



# Elder Law Newsletter

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## Subsidized housing programs offer options for elders

By Hannah Callaghan, Attorney, Legal Aid Services of Oregon

Low-income senior citizens are eligible for a range of subsidized housing programs. Because the programs vary, it is important to identify the most appropriate housing program and applicable federal statutes and regulations.

### Types of housing

#### Low Rent Housing (LRH)

Housing that a tenant rents from the local Public Housing Authority (PHA) is called Low Rent Housing. The PHA is the landlord, the tenant pays 30 percent of his or her adjusted gross income in rent, and the PHA cannot evict the tenant without good cause.

#### Section 8 Project-based Moderate Rehabilitation or Multifamily Housing

In these programs, the federal government provides subsidies for certain units of privately

developed properties for a contractually determined period.

The owner of the property sets these units aside for qualified low-income tenants. The tenant pays only 30 percent of his or her adjusted gross income in rent, and cannot be evicted without good cause. This is generally the same for Section 8 housing that is designated "seniors only" or "elderly and disabled only."

#### Section 8 Voucher Program

In this program, the tenant rents from a private landlord after locating housing on his or her own. During the initial term of the rental agreement, the tenant may not be evicted without good cause. Thereafter, the tenant is not protected against eviction and the rent may increase to more than 30 percent of his or her income. The availability of vouchers is also problematic. According to the Housing Authority of Portland, the wait list for the Section 8 voucher program is closed to new applicants and probably will not reopen for 24 to 48 months.

#### Low Income Tax Credit Housing and Affordable Housing

Some building owners get government tax credits or construction subsidies in exchange for providing rental units below market rate. Monthly rents are not based on income, although there are income limits to qualify for residence. A private organization or company may own the units or they may be owned by a local governmental housing authority. In most of this housing "good cause" is required to evict.

#### Eligibility requirements

There is an income limit for each pro-

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## Subsidized housing

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gram, and the income limits vary by the type of program and by locality. For example, to qualify for LRH in Portland, a single person's income limit is \$38,000. In Medford, the limit is \$29,200. Generally income limits are increased every year. There are no limits on assets, but any real or imputed income on those assets will be counted as income.

Income limit data for Section 8 programs is available on the Web at [www.huduser.org/datasets/il.html](http://www.huduser.org/datasets/il.html).

The housing provider must look at the total income for the entire household. There are some adjustments, depending on the program, for medical expenses for elders and the disabled. The applicant must be a citizen or a non-citizen eligible for citizenship.

If it is "senior only" housing subsidized by the federal Housing and Urban Development department, one of the persons living in the household (head of the household, spouse, or sole member) must be 62 years or older.

### **If disabled elder needs a live-in aide**

If the applicant is a person with a disability as defined under the fair housing laws, and has a letter from a health care provider to confirm that the applicant needs someone to live with him or her because of the disability, the housing provider must allow the tenant to have a live-in aide. Disability under fair housing laws is broadly defined to include any physical or mental condition that creates a substantial "major life impairment" such as difficulty seeing, walking, thinking, and so forth.

Generally an aide cannot have other full-time employment and must be required for 24-hour care. Live-in aides are subject to a criminal check and general background check. They are not considered "household members" for purposes of determining rent, and therefore their income is not counted toward the rent.

### **Applying for subsidized housing**

For Low Rent Housing and Section 8 vouchers, an applicant must go to the local Public Housing Authority to find out how to apply for each program in that county. An applicant can be on waiting lists for both programs at the same time. Some PHAs open up their Section 8 voucher list only occasionally, so an applicant must find out what each program requires.

For all the other types of housing, an applicant must go to each building and apply separately for the housing. The local HUD or Aging and Disability Services office has a list of most of those kinds of housing in each county.

### **If the applicant is turned down for housing**

In almost all kinds of subsidized housing, if an applicant is turned down he or she has the right to some kind of review. If the PHA denies admission, the applicant has the right to a hearing to review the decision. In other types of housing the applicant is generally entitled to some kind of review by someone other than the person who made the initial decision. If a private landlord denies admission to a Section 8 voucher-holder, there is no right to any kind of hearing. However, if the applicant suspects discrimination due to age, race, creed, familial status, source of income, religion, national origin, gender, gender identity, sexual orientation, or physical or mental disability, there could be a violation of the fair housing laws. For information on how to file a fair housing complaint, call the Fair Housing Council of Oregon at 503.223.8197 or 800.424.3247.

### **Can a tenant be evicted from subsidized housing?**

In all but Section 8 voucher housing, after the initial term of the lease the law requires that the landlord have good cause ("serious or repeated violations of the lease") to evict the tenant. Therefore, the landlord must have a reason and he or she must state that reason in writing. In the state of Oregon, unless it is for a very serious and potentially dangerous reason, the landlord must give a 30-day notice with a 14-day opportunity to cure. If the tenant fixes the problem within those 14 days, then the landlord cannot proceed to evict the tenant. However, if the tenant does substantially the same thing in the next six months, the landlord can evict with a 10-day notice for cause with no opportunity to cure. There are other types of notices as well.

If the tenant is a person with a disability and the tenant believes that the reason for the eviction has something to do with the disability, the tenant has the right to ask for a reasonable accommodation which may provide him or her with another chance at being a good tenant.

### **Resources**

42 U.S.C.A. Section 1437; Quality Housing and Work Responsibility Act of 1998 (Title V of P.L. 105-276); 24 C.F.R. 882, 883, 886, 888, 960, 966, 982; 24 C.F.R. Part V; HUD Handbooks, and Statements of Policies and Procedures of various Housing Authorities, as well as the Section 8 Administrative Plan of each PHA. See also [www.hudclips.org](http://www.hudclips.org).

U.S. Dept. of Housing and Urban Development (HUD): [www.hud.gov/offices/pih/index.cfm](http://www.hud.gov/offices/pih/index.cfm)

List of Public Housing Agencies: [www.hud.gov/offices/pih/pha/contacts/states/or.cfm](http://www.hud.gov/offices/pih/pha/contacts/states/or.cfm)

Fair Housing Council of Oregon: [www.fhco.org](http://www.fhco.org)

Housing Authority of Portland: [www.hapdx.org](http://www.hapdx.org)

City of Portland Housing Connections: [www.housingconnections.org](http://www.housingconnections.org)

## Innovative housing for elders with special needs

By Judith Woo Poutasse

For almost 30 years, the Pacific Northwest, and particularly Oregon, has been a leader in developing innovative long term care services for elders who live independently at home (Oregon Project Independence) and for those who live in substitute residential settings, such as assisted living facilities (ALF). Innovative residential housing arrangements for elders with physical disabilities and mental impairments, cultural and language barriers, dietary restrictions, and special needs have been established in Portland and Seattle. In general, these models share a common philosophy of optimizing an elder's overall quality of life and independence by coordinating long-term social services with well-designed residential housing. Although not intended as a comprehensive survey, this article highlights several innovative housing options.

### ALF for deaf and deaf-blind elders

Opened in August 2003 and established by Deaf Northwest, Chestnut Lane in Gresham, Oregon, is the first ALF in the nation that serves disabled deaf and deaf-blind (including deaf low-vision) elders. The \$8 million ALF offers 70 studio and one-bedroom apartments, 54 that are Medicaid eligible. Current residents average 70 years in age and come from Oregon, California, Washington, and Minnesota. A primary goal of Chestnut Lane is to reduce social isolation for deaf elders through well-planned residential facilities, program staffing, and related services. Chestnut Lane incorporates innovative architectural design features, including a Swedish nurse-call system to communicate words like a reader board, strobe flashing lights for fire drills, and vibrating beds to awaken sleeping residents in case of an emergency. All staff members are deaf with the exception of two hearing employees whose parents are deaf. Employees communicate with residents through American Sign Language. On-site programs and services include wellness and exercise classes and a beauty salon. In the future, Deaf Northwest hopes to develop independent living apartments and skilled nursing facilities for deaf and deaf-blind elders, including those also afflicted with Alzheimer's Disease.

### Housing options for elders with dementia

The demand for housing and care designed to meet the needs of people with dementia, which includes Alzheimer's Disease, continues to grow. When a facility advertises dementia care, it likely has a locked unit, staff with additional training and experience, or a specially designed program. Encore Senior Living in Portland is an example of the latter.

Opened in 1998, Encore Senior Living is Oregon's largest licensed free-standing residential facility for elders diagnosed with dementia. Encore consists of eight secured home-like and interconnected "cottages" of 12 to 14 residents each. Average age is the early 80s. One cottage accommodates residents with pets. Another cottage is exclusively for male residents and is staffed by male caregivers, and a third cottage is available for Medicaid eligible residents. Encore's "Rediscovery Program" focuses on creating a living environment that relies on use of a resident's senses. Periodic "quality of life" evaluations, health and fitness monitoring, and programs geared to each resident's interests are key components.

### "Campus of care" residential model for culturally diverse elders

In the 1970s, Nikkei Concerns, a nonprofit organization in Seattle, pioneered a model of health care and related services in a traditional atmosphere targeted initially at the post World War II generation of first generation Japanese Americans (Nikkei). According to Executive Director Catherine Kanda, Nikkei Concerns offers several long term care facilities for elders who live within a small geographical area or "campus of care":

- Seattle Keiro: a 150-bed skilled nursing home, now 60 percent ethnically Japanese-American and the balance from six other ethnic groups, 67 percent Medicaid residents, and average age of 81 years
- Nikkei Manor: a 50-bed ALF offering five cuisines to residents at average age of 83 years
- Midori condominiums: 22-market rate condominiums for independent elders through for-profit NC Enterprises, Inc.

Nikkei Concerns also offers social service programs for independent elders (both residents and nonresidents) through Kokoro



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## Innovative housing for elders with special needs

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Kai, an adult day program for social interaction and wellness activities; Nikkei Horizons, a continuing education program for active seniors; and KIDcare, an innovative intergenerational child care program. Ms. Kanda says Nikkei Concerns has broad community support and a reputation for high-quality health services and housing facilities where caring staff members speak 10 different languages. As the baby-boomer English-speaking children of Nikkei retire, she predicts increasing demand for private pay, high-quality, and culturally diverse residential facilities in the Pacific Northwest.

### Apartments and ALF for independent multi-ethnic elders

The Seattle-Chinatown International District Preservation and Development Authority (SCIDPDA), a nonprofit community development corporation, manages and develops mixed-use properties in the historic International District (ID) of Seattle. Village Square is the largest multi-ethnic project in the Pacific Northwest. Executive Director Sue Taoka states that Asian-American elders, who typically come from strong traditional family structures, often equate nursing homes with a place to die alone. A decade ago, SCIDPDA developed an innovative housing model by focusing on the housing and service needs—identified through numerous participatory meetings—of elderly Chinese, Japanese, Filipino, African, and Vietnamese Americans living in the ID.

Phase I, completed in May 1998, is an intergenerational, multi-ethnic, collaborative facility with 75 housing units (50 assisted living units in Legacy House and 25 independent living apartments), a child care center, and a health clinic. Services include job training and elder case management as well as mental health counseling in 35 different languages. All Legacy House residents are low-income, Medicaid eligible with 80 percent Asian Americans, 75 percent female, and an average age of 73 years. In 2004, Phase II—funded by 30 public, private, and foundation sources, including the Gates and Allen Foundations—will have 57 two and three-bedroom apartments for low-income families, a new branch of the Seattle Public Library, a community center/gymnasium, retail and office space, and an underground parking garage.

### Adult foster homes for special populations

Adult foster homes (also known as adult care homes) offer another housing option for special elder populations. Adult foster homes for five or fewer residents living together in a residential neighborhood setting are licensed by the Area Agency on Aging or Seniors and People with Disabilities office—or in some counties by the county agency charged with aging and disability services. Many of these facilities accept Medicaid reimbursement. Some offer support for special populations of elders and people with disabilities. Information about adult foster homes is not collected on a statewide basis, but may be available from a local Area Agency on Aging, and People with Disabilities office or from private placement agencies.

For example, Multnomah County's Aging and Disability Adult Care Home Program certifies individual homes that serve special populations of elders: 65 years and older, developmentally disabled, ventilator care, adult mental health, Alzheimer's/Dementia, Parkinson's Disease, and certain chronic illnesses. According to Shelley Lee Immel, Training Coordinator/Specialist, "limited" adult foster homes are also available for the care of specific persons with specific health conditions.

### Housing options for elders with religious and cultural preferences

Religious organizations have a long history of providing housing and care for elders and people with disabilities while also meeting their spiritual and cultural needs. Oregon examples include: Cedar Sinai in Portland (supported by the Jewish community; provides kosher meals); Good Samaritan Centers (operated by the Evangelical Lutheran Society in Hermiston, Brookings, Eugene, and other locations); Friendsview Retirement Community in Newberg (founded by the Northwest Society of Friends); Mennonite Village in Albany; and Providence Benedictine Nursing Center in Mt. Angel.

### Additional resources

Local communities have responded to the needs of the diverse aging population by offering ethnic meals and programs at meal sites. More options are likely to be developed to fit the needs and preferences of the changing group of elders and people with disabilities. For additional information:

- Oregon Department of Human Services Seniors and Peoples with Disabilities: 503.945.5811 or 800.282.8096  
[www.dhs.state.or.us/seniors](http://www.dhs.state.or.us/seniors)
- Oregon Area Agencies on Aging & Disabilities: 503.463.8692  
[www.o4ad.org](http://www.o4ad.org)
- Oregon Health Care Association (provider organization): 503.694.6580; [www.ohca.com](http://www.ohca.com)
- Oregon Alliance of Senior and Health Services (provider organization): 503.694.6580; [www.ohca.com](http://www.ohca.com)
- Multnomah County Aging and Disability Services Department Helpline: 503.988.3646
- Nikkei Concerns: 206.323.7100; [www.nikkeiconcerns.org](http://www.nikkeiconcerns.org)
- SCIDPDA: 206.624.8929

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## Fair housing laws protect elderly, disabled

By Moloy Good, Enforcement Coordinator, Fair Housing Council of Oregon

Federal and state laws (42 USC 3604 et. seq.; ORS 659A.145, 659A.421) specifically prohibit discrimination in housing based on race, color, religion, sex, familial status (i.e., the presence of children under 18 years of age in the household), national origin, and disability. Oregon law further prohibits discrimination based on marital status and source of income. Finally, Multnomah and Benton counties, and the cities of Corvallis, Eugene, Portland, Salem, and Springfield provide protection based on age.

This means that landlords cannot treat tenants differently based on a tenant's disability, or, in some localities, his or her age. For people with disabilities, the law is particularly expansive. Under the law, a landlord must grant reasonable modifications or accommodations that are necessary to afford a person with a disability the full enjoyment of the premises. The tenant must pay for the modification or accommodation and the landlord may require that interior modifications be restored to the original condition when the tenant leaves.

To obtain a reasonable modification or accommodation, the tenant must request it. There are no "magic words" the tenant must use, but at a minimum a tenant must make it clear he or she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of disability. Once a landlord receives a request he or she may ask for verification that (a) the tenant has a disability as defined by the Fair Housing Act, and (b) that the request is related to that disability. The Fair Housing Act applies to those with either a physical or mental disability—including hearing, mobility, and visual impairments, chronic alcoholism, chronic mental illness, AIDS, AIDS Related Complex, and mental retardation—that substantially limits one or more major life activity(ies).

Verification must be provided by someone who has the experience or expertise to know about the tenant's disability. It need not be from a medical professional, and a landlord who insists on verification from a particular source may be violating the law. Finally, a landlord may not require a tenant to release his or her medical records for verification.

A landlord may deny a request if it would pose an undue financial or administrative burden, or would fundamentally alter the nature of the landlord's operations. If a landlord objects to a request on these grounds, the reasonableness of the request will be determined by an analysis of the cost of the requested accommodation, the financial resources of the landlord, the benefit of the accommodation to the tenant, and the availability of alternative accommodations that would meet the tenant's needs.

A landlord may not make the granting of a request conditional on the payment of a fee or an enhanced deposit, including payment of a pet deposit for an assistance animal.

Although federal and state laws do not specifically protect senior citizens, any policy that limits options for elders should be carefully reviewed to ensure it does not have a disparate impact on people with disabilities. For example, it is unlawful for a landlord to require that all adult tenants be capable of living independently. The landlord's purpose behind this rule may be to discourage elders from living in the complex, but the rule would prevent any person who requires the

assistance of a caregiver from living there. Since most people who require caregivers are people with disabilities, the rule has a disparate impact on them and would be invalid.

A similar problem may arise in housing that is specifically for elders, if the landlord states that only "active" or "independent" people need apply. This rule would have a disparate impact on elders with disabilities, and would also be invalid.

There are a growing number of retirement communities, assisted living facilities, or other foster care homes designed for elders. All the fair housing laws apply to these facilities in the same manner and fashion as they apply to other housing, with one exception. Certain housing can discriminate based on familial status.

This exception is allowed for certain housing designated as

62 and over, or 55 and over. However, there are requirements that the landlord must meet in order to qualify for this exception. In 62-and-over housing, the housing must be intended for and solely occupied by persons 62 years of age or older. 42 USC 3697(b)(2). If any occupant is under the age of 62, even if he or she lives with someone who is over 62, there is no exception. In 55 and over housing, the housing must be intended and operated for occupancy by at least one person 55 years old or older in at least 80 percent of the units. The housing must either provide important housing opportunities for older persons, or it must have significant facilities and services designed to meet the physical or social needs of older persons. Also, the housing must publish and adhere to policies and procedures that demonstrate intent to provide housing for people 55 and older.

This is only a brief sample of some of the issues in housing for elders and people with disabilities. If you or your clients have questions about these or other fair housing issues, contact the Fair Housing Council of Oregon at 503. 223.8295. The staff can provide general information to both housing consumers and housing providers on all the fair housing laws.

**Landlords cannot treat tenants differently based on disability or— in some localities—age**

# Removal of unwanted persons from an elder's home can be a challenge

By Susan Ford Burns, Attorney at Law, Portland

Unwanted occupants arrive in an elder's home in a variety of ways. Some are the adult child or other relative of the elder, others may be "friends" of the elder, while still others start as assistants or employees. Some even start out as renters in the elder's home. Two issues must be addressed in deciding how to handle the removal of an unwanted person from an elder's home:

- Who has the right or power to remove the person?
- What is the person's actual status in the home? Is the person a "tenant" under the Oregon Residential Landlord and Tenant Act (ORTLA) or does the person have some other status?

## Who has the right to remove?

In many cases, the reason an elder or an elder's family wants an undesirable occupant removed from the home is because he or she is exploiting the elder. Often the elder is afraid.

If a mentally capable elder desires that the person be removed, he or she can work directly with an attorney to remove the undesired occupant.

If the elder is capable of expressing himself and willing to do so, the Elder Abuse Prevention Act (EAPA) ORS 124.005–124.040 is an excellent mechanism for removing certain abusers. Unfortunately, financial abuse alone does not provide for immediate relief, although a civil action under ORS 124.100 does provide for temporary injunctions and restraining orders as partial relief. ORS 124.120. If there are threats or actual physical abuse in a familial relationship, the Family Abuse Prevention Act (FAPA) ORS 107.700 to 107.732 may apply.

If the elder does not want the person removed, the issue becomes more complicated. In this situation, consideration must be given to whether it is possible to obtain a conservatorship or guardianship over the elder.

If it is possible to obtain a guardianship, ORS 125.315 allows the guardian to establish the elder's residence. By implication, this also means that the guardian has the right to establish who lives with the protected person.

Generally a conservator cannot determine with whom or where the protected person lives, but can use his or her powers to stop the undesirable occupant from obtaining money, food, shelter, or other services from the elder. See ORS 125.420. When the undesirable occupant is living in the elder's home and the conservator can show that this is creating extra costs for the conservatorship, the conservator can show that removal is a financial issue.

## Determining the status of the individual

Once someone has the power to remove the person from the property, the next step is to determine whether the person falls into the statutory definition of "tenant" in the ORTLA. ORS 90.100(42) defines "tenant" as "a person, including a roomer, entitled under a rental agreement to occupy a dwelling unit to the exclusion of others." The key to this definition is "under a rental agreement." "Rental agreement" is defined at ORS 90.100(33) as "all agreements, written or oral...embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises." Note that nothing in this definition says anything about the payment of rent. This means that if the elder allowed someone to stay with him or her in exchange for housekeeping, lawn mowing, or even personal assistance, then the person is probably a "tenant" under the statute.

The consequences of making the wrong choice regarding the status of the individual can be great. If you decide that the person is a tenant and you are wrong, the person remains on the premises and your client could end up paying for his or her attorney fees. If you incorrectly decide that the person is not a tenant (and therefore not entitled to the protections of ORTLA) and you are wrong, you again end up with the person remaining on the premises and your client paying his or her attorney fees.

## Removal of tenant

If the unwanted individual is a tenant under ORTLA, then he or she is entitled to all the protections provided in the statute. These protections include the right to a notice (generally 30 days) to move and the right to habitable premises.

Further, unless it can be shown that the undesired person is a tenant, the expedited Forcible Entry and Detainer (FED) action allowed under ORS 105.100 *et seq* cannot be used to remove the individual. *Kerr v. Jones*, No. A120512, \_\_\_ Or App \_\_\_ (June 9, 2004). The only exception to this is when the person was an employee whose right to occupancy was conditioned on "employment in and about the premises." ORS 90.110.<sup>1</sup>

If the individual is a tenant under the statute, the usual mechanism is to give a 30-day "no cause" notice to move as provided in ORS 90.427(2). There are other types of notice that can be given under certain circumstances, but each of those requires proof of the facts alleged for the shorter notice.<sup>2</sup> A 30-day "no cause" notice requires only proof that (1) the person is a tenant under ORTLA, (2) the tenant was properly served the notice, and (3) the tenant failed to move

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## Help elders avoid construction scams

By Sally Ridenour, Education Manager, Oregon Construction Contractors Board

**M**ost contractors are honest people who run legitimate businesses. A few, however, make it their business to defraud people.

"Elderly and retired persons are prime targets of many construction-related scams. Their homes are often in obvious need of repair or maintenance, and they may be trusting, lonely, or isolated and thus respond to friendly con artists," warns Oregon Construction Contractors Board (CCB) Chief Investigator Bruce Buffington. "Factor in the low probability of physical resistance, reduced memory, eyesight, hearing, or mobility and it's easy to see how seniors can be creatively separated from their money and possessions." Buffington says a few simple actions can help elders avoid home-repair scams.

### **Be careful of contractors who offer repairs door-to-door or solicit business over the phone**

A high percentage of scams involve door-to-door or telemarketing sales techniques. While some legitimate contractors use these marketing methods, most do not. Legitimate contractors build their businesses through referrals and traditional advertising methods. Scam artists use high-pressure sales and set traps for their victims.

"Typically, what happens is there's a knock on the door," says Buffington. "The victim opens it and a man claims to be repairing roofs, driveways, fences, or other things in the neighborhood and has some material left over. He offers to do the victim's home at 50-60 percent off his regular price. He asks for payment up front because he's offering such a good deal. The scam artist will hand the victim a written contract that looks legitimate, showing the name of the company and alleged state contractor's license number.

"After they get a full or partial down payment, scam outfits do little or no work, leave, and never return. Weeks or months later, the victim discovers his or her new roof is leaking or new asphalt driveway is crumbling. In reality, the stuff the con artist sprayed on the victim's roof was either water mixed with ink or roofing material cut with solvent."

### **Before handing over money or signing anything, ask for the contractor's business card and CCB number**

Verify the contractor's license number with the CCB. Folks can check a contractor's license and claims history at the CCB Web site or by calling the CCB office.

Anyone who does repairs, remodeling, or new construction must be licensed with the CCB. An active CCB license ensures that the contractor is bonded, insured, and can legally perform work. Although a license does not guarantee the quality of the work, it does provide some financial protection for consumers.

### **After checking out the contractor's CCB license and claims history, ask for references and set an appointment to talk about the needed repairs**

"Seniors might want to have a friend or family member with them during the appointment," suggests Buffington. "They should accompany the contractor throughout the house, listen carefully, and not sign anything they do not fully understand."

Some con artists will use a "free" inspection as a means of gaining entry into the victim's house, in order to see if there is anything of value inside. Later, they will come back and burglarize the home. That's why it is important to verify that the contractor has an active CCB license, and to ask for *and* call references.

### **Get several bids before beginning construction work**

Compare bids from several different contractors. It may be worth it to pay more for better materials, workmanship, and reliability. A good bid should itemize both labor and material costs.

### **Use written contracts**

Elders often make deals the old fashioned way, with a handshake and a smile. Unfortunately, handshakes don't usually hold up in court. A good way to prevent disputes and avoid trouble is to have a detailed written contract. In fact, written contracts are required by law for construction jobs \$2,500 or larger. Elders should never agree to any work until given a written contract that says exactly what will be done and at what price.

The contractor must perform the agreed-upon work and the customer must pay the agreed-upon price. Unless otherwise specified in the original contract, both parties must agree to any changes. A written change order is not required by law; it's just a very good idea. Some contractors put language in their contracts requiring that all changes be made in writing.

### **Avoid construction liens**

The homeowner is ultimately responsible for payments to subcontractors and suppliers even if he or she has paid the general contractor in full. One should not allow construction to start until the contractor furnishes a copy of "Information Notice to Owner About Construction Liens." This notice explains about liens and how to avoid them. Elders should read it carefully and follow its advice.

A packet that explains construction lien law in layman's terms is available from the CCB.

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## Construction scams

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It is called *Required Residential Construction Notices* and can be downloaded from the CCB Web site or requested by telephone.

### Report fraudulent activity to the police or the CCB

"Seniors can sometimes be embarrassed to tell someone that they've been taken advantage of," says Buffington. "But if fraudulent activity isn't reported, it is much harder to catch these con artists. Consumers can be our eyes and ears and can help us keep others from falling victim to scams."

### File a claim with the CCB

If the contractor is licensed and does negligent or improper work or breaches the construction contract, a claim can be filed with the CCB. Information on filing a claim is available at the CCB Web site. If you represent an elderly client and you do not have experience in construction law, call Bill Boyd at 503.378.4621, ext. 4028. He is an attorney and the manager of the CCB's Dispute Resolution Section.

### Be informed

More helpful tips on avoiding construction-related scams can be found in the CCB publications *16 Ways to Avoid Remodeling, Repair and Construction Problems* and *How to Avoid Being a Victim of Construction Fraud*. These free brochures can be obtained from the CCB Web site or by calling the CCB office.

### Oregon Construction Contractors Board

Phone: 503.378.4621

Web site: [www.ccb.state.or.us](http://www.ccb.state.or.us)

### Veterans' Home now accepts Medicaid

In October 2003, the Oregon Veterans' Home in The Dalles began accepting Medicaid reimbursement. The Medicaid contract will make the Oregon Veterans' Home a realistic option for more clients. You can find more information about the home at [www.odva.state.or.us](http://www.odva.state.or.us).

## Removal of unwanted persons

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within the time specified. If the tenant remains after the notice has expired, an FED action can then be initiated to remove him or her from the premises.

The FED action is an expedited process where the only issue litigated is the right to possession. ORS 105.105 to 105.168, *Class v. Carter*, 293 OR 147, 150, 645 P2d 536 (1982). Other issues, such as loans from the elder to the tenant, cannot be raised.

In an FED, the initial court appearance is set 8 to 14 days from the date the case is filed. If either party fails to appear at the first appearance, the other will win by default. If both parties appear and cannot negotiate an agreement, then a trial will be set within 15 days. The defendant is required to file an answer by the end of that day or the following day.<sup>3</sup>

If the plaintiff proves his or her case, the court issues a judgment. The plaintiff then has the sheriff serve a Notice of Restitution on the tenant, which gives 72 hours to leave. ORS 105.158. If the person fails to leave at that point, the plaintiff then obtains and serves a Writ of Execution and removes the individual (but not his or her possessions) from the premises. ORS 105.161.

Once the individual is removed, you then have to deal with his or her possessions. On a practical basis, the best method is to make arrangements with the party to pick up the property. If the tenant does not do so, or you are unable to contact him or her, you must follow the process outlined in ORS 90.425 for the disposition of the tenant's personal property (including vehicles).

### Removal of non-tenant

If the unwanted individual does not fit under the definition of tenant in ORTLA, the appropriate action for removal is ejectment under ORS 105.005. A non-tenant is not entitled to ORTLA's protections and there is no need for the statutory 30-day notice.

An ejectment action is similar to any other civil lawsuit and has no mechanism for an expedited process, although you may be able to obtain a temporary injunction if you can prove an immediate threat of harm. If there is a colorable claim for an interest in the property on the part of the undesirable occupant, an ejectment action may be the only process available to remove him or her from the property. See *Bunch v. Pearson*, 186 Or App 138, 62 P2d 878 (2003) and *Kerr v. Jones*, *supra*.

Like all other civil lawsuits, an ejectment action starts with a service of a complaint on the unwanted person. He or she then has 30 days to file an answer. The ejectment action continues through the same process as any other civil suit.

### Footnotes:

1. The eviction process for these employees is the same as for tenants. ORS 90.110(7).
2. Tenants who have committed acts that are "outrageous in the extreme" may be removed with 24-hour notice. ORS 90.400(3).
3. Some courts set FED first appearances for night court and require the answer to be filed the following day.



# Oregon property tax deferral programs for elders and persons with disabilities

By Leslie Kay, Regional Director, Legal Aid Services of Oregon, Multnomah County Office

Two Oregon programs allow qualified elders and persons with disabilities to delay payment of property taxes on their residences. If a person qualifies for one of the deferral programs, the state pays the property taxes to the county. A lien is placed on the property and the deferral accounts accrue six percent simple interest each year. Lien fees and interest are also deferred. The property tax lien follows any other lien on the property. ORS 311.666 *et. seq.*

## Senior deferral program

To be eligible for the "senior citizen" property tax deferral, the owner (or at least one spouse if the owner is a married couple) must be age 62 or older. Non-spousal joint owners must each be 62 or older before April 15 of the year a claim is filed.

## Disabled deferral program

To be eligible for the "disabled citizen" property tax deferral one must be receiving, or eligible to receive, federal Social Security disability benefits before April 15 of the year one files the claim.

## Eligibility requirements

In addition to single-family homes, manufactured homes, houseboats, multi-family, and income-producing properties are potentially eligible for the programs.

There must be no prohibition of the deferral of property taxes in any provision of federal law, rule, or regulation applicable to a mortgage, trust deed, or land sale contract for which the property is security.

Either a husband or wife may apply for the deferral or both may apply jointly. Married couples or joint owners must live on the property unless there are medical reasons for not doing so. They must own or be purchasing the fee simple estate.

For both programs, household income must be less than the federal adjusted gross income (FAGI) limit. The FAGI limit for income tax year 2003 was \$33,000. This limit may change each year. If incomes exceed the FAGI limit after a deferral account is established, one may be responsible for all or part of property tax liability for that year. The deferral amount will be reduced by 50 cents for each dollar over the FAGI limit. Household income includes the aggregate income of the taxpayer and spouse, or the income of individuals who have jointly filed a claim for deferral. Adjusted gross income includes payments received by the taxpayer or the spouse of the taxpayer under the federal Social Security Act for the benefit of a minor child or minor children who are members of the household. Income also includes child support received by the taxpayer, and in-home services approved by DHS. See ORS 311.666; ORS 310.630 (7) and (8).

## Application process

To apply for the programs, one must obtain a deferral application booklet from a county assessor's office or the Department of Revenue's Web site at [www.dor.state.or.us](http://www.dor.state.or.us). The application must be filed between January 1 and April 15. To complete the application one will need to attach the following documents:

- copy of the property deed
- copy of the property tax statement from the previous year
- income worksheet
- copy of one's federal income tax return from the previous year
- copy of title if the property is a mobile home
- copy of a trust if the property is in trust
- power of attorney if an attorney-in-fact is applying for the deferral

- copy of a doctor's statement if one does not live on the property due to medical reasons
- copy of the federal Social Security award letter if one is applying for the disabled citizens' property tax deferral.

The deferral account will become disqualified from the program when the property is sold or it changes ownership. One only needs to apply once for the deferral unless a spouse dies.

Surviving spouses may be eligible for continuing deferral. If the surviving spouse is at least 59 years old and did not sign the original application, he or she is required to file a new application if eligible.

If the surviving spouse is younger than 59, he or she may file a surviving spouse application, which will keep the deferral account balance in deferred status. Interest on the deferred taxes will continue to accrue. The surviving spouse is responsible for payment of all current and future property taxes to the county. At age 62, the surviving spouse may apply for the deferral program if he or she meets deferral program criteria. If the application is approved, the department of revenue will pay all current and future property taxes.

In the disabled deferral program, if the taxpayer receiving the disabled deferral dies, and the surviving spouse is also disabled and is determined eligible, or is receiving federal Social Security benefits, the deferral will continue. See ORS 311.688.

When the deferral property is inherited and the heir makes the property his or her principal residence by August 15 of the following year, a repayment schedule may be arranged with the Oregon Department of Revenue. ORS 311.695. The deferred taxes become immediately due if the heir does not live on the property.

One may pay all or part of the deferral account and continue to defer current and future taxes. Relatives or friends may also make payments on an account if the deferral holder does not object. Payments are applied first to lien fees, then accrued interest, then to past deferred taxes. ORS 311.690.

For further information, contact the Department of Revenue Deferral Unit: 503.945.8348 or 800.356.4222.

## Reverse mortgages can help cash-poor elders

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

Reverse mortgages allow house-rich, cash-poor elders to convert some of the equity in their homes to income while retaining home ownership and the right to live in the home. The money borrowed can be used for any purpose, and the homeowner remains responsible for taxes, repairs, and maintenance.

Reverse mortgages differ from traditional mortgages in several ways:

- The householder doesn't make monthly payments to the lender; instead, the lender sends the householder monthly payments or extends a line of credit to him or her.
- The borrower makes no payments until the loan comes due, ordinarily when the last owner/borrower dies or sells the house. The lender is paid when the house is sold (or refinanced by the borrower's heirs if they want to keep the house). Any amount left over goes to the homeowner or his or her estate.
- A reverse mortgage is a non-recourse loan, which means that if the value of the house at the time of sale is less than the amount owed, the lender cannot recover the difference from the borrower or the borrower's estate.
- A regular mortgage requires that the borrower have enough income to qualify for the loan, while a reverse mortgage does not. There are also no income limits for a reverse mortgage.
- A reverse mortgage is a rising debt loan, which means that the principal loan balance increases with each cash withdrawal and with interest charges, which are calculated on this rising balance and added to the loan balance each month. The total amount of interest paid increases significantly over time because of this compounding effect.

The amount of money that a homeowner can borrow depends on his or her age, the interest rate, and the home's value. For example, assuming an interest rate of nine percent and a home approved for a \$100,000 loan, a 65-year-old could borrow up to 22 percent of the home's value, a 75-year old could borrow up to 41 percent, and an 85-year-old could borrow up to 58 percent.

Since the mortgage is a loan rather than a sale, there are no immediate income tax consequences. If the house is sold after the elder dies, his or her successors will take a stepped-up basis in the house and so will not owe capital gains taxes. However, if the elder sells the house, it is possible but unlikely that a capital gain would be realized for income tax purposes.

To be eligible for a reverse mortgage, the borrower(s) must each be at least 62 and must own the home as a primary residence, with little or no debt owed on it. Eligible homes include single-family dwellings, one- to four-unit dwellings if the owner occupies one unit, some manufactured homes, and units in an FHA-approved condominium or cooperative. Borrowers must attend a free, government-approved information session.

The most common kind of reverse mortgage is an FHA-insured Home Equity Conversion Mortgage (HECM). This mortgage provides insurance that will pay the lender if the house does not sell for enough to pay off the debt. Because of the insurance feature, these loans may be less expensive than other reverse mortgages. However, the amount that may be borrowed is capped by the FHA mortgage limit for the area, which means that owners of higher priced homes can't borrow more than owners of homes valued at the FHA limit. To finance the insurance, HUD collects a premium from the borrower which is usually added to the principal balance of the loan.

HUD has approved reverse mortgages offered by twelve Oregon lenders. The list is available on the Web at [www.hud.gov](http://www.hud.gov), by choosing the "Seniors" option, followed by "Reverse Mortgages" and searching for lenders by city or state.

Borrowers whose houses are worth significantly more than the FHA cap may prefer a lender-insured reverse mortgage. The available forms of payout vary, and these loans may cost more than those that are FHA-insured.

Some lending institutions offer uninsured reverse mortgages, which are very different from the insured loans. They provide monthly loan advances for a fixed term only. At the end of the term, the loan balance is due and payable, and if the borrower cannot pay the loan, he or she may lose the house. An uninsured reverse mortgage is suitable only for people who have a short-term need for substantial cash and who know how they will pay off the loan at the end of the term.

Because of the complexity of reverse mortgages, a potential borrower needs good legal and financial advice. These mortgages can consume all the equity in a home and may well cost more than conventional loans. To make comparison of the costs of various reverse mortgages possible, federal law requires lenders to disclose the Total Annual Loan Cost (TALC) of each mortgage. The TALC disclosure shows the single rate that includes all of a reverse mortgage's costs and is very different from the annual percentage rate that must be disclosed for a conventional mortgage. An excellent source for further information is National Center for Home Equity Conversion, [www.reverse.org](http://www.reverse.org).

Scott Burns, a nationally-syndicated columnist, advised in a recent column that an elder considering a reverse mortgage should explore alternatives such as a state property tax relief program, or sale of the home and purchase of a smaller home, or even renting. The latter option adds to the person's capital and may be a way to limit or eliminate financial responsibility for operating expenses on a house, which may be desirable as a person ages.

## Help stop predatory mortgage loans

By Ed Johnson, Housing and Homeless Rights Support Unit Attorney, Oregon Law Center

**P**anfilo Vasquez-Lopez and Maria Dominguez needed about \$5,000 to repair the roof on their house. They contacted a company named Beneficial Oregon because they had received unsolicited refinance offers from them in the past. They were put into contact with a man named Joel Higgins who, like them, was from Mexico but who, unlike them, spoke and read English.

At the time that Vasquez-Lopez and Dominguez made the call to Beneficial, they were working hard to realize their version of the American Dream. They had moved to the United States in the 1980s with no money and no education. Eventually they found manufacturing jobs that paid them little more than minimum wage. But they were frugal with their money and eventually were able to purchase a home and secure a prime loan at seven percent.

Higgins convinced the couple to consolidate some other consumer debt into an \$18,000 loan at a 23 percent annual rate and then to consolidate this loan with their existing seven percent first mortgage. Since Vasquez-Lopez and Dominguez were current on their payments, they didn't need a new first mortgage. However, Mr. Higgins talked them into one in order to meet his quotas.

This story is typical of many predatory lending practices. What is atypical is that the prospective borrowers located a good loan broker named Bertha Ferrán. Then they met Portland attorneys Phil Goldsmith, Hope Del Carlo, and Mark Griffin. Their case was litigated. The jury found Beneficial Oregon had committed fraud and awarded \$500,000 in punitive damages.<sup>1</sup>

### The causes

Predatory lending is hardly a new phenomenon. Unfortunately, predatory mortgage lending has exploded in the past 15 years.<sup>2</sup> The reasons for this boom are many. Deregulation of the lending industry in the 1980s paved the way for many of today's common predatory practices. Likewise, the income tax legislation of 1986 eliminated many tax deductions, but retained the interest deduction on one's home. This led many homeowners to believe that rolling all of their debt into a home mortgage refinance would be a savvy move. The obvious prob-

lem with such "debt consolidation" is that previously unsecured consumer debt became secured by people's homes. In addition to these national trends, Oregon has seen a sharp rise in real estate values. With increasing equity in homes, lenders and brokers have devised a system in which mortgage brokers are actually given an incentive in the form of "yield spread premiums" to provide loans with bad terms to homeowners.

### The players

One of the first challenges a lawyer faces when sorting out a predatory lending case is figuring out the cast of characters on the other side. First, there is the mortgage broker, affectionately known in the industry as the "bird dog." This is often the only person the homeowner has ever met. Next, there is the loan originator. This is the lender that appears on the loan note, mortgage, and HUD-1 settlement statement. Rarely does this entity still hold the mortgage. Typically the mortgage has been sold on the secondary market at least once and assigned to another lender.

### Warning signs

The scams available to predatory lenders and mortgage brokers are limited only by the human imagination. However, there are common warning signs. Asset-based lending, where a loan is given based on the "loan-to-value" ratio in a home rather than a homeowner's income, is a common practice of subprime lenders. "Flipping" is the practice of giving the same homeowner multiple refinances over a short period of time in order to generate fees for the broker and the lender. Other warning signs include debt consolidation scams like the one in the case above, balloon payments, prepayment penalties, direct solicitation, kickbacks to the broker, payoff of low-rate mortgages with high-rate mortgages, rushed closings, and good old fashioned fraud. If your clients ended up with something wildly different from what they thought they were getting, one eyebrow should be raised.

### What can you do?

Predatory lenders and brokers prey disproportionately on the elderly, the disabled, and minority communities. If an issue of discrimination in lending arises, the Fair Housing Council of Oregon can be contacted at 503.223.8295.

There are federal and state laws that help combat predatory lending. Much litigation involves the Truth in Lending Act, the Home Ownership Equity Protection Act, the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, the Fair Housing Act, and sometimes even Civil RICO. State law in Oregon provides common claims as well. Common law fraud and misrepresentation suits are available to combat predatory lending. The Unfair Trade Practices Act (UTPA) at ORS 646.605-652 is available against brokers, but not lenders. UTPA claims are relatively easy to prove, but have limited damages. Also, ORS 59.925-930 regulates mortgage broker fraud and, arguably, can be applied to other players in a predatory lending scheme. Finally, if your client is 65 years old or older or has disabilities, ORS 124.005 *et seq.* may provide a cause of action against mortgage brokers.

*Continued on page 12*

## Stop predatory loans

*Continued from page 11*

### Where can you go for help?

Low-income homeowners who believe they have been victims of predatory lending can contact their local Legal Aid Services of Oregon or Oregon Law Center office. In addition, the State of Oregon regulates much of the lending industry through the Department of Consumer and Business Services, Division of Finance and Corporate Securities. Their phone number is 503.378.4140. The Attorney General's office maintains a consumer fraud hotline at 877.877.9392. The most important thing for potential victims of predatory lending to know is that they need to talk to someone and they should keep talking until someone listens.

### Footnotes

1. *Vasquez-Lopez v. Beneficial Oregon, Inc.*, Multnomah County Circuit Court Case No. 0210-10108.
2. Much of the information in this section comes from *Stop Predatory Lending: A Guide for Legal Advocates*, National Consumer Law Center, 2002.

### Circuit court fees increase

Legislation adopted during the 2003 session provided for increases in state circuit court fees, effective July 1, 2004.

A sampling of the filing fee changes of interest to elder law practitioners follows. The complete fee schedule is available on some of the county circuit court Web sites at [www.ojd.state.or.us](http://www.ojd.state.or.us).

Guardianship (Adult or Minor): . . .	\$78
Conservatorship or Probate: . . . . .	\$78 to \$729
Affidavit of Claiming Successor: . . .	\$78
Objection/First Appearance: . . . . .	\$72
Petition for Support (ORS 108.110): . .	\$7

## Report from the APR Subcommittee

*By Sam Friedenberg*

Members of the Agency and Professional Relations Subcommittee met with representatives of the Department of Human Services (DHS) in April. Some notes from that meeting:

### Funding Medicaid Service Priorities

Priorities 12 and 13 should be funded by August or September. The delay is federal approval, although it is expected.

### Assessing Medicaid Service Priorities

A number of changes were made to OAR 411-015-0000 *et seq.*, the assessment of Medicaid Service Priorities rules. The changes became effective April 23, 2004. According to the agency, the changes do not mean to include or exclude more clients. The goal was to clarify ambiguous language. Our brief review suggested this is the case.

### Spousal Pay Program

This program to pay a spouse for in-home care of the other spouse – details of which can be found at OAR 411-030-0080 – has a funding limit. However, spots are available for clients who are eligible for SSI. There is no provision for respite care for the caregiver.

### Post Eligibility Transfers by Community Spouse

We have regularly discussed transfers by the community spouse after the institutionalized spouse is on Medicaid. These could be to a third party or a revocable trust for the community spouse's benefit. A proposed rule change to OAR 461-140-0242 would clarify that such transfers affect the community spouse but not the institutionalized spouse. As of this time the exact language is not certain and the subcommittee has commented on the proposed language.

### Estate Recovery from Estate of Community Spouse

Another perennial issue is the claim that the Estate Administration Unit (EAU) files after the death of the community spouse for medical assistance provided only to the institutionalized spouse. There is no reference in the EAU communication to the limitation of the claim to those assets that were titled in the institutionalized spouse at his/her death. EAU will look into the communication to see if the limitation can be made clear to the estate.

### Life Estate Table

A change to OAR 461-135-0845 (1), the valuation of life estate rule, has been proposed to delete the CFR reference to the life estate table and add the actual table. This is not a substantive change because the table remains identical. The change becomes effective July 1.

### General Assistance

The program continues in truncated form. Financial rules track SSI, but disability rules have been made a little more liberal.

### Oregon Health Plan (Standard)

The program is scheduled to end August 1, 2004, but there is political will to resuscitate it, even with a reduced benefit packages such as hospital-only coverage. DHS is working on it.

### Medically Needy

This program will not be reinstated.

### Legislative Agenda

The EAU has no agenda. SPD is researching the costs that may come with the Medicare Part D coverage.

### Guardianship Fees for Medicaid Client

Apparently the rule is that the State won't pay for them, but there is a discretionary fund that is available in some instances.

### Miscellaneous

The agency has no position on spouses who waive their elective share in pre- or post-nuptial documents.

We should all look into "1619(b) Plans" for the working disabled.

Spouses who make gifts are not splitting disqualification periods unless both apply for Medicaid.

## Report on the Elder Law unCLE program

By Tim McNeil, Attorney, The Elder Law Firm, Portland

Outside the broad picture windows of the Valley River Inn in Eugene, the Willamette River flows calmly but relentlessly. Inside the Inn on May 15, 2004, the conversation flowed similarly at the Elder Law Section's second annual unCLE program. Unfettered by the static "talking-head" format of the traditional CLE seminar, fueled by hot, strong coffee and a hearty breakfast, motivated by the opportunity to mix informally with a host of accessible, experienced peers, thirty-six attorneys talked elder law for more than eight hours. But for the fact that a wedding party had booked the facility for the evening, the unCLE might have rolled on all night long.

The unCLE structure is simple: assemble a small group of elder law attorneys in a room, huddle them around an interesting elder law topic, and stand back. The Eugene location allows for geographical diversity, as Section members from southern Oregon mix with those from the Willamette Valley and beyond. A facilitator helps to move the discussion along, armed with a flip chart rather than an outline.

The unCLE program kicks off with a networking opportunity: a reception on the evening before the main event.

During four sessions, three groups work concurrently on their respective topics. Breakfast, lunch, and breaks between sessions give attorneys time to share forms that they use in their individual practices.

Despite its simple, unstructured nature, this year's unCLE program bestowed 5 general MCLE credits on participants.

In many of the program evaluations, participants lamented that they had to choose among the twelve topics, which included Medicaid Eligibility, Office Procedures, Estate Recovery, Trust Administration, Elder Abuse, and Guardianship Developments. These hard choices proved to be a minor irritant, however. The evaluations indicated that elder law attorneys embraced the opportunity to explore with their colleagues the challenging problems that keep them up at night. While a CLE seminar may graze an issue, the unCLE provides the rare opportunity to focus on specific problems among peers who may know exactly how to resolve them.

Judging by the program evaluations, the Elder Law Section will provide another such opportunity for members next year. Thanks to program chair Mark Williams, who was awarded an unPlaque for his work.



Alexis Packer of Ashland and Scott Strahm discuss ways to protect clients from elder abuse.



Kristianne Cox of Portland, Steve Heinrich of Corvallis, and Scott Strahm of Camas, WA, share practice tips at the Friday evening reception



Section chair Wes Fitzwater (l) of Clackamas makes his point in a conversation with Sylvia Sycamore of Eugene, Cinda Conroyd of Salem, Joshua Williams of Beaverton, and Alice Plymell of Eugene.



(l to r) Amanda Guldager of Hillsboro, Leslie Schockner of Milwaukie, and Greta Gibbs of Portland participate in a unCLE session.

## Committee proposes Oregon Uniform Trust Code revisions

By Susan N. Gary, Associate Professor, University of Oregon School of Law

The Oregon Study Committee on the Uniform Trust Code has recommended an amended version of the Uniform Trust Code for adoption in Oregon. The Public Affairs Committee of the Oregon State Bar has approved the legislative proposal and the bill will now go through the legislative drafting process. The Study Committee included members of the Estate Planning, Elder Law, and Tax Sections of the OSB and gathered input from many other sections of the Bar and from individual lawyers. The Study Committee also included members of the Oregon Bankers' Association and sought input from that organization's members.

The Oregon Uniform Trust Code ("Oregon Code") codifies existing Oregon law and provides a useful resource for Oregon lawyers. Because Oregon has limited case law discussing trust-related issues, Oregon lawyers must look to the Restatement for explanations of the common law. The Oregon Code states the basic principles of trust law and provides guidance for their application. Oregon already has statutes that address issues of trust modification, charitable trusts, pet trusts, and trust certification, and those statutes were used to formulate the Oregon Code. In addition, the Oregon Code incorporates the Prudent Investor Act, already adopted by Oregon.

The Study Committee's goals were to adopt uniform language wherever possible and to minimize changes to current law. The Oregon Code does change Oregon law in a few ways, but in many instances the Study Committee modified the Uniform Trust Code to conform to existing Oregon law. Thus, some of the concerns raised in other states about changes made by the Uniform Trust Code will not be issues in Oregon.

Key changes to the state law made by the Oregon Code are described below. The section numbers refer to sections of the Oregon Code. The full text of the Oregon Code, with comments, and a document explaining the bill and the changes it makes to Oregon law, are available electronically from co-chairs Valerie J. Vollmar, [vvollmar@willamette.edu](mailto:vvollmar@willamette.edu) and Susan N. Gary, [sgary@law.uoregon.edu](mailto:sgary@law.uoregon.edu).

**Section 103.** "Beneficiary" is defined to include a person with a present or future interest, whether vested or contingent, and a person holding a power of appointment, other than as a trustee. "Qualified beneficiary" is a more limited category and includes only persons currently eligible to receive distributions from the trust, either mandatory or discretionary, persons next in line to receive distributions, and persons who would receive trust property if the trust terminated immediately. The Attorney General is treated as a qualified beneficiary of a trust in which a charity has an interest, unless the charity's interest is negligible.

**Section 105.** The trustee's duty to inform and report to beneficiaries (a common law duty) is owed only to qualified beneficiaries. A settlor can modify or waive this duty either (1) for so long as the settlor or the settlor's spouse (if a qualified beneficiary) is alive and financially capable (i.e., does not meet the standard for conservatorship in ORS 125.005(3)) or (2) if the settlor names another person to receive the information. Thus, spouses can direct that information be given only to the two of them until the death of the survivor, even though the children are qualified beneficiaries of the trust because they will receive the trust assets after the second spouse dies. Further, a settlor who does not want a child to receive information about a trust created for the child's benefit can name someone else to receive notice and protect the child's interests. The child need not know that the trust exists.

**Section 303.** This section extends Oregon's provisions on representation beyond modification to include representation for notice and other purposes. This section also extends virtual representation to minor and financially incapable persons. (Financially incapable is the term used in Oregon statutes for a person who is unable to take the actions needed to obtain, administer, and dispose of his or her financial resources.)

**Section 402.** A trustee can select beneficiaries from an indefinite class, if the trustee does so within a reasonable time.

**Section 405.** A settlor of a charitable trust has standing to enforce the trust.

**Section 408.** If a court determines that the value of the trust property in a pet trust exceeds the amount required for the intended use, the excess property will be distributed as the trust instrument directs; or if the trust does not

specify, the trustee will distribute the property to the settlor or the settlor's successors.

**Section 409.** A trust created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a benevolent purpose is valid and can be enforced for 90 years.

**Section 410.** A settlor can commence a proceeding for modification or to ask the court to apply the cy pres doctrine.

**Section 413.** This section liberalizes cy pres to permit a court to apply cy pres if a purpose becomes "wasteful" and no longer requires a finding of general charitable intent for the application of cy pres. Cy pres can be applied even if the trust provides for the transfer of the property to a non-charity on the failure of a charitable purpose if 50 years have elapsed from the creation of the trust.

**Section 417.** The Oregon Code permits a trustee to combine or divide a trust without court approval if the rights of beneficiaries and the purposes of the trust are not materially affected.

**Section 601.** The standard of capacity required to create a revocable trust is lowered to be the same as that required to execute a will.

**Section 602.** This section changes the presumption that a trust is irrevocable to a presumption that the trust is revocable unless the trust provides otherwise. An agent acting under a durable power of attorney can revoke a trust only if the trust expressly authorizes the agent to do so. A conservator can revoke a trust only with court approval.

**Section 603.** While a trust is revocable, all rights of the beneficiaries, including rights to information, are subject to the settlor's control, and the trustee owes duties only to the settlor. Under current law, the trustee's duties extend to all beneficiaries.

**Section 604.** The statutes of limitations for actions to contest the validity of a revocable trust are four months after notice is given or three years after the settlor's death. The four-month period is consistent with the period for contesting wills. The three-year period is different from the rules that apply to wills.

**Section 705.** This section makes it easier for a trustee to resign without court approval.

**Section 706.** This section allows the settlor of an irrevocable trust to petition for removal of a trustee. This section does not require a beneficiary to post a bond before petitioning the court for removal of a trustee or for any other action. The Study Committee believes that the bond requirement under Oregon law creates an unreasonable bar for access to court.

**Section 813.** This section modifies the duties to inform and report to beneficiaries by limiting these duties to qualified beneficiaries. The trustee no longer has a duty to respond to requests for information from beneficiaries who are not qualified beneficiaries, but may choose to respond to requests that are reasonable.

*Continued on page 15*

## THE RESOURCE CORNER

# An interview with Mark Williams

By Ellyn R. Stier, Attorney at Law, Portland

**M**ark Williams, Chair-Elect of the Elder Law Section, recently joined the Elder Law Firm in Portland as a partner with Penny Davis and Richard Pagnano. From his window on the 18th floor of the U.S. Bank tower in Portland, Mark can see the Downtown Chapel, a progressive Catholic parish known for its commitment to social justice and service to the poor. Mark is the cantor at the chapel, and his affinity for elder law comes largely from his Catholic faith and values.

Prior to settling in the field of elder law, Mark worked as a legislative aide for Ron Wyden, as a Deputy District Attorney for Coos County, and as Assistant General Counsel for the Oregon State Bar. These jobs tapped into his idealism and love for public policy. After leaving the Bar, Mark worked for a small firm where he found estate planning to be the most enjoyable part of his practice, because of the non-adversarial approach to problem solving and working with families.

However, estate planning tends to focus on wealth transfer and did not satisfy Mark's interest in public policy and service to the poor. In the 1980s, Mark, then a sole practitioner, got into the new field of elder law, which grew out of concern for the unmet legal needs of the elderly. His claim to fame is that he represented the first income cap trust beneficiary in Oregon.

Much of Mark's practice today involves contested protective proceedings. For the past 10 years he has been program chair of the Oregon Law Institute's CLE seminar on guardianships and conservatorships. In addition, he volunteers for the Bar and helps educate lawyers about the field of elder law. He is working on the revision of OSB's book *Elder Law*, with co-editors Cindy Barrett and Penny Davis.

In addition to the OSB book on elder law, Mark recommends the National Academy of Elder Law Attorneys (NAELA) as an invaluable resource. NAELA membership is available to law students and practicing attorneys who work to serve the needs of the elderly. Membership dues include a subscription to *NAELA News* and the *NAELA Quarterly*, and access to the NAELA Internet discussion list. NAELA also publishes the brochures *Elder Law: A Practice Coming of Age*, *Questions and Answers When Looking for an Elder Law Attorney*, and pamphlets on substantive issues. These materials may be purchased in bulk to give to clients.

NAELA sponsors two continuing legal education programs each year for elder law practitioners: the Symposium each spring, and the Advanced Elder Law Institute each fall. New elder law practitioners have the option of attending the Basics of Elder Law Pre-session before the Symposium each spring.

When Mark hired associate Tim McNeil, he sent him to both the Basics of Elder Law and the Symposium for training. Tim found the Basics program to be extremely helpful. It is geared to beginners, and all of the presenters are nationally known experts who are skilled at teaching. The 2004 program included advance directives and surrogate decision making; Medicaid; housing options and nursing home issues; Medicare; office practice; wills, living trusts and basic taxation; Social Security; litigation; and ethics. The materials from the one-day Basics program are available for purchase.

The fall NAELA conference will take place November 11-14 in Colorado Springs, Colorado, and is co-sponsored by the National Guardianship Association and the National College of Probate Judges.

### Recommended Resources

NAELA membership  
New member: \$275 or \$137.50 after July 1. Dues after the first year are \$375.  
Phone: 520.881.4005  
Web site: [www.naela.com](http://www.naela.com)

*Basics of Elder Law*, NAELA Manual:  
\$95.00  
Order by calling 520.881.4005, or  
through Web site at [www.naela.com](http://www.naela.com).

*Elder Law*, CD or book with forms on  
disk: \$175  
Order from Oregon State Bar at  
520.620.0222 or online at  
[www.osbar.org](http://www.osbar.org).

### UTC

*Continued from page 14*

This section imposes notification duties on a trustee when the trustee accepts a trusteeship or becomes aware that an irrevocable trust has been created. These notification duties do not apply retroactively to trustee acceptances that occurred and to trusts that became irrevocable prior to the effective date of the Oregon Code.

This section requires a trustee to provide a copy of the trust to a qualified beneficiary who requests it. Current practice may be to provide only the provisions pertinent to a particular beneficiary who asks.

A beneficiary who asks for information must ask with respect to a single, identifiable trust. The trustee may charge a reasonable fee for providing information to a beneficiary.

Despite the usual rules, information, notice, and reports will be given only to the settlor's spouse if (1) the spouse survives the settlor, (2) the spouse is financially capable, (3) the spouse is the only beneficiary currently eligible to receive trust distributions, and (4) all of the other qualified beneficiaries of the trust are descendants of the spouse.

**Section 814.** This section adds tax savings clauses to Oregon law.

**Section 1005.** In addition to providing for two periods of limitation consistent with current Oregon law, this section cuts off claims after one year if the trustee discloses specific information about the cause of action to the beneficiary.

**Section 1007.** 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 a trust. The Oregon Code protects a trustee who does not have notice of such an event.

**Section 1013.** The current certification of trust statute was used as the model (replacing the UTC version) and has been modified slightly with some provisions from the Idaho statute.

## Plan to be there!

The Oregon Convention Center in Portland is the site of an October 8 elder law CLE program:

### Elder Law Connections.

Topics will include elder abuse, tax issues, issues related to the residence, ethics, and diversity.

We will also hold the Section's annual meeting after lunch, before the afternoon session starts.

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## Pro Bono Subcommittee calls for articles

Heard about a scam that targets elders? Know handy tips to make health-care directives more effective? Have sage advice about adding names to a bank account? Want to relate a cautionary tale?

A wide audience eager to hear from you is Oregon's most vulnerable elders. The State Unit on Aging is developing a periodic one-page newsletter to accompany home-delivered meals statewide and to appear in existing newsletters produced by many of the state's 136 senior centers. Submissions of very brief (no more than three to four paragraphs) issue-spotting articles are needed.

Your articles will include your byline and contact information. Material can be sent directly to Janay Haas, OAA legal services developer, at [janay.haas@state.or.us](mailto:janay.haas@state.or.us). Send questions to the same address or call 503.945.8999 for more information.

## Newsletter Board

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