



Elder Law Newsletter

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Elder Law Section bills become law

By Ruth E. Simonis, Aloha and Dady K. Blake, Portland

Four of the six bills proposed by the Elder Law Section made it through the 2001 Oregon legislative session. The legislature enacted House Bills 2363, 2367, and 2368—which relate to protective proceedings—and HB 2365, which deals with powers of attorney. Several other new pieces of legislation will also affect the practice of elder law in our state.

Bills sponsored by Elder Law Section

Notice Provision (HB 2363)

The bill modifies notice requirements in protective proceedings. During the 1999 legislative session, new notice requirements involving a petition for guardianship were

codified in ORS 125.070(3). These were supposed to be additions to the traditional notice requirements in ORS 125.070(2).

However, because of the way the statute was written, the notice requirements in ORS 125.070(2) applied only to cases involving minor respondents, and the statutory notice form created under ORS 125.070(3) applied only to adult respondents.

Under HB 2363, the notice requirements codified as ORS 125.070(3) are amended to include the relevant notice requirements listed in ORS 125.070(2), resulting in one standardized, comprehensive statutory notice form to all adult respondents in a guardianship.

Notice Provision (HB 2367)

House Bill 2367 amends ORS 125.320 to require the guardian to file a statement of intent with the court *prior* to placement of the adult protected person in a mental health treatment facility, nursing home, or other residential facility. ORS 125.320(3)(c) expands the list of persons who must be notified to include any attorney who represented the protected person at any time during the protected proceeding, the Office of the Long Term Care Ombudsman, and the agency which protects and advocates the rights of individuals with developmental disabilities and mental illness. However, ORS 125.320(3)(f) was added to make it clear that an attorney who receives such a notice is not required to represent the protected person in the protective proceeding.

Advance Directives (HB 2368)

The bill amends ORS 127.550 and 125.010 to authorize a single proceeding for judicial consideration of issues regarding an advance directive, together with issues

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Unless a bill contains an emergency clause, all legislation becomes effective January 1, 2002.

regarding appointment of a guardian or temporary guardian.

ORS 127.550 provides interested parties a forum in which to submit a petition for judicial review and seek resolution solely on matters pertaining to an advance directive. ORS 125.010 allows an interested party to petition the court in a separate action for appointment as guardian to make medical decisions on behalf of an incapacitated respondent. Where there is disagreement about the authority to make medical decisions on behalf of the incapacitated principal, interested parties may attempt to pursue separate tracks of resolution.

HB 2368 saves time, court costs, and attorney fees by allowing issues pertaining to the validity and authority of an advance directive to be decided "by a court as part of a protected proceeding (under ORS 125) in which a guardian or temporary guardian has been appointed for the principal, or in which the petition seeks the appointment of a guardian or a temporary guardian for the principal."

Powers of Attorney (HB 2365)

House Bill 2365 amends ORS 127.005, and provides that a party may not refuse to recognize a power of attorney solely because of the amount of time that has passed since the document was executed. It creates a new provision that limits the liability of persons who, acting in good faith, rely on the power of attorney. It provides that the agent must use the principal's property for the benefit of the principal unless provided otherwise in the document. The law applies to power of attorney documents created prior to the effective date of the change.

Elder law attorneys sought this bill based on their experience with refusal of powers of attorney based on date of execution. The bill was significantly changed during the legislative session because of opposition from the

Oregon Banking Association (OBA). The final version lost many of its "teeth," including a damage provision (with attorney fees). The OBA suggested that language which limits liability would encourage third parties to accept older documents. The provision requiring that the agent use the principal's property for the principal was an edited version of language aimed at reducing abuses of powers of attorney. The original language was modeled after Washington's power of attorney statute. In its present form it will have little effect on curtail- ing abuse.

Please contact Dady K. Blake about your clients' experiences with the new law (email: dadylaw@dsl-only.net). The Elder Law Section will be looking at additional legislation if this does not work.

**Other relevant legislation
Guardianships (HB 2382)**

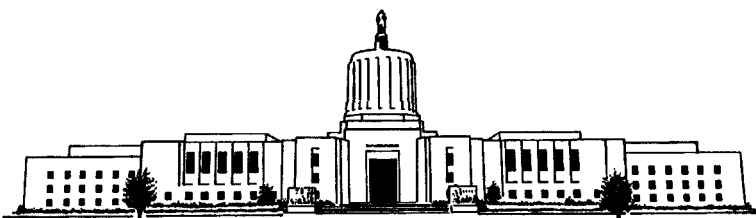
House Bill 2382 amends ORCP 69B, and provides that a party who seeks a default judgment must submit an affidavit that the party has no knowledge that a guardian or conservator has been appointed for the person against whom the judgment is sought.

Civil Commitment (HB 2398)

The bill amends ORS 426.234 & 236, which deals with the release of information and civil commitment proceedings. It requires that facilities establish rules for the release of information about persons held in custody. It requires that certain information be released to persons designated to receive it, if authorized by the patient. It also requires that the closest relative be notified of admission, unless the patient requests otherwise.

Real Estate Dealings (SB 446)

This revision of Oregon's licensing system for real estate professionals is of interest to our Section. ORS 696.030 is amended to clarify who is excluded from the enhanced real estate licensing requirements. An unlicensed person acting as attorney-in-fact under a duly executed power of attorney can meet a safe harbor exclusion if (1) the power is recorded; (2) the power specifically describes the real estate to be sold, leased, or exchanged; and (3) the power is not used to engage in professional real estate activity



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(receives no compensation).

The revisions with respect to "exclusions" attempt to target those individuals who unlawfully use a power of attorney to circumvent real estate licensing requirements. However, the statute is unclear and would seem to indicate that if you did not meet the three-prong test, you may not fall within the safe-harbor exclusion.

We have opened dialogue with the Real Estate Agency Policy Coordinator entrusted with establishing administrative rules in hopes of securing a policy statement which clarifies his position.

Until we clarify whether or to what extent this statute applies to unlicensed persons acting without expectation of compensation, those who draft estate planning documents may wish to consider modifying their power of attorney documents to include the specific addresses of real property the agent is authorized to manage and control. This will place one's clients more in line with the real estate licensing safe-harbor exclusions. It will also satisfy a number of title companies who strongly encourage the inclusion of real property addresses in the power of attorney as evidence of specific authority to transact business involving a particular piece of property.

On the other hand, estate planners who deal with paid private fiduciaries or who include "payment to agent" provisions in their powers of attorney need to make sure that no payment occurs for actions taken with respect to the sale or lease of real property. Compensation under those circumstances is a clear violation of the real estate licensing laws.

Elder Abuse (SB 780)

Senate Bill 780 amends ORS 40.460 to provide that a witness's complaint of abuse or criminal mistreatment of or theft from an elderly person may be considered as evidence by the trier of fact in trial or other hearing, and is not subject to exclusion as hearsay. It does not apply to statements of abuse made by nursing home residents. SB 780 is patterned after the California Evidence Code, and the bill was supported by law enforcement agencies to enable more effective prosecution of elder abuse crimes.

Elder Abuse (SB 956)

The bill amends ORS 124.100 to modify

the provisions which deal with actions against the physical or financial abuse of an elderly or incapacitated person. It provides that action may be brought by the personal representative for the estate of such a person.

Rental Assistance (SB 425)

Under the provisions of the bill, more than one taxpayer in a household may claim an Elderly Rental Assistance payment. It also extends the filing deadline for ERA payments to July 1. Any returns filed after that date would be processed in the following year. It changes the payment date for ERA claims from October to November 15.

Property Taxes (HB 2208)

The bill removes obsolete requirements for recording information on property tax rolls. It revises provisions which deal with rental assistance for the elderly and non-profit housing assistance. The bill increases the maximum household income that individuals may have to qualify for homestead property tax deferral. It extends the sunset date for property tax exemption for certain land acquired by Indian tribes. It increases the household income threshold to qualify for deferral of special assessments for local improvements. It indexes the household income threshold to inflation. The new law applies to tax years that begin on or after July 1, 2002.

Foster Homes (SB 210)

Senate Bill 210 amends ORS 443.740, 765 & 767, which address foster home complaints. It requires the appropriate division of the Department of Human Services or the Area Agency on Aging to document the outcome of a complaint investigation against an adult foster home. For the purpose of granting immunity from liability to a person who participates in the filing of a complaint against an adult foster home, the bill clarifies what is meant by acting in good faith.

Nursing Homes Project (SB 512)

Senate Bill 512 directs Seniors and People with Disabilities Services to establish a demonstration project for the regulation of nursing homes. It creates a Senior Consumer Advisory Committee to monitor and assess demonstration projects. It also creates an additional licensing fee for 2002 through 2004. Sunset date for the project is June 30, 2005.

*Members of the
Elder Law Section
Legislative
Subcommittee are
Dady Blake,
Ryan Gibb,
Ruth Simonis, and
Jennifer Wright*

How new Oregon trust and estate statutes affect elder law practitioners

By Jonathan Levy



Jonathan A. Levy practices law in Portland, with a focus on estate planning and elder law. He is a member of the executive committee of the OSB Estate Planning and Administration Section, and a past chair of the Oregon Trust Bankers' Association.

This article summarizes six new statutes that will affect the practices of elder law attorneys. A more complete description of this legislation appears in the 2001 *Oregon Legislation Highlights* published by the Oregon State Bar.

Creditors' Claims Against Revocable Trusts (SB 120)

Under current law, claims against a decedent can be satisfied with assets of a revocable trust established by the decedent during his or her lifetime. This creates two problems for trust parties who wish to give notice to creditors of the deceased trust grantor and thereby shorten the statute of limitations for presenting claims.

First, it is unclear whether the probate notice to creditors cuts off claims against revocable trust assets. Some, but not all, estate planning lawyers believe that the giving of probate notice to creditors does protect the trust assets. However, there is no Oregon court case to confirm this belief.

Second, even assuming that probate notice is effective as to revocable-trust assets, the decision of whether to invoke probate creates a dilemma for families with trusts. Initiating a formal probate with notice to creditors defeats the goal of avoiding probate, a chief motive for revocable trusts. On the other hand, not giving notice means that trust assets remain vulnerable to creditors' claims for an extended period—probably two years under ORS 115.005(4)—after the grantor's death.

Senate Bill 120 addresses the problem by creating an optional probate-like, but streamlined procedure by which a trustee may notify creditors that the grantor has died and that trust assets are about to be distributed. This optional procedure parallels the existing probate notice procedure and incorporates many of the provisions of ORS chapter 115. The trustee publishes a death notice in the newspaper and mails a notice to known and reasonably discoverable creditors. If no creditor steps forward during the time period—basically four months—the trustee can distribute the trust assets without the worry of future claims. If a creditor does present a claim, the trustee can either pay the claim or

ask the court to rule whether the claim is valid. However, SB 120 does not change existing substantive law on whether particular claims are valid.

Subsection 1(2) of SB 120 defines the types of trusts to which SB 120 applies—essentially revocable trusts that are will substitutes. This excludes testamentary trusts or irrevocable inter vivos trusts, such as life insurance trusts and charitable remainder trusts. Revocable trusts include those that become irrevocable during the grantor's lifetime because of incapacity.

Subsection 1(2)(C) limits the scope of SB 120 to claims arising from debts or liabilities of the grantor. Thus, SB 120 should have no effect on liabilities of the trust itself, such as loans taken out by the trustee on behalf of the trust or personal injury claims caused by improper maintenance of trust property.

Uniform Disclaimer of Property Interests Act (SB 123)

SB 123 enacts the Uniform Disclaimer of Property Interests Act (UDPIA) in Oregon. This act replaces Oregon's versions of the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act, ORS 105.625 to 105.640, and the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, ORS 112.650 to 112.667. SB 123 will apply only to disclaimers made on or after January 1, 2002.

The UDPIA carries forward many features of the previous disclaimer statutes. However, it also makes some important changes to those statutes:

- a. UDPIA does not impose a specific time limit for making a disclaimer. The prior disclaimer statutes had a nine-month deadline from the creation of the disclaimed interest. This generally matched the deadline for tax-qualified disclaimers under IRC §2518. The UDPIA recognizes that disclaimers may serve purposes other than tax planning, such as keeping property from the disclaimant's creditors or avoiding liability for holding title to contaminated real estate. A disclaimer that comes too late to qualify under §2518

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Trust and estate laws

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may still be effective under the UDPIA for non-tax purposes.

- b. The UDPIA creates rules for several types of disclaimers that were not expressly covered in the previous statutes. There are now detailed rules for disclaimers of joint property. (Section 7) A trustee may disclaim assets that would otherwise become trust property, or powers held in a fiduciary capacity. These fiduciary disclaimers must be consistent with the trustee's fiduciary duties. (Sections 8 and 11) The disclaimer of powers of appointment and interests which result from the exercise of such powers of appointment are also covered in more detail. (Sections 9 and 10)

Oregon's version of UDPIA largely follows the text as approved by the National Conference of Commissioners on Uniform State Laws. One difference is that section 14, dealing with tax-qualified disclaimers, refers to the provisions of the Internal Revenue Code and regulations in effect on the effective date of the act, January 1, 2002, rather than to the Code and regulations, including later amendments. This change avoids a possible violation of Article II, section 21 of the Oregon Constitution.

A second non-uniform provision is Section 17, which prohibits disclaimers made with the purpose or effect of preventing recovery of assets under ORS 411.620 (relating to state reimbursement for certain public assistance, including Medicaid benefits).

Custodial Accounts (SB 122)

SB 122 increases from \$10,000 to \$30,000 the amount that may be transferred to a custodian, for the benefit of a minor, without court approval. Note that a larger amount may be transferred to a custodian without court approval if the transfer is authorized by the governing trust or will.

SB 122 also authorizes the creation of custodial accounts that last until age 25.

Priority of Child Support Arrearages in Probate (SB 165)

SB 165 provides that child support arrearages have priority over general creditors and certain state reimbursement claims in a probate estate in which assets are insufficient to pay all claims. This priority applies only to estates for which probate petitions were filed on or after January 1, 2001.

Authority to Open Safe Deposit Boxes (SB 186)

SB 186 makes a technical correction to ORS 708A.655 to include out-of-state banks and trust companies which do business in Oregon as being within the law that sets procedures for opening safe deposit boxes of deceased persons.

Pet Trusts (SB 166)

SB 166 authorizes the creation of private trusts to care for designated domestic or pet animals. Previously, it was unclear whether private trusts for pets were legally enforceable.

Legislation on the Web

To research new state laws and the fate of bills which were before the 2001 Oregon legislature, go to www.leg.state.or.us and click on Bills/Laws.

Executive order creates task force

Executive Order No. EO 01-10 creates the Task Force on the Future of Services to Seniors and People with Disabilities. The task force will review, analyze, and recommend changes in the state's age and disability-related programs and policies. The executive order, signed by Governor John Kitzhaber on June 30, 2001, cites several concerns:

- An increasing number of older and disabled people
- A limited number of available caregivers
- Evidence that many individuals will outlive their financial resources
- A shortage of affordable housing
- A shortage of accessible transportation

The task force will be comprised of elders and people with disabilities, representatives from organizations who serve this population, and policymakers. It will be expected to make its first report to the governor by September 1, 2002, so that its recommendations can be considered in budget development.

EGTRRA, MDIB and other federal tax developments

Good news and bad news on the federal tax front

by Katherine M. Zelko



Katherine M. Zelko is a sole practitioner in Portland whose practice emphasizes estate planning and administration. She holds an LL.M. in taxation.

It is a rare occasion when the Internal Revenue Service does taxpayers (much less their legal advisors) a service. It did so in January of this year when it issued new proposed regulations in Code Section 401(a)(9) which govern the computation of minimum distributions from IRAs and other qualified plans.

Under the previous regulations, at age 70-1/2 a person had to choose from a bewildering array of methods for determining how much one would be required to withdraw from an IRA or qualified retirement plan each year. The choice depended on the age of one's spouse or other beneficiary, who the designated beneficiary was, and whether one chose to recalculate life expectancy for one's self and/or spouse each year. Once made, the choice was irrevocable. Also, if beneficiaries were changed after age 70-1/2, the required distributions might increase, but they would never decrease. There was a real disadvantage to naming a charity as beneficiary of an IRA, because the owner/participant was then forced to use a single life expectancy for determining required distributions. The new proposed regulations—which are to become final for distributions after 2001 and may be used for distributions in 2001—provide for a much simpler and generally more favorable method of computing distributions, and eliminate many of the problems that existed under the old scheme.

Briefly, the regulations assume that an IRA owner or plan participant has designated a beneficiary who is 10 years younger, and distributions are computed under the minimum distribution incidental benefit (MDIB) table set forth in Proposed Regs. 1.401(a)(9)-2. Because the beneficiary is generally a spouse who is less than 10 years younger, the new rules result in a longer payout period and smaller required distributions. If the owner/participant's spouse is actually more than 10 years younger, the more favorable joint life expectancy tables can be used.

The details of the new regulations—Prop. Treas. Reg. 1.401(a)(9)-0 through 1.401(a)(9)-8—are too lengthy for this space. An excellent summary can be found at [\[plan.com\]\(http://plan.com\), the Web site of Natalie Choate, a national authority on estate planning for retirement benefits. For our purposes, remember that:](http://www.atax-</p>
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(a) clients should look at the new rules before taking their 2001 distributions if possible, and certainly before taking their 2002 distributions; and

(b) upon the death of a client with an IRA or other qualified plan, review the rules to determine if the beneficiaries qualify for a more favorable payout period than the one adopted by the decedent.

Congress guarantees uncertainty with EGTRRA

The other major federal tax development so far this year is more of a mixed blessing. In June, President Bush signed into law the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), intended to deliver a \$1.35 trillion tax cut over the next 10 years. (The full text of EGTRRA, together with legislative history and explanation, is available from any of the national tax publishers, such as CCH, BNA, RIA, and Tax Analysts.)

Most provisions of EGTRRA are good news for our older clients and their families—at least temporarily. Under Section 901(a)(1) of the Act, all changes made by the Act expire (“sunset”) after calendar year 2010, and thereafter the Internal Revenue Code is applied as if EGTRRA had never existed.

Income tax relief

Until the Act expires (or until Congress makes further changes), many taxpayers will enjoy income tax relief. In addition to income tax rate reductions and marriage penalty relief for all taxpayers, higher-income tax payers will benefit from an increase in the alternative minimum tax exemption and the elimination of limits on itemized deductions and personal exemptions. There are increases in the amount of permitted contributions to IRAs and permitted deferrals under 401(k) plans and a tax credit for low and middle-income taxpayers who contribute to IRAs or elect to defer

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Federal tax laws

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income under a 401(k) plan. There is a new exclusion from gross income for qualified retirement planning services, which may encourage employers to offer retirement education programs for employees and their families. And, in a much-needed reform of a harsh rule, the IRS is given authority (after 2001) to waive in hardship cases the 60-day rollover period for qualified plan distributions. Under present law, if a taxpayer receives a distribution from an IRA or qualified plan and fails to roll it over to a new IRA within 60 days, the entire distribution is taxable, even where the failure to roll over was due to the taxpayer's ill health or incapacity. It remains to be seen, however, what criteria the IRS will use in determining whether a hardship exists.

Death tax uncertainty

For estate planners, EGTRRA introduces more uncertainty than ever into an already complex area of practice. At first glance, its provisions are welcome. The present \$675,000 exclusion from the estate tax is raised to \$1 million for persons who die in 2002 and 2003, to \$1.5 million for deaths in 2004 and 2005, to \$2 million for deaths in 2006 through 2008, and to \$3.5 million for deaths in 2009. In 2010, the estate tax is repealed entirely. The marginal rates of estate tax are also gradually reduced to a maximum of 50% to 45%. The unlimited marital deduction is preserved, as is the unlimited charitable deduction.

This estate tax relief, however welcome, brings many complications. The fact that the exclusion amount is phased in fairly quickly between 2002 and 2009 means that estate plans will have to be reviewed and client assets restructured frequently. For example, the typical older couple in a long-term marriage would not create a credit shelter or bypass trust at the first death other than for tax reasons. The rapidly increasing exclusion amount combined with the marital deduction formula in the wills we draft is likely to result in creation of credit shelter trusts where none are needed, or having too many assets allocated to the credit shelter trust and too little to the surviving spouse. This problem is exacerbated where our clients are aging and may become incapacitated and unable to change their wills or restructure their asset ownership.

To make matters worse, the Act reduces the state death tax credit by 25% in 2002 and eliminates it completely by 2005. For states like Oregon, which imposes a "pickup tax"—an inheritance tax equal to the state death tax credit allowed by federal law—there will be an immediate and drastic loss of revenue. It seems likely that the state inheritance tax laws will be amended in the near future, raising the level of uncertainty for estate planners.

Barring further action from Congress, the estate tax returns to its present form in 2011, and clients will have to revise their estate plans all over again.

Gift tax not repealed

While the applicable exclusion amount for estate tax purposes rises between 2001 and 2009, the gift tax exclusion remains unchanged at \$1 million (and is not indexed for inflation). The \$10,000 annual gift tax exclusion (indexed for inflation) also remains unchanged.

Basis step-up at death limited after 2009

The Act repeals the present rules under which property passing at death receives a stepped-up (or down) basis equal to date of death value, effective for decedents who die after 2009. Instead, only the first \$1.3 million in property that passes from a decedent will qualify for a new basis, as will an additional \$3 million in property passing to a surviving spouse. Nonqualifying property or property in excess of these limits will have a basis equal to the lesser of the decedent's basis or date of death value. There are complex rules governing the qualification of assets for the step-up in basis, which will require our attention as 2009 draws nearer.

Effect on our clients

In my own practice, I am considering changing the "boilerplate" in my powers of attorney to permit an attorney-in-fact to restructure asset ownership between spouses. Such a power would certainly have to be used with caution, and it remains to be seen whether it would be honored by banks and other financial institutions. I expect to recommend disclaimer planning more frequently, with all of its disadvantages and uncertainties. And I certainly expect to make my credit shelter trusts more flexible, as far as accessibility by the surviving spouse (which, carried too far, runs the risk of disqualifying the credit shelter trust).

My clients have suggested (not entirely in jest) further measures which border on the surreal, such as leaving health care instructions that they be maintained on tube feeding and life support until 2010—or that their children not be permitted to make end-of-life decisions, for fear that their children will keep them alive until 2010.

All in all, Congress and the President, in the guise of estate tax relief, have deprived many of our clients of one of the chief benefits of estate planning—peace of mind—while assuring them that they will pay more in professional fees than if tax relief had not been enacted at all.

Jury finds elder abuse in case of under-treated pain

By Barbara Coombs Lee

On June 13, 2001 a California jury found a doctor liable under the state's elder abuse statute for failure to adequately treat a patient's pain.¹ The jury returned a \$1.5 million verdict for the family of William Bergman, agreeing that he suffered excessive and unnecessary pain while he lay dying of lung cancer. The jury came within one vote of finding both malice and oppression, either one of which would have entitled the plaintiff to punitive damages.

News of the verdict is reverberating through the medical community. It is the first verdict against a doctor solely for under-treating pain.

The *Bergman* case is the latest development in the pain treatment advocacy of Compassion in Dying Federation (Compassion). It is part of our effort to impose accountability on physicians and other providers who neglect pain associated with terminal illness.² This success follows three years of mostly failed efforts to coax medical regulatory boards to police the profession in this area. Oregon's Board of Medical Examiners remains the only board to have disciplined a physician for failing to treat pain adequately.³

In January 1998, Compassion acted upon a widespread perception that physicians fail to use opiates largely because they fear the scrutiny of medical regulatory boards. We wrote the medical boards of all 50 states and the Federation of State Medical Boards, reminding them of their key role in shaping pain treatment. We recommended ways to correct physicians' imbalance of perceived risk, with a high degree of surveillance for alleged "excessive prescribing" and virtually no professional consequences when pain goes untreated.

Boards that responded said they do not receive complaints of under-treated pain and saw no reason to believe the problem exists within their jurisdictions. With scientific studies revealing that half of those who die in acute care hospitals throughout the nation are in serious pain,⁴ we turned our attention to case finding and the filing of administrative complaints.

Bergman, supported by independent expert opinion of substandard care, was the first complaint Compassion filed with the Medical Board of California (MBC). Although the MBC itself agreed Dr. Chin had failed to provide adequate pain care, it declined to act in any manner, refusing even to order remedial education for Dr. Chin in pain treatment.

Since an administrative complaint failed to produce accountability or remedy within the profession, we felt no alternative remained but to seek a remedy in litigation.

Bringing the case to court under the elder abuse statute was an innovative approach. California medical negligence law extinguishes claims for pain and suffering upon the death of the patient. With no remedy available under a medical malpractice tort, we turned to the elder abuse law.

Much of the credit for this strategy and its success goes to Kathryn Tucker, Compassion's Director of Legal Affairs, co-counsel James Geagan, and Clayton Kent and the firm of Brayton Purcell, who proceeded against all odds of prevailing, in order to raise public awareness and educate the medical community. Costs were borne with a generous grant from The Mayday Fund.

The *Bergman* verdict was widely reported in both the general and trade press. In its wake, Compassion has received notification of similar stories throughout the nation. It may require a number of these cases, and concerted high-profile publicity around them, to prompt medical boards to use their disciplinary authority in the service of improved pain care.

If medical boards consistently fail to take a leadership role, legislative action may be necessary. California AB 487, sponsored by Compassion, directs the MBC to adopt procedures for investigating reports of under-treated pain and to report yearly on the status of such investigations. It also mandates education in pain treatment as a requirement for physician relicensing.



Barbara Coombs Lee is President of Compassion in Dying Federation, a Portland-based national advocacy organization working to improve care and expand options at the end of life.

Footnotes:

- 1 *Bergman v. Chin*, No. H205732-1 Superior Court of California, County of Alameda 2001
- 2 Kathryn L. Tucker, "Improving Pain Care: A Safe Harbor is Not Enough, the Seas Outside the Harbor Must be Rough," *The Health Lawyer*, Vol. 11, No. 4 (May 1999), at 15
- 3 Stipulated Order in the *Matter of Paul Andre Bilder, M.D.* Board of Medical Examiners of the State of Oregon, March 19, 1999
- 4 SUPPORT study, 274 *JAMA* 1591 (Nov. 22, 1995); "Management of Pain in Elderly Patients with Cancer," 279 *JAMA* 1877 (June 1998)

Changes announced at Department of Human Services

In an effort to serve clients and communities better, the Oregon Department of Human Services (DHS) is reorganizing. Under the reorganization bill (HB 2294) which Governor Kitzhaber signed August 2, all current divisions will be replaced by three new program and policy groups:

- Seniors and People with Disabilities
- Health
- Children, Adults and Families

The leader of each group will report to Bob Mink, DHS Director, as will Administrative Services, Continuous System Improvement, Community Services (field offices), and miscellaneous other services.

Lydia Lissman of Salem was named as administrator of the new Seniors and People with Disabilities Services. Lissman has been with DHS since 1982. She was state director of the DHS volunteer program, a branch manager in the department's Adult and Family Services Division, and assistant administrator of Adult and Family Services. Most recently, she was acting administrator of the DHS Senior and Disabled Services Division. Her deputy will be James Toews (pronounced *tayvs*), formerly of the Mental Health and Developmental Disability Services Division. The new group Lissman heads comprises elements of the Senior and

Disabled Services and Mental Health and Developmental Disability Services divisions.

DHS and its partners serve more than 720,000 individuals, and three or more DHS divisions serve approximately 27% of these clients. The reorganization seeks to reduce fragmentation in the system so clients and families with multiple needs can more easily obtain a range of services.

Under the reorganization, DHS workers who serve elders and disabled people with multiple needs will work in teams with other department employees in different service specialties. Line staff employees will continue to serve the populations with whom they are trained to work. As the old divisions are replaced, some positions will remain the same; others will change. The State will be divided into 16 Service Delivery Areas (SDAs). Managers for the SDAs will be appointed in September, after interviews and community discussion.

Specific details can be found on the DHS Web site. To get there, visit www.hr.state.or.us, and click on Remaking DHS on the right side of the screen. You'll then find links allowing you to download the entire 95-page report, or selected sections, including a narrative on Seniors & People with Disabilities.



*Lydia Lissman
Assistant DHS
Director, Seniors &
People with
Disabilities
Services*



*James Toews,
Deputy Assistant
DHS Director,
SPDS*

HCFA becomes CMS

On June 14, 2001, Health and Human Services (HHS) Secretary Tommy G. Thompson announced that the Health Care Financing Administration (HCFA) is now the Centers for Medicare & Medicaid Services (CMS). The reorganization establishes three business centers:

- The Center for Medicare Management (CMM) is responsible for the traditional fee-for-service Medicare program. It will develop payment policies and manage contractors.
- The Center for Beneficiary Choices (CBC) will provide beneficiaries with Medicare, Medicare Select, Medicare+Choice, and

Medigap information. It will manage and supervise these programs and conduct research on their further development.

- The Center for Medicaid and State Operations (CMSO) will focus on programs run by the states.

The Medicare 800 number (800.633.4227) phone line is being enhanced to provide service to beneficiaries 24 hours a day, seven days a week. The agency's Web site remains the same at <http://www.hcfa.gov>.

Member News



Wes Fitzwater at a recent Alzheimer's Association event, where he received a Program Volunteer Award

Cindy Barrett lectured on elder law issues at ALI-ABA's annual summer program in Madison, Wisconsin, "Estate Planning in Depth." In April she also co-presented at NAELA's annual Symposium in Vancouver, B.C. on the "Basics of d(4)A Trusts."

Philip A. Hingson has joined Fitzwater & Meyer, LLP, Clackamas, as an associate.

Michael D. Levelle is a partner with Duffy Kekel LLP, Portland, effective July 1.

Tim Nay has been named Vice President of the Alzheimer's Association, Oregon-Greater Idaho Chapter. He was also recently chosen as Chair-elect of the Elder Law Section.

Jane Patterson received the Multnomah Bar Association/Volunteer Law Project/Senior Law Project/Legal Aid Pro Bono Award of Merit at the MBA's annual meeting held in May, 2001. Jane is currently serving as treasurer of the OSB Elder Law Section.

Sylvia Sycamore established Sylvia Sycamore, PC, on June 1. The new firm will have the same Eugene office location and phone number as **Helen Hempel**, who has moved her practice to Carmel, California.

Ellyn Stier has relocated her elder law and estate planning practice to 5 Centerpointe Drive, Suite 400, Lake Oswego, OR 97035. Her phone number is 503.620.1095.

Wes Fitzwater and **Donna Meyer** recently received the Program Volunteer Award for 2000 from the Alzheimer's Association. They have been speaking to and providing training for Alzheimer's support groups for several years.

Elder law legislation to be covered at Oregon State Bar convention

Join fellow Elder Law Section members at the OSB 2001 Convention, September 20-22 at the Seaside Civic and Convention Center in Seaside, Oregon. The Section is cosponsoring a CLE seminar on Friday, September 21 entitled "Issues in Elder Law—A Legislative Update." The CLE will take place from 3:45 p.m.–4:45 p.m. and is worth one credit.

Speakers Jennifer Wright, Clinical Law Program Willamette University College of Law, and Dady Blake, attorney at law, will highlight and summarize new legislation coming out of the 2001 Oregon Legislature that affects elder law practitioners and their clients.

The Elder Law CLE immediately follows another session of interest entitled "Legislative Changes in Estate Planning and Administration," to be held from 2:00 p.m.–3:30 p.m. This session, co-sponsored by the Oregon State Bar CLE Seminars Department and the Estate Planning and Administration Section, is worth 1.5 credits. Topics include:

- New form of accounting for probate estates and conservatorships, as required by the amended Uniform Trial Court Rules

- Pending statute creating a creditor notice process for revocable trusts
- Oregon's new "529 College Savings Plan," and other pending legislation, including the new disclaimer and Uniform Transfers to Minors rules

Speakers for this session are: Shannon M. Connelly, Davis Wright Tremaine LLP, Portland; Sam Friedenberg, Law Offices of Nay & Friedenberg, Portland; Jonathan A. Levy, Attorney at Law, Portland.

In addition to these CLE sessions, the Oregon State Bar 2001 Legislative Review Session will provide an update on estate planning, elder law, and several other areas. This session will be held on Thursday, September 20 from 1:00 p.m. to 5:00 p.m. and is worth four credits.

Don't miss these great educational opportunities and more at the OSB Convention! To register, see the Oregon State Bar web page at www.osbar.org or call the Oregon State Bar Order Desk at 503.620.0222 or 800.452.8260, ext. 413. We hope to see you in Seaside!

CLE Seminar Problem Prevention in Elder Law

Regardless of your area of practice, age, or socioeconomic background, elder law issues are a reality you will face in both your professional and personal life. Here are the facts:

- During the 20 years after the first baby boomers reach retirement age in 2010, the number of Americans over age 65 will increase from 43 million to 70 million.
- The “oldest old” (those over age 85) constitute the fastest-growing segment of the population, increasing from 3.5 million in 1994 to 6 million by 2010.
- The Census Bureau projects that the elderly population will concentrate in the South and West, doubling in the seven Western states by 2020.

On Friday, Oct. 26, the Oregon State Bar and its Elder Law Section will sponsor a Continuing Legal Education seminar, entitled *Problem Prevention in Elder Law*. The seminar will be held at the Oregon Convention Center in Portland. The seminar will arm you with knowledge, techniques, and strategies to prevent problems and develop long-term plans. Attendees at the event can earn 5.25 MCLE credits and 1.25 ethics credits.

Program schedule

8:00	Registration
8:45	Spousal Elective Share Issues in Medicaid Eligibility and Estate Recovery
9:45	New Laws, New Strategies
11:00	Elder Law Ethics in the Real World
12:15	Lunch
1:10	Elder Law Section Annual Meeting
1:30	Care Contracts in Long-term Care
2:30	Trust Issues
3:45	Panel Discussion: Bright Ideas to Prevent Problems
4:30	Adjourn

Registration information

General registration fee\$155
Elder Law Section member\$145
New lawyer (admitted after 01/01/00) or legal assistant\$100
Season Ticket holder\$15
Lunch\$20
Late Fee (if your registration reaches the Bar after Oct. 19)\$20

To register, call OSB CLE at 503.684.7413, or toll-free in Oregon at 800.452.8260, ext. 413.

Who wants to be an ethicist?

We all know Mr. L. He is the one who wants you to assist him with estate planning for his parents. He wants you to draft documents leaving all of his parents’ estate to him and to the exclusion of his siblings. Of course, Mr. L reasons he is the child who continued to build and save the family business and assures you his parents want him to have it all—or most of it anyway.

How about Mr. S? He is the personal representative who hired you to represent the estate. Now the heirs don’t want to pay your fees and have asked for a surcharge against the personal representative. Will you have to refund the fees paid to you already?

Don’t forget the 88-year-old client who can’t remember what she had for breakfast, but can remember her college roommate’s mother’s favorite dessert. She wants to sign a will and durable power of attorney. Should you let her? Does she really understand what she is signing?

At the Elder Law CLE seminar on October 26, Baird B. Brown of Grand Junction, Colorado will help you sharpen your skills in handling the difficult ethical situations we all too frequently encounter. Brown, a Certified Elder Law Attorney (CELA), received his law degree



Baird B. Brown

from Willamette University in 1975. His emphasis is on estate planning, trusts and estates, long-term care, probate, and conservator and guardianship matters. He is a Fellow of the American College of Trust & Estate Counsel, a member of the Colorado Bar Association Probate and Trust Law Section, and a Fellow of the National Academy of Elder Law Attorneys.

Says Brown, “Join the Elder Law Section’s annual presentation of *Who Wants to be an Ethicist?* aka *Survivor—the Ethical Lawyer*. Test your ethics skills as I ask members of the audience to share their insights on how they would handle ethical dilemmas. Participants will be asked to join me on stage to give their ethical spin on a typical elder law client’s situation. You won’t have to eat live beetles, but you might squirm.”

Resources for elder law attorneys

Events

Elder Law

September 13-14, 2001
Adam's Mark Hotel, Denver
CLE International, sponsor
Register online at www.cle.com or call
800.873.7130

National Association of Professional Geriatric Care Managers Annual Conference

September 13-16, 2001
Sheraton Music City, Nashville, TN
Contact Jenifer Mowery at 520.881.8008 or
jmowery@mgmtplus.com

Washington Elder Law Section Annual Meeting and Seminar

September 21, 2001
Edgewater Hotel, Seattle
Featured topics are special needs trusts; ethics by Charles Sabatino, current NAELA president; and keynote speaker Wendy Lustbader, MSW, author of *What's Worth Knowing*.
Contact Washington State Bar Assn. at 1.800.945.WSBA or register online at www.wsba.org/cle/calendar.htm

Oregon State Bar Convention

Saturday, September 20-22, 2001
Seaside, Oregon
Includes Elder Law CLE. See page 10

Elder Law: Advanced Planning

Saturday, September 22, 2001
New York University School of Continuing and Professional Studies
NYU's Midtown Center
New York City
Call 212.988.7171 or see
www.scps.nyu.edu/cle

Guardianships and Conservatorships

September 28, 2001
Oregon Convention Center
Portland
Features updated forms and procedures
Contact Oregon Law Institute Registrar at 503.243.3326 or 800.222.8213

National Aging and Law Conference: *Strengthening Protections and Building Bridges to Enhance Elder Rights*

October 10-13, 2001
Crystal Gateway Marriott
Arlington, VA
Sponsored by AARP Foundation's National Training Project, together with ABA Com-

mission on Legal Problems of the Elderly, the National Senior Citizens Law Center, the Center for Social Gerontology, the Center for Medicare Advocacy, and National Academy of Elder Law Attorneys. Includes a pre-conference "nuts & bolts" workshop for new elder law advocates. Contact Ada Albright at 202.434.2197; e-mail aalbright@aarp.org

Problem Prevention in Elder Law

CLE seminar sponsored by Elder Law Section, Oregon State Bar
Friday, October 26, 2001
Oregon Convention Center
Portland
See page 11 for details

Oregon Gerontological Association

October 15-16, 2001
Sheraton Portland Airport Hotel
Web site: <http://www.oregongero.org>

National Guardianship Association 2001 Conference

October 20-24, 2001
Marriott DelRay, DelRay Beach, FL
Contact Jenifer Mowery at 520.881.6561, ext. 114
or jmowery@mgmtplus.com

National Academy of Elder Law Attorneys 2001 Elder Law Institute

November 1-4, 2001
St. Louis, Missouri
Hyatt Regency Union Station
Deadline for hotel reservations is October 1.
Contact NAELA
1604 N Country Club Road
Tucson, AZ 85716-3102
tel 520.881.4005; fax 520.325.7925

National Academy of Elder Law Attorneys 2002 Unprogram

February 1-3, 2002
Embassy Suites Outdoor World
Dallas, Texas
Contact Jenifer Mowery at 520.881.4005 ext 114 or jmowery@naela.com

Monthly Elder Law Discussion Groups

Elder Law I meets second Thursday
Lloyd Center Tower, NE Portland
Elder Law II meets first Thursday
Legal Aid Services, Downtown Portland
For details: Ann Stacey, 503.224.4086

Important elder law number

The Food Stamp Utility Allowance is scheduled to be increased from \$224 to \$246 per month, effective October 1, 2001. The change will appear in the online Family Services Manual, which is accessible through the Oregon DHS Web site, and as a proposed rule change to OAR 461-160-0420.

Resources *Continued from page 12*

Elder Law Internet Discussion List

To subscribe, send a message to: lyris@lists.law.stetson.edu
Leave the subject line blank, and do not include a signature block. The body of the message should be: *Subscribe orelder your first name your last name*

Send messages to:
orelder@lists.law.stetson.edu

Some guidelines for the discussion list:

- If you simply use your "reply" function in response to a message sent to you, your reply will go to all the members of the discussion list. You may want to respond only to the person who sent the original message. In that case, be sure to enter his or her e-mail address.
- If you are posting a question or message to the list, be sure to include your e-mail address in your post. If you want people to respond privately to you, say so.
- Avoid any implication of antitrust. Avoid discussions of pricing or fees.
- When quoting from other sources, include attribution.

Book Review

A Life Complete: Finding Peace and Purpose at Midlife

Sallierae Henderson is an ordained minister and psychological counselor. Drawing on her years at Willamette View Manor in Portland, Oregon, she tackles in a wise and thoughtful manner the difficult questions of how it actually feels to grow older and closer to the end of life.

A Life Complete envisions midlife as a rich, reflective period that gives one the chance to begin a process of discovery. As a guide to this journey, which confronts the past and welcomes what the future holds, Ms. Henderson offers six simple skills:

- Befriending yourself
- Learning to grieve
- Recognizing that you always make a difference
- Maintaining a sense of personal evolution
- Finding a larger context for your life
- Accepting the help of others

Originally published by Scribner, the book is now available in paperback for \$12.00 from Simon & Schuster, ISBN 0-7432-0036-5. See www.simonsays.com. A wonderful gift for your clients and required reading for the elder law attorney!

—Shirley Bass

Practice tip What about personal effects?

By Shirley Bass

The problem

Widow Brown, who has been living in a retirement center, now needs to be placed in a nursing home. Her gerontologist says there is little or no chance of her ever returning home. There will be limited space in her nursing home room. She now lacks decision-making capacity. What to do with her personal effects? Continue to pay rent on the apartment? Place them in storage? Both are expensive solutions, not to mention the issue of keeping the property safeguarded and insured. In many cases, family members will swoop in and help themselves to the goodies, thus exposing themselves to possible liability.

A modest proposal

What to do? A foresighted attorney might have considered including directions in Widow Brown's revocable living trust and/or her powers of attorney that authorize her fiduciary to distribute personal effects during her lifetime in accordance with her testamentary wishes. Sample language follows:

If for any reason I should require long term care in a facility so that I am unable to continue to live in my current residence, and there appears to be little or no likelihood of my ever returning to my residence, then I authorize [my trustee/my attorney-in-fact] to make distribution of my tangible personal property in accordance with [Article _ of this Agreement/ Article _ of my Last Will], except for those items which my fiduciary determines to be necessary or proper for my own use. As a guide to my fiduciary in making distribution hereunder, I instruct my fiduciary to consider my needs first as well as possible disqualification from government benefits, balanced against the cost of storing, safeguarding, and insuring my tangible personal property. If such distribution is made in good faith, my fiduciary shall incur no liability therefor.

Note that the above direction should be preceded by a condition that the client is incapacitated, and the term "incapacity" should be clearly defined in the document.

Web sites you can use



By Susan Ford Burns, Portland

Since many elder law practitioners are solo practitioners or in small firms, we are often responsible for determining which kind of technology we use and troubleshooting it after we find it. Finding information about technology is one of the Internet's strong suits.

One Web site with a large number of articles about legal technology is www.denniskennedy.com. Dennis Kennedy is an attorney and author who does a great job of discussing various areas of legal technology. Another resource comes from a recent OSB CLE speaker, Ross Kodner. His Web site at www.microlaw.com/ contains a wealth of technology information, all directed at attorneys and the programs they use.

In addition to Web sites, there are also a variety of free discussion lists that can help you learn about legal technology in general or specific programs and areas. Lists are managed by a computer program (Listserv, Majordomo, or Listproc) located on another computer connected to the Internet. When you subscribe to a list, the program automatically sends you as e-mail any message sent to the list.

One of my favorite general technology discussion lists is the TechnoLawyer Community at www.technolawyer.com. This list covers a wide variety of software and hardware issues. Comprehensive technology articles, answers to questions posted to the list, and spirited (but not flaming!) debates are all here. The only drawback is a couple of e-mails every "TechnoRelease Tuesday," which are paid advertising from legal oriented sponsors of the community. Even those articles often contain useful information.

As a user of TimeMatters for case management, I find the discussion list hosted by Fleming & Curti, elder law practitioners in Tucson, Arizona to be quite useful, although it can be overly active at times. You can register for the list at www.lists.elder-law.com/cgi-bin/lyris.pl?enter=timematters. This firm also hosts discussion lists for users of Word, pclaw, and Linux. Archives for each of these lists can be accessed by clicking on "home" at the above address, going to the registration page for the lists in which you are interested, and selecting the option to visit the list without joining it. There are also lists hosted by the manufacturers of many software companies. Check with the one that

manufactures your software (for example, www.prolaw.com, www.timeslips.com).

Other software manufacturers offer newsletters or tips of the week or day. Summation offers tips of the week at www.summation.com/support/frames/index_tips.htm.

Those of us who are attached to our PalmPilots or Visors will find the resources contained by Nettech, Inc.'s Web site to be very useful. That site contains Palm Computing Resources for Lawyers at www.nettechinc.com/palm.htm. There is a wonderful collection of Palm documents at www.memoware.com/. Here you can find full-text versions of documents that can be downloaded to your Palm or Visor. Choices include such useful items as the U. S. and Oregon Constitutions, the Federal Rules of Civil Procedure, and large portions of the California Civil Code—along with more esoteric items such as the odds of poker hands and how to make wedding toasts.

Two other free online services I have found very useful for Palm users are AvantGo (www.avantgo.com) and VindiGo (www.vindigo.com). AvantGo allows you to select a wide variety of news sources and other Web sites, and automatically download them when you sync your Palm. VindiGo lets you download movie times and reviews, restaurant guides, and shopping information for a number of cities, including Portland and Seattle.

CLE online

The LANCE project offered a CLE seminar on elder law in May. The CLE was Webcast by live audio feed, with the help of Hearing.com (a service of the National Narrowcast Network in Washington DC) and the Oregon State Bar. A recording of the Webcast is available at www.lanecountylegalservices.org.

Oregon attorneys can receive three CLE credits by obtaining the written materials from the Oregon State Bar and listening to the recording on their computers.

Contact Barbara Herget at the Oregon State Bar for more information.

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Problem Prevention in Elder Law

Address elder law issues
before they become problems

Friday, Oct. 26, 2001

Oregon Convention Center
Portland, Oregon

5.25 MCLE credits and
1.25 Ethics credits

See page 11 for details

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Newsletter Board

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Editor:

Carole Barkley carole424@aol.com
503.796.0351

Advisory Board:

Shirley Bass, Chair sbass@cybcon.com
503.241.9455

Hon. Claudia M. Burton claudia.m.burton@ojd.state.or.us
503.378.4621

Penny Davis eldlawfirm@spiretech.com
503.452.5054

William J. Kuhn ksmhepp@centurytel.net
541.676.9141

Holly Robinson Holly.L.Robinson@state.or.us
503.986.1254

Prof. Bernard F. Vail vail@lclark.edu
503.768.6656

Oregon State Bar
Elder Law Section
5200 SW Meadows Rd
Lake Oswego, OR 97035-0889

