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## Understanding Medicaid is an important part of elder law practice

*By Monica D. Pacheco, Attorney at Law*

In most cases, people want their money and assets spent and used during their lifetime as they choose; and after death, people want their money to go to whom they choose. People also want to be cared for when care needs arise. Depending on the level of assets, the care needed, and the income levels, Medicaid benefits can help with all of the above. Perhaps not all goals can be attained, but as practitioners we can assist families with identifying their options and the effects of their choices.

Medicaid is part of the state-federal partnership administered by the Centers for Medicare and Medicaid Services (CMS). CMS issues guidance and information bulletins to state Medicaid directors and state health officials. Medicaid assists with payment of medical care and custodial care, including the intermediate level of care provided in nursing homes, adult foster homes, residential care facilities, memory care and in-home healthcare services. There are several Medicaid programs, each with

different requirements. This article focuses on the Medicaid program that covers care needs at home or in various facility settings.

In Oregon, the rules, and exceptions, for eligibility are found in the Oregon Administrative Rules (OARs), Chapter 461, entitled Self-Sufficiency Programs. The basic definitions begin with OAR 461-001-0000, Definitions for Chapter 461 which defines such things as “assets,” “child,” “community based care,” “countable,” “eligibility,” “marriage,” “standard living arrangement,” and “variable income.” It is essential to become familiar with OARs because the rules and their exceptions are important to our clients. I remember when I started practice, my senior partner insisted that I read through the rules, and then maintain them when the rules changed. Of course, at that time, the OARs were kept in a binder, and updates were mailed when there were changes to the rules. There are days that I miss the binder, as I had become familiar with the OARs and could look them up by location in the binder. Now I spend more time reading through the table of contents or searching for the terms I know are used. The point here is that you need to read the OARs, so that you can understand what they say, how they work together, and what exceptions may be available to assist your clients.

### Eligibility

Division 110 of OAR 461 defines eligibility groups. This is important as you start to read through the OARs, as many individual rules have different meanings and/or applications, depending on the different programs. For example, the filing group has six different rules (OAR 461-110-0310 through 461-110-0430), depending on the program you are looking for,

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## Medicaid

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such as TANF, SNAP, OSIPM, etc. Generally, the traditional Medicaid plan works through the Oregon Supplemental Income Program—Medical (OSIPM) rules. However, it seems that more and more clients need supplemental information or assistance with additional programs.

The applicant (and spouse) must meet the criteria for eligibility in three areas: care, income, and resources. The OARs provide the criteria for all three, including exceptions to some of the criteria.

An applicant for Medicaid must require a certain level of care to meet the eligibility requirements, i.e., he or she must need assistance with activities of daily living. The OARs in Division 135 discuss eligibility requirements. The discussion on activities of daily living is referenced in OAR 461-135-0750(3)(a), which refers you back to OAR 411-015-0100. In any case, Medicaid generally covers only those who have sufficient care needs. With 18 current levels of care, an individual must currently have care needs that rise to Levels 1 through 13. This is determined by an assessment of care needs that is completed by the caseworker assigned at the date of request. As practitioners, there is nothing we do to prepare this assessment. However, it is prudent to understand the process so that you can advise your clients and ensure there is some level of expectation for the assessment. At times, it may be necessary to accompany the client to the assessment in order to clarify answers or assist the client with an understanding of the questions being asked. Complete and unfettered answers regarding the actual needs of an applicant can make the difference in whether or not the applicant will meet the care criteria for eligibility.

### **Income limits**

Income is the second item looked at for Medicaid eligibility. When dealing with eligibility matters, the income of the person applying for benefits is the only income that will be considered. The rules require that all income be disclosed, so the first thing to determine is what is counted as income. Generally, our client's income consists of Social Security benefits, VA benefits and/or retirement income, and pension income. It is just as important to determine what is not income. For instance, a client may be withdrawing monthly amounts from an IRA or money-market account. Although the client receives regular monthly

deposits, these are not considered income. In most cases, these are assets that must be dealt with through the asset/resource assessment discussed below.

Once you determine what income is, you need to remember that there are limits to income. The OAR states that an individual who receives more than \$2,205.00 per month in income is over the income limit. This level of income triggers a requirement for an income cap trust. The client will not be found eligible for benefits if his or her income is over the \$2,205 per month limit unless he or she has established an income cap trust. It is important to note two things here:

- Caseworkers have differing definitions of "established." Some caseworkers want to see that an income cap trust is signed, while others might require that the resulting bank account be opened before they consider the income cap trust established. It is important for the practitioner to be aware of the local requirements when working with Medicaid offices.
- A practice tip: I often receive calls from individuals or their families, frantic because they need an income cap trust yesterday and need benefits immediately. In order to be able to respond quickly, it is essential to know the income rules. On many occasions, when I receive the list of income sources, there is a line item for VA Aid & Attendance benefits, or VA Pension (which is not retirement pay). One of the things not counted as income for eligibility purposes is VA Pension or VA Aid & Attendance. This answer often garners many a than-you from potential clients as they go merrily on their way to benefit eligibility. However, be aware that you then add the benefit amount back in when determining patient liability and income distribution amounts.

### **Assets**

The third item to determine eligibility is assets, or resources. A Medicaid applicant must have less than \$2,000 in countable resources, and a person who receives Medicaid benefits is required to report any changes in his or her income or resources. So, if a client inherits assets, their receipt may cause the client to lose Medicaid eligibility unless the money is spent

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## Medicaid

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down or protected within the calendar month in which it is received. However, in the case of a married couple, if the community spouse receives additional resources after the institutionalized spouse is receiving Medicaid assistance, the community spouse can retain those resources with no adverse impact on Medicaid for the institutionalized spouse.

Eligibility for Medicaid is based on financial need. If a person's resources or income are over the limits set by the Medicaid standards, he or she will not be eligible for the program. These limits are very low, which means that people will be required to spend most of their resources on their own care before being considered eligible for the program.

Proper Medicaid planning allows a person to protect assets by taking advantage of the maximum benefits allowed from the exemptions and exceptions under the Medicaid statute and applicable state rules.

### Resource test for a single person

Again, the State counts all of the person's available resources. This means we subtract the exempt resources. The home is exempt only if the person resides in it or intends to return there. Other exempt assets may include an automobile, a burial fund, and personal property. The balance after subtracting the exempt assets must be spent down to \$2,000 before that person is eligible for Medicaid.

### Resource test for a married couple

The state looks at the resources of both the institutionalized spouse and the community spouse on the first day of continuing care and counts all available assets, regardless of which spouse owns the resource. Again, subtract the exempt resources such as the home, an automobile, personal property, a prepaid funeral plan, and a burial fund. Then divide the balance by two. As of January 1, 2017, the community spouse is allowed to keep one-half of the resources up to a maximum of \$120,900; or if the one-half is less than \$24,180, the community spouse is allowed to keep \$24,180. Remember, the institutionalized spouse must have no more than \$2,000. The amount of resources left after the community spouse takes his or her share is considered to be available to the institutionalized spouse and must be spent down or protected for the community spouse in order to be eligible for Medicaid.

As an example, if a married couple has \$26,000 in available resources, the institutionalized spouse will qualify for Medicaid right

away (on resources). This is because the community spouse is entitled to retain \$24,180 in resources ( $\$24,180 + \$2,000 = \$26,180$ ). Because the assets are below the \$26,180 allowed together, the institutionalized spouse qualifies.

In another scenario, assume that the couple has \$200,000 in countable resources. The community spouse can retain \$100,000 ( $\$200,000/2$ ) and the institutionalized spouse can keep \$2,000. This means that the remaining \$98,000 must be spent or protected. ( $\$200,000 - \$100,000 - \$2,000 = \$98,000$ ).

The final example assumes that the couple has \$350,000 in countable resources. One-half is \$175,000. However, the \$175,000 is more than the maximum allowed of \$120,900. Here, the community spouse can only keep the \$120,900, and the spend-down/protect amount is \$227,100 ( $\$350,000 - \$120,900 - \$2,000 = \$227,100$ ).

### Timing

Timing can be crucial in Medicaid planning. Planning prior to the first day of continuing care may be different from planning after care begins. You can advise clients to spend the required resources on paying for care privately, purchasing exempt assets, improving exempt assets (such as major repairs to the exempt home, when necessary), or purchasing a Medicaid-compliant annuity for the community spouse (to increase monthly income). These are just the basic items on my list when discussing with clients how to spend down the required resources when approaching Medicaid eligibility.

### Review the OARs for more information

Once you have determined that your client may need to apply for Medicaid benefits, it will be worthwhile to review your knowledge of the OARs. The information above is merely a snapshot for beginners on the basic eligibility rules for Medicaid benefits to assist with the cost of long term care needs. Reviewing the OARs to determine how income is treated for both spouses is useful because the rules state that a community spouse is entitled to a minimum and maximum amount of monthly income (MMMNA). The MMMNA is calculated by determining if the community spouse is entitled to an increase to the base amount of \$2,003 per month, based on excess household expenses (there's a formula for that), but it does not exceed the maximum income of \$3,022.50. (Remember, all these numbers are adjusted annually.) Once the MMMNA is determined, you must then subtract the community spouse's income to determine the CSIA (Community Spouse Income Allowance). This is income that can be transferred from the institutionalized spouse to the community spouse, to reach the MMMNA. And once you figure all of these numbers out, if there is a spend-down that incorporates the purchase of a Medicaid-compliant annuity, the community spouse's income will increase, thereby decreasing the CSIA, and increasing the amount that the institutionalized spouse will pay for care. Whew...that's a mouthful.

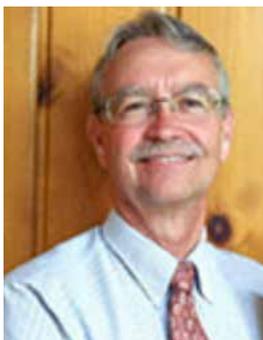
Again, the point is to become familiar with the OARs so that you know how income and resources are treated by the rules that govern Medicaid eligibility. When all else fails, find a mentor that you can take out for coffee to help you figure out the rule interactions that come into play when assisting your clients. ■

# How to file a petition for guardianship or conservatorship

By Kristen Chambers, Attorney at Law and Michael Schmidt, Attorney at Law



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**B**efore filing a petition for a guardianship or conservatorship, you must determine whether sufficient facts can be alleged to make out a prima facie case—that the respondent is, by clear and convincing evidence, incapacitated (to warrant a guardianship) or financially incapable (to warrant a conservatorship), as those terms are defined in ORS § 125.005(5) and (3), respectively.

The law imposes a presumption of sanity and competency that must be overcome to prove incapacity. *Van v. Van*, 14 Or. App. 575, 580, 513 P.2d 1205, 1208 (1973) (finding that a chronic alcoholic is not “per se incompetent,” and reasoning that “each case must be individually evaluated to determine the . . . victim’s abilities”). Furthermore, a finding of incapacity requires establishing that the impaired mental functioning is the reason for the respondent’s lack of self-care. *Schaefer v. Schaefer*, 183 Or. App. 513, 517, 52 P.3d 1125, 1128 (2002) (finding that respondent was not proven incapacitated even though the evidence showed her information-processing skills were mildly impaired and that she had made decisions that appeared to threaten her health). For further guidance on assessing capacity, see Charles P. Sabatino, “Representing a Client with Diminished Capacity: How Do You Know It And What Do You Do About It?,” 16 *J Am. Acad. Matrimonial Law* 481 (2000), available at <http://www.aaml.org/sites/default/files/representing%20a%20client%20with-article.pdf> and Sam Friedenberg, Julie C. Nimnicht, & Tim McNeil, *Working with Clients with Varying Levels of Capacity*, Oregon Elder Law Barbooks § 2.2 (2017), available at <https://www.osbar.org/legalpubs>.

In addition to determining whether the respondent has sufficient incapacity to merit pursuing a guardianship or conservatorship, you also must gather the factual information that is required for the petition under ORS § 125.055, including who will serve as the guardian or conservator. Often the proposed fiduciary is a family member or friend, but professional fiduciaries also fill this role. See ORS § 125.205 for fiduciary qualifications. The state and Multnomah County also have public guardians. A public guardian or conservator may only be

appointed if the fiduciary has petitioned for or consented to the appointment. ORS § 125.687.

When your investigation is complete and you have a fiduciary lined up, you are ready to draft the petition. The petition must specifically state in the caption and the body that the petitioner seeks appointment of a guardian or conservator (or other specific fiduciary). ORS § 125.055(1). Multnomah County also requires the caption to specify that the petition is for guardianship of an adult, whether it is for a temporary or indefinite time (or both), and whether a conservatorship is also being requested. SLR 9.075. In addition, the petition must allege the following “to the extent the petitioner is able to acquire the information with reasonable effort”:

1. The respondent, the petitioner, the nominated fiduciary, their contact information, and their relationships to each other as detailed in ORS § 125.055(2)(a)-(c)
2. A statement about the nominated fiduciary’s criminal, bankruptcy, and professional license history as detailed in ORS § 125.055(2)(d)
3. If the fiduciary is a professional, additional information as specified in ORS § 125.240
4. The name and address of any previously appointed fiduciaries, trustees, health-care representatives, or attorneys-in-fact for the benefit of the respondent. ORS § 125.055(2)(e)
5. The names and addresses of the respondent’s healthcare and welfare providers. ORS § 125.055(2)(f)
6. A statement of whether the nominated fiduciary intends to place the respondent in a residential facility. ORS § 125.055(2)(h)
7. A general description of the respondent’s estate, and sources and amount of income. ORS § 125.055(2)(i)
8. A statement of whether the nominated fiduciary is a public or private agency or organization (or an employee of one

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## How to file petition

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***In some jurisdictions all non-professional fiduciaries are required to successfully complete an education class for non-professional fiduciaries.***

***The timing of the class in relation to appointment as a fiduciary varies, so be sure to check with your Circuit Court for specific requirements.***

- of these) that provides services to the respondent. ORS § 125.055(2)(j)
9. Additional specific information depending on the type of fiduciary sought:
    - a. For a guardianship, the petition must include:
      - i. The factual information that supports the request for the appointment of a guardian, ORS § 125.055(2)(g), specifically that:
        1. The respondent is a minor in need of a guardian or “incapacitated” as defined in ORS § 125.005(5). ORS § 125.305(1)(a);
        2. The appointment of a guardian is necessary to provide continued care and supervision of the respondent. ORS § 125.305(1)(b); and
        3. The nominated guardian is both qualified and suitable, and willing to serve. ORS § 125.305(1)(c);
      - ii. The names and addresses of all persons who have information that would support a finding that the respondent is incapacitated. ORS § 125.055(2)(g);
      - iii. A statement regarding the nominated guardian’s exercise of control over the estate of the respondent as detailed in ORS § 125.055(3)(a); and
      - iv. In cases where the respondent is an adult (or older than 16 and the petitioner is likely to seek appointment of a guardian for when the respondent becomes an adult), a statement that a “visitor,” as defined in ORS §§ 125.005(11) and 125.150, must be appointed. ORS § 125.055(3)(b);
    - b. For a conservatorship, the petition must include:
      - i. The factual information that supports the request for the appointment of a conservator, ORS § 125.055(2)(g), specifically that:
        1. The respondent is a minor or is “financially incapable” as defined in ORS § 125.005(3). ORS § 125.400; and

2. The respondent has money or property that requires management or protection. ORS § 125.400;
- ii. The names and addresses of all persons who have information that would support a finding that the respondent is “financially incapable.” ORS § 125.055(2)(g); and
- iii. The petitioner’s estimate of the value of respondent’s estate. ORS § 125.055(4).

Once the petition is complete, you must file an original and duplicate copy with the probate court in the county where the respondent resides or is present. ORS §§ 125.055(1), 125.015(1) & 125.020 (with e-filing the requirement for filing a duplicate copy of the petition appears to be moot). You also need to determine the proper procedure for the appointment and payment of the court visitor in the court where the case will be filed. For example, in Multnomah County, SLR 9.075 requires you to make a deposit for the visitor’s investigation fee when you file the petition and the court will order the appointment of a visitor.

The nominated guardian or conservator is subject to court jurisdiction by the signing and filing of the petition, so if the nominated fiduciary is not the petitioner, the nominee must sign and file an acceptance of the appointment by which the nominee both agrees to serve and to be subject to court jurisdiction. See ORS § 125.215(1) and (3). After the petition has been filed and you have your case number, proceed with service of notice as required by ORS § 125.060 (who to serve), ORS § 125.065 (how to serve) and ORS § 125.070 (what to serve).

Finally, you get to sit back and relax for up to fifteen days until you see whether objections have been filed pursuant to ORS § 125.080. ■

# Enhancing self-determination in less-restrictive alternatives to guardianship

By Jan E. Friedman, Disability Rights Oregon Attorney, and Stephen Peters, Disability Rights Oregon Rights Advocate



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Stephen Peters is a Rights Advocate at Disability Rights Oregon who works closely with respondents and protected persons with guardianship issues. He graduated from Lewis & Clark Law School in 2016.

An Oregon adult guardianship can be a huge encroachment on a protected person's individual liberties. Guardianships often take away individuals' rights to decide the location of their home, the nature of their healthcare, the option of whether to work, the use of finances, and the ability to make decisions in many other arenas.<sup>2</sup> Moreover, unless a judge rules otherwise, guardianships last for the protected person's lifetime.

Any method employed to support an individual should be the least restrictive and allow maximum self-determination. The following sections discuss the importance of enhancing self-determination for protected persons who are under guardianships, and the importance of considering all relevant less-restrictive alternatives prior to imposition of a guardianship.

## Maximum self-determination for protected persons in existing guardianships

Because Oregon law delineates stringent guidelines for determining the scope of a guardianship, limited guardianships are often the most appropriate option. A guardian may be appointed only "as is necessary to promote and protect the well-being of the protected person ... [and] may be ordered *only to the extent necessitated by the person's actual mental and physical limitations* [emphasis added]."<sup>3</sup> Limited guardianships should be tailored to the circumstances—e.g., a respondent may need decision-making assistance with health care only, and the guardian's authority can be restricted accordingly. Despite this, in the experience of Disability Rights Oregon (DRO)<sup>4</sup>—the protection and advocacy law agency for people with disabilities—a broad-scoped guardianship (called "full" or "plenary") is generally used regardless of whether the protected person actually meets the definition of "incapacitated"<sup>5</sup> in each of the decision-making areas taken away.

Whatever the scope of the guardianship, guardians should assist the protected person in a manner that maximizes independence and self-reliance,<sup>6</sup> and honors the concept that the protected person retains all civil rights (aside from those specifically given to the guardian by the court).<sup>7</sup> Certainly, protected persons should be given the opportunity to voice their expressed desires and wishes prior to any decisions that affect their lives. The National Guardianship Association (NGA) endorses "substituted decision making"—i.e., substituting the decision the protected person would have made when the person had capacity if they no longer

have capacity.<sup>8</sup> At DRO we hear from many protected persons who feel that they essentially do not exist—they have been fully removed from any decision-making regarding their own lives.<sup>9</sup> This causes a feeling of loss of control, loss of individuality, loss of dignity.

Then there are protected persons who are no longer incapacitated and/or it is in the protected persons' best interests to terminate the guardianship.<sup>10</sup> For example, DRO reviewed an annual guardianship report that gave no answer as to why the guardianship should continue. Upon follow-up, both the guardian and protected person agreed that the guardianship was no longer necessary because it was put in place when the protected person was clinically depressed and thereby incapacitated. By the time of this report many years later, she no longer had this mental health concern.

## Alternatives to guardianship

Below are some examples from DRO's experience working with respondents and protected persons that illustrate instances where a less-restrictive alternative to guardianship was optimal. This list is, of course, is non-exhaustive and we recognize that you may be using alternatives that are not addressed. Because guardianship is extremely intrusive, all possible less-restrictive alternatives, from the many options, should be ruled out before a guardianship is pursued and authorized. These alternatives provide greater opportunity for an individual to exercise his or her basic right to make choices. Many studies support the idea that people with disabilities who have greater self-determination are more likely to be employed, independent, healthier, and safer.<sup>11</sup>

## Supported decision making

Supported decision making (SDM) is an increasingly popular alternative to guardianship. Today, SDM is not specifically set forth as an option in Oregon guardianship law.<sup>12</sup> However, Oregon has been using SDM for many years in provision of services to individuals with developmental disabilities. Often, a person in developmental disabilities services has at least one team that comes together for the individual's individual support plan (ISP). This team is selected by the individual, and is tasked with helping him or her with making informed life decisions.

Unlike guardianship, SDM allows individuals with a disability to have the final say in their major life decisions. Supporters are

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## Alternatives *Continued from page 6*

responsible for gathering information, communicating with others on the individual's behalf, and consulting with the individual about major decisions. Importantly, supporters do not gain any special authority under SDM. If a supporter wishes to have access to medical records, for instance, the supported individual would be responsible for providing the supporter access. SDM allows persons with disabilities self-determination, which can empower them towards greater independence, health, and better defenses against abuse.<sup>13</sup> Notably, there are many individuals in Oregon who do not have guardians because their ISP team is functioning as an alternative, essentially as SDM.

SDM as an alternative to guardianship may apply to individuals with any disability or at any age. For example, SDM is a common method for parents to continue to support their children once they reach majority. DRO has had protected persons as clients who express their dismay with restrictions imposed by their parent guardians. In many cases, these individuals live independently and maintain steady employment, but need assistance with more complex life decisions. Tensions may arise when the guardian attempts to exert authority over minor and personal aspects of the protected person's life, such as friends, relationships, or choice of clothing. Consequently, protected persons may become frustrated with their lack of autonomy, and the relationship with their guardians can sour. SDM can be a very non-coercive method of providing support that, for many individuals, affords dignity. More information on SDM can be found at [www.supporteddecisionmaking.org](http://www.supporteddecisionmaking.org).<sup>14</sup>

### **Representative payees and VA fiduciaries**

When an individual has difficulty managing public benefits, a third party can be appointed to provide assistance. A representative payee is typically an agent appointed by the Social Security Administration (SSA) to receive and manage a person with a disability's Supplemental Security Income (SSI). SSI benefit recipients are generally presumed to be competent to manage their income. However, an individual or organization that believes an SSI beneficiary cannot effectively manage his or her benefits can apply to become that individual's representative payee. The SSA will consider evidence to determine whether or not a representative payee is necessary to effectively manage an individual's SSI benefits. Similarly, VA fiduciaries can be appointed to manage an individual's veteran benefits. As with people receiving SSI benefits, recipients of veteran benefits are presumed competent, but a third party can apply with the field examiners of the Veteran Affairs Fiduciary Unit to receive and manage a finan-

cially incapable individual's benefits. Both programs provide beneficiaries the opportunity to contest the decision to appoint a representative payee or fiduciary, or to have someone other than the applicant appointed.

DRO has worked with a number of individuals who use either system as an alternative to guardianship. In one instance, DRO advocated for a respondent to a plenary guardianship petition that heavily relied on allegations that the respondent was financially incapable and vulnerable to being financially victimized by strangers. Upon further communication with the respondent, DRO learned that she operated a small home business for extra income, while her representative payee covered the bulk of her expenses with her SSI benefits. She explained that because her bills and groceries were covered by SSI, she chose to be generous with the small amount of money she made from her business. Fortunately, the petitioner in this case withdrew her petition once the respondent objected. Nonetheless, this illustrates how a representative payee can be effective in lieu of guardianship. Because her representative payee covered the respondent's major expenses, she was not at risk for mismanagement of her finances. She was additionally able to enjoy a small degree of financial autonomy without placing herself at risk financially. This autonomy allowed her the freedom to engage with her community in a way that felt meaningful.

### **Special needs trusts**

A special needs trust (SNT) is a tool that allows disabled individuals to receive financial assistance without affecting their eligibility for public assistance. Most public assistance programs have specific limits on income and assets, and individuals that exceed these limits are ineligible for assistance. Much like a representative payee or VA fiduciary, a SNT trustee can ensure many of an individual's financial needs are met, while allowing him or her a degree of financial autonomy. In one case, DRO intervened on behalf of a respondent to a conservatorship petition filed in response to the respondent's unexpected large inheritance. While the respondent had a severe and persistent mental illness, she was functioning well due to her engagement in on-going treatment. In response to the respondent's objection, the petitioner withdrew the petition and the respondent established a SNT. This allowed this individual to continue living autonomously.

### **Declaration for mental health treatment**

A declaration for mental health treatment (DMHT) allows Oregonians to establish a type of advance directive for mental health treatment.<sup>15</sup> A DMHT is a legal document that allows individuals to indicate their consent to specific sorts of treatment and their lack of consent to other treatments; and to communicate additional information about their mental health needs should they become mentally incapacitated.<sup>16</sup> DMHTs also allow individuals to appoint a health care representative (HCR) to make medical decisions on their behalf should they become incapacitated. DMHTs go into effect only when an individual is incapable of making informed choices about his or her treatment.<sup>17</sup> Individuals with DMHTs should always keep a copy on their person, and provide copies to their named HCR and treatment providers. Individuals in state mental health services are required to be offered a DMHT to complete if the individual so chooses,<sup>18</sup> and treatment providers and HCRs are obligated to follow its terms to the extent it is reasonable to do so.<sup>19</sup> DMHTs allow individuals with a mental illness the freedom to make decisions about their health care while they have capacity, and allow third parties engaged with the individual to advocate for their preferred treatment during a mental health crisis.

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## Alternatives *Continued from page 7*

DRO recently worked with a protected person subject to a limited guardianship that authorized the guardian to make healthcare decisions on the protected person's behalf. The protected person generally maintained the capacity to make informed decisions in all aspects of her life, but had a history of occasional but serious mental health emergencies that required hospitalization. The protected person stated that she was misdiagnosed for years, and had only recently found treatment that was effective. She was consequently concerned that her treatment might be mishandled with a guardian making health care decisions. Further, she was concerned about the scope of the guardian's decision-making authority, and was uncomfortable with her inability to make routine healthcare decisions while she maintained capacity. Here, a DMHT would allow this individual to ensure her treatment preferences are followed, and ensure that a HCR could only intervene if and when she was incapable. During the majority of the time she maintained capacity, a DMHT would allow her maximum personal freedom.

### Assistive technology

There are many forms of assistive technology (AT) that allow people with disabilities to be more integrated in their community. For example, speech-generating devices can afford nonverbal individuals the ability to communicate. It is always worth considering whether there is some form of AT that will allow the individual to communicate and process his or her decisions. DRO has had contact with clients who are trying to access assistive technology that will allow communication, such as the EyeGaze. This device has the potential to move the client from essentially nonverbal to having communicative abilities. If an individual can have access to the decision-making process through assistive technology, this should be explored as an alternative to guardianship and a self-empowerment tool.

### Other means

The above list of less restrictive alternatives to guardianship is only a beginning. Options such as power of attorney, advanced directives for health care, a developmental disability service health care representative,<sup>20</sup> daily money management, and support from an individual's family, friends, or caregivers can replace guardianship. Ensuring individuals with disabilities have maximum self-determination requires creativity, but can ensure increased happiness, productivity, and sense of dignity.

### Conclusion

There are many ongoing efforts to improve Oregon guardianship law. DRO has proposed legislation during the current legislative

session that would require guardianship petitions to detail which less restrictive alternatives have been considered and why they were ruled out. This is good practice whether or not the legislation passes. While guardianships are undoubtedly necessary for certain individuals, many individuals could be supported with less restrictive alternatives. In all cases, support should ensure that individuals retain the maximum amount of control regarding decisions. This positively affects an individual's sense of dignity and well-being. Given guardianship's effect on an individual's civil liberties, almost any alternative will be less restrictive.

Finally, while this article primarily focuses on the more negative aspects of guardianship, we recognize that there are instances where it is the appropriate option, and that many guardians are doing extraordinary work. DRO does not field many phone calls from protected persons who want to commend their guardian—although we recognize that some protected people are very grateful. Instead, we primarily hear from protected people who feel that their civil rights and ability to function as adults have been wrongfully taken away. Given that benefitting protected people is at the heart of guardianship proceedings, the maximum degree of self-determination and dignity should always be promoted. ■

### Footnotes

1. Or. Rev. Stat. Ann. § 125.005 (7) (2015) states: "Protected person" means a person for whom a protective order has been entered.
2. Or. Rev. Stat. Ann. § 125.315 (1) (2015)
3. Or. Rev. Stat. Ann. § 125.300 (1) (2015)
4. DRO reviews over 100 guardianship pleadings per month pursuant to ORS 125.060(7) and represents many additional respondents/protected persons in legal rights violation concerns under guardianship.
5. "Incapacitated: a condition in which a person is impaired to the extent of being unable to meet the essential requirements for the person's physical health or safety." These "essential requirements" include providing health care, food, shelter, clothing, personal hygiene, and other care without which serious physical injury or illness is likely to occur. Or. Rev. Stat. Ann. § 125.005(5) (2015).
6. Or. Rev. Stat. Ann. § 125.300 (1) (2015)
7. Or. Rev. Stat. Ann. § 125.300 (1) (2015)
8. NGA, Standards of Practice (Adopted 2000, Fourth Ed. 2013), Section 7: Standards of Decision-making
9. At DRO, we acknowledge that there are protected persons who are very grateful to be working with their guardians as well as guardians who function in a manner that allows the protected persons the greatest self-determination. Given that we address legal concerns with right violations under guardianship, we do not often hear these positive stories.
10. Or. Rev. Stat. Ann. §125.005(5) (2015); Or. Rev. Stat. Ann. § 125.090(1), (2)(b) (2015)
11. Francisco and Martinis, "Supported Decision-Making Teams: Setting the Wheels in Motion" (February 2017) citing Wehmeyer & Schwartz, 1997.
12. Texas has incorporated SDM in its guardianship statute as an alternative to guardianship.
13. Khemka, Hickson, & Reynolds, 2005; O'Connor & Vallerand, 1994; Wehmeyer & Schwartz, 1998
14. The article "Supported Decision-Making Teams: Setting the Wheels in Motion" by Francisco and Martinis has nuts-and-bolts worksheets for using SDM.
15. Or. Rev. Stat. Ann. § 127.736 (2015)
16. *Id.*
17. The DMHT makes it clear that only a court or two physicians determine that the individual is incapable of making informed choices about his or her treatment. *Id.*
18. Or. Rev. Stat. Ann. § 127.703 (1) (2015)
19. Or. Rev. Stat. Ann. § 127.736 (2015)
20. Or. Admin. R. 411-365-0100

# Representing the respondent: the basics of defending against a guardianship

By Christopher Hamilton, Attorney at Law



*Christopher Hamilton graduated from Willamette University College of Law and now practices elder law as a member of Hanson & Walgenkim, LLC in Salem. Christopher is involved with many Salem organizations that serve elders and people with Alzheimer's Disease and also enjoys working on the legislation committee of the Elder Law Section.*

Defending against a guardianship as the attorney for a respondent is a particularly tricky endeavor. There are a number of issues to be wary of in providing the best client advocacy.

## **Appointed or retained?**

One of the initial issues to address in defending against a guardianship is how the attorney represents the respondent. The respondent has the right to be represented by an attorney, granting the court the authority to appoint an attorney for the respondent. See ORS 125.070(2)(e)(A). When a court makes the first contact with the attorney, the court generally appoints the attorney as counsel for the respondent. However, when it is the respondent who makes first contact with the attorney, the attorney must decide whether to take the case like any other or to request the court appoint the attorney as counsel for the respondent. Generally, it is safer to request an appointment, because it prevents any later challenges to a fee agreement based on capacity and typically predisposes the court more favorably to an eventual fee petition.

## **Make a timely objection**

Once the attorney knows how he or she is representing the individual, the critical first step in any defense against a guardianship is ensuring a timely objection is filed with the court. Who may make an objection and how and when objections must be made is set forth in ORS 125.075. Generally, anyone who is interested in the affairs or welfare of the respondent may object. ORS 125.075(1). Objections to a petition to appoint a guardian can be made orally in a designated place or in writing, provided the appropriate filing fee (currently \$111 for guardianships) is paid or waived. ORS 125.075(2), ORS 21.175. An objection to a non-temporary proceeding must be made within fifteen days of the mailing or service of the notice. ORS 125.075(2). A respondent is not required to pay the filing fees and can present an oral or written objection to the court visitor in addition to the standard oral or written objections.

The objection is what triggers a hearing, which gives the respondent a position to

negotiate and ensures judicial scrutiny of the matter. In cases where the court has contacted an attorney to serve as appointed counsel, the respondent has generally already objected. If the attorney is contacted directly by the respondent, it is important to check OEI to determine whether an objection has been filed and download all of the documents currently filed. If no objection has been filed, the attorney needs to be sure to file an objection within the notice period. Without an appropriately filed objection, the court will typically sign a judgment appointing a guardian without a hearing once the court visitor's report is filed and the notice period has elapsed.

A high-quality objection will address which specific allegations in the petition the respondent disagrees with and to which proposed actions the respondent objects. The attorney should also work with the respondent to determine alternatives to the proposed guardianship that the respondent would prefer or be willing to accept. Once the attorney knows the respondent's preferences, he or she can begin negotiating with the petitioner and, if appropriate, file a cross-petition for a protective order the respondent would prefer. All of the issues presented below can be included in an objection and/or cross-petition, but if there is insufficient time left in the notice period to explore those issues, a blanket objection can be filed. The form of objection provided in ORS 125.070(4) can serve as a model for such an objection.

## **Negotiate and settle on a solution**

Typically, even guardianship cases where an objection is filed do not see the inside of a courtroom. If the respondent and the petitioner can agree on some middle ground that takes care of the petitioner's concerns without subjecting the respondent to the more objectionable parts of the petition, both parties can win. This is frequently accomplished by using professional fiduciaries or limiting the guardian's powers to minimize the imposition on the respondent.

*Continued on page 10*

## Representing the respondent *Continued from page 9*

### Preparing for hearing

Once an objection is filed and a hearing set, the attorney needs to begin preparing for the hearing. It is the petitioner's responsibility to notify the protected person, certain state agencies, and all other parties described in ORS 125.060(3) of the hearing at least 15 days before the hearing by mail or by publication if the identity or address of a party entitled to notice cannot be reasonably ascertained. ORS 125.075, ORS 125.065. The petitioner, court visitor, and respondent must be at any hearing on a petition for appointment of a guardian, but the respondent can appear by counsel rather than personally if necessary. ORS 125.080(3), ORS 125.155(5).

At the hearing, the respondent has the right to present evidence and cross-examine witnesses. See ORS 125.070(2)(e)(D). Thus, as in any other hearing, the attorney should provide the judge with a brief trial memorandum before the hearing that outlines the factual and legal basis for the objection and why the petition should not be granted. Also, the attorney should also prepare opening and closing statements to summarize the evidence to be presented and the reasons the petition should not be granted. Additionally, the attorney needs to gather, duplicate, and appropriately mark whatever documentary, photographic, or other evidence supports the respondent's objection and be prepared to get it admitted in court. Further, the attorney needs to develop direct examination questions for friendly witnesses and cross-examination questions for opposing witnesses. All of this should be organized into a trial binder or other organizational system and copies of the evidence and trial memorandum need to be provided for the judge, the petitioner, any other parties, and the witnesses.

Throughout the guardianship proceeding, the Oregon Rules of Civil Procedure and Oregon Evidence Code apply. ORS 125.050. This grants the attorney access to discovery provisions, if necessary, to gather the information required to present the respondent's case and allows for use of an ORCP 36C protective order to limit disclosure of information. This also requires the attorney to provide proper foundation and authentication for all evidence and testimony to be presented. One way to minimize the burden of these requirements is to confer with the petitioner and stipulate to as

many facts and to the admission of as much evidence and testimony as possible.

### Procedural defenses

The first line of defense against a guardianship is the procedural requirements. ORS 125.050 through 125.098 lay out the very exacting procedural requirements for the entire guardianship process. To determine what procedural defenses are available in the initial stages, the attorney needs to review the petition and the notices against the requirements of ORS 125.055 through ORS 125.070, to make sure all of the required elements are present, the proper people have been served, the proper service methods have been used, and the proper waiting period has been observed. If the petition or notices are in any way deficient, that can serve as grounds for the court to reject the petition or to require the petitioner to redo the petition and/or notices to remedy the deficiency.

### Substantive defenses

Procedural defenses are essential to ensure the respondent's rights are respected, but all the procedural defenses in the world will only buy the attorney more time while the petitioner correct the error. The meat of defending against a guardianship is in the substantive defenses. Here, the attorney is looking to prove that one or more of the requirements for appointment of a guardian have not been met. The requirements for appointing a guardian are laid out in ORS 125.305(1): the respondent is incapacitated or a minor; the appointment is necessary to provide continuing care and supervision for the respondent; and the nominated person is qualified and willing to serve. To win a guardianship petition, the petitioner must prove each of these elements by clear and convincing evidence. *Id.*

Most guardianship contests where a guardian is not appointed depend on a finding that the petitioner had not proven the respondent is incapacitated by clear and convincing evidence. Incapacitated is defined in ORS 125.005(5) as "a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to . . . [take] those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur." In Oregon, everyone is presumed to be competent (i.e., not incapacitated). *First Christian Church v. McReynolds*, 194 OR 68, 74, 241 P2d 135 (1952). To defeat the argument that the respondent is incapacitated, the attorney should speak with the respondent's doctors, family, neighbors, and anyone else that interacts with the respondent on a regular basis. The key is to establish how the respondent is able to provide for sufficient health care, food, shelter, clothing, and personal hygiene to prevent serious physical injury or illness.

Even if the respondent is incapacitated, it is still possible to defend against a guardianship by showing that the appointment is not necessary because less restrictive alternative measures will meet the respondent's needs. In-home care services, community supports, government programs, and agreeable community placements should all be considered as less restrictive alternatives to guardianship. The greatest tools in this argument are a properly drafted power of attorney and advance

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## Representing the respondent *Continued from page 10*

directive that were executed before the respondent became incapacitated. If the respondent executed either or both of these documents, it is critical to review them and determine the extent of the authority granted. A power of attorney can provide an agent all of the powers necessary to provide financially for the respondent's care. Likewise, an advance directive can give a healthcare representative the authority to make all placement and other decisions necessary to meet the respondent's needs. If the respondent has both documents and the documents provide the necessary powers to meet the respondent's needs, then a guardianship is not necessary. Unfortunately, this argument breaks down if the respondent is in disagreement with the agent or healthcare representative over what the respondent needs.

Even if a guardianship is appropriate, the respondent can still object to the suitability of the proposed guardian. This happens often in families with contentious intra-family relationships when a relative the respondent does not like petitions to be appointed as guardian. It is important to look at the proposed guardian's financial, criminal, and professional background to check for red flags that suggest the person is likely to take advantage of the respondent or be unable to fulfill the duties of a guardian effectively. In this circumstance, the attorney should work with the respondent to determine if there is any family member or friend who would be more acceptable, or to find a professional fiduciary the respondent likes. In these cases, a cross-petition to appoint the preferred fiduciary should be filed as quickly as is reasonable.

### Limitations on the guardian's powers

In addition to the substantive and procedural defenses outlined above, one of the most underused tools available to the attorney is requesting limitations on the guardianship. ORS 125.305(2) requires the court make the guardianship no more restrictive than is reasonably necessary. Thus, an important argument to make in the alternative to any of the arguments above is that the guardian should only be allowed to make decisions related to the specific unmet needs of the respondent or should be restricted from making decisions related to an area where alternative supports are sufficient.

### The court visitor

One of the most important parts of any guardianship hearing will be the court visitor's report and testimony. The visitor is an individual appointed by the court to serve as a neutral evaluator and provide recommendations regarding the petition. See ORS 125.150 through ORS 125.170. The court is most likely to sign a judgment that conforms with the visitor's recommendations. If the attorney needs to challenge the visitor's recommendations, it is imperative to determine how the information in the report was gathered, what information was left out of the report, what alternatives visitor evaluated, and why the visitor made those specific recommendations. Any of these can be grounds for challenging the recommendations and convincing the judge to issue a judgment contrary to the recommendations.

### After the hearing

Two major items need attention immediately after a guardianship hearing. First, the attorney needs to address the judgment implementing the judge's decision. This judgment is typically drafted by the petitioner unless the judge denies the petition in its entirety. The party that drafts the judgment is required to provide a copy to the other party and confer to attempt to reach an agreeable form of judgment. UTCR 5.100.

Second, the attorney needs to consider attorney fees. If the petition was denied in its entirety, the attorney can generally get paid by the respondent and there is no additional exposure. However, if any kind of fiduciary is appointed or a protective order is entered, the attorney must seek court approval prior to collecting any attorney fees. The respondent (now a protected person) may also be responsible for the attorney fees incurred by any other party to the proceeding whose actions provided benefit to the protected person. ORS 125.095 through ORS 125.098.

### Temporary guardianships

Finally, there are special requirements and concerns when the petition is for the appointment of a temporary guardian. This process is reserved for emergencies in which there is a serious and immediate danger to the life or health of the respondent and is governed by the additional requirements found in ORS 125.600 through 125.610. Due to the emergency nature of the process, a temporary guardian may be appointed before the respondent even receives notice of the proceeding. ORS 125.605(2). However, the appointment must be for a specific purpose and a specific period of no more than thirty days, unless extended by the court upon a motion for good cause shown. ORS 125.600(3). Further, the court must schedule a hearing much sooner if an objection is filed and the court visitor has less time to complete a report. ORS 125.605(4) and (5). In these cases, the attorney needs to be especially attentive to procedural requirements and consider asking for limitations on the temporary guardian's powers while the matter is being litigated.

These are just the starting points for defending against a guardianship. To learn more, consider review of all of ORS 125 and reach out to a local Elder Law Section member or the discussion list for assistance. ■

# Oregon and Washington differ on protected proceedings

By Laura S. Nelson, Attorney at Law



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I recently moved south of the border. While there is about the same amount of rain, there is way more traffic, and way more tourists. Life south of the Washington border is a lot different from what I expected. Oh, you thought I meant Mexico! No; I am a recent transplant from Clark County, Washington, practicing in estate planning, estate and trust administration, and guardianships and conservatorships. As much as we think of Oregon and Washington as sister states, with similar tastes for mountain hikes, craft beers, and love/hate relationships with brunch lines, there are quite a few differences between practicing in Oregon and Washington, particularly with regard to guardianships and conservatorships.

By way of brief introduction, a guardianship in Washington, or a guardianship and/or conservatorship in Oregon, is a legal proceeding wherein the court appoints one person to act legally on another person's behalf. These legal proceedings can limit or remove a person's constitutional rights, so courts are very guarded in their decisions to reduce a person's rights by appointing a guardian/conservator, and parties may benefit from seeking alternative solutions and arrangements prior to petitioning for guardianship.

This article discusses some of the similarities and differences between Oregon and Washington adult protective proceedings from petition to routine accountings. This is by no means a comprehensive treatise on the topic, but is meant to serve as a guideline to common pitfalls for cross-state practitioners.

## Terminology

Practicing law in another jurisdiction requires some familiarity with the local lingo. The two states use different terminology to describe the parties and concepts in a protective proceeding. The chart on page 14 summarizes these differences.

## Petition

Oregon and Washington have similar requirements for their petitions' contents. ORS 125.055 and RCW 11.88.030. Both must specify facts sufficient to give the court jurisdiction over the respondent or alleged incapacitated person, briefly describe the factual situation

giving rise to the petition, and the scope of the guardianship and/or conservatorship sought. Washington petitions will request the appointment of a guardian ad litem (discussed below) and Oregon conservatorship petitions will request the appointment of a court visitor (discussed below).

## Notice

Both states require that extensive notice be given to the respondent or alleged incapacitated person, the spouse, family, friends, and some service providers. ORS 125.070 and RCW 11.88.080. Oregon requires personal service on the respondent, which includes a blue objection form and information regarding attorney assistance. The specific requirements of the objection form are found in ORS 125.070(3). Washington requires that a statutory notice be personally served on the alleged incapacitated person along with the guardianship petition. The notice form is outlined in RCW 11.88.030.

## Court visitor/Guardian ad litem

Oregon requires only that a court visitor be appointed by the court on the petition for guardianship, not conservatorship, unless otherwise ordered by the court. ORS 125.150. Court visitor requirements are outlined in ORS 125.150(2).

Washington requires that a guardian ad litem be appointed in every guardianship matter, except in unusual cases. RCW 11.88.090.

Court visitors have fifteen days from the date of their appointment to file their report with the court. ORS 125.155. Their reports should address the abilities and vulnerabilities of the respondent. *Id.* The court visitor also must inform the court the respondent's preference for counsel and attending the hearing. *Id.*

Guardians ad litem are appointed by the court from a county-maintained list of trained guardians ad litem. RCW 11.88.090. Each county maintains its list differently, so it's important to check with the court or local counsel when seeking the appointment of a guardian ad litem. A guardian ad litem must file a statement of qualifications with the court, and has forty-five days from the date of appointment to file his or her report with the court. RCW 11.88.090(5)(f)(ix).

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## Oregon and Washington

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The guardian ad litem does lengthy and in-depth investigations and reviews medical and personal history and financial information. Guardian ad litem duties are outlined in RCW 11.88.090(5). The guardian ad litem has a strict duty to inform the court if the alleged incapacitated person needs counsel.

### Resolution

Upon the receipt and resolution of objections, or if no objections are given, the courts will hold a hearing and appoint a guardian and/or conservator for the respondent and a guardian for the alleged incapacitated person. Oregon does not afford the respondent a right to a jury trial on the issue of capacity, where Washington does. RCW 11.88.045(3). Both Oregon and Washington courts may require bonding and nonprofessional guardian training prior to the issuance of letters of guardianship, or letters of conservatorship, as the case may be.

### Nonprofessional guardian training

Generally, professional guardians do not have to complete guardian training prior to appointment in either Oregon or Washington.

Oregon Supplementary Local Rules will dictate whether a nonprofessional fiduciary is required to take a training class prior to appointment as guardian or conservator.

See, e.g.:

- <http://www.courts.oregon.gov/Multnomah/docs/CourtRules/2016SLREffectiveFebruary12016.pdf>
- [https://web.courts.oregon.gov/Web/ojdpublications.nsf/Files/Clackamas\\_SLR\\_2017.pdf/\\$File/Clackamas\\_SLR\\_2017.pdf](https://web.courts.oregon.gov/Web/ojdpublications.nsf/Files/Clackamas_SLR_2017.pdf/$File/Clackamas_SLR_2017.pdf)

Washington lay guardians are required to take a class prior to appointment. RCW 11.88.020(3); [https://www.courts.wa.gov/programs\\_orgs/guardian/?fa=guardian.layGuardianship&type=training](https://www.courts.wa.gov/programs_orgs/guardian/?fa=guardian.layGuardianship&type=training).

### Initial reports

Within ninety days of appointment, the conservator must file an inventory as described by ORS 125.470. Within three months of appointment, the guardian of the estate must file an inventory as described by RCW 11.92.040. In addition, a Washington guardian of the person must file an initial personal care plan within three months of appointment that describes the incapacitated person's needs and limitations, and the guardian's plan for the incapacitated person's care. RCW 11.92.043.

### Annual accounting

Oregon requires that an accounting be filed for a conservatorship within sixty days of the anniversary of appointment of conservator. ORS 125.475. Accountings must substantially comply with the requirements of Uniform Trial Court Rule 9.160. See [http://www.courts.oregon.gov/OJD/docs/programs/utcr/2016\\_UTCR\\_ch9.pdf](http://www.courts.oregon.gov/OJD/docs/programs/utcr/2016_UTCR_ch9.pdf). If an accounting is delinquent, the court has the discretion to set a show cause hearing why the fiduciary should not be removed or found in contempt of court. See, e.g., Multnomah Supplementary Local Rule 9.035, [https://web.courts.oregon.gov/Web/ojdpublications.nsf/Files/Multnomah\\_SLR\\_2017.pdf/\\$File/Multnomah\\_SLR\\_2017.pdf](https://web.courts.oregon.gov/Web/ojdpublications.nsf/Files/Multnomah_SLR_2017.pdf/$File/Multnomah_SLR_2017.pdf).

Washington requires that a guardianship estate accounting be filed annually within ninety days of the anniversary of appointment of a guardian of the estate. If the guardianship estate is less than \$3,000, or not more than twice the homestead exemption, the guardian may seek permission to report triennially. RCW 11.92.040(3). Although the court does not require a specific form of accounting, the requirements for the contents of the accounting are laid out by statute. The state, and some counties provide forms of accountings for pro se litigants. See, e.g., Washington State court Forms: Title 11 RCW Guardianship Forms: <https://www.courts.wa.gov/forms/>; Spokane County Guardianship and Trust Form: <https://www.spokanecounty.org/1167/Guardianship-Trust-Forms>; and Clark County Guardianship Forms: <https://www.clark.wa.gov/clerk/forms>. Local practice dictates how you receive approval for the accounting from the court. Consult with local counsel and the county to determine your best practice.

### Annual report

A guardian must report to the court annually within thirty days of the anniversary of the guardian's appointment on the status and well-being of the protected person. ORS 125.325. The specific requirements for the guardian's report are outlined in ORS 125.325.

A guardian of the person must report to the court annually within ninety days of the anniversary of the guardian's appointment on the status and well-being of the incapacitated person. The report requirements are outlined by RCW 11.92.043(2), and can be extended to a triennial reporting period under RCW 11.92.040(3). Local practice dictates how you receive approval for the report from the court. Consult with local counsel and the county to determine your best practice. ■

**See page 14 for a summary of differences in terms used in Oregon and Washington.**

## Oregon and Washington terminology differences

Term	What it Means in Oregon	What it Means in Washington
Guardian	Fiduciary who has been appointed to manage the personal affairs of a protected person.	Washington breaks the guardianship into two separate entities: guardianship of the person and guardianship of the estate. Note: in Oregon, the guardian of the person is known as simply the guardian and the guardian of the estate is the conservator.
Conservator	Fiduciary who has been court-appointed to manage the financial affairs of a protected person.	Term does not apply in Washington
Petitioner	Person who brings the guardianship and/or conservatorship petition.	Person who bring the guardianship petition
Respondent	Person for whom the guardianship and/or conservatorship is sought, who has not been adjudicated incapacitated yet.	Opposing party in a civil action
Alleged Incapacitated Person "AIP"	Term does not apply in Oregon	Person for whom the guardianship is sought, who has not been adjudicated incapacitated yet
Protected Person	Person subject to a protective proceeding; the court has appointed a guardian and/or conservator	Term does not apply in Washington
Incapacitated Person "IP"	Term does not apply in Oregon	Person subject to a guardianship; the court has appointed a guardian of the person and/or estate
Court Visitor	Neutral third party court-appointed to investigate the respondent's personal affairs; is required to report to the court 15 days after appointment in a guardianship matter	Term does not apply in Washington
Guardian ad litem	Guardians ad litem are appointed in civil litigation contexts to represent an incapacitated person; they are not generally appointed in the guardianship/conservatorship context. ORCP 27b. (ORS 419B applies only to parental termination proceedings.)	Neutral third party who is court-appointed to investigate the alleged incapacitated person's personal and financial affairs; is required report to the court 45 days after appointment in a guardianship matter
Lay Guardian	Term does not apply in Oregon	Nonprofessional guardian of the person or the estate for an incapacitated person.\
Nonprofessional fiduciary	Nonprofessional guardian or conservator for a protected person	Term does not apply in Washington
Professional fiduciary	Person who is defined by ORS 125.240 and is certified by the Center for Guardianship Certification or its successor organization as a National Certified Guardian or a National Master Guardian	"Guardian appointed under this chapter who is not a member of the incapacitated person's family and who charges fees for carrying out the duties of court-appointed guardian of three or more incapacitated persons" RCW 11.88.008



**Oregon and Washington use different terminology to describe the parties and concepts in protective proceedings.**

## What can we do to protect elders from online romance scams?

By Andrea Ogston, Attorney at Law



*Andrea Ogston is an attorney at Legal Aid Services of Oregon where she practices elder law. Her position is funded in part by the Older American Act, which prioritizes autonomy and freedom from exploitation for individuals over the age of 60.*

Elders increasingly use social media, dating websites, and chat rooms in search of a romantic connection. As a signal of the trend, AARP launched its own online dating partnership in 2012. With the increased popularity of online dating has come a shadow industry of fraud and exploitation known as “sweetheart scams” or “romance scams.” The Federal Trade Commission estimates that in the last six months of 2014, Americans lost 82 million dollars to online dating fraud. That number is undoubtedly low, because many individuals, out of shame and embarrassment, do not report that they have been defrauded. Of course, not all those victims are elders. Individuals across every age demographic seek companionship.

As an elder law practitioner, I have encountered numerous clients engaged in online romances that, from an outsider’s perspective, seem suspicious. Here are two examples, (with identifying details modified) which raised questions for me regarding autonomy and the “right to folly.”

Cindy is an older adult, with a long history of domestic violence and tumultuous relationships. She had an online boyfriend who had made numerous arrangements to fly into Portland. Each time he was to arrive, he was stopped by customs and unable to enter the country. Cindy repeatedly waited for him at the airport only to return home without him. She sent him money to resolve his visa and custom issues, and ultimately lost her discounted rental housing because she could not pay her rent. In all other areas, she was able to make reasonable decisions about money and safety.

Lucy is an older adult, recently divorced and recovering from a catastrophic stroke. She is extremely lonely and isolated, living in an adult foster home removed from her former community and family. During a meeting in which she is showing me frustrating text messages from her ex-husband, she reveals a series of text messages from a man she met online. Each text message expresses a deep and completely over-the-top ardent profession of love and adoration. This client does

not have control over her money, and for that reason is not at risk of financial exploitation. She is not immune to identity fraud, but likely sheltered from many of the more harmful resulting consequences.

Technology has created an ease of communication that allows sweetheart scams on an international scale. The perpetrators are nearly impossible to track, and once the money is gone, it’s gone, further raising the stakes of the game. On the flip side, many elders do find love online and end up in lasting relationships that are satisfying and, most important, real.

While working with Lucy and Cindy, I evaluated legal tools. In the case of Lucy, my intervention took the form of advice and education. I described for her some of the red flags of online dating scams (see <http://romancescams.org>), all of which were present in her situation (e.g., immediately wanting to go off of the dating website, quickly professing love, sending bank statements demonstrating his massive fortunes). I could sense that she agreed that his behavior matched the pattern, but was not interested in completely engaging with that reality.

The critical juncture is to stop the financial exploitation. But these scams are so effective because they begin with creating an emotional attachment. I knew that once the divorce settlement was disbursed, she would have more resources, so at that point in time, I decided to provide her with as much information as I could—supplying materials from the Department of Justice and doing a reverse Google image search of the profile picture to demonstrate he was a fake. It was hard to do and felt a little sad because he was giving her some hope; but I knew it would be much more sad for her to lose her financial independence.

In the case of my second client, the issue was much more pressing. She was actively sending money to this person, despite numerous interventions by bank employees, friends, and her landlord. She would have moments when she acknowledged her behavior was reckless, but later say that was how she had always been “ready to risk it all for love.”

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## Romance scams *Continued from page 15*



Because she was my client, everything I learned was a client confidence and she was clear that she wanted and valued her independence. Consequently, reporting the elder abuse would have been a violation of my ethical duties to a client. Had she not been my client, and I had met her before or after this situation arose, I would have been required to report this under my duties as a mandatory reporter of elder abuse.

Fortunately, other individuals did refer her to adult protective services. Unfortunately, the investigation was quickly closed, having found that she had capacity (which she most certainly did) and though her decisions were bad, they were hers to make. Ultimately, she did lose her housing and was bouncing around at age 70 between short-term hotels.

### What can families do?

What if a family member had come to me and presented the above scenario? Would Oregon law allow a conservatorship under these facts?

A conservatorship can be granted pursuant to a finding by clear and convincing evidence that the person is “financially incapable” and that the respondent has money or property that requires management or protection. ORS 125.400. In this situation, it was clear that Lucy had fallen for a scam and refused to stop sending money. The only complicating factor was that there were times that she said she knew it was a scam and that she did not care, that she simply wanted to help a desperate man living overseas. At the point she lost her housing, a limited conservatorship that prevented her ability to transfer large sums of money overseas would be appropriate and likely allowed under Oregon law. However, until the point she lost her housing, gathering the evidence that she was financially incapable would have been difficult. In families with significantly more assets or a home that is owned, a foreclosure can sometimes take years, and by then, it is far too late. I would assess with the family the consequences of the scam, and how clear the evidence is that the person is not real.

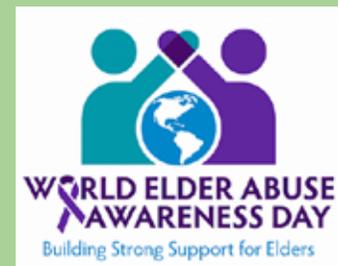
The best step we can take as lawyers is to provide information that outlines the red flags and educate our clients, because by the time the scam is discovered, it is often too late. ■

## June 15 is World Elder Abuse Awareness Day

Each year, an estimated 5 million older persons are abused, neglected, and exploited. In addition, elders throughout the United States lose an estimated \$2.6 billion or more annually due to elder financial abuse and exploitation—funds that could have been used to pay for basic needs such as housing, food, and medical care. Unfortunately, no one is immune to abuse, neglect, and exploitation. It occurs in every demographic, and can happen to anyone. Yet it is estimated that only about one in five of those crimes is ever discovered.

World Elder Abuse Awareness Day (WEAAD) was established in 2006 by the International Network for the Prevention of Elder Abuse and the World Health Organization at the United Nations. The purpose of WEAAD is to provide an opportunity for communities around the world to promote a better understanding of abuse and neglect of older persons by raising awareness of the cultural, social, economic and demographic processes involved in elder abuse and neglect. WEAAD serves as a call to action for individuals, organizations, and communities to raise awareness about elder abuse, neglect, and exploitation.

Access the latest WEAAD campaign materials through the USC Center on Elder Mistreatment website: <http://eldermistreatment.usc.edu/weaad-home>



## Resources for elder law attorneys

### Events

#### Advanced Estate Planning 2017

OSB CLE Seminar/Webcast

June 9, 2017/8:30 a.m.–4:15 p.m.

Oregon State Bar Center, 16037 SW Upper Boones Ferry Road, Tigard

[Register on Oregon State Bar website](#)

#### Tax Issues in Estate Planning

Sponsored by the OSB Taxation Section

June 21, 2017/Noon

Red Star Tavern, Portland

RSVP: Ryan Nisle: [ryan.nisle@millernash.com](mailto:ryan.nisle@millernash.com) or 503 224-5858

#### Second Annual Solo and Small Firm Conference

OSB CLE Seminar

July 7 & 8, 2017

Riverhouse on the Deschutes, 3075 N Hwy 97, Bend

Cosponsored by the Solo and Small Firm Section

[Register on the Oregon State Bar website](#)

#### Elder Abuse

September 20, 2017/Noon to 1:00 p.m.

Naegeli Deposition and Trial; Portland

Sponsored by the Solo & Small Firm Section

RSVP for Non-members: Michael L. Cooper: [mlcooper@lawyer.com](mailto:mlcooper@lawyer.com)

#### NAELA Summit

November 15 - 17, 2017

Newport Beach, California

[NAELA](#)

#### Aging in America

American Society of Aging Conference

March 26–29, 2018

San Francisco, California

[American Society on Aging](#) ■

### Publications

The Consumer Financial Protection Bureau (CFPB) has Oregon-specific guides for financial fiduciaries. The guides are intended not only to educate agents about financial fiduciary requirements, but focus on prevention of financial exploitation. All four guides come with the title *Managing Someone Else's Money*. Four separate guides—all available free through CFPB—were developed for conservators, trustees, representative payees/VA fiduciaries, and agents under a power of attorney.

The American Bar Association's *PRACTICAL Tool for Lawyers* helps lawyers identify and implement decision-making options for persons with disabilities that are less restrictive than guardianship. A 22-page Resource Guide expands on the steps and includes links to key resources. PDF and Word versions of both publications are available at no cost. Download at [http://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice/practical\\_tool.html](http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html) ■

### Websites

#### Elder Law Section website

[OSB Elder Law Section](#)

The website provides useful links for elder law practitioners, past issues of Elder Law Newsletter, and current elder law numbers.

#### National Academy of Elder Law Attorneys (NAELA)

[www.naela.org](http://www.naela.org)

A professional association of attorneys dedicated to improving the quality of legal services provided to elders and people with special needs

#### OregonLawHelp

[www.oregonlawhelp.org](http://www.oregonlawhelp.org)

Helpful information for low-income Oregonians and their lawyers

#### Administration on Aging

[www.aoa.gov](http://www.aoa.gov)

This website provides information about resources that connect older persons, caregivers, and professionals to important federal, national, and local programs.

#### Aging and Disability Resource Connection of Oregon

[www.ADRCOfOregon.org](http://www.ADRCOfOregon.org)

Includes downloadable *Family Caregiver Handbook*, available in English and Spanish versions

#### Big Charts

<http://bigcharts.marketwatch.com>

Provides the price of a stock on a specific date

#### American Bar Association Senior Lawyers Division

[http://www.americanbar.org/groups/senior\\_lawyers/elder\\_law.html](http://www.americanbar.org/groups/senior_lawyers/elder_law.html)

#### National Elder Law Foundation

<http://www.nelf.org>

Certifying program for elder law and special-needs attorneys

#### National Center on Elder Abuse

<https://ncea.acl.gov>

Guidance for programs that serve older adults. Practical tools and technical assistance to detect, intervene, and prevent abuse. ■

**Important  
elder law  
numbers**

as of  
January 1, 2017

Supplemental Security Income (SSI) Benefit Standards	Eligible individual ..... \$735/month Eligible couple ..... \$1,103/month
Medicaid (Oregon)	Asset limit for Medicaid recipient..... \$2,000/month Long term care income cap..... \$2,205/month Community spouse minimum resource standard ..... \$24,180 Community spouse maximum resource standard ..... \$120,900 Community spouse minimum and maximum monthly allowance standards ..... \$2,003/month; \$3,022.50/month Excess shelter allowance ..... Amount above \$601/month SNAP (food stamp) utility allowance used to figure excess shelter allowance ..... \$449/month Personal needs allowance in nursing home..... \$60/month Personal needs allowance in community-based care ..... \$164/month Room & board rate for community-based care facilities..... \$571/month OSIP maintenance standard for person receiving in-home services..... \$1,235 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2016 ..... \$8,425/month
Medicare	Part B premium ..... \$109.00/month* Part B premium for those new to Medicare in 2016 ..... \$134.00/month* Part D premium ..... Varies according to plan chosen Part B deductible ..... \$183/year Part A hospital deductible per spell of illness ..... \$1,316 Skilled nursing facility co-insurance for days 21–100..... \$164.50/day * Premiums are higher if annual income is more than \$85,000 (single filer) or \$170,000 (married couple filing jointly).



**Elder Law  
Section**

**Newsletter Committee**

The Elder Law Newsletter is published quarterly by the Oregon State Bar’s Elder Law Section: Monica Pacheco, 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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