



Elder Law Newsletter

Volume 4
Number 3
Summer 2001
Elder Law Section
Executive
Committee

Chair
Cinda Conroyd
Salem

Chair-elect
Lisa Bertalan
Bend

Past Chair
Richard Pagnano
Portland

Secretary
Shirley Bass
Portland

Treasurer
S. Jane Patterson
Gresham

- Members**
- Dady Blake
Portland
 - Allyn Brown
Newberg
 - Hon Claudia Burton
Salem
 - Wesley Fitzwater
Clackamas
 - Steven Heinrich
Corvallis
 - Helen Hempel
Eugene
 - William Kuhn
Heppner
 - Michael Levelle
Portland
 - Tim Nay
Portland
 - Ruth Simonis
Portland
 - Mark Williams
Portland
 - Jennifer Wright
Salem

Oregon laws provide help for elder abuse victims

By Shaun Wardinsky

Without being aware of it, lawyers who routinely deal with elders and disabled persons may be working with someone suffering abuse. Although they may have heard of incidents of elder abuse in long-term care facilities, many people are not aware of the prevalence of elder abuse among the population in general, because it usually occurs in an elderly person's home, and is quite often perpetrated by a family member. Abused elders are often in a highly dependent and needy position and therefore unable to protect themselves, let alone report their abuse. While the actual incidence is almost impossible to measure, the National Center on Elder Abuse estimates that in 1996 there were between 820,000 and 1,860,000 abused elderly people in the United States. 36.7% of known perpetrators are adult children,

10.8% are other family members, and 12.6% of the perpetrators are spouses. It is important that elder law attorneys are able to recognize the signs of abuse and are familiar with the laws clients can use to protect themselves.

Definitions of elder abuse

Physical abuse is the use of physical force that may result in bodily injury, physical pain, or impairment. Common indicators of physical abuse include cuts and bruises, burns, signs of restraint, trauma, fractures, repeated unexplained injuries, explanations inconsistent with the injuries, and doctor or emergency room "shopping."

Sexual abuse is nonconsensual sexual contact of any kind. Potential indicators of sexual abuse include trauma to the genital area, venereal disease, and sexual infections.

Emotional or psychological abuse is the infliction of anguish, pain, or distress through verbal or non-verbal acts. Signs of this kind of abuse include anxiety, depression, hopelessness, helplessness, thoughts of suicide, confusion, disorientation, trembling, clinging, lack of eye contact, evasiveness, hypervigilance, and agitation.

Financial or material exploitation is the illegal or improper use of an elder person's funds, property, or assets. Look for large withdrawals from accounts in a brief period of time, switching of accounts from one bank to another, significant ATM activity by a homebound elder, account statements no longer being sent to the elder, documents prepared for the elder to sign that he or she cannot explain or understand, a standard of living inconsistent with resources, missing valuables, inconsistent signatures which may be possible forgeries, and isolation of the elder from long-term friends or family.

Neglect, a very common form of elder abuse, is the refusal or failure to fulfill oblig-

In this issue..

Elder Abuse	
Elder abuse & the law	1
Sexual abuse of elders	4
Abuse of powers of attorney	5
Gatekeeper programs	5
Portland police elder crimes team .	6
Resources for combating abuse . . .	7
Plus...	
Change in rule on pooled trusts . . .	8
Update on annuity rule change . . .	8
Independent Choices program	9
NAELA symposium report	10
Member news	10
Important elder law numbers	11
Resources for elder law attorneys .	11

Continued on page 2

Elder abuse *Continued from Page 1*

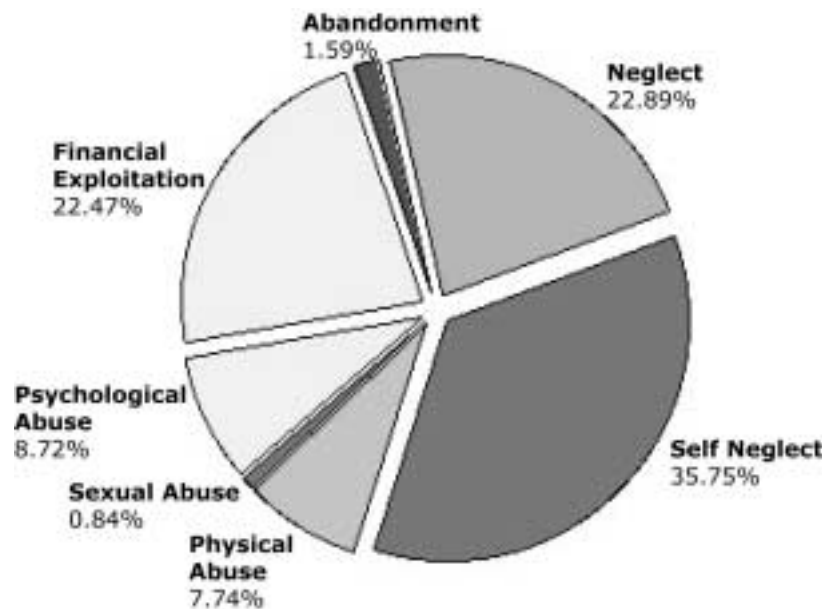
ations or duties to an elderly person. Signs of passive and active neglect include sunken eyes, weight loss, malnourishment, chronic physical and/or psychiatric problems, extreme thirst which may indicate dehydration, and bed sores.

Abandonment is the desertion of an elderly person by an individual who has physical custody of the elder, or by a person who has assumed responsibility for providing care to the elder.

Self neglect is behavior of an elderly person that threatens his own health or safety.

Incidence of elder abuse in Oregon

In the year 2000, the Abuse Prevention Unit of the Oregon Department of Social Services recorded 6,537 instances of elder abuse outside of long-term care facilities.



Reporting elder abuse

Oregon's community abuse reporting statute requires mandatory reporting by doctors, nurses, home health workers, certain state and county workers, clergy, and others who, while acting in their official capacity, have reasonable cause to believe that a person over 65 has been abused. [ORS 124.050-125.095] Attorneys are not mandatory reporters. The law covers non-accidental physical injury, neglect by withholding basic services, abandonment, and willful infliction of physical pain or injury. A report must be filed with the Senior and Disabled Services Division or with a law enforcement agency. Those who report in good faith are immune from civil liability, and are not required to participate in any subsequent judicial process. The identity of those who report is confidential and may be disclosed only after consent or through judicial process. Reports are investigated by local adult protective services workers familiar with community resources which may help stop abuse or prevent future abuse.

Elders who are residents in a long-term care facility are covered under ORS 441.630-441.675. The definition of abuse under this statute is broader, and includes verbal or mental abuse, involuntary seclusion, and some financial abuse. Attorneys are listed as mandatory reporters, but the concept of reporting suspected abuse without the client's consent raises ethical issues, including the duty to preserve confidences. Reports of elder abuse in licensed community-based care

facilities are treated as complaints against the facilities and are handled through the enforcement process.

Elderly and Disabled Persons Prevention Act

Any person 65 years or older who is not a resident in a long-term care facility is covered by the Elderly and Disabled Persons Prevention Act (EDAPA). [ORS 124.005-124.095] Although some disabled people are included, coverage appears to be limited to those with very low incomes who are eligible for SSI or state general assistance.

In order to qualify for a restraining order under the EDAPA, a person must show that he or she was abused in the preceding 180 days. Abuse may include a physical injury, neglect, abandonment, the willful infliction of physical pain or injury, name calling, inappropriate phrases, profanity, ridicule, harassment, coercion, threats, cursing, intimidation, or inappropriate sexual comments.

Elders who are subject to sweepstakes promotion abuse may also be protected under an EDAPA restraining order. The elder must show that a sweepstakes promoter caused a sweepstakes promotion to be mailed to an elderly or disabled person who previously spent more than \$500 in the preceding year on any sweepstakes promotions. [ORS 124.005(1)(f)]

No relationship between the petitioner and the respondent is required for a restraining order under EDAPA.

In addition to showing that he has been abused within the previous 180 days, a person who seeks a restraining order must also show that he is in immediate and present danger of further abuse. A history of abuse in the period before the last 180 days is extremely relevant here. The statute also provides that if the elder person leaves the residence to avoid further abuse, it will not prejudice his case. The standard of proof under an EDAPA claim is a preponderance of the evidence.

EDAPA requires that forms and information be made available free of charge by the clerk of the court, and if a petition has been filed, the clerk is also required to provide information about local protective services programs. The county sheriff must serve the respondent at no cost to the petitioner, unless the petitioner chooses another form of service.

As soon as the elements necessary to obtain a restraining order are satisfied and a

Continued on page 3

Elder Abuse *Continued from page 2*

petition asserting a prima facie case has been completed, a hearing must be held by either telephone or in person. A petitioner may request ouster of the respondent from the residence and access to a law enforcement standby, allowing a party leaving a residence to remove essential personal effects. He may also request that the respondent be restrained from abusing, intimidating, molesting, interfering with or menacing him, or attempting to do so. The court may also order any other relief it considers necessary to provide for the safety and welfare of the elderly or disabled petitioner.

If the respondent wishes to contest the restraining order issued under EDAPA, he may request a hearing within 30 days of service of the order. EDAPA provides that if an elder or disabled person does not want to be in the same courtroom as his alleged abuser(s), the hearing may be held by telephone. The hearing may include testimony from witnesses and adult protective services workers. The respondent may raise issues not previously raised in the request for hearing. However, if he does so, the petitioner is entitled to a continuance to respond to those issues. If a respondent is represented at his hearing but the petitioner is not, the court may extend the hearing for up to five days so the petitioner can seek an attorney. Other relief available to either party includes the court's assessment of reasonable attorney fees.

If a restraining order under EDAPA has been either successfully defended or uncontested, the restraining order will be in effect for one year or until withdrawn or amended. A court may renew an EDAPA restraining order for good cause shown. Good cause does not require additional abuse within the 180 days preceding the renewal request in order to justify the renewal.

Other Oregon statutes which are designed to help protect people subjected to various forms of abuse also interact with EDAPA. For example, EDAPA's mandatory arrest provision requires a law enforcement officer to arrest a respondent if the officer has probable cause to believe that there is a legitimate EDAPA restraining order and the respondent has violated the terms of the order. The statutory requirement that law enforcement officers enter restraining orders into the law enforcement data system (LEDS) facilitates this provision of EDAPA.

In addition, local law enforcement agencies and district attorneys are prosecuting increasing numbers of elder abuse cases under the criminal mistreatment statutes, which apply when the victim of the crime is 65 or older. [ORS 163.200-163.205]

Civil remedies

The Oregon Legislature has also created a civil action for abuse to an elderly or incapacitated person who has suffered damage or death by reason of physical or financial abuse. [ORS 124.100-124.140] A case can be brought by the injured person or by his or her conservator, guardian, or attorney-in-fact. The court may award either economic damages resulting from the abuse or \$500 (whichever is greater). Non-economic damages resulting from the abuse and reasonable conservator and guardian ad litem fees are also available. Attorney fees are likewise recoverable.

To be held liable for physical abuse, the defendant must have knowingly acted or failed to act, causing either physical abuse or financial abuse to the plaintiff. Physical abuse includes assault, menacing, reckless endangerment, criminal mistreatment, rape, sodomy, unlawful sexual penetration, sexual abuse, unreasonable physical constraint, prolonged or continued deprivation of food or water, or chemical restraint through psychotropic drugs without a doctor's order, given in a manner designed to punish the victim or in a man-

ner or extended period of time inconsistent with the prescribing doctor's orders.

Financial abuse includes the wrongful appropriation of an elder or disabled person's money or property, or withholding money or property of an elder without good cause. The transfer of property for the purposes of qualifying a person for Medicaid or other state or federal assistance programs does not qualify as financial abuse under the statute. To be liable under this statute, the defendant need not have a fiduciary relationship with the plaintiff.

The court may award plaintiff damages, fees, injunctive relief (i.e., establishment of bonds, receiverships, or trusts), as well as ordering the cessation of contact with particular persons or enterprises. Finally, the court may issue "other reasonable restraints" such as a permanent injunction on future activities or investments. Because the statute of limitations on such an action is seven years, these remedies may be still available when the time period for an EDAPA restraining order has lapsed.

A victim of elder abuse may also obtain a restraining order through the Family Abuse Prevention Act (FAPA) [ORS 107.700-107.732] or a stalking protective order under ORS 163.735. Depending on the type and nature of the abuse, and the victim's relationship with the perpetrator, these other restraining orders may be more appropriate.

A FAPA restraining order allows a petitioner the opportunity to seek emergency monetary relief and the custody of minor children. A stalking order provides permanent relief and does not have to be renewed after each year. A stalking order may also create a private cause of action which can include economic and non-economic damages, as well as damages for emotional distress, punitive damages, attorney fees, and costs.

Attorneys should also keep in mind the many general civil theories for recovery which might apply to particular situations. These include eviction, the Unlawful Trade Practices Act, proceeding on trust administration, conversion, replevin, constructive trust, breach of fiduciary duty, breach of contract, rescission, and unjust enrichment.

Shaun Wardinsky is an attorney with Yates, Matthews & Morasch PC.

The author thanks Patricia L. McGuire, Davis Wright Tremaine LLP, for her assistance with this article.

Elders can be targets for sex crimes

By GayLynn Pack

Sexual abuse seminar

On September 10, 11, and 12, 2001, the Abuse Prevention Unit of Senior and Disabled Services will host the *2001 Conference on Sexual Abuse of Vulnerable Adults: Investigation, Prosecution, and Preventive Strategies*.

The conference will be at the Eugene Hilton Hotel and Conference Center. Topics include sexual assault of elders and persons with disabilities, investigation and forensics, perpetrator typology, and survivor coping skills.

Preregistration is required and CLE credits are available.

A September 9 pre-conference program presented by the Oregon Coalition Against Domestic and Sexual Violence will cover a broad spectrum of sexual assault issues.

For more information call Marcy Eckhardt at 503.947.5004 or send her e-mail at Marcy.L.Eckhardt@state.or.us

The perpetrators of sex crimes do not respect age. During the year 2000, there were 55 cases of sexual abuse reported in Oregon, out of a total of 6,537 non-facility reports of elder abuse. In 1999, sexual abuse accounted for 76 of the 5,648 reports. Nationally, people aged 64 or older represent 1% of all rapes and sexual assaults.⁽¹⁾ Sexual assault of elders includes a continuum of unwanted sexual contacts or behaviors from voyeurism, exhibitionism, kissing, and fondling to unlawful penetration and rape.

Ninety-eight percent of sex abusers of older men and women are male. The majority of female victims live alone, and 73% of the rapes occur in the victim's home. Most rapes occur in the daytime and involve the use of physical force. Older women are more likely to sustain injuries than younger women. Most of the time the perpetrator is known to the victim and has (or pretends to have) a legitimate reason for being there. Sex crimes are not just perpetrated by strangers, and often the offender is a friend, acquaintance, caregiver, or family member.

The disturbing thing about these figures, is that in all probability, they are seriously under-reported. An estimated 3.5 million women sixty years and older are survivors of childhood sexual abuse and are less likely to disclose current sexual abuse. Other factors that may contribute to low reporting of sex crimes against elders are the conspiracy of silence around sexual abuse; sexual taboos in our culture; and fading memories of the event. Over the decades our definitions of what constitutes rape or sexual abuse have changed too, and the older victim may not identify what happened to her as sexual assault.

Just as ageist stereotypes contribute to the myth that elders or those with disabilities are unable to form or continue intimate relationships, such stereotypes also contribute to the myth that older women are not targets of rape. Fear of not being believed, shame, and embarrassment discourage elderly victims of sexual assault from calling the police.

Although physical and psychological limitations do not preclude healthy sexual relationships, such limitations may increase the risk for rape and sexual assault.

When older people reside in an institu-

tional setting, the risk for sexual assault increases simply as a function of increased dependency on staff for protection and care. Also, perpetrators who prey on elderly and disabled people are attracted to the jobs that give them the most access to their victims.

Unfortunately with older adults, the indicators of sexual abuse can be misinterpreted as signs of aging or dementia. Elders have been denied treatment and criminal investigation because officials did not believe they had been sexually assaulted. Signs of sexual abuse of elders are the same as those exhibited by victims of any age and include verbal disclosure, physical trauma, bruising, skin tears, urinary tract infections, physical or behavioral changes, sexualized behaviors, sleep disturbances, loss of appetite, confusion, depression, and new displays of anger, regression, or noncompliance. Any time these indicators are observed, the possibility of sexual violence should be taken seriously and explored thoroughly.

Adult protective services workers are trained to recognize the signs of abuse and to assist people who have been abused. Whenever sexual abuse of an older person or a person with a disability is suspected, contact the local Area Agency on Aging or state Senior and Disabled Services Division office, or the local law enforcement agency. If the person being abused is 65 or older, the unwanted sexual contact may be elder abuse under ORS 124.050 to .095. Abuse of nursing home residents of any age is covered by ORS 441.630 to .040. Health care providers, government employees, and others are mandatory reporters of suspected elder abuse in any setting. Attorneys are included as mandatory reporters of abuse of nursing home residents.

Don't think that just because a person is old, she won't be sexually assaulted, or that because a person is in a care facility, he is safe. It just isn't true.

Footnote:

(1) (Perkins, C. (1997), "Age Patterns of Victims of Serious Violent Crime-Special Report," NCJ-162031, p. 1, Washington, D.C.: Bureau of Justice Statistics, U.S. Department of Justice.)

GayLynn Pack is an Abuse Prevention Specialist with Senior and Disabled Services Division, Abuse Prevention Unit.

Reduce risk of abuse of powers of attorney

By Dady K. Blake, Portland

For many of our clients, powers of attorney are an easy, inexpensive way to ensure that someone else will be able to act on their behalf. However, their ease of establishment and use comes at a cost: They are also easy to abuse.

I tell my clients that the best way to prevent abuse of powers of attorney is to select only the most appropriate powers and to give them to someone who is absolutely trustworthy. I believe this is true, but the results are not always predictable.

A simple but cumbersome method is to keep the document with a letter of instructions that requires proof of financial incapability--or even incapacity--prior to releasing a power of attorney document to the designated agent. It may also be appropriate to send the agent a letter with a statement to sign which declares that he or she understands and accepts the limitations of powers.

I also recommend adding language based on Washington's RCW 11 94 050, which defines the limits of the agent's powers. For example:

My Agent shall use my property for my exclusive benefit. My Agent does not have my authority to make, amend, alter, or revoke my [estate planning documents] and beneficiary designations, to make gifts of my property, to sell my property for less than its fair market value, or to disclaim property on my behalf.

I've also provided clients and their agents with *The Fiduciary Handbook*, available from the Estate Planning Council of Seattle. The American Bar Association's booklet *You are the Fiduciary: A Handbook for Individuals Named as Executor or Trustee* contains easy-to-read basic fiduciary principles.

Increasingly I recommend language that requires an agent to account to designated individual(s) for his or her actions, and/or specifies the limitations on an agent's unilateral powers—such as limitations on withdrawals over a certain dollar amount. Limitations are placed on the first page in large print so they are more likely to be read.

Finally, the obvious: Take the time to understand a client's preferences and concerns regarding the use of this powerful tool and incorporate these into the document.

Newsletter Board comment: It is especially important to have a good understanding of the client's estate plan. Disclaimers and blanket prohibitions on gifting are contrary to good estate planning in many cases, as there may be substantial tax advantages available through such actions. Limitations on the power of attorney must be carefully considered and tailored to the needs of the client.

For an excellent overview and national perspective on elder abuse, see "Domestic Abuse in Later Life" by Bonnie Brandle, M.S.W. and Tess Meuer, J.D.; *The Elder Law Journal*, Volume 8, No. 2, pp. 297-335; Champaign, IL: University of Illinois College of Law (2000). Ms. Brandle is Project Coordinator of the National Clearinghouse on Abuse in Later Life. Ms. Meuer is Senior Staff Attorney of the Wisconsin Coalition Against Domestic Violence.

Gatekeeper programs identify elders in trouble

One way to identify elders suffering abuse is through "gatekeeper" programs. These programs, which operate through various health and welfare agencies around the world, train people whose jobs regularly put them in contact with older citizens to recognize warning signs of possible problems and to notify someone who can help. Gatekeepers include mail and newspaper carriers, customer service representatives, meter readers, grocers, ambulance attendants, apartment and mobile home court managers, pharmacists, taxi drivers, fuel oil dealers, bank personnel, firefighters, and police officers. When a gatekeeper identifies a person who may be at risk because of abuse, neglect, or exploitation, he or she calls a 24-hour help line. Case managers and adult and protective service workers assess the situation, and marshal community resources to get appropriate help for the elder.

The original problem identified by a gatekeeper is often "only the tip of the iceberg," according to Multnomah County Aging and Disability Services, which administers the program in Portland. An example was the case of a 78-year-old woman whose utility payments started to fall behind. A customer service representative became concerned and called the gatekeeper program. An investigation found the woman was being exploited by a man originally hired as a yard worker. He had moved into her home, convinced her that he was planning to marry her, and had gotten her to take out a \$40,000 second mortgage on her house.

Gatekeepers are often the first people to notice when an elder needs help, even when no abuse is involved. They are encouraged to call the help line whenever they become concerned about an elder person's ability to cope.

There are gatekeeper programs in several Oregon and Washington counties. All gatekeeper programs strive to offer resources and services while respecting individual choices.

County	Contact	
Multnomah	Paul Iarrobino	503.248.3646
Washington	Mary Gail Jones	503.640.3489
Clackamas	Louise Marsh	503.657.1366
Columbia	Donna Jo Stetzel	503.397.5863
Clark	David Radke	360.694.8144

Police acting to help elderly crime victims

By Carole Barkley



Those concerned with the welfare of elders should be aware that the Elder Crimes Response Team is very small and can deal with only the most serious cases.

The ECRT is developing a database on crimes against the elderly, which it hopes will convince the Portland Police Bureau to direct more resources to this area of growing need.

The Portland Police Bureau is trying to do something about the cases of elder abuse it encounters. Officers are improving their ability to identify cases of elder abuse, and the city's Elder Crimes Response Team (ECRT) works with police, social service agencies, and other community resources to intervene in cases of suspected abuse. However, according to ECRT Coordinator Jim Nelson, prosecuting those who prey on the elderly is often complicated by the victims' inability or unwillingness to cooperate.

Older people, whether wealthy or of modest means, can make ideal targets for various financial scams. A recent widow may be contacted by someone who says, "I am a friend of your husband—he entered into a contract with me and he owed me \$700." She pays him. A week later, he calls again—perhaps changing the story slightly—and she has forgotten she paid him and pays him again.

A common scenario is financial exploitation by someone who wants money to support a drug habit. It may be the elder's own child or grandchild or it may be someone from the neighborhood, or even a hired caregiver. This person will repeatedly ask for money, may use threats if the elder seems reluctant, and may ultimately resort to physical violence. "Drugs," says Nelson, "are probably the leading factor."

Financial exploitation of elders can go on for years without being detected. Cases come to light when a family member, an old friend, or another visitor sees that that something is different. They may notice that a new person has moved in. A doctor may notice suspicious injuries. A bank teller may see a suspiciously large withdrawal. A police officer who is investigating another matter may observe an elder he suspects is being victimized.

When a police officer or other official encounters a case of elder abuse, the ECRT is notified. This team, which operates out of East Precinct, is part of a network of social workers, prosecutors, community activists, and others who can step in to turn the situation around.

However, the victim may be in denial. Perhaps the abuser is a child or grandchild to whom the victim can't say no. In other cases,

the elder is just not putting it all together: not recognizing, for example, that it is illogical for someone to have 20 operations a year.

"Many victims are enablers. That is one of the major barriers to prosecution," says Nelson. "Even if someone can show an elderly victim how he is being swindled, he may not want to do anything about it. No one else out there is giving him any attention. In the back of his mind he has a feeling that it is worth it."

In one case, a very wealthy elderly man with chronic illnesses was exploited by a woman 50 years younger. "She had the key to his heart and his bank account," Nelson relates. "He got to the point where he didn't have enough money to pay for his medication." The woman was a professional swindler, but when a police detective showed the victim evidence of her criminal activities, he didn't believe it. He told the detective that even if it was true, he felt he could turn her around. "All his family was gone. He thought he was creating a new future for himself."

Another barrier to prosecution is the physical and mental condition of the victims. "Older, infirm people make lousy witnesses," says Nelson. "The defense can confuse them easily. Counterbalancing that is the sympathy factor for the victim. As long as the investigators have documented the transactions and can prove that the abuse happened, prosecution can take place."

Authorities are more likely than ever before to prosecute even if the victim is hostile or uncooperative, and the more that law enforcement and social service agencies work together, the more likely these cases will be prosecuted. Elder law attorneys who know of any possible witnesses can help by providing the police with names.

"Our first goal," asserts Nelson, "is to stop the abuse," and he credits as a major tool the restraining order available under the Elderly and Disabled Persons Prevention Act. "The restraining order gives the police arrest power," he says. It is a way of getting the victim away from the abuser, so social service agencies can provide real help.

Jim Nelson can be reached at 503.823.0291; by e-mail at jcnelson@police.ci.portland.or.us

Carole Barkley is a Portland freelance writer and the editor of the Elder Law Newsletter.

Resources for combating elder abuse

There are several government programs available to help elderly and disabled people seek protection from abuse through restraining orders. These include the following:

Senior & Disabled Services

500 Summer Street NE, 2nd Floor
Salem, OR 97301-1073
800.232.3020

Senior and Disabled Services Department, Multnomah County

4805 SW Griffith Drive
Beaverton, OR 97005
503.627.0362

Senior and Disabled Services Department, Clackamas County

18600 SE McLoughlin Blvd
Milwaukie, OR 97267-6723
503.655.8640

Senior and Disabled Services Department Hillsboro Senior Resource Center

133 SE Second
Hillsboro, OR 97123-4026
503.693.0999 or 503.640.3489

Senior and Disabled Services Department Tigard Senior Resource Center

11515 SW Durham Road, Ste E5
Tigard, OR 97224-3746
503.968.2312

Area Agency on Aging

503.248.3646

Multnomah County Legal Aid

Senior Law Program

700 SW Taylor, Suite 300
Portland, OR 97205
503.224.4806

The National Center on Elder Abuse

18 First Street NW, Suite 500
Washington, DC 20002
202.682.2470 or 202.682.0100

There are many community resources available to detect and counteract financial fraud and to get help for elders in trouble.

American Association of Retired Persons (AARP): 800.922.8716

Provides publications on how to avoid becoming a victim of fraud

Attorney General

Medicaid Fraud Control Unit: 503.229.5725

Regulation of charities: 503.229.5576

Department of Consumer and Business Services, Division of Finance and Corporate Securities: 503.947.7856

Offers information on investment scams

Elder Abuse Hotline : 800.232.3020

To report financial abuse statewide

Elder Financial Exploitation Prevention Program, SDSD:

503.945.8834

Offers counseling and presentations on financial fraud

Elders in Action Ombudsman Services: 503.823.5293

Offers trained volunteers who help resolve problems with elder abuse, healthcare, housing

Gatekeeper Programs (See article on page 5)

Multnomah County 503.248.3646

Washington County 503.640.3489

Clackamas County 503.657.1366

Columbia County 503.397.5863

Clark County 360.694.8144

Oregon Bankers Association: 503.581.3522

Provides *Prevention of Financial Exploitation of the Elderly*, an informative pamphlet for elders that describes types of fraud and how to avoid becoming a victim

Oregon Domestic Violence Hotline: 888.235.5333

Oregon "No Call" List

This is a list of telephone numbers of Oregon residents who do not want to be called by telemarketers at their homes. With some exceptions, the law prohibits telemarketers from calling households which have been added to the list. It costs \$6.50 to join the list. Annual renewals are \$3.00 per phone number. Registration forms for the list are available at www.ornocall.com. You may also call 877.700.6622 to have a registration form mailed to you. A telemarketer who unlawfully calls someone on the List violates Oregon's Unlawful Trade Practices Act [ORS 646.605-646.652], and is subject to civil penalties of up to \$25,000 per violation.



New rule on pooled trusts will benefit nonprofits

By Donna R. Meyer

A recent change in the Oregon rule regarding pooled trusts will benefit organizations that manage these trusts. Governmental programs such as Supplemental Security Income and Medicaid are intended to provide a disabled person with only the most basic needs, such as food, shelter, and clothing. A family which has a disabled member can set up a trust fund with a nonprofit organization, and disbursements from that fund can provide funds for other needs, including insurance premiums, education, supplemental nursing care, eyeglasses, travel, entertainment, reading materials, vacations, and telephone service. The change in the law affects what happens to the money left in the fund when the beneficiary dies.

OAR 461-145-0540(10)(d)(D) was recently amended to bring the rule pertaining to pooled trusts into compliance with federal law. The old rule required that any remaining balance of the deceased beneficiary's account be paid first to the State Medicaid agency to the extent Medicaid assistance had been provided. The new rule requires payment to the State Medicaid agency equal to the total medical assistance paid on behalf of the beneficiary to the extent that "amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust."

Under the new rule, a nonprofit association that manages a pooled trust, such as The Arc of Oregon, can retain any remaining balance in the deceased beneficiary's account and use it for the benefit of other disabled individuals.

Note that the Arc of Oregon's joinder agreement used to state that remaining funds go the state Medicaid agency, but that has been changed. It now allows the nonprofit organization to retain the funds.

This change has the potential to be of overall benefit to disabled people. Many of our clients will feel good about the opportunity to leave funds with a nonprofit organization that benefits the disabled population. However, there is potential for abuse. Individuals may establish pooled trusts that do not have a longstanding and demonstrated interest in serving the disabled. Such an individual might use the retained funds primarily to pay for administrative expenses such as his or her salary, with little or no benefit to disabled people.

Attorneys who work with clients contemplating the transfer of funds to a pooled trust should advise their clients to investigate the nonprofit organization managing the trust. Among the questions the attorney or client might ask a nonprofit organization that manages the trust::

- How long have you been incorporated?
- What services do you provide to the disabled community beyond administering the pooled trust?
- How many employees do you have and what is their experience?
- In those cases where the beneficiary has died, what has happened to the money left in the trust?

If clients and their attorneys make appropriate inquiries, there is less chance the rule change will be misused.

Update on annuity rule change

By Ruth Simonis, Aloha

Oregon's Senior and Disabled Services Division (SDSD) has clarified its stand on the recovery of annuities that remain in the estate of a Medicaid recipient. It will indeed seek recovery of annuity funds, but the rule apparently will not be retroactive, as had been feared.

On January 11, 2001, the Health Care Financing Administration (HCFA) revised the State Medicaid Manual and issued Transmittal 75 to provide policy clarification on mandatory and optional recovery when a Medicaid beneficiary receives services that are specified as collectable services under the State's plan for estate recovery. Transmittal 75 says that if a state chooses to use a broader definition of estate than probate, it is allowed to collect against an annuity that was the property of the deceased Medicaid beneficiary. Oregon has adopted the broader definition, in which an annuity is viewed as an "other arrangement."

This means that Oregon's Medicaid Estate Recovery Unit (ERU) has the option to recover Medicaid expenses paid on behalf of the annuity policy holder from the surviving beneficiaries of the annuity. At this point, recovery is limited to annuities owned by the Medicaid recipient and not policies owned by the spouse.

Following the publication of Transmittal 75, SDSD proposed a change to OAR 461-135-0832(6)(a) that defined an "estate" specifically to include an annuity. Initially SDSD intended that the rule be applied retroactively. However, when the rule was enacted, it was decided that recovery would apply only as against annuities created on or after April 1, 2001.

Unfortunately, this change was left out of the revised (6)(a) administrative rule, and the lack of clarity prompted significant back-and-forth dialogue between members of the elder law community and SDSD. In a recent follow-up conversation, SDSD stated that the recommendation for a proposed rule change to include clarifying language to limit recovery to annuities created on or after April 1, 2001 is "being examined."

Nevertheless, for all practical purposes, estate recovery will be pursued against annuities owned by the Medicaid recipient created on or after April 1, 2001.

Independent Choices program lets Medicaid recipients pay caregivers directly

By Chris Pascual

An innovative demonstration project in four Oregon counties will give Medicaid recipients more self-direction in planning their care and paying for services and products which will help preserve their independence. The Independent Choices demonstration project will enable a limited number of Medicaid long-term care clients (300 total) who live in their own homes to use Medicaid funds to choose and purchase services they feel best meet their needs.

Project participants will become the employers of their in-home providers and will assume all payroll responsibilities. This is an alternative to the traditional Medicaid in-home services program that allows the client to select the provider, but does not provide direct funds to clients.

The traditional Medicaid requirement that in-home services be provided by a licensed provider can also limit a person's flexibility in directing his or her own care. Independent Choices enrollees will determine for themselves which services will allow them to remain independent. They can choose to purchase services that would otherwise be unavailable to them. For example, they may choose to meet their needs for meal preparation by having food delivered or by purchasing a microwave oven.

The idea behind the program is to allow Medicaid clients to participate on the same level as people who pay for services privately. This is part of a national shift toward consumer self-direction. At least five other states have recently implemented similar demonstrations and are reporting an increase in satisfaction with services, as well as improved quality of life.

Senior and Disabled Services Division (SDSD) obtained approval from the Health Care Financing Administration for the project. People who are eligible to receive Medicaid funded in-home services and who live in the demonstration areas are eligible to

participate in the program. Medicaid benefits currently paid to a care provider on behalf of the client will be paid directly to the client as a cash benefit. The client will use the cash benefit to arrange for and purchase needed services.

Because being an employer will be new to many clients, assistance with payroll responsibilities will be available at no cost to the participant through a variety of sources. Participants will be offered training which covers the responsibilities of being an employer, including the hiring process, workers' comp, budgeting, and bookkeeping tasks. Parti-

cipants will also be offered six hours per year of technical assistance with these responsibilities. They may choose not to manage the funds directly, but use a payroll service instead. Participants who are unable

to manage their own funds will be required to use a payroll service.

Participants will create and manage their in-home service plans, as well as manage their employees. Case managers in the local SDSD and Area Agency on Aging offices will assist participants in assessing their needs and planning for their services, and will monitor the progress of the service plan. Participants will be expected to use the funds appropriately. Improper use of the cash benefit or substantiated claims of neglect or abuse will be cause for termination from the program.

The project is a five-year demonstration in limited areas of the state. The demonstration areas are Clackamas, Coos, Jackson, and Josephine counties. The target population for the demonstration is the elderly and younger disabled population in these counties who live in their own homes. The anticipated project start date is July 2001. The Institute on Aging at Portland State University will evaluate the demonstration.

To enroll in the program, clients may contact their local office for Senior and Disabled Services/Area Agency on Aging.

Chris Pascual is the project coordinator for Independent Choices. He can be reached in Salem at the Rate Setting and Audit Unit of the Senior and Disabled Services Division. His phone number is 503-945-7035, e-mail address Chris.Pascual@state.or.us.



The annual NAELA symposium on elder law was held this year April 18-21 in Vancouver, British Columbia, Canada.

In attendance from Oregon were elder law attorneys (left to right) Steve Kurzer, Shirley Bass, Margaret Phelen, Kristianne Cox, Mark Williams, Cynthia Barrett, Dady Blake, and Tim Nay.



NAELA confab accents international flavor

By Shirley Bass

Crossing Borders, the National Association of Elder Law Attorneys Symposium on Elder Law, offered something new: a special international track. Attendees at the event—held April 18-21 in Vancouver, British Columbia, Canada—also enjoyed the usual special interest breakfast meetings, Basics Day, Practice Development, Medicaid, and Healthcare tracks.

Keynote speaker Robert Evans, Ph.D., Centre for Health Services & Policy Research, Vancouver, outlined the Canadian health care system, comparing it with that of the United States. Citing the US administration cost (10%), Dr. Evans called our system inefficient. Funded by taxes, the Canadian system covers all residents for “medically necessary” hospital and medical care, without deductibles or co-insurance. While prescription drugs are not covered, they are available at a lower cost than in the States. Practitioners are paid on a fee-for-service basis and are predominantly self-employed full- or part-time in practices owned by other professionals. By contrast, hospitals receive an annual global budget from the Ministry of Health of the province in which they are located. Patients have “free choice” of general practitioner and can request referrals. Canada’s health care system, which was formed between 1968 and 1971, does not categorize patients, such as Medicare for the elderly or special programs for children—as does the US system.

Another highlight of the program was Christopher C. Jennings, former senior advisor to the US President for health care policy, who spoke on *Legislative Update: Medicare, Medicaid, Patient Bill of Rights and the Budget*. Jennings opined that the Clinton administration’s greatest accomplishment was making health care a national issue, citing legislation in 1996 on health care insurance portability and in 1997 expanding mental health coverage. Nevertheless, approximately 30% of Americans, or 40 million people, still have no health care insurance.

NAELA’s Advanced Elder Law Institute, to be held November 1-4, 2001, in St. Louis, will feature Michael E. Gerber, author of *The E-Myth Revisited: Why Most Small Businesses Don’t Work and What To Do About It!*

Member News

Jon Fritzler joined Richard Pagnano and Penny Davis in the Elder Law Firm as an associate on April 1, 2001.

Ruth Simonis has returned to her solo practice in Washington County.

Steve Kurzer has joined Bryant, Lovlien & Jarvis PC, in Bend.

Supplemental Security Income (SSI) Benefit Standards	Eligible individual. \$530/month Eligible couple \$796/month
Medicaid (Oregon)	Asset limit for Medicaid recipient \$2,000 Burial account limit. \$1,500 Personal needs allowance in nursing home \$30/month Monthly maintenance standard for long-term care in community. \$531.70 Long term care income cap. \$1,590/month Community spouse minimum resource standard. \$17,400 Community spouse maximum resource standard \$87,000 Community spouse minimum monthly maintenance needs allowance \$1,452/month Excess shelter allowance Amount above \$436/month Food stamp utility allowance used to figure excess shelter allowance \$224/month Average private pay rate for calculating ineligibility for applications made after October 1, 2000 \$3,750/month
Medicare	Hospital deductible per illness spell \$792 Skilled nursing facility co-insurance for days 21-100. \$99/day Part B premium \$50/month Part B deductible \$100/year

Important Elder Law Numbers

Events

Estate Planning for Life Insurance

Oregon State Bar CLE
 June 21, 2001
 9:00 a.m.– 4:45 p.m.
 Oregon Convention Center, Portland

Conference on Sexual Abuse of Vulnerable Adults

September 10-12, 2001
 Eugene Hilton Hotel
 (See page 4 for details)

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

Elder Law CLE at OSB’s annual meeting

Saturday, September 22, 2001
 3:00 - 4:00 p.m.
 Seaside, Oregon

Elder Law CLE seminar

October 26, 2001
 Oregon Convention Center, Portland
Problem Prevention in Elder Law Practice

National Aging and Law Conference

October 10-13, 2001
 Arlington, VA
 Crystal Gateway Marriott
 Contact Ada Allbright, AARP Foundation
 National Training Project 202.434.2197

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

Continued on page 12

Resources for elder law attorneys

Resources for elder law attorneys

Continued from page 11

National Academy of Elder Law Attorneys 2001 Elder Law Institute

November 1-4, 2001

St. Louis, Missouri

Hyatt Regency Union Station

Contact NAELA at 1604 N Country Club Road

Tucson, AZ 85716-3102;

Phone: 520.881.4005; fax: 520.325.7925

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

Books

Tales from Rhapsody Home, Or, What They Don't Tell You about Senior Living, by John Gould.

Algonquin Books of Chapel Hill (2000), ISBN 1-56512-280-1.

A humorous perspective of life in a retirement home written by a Maine journalist and nonagenarian.

The Oxford Book of Aging: Reflections on the Journey of Life
edited by Thomas R. Cole and Mary G. Winkler.

Oxford University

ISBN 0-19-507369-X.

More than 200 pieces that illuminate the pleasures, pains, dreams, and triumphs of people as they strive to live out their days in a meaningful way.

Presorted Standard
US Postage
PAID
Portland, Oregon
Permit No. 341

Newsletter Board

The *Elder Law Newsletter* is published quarterly by the Oregon State Bar's Elder Law Section, Cinda Conroyd, Chair

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

Helen Hempel hbhempel@continent.com
541.683.81124

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

