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Appointment of a trustee that is not a trust company

By Corey P. Driscoll, Attorney at Law

It is not uncommon for clients to lack close family or trusted friends to serve as a successor trustee. Usually the response is to refer those clients to a professional trustee service, most often a bank or other financial institution. However, many of these institutions have minimum-asset requirements or high minimum liquid-assets requirements before they will take on trust administration. Unfortunately, not all clients have the resources required to appoint such an institution as trustee. What is the solution?

Professional trustee licensing requirements

ORS 709.030(1) provides that no person other than a trust company shall transact a trust business in this state. Trust business is defined simply as acting as a trustee of a trust. ORS 706.005(29). A "trust company" is a company that is authorized under the provisions of ORS chapter 709 to transact trust business, including the trust department of a bank.

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Due to the arduous requirements to become a trust company, an individual is virtually precluded from acting as trustee. However, ORS 709.030(4) exempts certain classes of persons from the requirements of ORS chapter 709. Some of the exempt classes include persons who:

(a) Do not and will not regularly transact trust business in the ordinary course of the person's business
(b) Act in a manner authorized by law and in the scope of authority as an agent of a trust company
(c) Are attorneys who render a service customarily performed by an attorney

In addition to a number of other discrete classes of exempt individuals, ORS 709.030(4) also allows the director of the Department of Consumer and Business Service to, by administrative rule, exempt other individuals from these requirements.

The vast majority of trustees are either duly licensed large financial institutions or fall under the first exception listed above, in that they do not regularly transact trust business. The average trustee might serve as a trustee once or twice in his or her lifetime. However, this does not solve the problem initially presented: what about the client in need of a trustee who doesn't have the assets to qualify under the financial institution's requirements, but also doesn't have an individual to serve as trustee?

Exception to licensing requirement

A cottage industry of small professional trustees has sprung up to address this exact problem. These professionals often serve as fiduciaries in other capacities (e.g., professional guardian/conservator).

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Appointment of trustee

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However, the small professional trustee generally does not have the resources to meet the licensing requirements to transact trust business under banking statutes. Recognizing this issue, the director of the Department of Consumer and Business Service, with the input of various interest groups, issued OAR 441-505-4030 to add an exemption to the licensing requirements of ORS 709.030. As originally promulgated, this rule exempted "fiduciaries" appointed by a court of competent jurisdiction. However, "fiduciary" was not explicitly defined by the rule.

In 2007, the rule was updated to explicitly exempt "any person appointed as a personal representative, trustee or conservator by a court of competent jurisdiction, provided that the court requires the person to post a bond suitable to the size of the estate for which the appointment is made." OAR 441-505-403(1). Under this rule, the small professional trustee can act as a trustee without becoming a trust company if appointed by the court.

Petitioning the court for appointment

ORS 130.050 provides the court broad jurisdiction related to the administration of trusts. That statute should be used to petition the court for appointment of a non-trust-company professional trustee. The petition should include reference to ORS 709.030 and OAR 441-505-4030 to explain why court appointment of a named trustee is being sought. In addition, the petition must include a request that the court set a bond. This generally requires the petition to provide information in regard to the size of the trust estate. Unlike probate or conservatorship cases where a bond can be waived or reduced based upon restriction of assets, the bond of a professional non-licensed trustee must be "suitable to the size of the estate." OAR 441-505-4030(1). Although not explicitly required by rule or statute, the court may require annual or more frequent accountings.

From the drafting side, a practitioner may want to consider inclusion of the requirement that a named non-trust-company professional trustee be appointed by the court. This should be drafted carefully since this exception is an administrative rule and this is subject to change.

"Professional fiduciary"—guardian/conservator

It is also worth discussing professional guardians and conservators. As originally promulgated, OAR 441-505-403 referred to a "fiduciary." Around that time there was some discussion and argument that fiduciary was limited to the definition used in ORS 125.005(2): "Fiduciary means a guardian or conservator appointed under the provisions of this chapter or any other person appointed by a court to assume duties with respect to a protected person under the provisions of this chapter [125]." While the new rule has clarified this issue, there has been some lingering confusion about where the lines of professional trustee and professional fiduciary cross.

The term "professional fiduciary" is clearly defined in ORS 125.240(5). It means any person nominated as a fiduciary or serving as a fiduciary who is acting at the same time as a fiduciary for three or more protected persons who are not related to the fiduciary. As stated above, fiduciary is defined as any person appointed under ORS chapter 125. As such, a professional guardian or conservator must follow the certification and disclosure requirements of ORS 125.240 only if that professional is appointed by the court, under the provisions of Chapter 125, for three or more unrelated people.

Under these statutes, a person serving one or two people is not considered a professional fiduciary and is therefore not subject to the requirements of ORS 125.240. Likewise, acting as a trustee, personal representative, or other type of what would usually be considered a fiduciary does not count toward the "three or more protected persons" under ORS 125.240(5) simply because those are not persons appointed under ORS Chapter 125. ■

How to avoid trustee trouble

By Kristen A. Chambers, Attorney at Law

Kristen Chambers focuses her practice at Wyse Kadish LLP on estate planning, probate and trust administration, and adult protective proceedings.

Well-meaning trustees can usually stay out of trouble by complying with the mandatory trust administration provisions, engaging professional advisors such as attorneys, tax preparers, and financial planners, and communicating clearly with beneficiaries. Trustee liability is governed by the Oregon Uniform Trust Code, enacted in 2005 and codified at ORS Chapter 30, as supplemented by Oregon case law.[1] The main trustee duties, and the corresponding potential liabilities, are as follows.

Act in the beneficiaries' best interests.

The trustee is required to administer the trust in good faith and solely in the interests of the beneficiaries. ORS 130.650. The trustee must act with loyalty and impartiality. ORS 130.655; 130.660. To avoid liability, trustees should refrain from self-dealing. See, e.g., *Driver v. Blakeley*, 165 Or 312, 319, 107 P2d 524 (1940) (borrowing money from the trust); *Strickland v. Arnold Thomas Seed Serv., Inc.*, 277 Or 165, 172, 560 P2d 597 (1977) (operating a business that competes with a trust business); *McNeely v. Hiatt*, 138 Or App 434, 442, 909 P2d 191, adh'd to on recons, 142 Or App 522, rev den, 324 Or 394 (1996) (selling a trust asset to prevent the beneficiaries from inheriting it). In addition, trustees should be careful not to favor one beneficiary's interests over another's. ORS 130.660.

Administer the trust with care.

The trustee must exercise reasonable care, skill—including any special skills or expertise—and caution in administering the trust according to its purpose, terms, and circumstances. ORS 130.665;130.675. To avoid liability, the trustee should avoid excessive costs, distribute trust property in a timely manner, work with trusted and qualified advisors in areas which require expertise that the trustee does not have, such as making trust investments, and exercise reasonable care to prevent or address a co-trustee's breach of trust. ORS 130.670; 130.730(2); 130.680; 130.610(7). In addition, the trustee must administer the trust at a place appropriate for the trust purpose, and administer the trust in accordance with the Oregon Uniform Principal and Income Act. ORS 130.022; 129.200-129.450.

Keep good records and proper accounting.

The trustee must keep adequate records of administration, keep trust property separate from the trustee's own property, and where feasible take steps to ensure trust interest is reflected in records kept by third parties. ORS 130.695. To avoid liability, trustees should take care in the choice of banks and bank accounts to hold trust property, and pay for trust expenses directly from trust accounts in a manner that allows for a clear record of the payee, amount, and purpose.

Protect the trust property.

The trustee must take control of and protect trust property, pursue known claims that the trust may have against a former trustee, and enforce claims of the trust and defend claims against the trust. ORS 130.690; 30.705. The trustee must also act as a prudent investor of the trust's assets. ORS 130.750; 130.755. To avoid liability, the trustee should consider taking out insurance for high-value property at risk of loss, take steps to avoid foreclosure on trust property, update trust financial accounts to the name of the trustee, liquidate short-term investments, and transfer title of automobiles to beneficiaries where possible. The trustee should be careful to enter into contracts only in his or her fiduciary capacity, in order to avoid potential personal liability. ORS 130.845.

Keep the beneficiaries informed.

The trustee must provide qualified beneficiaries (as defined in ORS 130.010(14)) with notice of accepting a trusteeship, a copy of the trust agreement upon request, any planned change in the method or rate of the trustee's compensation, and in some circumstances notice and rights of beneficiaries upon the creation of an irrevocable trust. ORS 130.710(2) & (10). The trustee must send the qualified beneficiaries annual reports plus a report upon termination of the trust. ORS 130.710(3) & (10). In addition, the trustee must keep qualified beneficiaries informed of material facts necessary to protect their interests. ORS 130.710(1).

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Avoiding trustee trouble

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Liability can be limited by strict adherence to the statutes, good communication with the beneficiaries, and assistance from professional advisors.

This can include disclosing information to which beneficiaries would not normally be entitled. See, e.g., *Tseng v. Tseng*, 271 Or App 657, 352 P3d 74, rev den, 358 Or 69 (2015). (Beneficiaries were entitled to information about trustee's transactions during trustor's life, where such information was relevant to beneficiaries' interest.) The importance of keeping open lines of communication and being responsive to beneficiaries' requests cannot be overstated in terms of their ability to reduce the likelihood of claims against a trustee.

In addition to complying with the specific duties outlined in the statutes, trustees can limit their liability by getting beneficiary or court approval for their actions. Absent bad faith or lack of disclosure, a trustee is not liable to a beneficiary for a breach of trust where the beneficiary consents to the trustee's conduct, releases the trustee from liability for the breach, or ratifies a transaction entered into by the trustee. ORS 130.840. One method of accomplishing this is to have beneficiaries approve of the trustee's expenditures and plan of distribution in advance through a trust distribution agreement. Another method is to have beneficiaries and the trustee enter into a nonjudicial settlement agreement. ORS 130.045.

In circumstances where consent from beneficiaries is not an option, trustees can limit their liability by submitting a request for instructions or seeking a declaratory judgment from the court that approves the trustee's action or resolution of a particular problem. ORS 130.050. Using these tools will help ensure that beneficiary issues will be addressed as they arise, and put the trustee at ease about future liability. Even where the trustee is well-educated on his or her role as a fiduciary and acting in good faith, liability cannot always be avoided. But liability can be limited by strict adherence to the statutes, good communication with the beneficiaries, and assistance from professional advisors. ■

Footnote

1. Trustee duties and liability are subject to different rules where trust companies, trust advisors, and powers to direct are involved. See ORS Chaper 709; ORS 130.685; 130.735.

May 4 unCLE program

The 16th annual UnCLE will be held Friday, May 4, 2018, from 8:00 am to 4:30 pm at the Valley River Inn in Eugene.

This unique program provides elder law practitioners the opportunity to get together for a day-long session of brainstorming, networking, and the exchange of ideas on topics ranging from estate planning to guardianship to Medicaid to office practice management. The sessions will be held in small discussion groups with topics moderated by elder law attorneys willing to share their experiences. There will be no formal speakers, but there will be time to question and learn from our peers. The program has received very high ratings from attendees and may be the best educational opportunity available to us. Despite its title, this program in past years has been approved for MCLE credit.

Participants are asked to bring 25– 80 copies of documents of interest to elder law attorneys to share, such as sample language for estate or disability planning documents, office forms, pleadings, legislation, administrative rules or transmittals, and decisions by courts or agencies.

The registration fee for 2018 is $125, which includes breakfast, lunch and a reception after the program

The Elder Law Section's UnCLE program is limited to 80 participants and there are only a few spots left.Register online at https://ebiz.osbar.org/ebusiness/Meetings/Meeting.aspx?ID=868.

Designation of a trust as beneficiary of an asset

By Elizabeth Jessop, Attorney at Law

Elizabeth Jessop is a solo elder law and estate planning attorney in Portland, Oregon. Her practice emphasizes guardianship and conservatorship proceedings, trust and estate administration, and planning for Medicaid benefits.

This article is about naming a trust as the beneficiary of a non-qualified asset. Designation of a trust as the beneficiary of a retirement account is discussed in a different article in this newsletter.

Depository account or brokerage account

When instructing a client regarding the funding of a revocable living trust, do not overlook a discussion of the logistics of retitling an account. Most financial institutions cannot simply retitle the ownership of the client's current depository account to the new trust. Instead, the institution will require that the client open an entirely new account titled in the name of the trust.

For the client, opening a new depository account, and subsequently closing the account in the client's individual name, can be a huge hassle. For the elderly client, it can be an insurmountable obstacle. Many clients have set up their main checking account for automatic deposits of their monthly income, such as their Social Security retirement income. This account may also be set up for automatic payment of monthly expenses, such as for household utility bills, car payments, etc. The idea of having to undo and then redo automatic deposits and automatic debits can be overwhelming. The client may ignore the instruction to retitle the account, and simply leave the bank account in the client's individual name.

So long as the client's account balance remains modest, the successor trustee can likely marshal the asset after death through an affidavit using the procedure outlined in ORS 708A.430 or the small estate affidavit procedure found at ORS 114.505 et seq. However, one of the client's goals when setting up the trust was to simplify after-death administration and avoid unnecessary legal fees. The client can add a trusted individual, such as his or her child, as the joint owner of the bank account, but this can expose the funds in the account to the creditors of that individual. And that individual could always unexpectedly die first. For an excellent discussion of the downside of owning property jointly with children, see the PLF practice aid *Transferring Real Property to Adult Children*.

A solution for this situation is for the client to name the trust as the "pay-on-death" (POD) beneficiary of the depository account. The financial institution will normally allow the client to designate a trust as a POD beneficiary, such that after the client's death, the successor trustee can claim the account by showing the owner's death certificate and an updated certification of trust signed by the successor trustee. So that the planning for incapacity is not lost, it is key that the client have an up-to-date and thorough power of attorney in place.

A client could also follow this same procedure for a non-qualified brokerage account. However, the process to change the title of a brokerage account is generally less of an inconvenience for the client, especially if there is an active investment manager who oversees the brokerage account.

Life insurance

Be sure to find out if the client owns life insurance. Younger clients may have minimal net worth but own substantial term life insurance for the protection of the spouse and children. When instructing clients about beneficiary designations for life insurance, there are several issues to consider.

Minor beneficiaries. If the client's estate plan includes a trust for the benefit of children, it is important to name the trust as a beneficiary of the life insurance. If minor children are themselves named as beneficiaries, the life insurance company will require a conservatorship for the children prior to distributing the proceeds. If the client has executed a will that includes a testamentary trust for children, or a revocable living trust which contains an ongoing trust for descendants, the applicable trust, rather than the children, should be listed as beneficiary. The considerations are the same if the client wishes to keep assets in trust for the child beyond the age of adulthood.

Disabled beneficiaries. If the client has created a special needs trust for a disabled beneficiary, it is vital that no asset goes outright to that beneficiary. If an individual is receiving means-tested government benefits, the receipt

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Naming trust as beneficiary

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of an inheritance can result in the loss of those benefits until funds are again spent down to a required amount. This loss of benefits can be devastating, and if the individual is over the age of sixty-five he or she will no longer have the opportunity to create his or her own special needs trust to hold the inheritance. If the client wishes to use life insurance proceeds to fund a special needs trust, be sure to review the designation and make sure that it is done correctly.

Disclaimer and credit shelter trust planning. If a client's estate plan includes a credit shelter trust or a disclaimer trust, it is important to consider whether the trust should be named as the primary or contingent beneficiary of the insurance. If the spouse is the primary beneficiary and the trust is named as contingent, this would allow the spouse to decide, based on the circumstances at the death, whether it would be more beneficial to take the insurance proceeds outright or to disclaim the proceeds so that the trust is the beneficiary. One downside with this approach is that the spouse may forget your instruction to wait to claim life insurance and come to see you for advice only after receiving the life insurance proceeds. Or, at the time of the first death, the spouse may no longer have capacity to disclaim. So long as the life insurance company accepts instructions from the agent under the power of attorney, the agent can disclaim on the spouse's behalf. By naming the trust as the primary beneficiary, you can have more certainty that the funds will be available for funding a credit shelter or disclaimer trust.

Planning for contingencies. Even if your client does not have minor beneficiaries, disabled beneficiaries, or more complex irrevocable trust planning, it is still helpful to review what would happen to life insurance proceeds if a beneficiary were to predecease your client. Some beneficiary designation forms clearly allow for the share of a pre-deceased beneficiary to pass to his or her issue. Other forms state the share of a deceased beneficiary lapses and is split among the remaining surviving beneficiaries. If your client has put in place a trust in which planning for pre-deceased beneficiaries is a key provision, it may be necessary to name the trust as beneficiary, rather than naming individuals, in order to safeguard the client's contingency planning.

Caution—creditors of the decedent. When life insurance proceeds are distributed outright to an individual, the proceeds are not subject to the creditors of the decedent's estate. ORS 743.046. If your estate planning client has substantial creditors, one downside of naming the decedent's trust as beneficiary of the policy is that the proceeds will be available to pay creditor claims.

Annuities

If your client has tax-deferred annuities, review the article in this issue regarding beneficiary designations and retirement plans. For non-tax-deferred annuities, the considerations are essentially the same as those for naming life insurance beneficiaries. As with life insurance, annuity proceeds are protected from the decedent's creditors if distributed outright to an individual rather than to the decedent's trust. ORS 743.049.

Real property

With Oregon's Transfer on Death Deed (TODD), found at ORS 93.948 et seq., a trust can be named as the beneficiary of real property. There are disadvantages to the use of a TODD, such as the eighteen-month creditor period. (For a comprehensive overview of Oregon's TODD, see Freeman Green's article, "Oregon's Uniform Real Property Transfer on Death Act: Part II" in the July 2012 issue of the *Oregon Estate Planning and Administration Section Newsletter*.) However, if a client owns mortgaged real property that he or she does not occupy, transferring the real property into the name of the client's trust can be a risk. Arguably, the protections of the Garn-St. Germain Depository Institutions Act of 1982, Pub L No. 97-320, are not available for real property that is not owner-occupied. It is conceivably possible that a lender could call a loan due and demand immediate payment, based on the unauthorized transfer of ownership from the client to the client's trust. To avoid any potential of triggering a "due on sale" clause in a loan document, a client may be more comfortable naming the trust as the beneficiary of a TODD.

Further discussion of the Garn-St. Germain Act can be found in an article by Jessica Baggenstos, "Transfers of Mortgaged Property to Revocable Trusts: Limits on When Federal Law Protects Your Client From Triggering a Due-on-Sale Mortgage Clause" in the October 2012 issue of the *Oregon Estate Planning and Administration Section Newsletter*.

Reviewing the designation

In addition to instructing your client as to how to designate the trust as beneficiary, it is also a good idea to ask the client to provide you with documentation that shows the updated designation itself. A review of the designation may lead to the need to communicate with the financial institution or advisor if the language is incorrect. While this may increase the cost to client, an incorrect beneficiary designation can cause substantial problems if discovered only after your client has died. ■

Retirement benefits and lifetime trusts

By Melanie Marmion, Attorney at Law

Melanie Marmion is a partner with Fitzwater Law. She enjoys blending her knowledge of tax laws with her focus on working with clients who have a family member with special needs. She is the past-chair of the Executive Committee for the Estate Planning section and a member of the Academy of Special Needs Planners.

The intersection of estate planning and retirement benefits can be a daunting place to practice law, particularly when the client wants to direct his/her retirement assets to a lifetime trust for the benefit of a child or other family member. When these situations arise, it is important for attorneys to understand how the minimum distribution rules under Internal Revenue Code §401(a)(9) and the corresponding Treasury regulations will apply. The purpose of this article is to highlight and explain some general issues that attorneys should understand when they wade into these murky waters. I've purposely written this article with an informal tone and colloquial language in the hope of translating technical rules into understandable concepts. The rules discussed apply to many different types of retirement benefits, including IRAs, Roth IRAs, SEPs, 401(k) plans and 403(b) plans but for convenience I will use the term "retirement account" throughout this article which shall generally include all of these different types of retirement benefits. Where I thought necessary, I've footnoted the more formal explanation and/or appropriate citation.

Retirement accounts are tax-favored investments because the income earned each year is not subject to income taxes until the funds are withdrawn from the account, which allows the owner to invest the funds that would have been paid for income taxes. This tax-deferred growth will generally yield a significantly larger future value than an investment that is subject to (and reduced by) income taxes from year to year. The longer that funds can remain in the account, the more significant the effect of this tax-deferred growth. This is why many savvy retirement account owners will wait until they reach age 70 ½, also known as "the required beginning date"— the date that the IRS requires owners to begin to withdraw funds out of the retirement account and pay the resulting income taxes.[1]

Many clients are surprised to learn that the minimum distribution rules that apply to an owner of a retirement account do not apply to the inheritor (i.e. "beneficiary") of a retirement account. Rather than being allowed to wait until age 70½ to start withdrawing money from the account, the beneficiary of a retirement account must start taking distributions the year following the year of the owner's death, no matter the age of the beneficiary.[2] The amount that they are required to withdraw from the account (the minimum required distribution (MRD) will depend on whether the beneficiary qualifies as a designated beneficiary. Designated beneficiaries use their age to calculate the MRD.[3] This is usually an advantage when the applicable age is younger than the owner because the MRDs are spread over the remaining life expectancy of the designated beneficiary, thus minimizing the amount of the MRD subject to income taxes and, perhaps more important, allowing the balance of the funds to remain in the account and soak up all of that good tax-deferred growth.[4]

Only an individual and certain types of trusts (what I'll refer to as see-through trusts) qualify as a designated beneficiary. No other entity—an estate, charity, or "opaque" trust—will qualify.[5] If a beneficiary is not a designated beneficiary, or no beneficiary is named on the appropriate form with the financial company managing the retirement account, the distribution time period when the funds will need to be withdrawn/distributed from the retirement account will depend on whether the owner died before or after his or her required beginning date. If the owner died before the required beginning date, the distribution period is five years from the owner's death. If the owner died after the required beginning date, the distribution period is the owner's remaining life expectancy.[6]

Which trusts qualify as see-through trusts and therefore receive the designated beneficiary advantage described above? There are five requirements for a trust to qualify as a see-through trust:

1. The trust must be irrevocable.
2. The trust must be valid under state law.
3. A copy of the trust instrument must be provided to the financial institution managing the retirement account by October 30 of the year following the year of the owner's death.
4. All of the "countable" beneficiaries must be identifiable.
5. All of the "countable" beneficiaries must be individuals.[7]

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As you can see, the first three requirements should be easy to satisfy. It is those last two requirements and which beneficiaries are "countable" that can be tricky to analyze in certain situations which I will discuss in more detail later.

See-through trusts that meet these five requirements can be divided into two categories: conduit trusts and accumulation trusts.

Conduit trusts

Conduit trusts use the age of the primary/lifetime beneficiary to calculate the MRD.[8] They are drafted with specific language that requires the trustee to withdraw any MRDs from the retirement account (and any other funds that are withdrawn by the trustee that exceed the MRD), and immediately distribute all such withdrawn funds to the primary beneficiary of the trust.

In this way, the trust simply acts as a conduit for the withdrawn funds and the IRS views the primary beneficiary as the "true recipient" of the funds and therefore allows the primary beneficiary's age to calculate the MRD. The only "countable" beneficiary of a conduit trust is the primary beneficiary. Unlike the accumulation trust (see below), there is no need to consider the remainder beneficiaries in a conduit trust.[9] Conduit trusts have the double advantage of allowing a trustee to control the retirement account but still use the primary beneficiary's life expectancy to calculate the MRD. However, the obvious disadvantage of conduit trusts for some clients is that there are required and automatic distributions to the primary beneficiary. Because of those automatic distributions, special needs trusts, or any other type of lifetime trust where the clients wish to restrict the beneficiary's automatic access to money, should not be designed to include the conduit language. Those situations will require the attorney to consider whether the trust can qualify as an accumulation trust.

Accumulation trusts

An accumulation trust uses the age of the oldest countable beneficiary of the trust to calculate the MRD. In contrast to the conduit trust, remainder beneficiaries are countable beneficiaries for an accumulation trust. Further, all of the countable remainder beneficiaries must be identifiable and individuals to satisfy see-through-trust requirements #4 and #5. But which remainder beneficiaries count? To answer this question, I employ a technique espoused by retirement rules guru Natalie Choate[10] which I call the "chain test."[11]

Essentially, to determine the countable beneficiaries, you begin with the primary (lifetime) beneficiary as your first "link" in the chain. Then you analyze all the potential remainder beneficiaries of the trust by counting all successive beneficiaries until you come to the beneficiary(ies) who will be entitled to receive the trust property immediately and outright upon the death of the prior beneficiaries. That immediate and outright beneficiary is the last link in the countable beneficiary chain. To make this even more complicated, this test will not be relevant until after the retirement account owner has died.[12] This technical analysis technique is best explained with a few examples.

Assume that Ned Stark directed one of his IRA accounts to a special needs trust for his son, Bran (age 14), who is experiencing a disability after falling from a castle tower. Assume further that the special needs trust is designed so that upon Bran's death, the remaining trust assets will pay out to Ned's other children—Rob (age 24), Jon (age 23), Sansa (age 18), Arya (age 15), and Rickon (age 10).

Ned Stark dies at age 50 and is survived by all of his children. In this simple example, the countable beneficiaries are Bran (as the primary beneficiary) and the immediate and outright beneficiaries upon Bran's death: his siblings. All these countable beneficiaries are identifiable (trust requirement #4) and individuals (trust requirement #5) so this special needs trust does qualify as an accumulation trust. The oldest beneficiary of these countable beneficiaries is Rob. Rob's age would be used to calculate the MRD that must be withdrawn by the trustee of the special needs trust each year.

Let's add another layer of complexity. Assume the IRA is directed to a special needs trust for Bran, but upon Bran's death, the remaining trust assets are held in separate trusts for each of Ned's then-living children until they reach age 21. If a child dies prior to reaching age 21, the remaining assets of the "age 21 trust" are distributed to the child's descendants, by right of representation, and if the child has no descendants, to Ned's favorite charity, the Winter Is Coming Foundation.

Again, Ned dies survived by all of his children. In this example, the countable beneficiaries start with Bran and include the next layer of beneficiaries, the other five children. However, since at the time of Ned's death, three of the children (Sansa, Arya, and Rickon) would not receive their share outright, we must go to the next layer of beneficiaries, their descendants. But at the time of Ned's death, they don't have any descendants, so we must keep going to the next layer, which would be the charity. The countable beneficiaries in this example would be Bran, Rob, Jon, Sansa, Arya, Rickon, and the Winter Is Coming Foundation. The foundation is not an individual and causes the special needs trust to fail trust requirement #5. The special needs trust would not qualify as an accumulation trust and the funds in the IRA would have to be completely withdrawn (and subject to income taxes) within five years of Ned's death.

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Retirement benefits

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As you can see from this example, embedded trusts (trusts that can come into existence for the benefit of remainder beneficiaries) can complicate the analysis because we must analyze the potential remainder beneficiaries of those embedded trusts. Powers of appointment similarly create complication because all of the potential appointees, as well as the takers in default are countable beneficiaries.[13] Essentially, the more layers of beneficiaries that must be counted, the longer the countable beneficiary chain, and the more chance of failing trust requirements #4 and #5.

There may be "hidden" beneficiaries that can wreak havoc on the analysis. Some practitioners warn that, because the term "descendants" includes adopted individuals under many state laws, including Oregon's, there is a potential for failing trust requirement #4 (all countable beneficiaries must be identifiable).[14] To illustrate this, in the example above, because Sansa (or Arya or Rickon) could at some point in the future adopt a person who could be older than all of the other countable beneficiaries, that future adoptee is not identifiable at the time the trust is analyzed (after Ned's death) and the trust therefore fails requirement #4. There is also the argument that if, in our example, Bran's special needs trust is charged with its allocated share of estate taxes and is allowed to use the retirement funds to pay those taxes, the estate is also a countable beneficiary, thereby failing trust requirement #5.[15] To my knowledge, the IRS has never hinted at taking the analysis that far, but cautious attorneys include provisions in their trusts like defining the term descendants to exclude older adoptees and prohibiting the use of retirement funds to pay estate taxes to override these concerns.

Finally, it is vital to recognize that whether the trust qualifies as a see-through trust depends on facts as they exist after the death of the retirement account owner, not at the time the trust is drafted.[16]

While attorneys who design the lifetime trust as a conduit trust can be confident that the MRD will be based on the primary beneficiary's life expectancy, the same is not true for accumulation trusts. Because the analysis of a see-through accumulation trust depends on the identity of remainder beneficiaries who may or may not be alive at the time of the retirement account owner's death, there are no guaranteed outcomes, and attorneys should tread lightly when advising clients about the income-tax outcomes. ■

Footnotes

1. Technically, the required beginning date is April 1 of the year following the year that the owner turns age 70½. IRC §401(a)(9)(C). There is an exception for Roth IRAs. The minimum distribution rules only apply to Roth IRAs after the owner's death so there is no required beginning date for the owner of a Roth IRA.
2. Reg §1.401(a)(9)-2, A-5
3. See generally, Reg. §§1.401(a)(9)-3; 1.401(a)(9)-5
4. *Id*
5. Reg. §1.401(a)(9)-4, A-3
6. Reg. §1.401(a)(9)-5, A-5(a)(2); §1.401(a(9)-3, A-4(a)(2)
7. Reg. §1.401(a)(9)-4, A-5(b); §1.401(a)(9)-4, A-3
8. See Reg §1.401(a)(9)-5, A-7(c)(3), Ex. 2
9. Id
10. Her treatise, *Life and Death Planning for Retirement Benefits* is a must-own book for anyone interested in learning more about this area of law.
11. See section 6.3.08 of *Life and Death Planning for Retirement Benefits*, 7th edition (2011). See also,PLR 2004-38044.
12. Reg. §1.401(a)(9)-4, A-4(a)
13. See, e.g. PLRs 1999-03050; 2002-35038; 2004-38044
14. See Chapter 6, paragraph 6.2.07 in Choate book for discussion.
15. See, e.g., PLR 9809059 and Chapter 6, paragraph 6.2.10 in Choate book.
16. Reg. §1.401(a)(9)-4, A-4(a)

Practical tips for trust modification proceedings

By Sally Anderson Hansell, Attorney at Law

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Author's note:
I thank the colleagues who contributed their time and wisdom to this article. I am proud of the collegiality of our Oregon bar. Every time I have requested assistance from my colleagues, I have found support and generosity.

Modification of an irrevocable trust with court approval is allowed within the parameters of ORS Chapter 130. These proceedings can be tricky for the party who seeks the modification, because there are far more issues to address than simply alleging in a petition that the basic requirements of ORS Chapter 130 are met. This article contains practical tips for such a proceeding that were gathered from some of our colleagues: practicing attorneys, judges, and professional trustees.

Assume the court will not grant approval unless all beneficiaries consent in writing.

A contested modification is unlikely to succeed, so lay the groundwork with all parties before you file the petition. Aim to have written consent to the modification from all. Identify beneficiaries who require representation (minors, incapacitated persons, unknown/unascertained) and make arrangements for this representation before filing the petition.

Have a clear, well-articulated roadmap in the pleadings to help the court.

Recognize that these are not common proceedings and the court may not be familiar with the current version of ORS Chapter 130. Check off the basic requirements in ORS Chapter 130 and include specific explanations as to why the requested modification is allowed, such as how it conforms to the material purpose of the trust. Provide well-articulated explanations of all issues the court may have questions about and specifically address fairness issues. Inform the court of the various steps involved in the proceeding, such as the appointment of a representative or special representative, how a parent can represent a minor child, and why a group of beneficiaries comprise a class. Make your pleadings so thorough that the court can be confident in its approval.

Make requests for instruction to the court if there are any grey areas.

Explain how and why the issue is not obvious and straightforward, and provide suggestions on how the court could rule. Again, aim for written support for a particular resolution from all beneficiaries.

Be prepared for a hearing.

A hearing will address any objection issued, but it may also be called by the court to address its concerns or unanswered questions. If an objection is made, explain how the objection is unreasonable or not pertinent to the modification. Be prepared to explain what efforts were made to confer with a beneficiary whose consent was withheld, even if that person did not register an objection.

If any beneficiaries are incapacitated, minors, or unknown/unascertained, line up appropriate potential representatives in advance of filing the petition.

Provide the court with more than one potential and willing appointee from which to choose. Avoid potential conflicts of interest for all representatives. A common potential conflict of interest is when a parent represents a minor, so be prepared to explain to the court how the representative is qualified and free of any conflict of interest. Attorneys who are familiar with trust matters and professional fiduciaries generally known to the court may be more readily appointed than others.

Orders in protective proceedings may be needed in conjunction with the trust modification proceeding.

For example, a conservator or guardian may require approval in the protective proceeding in order to give consent to a trust modification that affects the protected person.

Address ethical considerations head-on.

If there is a whiff of a conflict of interest or ethical issue, the court will want it addressed and avoided. For example, avoid recommending that you or your law partner be appointed as successor trustee, no matter how much the client begs and how much you want to appease him or her. The court will always prefer a representative without a potential conflict of interest.

Consider alternate paths.

Seeking a beneficiary's consent to a trust modification may open the door for a beneficiary to register other concerns he or she might have with the trust or its administration. These can sideline the effort entirely, or offer an opportunity to amiably address those issues. Beneficiaries can make side deals among themselves to ensure consent to a trust modification. These agreements should be in writing and with consideration.

Make sure the client understands the costs involved.

Trust modifications can be expensive undertakings, especially if there are hearings, multiple fiduciaries, and attorneys involved. Modification of the trust may not be worthwhile compared to the cost and effort involved. This is why proper planning and communication with interested persons should be completed prior to filing a petition. ■

Pet trusts provide for lifetime care of animals

By Daniel R. Reitman, Attorney at Law

Daniel R. Reitman is a general practice attorney, of counsel to the firm of Gary M. Bullock & Associates, P.C., in Portland. He returned to practice in 2018 after a two-years hiatus due to a medical crisis. Prior to to his illness, he maintained a solo practice in Portland for 15 years.

"Mr. Simpson. Ms. Simpson. Is there anything else you want in your plan?"

"Well, I think we should make sure Santa's Little Helper and Snowball II are taken care of. Don't you think so, Homer?"

"D'oh!"

Given her son Bart's history with animals,[1] Marge is probably right not to feel secure that the family pets will end up in a good home. Fortunately, there is a means by which they can ensure that Lisa will have a fund dedicated to caring for their dog and cat. Section 408 of the Uniform Trust Code, which is substantially adopted in Oregon as ORS 130.185, provides for trusts for the benefit of animals.

The general function of ORS 130.185 is as an enabling act, setting forth default rules for pet trusts. It is intended to make a pet trust an enforceable trust, instead of a power of appointment.[2] Because the common law of trusts and general principles of equity supplement the UTC,[3] the practitioner will have the flexibility needed to address special concerns.

A trust can be created for the benefit of animals who are alive during the settlor's lifetime.[4] It lasts as long as any of the animals are alive. Pet trusts can be very easy to create. An oral statement can be enough. Because of difficulties documenting oral trusts, however, most are created in written trust documents or wills. The terms of the creating document are liberally construed in favor of the existence of a trust.

Trust property may be used only in accordance with the intended use of the trust, i.e., the care of the animal.[5] Special instructions should be considered with care. If your client has specific wishes about the conditions in which the animals are to live, you may want to discuss whether those wishes might bind the trustee too rigidly. In a recent case from New York, a personal representative was not allowed to sell the decedent's home, despite the need for repairs and the willingness of the proposed caretaker to move to a less expensive location, because the will specifically forbade sale during the duration of a trust for the decedent's cats.[6]

As with other trusts, the trustee may receive a reasonable fee from the trust.[7] A reasonable fee for a pet trust consisting of a moderate cash corpus probably will be based on the reasonable expense for tending a similar animal. Thus, for dogs and cats, kennel rates are probably the maximum. For horses, stabling fees can be expected. Animals with special pedigrees or needs probably can command higher compensation, as can trusts involving more complicated property holdings.

One shortfall of the Oregon statute is reduced oversight. The settlor may name a person to enforce the trust, or, if the trust instrument is silent, the court may appoint an appropriate person to fill this role. This person is considered a qualified beneficiary of the trust.[8] Unlike most trusts, however, pet trusts do not require periodic accounting by the trustee unless ordered by the court or directed in the trust instrument.[9] If your client wants to create a large pet trust, including a requirement to account periodically is probably advisable.

Care should also be given to consideration of remainders. If no remainder beneficiary is designated, the corpus reverts to the settlor or the settlor's successor in interest.[10] Failing to make a clear designation in a pet trust created as part of an estate plan could result in a reopened administration, much to the annoyance of the personal representative and probably the PLF.

There is very little case law on pet trusts nationally, and the official comment to UTC Section 408 does not attempt to expand much beyond the statutory language. One aid to predicting how a question may be resolved is a direction to look to the need for uniformity of construction of the UTC among the states that adopt it.[11] Unfortunately, counterbalancing this direction is the addition of non-uniform provisions to ORS 130.185. As of this writing, there are no cases construing Section 408 in any jurisdiction, so any ambiguity should be carefully considered when drafting the trust. ■

Footnotes

1. See "Bart Gets an Elephant," *The Simpsons* (first aired March 31, 1994)
2. Uniform Trust Code §408, Official Comment. It is presumed that an oral or written declaration of a trust is intended as a trust, and not a precatory or honorary designation. ORS 130.185(1)
3. ORS 130.025
4. ORS 130.185(1)
5. ORS 130.185(3)
6. Matter of Application of Copland, 988 NYS2d 458 (NY Surr Ct 2014) (based on non-uniform statute)
7. ORS 130.185(2). The provision for compensation is not included in Uniform Trust Code §408, so a provision for compensation may be advisable if the trust is likely to take effect in another state.
8. ORS 130.040(2)
9. ORS 130.185(4). This is a departure from Uniform Trust Code § 408.
10. ORS 130.185(3)
11. ORS 130.900

Trust review by Social Security Administration and Oregon's Medicaid program

By Cynthia Barrett, Attorney at Law

Cynthia Barrett retired in 2016, and can be seen roaming the West in an RV. A past president of the Multnomah Bar Association and the National Academy of Elder Law Attorneys, she practiced law in Portland for 38 years, focusing on special needs planning, estate/elder law, and LGBTQ spousal benefits. She received the Leading Practitioner Award from the national LGBT Bar Association in 2016. She serves on the Oregon DHS OHA APD Rules Advisory Committee and as a Democratic precinct committee person. As this article demonstrates, she remains, as always, a special needs and elder law "nerd."

Author's note: *My thanks to Rick Mills and Bill Brautigam from the State of Oregon Department of Human Services, Portland attorneys Garvin Reiter, Eric Kearney, Melanie Marmion, and David Robinson, and Salem attorney Heather Gilmore, and Seattle attorney Sean Bleck, for sharing their insights and experience with me as I wrote this article. You are bright lights to all of us working in special needs planning.*

When and how will the Social Security Administration or the State of Oregon review the trust you draft or administer? The federal Social Security Administration reviews all trusts for SSI beneficiaries, and Oregon's Department of Human Services reviews all trusts for disabled or aged (65+) Medicaid beneficiaries.

The goal of this article is to provide a brief description of how trust review might arise in your practice, and an in-depth resource for SSI program and Medicaid program trust review.

This article focuses on the OSIPM Medicaid program for poor Oregon residents who are aged (65 or over) or disabled or legally blind, and meet the level of care requirements. Disabled Oregon residents who receive federal Supplemental Security Income (SSI) are presumed eligible for Oregon Medicaid.

This article does not examine the twists and turns of Medicaid eligibility for poor non-disabled adults under age 65 (the MAGI Medicaid expansion population), minor children from low-income families (the CHIP population), and other special populations (refugees, non-citizens, undocumented residents, former foster children).

Your practice and SSA and Oregon Medicaid trust review

In the following three common estate planning and trust scenarios, the elder law attorney will need to know about the federal Social Security Administration and Oregon Medicaid trust review process.

1. **Parents' estate plan.** The parents' estate plan includes an unfunded trust for a disabled child, and they need advice about how to deal with SSI and state Medicaid when the trust is funded and begins operation. Some parents execute several unfunded standalone special needs trusts in planning: an accumulation discretionary special needs trust to hold retirement benefits (a special form of third-party trust); a payback 42 USC 1396p(d)(4)(A) special needs trust to hold otherwise disqualifying funds the child receives before age 65 (a first-party trust, because the assets were owned by the child before transfer to the payback trust); and a standard third-party special needs trust to be funded with the parents' non-retirement fund assets.
2. **Existing trust; beneficiary declines and needs Medicaid.** An existing trust's beneficiary situation declines and he or she now needs Medicaid.
3. **New trust created for beneficiary already on Medicaid.** A new trust is created to benefit someone who already receives Medicaid.

Quick summary of agency trust review and the three common scenarios

1. **Parents' estate plan.** Planners can caution parents to select trustees who will follow Social Security Administration rules and state Medicaid agency rules on:
   a. reporting the existence of a trust so that the Trust Review process can be initiated
   b. following the advice of an experienced attorney in making trust distributions, to avoid problems with any public benefit programs the child might need
   c. preparing trust disbursement records and accounts in anticipation of periodic review by state and federal agencies
   d. preparing final trust distributions and termination final account when the corpus is exhausted or the beneficiary dies, to meet any agency requirements.

Agency review will be extensive for the payback trust with its mandatory federal and state termination clauses and restrictions. But when a beneficiary dies, an agency might also ask for a record of third-party special needs trust distributions and termination details if the agency has overpayment concerns or did not fully review the third party during the life of the beneficiary and is "catching up."

2. **Existing trust; beneficiary declines and needs Medicaid.** As part of an SSI application and the separate state Medicaid application, the beneficiary in decline must report the existence of the trust and provide a copy and other details to the agency. The trust created by a third party for the beneficiary may not be a countable resource if it is discretionary and meets other trust review requirements. However, a mandatory support trust will be an available resource, and mandatory income distributions might

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exceed the program's income limit. The trustee would then look for ways to alter the disqualifying nature of the trust.

In some cases, the consent of the beneficiary is needed to alter the trust. Altering the trust creates a transfer of assets penalty, unless the beneficiary is under age 65 and follows the strict rules for establishment of a discretionary first-party SNT. Some lawyers recommend petitioning the court to approve trust termination and transfer of the corpus to a newly established payback trust. 42 USC 1396p(d)(4)(A). Both the SSA (if SSI is sought) and the Oregon Medicaid agencies will review the old trust, the court process to create a new trust, and the new payback trust itself.

3. **New trust created for beneficiary already on Medicaid.** If an individual already on Medicaid becomes the beneficiary of a newly created trust, the trustee must know how to submit the trust for review to Oregon Medicaid and to SSA, if the beneficiary receives SSI-linked Medicaid. After a review to determine if the trust is a countable resource, both Social Security and Medicaid will want to determine if the distributions create countable income and, if so, whether that income disqualifies the trust beneficiary from benefits.

SSI trust review system

Federal Social Security Administration (SSA) trust review is designed to reduce SSI overpayments and fraud or abuse in the Supplemental Security Income program. SSA trust review will NOT occur unless a trust beneficiary also receives, or applies for, SSI. SSI is a needs-based program. Generally, the recipient is ineligible if resources are valued at more than $2,000 and if income is more than the SSI monthly check ($750 in 2018).

SSA trust review for its SSI program is separate and distinct from Oregon state trust review for the jointly funded state/federal Medicaid program (separately described in this article).

If a person qualifies for SSI, he or she is presumed to qualify for Oregon's Medicaid health care program. OAR 461-135-0010 (5)(a). If the trust beneficiary loses SSI, he or she also loses Medicaid, unless qualifying for Medicaid under separate state criteria. As a shorthand, elder law practitioners say, "SSI is linked to Medicaid."

The SSI program trust review is focused on whether, under SSI program rules, the corpus of the trust is an available resource, and trust distributions count as "income."

In its 2018 audit goals, the SSA Office of Inspector General decided to review SSA's effectiveness in monitoring trusts held by SSI recipients, and noted that more than 33,000 SSI recipients had trusts whose value had not changed over time, which suggested no verification by staff had occurred since the initial reporting. Audit Work Plan Fiscal Year 2018 . More efforts to monitor trusts benefiting SSI recipients can be expected.

The Omnibus Budget Reconciliation Act of 1993, P.L. 103-66 (OBRA '93), signed into law on August 10, 1993, contained several provisions that permit Medicaid and SSI recipients to establish certain trusts which could exist concurrently with public benefits and not cause program disqualification (payback self-settled first-party trusts, pooled trusts, and income cap trusts).

Over the last twenty years, the SSA has slowly developed processes and procedures, memorialized in the SSA Program Operating Manual System (POMS), that guide field workers in determining when trusts are countable resources, and when distributions from trusts are countable income. Distinctions between trusts and the review and reporting of income were not standardized, and inconsistent determinations confused lawyers and clients and program administrators alike.

To resolve issues, and deal with denials of SSI to trust beneficiaries, some Oregon lawyers developed relationships with Seattle SSA regional counsel and regional office trust reviewers. However, not all lawyers knew about the agency's internal workings or its POMS field office guidance. Trust beneficiaries and trustees and SSA representative payees were in the dark when they received letters from the agency demanding disbursement records or received denial of benefits notices for in-kind income distributions.

On April 28, 2014, the agency began an SSI Trust Monitoring System (SSITMS), which made the local SSA field offices the entry point for trust review. In 2013, the SSA released early staff training materials about the SSITMS. In November 2014, a roomful of elder law practitioners met at the Oregon State Bar to review the SSA training materials and early POMS that described the SSITMS work flow.

Since the SSITMS was instituted in 2014, the SSA has refined and streamlined its process, and on November 1, 2017, released new guidance reflecting the entire trust review process. POMS: SI 01120.202 *Development and Documentation of Trusts Established on or After 01/01/00.*

Trust formal review occurs at the time of initial application for SSI, and "post-eligibility" when a previously reviewed and approved trust is amended, or a new trust is established for the beneficiary and presented to the agency. Post-eligibility formal trust review also occurs when SSA policy "develops" so that a previously approved trust no longer qualifies as an exempt resource

Trust distributions are reviewed "periodically." In my experience, every three or four years some trustees of both third-party special needs trusts and self-settled first-party payback trusts would receive letters from the SSA requesting a list of disbursements and bank statements to confirm the funds remaining in the trust.

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Formal SSI trust review to determine if the trust is a countable resource

When the trust review process occurs is just as important as the steps the field office takes to develop the claim.

At application for existing trust. A trust for an SSI program applicant must be revealed and reviewed at the time of application to determine whether it constitutes an available resource.

Post-eligibility. After an SSI recipient begins to receive benefits, he or she must report changes in income or resources within ten days of receipt, so that eligibility can be reviewed. A newly created trust, or an amended trust, must be reported and reviewed. The SSI program refers to this as a "post-eligibility" review.

Trust creation. Post-eligibility, if a new trust is established for an SSI recipient, that new trust must be submitted to trust review. The trust beneficiary may not wish to report the newly created trust or may not be capable of handling that reporting task. To prevent SSI eligibility problems, the trustee for the new trust should submit the trust to the local field office for the beneficiary after creation and before it begins operation. Sometimes, I would accompany the trustee and beneficiary to the local field office to provide a copy of the trust and discuss the sorts of distributions the trustee intended to make.

Amendment of a previously approved trust. The newly issued POMS clearly provide that if a previously approved trust (third-party or first-party self-settled payback) is amended, the amended trust must again be submitted for trust review. The field office must determine whether the amended trust is now a resource, and, if the old trust has been in operation post-eligibility, whether distributions are now countable income.

SSA policy clarification changes resource status of trust. As the SSA has developed policy on trusts, sometimes a previously approved trust has been found to be an available resource. The trust review process, post-eligibility, can "undo" a previously approved trust. In this unusual case, the POMS direct the field office to consider waiving any overpayment. But the trust must then be amended if continued SSI eligibility is to be maintained. POMS SI 01120.200J.7.

Field office/regional trust team the SSI Trust Review System (SSITRS)

To properly "develop" eligibility of the trust beneficiary, the field office worker needs to receive: (1) a copy of the trust, (2) copies of any signed documents between organizations making payments to the individual and the individual legally entitled to such payments, if the payments have been assigned, either revocably or irrevocably, to the trust or trustee, (3) documents showing source of assets funding the trust, and in some cases,(4) records of payments or disbursements from the trust. SI 01120.202 C.3.

In addition to these items mentioned in the POMS, include any court orders establishing the trust, and bank/financial institution account statements to verify the amount of the corpus and that funds are held in the name of the trust.

To help the field office worker, the lawyer can draft a cover letter accompanying a duplicate original (if possible, not just a copy) of the trust that covers the field office's initial areas of inquiry (from SI 01120.202 A.1.a). Make sure to include the beneficiary's Social Security number on the cover letter! The cover letter should cover needed review items as follows:

- ***Trust was established before, on, or after 01/01/00***. Give date of establishment
- ***Assets were transferred into the trust before, on, or after 01/01/00.*** Give date(s) the trust was funded
- ***Trust contains assets of third parties.*** Tell worker whether the applicant's assets went into the trust, or third party's assets.
- ***Individual is grantor, trustee, or trust beneficiary.*** Tell worker the names.
- ***Trust is revocable or irrevocable.*** Tell worker whether trust is revocable or irrevocable, and where that language is in the trust (section, page).
- ***Trust provides for payments to the individual or on the individual's behalf.*** Tell worker where the trust provides for distributions, and where that language is in the trust (section, page).
- ***Trust generates income (earnings), and if so, whether the individual has the right to any of the income.*** Tell worker what annual income is generated, and whether the applicant has a mandatory income distribution or discretionary income distribution, and where that language is in the trust (section, page).
- ***Trust contains a spendthrift clause that prohibits anticipation of any trust payments.*** Tell worker where the spendthrift clause is in the trust (section, page).
- ***Trust is receiving payments from another source.*** Tell worker if the trust receives annuity, structured settlement, or other periodic regular infusions of principal, the source of those funds, and attach copies of the structure or annuity documents showing payee as the trust.

After establishing each of the items listed above, the local field office worker reviews any local regional instructions and regional precedents located at PS 01825.000.

The local field office worker then makes the initial resource determination about the trust, and enters the trust details into the SSITRS. This triggers the Regional Trust Review Team (RTRT) review of the FO determination.

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After the RTRT review, a decision is communicated to the claimant. During the process, the field office or regional team may require further information.

If SSA determines that the trust is a countable resource, and you do not agree, immediately file a request for reconsideration, which triggers a review by the Regional Trust Lead. The RTL will request further development of the facts and consult with the Office of General Counsel as needed. A reconsideration determination will then be sent to the claimant.

The SSA field office sends the SSI trust determination information to the State of Oregon Medicaid office.

Post-eligibility review of trust distributions as countable income

An SSI recipient is required to report new items of income that can affect eligibility within ten days of receipt. Trust distributions directly in cash to the SSI recipient trigger a reporting obligation and are (if over the $20 a month unearned income "disregard") countable income. Countable income reduces the SSI monthly check dollar for dollar. Distribution of $771 or more monthly (the grant amount plus the $20 disregard plus one dollar) in cash to the trust beneficiary on SSI will always be disqualifying.

The SSA learns about the beneficiary's unreported income by cross-matching beneficiary information with the IRS and other income source databases. When the SSA knows there is a trust, whether a third-party discretionary trust or a special needs trust (third-party or self-settled), the SSA will "periodically" send a letter to the beneficiary or trustee to ask for a record of all disbursements from the trust for a specific period.

The POMS do not define how often the SSA will review trust distributions, but I have had clients (trustees of both third-party and self-settled payback special needs trusts) receive the SSA letters requesting disbursement information every few years. Knowing these inquiries will come, the trustee needs to keep basic records: who received the distribution, when paid, the amount, and the purpose of the payment.

The SSA POMS policy on disbursements from trusts is at SI 01120.201I, issued in September 2015. A full discussion of trust distributions, including use of credit cards, reimbursements to relatives who advance funds, in-kind income, and payment for companion expenses, is beyond the scope of this article. But the SSA is known to be considering new POMS on trust distributions for companion expenses that should be issued this year.

SSA trust review of pooled trusts

Review of pooled trusts to determine whether they are countable resources has been a major focus of the SSITRS this past year. The SSA issued guidance on reviewing and establishing pooled trust precedential opinions and review on Feb. 12, 2016, in Emergency Message EM-16006 PolicyNet/Instructions Updates/EM-16006: Guidelines on Reviewing

A pooled trust enters SSITRS when, at application or in post-eligibility review, an SSI applicant or recipient reports the existence of a pooled trust subaccount. If a precedential opinion has been posted that confirms the pooled trust has qualified as an exception to resource counting, the field office will review only whether the subaccount joinder agreement is compliant and send that determination to the regional trust review team for review.

If one of your clients is a fiduciary for a disabled or aged Medicaid recipient with a pooled trust account, you might want to check to see if that trust has gone through the SSITRS. Even if the trust beneficiary never received SSI, the status of the pooled trust as an exempt resource will be important if the client receives Medicaid in Oregon.

Many pooled trusts around the country have undergone SSI trust review during the past year, and many have not been approved. If a disabled beneficiary self-settles a subaccount in a pooled trust that does not meet the SSI trust review requirements for an exception, the subaccount is an available resource. Some pooled trust subaccounts are established with third party funds and are not subject to payback. But any pooled trust account for an SSI recipient will be at risk if the overall pooled trust failed review and was deemed an available resource.

A single Oregon pooled trust has gone through SSA trust review in Washington. The Beagle, Burke, and Associates Master Pooled Asset Special Needs Trust (Beagle Trust) operates in both Oregon and Washington. Oregon attorney Garvin Reiter drafted the Oregon version of the Beagle Trust. Oregon has one "home-grown" pooled trust, the Oregon Special Needs Trust established by ARC Oregon. Two Oregon attorneys reported using Good Shepherd Fund Pooled Special Needs Trust (from San Jose, California) for Oregon residents.

The Washington form of the Beagle Trust and the Lifetime Advocacy Plus Master Pooled Asset Special Needs Trust (Lifetime Trust) were drafted by Sean Bleck of Somers Tamblyn Isenhour Bleck PLLC in Seattle, and successfully passed through the SSI program pooled-trust review process, as reported in the SSA POMS Title XVI Regional Chief Counsel Opinions.

Oregon Medicaid trust review

The Oregon Health Authority and Oregon Department of Human Services (OHADHS) act jointly in many respects, and between these two agencies administer Oregon's federal/state Medicaid programs. Two DHS agencies review trusts.

Seniors and People with Disabilities (SPD) does initial trust review when the beneficiary applies for Medicaid and checks the trust again at annual re-determination. Estate Administration Unit (EAU) —part of DHS's Office of Payment Accuracy Review (OPAR)—checks trusts at early termination, or at termination by death of the beneficiary. EAU is

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primarily looking to make the proper payback claim at trust termination, but sometimes its termination review triggers a broader investigation if trust problems give rise to an overpayment.

An Oregon Medicaid agency trust review might occur at four times: at the initial application, when eligibility is re-determined each year, during the year for newly established trusts, and at termination of the trust. Federal SSI program trust review does NOT extend to trust termination—but the state Medicaid program is entitled to payback from self-settled trusts at termination.

The program eligibility worker should receive a copy of any existing trust at application, and any newly established trust when it begins to operate. SPD's eligibility policy trust specialist William Brautigam advised that redacting private information from unavailable third-party/family trusts was acceptable to the agency. However, all trusts —whether third-party or self-settled, payback or not—should be provided to the agency to trigger the initial state review that determines whether the trust corpus is an available resource.

The eligibility worker sends a copy of the trust to the Estate Administration Unit in DHS's Office of Payment Accuracy and Review (OPAR). When the beneficiary dies, the EAU will again review the trust to determine if any payback claim should be filed.

An Oregon trust review will not occur unless the agency knows the trust exists! The OSIP application form, SDS539A, specifically asks whether income from a trust is received, and whether a trust exists. A person receiving Medicaid has a duty to report all changes in circumstances that might affect eligibility within ten days of the change. Establishment and operation of a trust for the benefit of a Medicaid recipient is a reportable event.

However, many beneficiaries do not report the existence of a newly established trust until an annual re-determination and some do not report the trust even then. When the state learns of the existence of a trust (from Social Security Administration, if that agency has performed its SSI trust review, or from cross-matching with IRS records, or during some random contact between the field office and the Medicaid recipient), the worker must check for possible overpayment or/and disqualification.

This "crisis trust review" is frightening for the beneficiary, and the agency sees the failure to report as suspicious. No trustee wants to be involved in this situation. By understanding how Oregon trust review should happen, the trustee (and advisors) can proactively get the review done and reduce stress for both beneficiaries and the state workers.

Oregon trust review primarily focuses on whether the trust is an available resource, and occurs at initial eligibility, annual re-determination, and trust termination. But the state agencies may also review trust distributions, and send letters to question whether the distributions were for the benefit of a disabled beneficiary.

Initial application to determine if a trust is a countable resource

First-party trust: All self-settled trusts set up by "a member of the financial group" (usually client or client's spouse) other than by will with funds of the client or client's spouse are:

- If revocable: countable resource OAR 461-145-0540 (8)
- If irrevocable: countable resource if client can conceivably access it. A transfer-of-asset penalty will be imposed if client or spouse funds were placed in the trust, and the corpus is unavailable, or if the trustee makes a distribution other than to or for the benefit of the client

Third-party trust: All trusts set up with third-party assets are reviewed to see if they are available to the client, and if available are countable resources unless the trust is irrevocable or restricted and cannot be used to meet the basic monthly needs of the financial group. OAR 461-140-0020(2)(e).

Permitted trusts: A pooled trust subaccount, a payback 42 USC 1396p(d)(4)(A) trust, and an income cap trust are reviewed for compliance with OAR 461-145-0540. Most pooled trust subaccounts are self-settled and have payback clauses; some pooled trust subaccounts are funded with third party funds (such as life insurance that names the pooled trust subaccount as a beneficiary–in which case a payback clause is not necessary).

Redetermination of eligibility. Continuing eligibility is re-checked each year. There are two different redetermination procedures. Direct contact is made if the trust beneficiary is NOT on SSI, and a desk audit is conducted if the trust beneficiary receives SSI. Oregon presumes the SSI recipient is eligible for Medicaid but checks electronic databases to confirm details.

- ***Does not receive SSI:*** If person is not on SSI, the branch initiates contact by mail or phone and may request additional information if desk audit turned up income or resource. A form is sent, and appointment scheduled.
- ***Receives SSI:*** The State of Oregon then presumes eligibility for Medicaid. OAR 461-135-0010 (5)(a). A desk audit of databases is done to check for continuing SSI eligibility and any unreported income; no contact may occur if no problems are seen.

Staff tool: *Understanding Trusts and Rules*

To begin determination of whether a trust is a countable resource, Oregon staff looks to the "Understanding Trusts" staff tool. OAR 461-145-0540, Trusts, and OAR 461-140-0020(2)(e), Availability of Resources.

Review at termination of the trust

Undisclosed trust. The state agency may discover the existence of a trust after the Medicaid recipient dies. The state will ask for a copy of the trust, and about trust funding and operation.

If the undisclosed trust (whether third-party or self-settled) was a

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Trust review

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countable resource, then an overpayment investigation will ensue. If the undisclosed trust was not a countable resource, but the trustee made distributions that were disqualifying (for example, distributions to a non-beneficiary relative or distributions of cash directly to the disabled beneficiary that were not reported as income) then an overpayment occurred.

Disclosed trust. If the trust was fully disclosed, and was not a countable resource, then at death or early termination the state may still ask for information about disbursements from the trust to check on overpayment problems.

Payback claim. The primary purpose of Oregon trust review at death of the Medicaid recipient, or at early termination of a payback trust, is to make the Medicaid payback claim. Only first-party self-settled trusts, self-settled pooled trust subaccounts, and income cap trusts are subject to mandatory Medicaid payback.

Richard H. Mills, Policy Analyst for the DHS Office of Payment Accuracy and Recovery (OPAR), advised that a pending rule change to OAR 461-135- 0835 will add a new section (6) about payback trust termination to conform Oregon administrative rules to the SSI POMS on permissible distributions at death or at early termination. Oregon's estate recovery process for payback trusts is now set out in administrative rule, providing more certainty and uniformity for special needs planners.

Mr. Mills provided a copy of the proposed rule, presented below. I have been following development of this rule in my role as a member of the Rules Advisory Committee. The Oregon Medicaid trust claim recovery process is based on the SSI POMS self-settled trust termination provision. The Oregon Medicaid agency rule will reflect the common Oregon practice of joint conservator/trust first party SNT administration, and describes how the state will determine whether charged trustee and conservator fees are reasonable.

The proposed first-party self-settled payback trust termination review rule reads as follows:

(6) For trusts under OAR 461-145-0540(10), upon termination of the trust or upon the death of the original beneficiary the trust pays to the State or States from such remaining amounts in the trust an amount equal to the total amount of medical assistance paid on behalf of the original beneficiary. The State or States must be listed as the first payee or payees and first remainder beneficiary or beneficiaries, and have priority over payment of other debts and administrative expenses, and other beneficiaries, except as allowed in subsection (a) of this section. Subsections (4)(d) and(4)(e) of this rule do not apply to this section.

(a) Allowable administrative expenses payable before any State include:

(A) Taxes due from the trust, excluding taxes due from the beneficiary, to the State or States or federal government because of the death of the beneficiary; and

(B) Reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust. Trustee fees or conservator fees, not both, are limited to the month of the original beneficiary's death and the prior month.

(i) For a person that is a trustee, but not a conservator, trustee fees after the month of death, if claimed, must be reasonable and approved by the by the Department prior to payment.

(ii) For a person that is a conservator and trustee, conservator fees after the month of death, if claimed, must be approved by the court, after the Department is given notice and opportunity to object.

(b) Upon the death of the original beneficiary, the following expenses and payments are examples of some of the types not permitted prior to reimbursement of the State or States for medical assistance:

(A) Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;

(B) Payment of debts owed to third parties;

(C) Trustee or conservator fees, except as allowed by subsection (a) of this section;

(D) Funeral expenses; and

(E) Payments to residual beneficiaries.

Distribution review in Oregon

Oregon has limited trust distribution review. However, more oversight can be expected in the future as Oregon's DHS develops its Integrated Eligibility (ONE) computer system, according to Bill Brautigam, state SPD eligibility policy trust specialist.

Oregon state trust distribution review can be triggered by complaints about the trustee. A beneficiary, or friends and relatives and vendors, may complain to state workers about trustee behavior. The Medicaid field office records anecdotes about questionable trustee behavior and those anecdotes might lead to an inquiry.

Trust review may be triggered if the Medicaid worker is sent copies of a joint conservatorship/trust annual account. To obtain bonding, some third-party special needs trusts operate in conjunction with a conservatorship, and larger first-party special needs trusts also are jointly operated with a conservatorship. In these court-supervised cases, the trustee sends annual accounts that detail trust distributions to interested persons including the state Medicaid agency.

Most special needs planners have received the occasional letter from a state eligibility worker that asks about particular distributions from a trust. Inquiries to trustees of approved third-party trusts are less common than inquiries to trustees of payback trusts. ■

Report on the 2018 legislative session

By Christopher Hamilton, Chair, Elder Law Section Legislative Subcommittee

Christopher Hamilton practices elder law and estate planning as a shareholder at McGinty Belcher & Hamilton, Attorneys, PC in Salem, oregon. Christopher enjoys doing educational workshops and working to improve the legal protections and planning tools available to elders and people with disabilities through work with many local, state, and national organizations, including serving as the Chair of the legislative committee of the Elder Law Section.

The 2018 Legislative short session saw passage of advance directive legislation and many smaller changes that will affect the practice of elder law in the State of Oregon. Below are the major bills the Legislative Committee engaged with and tracked during this session including their official catchlines/summaries, brief practice notes, and links to the Oregon Legislative Information System page for each bill.

Enacted

HB 4038
Official catchline/summary: Directs Director of Veterans' Affairs to study progress of establishment of Roseburg Oregon Veterans' Home. Prohibits sale or destruction of military medals and decorations by Department of State Lands. Permits Department of State Lands to deliver military medals and decorations to certain custodians. Directs Director of Veterans' Affairs to identify potential sites for veterans' cemeteries. Establishes program to provide outreach and assistance to incarcerated veterans. Expands definition of "disabled veteran" for preference in public employment to include person receiving service-connected disability pension from United States Department of Veterans Affairs who does not otherwise meet state definition of "veteran." Declares emergency, effective on passage.

Practice Notes: This summary of the bill captures the salient points. The studies related to the Roseburg Veterans' Home and possible additional veterans' cemeteries may yield additional resources for clients to be aware of in estate planning, protective proceedings, and probate matters. The reentry benefits and the hiring preference in public employment are unlikely to have significant impact on elder law practice.
Signed by Governor
https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/HB4038

HB 4073
Official catchline/summary: Permits State Mortuary and Cemetery Board to grant temporary operating permit for cemetery without operating license to perform interment. Declares emergency, effective on passage.

Practice Notes: This bill reinstates the authority of the Oregon Mortuary and Cemetery Board to grant temporary operating permits to cemeteries. The temporary permits are only available in situations where a decedent has a prearrangement sales contract, as defined in ORS 97.923, and the cemetery that is party to the contract is no longer licensed. The temporary operating permit only grants authorization to perform that specific interment. HB3242 of the 2015 legislative session granted this authority with a sunset date of January 1, 2018 as a pilot to test the ability of the authority to address the problem. During that pilot period, 145 temporary permits were issued. This authority is important to know about for clients who have or are considering advanced planning, including as part of a Medicaid spend down, as it provides a way to enforce that planning even if the cemetery loses its licensure.
Signed by Governor
https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/HB4073

HB 4094
Official catchline/summary: Provides that affidavit submitted to court in support of petition for approval of settlement of personal injury claim of incapacitated person, minor or decedent is confidential. Modifies information required in petition in protective proceeding seeking appointment of fiduciary. Requires person nominated or appointed as fiduciary to inform court of circumstances of certain events.
Practice notes: No emergency was declared, so this law becomes effective on January 1, 2019. This bill seeks to address two separate issues. First, the type of detailed financial and other personal information required in an affidavit to support a petition for approval of a settlement agreement should not be public record, and can endanger the incapacitated people, minor children, and estates that approval process is intended to protect. With this bill, that affidavit can now be filed confidentially, as long as the caption states it is confidential, so that it is only subject to inspection pursuant to a court order entered after showing of good cause. Second, there was an incident of

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Legislative report

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a professional fiduciary who was removed for cause in a protective proceeding in Eastern Oregon petitioning to be appointed in a Metro Area protective proceeding without disclosing that removal. Upon investigation, the judge involved and the bar found there was no requirement for a proposed fiduciary to disclose having been removed. This bill corrects that by requiring disclosure of any prior removal under ORS 125.225 or any conduct that caused a surcharge under ORS 125.025(3)(e). The bill also requires notice of any such removal or conduct in any ongoing protective proceedings the fiduciary is involved in. It should be noted that ORS 125.225 only covers the removal of a fiduciary. Resignation of a fiduciary is covered by ORS 125.085(2). Moving forward, it will be important to cite the correct authority for resignations under settlement agreements and any other circumstances to avoid confusion with removals that must be disclosed.
Signed by Governor
https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/HB4094

HB 4129
Official catchline/summary: Allows Health Licensing Office to issue residential care facility administrator license to qualified applicant. Renames Nursing Home Administrators Board as Long Term Care Administrators Board. Prohibits board from carrying out disciplinary action against licensee unless at least one board member who represents type of license held by licensee is present at board meetings related to disciplinary action. Requires individual currently employed as residential care facility administrator in Oregon, or individual seeking employment as residential care facility administrator in Oregon prior to January 1, 2022, to apply for residential care facility administrator license by July 1, 2019. Allows Health Licensing Office to issue provisional residential care facility administrator license to qualified individual. Requires individual who holds provisional residential care facility administrator license to obtain residential care facility administrator license not later than January 1, 2022. Declares emergency, effective on passage.

Practice notes: This bill is a result of recommendations from the Administrator Licensing Work Group, which was created by the Speaker of the House after passage in 2017 of HB 3359, which in turn established the Residential Care Quality Measurement Program and outlined several policy changes regarding residential and memory care facilities. This will have little direct impact on elder law practice, but is worth keeping an eye on for the possible impact to client care at residential care facilities.
Signed by Governor
https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/HB4129

HB 4135
Official catchline/summary: Establishes Advance Directive Adoption Committee for purpose of adopting form of advance directive to be used in this state. Specifies that form may not take effect unless form is ratified according to constitutional requirements for passage of legislative measures. Requires Advance Directive Adoption Committee to submit form of advance directive to interim committee of Legislative Assembly related to judiciary. Directs interim committee, upon receiving form, to file proposed legislative measure with Legislative Counsel. Repeals statute setting forth current form of advance directive used in this state. Sets forth alternative form of advance directive that may be used in this state until January 1, 2022. Modifies means by which advance directive is executed. Modifies law by which individual is selected to make health care decisions for another individual who becomes incapable of making health care decisions. Makes certain other changes to provisions governing individuals who become incapable of making health care decisions. Becomes operative January 1, 2019. Takes effect on 91st day following adjournment sine die.

Practice notes: This was the biggest change for elder law and estate planning in the 2018 Legislative session. The bill is the product of work by a number of groups since 2015 to begin the process of updating Oregon's advance directive to make it easier for consumers to understand and use in expressing their wishes. The bill establishes requirements for the form of an advance directive and calls for a committee to review the advance directive form at least every four years and propose any necessary changes.

The committee will consist of 13 individuals including the Long Term Care Ombudsman and three members of the Bar, one each with expertise in elder law and advising individuals on how to execute an advance directive, estate planning and advising individuals on how to make end-of-life decisions, and health law. Before any proposed changes take effect, they must be ratified by the Legislative Assembly during an odd-numbered-year regular session in the manner required for passage of bills and signed by the Governor.

The bill created a statutory form for the appointment of a health care representative and an alternate health care representative, equivalent to Parts A, B, D, and E of the current form. The bill also adopted a temporary form for the advance directive, which includes the form for the appointment of a health care representative and an alternate health care representative and adds the equivalent of Part C of the current form. The bill gave the committee authority to propose changes only to the form of the advance directive. Both new forms include an explicit notice that if the person does not appoint a health care representative, one will be appointed for them if they become too sick to speak for themselves in

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the order of priority set in ORS 127.635(2). The advance directive form also replaces the three lines for additional conditions or instructions on the current form with a specific note that additional instructions may be attached on additional pages.

Currently valid advance directives will continue to be valid and advance directives inadvertently executed on old forms will have full effect. However, current templates and forms used with clients to make appointments or create new advance directives should be updated by January 1, 2019, when the new forms go into effect.

The bill allows for a notary to witness either document instead of the two witnesses currently required for an advance directive. The bill also changes the current form by replacing "physician" with "health care provider," which is defined as "a person licensed, certified or otherwise authorized or permitted by the laws of this state to administer diagnosis, treatment or care of disease, injury and congenital or degenerative conditions, including the use, maintenance, withdrawal or withholding of life-sustaining procedures and the use, maintenance, withdrawal or withholding of artificially administered nutrition and hydration in the ordinary course of business or practice of a profession [or a health care facility]." The bill made a number of other technical changes that largely serve to remove confusing language and make the statute easier to understand.

Additional information about the changes and intent of HB 4135 can be found in the testimony before the House Health Care Committee and the Senate Judiciary Committee, available on OLIS at the link above.
Signed by Governor
https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/HB4135
For the new statutory forms, see Sections 5 and 6 of the bill at
https://olis.leg.state.or.us/liz/2018R1/Downloads/MeasureDocument/HB4135

SB 1534
Official catchline/summary: Requires Department of Human Services to establish minimum training standards for home care workers and personal support workers and to provide training. Directs department and Home Care Commission to maximize federal funding available to pay for training. Becomes operative January 1, 2020.

Practice notes: The official summary covers the salient details of the bill's effects. The major issue for elder law practitioners to keep an eye on is how this will impact the availability and cost of in-home care services for clients. The probable increase in the cost of such services will likely change affect Medicaid planning, both when looking at how long resources might last before needing benefits and in determining whether applying for benefits makes financial sense for clients.
Signed by Governor
https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/SB1534

SB 1549
Official Catchline/Summary: Allows continuation of medical assistance for specified period following admission to state hospital. Permits Department of Consumer and Business Services to approve health benefit plan that fails to comply with state prohibition on application of deductible if necessary to qualify plan for health savings account. Requires insurer and health care service contractor to reimburse out-of-network providers for services provided at in-network facilities in amount established by department in accordance with specified standards. Sunsets provisions on January 2, 2022. Requires department to report to interim committees of Legislative Assembly related to health, by July 1, 2020, on effects of changes in law on complaints of surprise billing, network adequacy, premium rates and enforcing compliance with new requirements. Declares emergency, effective on passage.

Practice Notes: This bill took on many issues related to health insurance. The Elder Law Section followed this bill because of the provisions related to Medicaid for State Hospital patients. Medicaid funds are prohibited from being used to pay for services provided to patients in the State Hospital because it is deemed a "institution for mental disease." This bill addressed the related problems of individuals losing Medicaid during State Hospital admissions and provided a way to ensure that individuals admitted to the State Hospital, or their guardians or conservators, will be able to maintain or reapply for health coverage rather than being discharged with no insurance.
Signed by Governor
https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/SB1549

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SB 1554

Official catchline/summary: Specifies that amount in account established for higher education expenses is disregarded for purposes of determining account owner's financial eligibility to receive assistance or benefit authorized by law, other than means-tested state financial aid for higher education, to extent permitted under federal law. Specifies that amount in account established for higher education expenses is disregarded for purposes of determining account owner's financial eligibility to receive assistance or benefit authorized by law, other than means-tested state financial aid for higher education, to extent permitted under federal law. Directs Higher Education Coordinating Commission to study potential effects on financial aid programs of excluding amounts in accounts established for higher education expenses from determination of expected family contributions and to study policies to incentivize saving for higher education expenses among families at or below median income. Applies to eligibility determinations made on or after January 1, 2019. Takes effect on 91st day following adjournment sine die.

Practice notes: This bill may make significant changes to special needs planning, estate planning recommendations, and Medicaid planning, however, the exact impact of the bill is currently unclear due to the dual federal/state nature of Medicaid and other means-tested benefits. If Medicaid, SSI, and related benefits fall into the category of programs covered by this bill, 529 education savings plans have just taken on a much greater role in estate, special needs, and Medicaid planning and could be used to protect significant resources within families.

Signed by Governor

https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/SB1554

Stalled

SB 1518

Authorizes cemetery authority to move, temporarily store or reinter human remains dislodged from original cemetery plot by natural disaster or other similar emergency. Adds Department of Justice to Oregon Homeland Security Council membership. Directs office of State Fire Marshal to include training in plan for coordinated response to oil or hazardous material spills or releases that occur during rail transport. Directs Office of Emergency Management to submit quarterly report on progress in preparing for natural disasters and similar emergencies to interim committees of Legislative Assembly related to emergency preparedness. Directs Office of Emergency Management to collaborate with marine and railroad operators to determine operators' roles in responding to natural disaster or catastrophic emergency event and to report, not later than March 31, 2019, on progress of integrating operators into state planning. Directs Office of Emergency Management to collaborate with other state agencies to review federal, California and Washington programs related to oil spill prevention, preparedness and response and to submit recommendations for legislation to interim committees of Legislative Assembly related to emergency planning not later than September 15, 2018. Takes effect on 91st day following adjournment sine die.

Practice Notes: This bill would have protected former clients whose final rest is disturbed by natural disasters or similar emergencies by providing a process for moving and reinterring them. Unfortunately, a host of unrelated issues were amended into the bill by taking advantage of the broadness of the relating clause, "Relating to emergency planning; creating new provisions." While it is quite likely provisions of this nature will become necessary at some point, the future of this issue is unclear.

In committee (Senate Ways & Means) upon adjournment.

https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/SB1518

This concludes the Legislative Subcommittee's report on the 2018 legislative session. The committee is always open to feedback and input from section members regarding issues of concern or areas for legislative action. If you have any issues you want the committed to consider, please email them to the current chair of the Legislative Subcommittee, Christopher Hamilton of McGinty Belcher & Hamilton, Attorneys, PC, at Christopher@McGinty-Belcher.com, including "legislative issue" in the subject line. ■

Resources for elder law attorneys

Events

Elder Law Section unCLE program
May 4, 2018
Eugene,
See page 4 for details

2018 NAELA Annual Conference and Pre-conference Workshop
May 16–19, 2018
New Orleans, Louisiana
https://www.naela.org/store/events/registration.aspx?event=2018ANNCON

That Wasn't the Plan: Understanding How Estate Plans Turn into Litigation
May 30, 2018/3:00–5:00 p.m.
Multnomah Bar Association CLE program
World Trade Center, Portland
https://mbabar.org/education/upcoming-mba-cle-classes/that-wasn-t-the-plan-understanding-how-estate-plans-turn-into-litigation-/

Social Security Disability: Recent Trends and Tips
June 1, 2018/9 a.m.–4:30 p.m.
OSB CLE program
Oregon State Bar Center, Tigard
or live Webcast on your computer
https://ebiz.osbar.org/ebusiness/Meetings/Meeting.aspx?ID=968

Trust Accounting 201
June 20, 2018/Noon—1:00
Sponsored by the OSB Solo & Small Firm Section
Oregon State Bar Center, Tigard

Advanced Estate Planning 2018
June 22, 2018/8:30 a.m.–4:45 p.m.
Multnomah Athletic Club, Portland or live Webcast on your computer
https://ebiz.osbar.org/ebusiness/Meetings/Meeting.aspx?ID=964

Trusts and Estates
September 19, 2018/Noon–1:00
Sponsoreed by the OSB Taxation Section
Red Star Tavern, Portland
RSVP: Justin Hobson

Annual Elder Law Section CLE Program
October 5, 2018
Oregon Convention Center, Portland
The sessions will focus on basic elder law topics. Details TBA

Basic Estate Planning and Administration
November 16, 2018
Multnomah Athletic Club, Portland ■

Websites

Elder Law Section website
https://elderlaw.osbar.org
The website has links to information about federal government programs and past issues of the Section's quarterly newsletters.

National Academy of Elder Law Attorneys (NAELA)
www.naela.org
A professional association of attorneys dedicated to improving the quality of legal services provided to elders and people with special needs

National Center on Law and Elder Rights
https://ncler.acl.gov
One-stop support center for the legal services and aging and disability community to access trainings and technical assistance on a broad range of legal issues that affect older adults.

OregonLawHelp
www.oregonlawhelp.org
Helpful information for low-income Oregonians and their lawyers

Aging and Disability Resource Connection of Oregon
www.ADRCofOregon.org
Includes downloadable *Family Caregiver Handbook*, available in English and Spanish versions

Administration on Aging
www.aoa.gov
Information about resources that connect older persons, caregivers, and professionals to federal, national, and local programs.

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

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. ■

Bar Books

Available on the Bar Books section of the Oregon State Bar website.

Elder Law (OSB Legal Pubs 2017)

Elder Law 2016: Advanced Concepts, 2016 CLE materials

Elder Law Elements: 2015 CLE materials ■

Elder Abuse Hotline: 855.503.7233

This toll-free number enables you to report abuse or neglect of any child or adult to the Oregon Department of Human Services. ■

Important elder law numbers

as of
January 1, 2018

Supplemental Security Income (SSI) Benefit Standards	Eligible individual ..... $750/month Eligible couple $1,125/month
Medicaid (Oregon)	Asset limit for Medicaid recipient ..... $2,000 Long term care income cap ..... $2,250/month Community spouse minimum resource standard ..... $24,720 Community spouse maximum resource standard ..... $123,600 Community spouse minimum and maximum monthly allowance standards ..... $2,030/month; $3,090/month Excess shelter allowance ..... Amount above $609/month SNAP (food stamp) utility allowance used to figure excess shelter allowance ..... $454/month Personal needs allowance in nursing home ..... $61.38/month Personal needs allowance in community-based care ..... $167/month Room & board rate for community-based care facilities ..... $583/month OSIP maintenance standard for person receiving in-home services ..... $1,250 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2016 ..... $8,425/month
Medicare	Part B premium ..... $134.00/month* Part D premium ..... Varies according to plan chosen Part B deductible ..... $183/year Part A hospital deductible per spell of illness ..... $1,340 Skilled nursing facility co-insurance for days 21–100 ..... $167.50/day * Premiums are higher if annual income is more than $85,000 (single filer) or $170,000 (married couple filing jointly).

Oregon State Bar

Elder Law Section