

**Volume 22
Number 4
October 2019**

**Elder Law Section
Executive
Committee**

Chair

Darin Dooley
Lake Oswego

Chair-elect

Theresa Hollis
Portland

Past Chair

Jan E. Friedman
Portland

Secretary

Andrea Ogston
Portland

Treasurer

Kathryn Belcher
Salem

Members

Corey P. Driscoll
Bend

Kay Hyde-Patton
Springfield

Jennifer Kwon
Portland

Michael Mayerle
Medford

Matthew McKean
Hillsboro

Anastasia Yu Meisner
Portland

Julie C. Nimnicht
Portland

Monica Pacheco
Salem

J. Thomas Pixton
Lake Oswego

Julie Meyer Rowett
Portland

2019 legislative highlights

By Christopher Hamilton, Attorney at Law

The 2019 Legislative session saw passage of three bills from the Probate Modernization Work Group that address small estates, personal injury claims, wrongful death claims, and other cases where a personal representative is required for an estate without assets. The session also saw multiple bills that add substantive and procedural duties for guardians, alter the senior property tax deferral program, and make many other changes that will affect the practice of elder law in Oregon. Below are the major bills passed during this session that relate to elder law, including their official summaries, brief practice notes, and links to the final text of each bill.

HB 2088

Summary: Allows Department of Consumer and Business Services to restrict or suspend operations of endowment care cemetery for specified reasons. Authorizes specified parties to petition for appointment of receiver for endowment care cemetery for specified reasons. Authorizes specified parties to petition

circuit court to require cemetery authority to expend endowment care funds. Authorizes department, in collaboration with State Mortuary and Cemetery Board, to adopt rules related to endowment care cemeteries. Declares emergency, effective on passage. (Amends ORS 97.810, 97.825 and 97.928)

Practice notes: This bill may prove important for clients looking to care for deceased loved ones and for those looking to be buried in an endowment care cemetery. Should such clients run into problems with the management or care of such cemeteries, this bill provides tools for seeking state assistance to rectify the situation.

Effective date: March 27, 2019

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2088/Enrolled>

HB 2285

Summary: Clarifies receivership proceedings and reporting and notice requirements for residential properties that city or county determines are a threat to public health, safety, or welfare. Allows city or county to obtain judgment against property in lieu of receivership. (Amends ORS 105.425, 105.430, 105.435, 105.440, and 105.455)

Practice notes: Attorneys who represent personal representatives, conservators, trustees, and others who manage properties that may be sitting vacant need to be aware of the increased authority that this gives city and county governments to require abatement of housing and building code violations. City and county governments can, in lieu of having a

In this issue

Focus on legislation

Legislative highlights 1

Plus

ABLE accounts 13
 Disqualifying transfers 15
 Resources for clients 18
 SSA rule on special-needs trusts... 22
 Index to Volume 22 24
 Resources for elder law attorneys .. 25
 Important elder law numbers 26

Continued on page 2

Legislative highlights *Continued from page 1*



Christopher Hamilton is a partner with Salem firm McGinty, Belcher & Hamilton. He is Chair of the Elder Law Section's legislative subcommittee.

receiver appointed, get a general judgment for the estimated cost of abatement against property that is not being occupied as a dwelling if the estimated cost of abatement is greater than 25% of the real market value in the last certified tax roll. This judgment can be entered as a lien with priority over nearly all existing liens, pursuant to ORS 105.445.

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2285/Enrolled>

HB 2460

Summary: Provides that transferee of tax-deferred homestead is liable for amounts of outstanding deferred property taxes due on homestead if transferee is using homestead more than 90 days following taxpayer's death and is potential recipient of homestead under intestate succession or by devise, or received homestead from estate of deceased taxpayer or right to homestead by gift or assignment from insolvent taxpayer. (Amends ORS 311.695)

Practice notes: This is the bill that the Elder Law Section put forward during the 2019 legislative session. It is a fix for situations in which a property involved in the senior tax deferral program is underwater at the death of the owner. Prior to passage of this law, the letter of the statute seemed to suggest an heir was jointly and severally liable for the deferred property tax debt, even if that heir took no beneficial interest in the property or any other property of the estate. The Oregon Department of Revenue issued a number of tax demands to heirs under these circumstances. The bill ensures that an heir is only jointly and severally liable if he or she occupies, leases, or uses the property for more than ninety days after the death of the deferral program participant and is a potential recipient by intestate succession or devise, receives the property from the estate, or receives the property by gift or assignment from an insolvent owner.

Effective date: September 29, 2019

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2460/Enrolled>

HB 2524

Summary: Requires long-term-care facilities, residential facilities and adult foster homes to inform residents about availability and services of the Long Term Care Ombudsman and Residential Facilities Ombudsman. Excuses Long Term Care Ombudsman from reporting abuse of a person who is 65 years of age or older or who is residing in a long-term-care facility if report would violate federal law. (Amends ORS 124.060 and 441.640)

Practice notes: This bill accomplishes two goals relevant to elder law. First, it provides that persons who move into long term care facilities, residential facilities, or adult foster homes must be informed of the existence and services of the Long Term Care Ombudsman (LTCO). This will help elder law attorneys assist clients in care settings to assert and protect their rights as needed. The bill also removes a potential conflict between federal and state law regarding the LTCO being a mandatory reporter for elder abuse.

Effective date: May 14, 2019

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2524/Enrolled>

HB 2587

Summary: For purposes of homestead property tax deferral program for seniors and persons with disabilities, changes the prohibition on a homestead with outstanding deferred property taxes from being pledged as security for a reverse mortgage to a prohibition on homestead pledged as security for reverse mortgage from being granted deferral under program. Makes exception for certain homesteads to prohibition on reverse mortgages for participation in homestead property deferral program for seniors and persons with disabilities. (Amends ORS 311.700)

Practice notes: Understanding this bill requires a bit of legislative history. The Oregon Property Tax Deferral for Disabled and Senior Citizens program, in

Continued on page 3

Legislative highlights *Continued from page 2*

which the state pays a financially eligible elder's property taxes, places a lien against the property, and is repaid with interest at sale or transfer of the property, historically allowed for elders with reverse mortgages to participate. After the economic collapse, the program could not sustain its financial commitments and needed to be constricted. Among other things, the legislature added a prohibition against use of a property that was subject to any outstanding debt under the program as security for a reverse mortgage. As the economy recovered and the program not only became solvent, but started running at a surplus, the legislature has moved to loosen the restrictions on participation. In 2012 and 2013, the legislature allowed elders with reverse mortgages to access the program if those reverse mortgages had been executed within a period ending on June 30, 2011.

This bill does two basic things. First, it switches the prohibition on pledging a property with outstanding debt under the program as security for a reverse mortgage to a prohibition on accessing the program if there is an existing reverse mortgage. Second, the bill exempts reverse mortgages executed on or after July 1, 2011 (i.e., after the previous exemption expired) and before January 1, 2017, provided the equity in the homestead is 40% or more. The January 1, 2017, date is based on a change in federal standards for reverse mortgages that went into effect for reverse mortgages on or after that date and requires an analysis of the borrower's ability/willingness to pay taxes and requires a life-expectancy set-aside for those taxes if there are concerns. This federal change makes it extremely unlikely that any elder with a reverse mortgage executed on or after January 1, 2017 would qualify for the program. These changes are important to keep in mind for estate planning and Medicaid planning since both a reverse mortgage and the senior property tax deferral program can both be useful tools in those processes.

Effective date: September 29, 2019

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2587/Enrolled>

HB 2598

Summary: Permits creation of certain noncharitable business purpose trusts. Provides exemption from statutory rule against perpetuities for certain noncharitable business purpose trusts if terms of trust clearly elect exemption. (Amends ORS 105.965, 130.040, 130.045, and 130.155)

Practice notes: This bill came forward to address concerns of owners of purpose-driven businesses who want to ensure the purpose of their business carries on after they retire or die. Oregon currently has statutes allowing for benefit corporations, which allow for a charitable mission to be incorporated into a for-profit business's structure, and allowing for noncharitable purpose trusts, which exist without a specified beneficiary for the purpose of accomplishing a specific non-charitable mission. However, benefit corporations are easily changed by future owners and purpose trusts are limited to ninety years by the rule against perpetuities. This bill addresses these shortcomings by creating a new type of trust called a stewardship trust with several specific traits, including the new positions of "trust enforcer" and "trust stewardship committee." A stewardship trust:

- Must be created for a business purpose, and that purpose can seek economic and noneconomic benefits
- May hold an ownership interest in any corporation, partnership, limited partnership, cooperative, limited liability company, limited liability partnership, or joint venture
- Must have a trust enforcer who is not a trustee or a member of the trust stewardship committee. The trust enforcer is not a beneficiary of the trust but has all the rights of a qualified beneficiary. The trust enforcer has a fiduciary duty to enforce the terms and purpose of the trust. A trust can appoint one or more trust enforcers and provide a method for appointing successors. If no trust enforcer is acting, the court shall name one or more trust enforcers. If more than one trust enforcer is acting, action may be taken by a majority of the persons acting as trust enforcers.
- Must have a trust stewardship committee with at least three members, each of whom shall exercise authority as a fiduciary. The initial trust stewardship committee members can be named in the trust, along with successors or a process for selecting successors. If there is a vacancy on the trust stewardship committee that must be filled, it shall be filled in the following order of priority: according to the trust, by a person appointed by unanimous agreement of the trust enforcer(s), or by a person appointed by the court. Generally, the trust stewardship committee may act by a majority vote. Unless otherwise provided in the trust, the trust stewardship committee shall have the following powers in carrying out the purposes of the trust and after notice to the trust enforcer(s):
 - o Remove a trustee, with or without cause

Continued on page 4

Legislative highlights *Continued from page 3*

- o Appoint one or more successor trustees or co-trustees
- o Remove a trust enforcer, with or without cause
- o Remove a member of the trust stewardship committee by unanimous vote of all other members of the trust stewardship committee
- o Direct distributions from the trust
- o Exercise all rights of the trustee, including voting stock
- Trust stewardship committee members and trust enforcers may resign with 30 days' notice to the trustee, all trust enforcers, and all members of the trust stewardship committee, or upon approval of a court, unless otherwise provided in the trust.
- Trust stewardship committee must send a report to the trustee and to the trust enforcer(s) at least annually that shows receipts and disbursements and lists trust property and liabilities and keeps the trustee and trust enforcer(s) reasonably informed to enable them to fulfill their duties.
- Trustee shall act on direction of the trust stewardship committee unless manifestly contrary to the trust or a breach of fiduciary duty. Trustee is only liable for willful misconduct, not for reliance on documents provided by the trust stewardship committee or the trust enforcer(s).
- May be modified or terminated by unanimous action of the trust stewardship committee and the trust enforcers.
- Upon termination, all remaining property shall be distributed as the terms of the trust provide, or if the terms of the trust do not provide for complete distribution of the property, as a court determines to be consistent with the purposes for which the trust was created.
- Can elect to be exempt from the rule against perpetuities by specific reference to ORS 105.965(8) and by provision for a specific duration in excess of ninety years or provision for an indefinite duration.

This could be a powerful new estate/succession planning tool for business owners with a passion for service to

their communities who want to ensure that service lives on. However, attorneys will need to be very careful and specific in drafting to ensure all of the statutory requirements are properly embodied in the trust and ensure it is able to take advantage of the new provisions. Additionally, attorneys representing a settlor, or any fiduciary involved in a stewardship trust, should send a detailed letter to their client(s) outlining their duties under the trust. Attorneys also need to be cautious in representation of parties related to a stewardship trust, to avoid conflicts of interest that might arise from serving more than one party. As this is a brand-new type of trust in Oregon, it will be important for attorneys to look to other states—such as Delaware—where similar trusts have been attempted and to share with each other as appropriate documents are developed.

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2598/Enrolled>

HB 2601

Summary: Limits guardian's authority to limit protected person's preferred associations with third parties. Permits interested person to move court to review guardian's power to limit protected person's associations and requires court to conduct hearing. Permits court to remove guardian for unreasonably limiting protected person's associations or failing to perform certain duties. Requires guardian to utilize substituted judgment standard for making decisions on behalf of protected person. Permits guardian to utilize best interest standard if guardian is unable to determine protected person's preferences. (Amends ORS 125.080, 125.225, 125.315 and 125.325.)

Practice notes: This bill is the result of a few years of back and forth over promotion of self-determination for protected persons and protection against guardians improperly denying access to protected persons. It makes a number of procedural changes and codifies many things that guardians were generally already doing, but it does so in a manner that is vague and increases the exposure of guardians to litigation. The changes made by this bill include, but are not limited to:

- Prohibiting a guardian from limiting "a protected person's preferred associations" unless specifically allowed by a court or if "necessary to avoid unreasonable harm to the protected person's health, safety or well-being." The bill provides no definition of "preferred associations," but does state that, for protected persons who cannot communicate, "preferred associations" will be presumed based on prior relationships.
- Creating a motion process to challenge restrictions on association with a mandatory hearing, which can result in removal as guardian and an award of attorney fees and costs associated with the motion if a guardian is found to have unreasonably limited association. The statute does not

Continued on page 5

Legislative highlights *Continued from page 4*

specify attorney fees against a guardian.

- Requiring the guardian to:
 - o “become or remain personally acquainted with the protected person, and maintain sufficient contact with the protected person, including through regular visitation, to know the protected person’s abilities, limitations, needs, opportunities and physical and mental health”
 - o Get to know, to the extent practicable, the protected person’s values and preferences and including the protected person in decision making.
 - o Make “reasonable efforts to identify and facilitate supportive relationships and services”
 - o Make the decision they reasonably believe the protected person would make, based on previous or current instructions, preferences, opinions, values, and actions, to the extent known or reasonably ascertainable, unless that decision would unreasonably harm or endanger the protected person
 - o Decide in the protected person’s best interest based on information from professionals and interested persons, information the guardian believes the protected person would consider, and other factors a reasonable person would consider, including consequences for others, only if the guardian is unable to make a decision the protected person would make
- Adding an item to the annual guardian’s report regarding any limitations on association

Given the extensive nature of these changes, attorneys should review the statute in detail, update the letter sent to newly appointed or prospective guardians regarding their duties as guardian, update guardian report forms, and send a letter to all existing guardian clients to advise them of these changes before they go into effect.

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2601/Enrolled>

HB 3006

Summary: Modifies procedures for probate of estate with no known assets. Allows personal representative to file statement in lieu of certain required accountings if distributees of estate consent in writing. (Creates new provisions; amends ORS 113.035, 113.105, 113.155, 113.165, 113.175, 115.003, 115.135, 116.083, and 116.113.)

Practice notes: This is the first of the three bills put forward by the Probate Modernization Work Group this session. This bill establishes procedures for probate in cases where there are no assets in the probate estate, but a personal representative (PR) is needed to pursue a wrongful death claim, obtain medical records, or deal with other affairs of the decedent. The bill waives or defers many requirements of the probate process that don’t make sense in the absence of assets, doing the following:

- Adding an option to state in the petition for probate that the estate has no assets and, in such cases, requiring a statement of the purpose for appointing a PR
- Waiving the bond, the publication of notice, the declaration of compliance and notice to creditors, and the deadline for allowance or disallowance of claim, unless assets are later discovered
- Allowing for an inventory to be filed stating no property of the estate has come into the knowledge or possession of the PR and requiring the filing of a supplemental inventory if property of the estate comes into the knowledge or possession of the PR at a later date
- Allowing for a verified statement in lieu of annual accounting, similar in form to the verified statement in lieu of final accounting
- Allowing for a motion to close the estate, with requirements established in the bill, in lieu of a final accounting

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB3006/Enrolled>

HB 3007

Summary: Modifies provisions relating to small estates. Clarifies that execution of bargain and sale deed does not place personal representative of estate in chain of title to property conveyed, except under certain circumstances. Clarifies procedure for opening and examination of contents of safe deposit box of decedent. (Creates new provisions; amends ORS 58.387, 112.238, 113.238, 114.215, 114.505, 114.515, 114.517, 114.520, 114.525, 114.535, 114.537, 114.540, 114.545, 114.550, 114.552, 114.555, 114.560, 116.223, 130.150, 238.390, 238.458, 446.616, 708A.655, 723.844, and 803.094.)

Practice notes: This is the second of three bills from the Probate Modernization Work Group. The bill modifies the process for use of the small estate affidavit (affidavit) in probate

Continued on page 6

Legislative highlights *Continued from page 5*

proceedings involving estates with less than \$75,000 in personal property and \$200,000 in real property. The modifications include, but are not limited to:

- Specifying that the fair market value of the estate is determined at the time of the death of the decedent or, if the date of death is more than one year before the date of filing, then within 45 days of the filing
- Prohibiting use of the affidavit if the affiant would be disqualified from acting as a personal representative or if person has been convicted of a felony in Oregon or another jurisdiction
- Providing a process for filing an amended affidavit
- Specifying that if the value of the property of the estate exceeds the limitations for a small estate, the authority of the affiant is terminated and a personal representative must be appointed
- Increasing the information that must be disclosed in an affidavit
- Providing notice of the duty of others to pay to the affiant any debt owed to the decedent and to turn over property of the decedent to the affiant, and requiring notice of those duties to be included on the first page of the affidavit, which must be sent to potential debtors and creditors
- Updating the process for compelling payment of debt or transfer of property
- Prohibiting creditor from using summary review provisions if a claim was properly presented and disallowed and summary review was not sought within the time required
- Allowing attorney fees to a prevailing party in cases in which a court finds an affiant filed a motion to compel payment of a debt or delivery of property without an objectively reasonable basis, or the other party refused to deliver the property or pay the debt without an objectively reasonable basis
- Specifying the procedure for claims against a small estate
- Updating the process for the court to make a summary determination of a claim against a small estate

- Affirming that the affiant is a fiduciary with a general duty to administer, preserve, settle, and distribute the estate and prohibiting commingling of property of estate with that of the affiant or any other person
- Updating rules on selling or transferring property of the estate
- Detailing liability of the affiant, including liability for losses due to neglect, commingling, self-dealing, or negligence in administration of the estate
- Removing automatic transfer provisions
- Updating process for an heir, beneficiary, or creditor to obtain amounts owed from estate through summary review

The bill also clarified ORS 112.238, which allows a petition to show that a writing was intended to be a decedent's will, even if not properly executed, by adding an additional cross reference to the requirement that a petition under ORS 113.035 be served and by specifically authorizing a petition to establish a decedent's intent that a writing be the decedent's will, in addition to the previous provision which allowed for filing of a writing that is not a properly executed will as a will if the proponent can establish by clear and convincing evidence that the writing was intended as the decedent's will, a partial or complete revocation of the decedent's will, or an addition or alteration to the decedent's will. Finally, the bill makes numerous clerical amendments to adapt to the substantive changes in the small-estate statutes.

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB3007/Enrolled>

HB 3008

Summary: Requires approval by probate court of settlement of personal injury claim or wrongful death claim arising out of injuries to decedent. Modifies provisions relating to probate proceedings related to personal injury claims and wrongful death claims. Modifies provisions relating to misstatement of value of asset in certain probate inventories and accounts. (Creates new provisions; amends ORS 30.030, 113.015, and 116.173.)

Practice notes: This is the last of the three bills put forward by the Probate Modernization Work Group this session. This bill addresses the probate process for cases where there is a personal injury (PI) or wrongful death (WD) claim attached to the decedent. It makes the following changes in PI and WD cases:

- Clarifying that a PR can petition for court approval of a settlement without having filed a claim on the underlying PI or WD matter
- Requiring that a petition to approve a PI or WD settlement must include a declaration:
 - o Stating whether the claim is PI or WD
 - o Describing the incident leading to injury/death and the injuries incurred

Continued on page 7

Legislative highlights *Continued from page 6*

- o Stating the amount of the claim, the settlement, the attorney fees and costs, any reimbursements owed under ORS 30.030(3) and, for PI, ORS 416.540, and any PR fee attributable to a WD claim
- o Stating reasons for settlement and efforts to maximize recovery
- o Stating the attorney has examined the applicable medical records
- o Explaining why it is appropriate to settle
- Requiring the court—in cases where a PI claim that has not been adjudicated or settled is the only asset of the estate—to defer bond until settlement is approved, and accept an update on the status of the PI case in lieu of an accounting

HB 3008 also provides the following in situations where the sole purpose of filing a probate is to appoint a PR to pursue a WD case:

- The following must be included with the petition to appoint PR:
 - o A statement that the petitioner is filing for the sole purpose of pursuing a WD claim
 - o The named's relationship to decedent, and post office address of beneficiaries, and age of minor beneficiaries
 - o A statement that reasonable efforts have been made to locate and identify all beneficiaries and indicating any omissions
- Information must be sent to the beneficiaries and to Department of Human Services (DHS) and Oregon Health Authority (OHA). This notice goes to the Estate Administration Unit (EAU):
 - o Title of the court in which the estate is pending and the case number
 - o Name of decedent and place and date of death
 - o Name and address of PR, attorney for the WD case, and attorney for the estate
 - o Date of the appointment of the PR
 - o Statement advising the beneficiaries that the rights of the beneficiaries may be affected

by the proceeding and that additional information may be obtained from the records of the court, the personal representative, or the attorney for the personal representative.

- If the PR has actual knowledge that the petition omitted a beneficiary, the PR has a duty to make reasonable efforts to find the beneficiary and send him or her notice.
- The following requirements are waived if no assets are discovered:
 - o Information to devisees, heirs, and interested persons under ORS 113.145
 - o Publication of notice
 - o PR Bond
 - o Proof of compliance of diligent search under ORS 115.003
 - o Inventory
- PR may file an annual status report on the WD case in lieu of an accounting.
- PR may file a motion to close rather than a final accounting. The motion to close may be filed after the resolution of the WD claim and distribution of any funds recovered, but no sooner than 4 months after notice to beneficiaries and EAU. The motion must:
 - o State no assets have been found and the WD claim has been resolved
 - o Include receipts or other evidence of distribution of the WD claim proceeds
 - o Be sent to each beneficiary not less than 20 days before the time for filing objections
- PR is discharged by granting of motion to close and that discharge may only be challenged for one year after the judgment is entered.
- WD settlement proceeds must be placed in the IOLTA account of the attorney for the PR in the WD or probate case or a court-restricted account before being distributed pursuant to ORS 30.030.

The bill also updates the PR fee statute to add PI and WD proceeds to the amount of the estate for calculating the fee and clarifies that the highest correctly reported value of each asset is to be used in the calculation, excluding any materially misstated values. Finally, the bill adds any county where a PI or WD claim could be maintained to the list of acceptable venues for a probate.

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/EB3008/Enrolled>

Link to the report of the Probate Modernization committee that provides additional details regarding HB 3006-3008:

<https://elderlaw.osbar.org/files/2019/10/HB-3006-3008-Probate-Mod-Report.pdf>

Legislative highlights *Continued from page 7*

HB 3447

Summary: Increases certain filing fees, motion fees, settlement conference fees, trial fees, fees for writs of garnishment, marriage solemnization fees, and prevailing party fees. Directs State Court Administrator to study issues relating to courts. (Creates new provisions; amends ORS 18.999, 20.190, 21.135, 21.145, 21.155, 21.160, 21.170, 21.180, 21.200, 21.205, 21.215, 21.225, 21.235, 24.115, 24.135, 36.425, 46.570, 105.130, 106.120, and 205.320.)

Practice notes: HB 3447 raises filing fees for filings on or after October 1, 2019. The filing fees most relevant to elder law will be increased to the following:

- Guardianship (\$124)
- Petition to appoint PR or conservator for estate with value:
 - o Less than \$50,000 (\$278)
 - o \$50,000 or more, but less than \$1 million (\$591)
 - o \$1 million or more, but less than \$10 million (\$882)
 - o More than \$10 million (\$1,176)
- Accounting for estate or conservatorship with value
 - o Less than \$50,000 (\$35)
 - o \$50,000 or more, but less than \$1 million (\$298)
 - o \$1 million or more, but less than \$10 million (\$591)
 - o More than \$10 million (\$1,176)

Effective date: July 23, 2019 (New fees effective October 1, 2019)

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB3447/Enrolled>

SB 20

Summary: Consolidates eligibility for services to children and adults with developmental disabilities. Modifies types of developmental-disability services that may be offered, and eligibility for services and entities that may deliver services. Establishes new terminology. (Amends ORS 427.101, 427.107, 427.115, 427.121, 427.154, 430.662, and 430.664; repeals ORS 427.160.)

Practice notes: The changes in this bill may come into play for attorneys who help implement special-needs planning

and other supports for adults with developmental disabilities. The bill grants individuals receiving developmental disability services through the Department of Human Services the right to be informed about their services and to be included to the greatest extent practicable in the decision-making process for these services, including decisions about where to live, who to receive services from, and what is important in quality assurance for those services.

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB20/Enrolled>

SB 31

Summary: Permits Oregon Public Guardian and Conservator to establish county, regional, and statewide high-risk teams to determine options available for addressing safety risks facing highly vulnerable adults. Permits high-risk teams to disclose protected health information and other confidential information in certain situations.

Practice notes: This bill codifies and expands the screening process of the Oregon Public Guardian and Conservator (OPGC), using high-risk teams of area service providers, eight of which already operate in regions of the state, to identify those most in need of intervention and working to find appropriate interventions, up to and including use of the OPGC and state hospital if no less restrictive alternatives are viable. Elder law attorneys should identify the entities involved in the high-risk team in their area, both as a resource for clients whose needs have grown to exceed their resources and to consider making themselves available in cases where a guardian is necessary but the OPGC is unable to intervene due to service priorities and budget constraints.

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB31/Enrolled>

SB 163

Summary: Provides that Oregon 529 Savings Board may collect certain fees to defray costs of ABLE program. (Amends ORS 178.380.)

Practice Notes: This bill allows for application, account, and administrative fees to be collected to defray the cost of the ABLE program. Attorneys should inform clients of this change when considering the use of an ABLE account for special-needs planning. Also, since many states' ABLE programs allow out-of-state individuals to maintain accounts and offer a variety of costs, access options, and investment options, attorneys should encourage clients to shop around to ensure the ABLE program they choose best meets their needs.

Effective date: September 29, 2019

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB163/Enrolled>

Continued on page 9

Legislative highlights *Continued from page 8*

SB 178

Summary: Permits health care representative to make election for hospice treatment on behalf of incapacitated principal with terminal condition who does not have valid advance directive. (Amends ORS 127.635)

Practice notes: This bill clarifies the powers of an unappointed health care representative to elect hospice treatment. An unappointed health care representative can act under ORS 127.635 if an individual is incapable, does not have a health care representative appointed in an advance directive or appointment of health care representative, and has a terminal condition, is permanently unconscious, has a condition in which life support would cause permanent and severe pain without causing meaningful improvement, or has a progressive illness that will be fatal and has reached a stage where the individual is consistently and permanently unable to communicate by any means, swallow food or drink, care for himself, and recognize family and others, when that condition is very unlikely to substantially improve. Under those circumstances, the first available of the following becomes the unappointed healthcare representative: guardian, spouse, adult chosen by others on this list, majority of adult children, either parent, or any adult relative or friend. Under the new provisions of this bill, the unappointed health care representative may elect hospice treatment, which focuses on palliative care, including care for acute pain and symptom management, rather than curative treatment, provided to an individual with a terminal condition.

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB178/Enrolled>

SB 294

Summary: Authorizes annexation of land to pioneer cemetery maintenance district upon petition by owner and approval of governing body of district. Requires board of affected counties to file boundary change with county assessor and

Department of Revenue.

Practice notes: This is an estate and burial planning consideration for clients in rural areas that have land outside of the urban growth boundaries of all Oregon cities. Such clients may petition for land to be annexed to an existing pioneer cemetery maintenance district if they wish that land to be held and maintained as a pioneer cemetery under ORS 265. This may be particularly appealing to clients with longstanding family land holdings and multi-generational family history in Oregon.

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB294/Enrolled>

SB 361

Summary: Modifies prudent investor rule to allow trustee to consider settlor's or beneficiaries' personal values, including settlor's or beneficiaries' desire to engage in sustainable or socially responsible investment strategies aligning with settlor's or beneficiaries' social, environmental, governance or other values or beliefs, and beneficiaries' financial needs, when making investment decisions. (Amends ORS 130.020 and 130.755)

Practice notes: This bill was put forward by the OSB sustainable futures section to address concerns over comments promulgated with the Uniform Prudent Investor Act and at the legislative hearings when Oregon adopted its prudent investor act that created an ambiguity in regard to whether environmental, social, and governance factors can be considered by trustees when investing. The bill makes clear that trustees can consider any factors the trust directs them to consider regarding how to invest, "including whether to engage in one or more sustainable or socially responsible investment strategies in addition to or in place of other investment strategies, with or without regard to investment performance." The bill also added two new circumstances to be considered when selecting investments. First, "the intent, desire and personal values of the settlor, including the settlor's desire to engage in sustainable or socially responsible investment strategies that align with the settlor's social, environmental, governance or other values or beliefs to the extent known by the trustee."

Second, "the needs of the beneficiaries, including but not limited to the beneficiaries' personal values and desire that the trustee engage in sustainable or socially responsible investing strategies that align with the beneficiaries' social, environmental, governance or other values or beliefs, as well as the financial needs of the beneficiaries."

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB361/Enrolled>

Continued on page 10

Legislative highlights *Continued from page 9*

SB 376

Summary: Directs court to order guardian to file motion to terminate protective proceeding or supplement guardian's report if guardian indicates guardianship should not continue or fails to support continuing need for guardianship. Directs court to order show cause hearing if guardian fails to comply with order. Directs court to serve copies of orders upon certain persons. (Creates new provisions; amends ORS 125.325)

Practice notes: SB 376 adds a notice requirement after the appointment of a guardian similar to the notice of appointment of a personal representative. After a guardian is appointed, the guardian must send notice to the entities listed in ORS 125.060 (3) (and therefore ORS 125.060 (8)) and file proof of service within 30 days of appointment. The notice must include:

- Title of court and case number
- Name and address of protected person, guardian, and the attorney for each, if any
- Date of appointment
- Description of guardian's authority and limitations
- Statement advising recipients that protected person has the right to seek removal of guardian and/or termination of guardianship

SB 376 also adds requirements related to the annual guardian's report. If a guardian indicates a guardianship should not continue or does not provide "adequate information in the report supporting the continuing need for the guardianship," the court shall order the guardian to provide supplemental information or move to terminate the guardianship.

If the guardian fails to provide information or file the motion to terminate within 30 days, such failure is made grounds for removal of the guardian, and the court is required to hold a show cause hearing. The court is required to send notice of any order issued under these new provisions.

In practice, these changes likely mean attorneys should advise guardian clients

to provide greater detail in annual reports to indicate why a guardianship should continue. It is unclear exactly what information will be required, and attorneys would be well advised to reach out to their local probate departments for guidance on how each county intends to implement this provision, as there is no standard articulated in the bill.

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB376/Enrolled>

SB 454

Summary: Transfers administration of Uniform Disposition of Unclaimed Property Act, unclaimed estates and escheating funds from Department of State Lands to State Treasurer. Eliminates additional requirements for recovering proceeds of unclaimed United States savings bonds.

(Creates new provisions; amends ORS 60.674, 62.720, 63.674, 65.674, 87.691, 90.425, 97.170, 98.050, 98.302, 98.329, 98.348, 98.352, 98.353, 98.354, 98.356, 98.362, 98.366, 98.372, 98.376, 98.382, 98.384, 98.386, 98.388, 98.392, 98.396, 98.402, 98.412, 98.416, 98.422, 98.424, 98.991, 98.992, 112.055, 113.045, 113.075, 113.085, 113.105, 113.235, 113.238, 113.242, 114.325, 114.505, 114.520, 114.535, 116.193, 116.203, 116.243, 116.253, 146.125, 183.635, 273.125, 273.141, 273.183, 287A.474, 293.450, 293.455, 293.460, 293.701, 314.840, 327.405, 652.405, 657.665, 708A.430, 708A.655, 711.225, 711.230, 711.235, 711.590, 716.905, 716.910, 723.466, and 723.844 and section 2, chapter 91, Oregon Laws 2018, section 2, chapter 95, Oregon Laws 2018, sections 22 and 23, chapter 105, Oregon Laws 2018, and section 6, chapter 166, Oregon Laws 2019 Enrolled House Bill 3008)

Practice notes: Elder law attorneys need to watch for upcoming administrative rules and policies related to this change in administration of the unclaimed property act to ensure they are following correct procedures for checking for unclaimed property and retrieving any such property as appropriate for clients and estates.

Effective date: September 29, 2019. Operative dates start phasing in July 1, 2021.

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB454/Enrolled>

SB 474

Summary: Reduces length of time of parental desertion or abandonment of child resulting in forfeiture of parent's intestate share of child's estate or parent's interest in property transferred from child to parent by transfer-on-death deed in parental forfeiture action to one year if person who would benefit from forfeiture is child or sibling of deceased child, or three years for all others. Prohibits parent or stepparent who abandoned child from receiving damages for wrongful death of child.

Continued on page 11

Legislative highlights *Continued from page 10*



If a section or committee decides to take a position on a bill, it must make a written request to the Oregon State Bar public affairs committee, setting forth its position and how it is appropriate under the legislative guidelines established by the Board of Governors. The section or committee is then responsible for presenting its position or testimony on that bill.

(Creates new provisions; amends ORS 93.983, 93.985, 112.047, and 112.049)

Practice notes: Elder law attorneys who deal with probate administrations—especially those with wrongful death and/or personal injury claims—need to be aware of this change in parent and step-parent forfeiture timelines. The changes related to intestate estates are effective in estates commenced prior to the effective date of the statute if the estate is pending on the effective date. This means that attorneys who represent personal representatives need to assess their open intestate estates to ensure these rules do not apply, and attorneys representing heirs or potential heirs need to reevaluate whether forfeiture rules apply.

Effective date: June 20, 2019

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB474/Enrolled>

SB 729

Summary: Modifies Elderly Persons and Persons With Disabilities Abuse Prevention Act to apply to elderly persons who are residents of long term care facilities. (Amends ORS 124.005)

Practice notes: The current definition of “elderly person” in ORS 124.005, which provides definitions for restraining orders based on abuse of elderly persons and persons with disabilities has an exclusion for persons who are covered by the long-term-care resident abuse reporting requirements in ORS 441.640–441.665. This bill removes that exception, making all persons 65 years old or older “elderly persons” for purposes of ORS 124.005–124.040. This bill allows persons age 65 or older who are residents in long-term-care settings to access the same restraining order protections available to all other persons age 65 or older.

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB729/Enrolled>

SB 783

Summary: Modifies requirement to notify Attorney General of elder abuse proceeding, making failure to notify not a jurisdictional defect. Conditions entry of judgment for plaintiff on proof of notice. (Creates new provisions; amends ORS 124.100)

Practice notes: The current service requirement in ORS 124.100 (6) has been interpreted by the Oregon Court of Appeals as being a jurisdictional issue, requiring dismissal of claims where notice was not served on the Attorney General within 30 days of commencing the action. *Bishop v. Waters*, 280 Or App 537, 548–549 (2016). SB 783 expressly states “Failure to mail a copy of the complaint or pleading is not a jurisdictional defect and may be cured at any time prior to the entry of judgment.” The bill further prohibits the court from entering judgment until proof of mailing to the Attorney General is filed. The bill does not apply to actions initiated before the effective date, regardless of whether a judgment has been entered or not.

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB783/Enrolled>

SB 815

Summary: Requires residential care facilities to provide written notice to applicants for admission and to current residents upon request regarding services, types and level of care, potential for resident to be required to leave facility if facility can no longer meet resident’s needs for care and services, possibility of resident not being permitted to return to facility if resident leaves facility for acute care, and resident’s right to appeal facility’s decision to remove resident or to not permit resident to return after receiving acute care. Establishes requirements for written notice. Extends, for one year, deadline for residential care

Continued on page 12

Legislative highlights *Continued from page 11*

Elder Law Section Legislative Subcommittee

Chair

Christopher
Hamilton

Members

Stephanie Carter
Darin Dooley
Shauna Haney
Layla McLean
Anastasia Meisner
Trina Montalban
Laura Nelson
Mike Schmidt

facilities to report on quality metrics, and for Department of Human Services to publish report on residential care facilities' quality metrics. (Amends section 19, chapter 679, Oregon Laws 2017)

Practice notes: The notice required by this statute will be helpful in explaining to guardian and Medicaid clients the limits on what a given facility can provide, and attorneys should draw attention to them when working with clients to facilitate placements.

Effective date: September 29, 2019

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB815/Enrolled>

SB 1039

Summary: Authorizes appointment of health care advocate to make health care decisions for an individual with developmental disability receiving services through an individualized written service plan if individual does not have guardian or health care representative. Specifies requirements for appointment of health care advocate, restrictions on health care advocate, and rights of individual for whom healthcare advocate has been appointed.

Practice notes: This bill provides for appointment of a "health care advocate" as an alternative to guardianship for making health-care decisions for individuals with developmental disabilities who receive developmental disability services under an individualized written service plan (IWSP). An individual can have a health-care advocate named for him or her if incapable of making medical decisions according to a court or treating physician and has no guardian and no healthcare representative.

A healthcare advocate must initially be approved by two-thirds of the IWSP team, including the individual for whom decisions will be made. A healthcare advocate serves for one year and can be reappointed by a majority of the IWSP team.

The bill provides a number of decisions that the advocate is not allowed to make, including withholding life support, most experimental treatments, and use of seclusion or restraint. The bill also provides that any treatment that requires hospitalization or general anesthesia must be approved by a majority of the IWSP team in an in-person meeting with documented consideration of alternatives, risks, benefits, impact of the treatment, and any expressed preference of the individual.

The bill provides procedural safeguards for informing the individual, allowing the individual to challenge the advocate chosen, and to protest any decision made by the advocate. A protest by the individual revokes the decision and the advocate's authority related to that decision and must be communicated to the relevant medical provider by the advocate or IWSP team.

This process can be a boon to families of individuals with developmental disabilities operating under supported decision-making agreements and otherwise trying to avoid the appointment of a guardian to encourage independence. Once this bill goes into effect, this will be one of the alternatives that attorneys will need to help clients consider prior to petitioning for guardianship, pursuant to ORS 125.055 (2)(g).

Effective date: January 1, 2020

<https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB1039/Enrolled> ■



ABLE accounts at risk of collapse

By Monica H. Logan, Attorney at Law



Monica H. Logan joined the Salem firm of Douglas, Conroy, Gibb & Pacheco, P.C. in 2019 as an associate. She practices in the areas of Medicaid planning, estate planning, probate, and guardianship/conservatorship proceedings.

The Achieving a Better Life Experience (ABLE) Act created an opportunity for an account specifically designed to increase the financial stability of an individual with a disability, determined prior to age 26. Oregon's program has more than 1,000 participants after its first year, but the total estimated population of individuals with disabilities in Oregon between the ages of 18 and 26 is approximately 38,600.¹ Because only a fraction of the eligible population is using this program in Oregon and other states, lack of widespread use could endanger the affordability and longevity of the program.²

The federal legislation that created and described the ABLE account was enacted in 2014 and is codified in 26 U.S.C. 529A. There are various advantages to be gained through these accounts, but it is worthwhile to note the restrictions. The restrictions state the amount that can be transferred into an ABLE account per year is \$15,000.00. The maximum amount that can be held at any one time, without being counted as a resource by SSI, is \$100,000.00. Only one ABLE account is allowed per individual, and the individual's disability must be shown either through SSI or SSDI eligibility or by meeting Social Security's criteria with a doctor's confirmation. Currently, the individual must have been disabled prior to age 26.

The key advantage to the ABLE account is that the monies are excluded as a resource for the individual. The individual has direct access and control over the account, and withdrawals for permitted expenses, called Qualified Disability Expenses (QDEs), are not taxed as income. The QDEs include food, housing, education, transportation, and administrative fees and are specifically outlined in 26 U.S.C. 529A. ABLE accounts provide more flexibility for a capable individual with a disability than other asset-protecting mechanisms like Supplemental Needs Trusts. In addition, an ABLE account can be opened in any state that currently operates an active program. There are

currently 42 active programs in the U.S., according to the ABLE National Resource Center (www.ablenrc.org).

In March 2019, the U.S. Senate and House of Representatives introduced identical bills to increase the age limit for eligibility of an ABLE account to 46.³ The House submitted its bill to the Ways and Means Committee, while the Senate's bill was sent to the Finance Committee. This bill will allow an additional 14 million people to become eligible, doubling the potential consumer base.³ The attempt to increase the age limit for these accounts shows how reform is desperately needed to increase the availability and viability of the ABLE account.

The possibility of incorporating new incentives—thereby broadening the rewards of using the ABLE account—should motivate individuals to take advantage of these changes. The National Disability Institute suggested creation of a tax-advantage benefit for employers who match contributions to an employee's ABLE account. If ABLE accounts were to receive contributions, rather than a countable retirement account, it could prove fruitful for both employer and employee to increase the money saved. In 2018, the ABLE to Work Act was enacted, which permits employed persons with disabilities to contribute above the \$15,000, depending on their gross income. 2018 also saw the inclusion of the ABLE Financial Planning Act, which allows for a 529 college savings account to be rolled over into an ABLE account, and the Retirement Savings Contributions Tax Credit, which provides a non-refundable tax credit to individuals who contribute to their own ABLE account.

Another potential change is the removal of the payback provision. Oregon, under ORS 178.380 (2017), prohibits any payback to the state from an ABLE account. However, the ABLE Act permits states to recover from ABLE accounts. A federal prohibition to the payback rule

Continued on page 14

ABLE accounts Continued from page 13

would be a major benefit because the act permits individuals to apply to programs outside their own state's program. Unfortunately, some states do not permit outside residents to apply. Oregon's ABLE Account Savings Plan does not allow outside residents, but Oregon also created a separate program, called the ABLE for ALL Savings Plan, that permits outside residents to apply and take advantage of its conservative investment and saving strategies.⁴

An additional modification that would most likely encourage participants is the IRS publication of final rules for the ABLE Act. The latest published agenda predicts ABLE Act rules will not appear before spring 2020. Because the IRS has belabored the finalization for five years and continues to do so, clarification is lacking, especially as new rules regarding tax credits and income-based contributions arise. Despite these issues, the 2015 Notice of Proposed Rulemaking from the IRS provides enough guidance to allow ABLE accounts to be a reliable financial source for disabled individuals on public benefits.

To increase the use of ABLE accounts, the ABLE National Resource Center is encouraging qualified individuals to take advantage of the account. The ABLE NRC spent the month of August 2019 specifically promoting ABLE accounts through a weekly webinar series, a video contest, and its own hashtag (#ABLEtoSave).⁵

The National Resource Center provides easily digestible information and useful tools to encourage clients to investigate the wisdom of using one of these accounts for themselves. Attorneys advising clients on their eligibility and discussing the advantages of these accounts need to be well informed. Many clients have little or no exposure to this program designed specifically for disabled individuals, but as a resource for these clients, we can guide them to better financial stability and a higher quality of life.

Ultimately, the legislative bodies and disabled population will determine the future of the ABLE account. However, positioned as we are between the law and the people, we can spearhead the movement toward practical support and financial security for our clients by apprising them and ourselves of these potential changes and the current advantages of this beneficial savings program. ■

Endnotes

1. **Cornell University. Disability Statistics.** <http://disabilitystatistics.org/reports/acs.cfm?statistic=1>
2. **National Disability Institute, Washington Insider** (May/June 2019), *ABLE Advocacy Ratchets Up on the Hill and Beyond*, <https://www.nationaldisabilityinstitute.org/newsletters/may-june-2019>
3. **Congress.Gov, 116th Congress: House Bill H.R. 1814-ABLE Age Adjustment Act**, <https://www.congress.gov/bill/116th-congress/house-bill/1814/related-bills>
4. **ABLE National Resource Center, Oregon Savings Plan**, <https://www.ablenrc.org/wp-content/uploads/2019/08/OREGON-ABLE-SAVINGS-PLAN-DISCLOSURE-BOOKLET.pdf>
5. **ABLE National Resource Center, August 2019 Achievable Newsletter**, <https://www.ablenrc.org/august-2019-achievable-newsletter>

Correcting a disqualifying transfer of assets

By Darin Dooley, Attorney at Law



Darin Dooley is with the Lake Oswego firm of Draneas Huglin Cooper LLC. He practices elder law, estate planning and administration, and probate. Darin is the 2019 Chair of the Elder Law Section.

An individual or couple cannot transfer assets for less than fair market value to become eligible for Medicaid or maintain Medicaid eligibility based on resource limits. Occasionally, potential clients have unknowingly or ill-advisedly transferred assets prior to contacting an elder law attorney. Understanding how the various Oregon administrative rules and federal law relate can help clarify the process and options when presented with a disqualifying transfer.

Disqualifying transfer

A disqualifying transfer of an asset for less than fair market value by a Medicaid applicant or the applicant's spouse during the 60-month "look-back period"¹ immediately prior to the date of the application results in a penalty period, during which the applicant will be ineligible for Medicaid coverage for care.² The look-back period is measured from the date of request,³ which is when DHS receives the request for Medicaid.

Some transfers for less than fair market value are exempt, including transfers to the spouse, a minor, and a blind or disabled child.⁴ Transfers made to someone else must be for the sole benefit of the spouse or blind or disabled child.

When a transfer for less than fair market value has occurred and is not an exempt transfer, a presumption arises that the transfer was to establish or maintain eligibility for medical assistance, and it is the applicant's burden to establish eligibility for Medicaid by rebutting the presumption.⁵ To do that, the individual must provide evidence, other than the individual's own statement, that shows:

- the decision to make the transfer was not within the individual's control, or
- at the time of transfer, the individual could not reasonably have anticipated applying for medical assistance, or
- unexpected loss of resources or income occurred between the time of transfer and the application for medical assistance, or

- because of other, similarly convincing, circumstances, it appears more likely than not that the transfer was not made, in whole or in part, for the purpose of establishing or maintaining eligibility for benefits.⁶

The examples in this article are from the DHS worker guide, which is not policy. The worker guide presents scenarios and calculation examples that show how to determine whether a transfer of assets is disqualifying. It cautions that "transfers of assets must be evaluated on a case-by-case basis, and the decision about whether a disqualification results will depend on the unique facts surrounding each case."⁷

When DHS finds a disqualifying transfer of assets, a notice is sent to the applicant. The notice must include the action that led to the disqualification, including the uncompensated value used to calculate the disqualification, the length of the resulting disqualification period, and information to explain that a waiver of the disqualification can be requested if the disqualification will cause an undue hardship.

Calculating the penalty period

The penalty period is calculated by dividing the total uncompensated value of transferred assets by the average monthly cost to a private patient for nursing facility services.⁸ If the initial month is on or after October 1, 2018, the divisor in Oregon is \$8,784.⁹ For a new applicant living in a nonstandard living arrangement, the initial month is the month in which the individual would have been eligible except for the disqualifying transfer of assets. For a current recipient of the OSIP or OSIPM program receiving or applying for care in a nonstandard living arrangement, the initial month is the later of (a) the month of the disqualifying transfer or (b) the month of application for long-term care services if the individual would otherwise have

Continued on page 16

Disqualifying transfer *Continued from page 15*

been eligible except for the disqualifying transfer. The remainder from the calculation of the penalty period is not rounded down. The remainder is used to calculate an additional partial month or days of disqualification.¹⁰

Examples

- 1) Sam is in good health and gives his son Ben \$30,000 for a down payment on Ben's first house. Two months later, Sam suffers a stroke and needs medical benefits and long-term care. This transfer is not disqualifying, because it was done exclusively for a purpose other than to become eligible for medical benefits. The purpose was to help Ben buy his first house. At the time of the transfer, Sam did not anticipate a need for medical benefits. Therefore, the transfer was made without the asset limit for Medicaid as a consideration.
- 2) Sara is in an assisted living facility and gives her son Joe \$30,000 for a down payment on Joe's first house. Two months later, Sara can no longer afford her care situation, so she applies for medical benefits. Sara's assets are now under \$2,000 and her income has not changed. This transfer is disqualifying, because although it was made for a purpose other than to become eligible for medical benefits (to help her son buy his first house), at the time of the transfer Sara could anticipate a need for Medicaid to pay for her cost of care. Sara would not have gifted the \$30,000 if she did not expect to become eligible for medical benefits when her assets dipped below the \$2,000 Medicaid limit.
- 3) Ray has \$150,000 assets and is paying privately for care in an adult foster home. He gives his grandchild Leo \$50,000 when Leo completes medical school. With Ray's monthly income, he expects the remaining \$100,000 will be enough to pay for his care for the rest of his life. However, two months later, Ray's dog bites another resident's visiting granddaughter. The family sues Ray and the court awards \$100,000 in damages to the victim. Ray now cannot afford his living situation and applies

for medical benefits. The \$50,000 gift is not a disqualifying transfer, because it was made exclusively for purposes other than to become eligible for medical benefits. Ray did not anticipate a need for medical assistance at the time that he made the \$50,000 gift. Therefore, the transfer was made without the asset limit for Medicaid as a consideration. In addition, Ray did not anticipate and had no choice in paying the \$100,000 damages awarded by the court.

- 4) Sam and Ruth apply for medical benefits because Sam needs long-term care. Ruth's Community Spouse Resource Allowance (CSRA) is \$110,000 in assets. Sam is determined eligible. Within the next six months, Ruth gifts \$30,000 to each of their three children for future grandchildren's college funds. If Ruth does not need long-term-care services herself, assets she transfers will not be evaluated as possibly disqualifying.
- 5) Chuck and Pen apply for medical benefits because Chuck is in an assisted living facility. In the resource assessment process, it is determined that Pen, who receives care and resides in the same assisted living facility, can keep \$50,000 in assets. Chuck is determined eligible. Within the next four months, Pen's favorite sibling passes away and leaves Pen \$100,000. Pen gifts the \$100,000 to their daughter to begin a restaurant business. Pen spends down the remaining \$50,000 paying privately for care, and then applies for medical benefits within seven months.

This transfer is disqualifying. Although OAR 461-140-0242 allows the community spouse to transfer assets as determined in the resource assessment, a transfer of these assets could be disqualifying if the community spouse later needs long-term care services. Pen was aware of the potential need for long-term care and could

Continued on page 17

Disqualifying transfer *Continued from page 16*



anticipate the need for medical benefits when transferring this gift to their daughter. Although Pen had another purpose for making the gift, Medicaid eligibility was a consideration. Pen would not have transferred this asset if she did not expect to become eligible for medical benefits.

Start of the penalty period

If the client is living in a standard living arrangement, the penalty begins the month following the month of the first asset transfer.¹¹ If the client lives in nonstandard living arrangements, the penalty begins the *later* of the month following the month of the first asset transfer or the date when the applicant is receiving care and would otherwise qualify for Medicaid.¹²

Partial return of assets

An individual is not ineligible for medical assistance due to a transfer of assets for less than fair market value to the extent that the individual can satisfactorily show that all such transferred assets have been returned to the individual.¹³ OAR 461-140-0300(2) states that “the disqualification ends if the transfer that caused the disqualification is rescinded. The duration of the disqualification is recalculated if the terms of the transfer are modified.” Thus, the penalty period may be shortened to the extent that some of the transferred assets, or their fair market equivalent, are returned to the individual. Generally, for an asset to be treated as “returned” it must be given directly to the individual and/or spouse—and not a third party.

While a full or partial return may eliminate or shorten the penalty period imposed, the applicant may still not be eligible for Medicaid if the returned assets cause the applicant or applicant and spouse to go over the resource limit(s). If this is the case, a carefully planned spend-down of the excess resources should be part of the discussion with the client. ■

Endnotes

- 1 OAR 461-140-0210(5)(b)
- 2 42 USC § 1396p(c)(1)
- 3 OAR 461-140-0210 (5)(a) and (b)
- 4 42 USC §1396p(c)(2)
- 5 OAR 461-140-0242(5)
- 6 OAR 461-140-0242(6)
- 7 These examples are included for illustration purposes only and should not be relied upon as binding on DHS.
- 8 42 USC § 1396p(c)(1)(E)(I), OAR 461-140-0296(2)
- 9 OAR 461-140-0296(2)
- 10 OAR 461-140-0296(4)
- 11 OAR 461-140-0296(3)(c)
- 12 OAR 461-140-0296(3)(d), 42 USC § 1396p (c)(1)(D)(ii)
- 13 42 USC § 1396p(c)(2)(C)(iii). 1 OAR 461-140-0210(5)(b)



About 65 percent of nursing home residents are supported primarily by Medicaid.

Additional resources to consider for your clients

By Rebecca Kueny and Alana Hawkins, Attorneys at Law



Rebecca Kueny is an attorney with Kueny Law LLC, in Salem. She represents clients in estate planning, guardianships and conservatorships, Medicaid and VA long-term care planning, special-needs trust planning, probates, and administration of trusts. She is accredited with the Veterans Administration.



Alana Hawkins is an estate planning and elder law attorney in Lake Oswego. Her primary practice areas include long term care planning, Medicaid and VA benefits, estate planning and administration, protective proceedings, and Social Security Disability.

In the Elder Law community, we generally discuss only a small portion of the benefits that are available to our clients. While Medicaid benefits and Social Security benefits dominate a large portion of our discussions, there are many other benefits that our clients may access. Our hope is to give our community information about other benefits.

Healthcare and/or long-term care

Care or assistance in the home may be an option and can be achieved using various programs and resources, including family members providing care, private payment for in-home care, and the Oregon Supplemental Income Program Medical (OSIPM). However, other health care or long-term care resources are also available.

Medicaid: Oregon Health Plan (OHP)

For clients who need health care insurance, OHP offers insurance options, including dental, hearing, home health, hospice, hospital care, immunizations, lab work, medical equipment, medical transportation, mental health care, physical therapy, occupational therapy, speech therapy, prescriptions, and vision care. OHP is for individuals who are between the ages of 19 and 65 who are not covered by Medicare. Income must be under 133% of the federal poverty level, (FPL) with a 5% disregard (138% FPL). Assets are not part of eligibility. For more information: <http://www.oregon.gov/oha>.

Oregon Project Independence (OPI)

For clients who do not yet qualify for OSIPM, Oregon Project Independence (OPI) may be a valuable resource. OPI includes services for clients who do not require high levels of care, but do require some assistance to remain at home. The services include meal delivery, transportation, respite care, home chores, technology assistance, and even support for the primary caregiver (including counseling). There may be fees associated with these services, depending on the financial eligibility of the client. For more information on OPI, contact the local Department of Human Services (DHS) or Aging and Disability Resource Connection

(ADRC), or refer to OAR 411-032-0000 through 411-032-0050.

Employed Persons with Disabilities (EPD), "Medicaid 250"

This program is for clients who are disabled and working. To qualify, clients must be employed and receiving wages that are no more than 250% of the FPL after deductions allowed by DHS. Resources may not exceed \$5,000.00. EPD covers medical and long-term care services. A monthly premium will be calculated based on how much the client earns and is usually between \$0 and \$150 per month. Visit <http://www.dhs.state.or.us/spd/tools/program/osip/wg11.htm> for more about eligibility.

Medicaid Health Insurance Premium Payment program (HIPP)

HIPP is a reimbursement program available to individuals covered by private insurance. HIPP will reimburse premiums associated with the private insurance for clients who also qualify for OHP and who have insurance determined to be "cost-effective" per OAR 410-120-1960. This includes COBRA and commercial insurance. Medicaid will be the secondary payer. Think about this option when your client may have a high cost of care due to a specific diagnosis. For more information see <https://www.oregon.gov/dhs/business-services/opar/pages/tpl-hipp.aspx>.

CAREAssist: Oregon's AIDS Drug Assistance Program (ADAP)

For clients who live with HIV or AIDS, this is an option to pay for medical expenses by paying for insurance premiums and prescriptions/medical services co-pays. Clients may earn up to 500% of the FPL and still qualify for assistance see <https://www.oregon.gov/oha/PH/DiseasesConditions/HIVSTDViralHepatitis/HIVCareTreatment/CAREAssist/Pages/index.aspx>.

Continued on page 19

Additional resources *Continued from page 18*

Veteran's benefits

A client who is a veteran or a surviving spouse of a veteran may be eligible for benefits from the Veteran's Administration (VA). There are various programs with the VA that increase household income. Clients should meet with an accredited attorney, a Veteran Service Organization (VSO), or the VA to discuss eligibility. Similar to Medicaid, it is important that clients also meet with an accredited attorney to discuss long-term-care planning options. Pension benefits require eligibility criteria on the veteran's time of service and form of discharge.

Basic pension

This is a tax-free monetary benefit payable to low-income wartime Veterans (and surviving spouses). The basic pension is needs based with income and "net worth" limits for veterans that are over 65 years old, totally and permanently disabled, a patient in a nursing home, or receiving SSDI/SSI. For more information go to <https://www.benefits.va.gov/pension/index.asp>.

Aid and Attendance and housebound pension

Veterans and their survivors who are eligible for a VA pension may be eligible for additional monetary payment (benefits that are paid in addition to the basic pension). Aid and Attendance increased monthly pension may be added to the basic monthly pension *if* your client requires assistance with at least two activities of daily living (bathing, feeding, dressing, elimination/toileting, adjusting prosthetic devices, protective environment), is bedridden, is a patient in a nursing home; *or* has limited eyesight in both eyes (5/200 visual acuity).

Housebound increased monthly pension funds may be added to the basic pension when your client is substantially confined to your immediate premises because of permanent disability.

Disability compensation

This tax-free monetary benefit is paid to veterans with disabilities that are the result of a disease or injury incurred or aggravated during active military service.

Dependency and indemnity compensation (DIC)

This tax-free monetary benefit is generally payable to a surviving spouse, child, or parent of service members who died in active duty, active duty for training, or inactive duty training or to the survivors of veterans who died from their service-connected disabilities.

Special monthly compensation (SMC)

An additional tax-free benefit can be paid to veterans, their spouses, surviving spouses, and parents. It is a higher rate of compensation due to special circumstances such as the need for aid and attendance by another person or a specific disability.

Family caregiver support

This program provides support for family caregivers. When family caregivers are supported, the caregivers can stay healthy, happy, and are better equipped to assist the client. For more information, contact the local DHS or ADRC.

Medical supplies and equipment

Medical supplies, devices, and equipment may be purchased through Medicaid and/or Medicare. If clients are trying to purchase such products, refer them to Medicaid and/or Medicare to see if the products are covered.

Qualified Medicare beneficiaries (QMB)

QMB assists clients who are receiving Medicare Part A coverage. The program pays for Medicare Part A and Part B premiums, allowing clients to save on insurance costs. For more information, contact the local DHS or ADRC or review the Medicare Savings Program Manual at <http://www.dhs.state.or.us/spd/tools/program/qmb/a.htm>. Several different programs within QMB offer different levels of assistance depending on income and assets.

Low-income Subsidy (LIS)

LIS is a Medicare savings program for low-income clients. LIS pays Part D premiums and costs associated with Part D. For more information on this program, review the 2019 LIS Reference Sheet, located at http://www.dhs.state.or.us/spd/tools/additional/mma/2019_LIS_Reference_Sheet.pdf.

Health and Wellness Programs

Many elderly clients cannot stay at home due to the threat of falls or due to a previous fall. Oregon has created several programs to assist clients with fall prevention, including Otago, Tai Chi, and a fall-prevention program.

Continued on page 20

Additional resources *Continued from page 19*



Housing

According to the National Council on Aging, more than 25 million Americans over the age of 60 are considered low-income. Low-income clients may be eligible for certain housing programs or upgrades. Programs may assist the client with staying at home for as long as possible without paying as much cost for housing and/or repair expenses.

Oregon Homeownership Initiative

The Oregon Homeownership Stabilization Initiative (OHSI) administers various housing programs for clients who find it difficult to pay for their current mortgage or property taxes. Each program has specific qualification requirements.

<https://www.oregonhomeownerhelp.org>

- **Principal Reduction and Lien Extinguishment (PRLE)**

If your client is on a fixed income and struggling to afford mortgage payments, OHSI can provide up to \$50,000 to pay down the mortgage and lower monthly payments.

<https://www.oregonhomeownerhelp.org/fixed-income-support>

- **LPA-Reverse Mortgage Benefit**

If your client has a reverse mortgage and has received a default notice, OHSI can provide up to \$40,000 to help the homeowner get out of default. OHSI may also pay up to 24 months of future property tax and homeowner's insurance payments.

<https://www.oregonhomeownerhelp.org/reverse-mortgage-support>

- **LPA-Preservation Benefit: Past due mortgage support**

If your client is behind on mortgage payments and struggling to catch up, OHSI can provide up to \$40,000 to help the homeowner catch up on mortgage payments and reinstate his or her account.

<https://www.oregonhomeownerhelp.org/past-due-mortgage-support>

- **LPA-Property Tax Benefit: Property tax support**

If your client is behind on property-tax payments and struggling to catch up, OHSI can provide up to \$40,000 to help the homeowner catch up on property-tax payments.

<https://www.oregonhomeownerhelp.org/property-tax-support>

Villages

Communities in Oregon and other states are creating villages specifically for residents to age in place. Here in Oregon, multiple villages have been created or are in the process of being created.

Utilities

Another large cost for clients who live at home may be utility expenses for the residence.

Weatherization

Low-income clients may qualify for weatherization updates on their residence. For instance, if there is no heat in the residence due to issues with the furnace, the client may be able to receive a free furnace immediately. For more information, visit <http://www.caporegon.org>.

Energy assistance programs

For clients who have difficulty paying for utility bills, there are programs that can assist with payments.

- **Utility company:** One option is to contact the utility company directly to see if it offers a program or grant.
- **LIHEAP:** The Oregon Low-Income Home Energy Assistance Program (LIHEAP) provides assistance to low-income clients with home energy costs, such as bill payment assistance, energy education, case management, and home weatherization services. For more information, visit <https://www.oregon.gov/ohcs/Pages/low-income-energy-assistance-oregon.aspx>.

Continued on page 21

Additional resources *Continued from page 20*

- **OEAP:** The Oregon Energy Assistance Program (OEAP) is a program that assists low-income clients who may have disconnected electricity service due to the expense of heating. For more information, visit <https://www.oregon.gov/ohcs/Pages/oregon-energy-assistance-program.aspx>

Food

Many elderly clients move from their homes for residential care because of poor nutrition, which creates other health issues—or because it is too difficult to shop or make meals.

Meals on Wheels

This nationwide program assists clients by preparing meals and delivering them to clients' homes. Recipients of Meals on Wheels also report feeling less isolated. For more information, contact the local Meals on Wheels.

Shopping services

Grocery shopping is often difficult due to fatigue, mobility, or transportation. It is also difficult to leave an ailing spouse at home. Many companies have started online grocery shopping. Amazon Fresh, Fred Meyer, and Instacart each have an online presence that allows the client (or or another person) to purchase the groceries and have the groceries delivered to the client's home.

Oregon Food Bank (OFB)

Oregon Food Bank is the coordinating agency for a statewide network of 21 Regional Food Banks and approximately 1,200 food assistance sites that provide food to people experiencing hunger throughout Oregon and Clark County, Washington.

<https://www.oregonfoodbank.org/about-us/locations>.

Religious Institutions

Clients may be able to receive assistance from their community religious institutions. Many offer sponsors and other assistance to clients struggling with food insecurity. This includes visiting with the person, preparing meals with her or him, providing transportation, or assisting with grocery shopping.

Supplemental Nutrition Assistance Program (SNAP)

SNAP provides financial assistance for low-income clients to purchase groceries and food for the home. For more information, contact the local DHS or ADRC.

Financials

Some clients live at home, but find it difficult to pay bills and/or manage funds. Of course, if the client still has the mental capacity to create an estate plan, the client should discuss this with an estate planning attorney.

Outside of an estate plan, clients can make use of the Oregon Money Management Program. This free program is offered by local DHS or ADRC organizations to provide assistance with money management for a client with limited income and assets. The service includes assistance with financial filing and organization, budgeting, paying bills, banking, form completion, debt management, and insurance claims. For more information, contact the local DHS.

Public Guardian

This program is for clients who do not have anyone willing or able to serve as a guardian. The program is still in early development, so services are currently limited. For more information, visit <http://www.oregon.gov/LTCO>.

Technology

For clients who need technology assistance, Oregon offers Access Technologies (more information at <https://www.accesstechnologiesinc.org/about/oregon-statewide-at-program>). Services include a technology device library, trainings, financing, assistance with technology, demonstrations, device repairs, device recycling, and device trades.

Conclusion

It is essential that our clients know these additional resources exist to help them achieve the goal of living at home for as long as possible. If a client discloses an issue that potentially prevents him or her from staying in the home, we suggest you reach out to state and community services, attorneys, and other resources for assistance. ■



New Social Security rules published and then shelved cause confusion for special-needs attorneys

By Melanie Marmion and Christopher Ray, Attorneys at Law



Melanie Marmion is a partner with the law firm of Fitzwater Law, LLP. Her practice focuses on all aspects of estate planning and administration, including planning for high-net-worth clients, complex trust administration, preparation of estate tax returns, and planning for families with special needs. She is a past Chair of the executive committee of the Estate Planning and Administration section.



Christopher Ray is an associate with the law firm of Fitzwater Law, LLP. His practice focuses on estate planning and administration, including planning for families with special needs, Medicaid, and guardianship/conservatorship matters. He is licensed in both Oregon and Washington.

The Social Security Administration (SSA) took the special-needs community on a roller coaster this summer, by publishing new guidelines in June that seemed to suggest attorneys who draft special-needs trusts must get approval from SSA for their fees, then unexpectedly pulling those guidelines in late September.

Prior to June 2019, it was widely believed that only attorneys who represent clients specifically before the SSA in the determination of their clients' eligibility for Social Security benefits must have their fees approved. It was further assumed that attorneys who represent clients in the creation and administration of special needs trusts did not need SSA approval of their fees.¹ However, on June 25, 2019, SSA published new examples in their *Practice Operations Manual* (POMS)² which cast doubt on these assumptions.

The authoritative guidance for attorney fees is POMS GN 03920.007 which provides, in relevant part:

Section 206 of the Social Security Act requires us to authorize a representative's fee when the representative's services are performed **"in connection with" a claim before the agency.** (emphasis added)

Nothing in POMS GN 03920.007 gave any indication that assisting clients with the creation of a special needs trust would be a service performed **"in connection with a claim" before the agency.** However, specific factual examples published in June to "clarify"³ what type of services would fall under the umbrella of "in connection with a claim before the agency" clearly included the drafting of certain special needs trusts. It did not help that the examples—and particularly the explanations for the conclusions in the examples—were poorly written and created more questions than answers.

Example 1. Mary Smith, a woman whom we have found disabled under Title II and allowed monthly disability benefits, hires an attorney, Ms. Roberts, to establish a trust with \$10,000 in assets. We do not need to authorize Ms. Roberts' fee for the services provided to establish the trust.

SSA explanation: *An attorney may establish a trust for an individual who is already receiving benefits without the need of our authorization of the fee he or she seeks, so long as the trust was not established to protect SSI eligibility.*

In this first example, Mary Smith is collecting Social Security Disability Income (SSDI), a Title II entitlement benefit. The creation or funding of any type of trust for Mary Smith would not affect her eligibility for her SSDI, so it is no surprise that SSA concluded no fee approval was necessary. However, the phrase "so long as the trust was not established to protect SSI eligibility" is what caused alarm. Special-needs attorneys understand that most first-party special needs trusts are established with the primary intent to protect the client's eligibility for SSI. The SSA explanation of Example 1 inferred that if a trust is established to protect an individual's eligibility for SSI, fee approval would be required.

Example 2. Sometime later, Ms. Smith applies for SSI. She also asks Ms. Roberts to revise her trust because she has changed her name. The attorney can again collect a fee for the services provided on the trust due to the name change without our authorization. A month later, we notify Ms. Roberts that the trust language needs to be revised again, because as drafted it does not meet our requirements for exception to resource counting. She discusses the issue with the claims representative (CR), amends the trust, and submits the amended trust to the agency. The services related to amending the trust and communication with the agency are

Continued on page 23

SSA rules *Continued from page 22*

performed in direct connection with Ms. Smith's pending SSI claim, and fees for those services require our authorization.

SSA explanation: *If a representative assists a claimant or recipient to alter an established trust for reasons such as a name change or the death of a parent, we do not need to authorize the fee because the legal service is not performed in connection with a pending claim or future claim and the parties have not submitted a fee agreement or a fee petition. However, the second transaction affects whether the assets in Ms. Smith's trust are countable resources for SSI purposes, and therefore her potential eligibility for benefits, so we must authorize the fee the representative may seek for the preparation of documents or conducting business with us.*

At least Example 2 was clear and confirmed the inference suggested in Example 1. That is, any special-needs trust that is established for the purpose of obtaining or continuing eligibility for SSI needs to have SSA fee approval.

Thus far, the examples were focused on first-party special-needs trust planning. It appeared that a special-needs trust established as part of an estate plan for the benefit of a child or other individual (often called third-party special-needs trusts) would be exempt from the reach of SSA fee approval, but then came Example 3.

Example 3. Clara Waters, a grandmother, establishes a trust for Rainbow, her granddaughter through Mr. Johnson, an attorney. Generally, we would not need to authorize Mr. Johnson's fee, so long as the trust was not established for the purpose of affecting his client's eligibility for benefits.

SSA Explanation: *An attorney may establish a trust for a minor child for many reasons. If a trust is prepared in order to affect someone's eligibility for benefits, we must authorize the representative's fee for preparation of the trust. However, if a trust is prepared for a reason unrelated to a claim for benefits, we may not need to authorize the fee charged for preparing the trust. Depending on the information in a claims file, we may need to obtain an explanation from the representative*

or claimant if there is a question about the purpose of the trust, or about why it was established. If a trust is prepared not in connection with a claim, but the parents later apply for benefits and enlist the assistance of an appointed representative (the same attorney or someone else) to prepare or provide information to us, we would authorize fees for only those services provided in connection with a matter before us.

Both the facts of the example and the explanation of Example 3 were confusing in many ways. First, note that the facts moved beyond the specificity of SSI to "benefits" in general. Also, who is the client here? We would assume that the client was Clara, because Rainbow is a minor. But how would establishing a trust for Rainbow affect eligibility of the attorney's client (Clara) for benefits? The facts also did not even tell us whether the trust was funded or it was part of Clara's estate plan to be funded at her death.

Let's move on to the explanation. Again, it is unclear who in this example is attempting to claim benefits. It doesn't appear that Clara or Rainbow would be making a claim for SSI benefits. The explanation states that even if the trust was established for a reason unrelated to a claim for benefits, SSA would check its claims file and might request additional information about the purpose of the trust. Did this mean that every time a trust is established for someone on benefits, including SSDI—or someone who could claim benefits in the future—we would have to submit something to SSA to learn whether they require further explanation to determine whether a fee approval is necessary? What if there is no claim (as in the case of Rainbow)? Then what? The only part of this explanation that makes sense is the last part, where clearly the attorney is representing the clients before the SSA. The lingering conclusion from this example was that there could be situations involving third-party special needs trusts that will require prior SSA approval of attorney fees.

Heeding the outcry of confusion from special-needs attorneys across the country, the National Association of Elder Law Attorneys (NAELA) and other like-minded organizations began meeting with SSA administrators to address the concerns and uncertainties raised by the examples. In late September, in apparent response to this public pressure, the SSA took the highly unusual step of rescinding⁴ the June 2019 examples.

Many attorneys breathed a sigh of relief at this development, but there is still concern that SSA believes there are situations in which an attorney drafting a special-needs trust will need to get SSA approval for his or her fees. In explaining the reason for "archiving" the new POMS, a highly ranked staff member at the SSA Office of Operations stated that SSA understood how the examples, as written, could have been confusing but she did not believe they changed previous SSA policy regarding fee approval, and that SSA is now "going back to the drawing board" to rewrite the examples.⁵

Continued on page 24

SSA rules *Continued from page 23*

Life was seemingly easy for us estate planners/special-needs attorneys prior to June 2019. Now we must all grapple with how best to interpret SSA's actions this summer, and there are currently few clear answers. Because failure to comply with attorney fee approval requirements can result in a misdemeanor conviction, a \$500 fine, and up to one year in jail for each occurrence, we believe the confusion caused by the fact examples and the recent statements of SSA staff may have a chilling effect on the activities of many estate planners.

We hope clear answers will be forthcoming. Stay tuned. ■

Endnotes

- 1 See, e.g., *SSA Ethical Rules—Mountains or Molehills*, a treatise by attorney Constance R. Somers presented at the University of Texas 13th Annual Changes and Trends Affecting Special Needs Trusts program on February 9, 2017.
- 2 The POMS is an internal SSA manual for its employees. Though not legally binding, the courts have deferred to its rules when evaluating special needs cases. See, e.g., *Draper v. Colvin*, 779 F.3d 556 (8th Cir 2015).
- 3 The term “clarify” is taken from the preamble statement to the newly issued language for the POMS.
- 4 SSA uses the word “archive” but essentially the June examples are no longer part of the POMS.
- 5 This information comes from Stacy Braverman Cloyd, an advocate with the National Organization of Social Security Claimants Representatives (NOSSCR). She spoke with the SSA staff member on the phone and received permission to share the SSA staff member's statements with the public.

Index to Volume 22 of the Elder Law Newsletter

No. 1:
January 2019
No. 2:
April 2019
No. 3:
July 2019
No. 4:
October 2019

Elder Abuse

Combatting financial elder abuse... No. 1, p. 13

Elder Law Basics

Resources for clients.....No. 1, p. 18

Estate Planning

Unmarried couples..... No. 2, p. 1

Succession plans for family farms..No.3, p. 1

Second marriages.....No. 3, p. 4

Estate planning & pets.....No. 3, p. 6

Individual Retirement Account

Inheritance of an IRA No. 2, p. 5

Legislation

2019 Legislative highlights No. 4, p. 1

Long Term Care

Medicaid LTC at state level No. 1, p. 6

Washington's LTC program No. 3, p. 3

Marriage

Immigration IssuesNo. 2, p. 6

Estate planning/second marriages ..No. 3, p. 4

Medicaid

Spousal impoverishment: CA No. 1, p. 4

Medicaid LTC at state level No. 1, p. 6

Disqualifying transfers No. 4, p. 15

Estate recovery: OR/CA No. 1, p. 11

Protective Proceedings

OR & WA differences No. 1, p. 1

Section News

Elder Law CLE photosNo. 1, p. 17

Section unCLE program.....No. 3, p. 8

Attorney interviewed for podcast...No. 2, p. 9

Social Security

SS benefits..... No. 2, p. 4

Trusts

ABLE accounts No. 4, p. 13

SSA rule on special-needs trusts... No. 4, p. 22

Resources for elder law attorneys

Events

Postmortem Trust and Estate Planning

Audio CLE Webinar

October 31, 2019/ 10:00–11:00 a.m.

<https://or.webcredenza.com/program?id=97677>

Mediation of Trust & Estate Disputes

Audio CLE Webinar

November 1, 2019/ 10:00–11:00 a.m.

<https://or.webcredenza.com/program?id=97704>

What's Happening with Medicare in 2020

National Council on Aging Webinar

November 8, 2019/ 2:00–3:30 p.m.

<https://www.ncoa.org/event/medicare-in-2020>

NAELA 2019 Summit

November 14–16, 2019

Washington, D.C.

<https://www.naela.org/Summit>

Basic Estate Planning for Oregon

Taxable Estates

OSB CLE Seminar

November 15, 2019/ 8:30 a.m.–5:00 p.m.

Multnomah Athletic Club, Portland

<https://ebiz.osbar.org/ebusiness/Meetings/Meeting.aspx?ID=2609>

Planning for the Freeze: Trust & Estate Planning to “Freeze” Asset Values

Audio CLE Webinar

November 21, 2019/ 10:00–11:00 a.m.

<https://or.webcredenza.com/program?id=98037>

Alzheimer's Disease and Other Dementia: The Pandemic Affecting Your Practice—2019 Update

OSB CLE Seminar

November 22, 2019/ 9:00 a.m.–12:15 p.m.

Oregon State Bar Center, Tigard

<https://ebiz.osbar.org/ebusiness/Meetings/Meeting.aspx?ID=2592>

Annual Probate Update

Multnomah Bar Association CLE Seminar

December 3, 2019/3:00–5:00 p.m.

World Trade Ctr., Bldg 2, Portland

<https://www.mbabar.org/education/annual-probate-update-2019>

Websites

Elder Law Section website

<https://elderlaw.osbar.org>

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

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>

Trainings and technical assistance on a broad range of legal issues that affect older adults

OregonLawHelp.org

www.oregonlawhelp.org

Helpful information for low-income Oregonians and their lawyers

Ageing and Disability Resource Connection of Oregon

www.ADRCofofOregon.org

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

Administration for Community Living

<https://www.acl.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

For elder law attorneys age 62+

https://www.americanbar.org/groups/senior_lawyers/

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

Elder Law Marketing 101

<https://blog.eldercounsel.com/elder-law-practice-marketing-101>

Blog from eldercounsel.com that suggests ways to attract and retain elder law clients

Multnomah County Senior Law Project

<https://oregonlawhelp.org/organization/senior-law-project>

Free half-hour legal consultations with attorneys at Multnomah County Senior Centers ■

**Important
elder law
numbers**

as of
October 1, 2019

Supplemental Security Income (SSI) Benefit Standards	Eligible individual \$771/month Eligible couple..... \$1,157/month
Medicaid (Oregon)	Asset limit for Medicaid recipient.....\$2,000 Long term care income cap.....\$2,313/month Community spouse minimum resource standard \$25,284 Community spouse maximum resource standard \$126,420 Community spouse minimum and maximum monthly allowance standards..... \$2,113.75/month; \$3,160.50/month Excess shelter allowanceAmount above \$634.13/month SNAP (food stamp) utility allowance used to figure excess shelter allowance\$444/month Personal needs allowance in nursing home \$63.10/month Personal needs allowance in community-based care.....\$172/month Room & board rate for community-based care facilities..... \$599/month OSIP maintenance standard for person receiving in-home services.....\$1,271 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2018.....\$8,784/month
Medicare	Part B premium \$135.50/month* Part D premiumVaries according to plan chosen Part B deductible \$185/year Part A hospital deductible per spell of illness.....\$1,640 Skilled nursing facility co-insurance for days 21-100\$170.50/day * Premiums are higher if annual income is more than \$85,000 (single filer) or \$170,000 (married couple filing jointly).



**Elder Law
Section**

Newsletter Committee

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

Editor:
 Carole Barkley carole424@aol.com; 503.224.0098

Committee Members:
 Monica Pacheco, Chair monica@dcm-law.com; 503.364.7000
 Dady K. Blake.....dady@dadylaw.com; 503.249.0502
 Hon. Claudia M. Burton .. claudia.m.burton@ojd.state.or.us; 503.378.4621
 Darin Dooley..... darin@draneaslaw.com; 503.496.5500
 Prof. Leslie Harris..... lharris@uoregon.edu; 541.346.3840
 Leslie Kay leskayvida@gmail.com; 503.333.3005
 Karen Knauerhase karen@knauerhaselaw.com; 503.228.0055
 Monica Logan mlogan@dcm-law.com; 503.364.7000
 Barbara Smythebarbara@elderlawportland.com; 503.496.5515