



Elder Law Newsletter

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Elder Law Section sponsors legislation

By Allyn E. Brown, Attorney at Law, Newberg

The Elder Law Section Executive Committee is sponsoring nine legislative proposals which will be submitted by the Bar during the 2003 session of the Oregon State Legislature. They address a variety of issues that arise in the practice of elder law.

Protective proceeding pilot project

The Multnomah County Protective Proceeding Pilot Project found in Chapter ORS 125 will sunset on December 31, 2003 unless the program is extended. Our bill proposes to continue the program, but with some modifications pertaining to court visitor training, responsibilities, and reporting requirements. *Legislative Counsel No. 455.*

Guardianships

Many Medicaid recipients in long term care need a formal guardianship established in order to authorize necessary medical treatment. However, under existing law all of the Medicaid recipient's income must be used to pay for medically necessary expenses, thereby making it difficult or impossible to pay the costs associated with creating and maintaining the needed guardianship. The proposed legislation amends ORS Chapter 414 to permit costs and fees associated with guardianships to be paid either out of the long term Medicaid recipient's income or out of Medicaid funds when a guardianship is necessary to authorize needed medical treatment. *Legislative Counsel No. 457.*

Joint bank accounts

ORS 708A.470, which pertains to multi-party bank accounts, provides that at the death of a party to a joint account, the remaining deposit belongs to the surviving party or parties as against the estate of the decedent, *unless there is clear and convincing evidence of a different intention in the bank's records at the time of death.* This statute was designed to provide banks with a "safe harbor" when faced with claims of competing ownership in jointly held accounts. Although that purpose is not problematic, the committee feels the language as drafted to protect banks is too broad and has been used as a shield by those who improperly influence or prevail upon elderly persons to obtain funds that should rightly go to the elderly person's estate. The Executive Committee is proposing an amendment to the statute which would first give a surviving account owner a disputable presumption of ownership of the remaining bank account fund, but this presumption can be overcome by evidence that shows the deceased account

In this issue..

Legislation

Elder Law Section Proposals	1
Estate Planning Section Proposals . . .	3
UTC Committee	4

Plus...

Changes to note	4
Elder Law CLE	5
Recent ruling on guardianship	6
Law students recover funds	6
Prescription discount cards	6
Member news	6
Contested conservatorships	7
Important elder law numbers	9
Index of articles in Volume 5	9
Resources for attorneys	10
Web sites you can use	11

Elder Law Section proposes legislation

Continued from Page 1

owner had a different intention. The proposed legislation still eliminates a bank's liability for distribution of funds to a surviving account owner as per the terms of the underlying multi-party account contract. *Legislative Counsel No. 546.*

Special needs trusts

Under existing federal Medicaid law, the "under 65" or "(d)(4)(A)" trust can be funded by the resources of a disabled Medicaid recipient under the age of 65 and used to pay the recipient's supplemental needs. Federal law requires the trust be established by the person's parent, grandparent, legal guardian, or a court. The applicant/recipient cannot create the trust. If a parent or grandparent is unavailable, the only option in Oregon is to file a protective proceeding asking the court to approve the trust or to appoint a conservator to create the trust. However, for the court to have jurisdiction in Oregon protective proceedings, the applicant/recipient must meet the standards for financial incapacity. Oregon law affirms that courts may not create such a trust for financially capable individuals. The Section's proposed legislation amends ORS 125.005 to authorize the court to either appoint a special conservator or enter a protective order for the purpose of authorizing the creation of an irrevocable special needs trust for a person under the age of 65 who is disabled as defined by the Social Security Administration, whatever the disability. The court need not make a finding that the Medicaid recipient is financially incapable as a condition of entering a protective order. This proposed legislation would put Oregon on par with other states. *Legislative Counsel No. 458.*

Real estate transactions and licensure

A proposed amendment to ORS Chapter 696 would correct an unintended consequence of legislation passed last year to tighten real estate broker and sales person licensure law. The 2001 legislation (Senate Bill 446) amended ORS 696.030(b) to narrowly restrict participation of unlicensed individuals in real estate transactions through a power of attorney, thereby circumventing the licensing process. The 2001 legislation exempted the use of power of attorneys by unlicensed persons involved in real estate

transactions so long as (1) the power of attorney was recorded; and (2) the power of attorney specifically describes all the real property to be sold, leased, or exchanged; and (3) the attorney does not use the power of attorney to engage in "professional real estate activity."

This legislation immediately caused great concern among estate planning and elder law attorneys. The viability of existing powers of attorney was immediately suspect and many well-meaning citizens and practitioners became subject to criminal exposure for inadvertent violation of this real estate licensing law. The Elder Law Section Executive Committee submitted legislation to amend ORS 696.030(b) to delete the phrase "the power of attorney specifically described the real estate to be sold, leased or exchanged," and to add new ORS 696.030(C) to address the effect on existing powers of attorney executed prior to the new law effective July 1, 2002, as well as the treatment of existing power of attorneys after the new law changed on July 1, 2002 as amended. The legislation further adds Section ORS 696.010(3) to clarify that "professional real estate activity" means activity where there is a promise, intention, or expectation of compensation for the attorney-in-fact and specifically excludes a privately paid fiduciary whose compensation from the estate of the principal is limited to securing the services of a real estate broker or management company engaged in professional real estate activity, and where the "compensation" is in expectation of inheritance, gifts of personal items, household belongings, or family heirlooms that naturally would be given to family members, heirs, or decedents who perform activities which would otherwise be exempt under the real estate licensing laws. *Legislative Counsel No. 459.*

Services provided by a fiduciary

A proposed amendment to ORS 125.240 would prevent a professional fiduciary from using funds from a protected person's estate to pay for services provided by the fiduciary's spouse, parent, child, or fiduciary's business entity—unless the charges for the services are first approved by court order. In requesting approval, the fiduciary must furnish the court with the qualifications of the service provider, the specific services to be provided, and the terms and rate of compensation, along with other relevant information bearing on the appropriateness of the services and the person providing them. The information would include, but is not limited to, prior criminal records or loss of a professional license. *Legislative Counsel No. 460.*

Background checks for fiduciaries

Under existing law, criminal background checks are mandated for all professional fiduciaries who are appointed to act as guardians or conservators under Oregon protective proceedings. A proposed amendment to ORS 125.240(1)(2)(a) would require the background checks to be updated annually and filed with the clerk of every court in which the fiduciary serves. *Legislative Counsel No. 461.*

Restraining orders

Proposed legislation to amend ORS 124.020 would better address elderly and disabled persons' need to obtain restraining orders. The proposed amendment would allow persons other than the victim to petition for a restraining order where the petitioner is (a) a court

Continued on page 3

Estate Planning Section proposes legislation

By Bernard F. Vail, Professor of Law, Northwestern School of Law

The Estate Planning Section is sponsoring several pieces of legislation in the 2003 legislative session, and is continuing to study other issues for future proposals.

Uniform Principal and Income Act

This legislation, based on the 1997 Revised Uniform Principal and Income Act, updates Oregon law to facilitate trust investing under the Uniform Prudent Investor Act and modern portfolio theory, and modernizes the law concerning what items constitute trust principal and income.

Will/trust harmonization

This legislation lessens the different impact of use of a will, or a trust as a will substitute, and applies to inter vivos trusts a number of traditional will doctrines, including lapse, pretermitted children, ademption, advancement, and revocation by divorce.

Power of attorney

This statute would explicitly authorize springing powers effective on disability, provide a statutory form for durable powers, and—it is hoped—make powers more readily acceptable by third parties. The legislation includes extensive statutory provisions dealing with the construction and interpretation of the form.

Revocation on divorce

Legislation based on Uniform Probate Code Sec. 2-804 will unify the law of probate and non-probate transfers with respect to revocation on divorce. In the event of divorce, the new statute will revoke any revocable designation of a former spouse as a beneficiary under wills and will substitutes (including for example, insurance policies and revocable trusts), any provision conferring a power of appointment on the former spouse, and any nomination of the former spouse as a fiduciary, and will sever interests of the former spouses in property held as joint tenants.

Uniform Marital Property Act/elective share

The Oregon Law Commission was considering a proposal to adopt the Uniform Marital Property Act, converting Oregon from a separate property state to a community property state. The proposal stemmed from the perceived inequity in the current elective share statute that may encourage divorce because in some circumstances a divorcing spouse can do better financially than a spouse who remains married until his or her spouse's death.

The Estate Planning Section found the proposal advantageous, largely for tax reasons. However, other sections of the Bar—including Elder Law, Family Law, and Debtor-Creditor—raised concerns about the potential effects of such a change. In light of this opposition the Program Committee of the Oregon Law Commission voted not to proceed further with the Uniform Marital Property Act. Given that decision, the legislative subcommittee will consider other possible changes to the elective share statute.

Uniform Trust Code

The Section will provide input to the Uniform Trust Code Study Committee. The Study Committee, co-chaired by Valerie Vollmar and Susan Gary, will review Oregon trust law, consider the newly promulgated Uniform Trust Code, and develop legislation for submission to the 2005 legislature.



Elder Law legislation

Continued from page 2

appointed guardian of the victim or (b) a protective service worker in situations where the protective service worker reasonably believes the victim lacks legal capacity to understand the nature of the restraining order proceedings, or the victim is physically unable to appear in court. Notice provisions under the statute would also be amended to require the same notice that is given to the alleged abuser of the victim to be given to the victim when the petitioner for the restraining order is not the victim. *Legislative Counsel No. 462.*

Update of nursing home costs

A proposed amendment to ORS Chapter 414 would require the Oregon Department of Human Resources to update on an annual basis the figure used to represent "the average private pay cost of nursing home facility services," i.e., the Medicaid divisor used to determine the period of ineligibility if a Medicaid applicant, recipient, or spouse transferred money or property for less than fair market value. Under the amendment, if ODHS fails to amend the Oregon Administrative Rules to update the divisor it will automatically adjust in accordance with most recent annual changes in the medical inflation index. *Legislative Counsel No. 463.*

Committee to study Uniform Trust Code

The Oregon State Bar, the Oregon Bankers Association, and Oregon probate judges have formed a committee to study the new Uniform Trust Code (UTC) for possible adoption in Oregon. The UTC is the most comprehensive trust and estate legislation developed by the National Conference of Commissioners on Uniform State Laws since 1969, when the Uniform Probate Code was approved. Kansas has already adopted the UTC, and at least 30 states have study projects or legislative proposals pending.

Most states, including Oregon, have relatively few statutes governing trusts. Case law often is scarce, which leaves trust beneficiaries, lawyers, trustees, and the courts to rely on the Restatement of Trusts and the multi-volume treatises by Bogert and Scott. States that enact the UTC or similar legislation will be able to specify their rules on trust law with precision and in a readily available source. While some of the UTC's provisions merely state generally accepted trust law, the UTC does make some significant changes. The text of the UTC is available online at www.nccusl.org.

The UTC Study Committee is co-chaired by Professor Valerie Vollmar of Willamette University College of Law and Professor Susan Gary of the University of Oregon School of Law. Other members of the 12-person committee are Ron D. Bailey (Portland), Alan Bennett (Salem), Allyn Brown (Newberg), Rita Batz Cobb (Hillsboro), Penny Davis (Portland), Susan Grabe (Portland), Steve Lane (Eugene), Tim O'Rourke (Pendleton), Ken Sherman (Salem), and Jennifer Todd (Salem). Committee members were selected to allow involvement of the Elder Law Section, Estate Planning and Administration Section, and Taxation Section of the Oregon State Bar, as well as the Oregon Bankers Association, Oregon probate judges, and the Oregon State Bar's Public Affairs staff.

The committee will begin meeting in September 2002. Interested persons will be asked to present their views to subcommittees during the first half of 2003, and the committee itself will reconvene in fall 2003 to consider the subcommittees' recommendations. The committee's goal is to develop specific legislative proposals by April 2004, for consideration by the Oregon legislature during the 2005 session.

If you would like to serve on a subcommittee or present your views on the UTC, please contact one of the co-chairs:

Professor Valerie J. Vollmar
Phone: 503.370.6079
E-mail: vvollmar@willamette.edu

Professor Susan N. Gary
Phone: 541.346.3856
E-mail: sgary@law.uoregon.edu

U.S. House passes tax break for long term care insurance premiums

On July 25, 2002, the U.S. House of Representatives passed H.R. 4946, the Improving Access to Long Term Care Act of 2002, which would allow middle-income taxpayers to take a tax deduction for the cost of their long term care insurance premiums. Current law permits taxpayers to deduct the cost of LTC insurance premiums, but the amount that can be deducted must equal more than 7.5% of their incomes when combined with all medical expenses, and individuals must itemize the deduction. Under the bill, which passed 362-61, taxpayers could take a deduction for the premium without itemizing. Individuals earning \$20,000-\$40,000 in adjusted gross income and couples earning \$40,000-\$80,000 and filing jointly would be eligible for the deduction. The measure also would permit a personal tax exemption of \$3,000 in 2002 for people who act as long-term caregivers for a family member. The measure now goes to the Senate for consideration.

Some changes to note

The IRS issued a revenue ruling to confirm that special needs trusts—including payback trusts—can be the recipient of streams of payments from charitable remainder trusts (both unitrusts and annuity trusts). The revenue ruling also clarifies that drop-down trusts for persons who are expected to be mentally incapacitated for 12 months or more qualify as recipients. The use of the term "permanently incapacitated" in private letter rulings and the former Re Ruling on point (1976 - 2 C.B. 194) was not helpful for periodically incapacitated mentally ill potential CRT stream of payments recipients with trusts. The ruling is in the Internal Revenue Bulletin No. 2002-17 for April 29, 2002, and can be found on the IRS Web site at www.irs.gov/pub/irs-irbs/irb02-17.pdf

Effective September 1, 2002, the ABA Commission on Legal Problems of the Elderly will become the ABA Commission on Law and Aging.

CLE Seminar**Oregon Elder Law 2002: The Face of the Future**

Plan to be in Portland on Friday, October 11, 2002, when the Oregon State Bar and the Elder Law Section will cosponsor a continuing law education seminar that focuses on issues that face attorneys as the population ages.

There are 76 million American "baby boomers," and their concerns and needs are already redefining what it means to grow old in this country. The sheer size and diversity of this watershed group is profoundly changing the human, financial, and legal aspects of aging. This seminar will provide you with the knowledge you need to deal effectively with complex issues unique to older clients and their families.

A faculty of some of Oregon's most experienced elder law attorneys will present a highly practical program that includes:

- Proposed changes to Oregon Medicaid law and how to respond
- Guidelines for the creation and operation of the Payback Special Needs Trust
- Ways to better serve clients by bridging cultural differences
- Analysis of contested guardianship and conservatorship
- Analysis of the most frequent ethical issues in advising elderly clients and their families

The seminar will be held at the Oregon Convention Center in Portland and will earn attendees 4.25 MCLE credits, 1 ethics credit, and 1 Diversity credit. To register, call the OSB CLE order desk at 503.684.7413 or 800.452.8260, ext. 413.

The program will be videotaped and shown in its entirety at various locations around the state. Call the CLE Video Replay Hotline for each week's schedule: 800.452.8260.

**The Face of the Future: Agenda**

8:00	Registration
9:00	Responding to Proposed Changes to Medicaid Law: Strategy, Advocacy, and History Narrowing of Medicaid eligibility criteria, documentation for various strategies, estate recovery, history of 1988 Medicare Act
10:00	Creating and Operating the Payback Special Needs Trust Creation of the trust, establishing a trust through conservatorship, annual accountings
11:15	Bridging Cultural Differences Through Communication Appreciating your client's cultural orientation, understanding your client's expectations, identifying cultural awareness blind spots
12:15	Lunch
1:15	Contested Guardianship and Conservatorship Settling disputes and stipulated orders, discussion of basic litigation issues, a view from the bench
2:15	Recent Administrative Rule Changes Eligibility, strategies, challenging rules
3:15	Conflicts in Elder Law Practice Identifying the client, protective action for incompetent clients, intra-family conflicts—disclosures and waivers, effective waiver of conflict
4:15	Adjourn

Elder Law CLE Program Planners

Tim Nay, Chair
Portland

Cinda Conroyd
Salem

Kristianne Cox
Portland

Penny Davis,
Portland

Wesley Fitzwater
Clackamas

Sam
Friedenberg
Portland

Steven Heinrich
Corvallis

S. Jane
Patterson
Gresham

Prescription discount cards available

An area of concern among those we serve is the rising cost of prescription medications. While we wait to see what unfolds on the national scene with regard to a basic Medicare prescription benefit, a number of pharmaceutical company discount cards have become available:



Together Rx Card

Phone: 800.865.7211

Web site: www.together-rx.com

Novartis Care Card

Phone: 866.974.2273

Web site: www.novartis.com/carecard

Orange Card (GlaxoSmithKline)

Phone: 888.672.6436

Pfizer Share Card

Phone: 800.717.6005

Web: www.pfizerforliving.com/sharecard

Lilly Answers

Phone: 877.795.4559

Web site: www.lillyanswers.com

Elder Law Section member news

Leslie Kay was recently appointed Regional Director of Multnomah County Office of Legal Aid Services of Oregon. Replacing her in the position of senior law attorney is Jenny Kaufmann, who has been at the National Senior Citizens Law Center in Washington DC for the past two years and was with a Virginia Legal Services program for six years before that.

The firm of Douglas, Conroyd & McMinimee is sorry to announce that **Marcie McMinimee** left the firm in order to move with her family to Colorado. The Salem firm will now be known as Douglas & Conroyd, P.C.

Law students recover funds

By Jennifer Wright, Director, Clinical Law Program, Willamette University College of Law

In a recent case, the Civil Practice Clinic of the Willamette University College of Law successfully recovered funds a bank had allowed a conservator to withdraw, in spite of a restriction on the account that was intended to prevent this.

When a conservatorship is set up for a small estate, it sometimes is not cost-effective to require the purchase of a bond, which will significantly deplete the principal of the estate. In such cases, the court may agree to waive the bond if the bank account in which the conservatorship assets are held is restricted, such that the conservator cannot withdraw the funds without court order. But what happens if the bank fails to honor the restriction on the account, and allows the conservator to withdraw and dissipate the funds?

The Civil Practice Clinic received one such case from the Probate Division of Marion County Circuit Court. The court appointed the clinic to represent a minor whose few thousand dollars from a personal injury settlement had been withdrawn and spent by the family member/conservator from the supposedly restricted account. The family member/conservator was judgment proof.

The law students contacted the bank to demand reimbursement of the funds disbursed to the conservator in violation of the restriction on the account. They talked to many low-level staff members in the legal department without any satisfactory response.

The clinic team specifically looked at claims for relief that would expose the bank to more than the contract damages, since those damages were so small. They drafted a complaint against the bank, with claims for violation of contract, unlawful trade practices (including attorney fees), fraud (potential punitive damages), conversion, and breach of fiduciary duty. They sent a courtesy copy of the complaint to the bank. Within a few days, the bank agreed to repay the full balance of the account, including all interest that would have been earned if the unauthorized withdrawal had not been made. A new conservator (a professional, who gave the client a break on the fee) and a new restricted account meant a happy ending for the clinic's client.

If the clinic staff had been required to litigate the case, the plan was to discover the instructions in the bank's operations manual about how to handle restricted accounts. They had heard rumors that bank employees are instructed not to take any action to restrict accounts under a certain amount, because the exposure was so small; no one would pay to sue the bank over a \$5,000 account. If the law students found such instructions, they felt they would have a decent case for punitive damages.

If anyone would like a copy of the complaint and/or research or would like to discuss a similar case, please contact Jennifer Wright at jlwright@willamette.edu or 503.370.6140.

Court upholds right to refuse medication

An important guardianship case was decided recently by the Court of Appeals. The ruling in *Schaefer v. Schaefer*, 183 Or.App. 513 (2002) adopts identical reasoning to that found in civil commitment cases and upholds the right of elderly persons to refuse to take prescribed medications, if they understand the consequences and decide that the side effects outweigh the benefits. The case can be found on the Internet at www.publications.ojd.state.or.us/A115334.htm

Tips from the bench for contested protective proceedings

By Claudia Burton, Circuit Court Judge, Pro Tem

Editor's note:

Attorneys involved in contested protective proceedings should be aware of the factual and legal information judges look for. We asked Judge Burton to provide some feedback on what lawyers can do that would be particularly helpful in protective proceedings—and tips on how to be prepared to best represent their clients in court.



First and foremost, contested guardianship and conservatorship proceedings have more in common with other types of bench hearings or trials than not. The rules of evidence and civil procedure apply. ORS 125.050.

The comment most frequently echoed by members of the bench with whom I spoke was the need for practitioners to keep in mind the applicability of the rules of evidence. Do not assume that you will be able to present hearsay evidence, copies of documents that are not properly authenticated, etc.

In particular, the visitor's report is hearsay itself, and is also rife with hearsay statements made to the visitor. This presents a dilemma for courts and attorneys. There is no specific exception to the hearsay rule for the visitor's report, and yet the visitor's report is statutorily required, so it seems odd to disregard it. Different courts will handle this in different ways. If the visitor is qualified as an expert, much of the hearsay contained in the visitor's report may come in as the basis for expert opinion. ORE 703 (ORS 40.415). Another possibility is that the visitor's direct observations will come in, but the statements to the visitor by other persons will not. It is wise to talk with opposing counsel and perhaps request a status conference with the court if you need clarification on what will be admissible in order to prepare for the witnesses you need to have testify.

If you want witnesses to testify by phone, make sure that you obtain a stipulation from opposing counsel or file a motion as required by ORS 45.400(1). Plan in advance, because the statute requires the motion to be filed 30 days ahead of trial unless the court shortens the time. Once you have determined that you will be permitted, either by stipulation or by order, to have a witness testify by phone, be sure to contact court staff in advance and make arrangements. Do not automatically assume that a phone will be available in the courtroom or that you will be permitted to make a long distance phone call.

If your client needs some kind of accommodation (i.e., your client has trouble hearing or needs an interpreter), be sure you notify the judge's staff at least two days before the hearing so the court can make arrangements. Do not assume that an interpreter or audio equipment will be available.

Remember that only a few counties have judges or referees who hear probate matters on a regular basis. Much of the time you will be appearing before a judge who handles probate issues only occasionally. If the judge does not regularly hear probate matters, a short trial memo (emphasis on the word short) that sets out a few basics such as the statutory standard for incapacity and the clear and convincing burden of proof will be helpful to the judge.

Make sure that you provide the trial memo enough in advance that the judge will actually have time to read it—not 10 minutes before the hearing is scheduled to start. Also, check with the judge's staff as to

where to deliver the memo. A document filed at the civil window may not get to the judge's office for several days. Judges vary on whether they want a bench copy delivered to their chambers. If your case presents any issues beyond the basic "should a fiduciary be appointed?" even a judge who regularly hears probate matters will appreciate a short trial memo that outlines the particular issues in your case.

Be realistic in your communication with the court about how much time you are going to need for the hearing. If you tell court staff that you can get the hearing done in an hour, and then you call five witnesses and the other side also has five witnesses, you will have an unhappy judge on your hands. On the other hand, do not demand more time than you really need, especially if you are requesting an emergency hearing on a temporary order under ORS 125.605(5). Do not expect that the court will be able to free up a full day of trial time for you within two judicial days.

If you are requesting a hearing within two judicial days as required under ORS 125.605(5), call, fax, or e-mail the judge's staff (taking into account the preferences expressed by your court). Don't just file your objection. If you just file the objection, staff may not even find your file within two judicial days, much less schedule a hearing.

Also, make sure that you check before telling the court you are available for a certain date and time for hearing. After the judge's staff has spent time on the phone talking to all the lawyers and issued notices, neither the judge nor her or his staff will be pleased if you request that it all be done over again because you neglected to confirm the availability of your most important witness.

Avoid ex parte contact with the court. Many probate attorneys are used to being able to call or write to the court fairly freely,

Continued on page 6

Tips from the Bench *Continued from page 5*

because most probate matters are uncontested. Once you are involved in a contested case, do not put yourself or the court at risk of an ethical violation.

If you call experts, a curriculum vitae for the court's review is helpful.

Watch for conflicts. If you were a woman's long-time attorney and she is now incapacitated, can you represent her daughter as petitioner? Does the respondent have capacity to waive that conflict? Can you serve as temporary guardian and then represent both yourself as temporary guardian and someone else as petitioner at the same hearing?

Also, watch for situations that will call for you to become a witness (again, the example of an attorney serving as a temporary fiduciary, and then as counsel for the fiduciary; or representing the petitioner in a protective proceeding when you have knowledge of the respondent's capacity from previously serving as the respondent's attorney). See DR 5-102.

If you represent the petitioner

Do not just rely on the visitor's report or testimony, even if you have ensured that it will be admitted. Your burden of proof is clear and convincing evidence. ORS 125.305(1); ORS 125.400. If it is apparent that the visitor's opinion was heavily influenced by, for example, reports that senior services staff had found rotting food and urine-soaked carpets in the respondent's residence, be prepared to call those senior services staff as witnesses. Even assuming that the visitor's report or testimony regarding what he or she was told by senior services overcomes the hearsay obstacle, the court may well find that such evidence is not clear and convincing.

On the other hand, a protective proceeding is unlike other contested proceedings in that everyone is supposed to be interested in the welfare of the protected person. There is a reason that protective proceedings are captioned "In the Matter of..." instead of "Smith v. Jones." Put on the evidence that you need to meet your burden of proof, but avoid being overly aggressive or putting the proposed protected person on the defensive. If your client appears to be a child bent on punishing her parents for her dysfunctional childhood now that they are old and helpless, this will not go over well with the court.

If the judge feels that mother could probably use someone to manage her funds, but the proposed conservator will be harsh and controlling, the judge may decline to appoint her. Neither will it look good for you to humiliate the respondent with a withering cross-exam.

Remember your burden is not just to prove that the respondent needs a fiduciary, but also that the proposed fiduciary is appropriate. ORS 125.305(1)(c). Look up his or her history on OJIN, and check with a bonding company to make sure that he or she will be bondable if it appears a bond will be required. Have the proposed fiduciary in court so the court can make its own determination of whether he or she is appropriate.

ORS 125.080(2) mandates a hearing if an objection is filed and the objection is not withdrawn. If the objector does not show up to the hearing, but also does not withdraw the objections, be prepared to go ahead with a prima facie case. Discuss with the court how it wishes to proceed in light of the statute. The court might wish simply to allow you to make an offer of proof as to what the witnesses would testify.

If you represent the respondent/objector

If you represent a family member who agrees that Mom needs a guardian, but doesn't think it should be her sister, file a cross-petition. The court cannot appoint any fiduciary who has not been named in a properly served petition. *Spady v. Hawkins*, 155 Or App 454 (1998). If there is no cross-petition, the court's only options will be to appoint or not appoint the fiduciary named in the petition. If everyone is in agreement that the respondent needs a fiduciary, it will be difficult for the court to refuse to appoint the named fiduciary unless there is evidence that the named fiduciary is so bad that the protected person would be better off with no fiduciary.

If you represent the respondent, and the respondent came to you of his or her own accord, you should consider requesting that you be appointed by the court. Aside from the question of whether the respondent has capacity to retain you, there is also the question of whether the respondent can contract to pay you. A protected person for whom a conservator has been appointed cannot convey or encumber his or her estate or make any contract affecting his or her estate. ORS 125.455(2). The court may find that the respondent wanted to be represented by you, but did not have capacity to contract to pay for your services. There is the question of whether your request that the court appoint you somehow signals to the court that you yourself question your client's capacity (i.e., that perhaps you think the client meets the legal criteria for appointment of a fiduciary). Most courts want the respondent to be represented, and will not hold a request that you be formally appointed against you in that manner. If a conservatorship is pending, you can point out to the court the dilemma that ORS 125.455(2) presents, in that if your client loses and a conservator is appointed, his or her fee agreement with you may not be enforceable.

Make sure you point out to the court that the clear and convincing evidence standard applies and is the petitioner's burden of proof.

Supplemental Security Income (SSI) Benefit Standards	Eligible individual \$545/month
	Eligible couple \$817/month
Medicaid (Oregon)	Asset limit for Medicaid recipient \$2,000
	Burial account limit \$1,500
	Personal needs allowance in nursing home \$30/month
	Room & board rate for community-based care facilities \$446.70/month
	OSIP Maintenance Standard for person receiving in-home services \$546.70
	Long term care income cap \$1,635/month
	Community spouse minimum resource standard \$17,856
	Community spouse maximum resource standard \$89,280
	Community spouse minimum monthly maintenance needs allowance \$1,493/month
	Excess shelter allowance Amount above \$448/month
	Food stamp utility allowance used to figure excess shelter allowance \$261/month* * \$186 without heating and cooling cost
	Average private pay rate for calculating ineligibility for applications made after October 1, 2002 \$4,300/month
	Medicare
Skilled nursing facility co-insurance for days 21-100 \$101.50/day	
Part B premium \$54/month	
Part B deductible \$100/year	

Important elder law numbers

October 1, 2002

Elder law practice

- Establishing an elder law practice* No. 2, p.1
- Representing the client with limited English* No. 2, p.4
- Communicating with clients who are hard of hearing* No. 2, p.5
- Working with clients who have vision impairment* No. 2, p.6
- Tips from the bench for contested protective proceedings* No. 4, p.7
- Court upholds right to refuse medication* No. 4, p.6
- Law students recover funds* No. 4, p.6
- Web sites you can use* No. 1, p.7; No. 2, p.15
No. 3, p.15; No. 4, p.11

Estate planning

- Trusts provide safety net for disabled* No. 1, p.1
- Estate Planning Section proposes legislation* No. 4, p.3

Ethics

- Potential conflicts of interest* No. 2, p.11
- Representation of former client's spouse leads to conflict of interest admonition* No. 3, p.12

Insurance

- Help with Medicare supplement choices* No. 2, p.9
- Long term care insurance helps with high care costs* No. 3, p.5
- Claiming long term care benefits* No. 3, p.6
- LTC insurance Q&A* No. 3, p.6
- Some employers offer long term care insurance* No. 3, p.7
- How Medicaid views long term care insurance payments* No. 3, p.8
- Taxability of long term care policies* No. 3, p.9

Family law

- Rules get tougher for grandparents' visitation and custody* No. 1, p.4

Legislation

- Elder Law Section sponsors legislation* No. 4, p.1
- Estate Planning Section proposes legislation* No. 4, p.3
- Committee to study Uniform Trust Code* No. 4, p.4

Long term care

- Resolving problems in long term care facilities* No. 3, p.3
- Sources of information for clients who seek LTC* No. 3, p.4
- Medicaid discrimination in long term care* No. 3, p.1

Medicaid

- Changes in rules for income cap trusts* No. 1, p.2
- Income cap trusts: one size does not fit all* No. 1, p.3
- Agency and Professional Relations Subcommittee update* No. 2, p.13
- Medicaid discrimination in long term care* No. 3, p.1
- Medicaid: an overview* No. 3, p.11
- How Medicaid views long term care insurance payments* No. 3, p.8

Medicare

- Medicare: an overview* No. 3, p.10

Social Security

- Understanding SSD and SSI* No. 2, p.7
- Social Security's representative payee program* No. 2, p.10

Index to Volume 5 of the Elder Law Newsletter

**No. 1:
Winter 2002**

**No. 2:
Spring 2002**

**No. 3:
Summer 2002**

**No. 4:
Fall 2002**

Resources for elder law attorneys

Events

Washington State Bar 2002 Annual Elder Law Section Meeting and CLE

September 20, 2002

SeaTac Marriott Hotel

Phone: 800-945-WSBA; Web site:

www.wsba.org/cle/2002/02378.htm

The Contested Estate Plan

October 2, 2002

Oregon Convention Center, Portland

Contact OLI Registrar at 503.768.6580 or 800.222.8213

Web site: www.lclark.edu/org/oli

2002 Oregon State Bar Annual Meeting: The Changing Face of the Bar

October 4-5, 2002

Valley River Inn, Eugene

CLE sessions: *The Tax Man Cometh, Diversity & Your Practice, Litigation Lions and How They Roar, Future Trends and Economics*. Register before September 23 to avoid late fee. Web site: www.osbar.org/2practice/annualmeeting/annualmeeting.html

National Guardianship Association Annual Conference

October 6-9, 2002

St. Louis, Missouri

Contact Jenifer Mowery at 520.881.6561, x114 or jmowery@naela.com or visit

www.guardianship.org

OR Elder Law 2002: The Face of the Future

October 11, 2002

Oregon Convention Center, Portland

See Page 5 for details.

Int'l Conference on Family Caregiving

Oct 12-14, 2002

Washington, DC

Phone: 800.537.9728

Web site: www.caregiving.org

e-mail: info@asaging.org

National Association of Professional Geriatric Care Managers Annual Conference

October 17-20, 2002

Denver, Colorado

Contact Jenifer Mowery at 520.881.6561, x114, or jmowery@mgmtplus.com Web site:

www.caremanager.org

National Aging and Law Conference

October 23-26, 2002

Arlington, Virginia

Web site: www.aarp.org/ntltrpro

e-mail: Aalbright@AARP.org

2002 NAELA Institute

November 14-17, 2002

Albuquerque, NM

Contact Jenifer Mowery at 520.881.4005, x114 or jmowery@naela.com

NAELA UnProgram

January 31-February 2, 2003 and February 7-9, 2003 (2 weekends)

Dallas, Texas

Contact Jenifer Mowery at 520.881.4005, x114 or jmowery@naela.com

Elder Law Section Executive Committee Meetings

September 13-14, 2002

Cannon Beach

November 8, 2002

2:00 p.m.-5:00 p.m.

Lake Oswego OSB Center

Monthly Elder Law Discussion Group

Meets second Thursday: Legal Aid Services, Downtown Portland

Details: Cathy Keenan 503.224.4086

Books

Advance Health Care Directives: A Handbook for Professionals

by Carol Krohm, M.D. and Scott Summers

Includes a CD-ROM containing advance health care directives by state.

Published by and available through the American Bar Association,

Product Code 5460034, 374 pages, \$99.95. Phone 800.285.2221.

Web site: www.abanet.org/srlawyers

Third-Party and Self-Created Trusts, new third edition

by Clifton B. Kruse, Jr.

Updated through April 29, 2002 and includes Revenue Ruling 2002-20, 2002-17 I.R.B. 7-94, which expands the types of trusts to be created for the benefit of a person with disabilities to which a Charitable Remainder Trust makes income distributions. Sample trust illustrations. New chapters on Medicaid (dis)qualifying trusts, Medicaid liens, sole benefit disability trusts, trusts created for S.S.I. purposes under 42 U.S.C. Sec. 1382b(e), V.A. pension benefits, and disability trusts under 42 U.S.C. Sec. 1396p(d)(4)(A). A must-have for all elder law attorneys.

Available through the American Bar Association, Product Code 5430436. \$84.95 if ordered before September 30, 2002 to customers who purchased previous editions. Refer to Source Code PRP2MTHR. Phone 800.285.2221 or e-mail at orders@abanet.org.

Web site: www.ababooks.org

Publications online

The Merck Manual of Geriatrics is at www.merck.com/pubs

Fourth Annual Report on Oregon's Death with Dignity Act

is available at www.ohd.hr.state.or.us/chs/pas/nas.htm

Veterans' Administration Benefits Guide

Explains how to locate specific information about V.A. benefits online.

Explanations of educational benefits, burial benefits, employment services. www.va.gov/opa/feature

Web sites you can use

Internet research can assist you in getting information quickly about a topic with which you are unfamiliar.

Among the documents a client brought in recently was a copy of a "land trust." He had a variety of questions. My Internet land trust research provides a helpful roadmap for attorneys who need to deal quickly with unfamiliar terms or documents.

There are a several ways to start the search. Most people will start their search with a general search engine—www.netscape.com, www.altavista.com, or www.google.com—or with a more specific search engine like the attorney-oriented www.law.cornell.edu, www.lawsources.com, or the significantly less formal 'Lectric Law Library www.lectlaw.com

One should be careful about using some of the lesser-known search sites unless well equipped with a program designed to kill "pop-up" and "pop-under" ads. Many search engines are paid for by advertising and the ads are used with a greater frequency than they used to be. I use a freeware program called "Pow" from AnalogX. At www.analogx.com, just search for browser add-ons. There are also others. If you use Microsoft Explorer for browsing, they also offer a useful freeware to handle "cookies" called Cookie Wall. That program is not yet available for those of us who use Netscape, although they promise it is coming. There are many other programs out there that deal with both pop-ups and cookies. Try searching for "popup ad killer."

Since I knew that land trusts were being marketed in creative real estate financing seminars for the general public, I decided to use the general search engines rather than the legal specific ones to start. Less popular subjects often lend themselves to a start with the legal-specific engines.

Netscape gave me 2.5 million hits, with two "sponsored links." One sponsored link referred to the use of land trusts as "asset protection," and the other linked to a land trust organization that uses land trusts to protect natural resources like farm or forest land. I am always somewhat skeptical about sponsored links, although I look at both. The asset protection turns out to be a commercial site selling offshore trusts, among other asset protection schemes. A cursory view of the first few pages of the Netscape results told me that natural resource protection trusts populate the bulk of the sites this browser listed.

Since Netscape did not seem to be getting me the information I needed, I switched to AltaVista. AltaVista showed me a link to an attorney who promises to teach you the secrets of using land trusts for privacy, anonymity, and asset protection. It turned out that this attorney's writings are some of the resources that my client had been looking at. This sponsored link was titled "Your Step by Step to Land Trusts" and led to a book sales company hawking his book.

I seemed to be getting closer, so I refined my search by adding the terms "privacy" and "estate." Within a page or two, I found a site that says it explains the basics of land trusts in Illinois. This link turned out to be a site from an Illinois attorney. His article explained Illinois land trusts and their effects. Upon examination of a few more hits, I found a bank that handles land trusts in Illinois and other sites that refer to land trusts in the context that my client was asking about. I also found an article that lists the states that specifically recognize land trusts.

Having determined that Illinois and Florida both have specific land trust statutes, I decided to search those state statutes. On Cornell's www.law.cornell.edu I searched for the Illinois and Florida legal materials. Cornell took me to the official Illinois state statutes at www.legis.state.il.us/ilcs. Using its search engine and searching for "land trust" I discovered that land trusts are covered in Section 765 of the Illinois Compiled Statutes and I could review the statutes on line, print them out, save them to my hard drive in my client's file, or cut and paste them into a research memo. I could do the same for Florida.

After I had reviewed a few statutes and had an understanding of the statutory scheme under which land trusts are based, I decided to research the author of the step-by-step guide for land trusts. I put the author's name in an AltaVista search. I found online message boards, books written by this attorney, courses offered by him, and a variety of similar links. A cursory review of some of the hits on the list gave me the names of all the "gurus" in the "creative real estate financing" seminar market. I even found a site that has articles written by most of these people.

I now knew where my client was getting his information and what the issues are regarding his matter. How much time did I spend? Less than two hours. How much did I spend for paid databases? Nothing.



By Susan Ford Burns,
Portland

Some definitions

"Pop-up" and "pop-under" ads are the ads that show up when you go to a site and get extra windows opening up with ads. Pop-up ads show up in front of the Web page, while pop-under ads show up when you close the original site.

A "cookie" is a simple text file that allows a Web site to store information on your PC's hard disk and retrieve it from your hard disk the next time you visit the site. A Web site can only retrieve the information it has placed on your PC. It cannot retrieve information from other cookie files and cannot access any other information on your PC. Cookies are not programs and therefore cannot harm your PC, although they do take up memory space.

Oregon Elder Law 2002: The Face of the Future



Friday, October 11, 2002

**Oregon Convention Center
777 Martin Luther King Jr. Blvd
Portland, Oregon**

4.25 MCLE credits, 1 ethics credit, and 1 diversity credit

See Page 5 for details

Newsletter Board

The *Elder Law Newsletter* is published quarterly by the Oregon State Bar's Elder Law Section, Tim Nay, 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
503.796.0351

Advisory Board:

Penny Davis, Chair eldlawfirm@spiretech.com
503.452.5050

Shirley Bass sbass@cybcon.com
503.241.9455

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

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

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

