Oregon State Bar

Elder Law Newsletter

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Update on OAR 461-135-0845:

Valuation of Life Estate, Transfer on Death Deeds, Reversionary Interest, and Property

By Rebecca Kueny, Attorney at Law, and Alana Hawkins, Attorney at Law

This article discusses the valuation and determination of estate-recovery interests in resources owned by multiple parties or transferred upon the death of a person who received medical-assistance benefits. Note that this article only discusses interests and valuations of resources that are owned in whole or in part at the time of death by a person who received medical assistance. It does not discuss the potential estate recovery, valuation, or interest in resources that are transferred and/or sold prior to death by a person who received medical assistance.

On October 22, 2019, the State of Oregon amended OAR 461-135-0845 (*Valuation of Life Estate, Transfer on Death Deeds, Reversionary Interest and Property*) to streamline and clarify the valuation of interests held in different types of property for the purposes of medical-assistance estate recovery. Specifically, the amendments address the following:

- Define "spouse" and broaden it to include "domestic partner" for medical-assistance programs
- Establish, for medical-assistance recovery purposes, a rebuttable presumption that the interest of an assistance recipient in multi-party financial accounts is 100%
- Establish for medical-assistance recovery purposes, a rebuttable presumption that the interest of an assistance recipient on an asset that includes a transfer-on-death deed or payable-on-death beneficiary is 100%
- Establish how the value of various types of property, whether included or excluded from the probate estate of the deceased spouse, are determined

The Department of Human Services (DHS) states that it sought these amendments for purposes of making the rule text more concise, addressing more situations, and aligning the rules with current practices.

In general, this rule seeks to identify:

- How proportional ownership interests are determined following the death of a medical-assistance recipient or the spouse of a medical-assistance recipient
- How to value various types of properties following the death of a medical-assistance recipient
- The amount of a claim that is recoverable from a person other than a medical-assistance recipient.

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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 and a member of the Special Needs Alliance.

Alana J. Hawkins is an Elder Law Attorney at Kueny Law LLC, in the Portland Metro area. Her primary practice areas include long-term care planning, Medicaid and VA benefits, estate planning and administration, protective proceedings, and Social Security Disability.

Determining proportional ownership interests

The following highlights the treatment of certain types of property for the purposes of assistance recovery under the amended rule.

Life estates

The interest held by an assistance recipient, or the value of a life estate, is determined based on an individual's life span using the life-estate-valuation tables and is measured at the time of death. The tables are incorporated into OAR 461-135-0832(2).

For the purposes of assistance recovery, the value of the life estate available for "recovery" is based on the fractional interest that was held by the assistance recipient at the time of death.

For example, if an assistance recipient without a spouse dies at age 88, having received in-home care services, he or she died holding an interest of .30859 of the full value of the real property holding the life estate.

An important reminder to future interest holders is that while the property is exempt for the purposes of program eligibility, the life estate may still be subject to assistance recovery.

Co-ownership of property, other than with spouse

Note: This does not apply to multi-party accounts for medical-assistance recovery and this does not apply to property with survivorship provisions such as transfer-on -death deed or payable-on-death beneficiary. The value of concurrent property interests is presumed to be the fractional interests outlined in the ownership document. In the absence of a specific fractional interest in the ownership document, equal shares are presumed. Both are rebuttable presumptions and can be rebutted using the consideration furnished test and convincing evidence (See OAR 461-135-0832.)

Similar to a life estate, the co-ownership of certain types of property may make that property exempt for the purposes of program eligibility, however, the interest held by an assistance recipient following their death, may still be available for the purposes of assistance recovery.

Multi-party accounts

For medical-assistance-recovery purposes, the interest of an assistance recipient for accounts held with an insured institution or credit union is presumed to be 100% even where there are multiple owners of the account. This is a rebuttable presumption and can be rebutted using consideration- furnished test and convincing evidence. (See OAR 461-135-0832)

The concept of 100% ownership of the assistance recipient is not new. However, it is a good reminder to family members and friends of the recipient who may be listed as co-owners that DHS views their names on the account as being primarily for convenience and that the balance following the death of an assistance recipient will be considered available for the purposes of assistance recovery.

Co-ownership of property, with spouse

The value of property held with a spouse is deemed to be one-half, regardless of whether it is held as co-tenants, joint tenants, tenants by the entirety, or other concurrent ownership. If ownership documents expressly set forth a different fractional share of ownership, and such fractional share is lawful, then the interests are presumed to be the fractional share set forth in the ownership documents. The presumption may be rebutted using convincing evidence, but the consideration-furnished test does not apply. (See OAR 461-135-0832.)

If the spouse of an assistance recipient survives the assistance recipient, and real property had been owned as tenants by the entirety, the proportional interest in the house held by the assistance recipient would still be one-half of its value for the purposes of assistance recovery. The department would still delay recovery until the surviving spouse's death.

Transfer-on-death and payable-on-death beneficiaries

The value of property conveyed by a transfer-on-death deed, or payable-on-death beneficiary, or similar arrangement, is 100% for the purposes of assistance recovery.

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Similar to multi-party accounts, 100% of the value of the property is subject to assistance recovery prior to the transfer of death deed or payable to death beneficiary arrangement.

Valuation of interests following the death of the assistance recipient

Determination of the actual value of various types of property is based on traditional methods of valuing property via appraisals, real-market values—taking into consideration liens and other encumbrances—at the time of death. When a formal appraisal or real-market value is not easily obtained, DHS permits a written estimate from a person knowledgeable in the field of appraising such items, and proof from published sources (e.g., Kelly Blue Book values).

Valuation of interests when a claim is deferred until an assistance recipient's spouse dies

If a claim is deferred until the spouse of an assistance recipient dies, the value of property subject to the deferred claim is established using:

- Property that is part of the probate estate: The value is the value of the current value of assets at the time of probate; or
- Property that is outside of the probate estate: The value is determined on the later date of the claim or the sale of such property.

The amount of a claim that is recoverable from a person other than the assistance recipient

DHS lays out three steps:

- *Step One*: Determine the value of the property received by the person from the recipient of assistance.
- *Step Two*: Deduct the amount of any liens or encumbrances from the value.
- *Step Three*: Multiply the result by the fraction or percentage that constitutes the interest received from the recipient of assistance.

Examples and hypotheticals

Example 1: Medical assistance recipient, Bob, received in-home care services that permitted him to age in place at home. Bob does not have a surviving spouse. Bob owned his home outright. During his life, Bob's home was an excluded asset for the purposes of eligibility. Following Bob's death, we learn that Bob recorded a "Transfer-on-death Deed" to his son, Tom.

What is Bob's interest in his home?

- Bob's interest in the home is 100%.
- Transfer on death does not prevent the department's claim for assistance recovery.
- Tom takes the property subject to the department's claim for assistance recovery.
- Reminder: There are still exemptions, such as transfers to disabled children and/or transfers to caregiving children.

What is the value of Bob's home?

- The value of the residence is the real market value minus any liens and encumbrances.

What is the estate recovery claim on this property?

- The full value of the home, up to the amount of the estate-recovery claim.

Example 2: Medical-assistance-recipient Cindy owns real property with her sisters, Sunnie and Leslie. Cindy does not have a spouse. The ownership document does not specify specific fractional interests, but it does specify survivorship.

What is Cindy's interest in the real property?

- Cindy has a one-third interest in the property because equal ownership is presumed in the absence of specified fractional interests in the ownership document.
- The survivorship provision does not prevent a claim for assistance recovery against Cindy's one-third interest.

What is the value of Cindy's home?

- The value of the residence is the real market value minus any liens and encumbrances.
- NOTE: If Sunnie and Leslie had been making payments to Cindy on a contract for sale, not yet fulfilled, they may be able to rebut the presumption of one-third ownership.

What is the estate-recovery claim on this property?

- The full value of Cindy's interest in the real property, up to the amount of the estate-recovery claim.

Example 3: Medical-assistance-recipient Rachel holds a life estate in real property. The future interest holder is her daughter, Yvette. Rachel does not have a living spouse. Rachel dies at age 92. The real property's real market value is $300,000. The life-estate table indicates that Rachel has a .25771 interest in the real property.

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What is Rachel's interest in the real property?

- The life-estate table indicates that Rachel has a .25771 interest in the real property.

What is the value of Rachel's interest in the real property?

- The value of Rachel's life estate at the time she dies is $300,000 X .25771 = $77,313.

What is the estate-recovery claim on this property?

- The full value of Rachel's life estate share ($77,313), up to the amount of the estate recovery claim.

Example 4: Alex and Chris are married and jointly own a residence with right of survivorship. Alex is a medical-assistance recipient. The community spouse, Chris, lives in the residence while Alex is in memory care. Following Alex's death, Chris continues to live in the residence. DHS defers its claim for assistance recovery because Chris is still alive at Alex's death.

What is Alex's interest in the residence?

- The presumption is that spouses own property 50/50, so it is presumed that Alex's interest is 50%.

What is the value of Alex's interest?

- If there is a probate, Alex's interest is 50% of the real-market value of the residence, minus any liens and encumbrances, when the probate is opened.
- If there is no probate, Alex's interest is 50% of the real-market value, minus any liens and encumbrances, at the later of the date DHS makes its claim or the date that the residence is sold.

Conclusion

As we have all seen, the State of Oregon has started to take a firmer stance on estate recovery to ensure that the state has enough funds to continue to cover Medicaid benefits for our community. Attorneys may handle estate-recovery claims in different ways, but it is important to understand the basis of the claims to protect your clients and to inform clients on the potential estate-recovery claims that may occur in the future. It is also essential to understand that these estate-recovery rules and their enforcement are constantly changing. We recommend informing all clients that the rules change, are sometimes litigated, and there are no guarantees on how estate recovery will affect the family or asset(s), but the current estate-recovery claim would likely affect assets in this manner. ■

Elder Law Section News

Because of Covid-19 restrictions, in lieu of an annual meeting this year, the Section voted by email for our executive committee members.*Thank you* to everyone who voted on the proposed 2021 Elder Law Section Executive Committee slate.

The slate was approved as presented and the following list represents the 2021 Executive Committee.

Officers
Terms ending December 31, 2021

Chair: Julie Meyer Rowett
Chair-elect: Andrea N. Ogston
Past Chair: Theressa Hollis
Secretary: Julie C. Nimnicht
Treasurer: Anastasia Yu Meisner

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T*erms ending December 31, 2022*

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Members previously elected to the executive committee
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Kathryn Gapinski
Christian Hale
Jennifer H. Kwon
Alana J. Hawkins

Developments in *Nay v. Department of Human Services*

By Julie Meyer Rowett, Attorney at Law

Julie Meyer Rowett is a partner at Yazzolino & Rowett where she specializes in Medicaid, estate planning and administration, and protective proceedings.

On December 15, 2016, the Oregon Supreme Court affirmed the Oregon Court of Appeals decision in *Nay v. Department of Human Services* (267 Or App 240 2014), which held OAR 461-135-0832(10)(b)(B)(viii) and OAR 461-135-0835(1)(e)(B)(iii) are invalid. These administrative rules had attempted to expand the scope of estate recovery by the Department of Human Serivces (DHS) to assets that the Medicaid recipient conveyed to the recipient's spouse within five years of the date of the Medicaid application.

Since 2016, DHS has continued to seek expanded estate recovery. The department is actively filing claims in estates and trust administration proceedings and this issue is again in front of the Oregon Court of Appeals. Although this new issue may not be resolved for years, this article is intended to provide an update on where this matter stands. Although Oregon DHS disagrees, it is important to note that *Nay v. Department of Human Services*, 267 Or App 240 (2014) and the subsequent case, *Nay v. Department of Human Services*, 360 Or 688 (2016) currently control estate recovery in Oregon. This is crucial to consider when evaluating any claim filed in an estate or trust administration.

The case currently on appeal is *State of Oregon v. Henry L. Hobart and Rose E. Jiminez*. Hobart presents a common fact scenario for Medicaid planners. In that case, Alexandra and Maynard Hobart owned their home in Washington County as tenants by the entirety. On April 13, 2016, Alexandra Hobart, a Medicaid recipient, conveyed her legal interest and title to her spouse, Maynard Hobart. Alexandra died on August 23, 2016. After her death, her spouse conveyed title of the residence to himself as trustee of his revocable trust. He subsequently died on December 15, 2016. The residual beneficiaries then conveyed title to themselves on February 27, 2017. More than a year later, on June 14, 2018, the Oregon Department of Justice initiated a complaint in Washington County Circuit Court for recovery of Medical assistance against the residual beneficiaries. Following a trial on March 18, 2019, the Honorable Keith R. Raines entered a general judgment setting aside the April 13, 2016, transfer. Elder Law attorney Tim Nay appealed that decision and *Hobart* is presently in front of the Oregon Court of Appeals. The case has been briefed and is awaiting oral argument in December 2020.

Two questions are presented on appeal:

- Does the Supremacy Clause of the U.S. Constitution and 42 USC 1396§p(b)(4) preempt Oregon DHS's Medicaid estate recovery from assets in which the Medicaid recipient had no legal title or interest at the time of his or her death?
- Did the trial court err in permitting any of the plaintiff's claims to go forward when Alexandra Hobart held no legal title or interest to the home at the time of her death?

The State of Oregon takes the position that federal and state law require DHS to seek recovery of benefits after the death of the Medicaid recipient and his or her spouse. The State further argues that, pursuant to ORS 411.602(2), 411.630(2) and 416.350(2), DHS is authorized to file an action to set aside a property transfer by a Medicaid recipient if (1) the transfer was made without adequate consideration after the decedent became a Medicaid recipient; or (2) the transfer was intended to hinder or prevent estate recovery by DHS. The State argues that federal law does not expressly or impliedly limit the State's ability to set aside transfers by a Medicaid recipient that lack consideration or that were intended to prevent estate recovery.

The State takes the position that the Nay cases only invalidated certain rules that exceeded the agency's statutory authority by giving DHS an automatic right to recovery from certain assets. The State argues that the rules invalidated are not at issue and nothing in that ruling prevents a trial court from setting aside transfers after the death of a Medicaid

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recipient. The State also argues that *Nay v. Department of Human Services,* 360 Or 688 (2016) did not hold that federal law preempted Oregon law and instead argues that the case did not reach that issue.

Tim Nay, in his response, argues that setting aside completed predeath assets transfers after a recipient's death does not create legal title or interest in assets which a recipient held at the time of death. He also argues that federal preemption limits Oregon Medicaid estate recovery to assets in which a Medicaid recipient held legal title or interest at the time of the recipient's death. In his opening brief, Tim Nay sets forth two assignments of error. First, that the trial court erred in determining that Oregon law permitted Medicaid estate recovery from assets in which Hobart held no legal title or interest at the time of her death. Second, that the trial court erred in determining that none of DHS's claims were preempted by controlling federal law.

Mr. Nay then sets forth a comprehensive statutory overview of the Social Security Act and federal spousal impoverishment provisions. He further summarizes that the key federal law at issue is the Medicare Catastrophic Coverage Act (MCCA) of 1988 and its subsequent amendments. The provisions of the MCAA set forth mandatory requirements for establishing Medicaid eligibility, including transfers of property that must be made between spouses in order for one spouse to qualify for Medicaid. Next, he summarizes the 1982 Tax Equity and Fiscal Responsibility Act (TEFRA) that first permitted limited Medicaid estate recovery. That Act was amended in 1993 by the Omnibus Budget Reconciliation Act by permitting states to adopt an optional expanded definition of a recipient's estate. Since that amendment, the Secretary of Health and Human Services (HHS) has twice issued guidance regarding Medicaid estate recovery through department transmittals. Neither transmittal contained any language adding predeath interspousal transfers or assets in which the Medicaid recipient held no legal title or interest at the time of his or her death to the definition of a recipient's estate.

In 1995, Oregon adopted the OBRA 1993 expanded definition of an individual's estate. ORS 416.350(6)(a) defines estate as follows:

> *All real and personal property and other assets in which the deceased individual had any legal title or interest at the time of death including assets conveyed to a survivor, heir or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust or other similar arrangement.*

This statute continues as the controlling statute today.

After setting forth the statutory overview, Mr. Nay sets forth his legal arguments. First, he argues that federal and Oregon law limit Medicaid estate recovery to assets in which a Medicaid recipient held legal title or interest at the time of death. DHS's limits for Medicaid estate recovery have already been determined by *Nay v. DHS*, 276 Or App 240, 340 P3d 720 (2014) and affirmed in *Nay v. DHS*, 360 Or 668, 385 P3d 1001 (2016). He argues that since the 2016 decision, no substantive changes have emerged that affect the courts' analysis of 42 USC §1396p(b)(4)(B), ORS 416.350(2) and (6), including no subsequent Oregon or national case law, nor any amendments to §3810 of the CMS State Medicaid Manual or the Oregon State Medicaid Plan. He goes on to offer a comprehensive analysis of both Nay cases and the courts' invalidation of rules that were preempted by federal law. Mr. Nay also argues that DHS's recovery from assets in which a Medicaid recipient held no legal title or interest at the time of her death is preempted by Article XV, §5 of the United States Constitution. This is a compelling argument, because the federal law and the Oregon law cited by DHS actually conflict.

Mr. Nay cites *In re Estate of Barg* as the leading case on estate recovery. In that case, Minnesota's Supreme Court ruled that federal law preempted a Minnesota statute that purported to allow recovery from assets transferred during a Medicaid recipient's marriage, though the recipient had no interest in that property at death. He establishes a clear line between the facts of Barg and DHS's attempts to recover against assets in which the recipient had no legal interest in at death. After discussing *Barg* in detail, Mr. Nay then addresses other case law that DHS uses to support its position.

One additional argument raised by Mr. Nay is that if the trial court is affirmed, attorneys advising clients to transfer assets would violate ORS 411.630. Essentially, any attorney who advises an Oregonian to lawfully convey property to a spouse as part of Medicaid planning would violate ORS 411.630(3) because a person may not knowingly aid or abet any person to violate any provision of this section. Mr. Nay cites a New York "Granny Goes To Jail" case that enjoined the United States from enforcing a law which criminalized attorneys who counseled clients to dispose of assets in order for an individual to become eligible for medical assistance. Although not the primary argument, this raises an alarming issue in the DHS approach to setting aside lawful transfers. The transfer of the residence to a community spouse is a common planning tool that elder law attorneys in Oregon employ to protect our clients from impoverishment, and DHS's position will potentially impact both past and future work.

This case is an important case for all Medicaid planners to follow, as it will have widespread implications on the practice of elder law in Oregon. ■

Remote Online Notarizations—aka RON

By Anastasia Yu Meisner, Attorney at Law

Anastasia (Stacie) Yu Meisner is a partner at Samuels Yoelin Kantor LLP. Her practice focuses on estate planning, mediation, probate, trust and estate administration. She also works with guardianships and conservatorships, as well as business transactions and formation.

One of many services that attorneys and other professionals frequently provide their clients is notarization. However, the Covid-19 pandemic stymied this common client service. Initially, we faced restrictions on travel, many of us were restricted from working in our offices, and clients were sequestered in their care facilities. Even though some of these restrictions have been lifted, we still face challenges in meeting with clients in person.

To address the difficulty that many industries faced in getting documents notarized, HB 4212A was signed into law on June 30, 2020. This new law allows Remote Online Notarization (RON) in Oregon through July 2021.

Per the Oregon Secretary of State (SOS), the law allows a commissioned notary public to perform notarial acts using audio/video technology for remotely located individuals under certain circumstances using vendors meeting specific requirements.

RON notarizations use an internet-based platform to ensure document and data security; confirmation of identity; real-time recorded conferencing; and digital signing, notary, and journal. Notaries are required to ensure that the vendor they choose to use and its internet-based platform meet Oregon's technology standards. The SOS states that a notary may rely on a vendor's declaration that it meets Oregon's legal standards. The SOS provides an online search engine to find vendors that meet Oregon's legal requirements. Vendors that do not currently meet Oregon's requirements are GoToMeeting, FaceTime, and Zoom.

Though some aspects of traditional notarizations and RON notarizations are the same—such as journal retention of 10 years—the fees are different. Traditional notarization fees are $10 per act and RON notarizations is $25 per act.

Though the fee that can be charged per notarial act has increased slightly, the overall cost of providing RON notarizations is much higher with respect to an attorney's operating costs. Fees that a commissioned notary must pay to use approved internet-based platforms vary amongst the vendors. For example, one vendor may charge $480 per year for each license and limit the number of notary transactions, and another vendor may charge $120 per year for each license plus a fee per notary transaction. For high-volume professions such as title companies, volume pricing is typically available. But for the typical attorney, RON notarizations may not pencil out.

In addition to this article, the Estate Planning and Business Law sections have articles on RON notarizations.

Additional information can be found on the Secretary of State's website: https://sos.oregon.gov/business/pages/remote-online-notarization.aspx.

You can also watch a short Secretary of State video at https://www.youtube.com/watch?v=kAFhzjxqUrM&feature=youtu.be ■

Resources for elder law attorneys

CLE Seminars

Adjusting to a Post-Pandemic Workplace
October 26, 2020/12:00–1:15 PM
OSB Webcast
Information and Registration

Representing Veterans and Their Families—VA Accreditation
October 27, 2020/9:00 AM–12:15 PM
OSB Zoom meeting
Information & Registration

Oregon Legislative Update
November 4, 2020/12:00 PM–1:15 PM
OSB Tax Section online event
Information & Registration

Fundamentals of Electronic Signature Law
November 9, 2020/12:00 PM–1:15 PM
OSB Webcast
Information & Registration

Advanced Estate Planning 2020
November 13, 2020/8:30 AM–4:35 PM
OSB Webcast
Information & Registration

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)
https://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
https://oregonlawhelp.org
Helpful information for low-income Oregonians and their lawyers

Aging and Disability Resource Connection of Oregon
https://www.adrcoforegon.org/consite/index.php
Includes downloadable Family Caregiver Handbook, available in English and Spanish versions

Important elder law numbers

as of
October 1, 2020

Supplemental Security Income (SSI) Benefit Standards	Eligible individual ..... $783/month Eligible couple $1,175/month
Medicaid (Oregon)	Asset limit for Medicaid recipient ..... $2,000 Long term care income cap ..... $2,349/month Community spouse minimum resource standard ..... $25,728 Community spouse maximum resource standard ..... $128,640 Community spouse minimum and maximum monthly allowance standards ..... $2,155/month; $3,216/month Excess shelter allowance ..... Amount above $646.50/month SNAP utility allowance used to figure excess shelter allowance ..... $442/month Personal needs allowance in nursing home ..... $64.11/month Personal needs allowance in community-based care ..... $175/month Room & board rate for community-based care facilities ..... $608/month OSIP maintenance standard for person receiving in-home services ..... $1,283 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2020 ..... $9,551/month
Medicare	Part B premium ..... $144.60/month* Part D premium ..... Varies according to plan chosen Part B deductible ..... $198/year Part A hospital deductible per spell of illness ..... $1,408 Skilled nursing facility co-insurance for days 21–100 ..... $176/day

* Premiums are higher if annual income is more than $85,000 (single filer) or $170,000 (married couple filing jointly).

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Oregon State Bar Elder Law Section

Newsletter Committee

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