



Elder Law Newsletter

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Elder Law Section played active role in passing 2005 legislation

By Ryan E. Gibb, Elder Law Section Legislative Subcommittee Chair

The second-longest legislative session in Oregon's history is finally over! The Elder Law Section was successful with all three of its bills this session, and influenced a number of other bills as well.

Small estate affidavits

The final version of HB 2289 amends ORS 114.515 and 114.540 to allow the filing of amended or supplemental small estate affidavits in specific circumstances. The bill allows for additional affidavits to be filed in two circumstances:

- An "amended" affidavit may be filed for the purpose of correcting an error or omission in the original affidavit, as long as the amended affidavit is filed within four months of the original affidavit.
- A "supplemental" affidavit may be filed

to include property not included in the original affidavit, as long as the aggregate values of the property do not exceed the small estate limits set forth in ORS 114.525. Copies of any previously filed affidavits must be attached to the affidavit being filed. A supplemental affidavit may be filed at any time.

Accounting by fiduciary

HB 2290 amends ORS 116.083 and ORS 125.475, which relate to the time allowed a fiduciary for filing an accounting. The bill increases the time for filing an accounting in an estate from 30 to 60 days. The court retains the authority to modify this time limit. The bill also increases the time for filing an accounting in a protective proceeding from 30 to 60 days. However, in cases where the conservator is resigning or being removed, the time limit for filing an accounting remains 30 days. The amendments do not apply to any accounting due prior to the effective date of the bill, as calculated under the old version of the statutes.

Elder abuse

HB 2291 amends ORS 124.100 to include trustees in the list of those who may bring an action for abuse of the elderly or disabled under ORS 124.100. The amendment applies to any action for injury arising before, on, or after the effective date of the bill.

Other legislation of interest

There were several other bills on which the section took a position.

HB 2547 amends ORS 114.525 to increase the limits on small estates. The new limits for a small estate are: personal property val-

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2005 legislative session *Continued from page 1*

ued at no more than \$50,000 and real property valued at no more than \$150,000, for a total aggregate estate value of no more than \$200,000. The amendments are effective only for estates of decedents who die on or after the effective date of the act.

SB 106 amends ORS Chapter 124 (abuse of the elderly and disabled). SB 106 expands the definition of "abuse" for the purpose of obtaining a temporary restraining order to protect an elderly or disabled person. That definition now includes financial abuse as well as sexual contact with a person who does not consent or who is not deemed to have capacity to consent. The bill amends ORS 124.010 to no longer allow an elderly or disabled person to file a petition for a restraining order against a guardian or conservator for the person. The bill also limits what remedies the court may grant in relation to an allegation of financial abuse. The bill specifically states that a court may not grant relief that would normally require a protective proceeding filed under Chapter 125, i.e., placing financial control in the hands of another person/fiduciary. This limitation was included specifically to ensure that the restraining order process would not be used in place of a conservatorship proceeding. SB 106 amends ORS 124.050 to require mandatory reporters to report financial as well as physical or emotional abuse. Finally, the bill requires the Board of Parole and Post-Prison Supervision to notify long term care facilities and residential care facilities if a person seeking admission to the facility has been deemed a predatory sex offender. *For a more detailed analysis of SB 106, see the article on page 6.*

SB 881 states that, before appointing a person to serve as a trustee, a court shall require the person to submit certain information to the court. Specifically, the prospective trustee must submit:

- Full name and any business name
- Address and telephone number
- Educational credentials and professional experience
- Identity of any other trusts administered
- Aggregate dollar value of all assets currently under the person's supervision
- Whether he or she has ever been removed

by a court as trustee for cause, or resigned – and if so the circumstances

- Any other information the court requires

Any person required to submit the above information must also submit a notice of any change of this information within 30 days. The bill does not apply to trust companies or their employees or to FDIC-insured institutions and their employees. The bill also requires courts to report the removal of a trustee to the state trial court administrator, who must maintain a registry of persons removed by the court for the last five years. The act sunsets on January 2, 2010.

HB 3352 creates new provisions, and amends ORS 113.035 and ORS 113.145. The bill eliminates a parent's right to inherit from a deceased child's estate through intestate succession if the deceased child was an adult at the time of death and either of the following is true:

- The parent willfully deserted the decedent for the 10 years prior to the date on which the child became an adult.
- The parent neglected to provide proper care and maintenance for the child without just and sufficient cause during the 10 years prior to the date on which the child became an adult.

The parent also loses his or her right to inherit from a deceased child's estate through intestate succession if the deceased was a minor and either of the following is true:

- The parent willfully deserted the decedent for the 10 years prior to the date of death of the child.
- The parent neglected to provide proper care and maintenance for the child without just and sufficient cause during the 10 years prior to the date of death of the child.

The desertion and neglect language were inserted to make ORS 113.035 and 113.145 consistent with ORS 109.324, which relates to parental rights in an adoption. However, no actual connection was made between the statutes. To determine if the parent has truly deserted the child or neglected to provide care for the child, the court may disregard incidental visitations, communications, and contributions, and the court may also consider whether the custodial parent or other custodian impeded the efforts of the parent whose intestate share is to be forfeited to provide contact or care. A parent's intestate inheritance rights are not automatically forfeit. Rather, a petition must be filed within four months of the date of delivery or mailing of the information described in ORS 113.145 or four months after the first publication of notice to an interested person. The court must find clear and convincing evidence of desertion or willful neglect and the burden of proving desertion or willful neglect is placed upon the petitioner. The provisions of this bill apply only to the estates of those persons who die on or after the effective date of the bill.

I would like to express my appreciation to those who took an active role in the legislative process this year (you know who you are). The success of the legislation proposed by the Section and the influence that the Section was able to have on other legislation would not have been possible without your assistance.

New laws affect inheritance taxes, slayers' rights, death benefits, and more

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

The headlines about the recently ended session of the Oregon legislature highlighted methamphetamine abatement, funding for education, land use laws, and civil unions. In addition, the legislature amended or enacted new laws regarding the state inheritance tax, the right of killers and abusers to inherit from their victims, the authority of divorce courts to prevent people from receiving death benefits when former spouses die, the rights of grandparents in adoption, access to health care information, and more matters of interest to elder law attorneys. (Legislation the Section was tracking and the new Oregon Trust Code are the subjects of other articles in this issue.)

Oregon inheritance tax

Oregon legislation enacted in 2003 allows a surviving spouse to make an election so that state and federal estate taxes on the estate of the decedent spouse will not be due until the surviving spouse dies. However, the law allowed a QTIP election for purposes of the state tax only if income distributions were mandatory, and a decedent's personal representative could not elect the amount of the trust that would qualify for the marital deduction. HB 2649 changes both these rules.

The bill broadens the definition of special marital property to include trusts that provide for discretionary income distributions. It also allows the executor of a decedent's estate to make a QTIP election, provided that the surviving spouse consents in writing. If the election affects a trust that permits distributions to beneficiaries other than the spouse, the other beneficiaries must also give their written consent. The election must satisfy the requirements for federal QTIP property. Therefore, distributions cannot be made to anyone except the surviving spouse during his or her lifetime, and all living beneficiaries must irrevocably release all rights to distributions during the spouse's lifetime and must sign on behalf of all unborn lineal descendants of the beneficiary. When the surviving spouse dies, the value of the special marital property will be included in his or her gross estate.

These changes take effect 90 days after the end of the 2005 legislative session, but amended estate tax returns to take advantage of the election may be made for deaths that occurred on or after January 1, 2002, and before the effective date of the act. Refunds paid in response to such an amended estate tax return do not bear interest unless they are made on or after March 1, 2007.

Slayer statutes

The Oregon slayer statutes, ORS 112.455 through 112.535, provide that a person who kills another with felonious intent may not inherit property from the person he or she killed or obtain property from the victim as a surviving joint tenant, life insurance beneficiary, or trust beneficiary. If the slayer holds the remainder in property following the victim's death, the slayer does not come into possession and enjoyment until the end of the victim's normal life expectancy. Two bills enacted in 2005 expand the slayer statute.

HB 2415 extends the ban on inheriting or otherwise profiting from the death of one's victim to people who were convicted of felony abuse of a decedent within five years of the decedent's death. For purposes of this statute, "abuse" means physical abuse as defined in ORS 124.105 or financial abuse as defined in ORS 124.110.

The second bill, **SB 392**, closes a possible loophole in the slayer statute. Before this change, a slayer might benefit from the death of his or her victim under the following scenario, which is taken from a staff measure summary for the bill:

"A and B are brothers. B has a daughter, C. A kills B. All of B's property goes to C. C's only heir is her uncle, A, the slayer of her father, B. C dies. A would inherit all of C's property including what she inherited from her father."

SB 392 precludes a slayer or an abuser, as defined in HB 2415, from benefiting under these circumstances by providing that the slayer/abuser cannot inherit from the heir or devisee of the victim unless that heir or

Copies of the bills mentioned in this article and all others introduced are available from the legislature's Web site at www.leg.state.or.us/index.html.

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New laws *Continued from Page 3*

devisee executed a will or trust after the death of the original victim in favor of the slayer/abuser. The bill also prevents a slayer/abuser from benefiting from an insurance policy on the life of the victim through the victim's heirs. Property that would otherwise have gone to the slayer/abuser passes as if the slayer/abuser had predeceased the victim's heir or devisee.

Interest on pecuniary devises

ORS 116.143 provides that if distribution to a devisee of a specific monetary bequest in a will is delayed by more than a year, the devisee is entitled to the bequest with five per cent per year interest. **HB 2632** changes the interest rate to the "discount rate," which is defined as the average auction rate on 91-day Treasury bills. The effect is that the interest will vary with the interest paid on short-term investments, protecting the residuary estate when the going interest rate is less than five percent. The change took effect July 1, 2005.

Court authority to change beneficiary of life insurance and other death benefits

Under ORS 112.315 a provision in a will in favor of a person's former spouse is automatically revoked by divorce or annulment unless the will expresses a contrary intent. However, this statute does not apply to non-probate assets, such as life insurance and employee death benefits. A divorced person who does not want a former spouse to receive these benefits should change the beneficiary designation, but it is not uncommon for people to die without doing this. The 1990 Uniform Probate Code applies the revocation by divorce rule to these non-probate will substitutes, but Oregon has not enacted this rule, and the Supreme Court has held that the UPC provision cannot constitutionally be applied to pension rights covered by ERISA. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

HB 2978 addresses this problem. It permits a court that issues a judgment of annulment, separation, or divorce to order the revocation of a beneficiary designation in favor of a former spouse or a relative of a former spouse under some circumstances. The authority, which extends to life insurance, employee retirement benefits, IRAs,

and other retirement plans, only arises as to beneficiary designations made by the spouse and which the spouse has authority to revoke at the time of the court order. The proceeds pass as if the former spouse or relative of the former spouse had predeceased the principal.

The act provides that written notice of the revocation must be mailed to the stakeholder, though it does not provide who must do the mailing. If the stakeholder does not receive notice of the revocation and pays out proceeds as provided for in the designation of beneficiary, the stakeholder has no further liability. If the stakeholder does receive notice and if the principal dies without designating a new beneficiary, the stakeholder pays the proceeds to the court in which probate proceedings for the principal's estate are pending. If no probate proceedings are pending, the stakeholder pays the proceeds to the circuit court for the county in which the decedent resided at the time of death. These provisions, designed to protect the stakeholder, may be sufficient to resolve the problems that led the *Egelhoff* court to hold that automatic revocation statutes are fatally inconsistent with ERISA, but no courts have addressed this issue.

HB 2978 also allows a divorce court to require a former spouse to release "contingent or expectant interests, including right of survivorship, that are necessary to effectuate a division of assets" of the former spouses.

Grandparent rights in adoptions

SB 973 requires a person who petitions to adopt a minor child to serve the petition on the child's grandparents, if the child's parent is deceased or incapacitated and the petitioner knows or can readily ascertain the names and addresses of the grandparents. The bill also requires the petitioner to file a statement that includes:

- the full names and permanent addresses of the child, the petitioner, and persons with whom the child has lived and the places where the child has lived during that period, if the petitioner can readily ascertain the names and addresses
- information about any person known to the petitioner who has physical custody of the child or claims rights of legal or physical custody, parenting time, or visitation

Access to health care information

Two bills facilitate implementation of the federal Health Insurance Portability and Accountability Act (HIPAA) of 1996 and corresponding state law, ORS 192.518-192.524.

The first bill, **HB 2442**, amends the Oregon Health Care Decisions Act (ORS 127.505-127.660) to provide that a health care representative designated pursuant to the act is a "personal representative" who may consent to disclosure of a person's health care information when the principal is unable to give consent, as provided in state and federal law. The state health care information statute already designated a health care representative as a personal representative, but no statute authorized a health care representative to act for purposes of HIPAA.

The second bill concerns exceptions to the requirement that entities holding health care information obtain written permission before disclosing the information. Both state and federal law already provide

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New laws

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for some exceptions. **SB 278** adds an exception that allows a designated person to gain access to a decedent's health information where the court has not appointed a personal representative or where the court-appointed representative has been discharged. The bill was supported by the OSB Health Law Section, which told a legislative committee that the bill meets "the legitimate needs of family members to access PHI (protected health information) in circumstances where an individual has passed away."

Under the bill, if there is no court-appointed personal representative for a decedent, the first of the following who can be located upon reasonable effort by the healthcare provider and who is willing to serve will have authority to obtain the information:

- a person appointed as guardian or with authority to make medical and health decisions at the time of the decedent's death
- the decedent's spouse
- an adult designated in writing by the persons on this list, if no listed person objects
- a majority of the adult children of the decedent who can be located
- either parent of the decedent or a person acting in loco parentis
- a majority of the adult siblings of the decedent who can be located
- any adult relative or friend

Clean-up legislation

Several bills clean up ambiguities in legislation left after the 2003 session and confusing language.

Until 2003, a custodianship under the Uniform Transfers to Minors Act had to terminate when the beneficiary became 21, and any property in the custodianship had to be conveyed to the beneficiary outright. A 2003 amendment to ORS 126.872 permits a transferor to create a custodianship that lasts until the beneficiary is 25, but other provisions of the UTMA were not amended, making it unclear whether it is possible to create a custodianship for a person older than 21 but younger than 25. **SB 277** amends various provisions in the UTMA to substitute the word "beneficiary" for "minor," making clear that property can be transferred to a custodian at any time before the beneficiary becomes 25.

ORS 116.173 measures the compensation of the personal representative of an estate by the ordinary duties of a personal representative "in the discharge of a trust." In recognition that personal representatives are not trustees, **HB 2633** changes the language to refer to the "performance of duties as a personal representative."

HB 2276 streamlines legislation pertaining to state aid to persons with disabilities and those who are blind or elderly and brings the statutes in line with actual agency practice. It repeals obsolete sections of ORS chapters 412 and 413 and codifies the Oregon Supplemental Income Program (OSIP), which supplements Supplemental Security Income payments and special need allowances for one-time or ongoing needs.

HB 2359 resolves issues that arose after the legislature made major changes to Oregon laws regarding judgments in 2003. The staff measure summary for the bill describes the changes in more detail. It is available at www.leg.state.or.us/comm/sms/SMS05Desc.html?billno=hb+2359.

Oral argument scheduled in Medicaid long term care case

By Leslie Kay, Regional Director, Legal Aid Services of Oregon

Oral argument has been scheduled for November 17 in the Ninth Circuit Court of Appeals in the case of *Watson v. Thorne*. *Watson* was filed by Legal Aid Services of Oregon, the Oregon Law Center, Lane County Law and Advocacy Center, and the National Senior Citizens Law Center when home and community-based waived services were terminated in 2003 as a result of state budget cuts that raised the bar on service priority levels. The appellate court will sit in the U.S. District Court in Portland. The Elder Law Section has submitted an amicus brief in support of plaintiffs on the issue of whether plaintiffs have stated a right of action under the Medicaid Act.

New laws affect civil filing fees

Because of several bills enacted by the 2005 legislature, some state court civil filing fees have changed. Several important changes to state court civil filing fees took effect July 1, 2005 and at the start of business on August 4.

The legal aid surcharge increased July 1, 2005.

The 30% filing fee surcharge for court operations that was originally enacted in 2003 was extended as of August 4, 2005.

Some courts post fee schedules on their local Web sites, which can be reached from the Oregon Judicial Department's home page at www.ojd.state.or.us. However, some schedules have not been updated, and attorneys should contact court clerks to be sure they know the correct fees.

Recent legislation expands remedies for abuse of elderly persons and persons with disabilities

By *BeaLisa Sydlik*



BeaLisa Sydlik works as Family Law Staff Counsel with the Oregon Judicial Department in Salem. She researches and assists in the development of programs, information, and forms for Oregon's courts, and represents the Judicial Department on proposed legislation and interim task forces in the areas of family law, domestic violence, and elder abuse. She can be reached at 503.986.6423 or by e-mail at bealisa.sydlik@ojd.state.or.us.

Laws that protect elderly and disabled persons from abuse were strengthened by the Oregon legislature this year.

In 2004, Governor Theodore Kulongoski appointed an Elder Abuse Task Force "to look at the various forms of elder abuse and neglect and make suggestions on additional measures the state could take to provide enhanced safeguards for Oregon's elderly population." One of the Task Force's recommendations included a legislative proposal to widen the categories of abuse by adding "financial exploitation" and "sex abuse" to the Elderly Persons and Persons with Disabilities Abuse Prevention Act or "EPPDAPA" (ORS 124.005 to 124.040), and to enhance the abuse reporting requirements for elderly persons. ORS 124.050 - 124.095.

The Oregon legislature passed these legislative proposals as Senate Bill 106 (SB 106), which was signed into law by the Governor in July. SB 106 has an "emergency clause" that made its provisions effective immediately upon signature.

Overview of changes in the law

SB 106 makes three major changes in the elder law arena.

First, SB 106 broadens the restraining order remedies available to elderly persons, persons with disabilities, or their guardians to prevent financial exploitation and – with some limitations – remedy damages that may have already occurred. The legislative history of this bill makes it clear that the restraining order remedy is primarily available for emergency purposes, and is not intended to replace guardianships and conservatorships for long-term oversight of financial affairs by a fiduciary in the context of an ORS Chapter 125 protective proceeding. ORS 124.005(1)(g),(h).

Second, SB 106 includes firefighters and emergency medical technicians (EMTs) within the definition of public and private officials who are mandatory reporters of elder abuse. ORS 124.050(4).

Third, SB 106 requires state agencies to notify long term and residential care facili-

ties of predatory sex offenders seeking admission, and authorizes such care facilities to refuse admission to, discharge, and transfer registered sex offenders who are on probation, parole, or post-prison supervision. ORS 181.586; ORS 181.588.

EPPDAPA restraining orders

As noted above, SB 106 broadens available restraining order remedies. It adds two additional grounds for seeking a restraining order to prevent abuse of an elderly person or person with disabilities: financial abuse and sexual contact.

Financial abuse is defined as "[w]rongfully taking or appropriating money or property, or knowingly subjecting an elderly person or person with disabilities to alarm by conveying a threat to wrongfully take or appropriate money or property, which threat reasonably would be expected to cause the elderly person or person with disabilities to believe that the threat will be carried out." ORS 124.005(1)(g).

The Governor's Elder Abuse Task Force found that the majority of reported crimes against elders are financially based. The Oregon Department of Human Services (DHS) investigates almost 2,000 cases of financial abuse each year. The addition of financial abuse as grounds for obtaining an EPPDAPA order will make an ex parte remedy available to stop or prevent financial exploitation on an emergency basis. The types of cases the courts anticipate being filed include those where the petitioner wants to stop a third party from interfering in the elderly person's financial affairs, or require a third party to return control over personal or real property (e.g., bank books, keys, car) to the elderly or disabled person.

Sexual contact is defined as "[s]exual contact with a nonconsenting elderly person or person with disabilities or with an elderly person or person with disabilities considered incapable of consenting to a sexual act as described in ORS 163.315. As used in this

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Recent legislation expands remedies for abuse

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paragraph, 'sexual contact' has the meaning given that term in ORS 163.305." ORS 124.005(1)(h).

The Governor's Elder Abuse Task Force learned that elderly persons or persons with disabilities are often taken advantage of and subjected to unwanted sexual contact either in their own homes or in care facilities. EPPDAPA included "inappropriate sexual comments" as abuse, but it did not cover sexual abuse that went beyond words without resulting in physical injury. ORS 124.005(1)(e).

Income eligibility requirement deleted from definition of "disabled person"

Existing law defined a "person with disabilities" as a person with a physical or mental disability who was eligible for Supplemental Security Income or for general assistance. ORS 124.005(8); ORS 410.040(5). SB 106 deleted this income eligibility requirement.

Disclosure of pending protective proceedings

Existing law requires that EPPDAPA petitioners disclose the existence of other restraining order and domestic relations cases. SB 106 added the requirement that petitioners also disclose the existence of pending protective proceedings such as guardianships or conservatorships under ORS chapter 125. ORS 124.010(4). This requirement is intended to inform the court of others who might be entitled to exercise control over the petitioner's financial matters and property.

EPPDAPA proceedings cannot be brought against guardian or conservator

Petitions for EPPDAPA restraining orders may not be filed against a guardian or conservator for the elderly person or person with disabilities. ORS 124.010(8). This limitation was intended to confine complaints about fiduciary conduct to the pending protective proceeding. At public hearings before the legislature, concern was raised that disgruntled protected persons or others interest-

ed in their affairs might seek to undo the effect of an order issued in a guardianship or conservatorship proceeding by seeking a restraining order in an alternate forum. Legislators determined that there was potential for conflicting judgments if such cases could be filed, and also found that there were sufficient statutory protections in ORS Chapter 125 to protect the elderly and persons with disabilities against an abusive fiduciary.

Statutory restrictions on EPPDAPA relief

SB 106 restricted the type of financial abuse relief that can be granted in EPPDAPA restraining orders to that relief the court "considers necessary to prevent or remedy the wrongful taking or appropriation" of the elderly or disabled person's money or property. ORS 124.020(2)(a). In addition, the court is specifically prohibited from ordering anyone other than the elderly or disabled person or a court-appointed guardian or conservator to assume control over money or property of the elderly or disabled person. ORS 124.020(2)(b)(B).

These restrictions are intended to prevent the EPPDAPA process from being used by "friends" or relatives as an inexpensive alternative to a protective proceeding brought pursuant to ORS chapter 125—in other words, to prevent the process from becoming the "poor man's conservatorship." They were also intended to save the court from hearing competing testimony and requests for relief from a multitude of persons who might be interested in the elderly person's affairs, and from combing through stacks of documentation for an analysis of who would most competently handle the protected person's finances. Requiring courts to do so would have resulted in turning what are supposed to be expedited summary proceedings for emergency relief into full-fledged protective proceedings.

Examples of allowable financial abuse remedies in EPPDAPA proceedings are listed in the new law and include:

Revised statutory forms on the Internet

The statutorily mandated forms and instructions required by ORS 124.020(6) have been revised and are available at court locations and can be downloaded from the Oregon Judicial Department's Web site at www.ojd.state.or.us/familylaw.

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Remedies

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- Directing the respondent to refrain from exercising control over the elderly or disabled person's money or property
- Requiring the respondent to return custody or control of the elderly or disabled person's money or property to the elderly or disabled person
- Requiring the respondent to follow the instructions of the elderly or disabled person's guardian or conservator
- Prohibiting the respondent from transferring the elderly or disabled person's money or property to any person other than the elderly or disabled person.

ORS 124.020(2)(a)(A-D).

What remains unchanged

The new law did not affect the rest of the EPPDAPA process, including the following:

- Abuse that can be prohibited is not limited to abuse between family or household members (as it is in Family Abuse Prevention Act proceedings).
- The abuse must have occurred within the 180 days preceding the filing of the petition.
- Neither the court nor the sheriff may charge filing, service, or hearing fees.
- The respondent must request a hearing; otherwise, the ex parte order becomes final within thirty (30) days.
- The court may order respondent to move from petitioner's residence if the residence is solely in the petitioner's name, the parties jointly own or rent the residence, or the parties are married.
- The EPPDAPA order lasts for one year or until amended or withdrawn.
- EPPDAPA orders are enforced through ORS Chapter 33 contempt proceedings.

Overview of laws that protect vulnerable persons

By Pete Shepherd

Oregon Laws 2005, chapter 671 is but the latest in a series of legislative initiatives that protect vulnerable Oregonians.

In 1993, the Oregon legislature expanded the offense of criminal mistreatment to include abandonment or desertion of an elderly person. ORS 163.205.

In 1995, financial institutions were given immunity from liability arising from the institution's release of an elder's private financial data to enforcement officials. ORS 192.575(5); ORS 192.555(2)(a).

In 1995, the legislature also adopted the Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA). ORS 124.005 to 124.040. The statute authorized elderly victims of physical abuse to obtain self-help restraining orders. Successive amendments allowed "disabled persons" to seek restraining orders (1999), defined certain sweepstakes scams to be forms of abuse that can be restrained (1999), and allowed guardians or guardians ad litem to seek orders on behalf of protected persons (2003). EPPDAPA was amended this year, as described in Ms. Sydlik's article. ORS 124.100 to 124.140, enacted in 1995, created a statutory civil claim for damages and injunctive relief for physical and "fiduciary" abuse of elderly and incapacitated persons. Subsequent amendments substituted "financial abuse" for "fiduciary abuse" (1999) and enlarged the protected class to include persons who are vulnerable to abuse because of physical or mental impairment regardless of age. Or Laws 2005, ch 386.

In 2001, the Oregon Rule of Evidence 404 was amended to allow admission of hearsay statements from declarants, whether or not available to testify, consisting of a "complaint of abuse of an elderly person, as those terms are defined in ORS 124.050, or a complaint relating to a violation of ORS 163.205 or 164.015 in which a person 65 years of age or older is the victim. . . ." Or Laws 2001, ch 533.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that "testimonial" hearsay is inadmissible unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination. However, the court expressly validated a rule barring hearsay objections to statements by a declarant that the defendant himself or herself has rendered unavailable. In 2005, in part because of the detrimental effect of *Crawford* on criminal prosecution of elder abuse cases, the legislature enacted a new law that allows hearsay statements to be admitted if the declarant is unavailable and the statement is offered against a person who contributed in specified ways to the declarant's unavailability. 2005 Or Laws, ch 458. The amendment takes effect January 1, 2006. Because many forms of elder abuse can render the victim "unavailable," the new rule of evidence may restore some of the damage done by *Crawford*.

Pete Shepherd has been the Deputy Attorney General in the Oregon Department of Justice (DOJ) since January, 2001. Previously, he was Assistant Attorney General in the Organized Crime Section, Attorney-In-Charge of the Financial Fraud/Consumer Protection, and Special Counsel to Attorney General Hardy Myers. He was a member of Governor Kitzhaber's Mental Health Alignment Task Force and the Governor's Security Council. He lives in Salem.

New Oregon Uniform Trust Code to take effect January 1, 2006

By Susan N. Gary



Susan N. Gary is an Associate Professor at the University of Oregon School of Law. She served as Co-chair of the Oregon Trust Code Study Committee.

After three years of work by members of the Estate Planning and Administration, Elder Law, and Taxation Sections of the Oregon State Bar, representatives from the Oregon Bankers Association and the office of the Oregon Attorney General, probate judges, and lawyers from around the state, the Oregon Uniform Trust Code became law on June 29, 2005. The new law takes effect January 1, 2006.

The Oregon Uniform Trust Code draws heavily from the Uniform Trust Code, a model act promulgated by the Uniform Law Commission in 2000 and already adopted in 13 states in addition to Oregon. For the most part the Trust Code codifies existing Oregon law, providing a convenient resource for anyone working with trusts in Oregon. The Trust Code changes current law in some respects, however, and understanding those changes will be important for the lawyers, bankers, and other advisors who help their clients with trust matters.

General provisions and definitions

Scope. The Trust Code covers all trusts, except for a few types explicitly excluded under current law. Section 2. These include employee benefit trusts, 509 trusts, business trusts, and certain other arrangements. Fiduciary duties of the sort outlined in the Trust Code will, of course, continue to apply to the persons who manage these funds.

Definitions of settlor, beneficiary, and qualified beneficiary. The Trust Code uses "settlor" rather than "trustor" to describe a person, including a testator, who creates or contributes property to a trust.

The Trust Code uses two critical terms: "beneficiary" and "qualified beneficiary." Section 3(2) defines "beneficiary" to mean any person with a beneficial interest in a trust, vested or contingent, and any person other than a trustee who holds a power of appointment. This section changes existing law by treating vested and contingent beneficiaries and holders of powers of appointment in the same way.

"Qualified beneficiary" means a beneficiary who is currently eligible to receive distributions of trust income or principal, whether mandatory or discretionary (a "permissible distributee"); a beneficiary who would be next in line if the interests of the permissible distributees terminated; and a person who would be a permissible distributee if the trust terminated. Section 3(14). "Qualified beneficiaries" have some rights that beneficiaries whose interests are contingent or remote do not have.

Section 10 of the Trust Code provides that three additional categories of beneficiaries and nonbeneficiaries have the rights of qualified beneficiaries:

- charitable organizations expressly designated to receive distributions, provided that the charitable organization satisfies the definition of qualified beneficiary
- persons designated as enforcers for pet trusts or trusts with a noncharitable purpose
- the Attorney General with respect to the enforcement of charitable trusts, unless contingencies make the charitable interest negligible

These provisions are consistent with current Oregon law, although the concept of a trust for a noncharitable purpose is new.

A trustee owes different reporting duties to the two kinds of beneficiaries, and qualified beneficiaries have more extensive rights to obtain information about the trust and to seek removal of trustees. The paragraphs of this article that cover Sections 71 and 55 explain these differences.

Default and mandatory rules. Trust law has always been primarily default law, meaning that a trust is controlled by its terms. The provisions of trust law, either the common law or statutory law, apply only when the trust is silent. However, some basic principles apply to all trusts and cannot be overridden by a settlor. For example, a trustee must act in good faith and in accordance

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with the purposes of the trust. Section 5 sets out the rules that the settlor cannot override. With two exceptions, the rules in section 5 codify existing common law principles. The rules that may change current law involve the trustee's duty to report to beneficiaries.

First, current law presumably does not permit the creation of an entirely secret trust, one for which the trustee did not provide information to anyone. Someone, usually the beneficiary, must be able to protect the beneficial interests in the trust and to enforce the trust against the trustee. Consistent with this principle, subsection 5(2)(h) of the Trust Code says that the settlor cannot eliminate the trustee's duty to notify qualified beneficiaries of an irrevocable trust of the existence of the trust, of the identity of the trustee, and of their right to request trustee reports.

Second, existing Oregon law imposes on trustees a duty to report certain information about administration of the trust that probably cannot be waived, at least in the case of some beneficiaries. The Trust Code clarifies the extent to which settlors can waive trustees' reporting obligations and may give settlors greater power to waive the duty to report than exists under present law. Under subsection 5(2)(i) the settlor cannot modify the duty of the trustee to respond to the request of a qualified beneficiary of an irrevocable trust for trustee reports and other information reasonably related to the administration of a trust.

However, the requirements of both 5(2)(h) and 5(2)(i) can be waived under two circumstances. First, the settlor can waive these duties during the period that the settlor is alive and financially capable (the term used in Oregon statutes to mean legally competent), or the settlor's spouse may waive them if the spouse is a qualified beneficiary of the trust and is alive and financially capable. Section 5(3)(a). Second, the trustee's duties to report to beneficiaries can be waived if the settlor designates another person to act in good faith to protect the interests of qualified beneficiaries and to receive any notice, information or reports that would otherwise be given to the qualified beneficiaries. Section 5(3)(b). The effect of these two provisions is to require the trustee to report to someone while permitting the settlor to limit the per-

sons who receive the report. If the settlor and the settlor's spouse are beneficiaries of a trust, the settlor may not want anyone but the two of them to receive information about the trust while they are capable of monitoring the trust. If a settlor creates a trust for a beneficiary who may be better off not knowing about the trust (a child with a substance abuse problem, for example), the settlor can provide for notice to be given to someone else who can monitor the trust and the trustee.

Representation

Sections 16-20 deal comprehensively with representation of beneficiaries with respect to the receipt of notices and to the giving of consents. These sections are similar to the provisions of ORS 128.135 relating to modification but apply the concepts more broadly, permitting representation in other situations.

The Trust Code, like ORS 128.135, allows both actual representation (e.g., representation by a conservator) and virtual representation, which is representation of a beneficiary by another beneficiary with a substantially identical interest. ORS 128.135 already provides for representation by fiduciaries and for virtual representation of unborn or unascertainable beneficiaries. Section 19 of the Trust Code extends virtual representation to minors and financially incapable adults. Section 20 (like ORS 128.179) authorizes the court to appoint a special representative to receive notice, give consents, and otherwise represent persons incapable of representing themselves, whether the issue to be resolved is in or out of court.

Creation, validity, modification, and termination of trusts

Creation of trusts. The Trust Code largely codifies traditional doctrine. One difference is that Section 22 permits a settlor to empower a trustee to select the beneficiaries from an indefinite class, if at least one person can meet the description and if the trustee exercises the power within a reasonable time.

Enforcement of charitable trusts. Section 25(3) permits a settlor to enforce a charitable trust. Under current law only the Attorney General has that authority.

Oral trusts. Section 27 requires clear and convincing evidence to establish an oral trust, a higher standard than required by existing law.

Pet trusts. Section 28 follows the pet trust statute recently enacted in Oregon. The only significant change is that a person having an interest in the welfare of the animal for which a trust was created may request the court to appoint a person to enforce the trust. Current law permits enforcement by a person designated in the document or named by the court.

Trust for a purpose. Section 29 validates a trust created for a non-charitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose (for example, a benevolent purpose) to be selected by the trustee. Current Oregon law requires that a beneficiary be ascertainable within the period of the Rule Against Perpetuities.

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Modification and termination of trusts. The Trust Code contains comprehensive provisions on trust modification and termination, but makes only minor changes to current Oregon law.

Settlor standing. Section 30(2) gives a settlor standing to commence a proceeding to modify or terminate a trust and to petition the court to apply cy pres to modify the settlor's charitable trust. Current law permits a settlor to participate in modification or termination by agreement but does not give a settlor standing to commence a proceeding.

Material purpose. The Trust Code continues to apply the material purpose doctrine (stated as "dominant purpose" under current Oregon law) to modifications and presumes that a spendthrift clause is a material purpose. Beneficiaries of a trust can modify or terminate a trust by consent only if the change is not inconsistent with a material purpose of the trust.

Unanticipated circumstances. Section 32 broadens the court's ability to modify trust terms because of circumstances unanticipated by the settlor (whether or not the circumstances existed on creation), if the modification or termination will further the settlor's broader purposes. In addition, the court may modify administrative terms if the existing terms are impractical or wasteful or impair the trust's administration.

Cy pres. Section 33 changes the doctrine of cy pres in ways believed more likely to carry out the average settlor's intent. The court may apply cy pres not only if the original scheme becomes impossible, unlawful, or impracticable, but also if it becomes wasteful. Further, this section presumes general charitable intent that permits application of cy pres, whereas under the common law a court had to determine that the settlor had general charitable intent. Section 33 also changes cy pres by providing that a gift over to a noncharity upon failure or impracticality of the original charitable purpose is effective only for the settlor's lifetime, if the trust property is to revert to the settlor, or if fewer than 50 years have elapsed since creation of the trust.

Creditors' claims

Creditors' claims and spendthrift clauses. Section 40 states the general rule that, to the extent a trust is protected by a spendthrift provision, a beneficiary's creditors may not reach the beneficiary's interest until the trustee distributes the assets. This section also provides that a trust term saying that a beneficiary's interest is held subject to a "spendthrift trust" is sufficient to cause the trust to be treated as a spendthrift trust.

Section 41 identifies special creditors who may assert a claim against a beneficiary's interest in a spendthrift trust. These creditors include the holder of a judgment, court order, or administrative order against a beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse, and a judgment creditor who had provided services for the protection of a beneficiary's interest in the trust. The rights of these special creditors are limited, extending only to distributions required by the express terms of the trust, such as mandatory payments of income, and to distributions the trustee has otherwise decided to make, such as through the exercise of discretion. These special creditors cannot compel a discretionary distribution under Section 41.

Creditors' claims against settlor. The Trust Code probably does not change current Oregon law with respect to a creditor's claims against the settlor, but existing Oregon cases are sketchy. Creditors can reach a revocable trust during the settlor's lifetime or after death. Creditors can reach an irrevocable trust to the extent distributions can be made to the settlor. Generally, creditors of a holder of a power of withdrawal can reach property subject to the power. However, if the trustee of a trust is not the settlor, the trustee's creditors cannot reach property the trustee can withdraw for the trustee's own benefit, if the trustee's power is limited by an ascertainable standard.

Revocable trusts

Capacity of settlor of revocable trust. Section 45 lowers the standard of capacity required to create a revocable trust to that required to execute a will.

Revocation or amendment of revocable trusts. Section 46(1) changes the existing presumption that a trust is irrevocable to a presumption that a trust is revocable, unless the trust provides otherwise.

Subsection (3) follows the traditional rule that a settlor must comply with procedures specified in the trust instrument in order to revoke the trust. However, this subsection probably loosens the Oregon rules a bit by permitting substantial compliance with those specified procedures. If the terms of the trust are silent as to revocation, subsection (3) permits revocation by any other method manifesting clear and convincing evidence of the settlor's intent, other than by execution of a will or codicil.

Settlor's powers. Section 48(1) provides that while the settlor of a revocable trust is alive, all rights of the beneficiaries are subject to the settlor's control, and the trustee owes duties only to the settlor. This provision likely changes Oregon law because fiduciary duties generally are owed to all beneficiaries.

Limitation on action contesting validity of revocable trust; Distribution of trust property. Section 49 creates a statute of limitations of three years running from the settlor's death, allows a trustee to shorten the statute to four months by giving notice to a potential contestant, and protects a trustee

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unaware of a possible contest who makes distribution prior to the expiration of the contest period. The four-month period is consistent with the period under Oregon law for contesting wills after notice has been given. The three-year period is different from Oregon law applicable to wills, but the Study Committee concluded that three years from the date of death was an appropriate limitations period for a revocable trust.

Trustees

Resignation of trustee. Subject to the right of the settlor to specify the method for resigning, Section 54 allows a trustee to resign upon notice to the settlor, if living, the cotrustees, and the qualified beneficiaries. Alternatively, a trustee may resign with the approval of the court. Section 54 changes Oregon law to make it easier for the trustee to resign without court approval, in accordance with standard drafting practice.

Removal of trustee. Section 55 allows a trustee to be removed for a variety of specified grounds. Some of the grounds are traditional, including serious breach of trust, lack of cooperation among trustees, and unfitness, unwillingness, or persistent failure to administer the trust effectively. Other grounds are new. These include changed circumstances or the unanimous request of the qualified beneficiaries, coupled with findings by the court that removal best serves the interests of all the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable successor trustee is willing to act. The section also changes Oregon law by permitting the settlor of an irrevocable trust to petition for removal of the trustee.

Section 55 further changes Oregon law by eliminating the requirement that a beneficiary post a bond as a prerequisite to petitioning the court for removal of a trustee or any other action. ORS 128.155 now requires a bond.

Trustee's duty to inform and report. Section 71 deals with a beneficiary's right to information, including the rights to be informed of the trust's existence and of the identity of the trustee, and the rights to receive annual reports and a copy of the trust instrument. The duty to inform and report is a common

law duty, necessary to the proper functioning of a trust. This section balances the need for someone to have information about the trust in order to enforce the trust with the possible desire of a settlor to limit certain beneficiaries' knowledge about the trust.

Section 71 requires the trustee to keep "qualified beneficiaries" reasonably informed about the trust. This duty runs only to qualified beneficiaries and not to all beneficiaries. As discussed above, under Section 48(1) no beneficiary of a revocable trust other than the settlor has a right to information while the settlor is alive. Under Section 10(3), the Attorney General steps up to the level of a qualified beneficiary with respect to a charitable trust, unless contingencies make the charitable interest negligible. For example, the Attorney General probably would not be entitled to reports under Section 71 if a charity were designated to take only if all the members of a large family had died. However, if a charity is third in line to take an interest (to A for life, then to B if B is living on A's death, and if B is not then living to Charity), the Attorney General, but not the charity, would be entitled to reports while A and B are both alive. In addition to the duty to keep qualified beneficiaries reasonably informed, subsection (1) of section 71 permits, but does not require, the trustee to respond to reasonable requests for information from a nonqualified beneficiary.

Under section 71(2), a trustee must provide a copy of the trust instrument to a qualified beneficiary who requests one. Further, when a trustee accepts a trusteeship, the trustee must notify the qualified beneficiaries of the acceptance and of contact information for the trustee. When a trustee becomes aware that an irrevocable trust has been created, or that a revocable trust has become irrevocable, the trustee must notify the qualified beneficiaries of the trust's existence, the identity of the settlor, the right to request a copy of the trust instrument, and the right to a trustee's report. These duties of notification do not apply retroactively to trustee acceptances that occurred or to trusts that became irrevocable prior to the effective date of the Trust Code.

Under section 71(3), a trustee must send annual reports to the permissible distributees of trust income or principal and to other qualified beneficiaries who request reports. Permissible distributees are those beneficiaries who are currently eligible to receive mandatory or discretionary distributions from the trust. Section 3(10). Section 71(4) provides that a qualified beneficiary can waive the right to reports or other information.

Under section 71(5), the trustee may charge a reasonable fee for providing information under Section 71. Subsection (6) provides that, if a beneficiary requests information, the request must be with respect to a specific trust and not a general "let me know about any interests I have in any trust you manage."

Section 71(8) provides that information, notice, and reports will be given only to the settlor's spouse if:

- the spouse survives the settlor,
- the spouse is financially capable,
- the spouse is the only permissible distributee of the trust, and
- all of the other qualified beneficiaries are descendants of the spouse.

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This provision was added to take care of situations in which two spouses want to control their property until the death of the survivor and would rather not have their children know about the assets in a trust (for example, a credit-shelter trust) while the survivor is still alive. Unless the terms of the trust provide otherwise, if the spouse becomes financially incapable, notice must be provided to others so that someone can keep an eye on the trustee.

As discussed above in connection with mandatory and default rules, a settlor can waive or modify the duties under Section 71, either during the period that the settlor or the settlor's spouse is alive and financially capable or by designating a person to receive the required information, notice, and reports. Thus, the settlor can direct that no information be sent to anyone other than the surviving spouse, as long as the surviving spouse remains financially capable, regardless of the identity of the other beneficiaries. Also, if the settlor creates a trust for an irresponsible child, the settlor can provide that all information, notice, and reports will be sent to a responsible third party who will act in good faith to protect the interests of the child and any other beneficiaries. Section 5(3).

The duty to keep the beneficiaries reasonably informed about the administration of the trust is a fundamental duty of a trustee. In some respects the Trust Code restricts the trustee's duty to provide information more than current Oregon law does, because under the Trust Code the trustee's duty is owed only to qualified beneficiaries. However, with respect to the duty of the trustee under Section 71(2)(a) to provide a copy of the trust instrument to any qualified beneficiary who requests it, the Oregon Code probably expands current Oregon law. The requirement under Section 71(3) of the Trust Code that a trustee send annual reports to permissible distributees and to qualified beneficiaries who request a report also creates an affirmative duty that probably does not exist under current Oregon law, but the settlor can limit this duty as long as someone has the right to receive information about the trust.

ORS 128.125(2) requires a trustee to respond to requests from a beneficiary for an itemized statement of receipts and disbursements or a statement of property held by the trustee. The beneficiary has a right to peti-

tion a court to obtain this information if the trustee fails to provide it (ORS 128.125(5)), and a right to petition for an accounting under ORS 128.135. Thus, current Oregon law focuses on the beneficiary's right to request information. The Trust Code, in contrast, emphasizes the trustee's common law duty to keep beneficiaries informed but also sets forth specific obligations rather than merely imposing a more generalized duty.

Liability of trustees and rights of persons dealing with trustee

Limitation of action against trustee. Section 87 limits a trustee's potential liability to

- six years from the time the act or omission is discovered or should have been discovered,
- one year from the sending of a report that adequately discloses potential claims, or
- the later to occur of 10 years from the date of the act or omission or two years from the termination of any fiduciary account established under the trust.

Subsections (1) and (3) restate the periods set forth in ORS 12.274. Subsection (2), which cuts off claims after one year if the trustee discloses specific information about the potential claim to the beneficiary, is new.

Event affecting administration or distribution. Section 89 protects a trustee who acts without knowledge of an event such as marriage, divorce, performance of educational requirements, or death, as long as the trustee exercised reasonable care to ascertain the happening of the event. At common law, a trustee is absolutely liable for misdelivery of trust property even if the trustee does not have notice of the happening of an event that affects distribution under the trust terms.

Exculpation of trustee. Section 90 validates, but at the same time places limits on, the enforceability of an exculpatory provision. The trust cannot relieve the trustee of liability for a breach of trust committed in bad faith or with reckless indifference. A clause drafted by the trustee will be invalid unless the settlor is represented by independent counsel or the trustee proves that the exculpatory term is fair and that the term was communicated to the settlor.

SB 275 is the bill that became the Trust Code, and references to sections in this article are to the original bill, which is available at www.leg.state.or.us/05reg/measures/sb0200.dir/sb0275.b.html.

This article does not provide a comprehensive discussion of trust law in Oregon. Additional explanations of the Trust Code will appear in the Oregon State Bar publication, "Administering Oregon Trusts," and in the materials for a CLE seminar on trust law to be presented by the Estate Planning and Administration Section on November 4, 2005.

Medicare Part D: prescription drug program

By Jenny Kaufmann, Legal Aid Services of Oregon



The high cost of prescription drugs forces many Medicare beneficiaries to make difficult decisions about whether to pay for their housing, food, and utilities or their medications. Some have resorted to reverse mortgages, second mortgages, or credit cards to pay for their prescription drugs, and today's elders are carrying more debt than previous generations. The Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA)(P.L. 108-173) was passed, in part, to provide beneficiaries with some financial assistance for prescription drugs. The program is scheduled to begin on January 1, 2006, and it will be important for you to understand how it will operate.

Most Medicare beneficiaries will pay monthly premiums and co-pays. While there is no doubt that a significant number of low-income elders and persons with disabilities will benefit from the prescription drug program, those with very low incomes and those with slightly higher incomes may lose the more generous prescription drug benefits they already have through Medicaid or employer-based programs. Medigap insurers will no longer be able to issue new drug policies to supplement those provided through the MMA.

How it will be administered

The Medicare Prescription Drug Program, or Part D, establishes a voluntary outpatient drug benefit that will be administered mainly through private prescription drug plans (PDPs). Existing Medicare Advantage plans will now offer both prescription drug and health care coverage and will be known as MA-PD plans. Both types of plans must provide a standard drug benefit that must be approved by the Center for Medicare and Medicaid Services (CMS). PDPs and MA-PD plans may offer enhanced benefits at higher costs to beneficiaries.

Enrollment in the program is scheduled to begin on November 15, 2005. Beneficiaries must affirmatively enroll in Part D. This is unlike Part B, which requires a beneficiary to affirmatively elect out of coverage. Current

Medicare beneficiaries and those who become eligible must enroll by May 15, 2006, or they will be assessed a surcharge (or penalty) in addition to monthly premiums.

After January 1, 2006, Medicaid will no longer pay for the vast majority of prescription drugs for anyone who is also eligible for Medicare. The Social Security Administration and state Medicaid programs have already begun mailing information on enrollment to those whom this affects.

Enrollment is, however, only the first step. Beneficiaries must also select an appropriate PDP or MA-PD plan from among numerous and vastly different options.

What prescriptions it will and will not cover

There is a real risk that a Part D participant will not be able to find a PDP that meets his or her prescription drug needs.

Drug formularies – the approved lists of drugs that can be dispensed – are just now being finalized and approved by CMS. To complicate matters even further, not all pharmacies will provide coverage under every plan available. There is some concern that smaller local pharmacies in rural areas may choose not to participate, because reimbursement rates will be set by CMS and may not cover the cost paid to a drug company or supplier by a pharmacy that may be too small to qualify for volume discounts.

In response to concerns and criticisms raised by critics of the MMA, CMS has mandated that PDPs and MA-PDs cover six categories of drugs through their formularies: antidepressants, antipsychotics, anticonvulsants, antiretrovirals, antineoplastics, and immunosuppressants. Under the act, the plans do not have to cover every single drug in these categories; but it does appear that CMS is requiring the plans to cover substantially all the drugs in these categories.

The act specifically prohibits coverage of two classes of drugs commonly used by most seniors and persons with disabilities: benzodiazepines (e.g., Valium and Xanax) and bar-

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biturates. Medicaid will be permitted to pick up coverage for these two categories of drugs. The plans will also not cover drugs to treat anorexia, weight loss, weight gain, fertility, cosmetic conditions, hair growth, cough or cold symptoms, or prescription vitamins.

The plans will not be permitted to discriminate against enrollment of individuals with specific diseases (e.g., diabetes, Alzheimer's, high blood pressure).

Finally, each plan must cover at least two drugs in each category and class of drugs beyond the mandated groups.

What it will cost

The standard drug benefit, available to all beneficiaries regardless of income or resources, will require the payment of a monthly premium that ranges from a low of \$23.25 in California to a high of \$36.60 in North Carolina. See www.cms.hhs.gov/healthplans/rates for the full list.

There is also a yearly deductible of \$250 and a 25 percent co-pay on the first \$2,250 spent on medication. There is no coverage for out-of-pocket expenses between \$2,250 and \$3,600 a year. After a beneficiary has paid (not just incurred) \$3,600 in out-of-pocket expenses, his or her costs are limited to \$2 for generics and preferred multiple source drugs and \$5 for all other drugs or five percent of the price of the drug. Dual eligibles and low-income beneficiaries will not be subject to these premiums and out-of-pocket expenses.

How it affects those on Medicaid

Perhaps the most significant change in coverage will be for beneficiaries known as the "dual-eligibles" – those individuals who are eligible for both Medicare and full Medicaid coverage.

CMS is automatically enrolling dual eligibles in Part D. CMS also plans to enroll dual eligibles randomly in a PDP if they are not already enrolled in a Medicare Advantage program. Some states are even pushing dual eligibles to enroll in Medicare Advantage programs as one way to ensure they continue to receive the prescription drugs prescribed by their treating physician. CMS

decided early in the summer to proceed with automatic enrollment because of a concern that many beneficiaries would not understand the various notices and "advertisements" they receive or would fail to enroll before January 1, 2006, when Medicaid must stop paying for prescription drugs.

Dual eligibles will now have a mandatory co-pay of \$1 for each generic prescription and \$3 for any other prescription. Most states currently have no co-pay or waive any co-pay for Medicaid beneficiaries.

How it affects low-income elders

The group of Medicare beneficiaries that will most benefit from the program are low-income elders not covered by a Medigap policy or an employer-based policy.

Medicare beneficiaries eligible for low-income subsidy fall into three main groups:

1. Full-benefit dual eligibles with income below 100% of the federal poverty limit (FPL) and assets of \$2,000 for an individual or \$3,000 for a couple. In 2005, the FPL is \$798/month for an individual.
2. Dual eligibles with income greater than 100% of FPL or participants in a Medicare Savings Program¹ or beneficiaries with income below 135% of FPL and assets under \$7,500/\$10,500. Beneficiaries in this group have no monthly premium or yearly deductible but will have co-pays of \$2 for generic drugs and \$5 for all other prescriptions, up to the out-of-pocket limit.
3. Beneficiaries with income between 135% to 150% of FPL and assets under \$11,500/\$23,000. This group will have a sliding scale premium up to the maximum average premium, a \$50 deductible, no gap in coverage, co-insurance of 15% up to the out-of-pocket limit and co-pays of \$2 and \$5 once the out-of-pocket limit is reached.

Individuals in the low-income subsidy group will not be automatically enrolled and must apply for the subsidy either through the Social Security Administration (SSA) or their Medicaid program (OMAP in Oregon).

According to CMS, SSA will have primary responsibility for determining who is eligible

The group of Medicare beneficiaries that will most benefit from the program are low-income elders not covered by a Medigap policy or an employer-based policy.

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Resource

The Senior Health Insurance Benefits Assistance (SHIBA) program provides a statewide network of trained volunteers who educate, assist, and serve as advocates for people with Medicare.

SHIBA volunteers help people with Medicare understand their rights and options in health insurance, so that they can make informed choices.

This free program is sponsored by the Oregon Insurance Division, which is part of the Department of Consumer & Business Services (DCBS).

Web site:
www.oregon.gov/DCBS/SHIBA

Telephone: 800.722.4134

October 1 rule change on annuities canceled

The Department of Human Services had proposed to amend OAR 461-140-0220 to limit the use of annuities to provide income for the community spouse of a Medicaid recipient. DHS did not receive approval to make changes in the rules, which were to be effective October 1.

There will be no changes at this time, although the rules may be modified at a later date. DHS's Joanne Schiedler said the department will continue to take into account concerns raised by elder law practitioners.

for a low-income subsidy, but keep in mind that SSA may deny coverage and not refer eligible individuals to the state for assessment. Some states have more generous asset limitations for Medicaid-eligible individuals than Part D provides.

Issues for concern

Most advocates for elders and persons with disabilities agree that the following issues are of greatest concern:

- **Involuntary disenrollment.** This could result if a beneficiary moves out of the service area, if he or she loses eligibility for a number of reasons (including the beneficiary's behavior), if the PDP's contract is canceled, or if a plan misrepresents information.
- **Noncoverage or change in coverage of medically necessary prescription drugs.** A PDP must provide notice when it drops a drug from its formulary, but when and what type is unclear. 42 CFR §423.120(b)(5)(i)(A-B). Furthermore, a beneficiary may be unable to change plans.
- **Complicated appeals process.** The process described in 42 CFR §423.120(b)(5) includes very short time frames, with a final appeal to federal district court.
- **Complicated process to request an exception to the PDP coverage.** Described in 42 C.F.R. §423.120(b)(5)(ii).
- **Inflexibility.** A beneficiary can change to a different PDP only once a year (except for the dual eligibles who can change at any time).
- **Uncertainty.** A PDP can terminate its contract at will.
- **Possible loss of employer-paid benefits for retirees.**
- **Access to participating pharmacies for rural residents.**

Conclusion

It is clear that the Medicare Prescription Drug program will provide much needed relief to low-income elders who have no prescription drug coverage through Medicaid or an employer. It will also help those with more substantial income and resources who also have substantial drug costs. It is also clear that the enrollment process is extremely complicated and many people will be unable to navigate the system without help.

Footnote

- 1 In Oregon these programs are known as Qualified Medicare Beneficiary-Basic (QMB-BAS), Qualified Medicare Beneficiary-Disabled Worker (QMB-DW), Qualified Medicare Beneficiary-Special Medicare Beneficiary (QMB-SMB), and Qualified Medicare Beneficiary-Supplemental Medicare.

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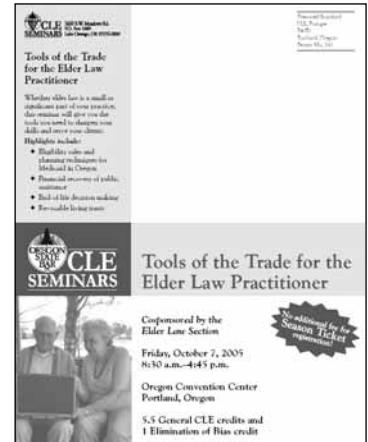
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- A checklist of planning considerations
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Elder Law Section member discount—subtract \$20

The annual meeting of the Elder Law Section will be held at 1:15 PM.

Resources for elder law attorneys

EVENTS

Tools of the Trade for the Elder Law Practitioner Oregon State Bar CLE program, cosponsored by the Elder Law Section

Friday, October 7, 2005; 8:30 AM to 4:45 PM

Oregon Convention Center

777 NE Martin Luther King, Jr. Blvd, Portland

Whether elder law is a small or significant part of your practice, this seminar will give you the tools you need to sharpen your skills and serve your clients.

Highlights include:

- Eligibility rules and planning techniques for Medicaid in Oregon
- Financial recovery of public assistance
- End-of-life decision making
- Revocable living trusts

See Page 17 for more details

Advance Directives and the POLST Program: What to Do When the Advance Directive is Not Enough and the Courts Get Involved

Multnomah Bar Association CLE seminar

Thursday, October 27, 2005; 3:00 to 5:00 PM

World Trade Center

26 SW Salmon, Portland

This class will address what the attorney needs to know about end-of-life decisions and the problems that advance directives alone cannot solve.

www.mbabar.org/MBA_calendar.htm

Guardianships and Conservatorships: Updated Forms and Procedures

Oregon Law Institute seminar

Friday, October 28, 2005; 8:15 AM to 4:15 PM

Oregon Convention Center

777 NE Martin Luther King, Jr. Blvd, Portland

Topics: Guardianships, Conservatorships, Alternative Dispute Resolution in Protective Proceedings, Representing Respondents, Preserving the Estate Plan and Medicaid Planning, Current Court Policies

www.lclark.edu/org/oli/calendar.html

Administering Trusts in Oregon

Oregon State Bar CLE program

Friday, November 4, 2005; 8:30 AM to 5:00 PM

Oregon Convention Center

777 NE Martin Luther King, Jr. Blvd., Portland

- Trust Law in Oregon
- The Oregon Uniform Trust Code
- Ethics...and more

www.osbar.org/cle/programs/clecalendar.html

State Unit on Aging Seminars

The Unit on Aging will be sponsoring a series of short CLE seminars around the state. For specific sites and CLE credit information, contact Janay Haas, Legal Services Developer, State Unit on Aging: 503.945.8999 or Janay.Haas@state.or.us.

Housing Discrimination and Oregon Elders

Klamath Falls: Sept. 28/3:00 to 5:00 PM

Bend: September 29/3:00 to 5:00 PM

Pendleton: October 11/3:00 to 5:00 PM

La Grande: October 12/3:00 to 5:00 PM

Newport: November 11/3:00 to 5:00 PM

New Issues in Medicare

Klamath Falls: Sept. 28/3:00 to 5:00 PM

Ontario: September 30/3:00 to 5:00 PM

Albany: October 5/3:00 to 5:00 PM

Scappoose: October 6/3:00 to 5:00 PM

The Dalles: October 13/3:00 to 5:00 PM

Pendleton: November 1/3:00 to 5:00 PM

Hood River: November 4/3:00 to 5:00 PM

Tillamook: November 10/3:00 to 5:00 PM

Eugene: December 1/3:00 to 5:00 PM

Newport: December 2/3:00 to 5:00 PM

Facets of Nursing Home Law

Hood River: October 14/3:00 to 5:00 PM

Klamath Falls: October 26/3:00 to 5:00 PM

Bend: October 27/3:00 to 5:00 PM

La Grande: November 2/3:00 to 5:00 PM

The Dalles: November 3/3:00 to 5:00 PM

Eugene: November 17/3:00 to 5:00 PM

Civil and Criminal Remedies in Elder Abuse

Ontario: October 28/2:00 to 5:00 PM

Albany: November 16/2:00 to 5:00 PM

St. Helens: November 18/2:00 to 5:00 PM

Resources

Joint Conference of the National Council on the Aging and the American Society on Aging

March 16 to 19, 2006
 Anaheim, California
www.agingconference.org

PUBLICATION

2005 Oregon Legislation Highlights

Oregon Legislation Highlights offers a timely and authoritative resource to help lawyers catch up on the latest legislative developments. The 2005 edition will include descriptions and analyses of new and amended laws in 22 practice areas.

The information in the book is organized into 22 chapters, alphabetically by practice area. Each chapter begins with an outline of the topics and bills discussed in the chapter. Each bill is then summarized and analyzed. Practice tips appear when appropriate. If a bill has a special effective date, that date is noted at the end of the discussion of the bill.

Each bill is identified—in the chapter outline and in the text— by its bill number and its 2005 Oregon Laws chapter number. A table of bill numbers and Oregon Laws chapter numbers appears at the end of the book for quick reference to the discussion in the text.

For more information, contact Beth Richley at 503.431.6376.

ELDER LAW SECTION ELECTRONIC DISCUSSION LIST (LISTSERV)

Everyone in the Elder Law Section is automatically signed up on the list, but your participation is not mandatory. If you want out, simply unsubscribe.

How to use the discussion list

Send a message to all members of the Elder Law Section distribution list by addressing it to: eldlaw@lists.osbar.org.

Replies are directed (by default) to the sender of the message ONLY. If you wish to send a reply to the entire list, you must change the address to: eldlaw@lists.osbar.org, or you can press "Reply to all."

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See page 17 for details.

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Newsletter Board

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

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