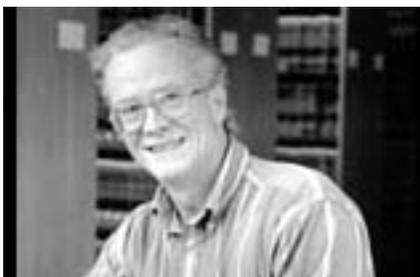
The toll-free number is 800.772.1213
(TTY 800.325.0778). ■

Important elder law numbers

as of July 1, 2014

Supplemental Security Income (SSI) Benefit Standards	Eligible individual.....\$721/month Eligible couple..... \$1,082/month
Medicaid (Oregon)	Long term care income cap..... \$2,163/month Community spouse minimum resource standard..... \$23,448 Community spouse maximum resource standard \$117,240 Community spouse minimum and maximum monthly allowance standards.....\$1,967/month; \$2,931/month Excess shelter allowance Amount above \$590/month SNAP (food stamp) utility allowance used to figure excess shelter allowance\$441/month Personal needs allowance in nursing home\$60/month Personal needs allowance in community-based care..... \$160/month Room & board rate for community-based care facilities..... \$561/month OSIP maintenance standard for person receiving in-home services\$1,221 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2010..... \$7,663/month
Medicare	Part B premium \$104.90/month* Part B deductible..... \$147/year Part A hospital deductible per spell of illness.....\$1,216 Part D premium: Varies according to plan chosen Skilled nursing facility co-insurance for days 21-100..... \$152/day * Premiums are higher if annual income is more than \$85,000 (single filer) or \$170,000 (married couple filing jointly).

Thanks, Bernie!



Many thanks to Professor Bernard Vail as he steps down from the *Elder Law Newsletter* advisory board. He has been a faithful reviewer of articles for the past 13 years. I have enjoyed working with him and will miss his very helpful comments and suggestions.

Professor Vail is retiring from Lewis and Clark Law School, where he has been a member of the faculty since 1972.

Carole Barkley, Editor

Newsletter Advisory Board

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

Editor:

Carole Barkley..... carole424@aol.com; 503.224.0098

Advisory Board:

- Erin Evers, Chairerin@evers-law.com: 503.640.1084
- Dady K. Blake..... dady@dadylaw.com; 503.249.0502
- Hon. Claudia M. Burton claudia.m.burton@ojd.state.or.us; 503.378.4621
- Penny Davis..... penny@theelderlawfirm.com; 503.452.5050
- Prof. Leslie Harris..... lharris@law.uoregon.edu; 541.346.3840
- Phil Hingson phil@oregontrustattorney.com; 503.639.4800
- Leslie Kay leslie.kay@lasoregon.org; 503.224.4086
- Karen Knauerhase..... karen@knauerhaselaw.com; 503.228.0055
- William J. Kuhn kuhnandspicer@windwave.org; 541.567.8301
- Monica Pacheco..... monica@dcm-law.com; 503.364.7000
- Daniel Robertson..... drobertson@armlaw.us; 541.673.0171
- Barbara Smythe..... barbara@elderlawportland.com 503.496.5515
- Mary Thuemmel marythuemmel@gmail.com; 503.318.8393