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OJD’s new conservatorship auditing and staff training programs

By Christian Hale, Attorney at Law, and Jeff Petty, Attorney at Law

The Oregon Judicial Department (OJD) has launched a pilot conservatorship auditing program and an internal protective proceedings education and training initiative.

The primary goal of the auditing program is to improve and assure court-appointed fiduciary compliance with guardianship and conservatorship laws and limited judgments.

The primary goal of probate substantive training is to develop greater case monitoring competence and establish peer-supported assistance for circuit court judges and staff.

Federal support

This work is supported in large part by a federal grant from the Department of Health and Human Services’ Administration for Community Living (ACL). In September of 2021, the OJD was notified of funding awarded through the ACL Elder Justice Innovation Grants program, and has since been working to develop and staff internal programs that improve safety and autonomy for Oregon’s vulnerable protected persons through improved court monitoring practices.

The auditing program

Starting in September of 2022, the OJD rolled out a pilot conservatorship auditing program in four jurisdictions that cover five counties:

- First circuit: Jackson County
- Fifth circuit: Clackamas County
- Tenth circuit: Union County and Wallowa County
- Twenty-first circuit: Benton County

The addition of a fifth jurisdiction is pending. The department aims to have its centralized protective proceedings auditing service available to all Oregon circuit courts by the fall of 2023.

While the auditing program primarily focuses on assisting courts and their staff with reviews of conservatorship annual accountings, auditors look at additional filed documents to gain better understanding of what is, what is not, and what should be disclosed to the court and to parties entitled to notice from a fiduciary. A review of the initial (and any subsequent) petition is performed to check for compliance with ORS 125.055. The auditor will check to verify that persons entitled to notice were served with relevant documentation and adequate proof of service is on file with the court. See ORS 125.060 and 125.070. Any filed objections are reviewed to learn the nature of any concerns and to determine whether a hearing on the objection took place. See ORS 125.075 - .080. The auditor reviews court visitor reports to learn more about the nature and extent of the alleged disabilities of a respondent, to confirm that the petitioner’s allegations about the

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Christian Hale joined the OJD's Office of Internal Audit in February 2022. He previously worked at the Oregon Department of Human Services as an operations and policy analyst, the state legal services developer, and interim director of Oregon's SHIBA (Medicare benefits assistance) program. He served as the financial exploitation investigation specialist for adult protective services at the former Office of Adult Abuse Prevention and Investigation, and brings experience as an elder law attorney, certified internal auditor, certified fraud examiner, and national certified guardian.



Jeff Petty joined OJD's Juvenile and Family Courts Program Division in February 2022. He has been with OJD since 2013, previously working as a Multnomah Circuit Court probate analyst and as the Clackamas County probate coordinator. He welcomes your input on improving court monitoring practices for all probate case types.

health and welfare of a respondent meet the statutory requirements for imposition of a protective arrangement, and to note whether a less restrictive alternative to a plenary guardianship or conservatorship may be appropriate. See, e.g., ORS 125.055(2)(i)(A) for information to be included in the petition, 125.155 for information about a visitor's report, and 125.305(2) for provisions in guardianship orders. Limited judgments appointing a fiduciary are reviewed, as are letters of appointment, to determine the extent of any court-ordered limitations on a guardianship or conservatorship.

When reviewing annual accountings, the auditor similarly reviews the above-noted documents as applicable, the inventories required by ORS 125.470, and supplemental documents filed concurrently with the accounting, including the statement of a fiduciary in support of requested fees, the attorney's statement in support of requested fees, notice documents to persons who should have been served with a copy of the accounting, and the proposed order to allow an annual (or final) accounting. The contents of the accounting document are often of primary importance to the auditor. ORS 125.475 (2) requires a conservator to timely provide accurate information on the estate of a protected person, and the accounting should include:

- The period of time covered by the accounting
- The total value of the property with which the conservator is chargeable according to the inventory, or, if there was a prior accounting, the amount of the balance of the prior accounting
- All money and property received during the period covered by the accounting
- All disbursements made during the period covered by the accounting
- The amount of bond posted by the conservator during the period covered by the accounting
- With respect to conservators who are professional fiduciaries, the total amount of compensation that investment advisers or brokers other than the professional fiduciary charged or received in charges for investments managed or transacted by the investment advisers or brokers; and

- Such other information as the conservator considers necessary, or that the court might require, for the purpose of disclosing the condition of the estate.

In some cases, review of or reference to prior accountings may be relevant.

Generally, vouchers (receipts or similar documentation) for disbursements must accompany the accounting unless otherwise provided by order or rule of the court. See ORS 125.475(3) regarding the maintenance of vouchers, and 125.475, generally, for additional requirements.

Note also the requirements of Uniform Trial Court Rules (UTCRC) 9.020 (approval of bonds), 9.050 (restricted accounts), 9.060 (fee requests in guardianships, and conservatorships) 9.160 (form of accountings), 9.170 (fiduciary disclosure in accountings), 9.180 (vouchers and depository statements), all of which may be applicable to annual accountings. Supplementary local court rules in place at the circuit court level often add to or may limit the disclosures that must accompany a conservator's accounting.

In Oregon, cases are currently assigned for review or audit in two ways: first, through court referral; second, through auditor selection methods based on case type, venue (circuit), and case attributes that are selectable through reference to the Odyssey case management and information system. Lessons learned from the pilot program will inform the planning and management of future departmental audit policy and procedure.

Monitoring programs in other states

The OJD audit staff has reached out to guardianship and conservatorship auditing programs in other states as a part of program development. While only a small handful of states have audit programs that have been in place for over a decade, federal support is enabling seven states to improve their approach to and monitoring of protective proceedings. Alaska is expanding its guardianship monitoring project and increasing the frequency of reports from guardians. Massachusetts is creating an office of guardianship and conservatorship oversight. Minnesota is expanding and enhancing its current conservatorship

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auditing program. Nevada is focusing efforts on guardianship data collection and additional training for judges and court staff.

Internal training and development

Parallel with development of the centralized auditing program, OJD has been building an internally accessible portal providing on-demand training and resources for probate court staff and judges. As an initial part of the Administration for Community Living grant-funded work, OJD performed a statewide self-assessment of circuit court protective proceeding case management to determine variations in business processes and opportunities for the court system to improve monitoring practices. The assessment included investigation of current court practices, availability of local training and education, and the allocation of staffing and resources to protective proceeding case types. More than 50 judges and staff members contributed to surveys and interviews, sharing their local practices and strategies as well as needs and gaps.

Based on the survey and interview responses, many circuit courts reported the need for more robust training materials and better tools to assist monitoring their guardianship and conservatorship caseload. ORS 125.025(1) tasks courts with exercising continuing authority over protective proceeding cases, to determine the condition and welfare of the respondent or protected person and to inquire into the proper performance of the duties of the appointed fiduciary. Although OJD has maintained an Odyssey Help system with probate-specific topical guidance, the system has generally been limited to software business processes with a data-entry focus. Probate court staff and judges instead were asking for more substantive explanation and training in relation to their ongoing monitoring obligations, specifically requesting webinars and training videos, an advice resource, and strategies to assist with efficiency.

To address those requests, OJD created a SharePoint intranet site to serve as a hub for materials and training. The site hosts three new resources for judges and staff:

- An advice and discussion board where staff may solicit their peers' opinions on unique fact patterns and unusual case

issues. Having removed any case-identifying information before submitting their question, posters can receive guidance from other judges and staff who may have seen the issue before, and engage in discussion of the benefits or concerns about strategies to address the issue.

- A monthly installment of webinar training, covering specific protective proceeding issues. Each month a new topic relevant to guardianships and conservatorships is covered in a roughly hour-long session that judges and staff may attend remotely. The recording of the webinar is then posted to SharePoint for future on-demand reference. As of December 2022, judges and staff had attended more than 200 hours of live webinar training.
- A growing library of checklists, forms, and guides for reference when reviewing filings or considering protective proceeding issues. New materials are added in conjunction with webinar training topics, so instruction on the documents accompanies their introduction.

The statewide assessment confirmed what has long been a concern expressed by practicing attorneys: that monitoring practices and court expectations vary notably from circuit to circuit. In some instances, these differences are the unavoidable result of the limited resources of smaller counties, but in others there may have been a vacuum of information about how to approach unusual case issues. Where possible, OJD is creating centralized resources to provide direct and supplemental services to courts that otherwise lack the programmatic scope to establish these on their own. These supplemental services are not designed to replace circuit court judges' own document review or decision-making responsibilities, but rather to provide context and analysis to support more informed and efficient rulings. In other more collaborative spaces, such as the message boards, OJD is encouraging discussion between similarly situated courts for staff to share with each other what works for them. The longer-term goal of these projects is to build more uniform statewide practice standards to better reflect the statutory expectations of fiduciary behavior and court monitoring obligations of those fiduciaries' duties. ■

Resources

- Accounting packet form is available at <https://www.courts.oregon.gov/forms/Documents/Accounting-packet.pdf>
- "Probate and conservatorship accountings," by Heather O. Gilmore in the January 2020 issue of *Elder Law Newsletter*. Available to download at https://elderlaw.osbar.org/files/2020/01/January_2020.pdf
- Forms, including guardianship checklist, guardianship duties; conservatorship acknowledgement of restriction of assets, conservatorship checklist, and conservatorship duties, are available through the Professional Liability Fund at <https://osbplf.org/services/resources/#forms>. (Click on "conservatorship or guardianship" in the form categories section.)
- Conservatorship accountability project: information provided by the Center for Elders and the Courts, a project of the National Center for State Courts is available at <https://www.eldersandcourts.org/guardianship-old/CAP>

Petitioning for an EPPDAPA protective order

By Brook D. Wood, Attorney at Law



Brook D. Wood is an associate with Rudolph Law, LLC, where his practice focuses primarily on probate and trust administration and disputes, adult protective proceedings, and elder financial abuse litigation.

Oregon's Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA), ORS 124.005 to 124.040, provides elders and their advocates with a powerful tool to both correct abuse and prevent future abuse. As part of an EPPDAPA order a court may require, among other relief, that an abuser vacate the victim's home, refrain from contacting the victim, return the victim's money or property, or make other orders necessary to provide for the safety and welfare of the victim. ORS 124.015; ORS 124.020. This article will provide a basic overview of the requirements, petition, initial hearing, and a few practical considerations in EPPDAPA restraining order proceedings.

The petitioner

As the full title suggests, to make use of EPPDAPA, the victim must be an "elderly person," i.e., 65 years of age or older, or a person with a disability as defined under ORS 410.040(7) or provided by ORS 410.715. Though EPPDAPA protects more than just Oregon's elders, they will be the focus of this article. Do not forget, however, that this relief may be available in other situations, for example when disabled people are victims of abuse.

A victim who meets this requirement may petition the court for relief under EPPDAPA. In many scenarios the elderly victim may not be capable of completing and filing the petition, much less appearing before the court. ORS 124.010(1)(b) allows that the petition may be filed by the elder victim, their guardian if one has previously been appointed, or a guardian ad litem. ORS 124.020(3) further allows that the showing required to obtain an EPPDAPA order may be made by the victim, their guardian or guardian ad litem, witnesses to the abuse, or an adult protective services worker who investigated the abuse. In any case, the victim is referred to as the petitioner. If the petition is filed by a guardian or guardian ad litem, they are referred to as the guardian petitioner.

The abuse

To obtain relief under EPPDAPA the petitioner must show that they were the victim of at least one incident of abuse committed by the respondent within 180 days prior to the date the petition is filed. ORS 124.020(1).

Abuse is defined under ORS 124.005(1), and includes:

- non-accidental physical injury
- neglect
- abandonment
- willful infliction of physical pain or injury
- verbal abuse
- the wrongful taking of the victim's money or property, or threatening to do so
- sexual abuse

Also included is "persistent sweepstakes offerings," defined as:

Causing any sweepstakes promotion to be mailed to an elderly person or a person with a disability who had received sweepstakes promotional material in the United States mail, spent more than \$500 in the preceding year on any sweepstakes promotions, or any combination of sweepstakes promotions from the same service, regardless of the identities of the originators of the sweepstakes promotion and who represented to the court that the person felt the need for the court's assistance to prevent the person from incurring further expense.

Neglect on which an EPPDAPA petition is based must have resulted in physical harm by withholding necessary services for health and well-being. For example, terminating or interfering with the caregiver of a person with capacity issues can result in the unsupervised individual leaving their home and being injured by falling, wandering into traffic, or encountering a stray or wild animal.

Abandonment is the desertion or forsaking of duties owed to the victim by a caregiver or other person.

ORS 124.005(1)(e) provides examples of actionable verbal abuse, and also includes a catchall for other "conduct of such a nature

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as to threaten significant physical or emotional harm” that can be helpful when an incident of abuse does not quite fit any other provision.

Incidents of abuse that occurred more than 180 days prior to the filing of the petition are not actionable in and of themselves but can still be helpful in satisfying the next element, which is the risk of further abuse.

Risk of further abuse

In addition to actual abuse committed within the prior 180 days, to succeed a petitioner must also show that the respondent represents an immediate and present danger of further abuse to the victim. ORS 124.010(1)(a). See also *M.E.D. v. Rohrbach*, 257 Or.App. 523 (2013); *D.R.S. v. Baker*, 296 Or.App. 96 (2019).

Purely anecdotally, this is where many EPPDAPA petitioners likely fail. It is not enough to show that abuse occurred, no matter how egregious. One of the key purposes of an EPPDAPA order is to prevent future abuse. If there is no danger of future abuse, an EPPDAPA order is not appropriate and should not be granted.

As mentioned above, however, one way to potentially make this showing is to demonstrate a history of abuse, including even incidents of abuse that may have occurred beyond the 180-day window in which they could themselves be actionable under EPPDAPA. In the face of such a history, the court might reasonably infer that the respondent represents an “immediate and present danger of further abuse” to the victim.

Completing the petition

Restraining-order petitions are often prepared and filed by self-represented parties. Given the urgency these proceedings are intended to address, as a matter of ensuring access to justice the forms center of the Oregon Judicial Department (OJD) provides detailed instructions and forms for both petitioners and respondents. <https://www.courts.oregon.gov/programs/family/domestic-violence/Pages/elderly-abuse.aspx>.

The petition may be filed in the circuit court of a county in which either the petitioner or respondent resides. ORS 124.012. Use of the standard forms is strongly recommended, as it allows quick review by clerks and judges for the necessary information in the format with which they are already familiar. Be aware that the packet includes more than just the petition. There are items to be completed by the petitioner (or guardian petitioner) on other documents, as well — the order, for example. With the detailed instructions provided by the OJD informational packets, it is common practice among attorneys to provide the OJD packet and allow the client to complete the forms, followed by the attorney’s review, correction, and supplementation. Any relevant exhibits should be appended to the petition as it will be filed.

Appointment of a guardian ad litem to act as guardian petitioner is done by motion completed and filed contemporaneously with the petition. Both the OJD website and court clerks have a form of motion available. Even where a guardian has been appointed, be aware that some clerks may still recommend or even require the guardian ad litem motion be completed and filed with the packet.

Filing the petition

There is no filing fee for an EPPDAPA petition. ORS 124.020(7)(d). Some Oregon circuit courts require the petition to be filed conventionally, rather than electronically. The petition must also be filed before a particular time each morning, so that it may be heard and considered by a judge the same day. The department in which the petition is filed varies by county, as well. The following table lists the basic filing requirements for Oregon’s five most populous counties.

County	E-filing OK?	Paper petition filed with	Filing Deadline	Hearing Time
Multnomah	No	Family Law Dept., 2nd floor	12:00 PM, but by 11:30 AM preferred	1:15 PM same day †
Washington	Yes	Room 103J	10:00 AM	1:00 PM same day
Clackamas	Yes*	Information desk	11:00 AM	1:00 PM same day
Lane	Yes	Information desk, 2nd floor	9:30 AM	10:30 AM same day
Marion	Yes	Family Law Dept.	10:30 AM	1:30 PM same day

* Clerks have provided conflicting information as to whether e-filing is allowed or if conventional filing is required.

† Multnomah County also allows the initial hearing to be conducted remotely via telephone upon request, in which case the court will call the filer (petitioner or guardian petitioner) sometime between 1:15 PM and 4:00 PM the same day.

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Because it is an ex parte matter, it is also not uncommon for attorneys to allow clients of sufficient sophistication to file and appear at the initial hearing without counsel. If the petition indicates that it was prepared by an attorney or that the petitioner or guardian petitioner will be represented at the initial hearing, most counties will require that both the attorney and client be present to conventionally file a petition. Any particular court's filing and hearing details should be confirmed by contacting the court prior to filing.

The initial hearing

As mentioned above, the initial hearing is held ex parte, and must occur either the day the petition is filed or on the next judicial day. ORS 124.020(1). These hearings are usually conducted at the same time as hearings in other types of restraining-order matters. It goes without saying that the Oregon courts have limited judicial time for even these serious matters. As such, if the petition, on its face, makes the required showing, some judges may rule, granting the requested order, from chambers or take the bench only to ask a few questions. The conduct of the initial hearing will vary widely from court to court and even judge to judge.

Following the hearing, the judge will issue findings and either grant or deny the petition, indicating all of this on the form of order submitted with the petition. If the order is granted, the attorney or client should be sure to request a sufficient number of copies of the order and other documents that will be served on the respondent. At minimum, copies should be requested for the attorney, the client, and the respondent, plus one for the petitioner if the client filed as a guardian petitioner, and another (called the 911 copy) to be provided to facility security if the petitioner lives in a care facility and the order disallows the respondent from entering the property. If the respondent then visits the facility, security can call the police and show them the 911 copy. Police may then arrest the respondent if they had already been served, or serve them if they had not been previously.

Service

After the hearing, service copies for the respondent, and the petitioner (if filed by a guardian petitioner) should be taken immediately to the sheriff's office of the county where the court is located, to arrange for service. If service on the petitioner is required, it must occur within 72 hours of the grant of the order. ORS 124.024(4). When a party to be served is located in another county, the granting county's sheriff's office will help coordinate service with the other county.

Again, there is no fee for service by the sheriff. ORS 124.020(7)(d). The sheriff will file proof of service with the court. Service by a private party process server is an option, but also requires that a copy of the proof of service be provided to the sheriff. ORS 124.030.

Other issues

Following service, the respondent has 30 days within which to request a hearing to contest the order. ORS 124.020(9)(a). For orders obtained by a guardian petitioner, the petitioner may also contest the order.

A hearing requested by the respondent or petitioner must be held within 21 days of the request. ORS 124.015(1). If uncontested or affirmed following a contested hearing, an EPPDAPA order is effective for a period of one year from the date it was granted, unless amended or withdrawn sooner. ORS 124.020(1). Violations of the order may be reported to law enforcement and are punishable through criminal contempt proceedings under ORS Chapter 133.

Though EPPDAPA proceedings do not allow for the treble damages provided by a civil action for elder abuse under ORS 124.100, et seq., they should not be discounted as an option, especially when urgency may prevent wrongfully taken assets from being squandered by an otherwise "judgment-proof" abuser. ■

Elder Law CLE program available online

If you missed the annual Elder Law Section CLE program on October 7, 2022, you can still download it from the Oregon State Bar website.

Topics include planning strategies for Medicaid eligibility and estate recovery analysis, protection trusts and their tax planning considerations, Medicaid eligibility for unmarried partners, estate planning with estate recovery in mind, and maintaining Medicaid eligibility after a triggering event.

5.5 General CLE credits

Cost: \$200

Find it here: <https://ebiz.osbar.org/ebusiness/ProductCatalog/Product.aspx?ID=5663>

Estate planning for the African American community

By Ekua Hackman, Attorney at Law



Ekua Hackman is an Attorney Fellow with The Commons Law Center. Previously, she worked in the Willamette Clinical Law Program with a focus on estate planning, and was a judicial clerk for the Hon. Cheryl Albrecht. Ekua joined The Commons because she has a passion for helping build intergenerational wealth within the Black community. Ekua also currently serves as President of the Oregon chapter of the National Bar Association, the nation's oldest and largest global network of predominantly Black American attorneys and judges.

As a Black teenager growing up in northern California, I thought wills were a tool mostly available to white people with money to pass on the family home, or to pass on great wealth. I also assumed that my parents, who raised me to have my ducks in a row and have both worked in the medical field, had all of their affairs in place in case an emergency or death occurred.

My first brush with estate planning (or the need for it) took place while I was a 1L student during finals. My mother was working a shift at the hospital and collapsed in the emergency room. A heart attack at 50 years old. After being admitted to the hospital, she was taken in for a routine angiogram. A medical professional accompanied by a clergy member walked up to me to break the news: an artery had been nicked and the surgeon had to operate.

What followed was nine hours of open-heart surgery—probably the longest day of my life—during which doctors discovered a 90% blockage of a major artery. Fortunately, my mother survived. My mother had no power of attorney or healthcare advance directive in place, so had things gone further south, I would have been the person called upon to make those life-or-death decisions.

Why Black Americans badly need estate planning

Experienced estate planning attorneys understand the importance of having an estate plan put in place by someone who knows what they are doing. Reasons include tax planning, avoidance of probate, appointment of a guardian for minor children/disabled person, etc. The cost of dealing with probate can be especially debilitating for a family of modest means.

Of course, the same reasons apply to Black clients or any traditionally excluded population of people. For the purposes of this article, I'm going to focus primarily on the population of clients I serve.

I felt called to combine my interest in estate planning with the goal of helping Black families preserve and pass on their assets just before this life-changing pandemic blindsided us as a nation. I was serving as a judicial clerk in Multnomah County Circuit Court, and my judge, being the incredible

mentor that she is, plopped an article on my desk about estate planning and the wealth gap in the United States.

I fell into the wormhole and started reading every credible article I could find on the subject. I had already been educated about the effects of slavery, reconstruction, Jim Crow, and the civil rights movement on the wealth gap. I knew about the exclusionary practices that took (and take) place in this country when it comes to jobs, loans, education, access to resources and more. I knew about the GI Bill and who actually benefited in the long term. Finally, I knew that as a result of generations of violence and exclusion, the differences in wealth between certain demographics might be a little skewed.

However, I did not realize just how extreme the racial wealth gap is. The median wealth of Black Americans is less than 15% of that of White families in the U.S., according to the Federal Reserve's 2019 Survey of Consumer Finances. White families had a median wealth of \$188,200, compared to \$24,100 for Black families.¹

Overall, 33% of U.S. adults have a will, according to Caring.com's 2021 wills and estate planning survey. Meanwhile, 27.5% of Black Americans have one, up from 25.9% in 2020. Over the next 25 years, a younger generation of heirs is expected to inherit around \$68 trillion dollars.² Black Americans may miss out due to a lack of planning.

The Homeownership Asset Preservation Program

Without an estate plan, the family home can be lost when a partner, spouse or parent dies. The Homeownership Asset Preservation Program (HAPP) was created by the African American Alliance Homeownership (AAAH) in collaboration with the City of Portland Housing Bureau (PHB). HAPP was created to assist in reducing the Black wealth gap, building intergenerational wealth, and continuing mitigation of the harm caused to the Black community in North/Northeast Portland due to displacement by redlining, gentrification, and eminent domain (the 84 freeway), to name a few factors.

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Estate planning

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AAAH has been working to achieve its mission for more than twenty years. It is a Housing and Urban Development certified housing counseling agency, providing first-time homebuyer and foreclosure-prevention services to the public. AAAH serves homeowners seeking home repairs, energy efficiency upgrades, and resource navigation.

Through its work the agency noted a trend of Black Portland families losing their homes following the death of the homeowner parent or partner. Many deceased homeowners did not have an estate plan. After seeing time and time again the devastation lack of estate planning can cause, AAAH advocated with the PHB to secure grant funding to provide Portland homeowners with estate planning services.

AAAH had the cultural specificity, existing relationship with the community, and insight into the problem needed to connect people to HAPP. It needed a legal partner to deliver services.

The Commons Law Center

The Commons Law Center (The Commons) is an Oregon 501(c)(3) nonprofit that provides stabilizing civil legal services to people who fall below 400% of the federal poverty level. Sixty percent of clients live at or below 125% (less than \$34,688/year for a family of four). The legal industry has limited models to help those who cannot afford market-rate services, and there are limits to the legal aid and pro bono solutions for people of limited means. The fee-for-service model of The Commons supports 70% of its operating budget. The organization has received local and national recognition for its innovative model, which combines practical training, fee for service, and technology to expand legal access.

Through HAPP, The Commons provides free-of-charge estate plans to longtime, low-income, predominantly African American homeowners. When HAPP launched in early 2020, services were limited to historically Black neighborhoods; in 2021 PHB expanded the program citywide. So far, HAPP has reached more than 260 people with a targeted webinar, delivered estate planning documents for more than 35 families, and has 26 active matters.

Unexpected challenges

HAPP launched in March 2020. Planning included in-person workshops, educational events, and participation in community fairs. The COVID-19 pandemic put a stop to all that and created barriers for some clients, especially elders who struggled with technology such as Zoom or Google Meet.

Trust has been a bigger challenge than technology. First, as a newer attorney with minimal client management experience, translating estate planning documents and explaining their benefit into plain and conversational English was a steep learning curve for me. When clients did not feel I could explain concepts in an understandable way, I could see them questioning whether or not I knew what I was doing.

Second, the program was funded by the City of Portland, an entity in part responsible for the extensive displacement of Black Portlanders from N/NE Portland. Clients were concerned PHB might get something out of their estate plan or that there was a catch. Third, estate planning, like many other law practice types, involves clients sharing a lot of personal information with their lawyer. HAPP clients have previously expressed concern about sharing their family's contact information—such as their agent's address on an advance directive—because they feared we would use their family's information against them, perhaps to market an estate plan to them or sell their information.

Over time, I have learned to modify my approach to an initial client meeting so my clients are put at ease. I explain my ethical obligations under the rules of professional responsibility, that I am prohibited from sharing their information and I take my ethical obligations very seriously. I explain how the third-party payor works, and how PHB has no access to their estate plan and never will.

My takeaway is this: Building trust takes time and meaningful effort. Whether a client feels respected, heard, and understood by their lawyer matters—especially when a community has repeatedly and routinely been denied access and opportunities. As a Black lawyer serving primarily Black clients with estate planning services in Oregon, I am in a minority. I think a lot about what it would take for me not to be, and what it might mean for me and other Black folks.

HAPP is an incredible opportunity for some Black families to have the opportunities of intergenerational wealth building that estate planning provides. As a lawyer who cares about access to justice, it is my sincere hope that HAPP is only a starting point for a much bigger conversation about economic and social equity. ■

Endnotes

1. Bhutta, Neil, Andrew C. Chang, Lisa J. Dettling, and Joanne W. Hsu (2020). "Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances," FEDS Notes. Washington: Board of Governors of the Federal Reserve System, September 28, 2020, <https://doi.org/10.17016/2380-7172.2797>
2. Michelle Fox, "'We are in a state of emergency.' More than 70% of Black Americans don't have a will. Here's why a plan is key." <https://www.cnbc.com/2022/02/07/70-percent-plus-of-black-americans-dont-have-wills-why-estate-plans-are-key.html#:~:text=Yet%2C%20estate%20planning%20isn%27t,up%20from%2025.9%25%20in%202020>

Long term care insurance: purchasing a policy

By Cynthia Barrett, Attorney at Law



Cynthia Barrett is a retired Portland elder law attorney. She is a volunteer with Oregon's SHIBA program, which provides health insurance counseling statewide on Medicare, health insurance issues, and long-term care.

If your client does not yet have long term care insurance (LTCI), they may be interested in purchasing a policy. Both individual and group policies are still being issued in Oregon, but according to the National Association of Insurance Commissioners (NAIC), fewer than twelve companies remain active in the LTCI market. All other companies have closed the LTCI book of business, and most have offloaded claims administration and premium collection to third parties.

Individual policy—underwriting and cost

Individual LTCI policies are still being written in Oregon, if the applicant can pass strict medical underwriting criteria and afford the premiums. Some individual policies qualify for the Long-Term Care Qualified Partnership Program, which established a partnership among the Oregon Department of Human Services (DHS), the Department of Consumer and Business Services, and some private long-term care insurers to offer special policies that provide protection from estate recovery if the policy-holder receives long-term care through Medicaid. Each dollar the policy pays for long-term care is a dollar that the state cannot later claim from the estate. Because the partnership program mandates an inflation rider, the qualifying policies are expensive. Information can be found at <https://dfr.oregon.gov/insure/health/long-term-care/Pages/qualified-partnership-program.aspx>.

Policies typically vary by the amount paid per day or month, the benefit period (e.g., one year, five years, lifetime), the waiting period (30 to 180 days of LTC before payment commences), inflation protection (if any) and spousal survivorship benefit (if any). On its website, Northwestern Mutual has a coherent explanation of policy provisions, and options when premium rate increases are proposed. <https://www.northwesternmutual.com/faq/ltc-price-increase>.

The American Association of Long Term Care Insurance (AALTCI), an industry group, provides some pricing and company background information on its website.

For example, for Northwestern Mutual, see <https://www.aaltci.org/long-term-care-compare-reviews/compare-northwestern-mutual-long-term-care.php>. Other companies compared on the AALTCI website are Mutual of Omaha, Genworth, Lincoln Financial, New York Life, and John Hancock. I am not sure how current the AALTCI website is. John Hancock left the individual policy LTCI market in 2016, although it still issues employer group policies.

All LTCI policies cost less when the applicant is younger. Some LTCI companies do not issue policies to applicants after a certain age (i.e., those older than 75 years). The COVID pandemic has made medical underwriting more stringent. How to measure risk for someone who had mild or severe symptoms, or just tested positive? An insurance agent should have a handle on which companies might be accepting new policy applications, and current medical underwriting practices.

Group policy eligibility—employees and qualified relatives

Most insurers have left the group LTCI business, and some of those managing active group plans have stopped writing new group plans. Clients who work in the public sector (and their eligible relatives) can often purchase group coverage (except in California, where the CalPERS plan just announced on its website that it is not accepting new enrollees).

Applying to an employer group LTCI plan made sense for someone with pre-existing medical conditions. Group LTCI plans had two crucial features that helped the applicant with pre-existing medical problems get a policy:

- Guaranteed issue (GI) for new employees (if they apply within 30 days after start of employment)
- Less stringent medical underwriting for employee applications after the GI period, and for applications by qualified relatives

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LTC insurance *Continued from page 9*

If a client is thinking of purchasing LTCI, a lawyer can suggest the client compare individual policies to any available group plan. A good LTCI agent should make the comparison for the client, although the agent earns no commission if the client selects a group plan. Group plans are not immune from the skyrocketing rate increase problem in the LTCI market.

Oregon state employees PEBB group LTCI plan

If a client works for the State of Oregon, a lawyer can encourage them to consider an application for the PEBB group LTCI plan.

Oregon's PEBB contracted with Unum Group to offer group LTCI to employees and qualified spouses/domestic partners. See the PEBB website for details: <https://www.oregon.gov/oha/pebb/Pages/Long-Term-Care.aspx>.

The GI period in Oregon for new employees is only 30 days, and is limited to a \$4,000 per month benefit for three or six years:

As a Newly Hired Employee you are eligible for benefit amounts on a Guaranteed Issue basis of up to and including \$4,000 and a Facility Benefit Duration of 3 or 6 years. This does not require completion of a Medical Questionnaire if you are applying during your initial eligibility period. Amounts over \$4000 and Unlimited Duration require an Enrollment Form and completion of a Medical Questionnaire. Coverage is also available to your Spouse or Domestic Partner and requires a Medical Questionnaire for all coverages.

The PEBB Unum group plan increased premiums by 44% recently. Oregon regulators explained the reasons for approving the increase:

Unum requested a 60 percent average annual rate increase for long-term care policies covering over 13,000 policyholders, 55 percent of which are PEBB members. The Oregon Division of Financial Regulation, after a thorough review, approved a 44 percent increase, to be implemented 20 percent each year for 2 years.

Why did Unum receive any increase?

Unum no longer sells new long-term care policies, but still issues coverage to employees if their employer is an existing policyholder.

This is unique in comparison to most long-term care companies in Oregon, as Unum's liability increases for each new life joining the block.

Prior to the request for rate increase, Unum's loss ratio (how much of each premium dollar that goes towards paying claims) was between 107 and 129 percent. Oregon law requires a minimum loss ratio of 60 percent. The company, like many other long-term care companies, was in a position of losing money on this group of policies and was attempting to reach a level of self-sustainability with the rate increase

What are the options for a Unum policyholder?

BEFORE making any decisions, it is essential to reach out to the insurance company or agent to discuss options.

Similar to other long-term care companies, Unum policyholders were given options to mitigate the increase, including:

- Reducing daily benefit amounts
- Reducing the benefit period
- Removing optional riders
- Increasing the elimination period

<https://dfr.oregon.gov/insure/health/long-term-care/Pages/rate-increases.aspx>.

Unum stopped selling individual LTCI policies in 2009, and in 2012 joined insurers pulling out of the LTCI group market. <https://www.thinkadvisor.com/2020/05/05/unum-to-add-2-1-billion-to-long-term-care-insurance-reserves-over-7-years>.

The Unum company website describes its plan to continue to accept new enrollees on active group plans:

Unum's decision to discontinue selling new LTC policies does not affect our relationship with current LTC policyholders. There are no changes to the coverage or contractual rights of current covered individuals. We will continue to administer existing policies, and we will accept future enrollees on active group plans.

<https://www.unum.com/employers/employee-benefits/long-term-care-insurance>.

Federal employees' group LTCI: John Hancock

The federal government's Office of Personnel Management (OPM) contracts with John Hancock to offer a robust long-term-care group plan to federal and U.S. Postal Service employees and annuitants, active and retired uniformed service members, and certain qualified relatives: spouses, domestic partners, adult children and stepchildren of employees and retirees, and parents and parents-in-law of eligible employees.

The plan's broad definition of qualified relatives enabled several of my clients to acquire good LTCI—in one case, through a son on military active duty in Iraq, and in another case, through an elderly parent receiving a federal annuity.

The federal long-term care program has a great website, where the client can design a plan and get premium quotes instantly. I used it with qualified relatives or federal employees/retirees several times

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LTC insurance *Continued from page 10*



A client might contemplate buying into a continuing care retirement community. LTCI can help them meet the financial criteria.

a year. <https://www.ltcfeds.com/program-details/eligibility>.

The federal plan has paid out more than \$2 billion dollars in claims and boasts of its 97.7% claims approval record. <https://www.ltcfeds.com/claims-information>.

The federal plan is not immune from the market failure problems. Premiums are 100% paid by employees with no federal share. <https://federalnewsnetwork.com/workforce/2018/04/opm-doesnt-have-a-contingency-plan-if-long-term-care-insurance-market-upends>.

John Hancock exited the individual LTCI market in 2016 and was the only bidder for the federal plan contract in 2016. Premiums are bound to increase when OPM puts the contract up for bid in 2023. <https://www.ltcfeds.com/program-details/about-premiums/fltcip-oversight>.

Continuing care retirement communities and LTCI

A client might contemplate buying into a continuing care retirement community (CCRC) or has already paid a deposit to be on a particular CCRC's wait list.

The CCRC form of retirement living has a substantial upfront cost: a buy-in for an

apartment in the Portland area are might cost from \$100,000 to \$600,000. A CCRC charges hefty monthly residential fees to each independent-apartment resident (from \$2,000 to \$6,000, depending on the size of the unit purchased). Should the resident move from independent living to assisted living, memory care, or nursing areas of the CCRC, those services will be billed at market rates.

CCRC applicants must meet both financial and medical screening criteria before acceptance as residents. LTCI can help an applicant more easily meet the financial criteria. Andrea Calcagno, former director of sales and marketing at Portland's Holladay Park Plaza, advised: "If an applicant already has LTCI in place, keep it! It's a great asset. But if the applicant does not yet have a policy, and is over age 70, it is hard to justify a purchase."

When it comes time to access the policy benefits, Ms. Calcagno noted: "Filing a claim won't be as much of a burden. We give all the information the insurer requires to get the funds flowing. Our staff is used to doing this." ■

Coming in May: Long term care insurance: claims

Helpful 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>

Training 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

Ageing and Disability Resource Connection of Oregon

<https://www.adrcforegon.org/consite/index.php>

Includes downloadable Family Caregiver Handbook

Administration for Community Living

<https://acl.gov>

Information about resources that connect older persons, caregivers, and professionals to federal, national, and local programs

Big Charts

<https://bigcharts.marketwatch.com>

Provides the price of a stock on a specific date

National Center on Elder Abuse

<https://ncea.acl.gov>

Provides the latest information on research, training, best practices, and resources related to elder abuse, neglect, and exploitation.

An interview with Beth Wolfsong

By the Elder Law Section Diversity, Equity, and Inclusion Subcommittee

Tell us about your practice.

My wife Jennifer and I have a small law firm in Southwest Portland. We are the two attorneys, and we have one legal assistant. Our main practice areas are estate planning and what we call family formation law. Family formation law is helping people grow and protect their families through adoption and assisted reproduction (sperm, egg, and embryo donation, as well as surrogacy).

Neither my wife nor I ever anticipated that we'd be working in either of these practice areas but we're so grateful that our road led us here. The two practice areas coincide wonderfully, and family formation law in particular has led to opportunities we never anticipated.

For example, not only do we work with donors, surrogates, and intended parents in Oregon and Washington, but we have an increasing number of clients throughout the U.S. and from all over the world. We've really enjoyed developing relationships with clients and attorneys from other countries and the greater exposure to other cultures as well as learning how to competently represent clients who do not speak English, or for whom English is a second language. We also have a large LGBTQ client-base—both domestic and from abroad—and greatly enjoy the additional level of advocacy and problem-solving that entails.

Tell us about yourself and how you got into the legal profession.

Not to spin too long a yarn, but it was definitely a bumpy road for me to get to law school. I think I first had an inkling that it was something I wanted to do when I participated in mock trial during high school. But I believed—perhaps not consciously—that law school was something out of reach, and I lacked the confidence to pursue it.

I am an only child and was raised by my mom, a single parent, on the lower end of the economic scale. I watched my mom work hard and struggle for just about everything we had. Her parents, my Oma and Opa, had immigrated from Germany in 1936, fleeing the increasingly punitive anti-Jewish laws and growing violence against Jews. Growing up, even through the eyes of a child, I could see the traces of grief my grandparents experienced from upending their life to start over in a new country, and for my grandmother especially, even so many years later, struggling with the trauma of losing her entire nuclear family, except one brother, at the hands of the Nazis.

On my father's side of the family, I come from a long line of mountain folk, many of whom worked in the coal mines in Southwest Virginia. Good people, salt of the earth, but to my knowledge not one had ever graduated with a four-year degree, let alone a post-graduate degree.

So long story short, I was 30 years old when I started law school. I finally shed my misconceptions about higher education being only for certain people, found my self-confidence, and accepted that I wasn't going to be happy doing anything else. That, and growing into the knowledge that I was made of the same stuff as my mom and my grandparents: strength, courage, determination. But the really cool



part of me having to go through that struggle to get to law school is that it was so much more meaningful for me. There were days that I would be sitting in class and I would think, "I can't believe I am actually here" and I'd get goose-bumps.

My wife and I both went to law school in Tucson, Arizona. After our daughter was born, we decided it was time to move home to Oregon not only to be closer to my mom, but so I could do a second-parent adoption—which was not possible in Arizona at the time—and so we could raise our daughter in the community I hold most dear to my heart. It was difficult to upend our lives in Arizona and start over again—move across country with an infant, take another Bar exam, find a new job, etc.—but it was absolutely the best decision.

You know that song about broken roads? (["Bless the Broken Road." Songwriters: Marcus Hummon, Jeff Hanna, Bobby Boyd.](#)) You feel like you are on this broken road, obstacles keep cropping up, forcing you to veer in another direction, and you feel like you're getting lost? But then, after a while, you look back and you realize you ended up exactly where you were meant to be? I think it's actually a song about relationships but I feel like it really fits my journey. "God blessed the broken road that led me straight to you." This is never where I thought I'd end up but it's exactly where I was meant to be.

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Wolfsong *Continued from page 12*

What is your life like when you are not working?

Jennifer and I are about to celebrate our 28th anniversary in February. We have a 19-year-old daughter, two dogs and two cats. We very much enjoy doing things out of doors. In the winter we like to hike, snowshoe, and ski. In the summer, we love kayaking, hiking, camping, and backpacking. We love getting out in really remote wild places with as few other humans around as possible. We are big fans of professional women's soccer and love to root for our Portland Thorns every chance we get.

Describe the issues or challenges that diverse attorneys in Oregon face.

I know that there is often still a feeling of being an outsider. It's partly I think when you don't see people who look like you or hear people who have shared or similar experiences, and you feel like you are on the outside looking in. Then you can feel isolated.

What OSB programs or professional DEI initiatives are effective?

As a Bar, we are talking about it; we're addressing it. There are programs and speakers that are focusing on particular issues in their communities. I think all those acts of visibility help DEI attorneys feel less of that wall, less of "I am on the outside looking in."

I think that one of the things that is valuable is to actively increase visibility for all members of the Bar, but also to provide forums and opportunities for people to meet each other. Opportunities for Law in Oregon (OLIO) wasn't a program I participated in because I was already past law school and practicing by the time we moved back to Oregon but when I learned about it, I just thought "What a cool program!" And I hear lots of people who participated were really enthusiastic. Also, the mentoring that happens through the Bar is really great.

Can you describe challenges you see your diverse clients face?

One of the biggest things I see on a relatively regular basis: People are intimidated by lawyers. They are nervous when they call for appointments. They are nervous when they first meet with you. It takes a little time for them to feel more comfortable and

realize you are a real person just like every other real person. People who come from diverse communities or diverse backgrounds have an added layer, vulnerability or sometimes wariness, worrying that someone is going to judge them or reject them. Some folks feel really "on guard" until they know for sure they're in a welcoming environment. I think those potential clients are looking for folks they can feel safe with. Comfort and safety are huge. I see that a lot.

Language barriers can also be a really significant barrier to accessing legal services. It's already challenging to try to break down complex legal terms and concepts into more digestible form for our clients, then when you have someone with English as a second language or who doesn't speak English at all you have that additional barrier to clients getting the help they want and need.

Clients with disabilities also face difficulties with access. All these years after the ADA and as much as there are rules around new construction, I still see people struggling with physical access to lawyers and law offices. It could be a hard-of-hearing client who calls the office, but the staff has never worked with TTY before. Or someone struggles to open the door of your building because it's too heavy or they can't open the door to your suite because of the round knob. Maybe your restroom is not accessible to someone with ambulatory difficulty or using adaptive equipment. Perhaps a client in a wheelchair enters your lobby but can't see the receptionist because the reception counter is four feet high. All those types of things I see being issues as well.

Share a tip or best practice to help fellow practitioners better serve diverse clients.

One of the most important things for us as attorneys is to learn to be comfortable around people who are different from us, and to be comfortable asking questions. For example, if you have a trans client, the more you act nervous or uncomfortable because you don't know which pronoun to use, the more you are going to make your client uncomfortable. You need to be able to just say, "What pronoun do you use?" and saying that comfortably and genuinely is really key. Sometimes that's difficult, because you won't want to make assumptions about people, and you're afraid when you ask a question you are going to show what assumption you just made. But I think for the most part when clients sense that you're genuine— that you want to know and understand and be respectful— they respond to that and feel comfortable and stay with you.

In addition to trying to be comfortable asking questions, you can also try to tailor your intake sheet so you're asking the same questions universally of everyone: What pronouns do you use? Do you need TTY/relay services for phone appointments? What is your primary language? Are there accommodations we can make so you can enter our office comfortably? That way you're not putting yourself or your clients on the spot during a first meeting.

Finally, I think active listening is essential. With estate planning in particular, listening helps you drill down to what each particular client really wants and needs from their estate plan. People want to tell their stories and their stories provide important clues to who they are and what is important to them. ■

Important elder law numbers

as of
January 1, 2023

Supplemental Security Income (SSI) Benefit Standards	Eligible individual.....\$914/month Eligible couple\$1,371/month
Medicaid (Oregon)	Asset limit for Medicaid recipient.....\$2,000 Burial account limit\$1,500 Long term care income cap.....\$2,742/month Community spouse minimum resource standard..... \$29,724 Community spouse maximum resource standard\$148,620 Community spouse minimum and maximum monthly allowance standards\$2,288.75/month; \$3,715.50/month Excess shelter allowance Amount above \$686.63/month SNAP utility allowance used to figure excess shelter allowance\$452/month Personal needs allowance in nursing home.....\$74.75/month Personal needs allowance in community-based care\$203/month Room & board rate for community-based care facilities..... \$711/month OSIP maintenance standard for person receiving in-home services..... \$1,414/month; SSI only \$936/month Average private pay rate for calculating ineligibility for applications made on or after October 1, 2020\$10,342/month Home equity limit for an individual.....\$688,000
Oregon ABLE Savings Plan	ABLE account contributions for 2023 are capped at \$17,000. The beneficiary can also contribute an additional amount that is the lesser of the beneficiary's compensation for the tax year OR \$13,590 (continental US).
Medicare	Part B premium \$164.90/month* Part D premiumVaries according to plan chosen Part A hospital deductible per spell of illness\$1,600 Part B deductible \$226/year Skilled nursing facility co-insurance for days 21–100..... \$200/day * Premiums are higher if annual income is more than \$97,000 (single filer) or \$194,000 (married couple filing jointly).



Elder Law Section

Newsletter Committee

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