Oregon Bar

Elder Law Newsletter

Volume 26
Number 4
November 2023

Elder Law Section Executive Committee

Chair
Julie Nimnicht
Portland

Chair-elect
Christopher Hamilton
Salem

Past Chair
Anastasia Yu Meisner
Portland

Secretary
Christian Hale
Salem

Treasurer
Alana Hawkins
Salem

Members

Darin J. Dooley
Lake Oswego

Corey P. Driscoll
Bend

Kathryn Gapinski
Portland

Alex E. Gavriilidis
Springfield

Ekua Hackman
Portland

Theressa Hollis
Portland

Garvin Reiter
Portland

Julie Meyer Rowett
Portland

Rachele Selvig
Ashland

John F. Shickich
Lake Oswego

2023 Legislative Highlights

By Christopher Hamilton, Attorney at Law

The 2023 legislative session saw passage of several bills that affect the practice of elder law. Below are the bill titles, official catchlines/summaries, Oregon Laws citations, and effective dates of each bill, along with brief practice tips for elder law practitioners in light of the new law.

Also included at the end of each bill's section is the Oregon Legislative Information System (OLIS) link for the bill, which interested attorneys can use to find the full text of the bill, review testimony on the bill, and find an assortment of other information related to the bill.

Because there was no legislative highlights article in 2022, this article also includes 2022 HB 4120 regarding filing fees in probate and protective proceeding matters.

The article wraps up with discussion of SB 528, which did not pass, but was a focus for some intense conversation around implementation of 2021 SB 578, which requires appointed counsel in certain protective proceedings, and other issues of respondents'/protected persons' rights.

2022 HB 4120

Bill Title: Relating to court proceeding modifications, and declaring an emergency.

Catchline/Summary: Authorizes court to waive minimum fine in violation proceedings in certain circumstances. Modifies types of documents that must accompany request for filing-fee waiver or deferral by adult in custody. Specifies filing fees that may be charged in protective proceedings when petition requests multiple fiduciaries or multiple protective orders. Prohibits charging of filing fee when amended affidavit is filed in small estate probate case. Modifies manner of requesting filing-fee waiver for writ of habeas corpus. Authorizes Chief Justice to direct or permit electronic court appearances. Authorizes presiding judge to order in-person appearance in specified circumstances.

2022 Oregon Laws Chapter 68
Effective March 23, 2022

Practice notes: Many county courts had a practice of charging for every fiduciary and/or protective order requested in a petition under ORS 125 and for each amended small estate affidavit, while other counties charged only the highest applicable filing fee for petitions under ORS 125, and did not charge for amended small estate affidavits. This created confusion among attorneys and parties and created disparities in the cost of access to the courts based on a party's location.

Sections 4 and 5 of this bill, codified in

Continued on page 2

In this issue

2023 Legislative highlights 1
Change in Section 8 rules 8
Court visitor information available 9
Update: medical aid in dying 10
EPPDAPA protective orders 12
Long term care insurance 15
Cloud security: vetting vendors 17
The right residence for protected person.. 19
The ADRC 21
Helpful websites/resources 23
Elder law numbers chart 24
Professional opportunites 16

Legislation

Continued from page 1

Christopher Hamilton owns Willamette Elder Law, PC, a small virtual law firm, and is launching a new focus as Chosen Family Estate Planning. His practice focuses on using the available tools to protect and support what family really looks like for most of us, beyond the legal defaults. He is the Chair of the Elder Law Section's Legislative Subcommittee and also works with colleagues to address legislation of interest outside that capacity.

ORS 125.055(1)(b) and 125.650(1), respectively, provide that only one filing fee shall be collected for any petition in a protective proceeding, regardless of whether multiple fiduciaries or protective orders are requested, which shall be the highest fee applicable to the requests in the petition. Similarly, Section 6 of this bill, codified in ORS 114.515(5), provides that a fee may not be charged or collected for filing an amended small estate affidavit.

These provisions provide equity and uniformity in the application of filing fees in protective proceedings and small estates. If attorneys or parties encounter court staff requesting improper payment, these statutes should be cited along with refusal to pay more than the appropriate single fee.
https://olis.oregonlegislature.gov/LIZ/2022R1/Measures/Overview/HB4120

HB 2329

Bill Title: Relating to execution formalities.

Catchline/Summary: Modifies execution formalities for appointment of person to make decisions concerning disposition of remains and for declaration for mental health treatment.
2023 Oregon Laws Chapter 11
Effective January 1, 2024

Practice notes: Among the Oregon estate planning tools are the Appointment of Person to Make Decisions Concerning Disposition of Remains under ORS 97.130 and the Declaration for Mental Health Treatment under ORS 127.700 to 127.737. The Appointment under ORS 97.130 allows an individual, or the person with statutory priority if the individual is deceased, to delegate the authority to direct the manner of the disposition of the individual's remains. Execution of the appointment requires the attestation of two witnesses other than the people appointed to make decisions concerning the disposition of remains.

The declaration under ORS 127.700 to 127.737 allows an individual to name a decision maker and alternates to address all mental health treatment, including convulsive treatment, psychoactive medication, up to 17 days of inpatient treatment, and outpatient services, should the individual lose the capacity to make mental health decisions. Execution of the declaration requires the attestation of two witnesses who are not the attending physician or provider, a relative of the attending physician or provider, an owner, operator, or relative of an owner or operator of a healthcare facility treating the individual, or related to the individual by blood, marriage, or adoption. The declaration also expires after 3 years.

Finding qualified witnesses can be difficult, preventing the use of these tools, and is inconsistent with powers of attorney and advance directives, the most closely related planning documents. The advance directive in particular has received substantial legislative attention and amendment in the past several years.

Thus, the Oregon State Bar at the request of the Elder Law Section, put forward this bill to allow for notarization as an alternative to the signatures of two witnesses, simplifying the execution of these important estate planning documents for both attorneys and lay people. The bill also consolidates and clarifies the requirements for the witness attestation and the list of persons who may not serve as witnesses. Attorneys wishing to take advantage of this for their clients should review the new statutory forms and update their forms accordingly.
https://olis.oregonlegislature.gov/LIZ/2023R1/Measures/Overview/HB2329

HB 2447

Bill Title: Relating to agency declarations relating to deceased depositors.

Catchline/Summary: Provides that declarations of the Department of Human Services or the Oregon Health Authority relating to deceased depositors of certain financial institutions must be made within specified time period.
2023 Oregon Laws Chapter 84
Effective January 1, 2024

Continued on page 3

Legislation

Continued from page 2

Practice notes: Among the Oregon non-probate tools for the transfer of assets at death is an affidavit by a claiming individual or a declaration from the Oregon Health Authority (OHA) or the Department of Human Services (DHS) under ORS 708A.430 for insured institutions, such as banks, and ORS 723.466 for credit unions, for payment of deposits under $25,000.00. The payment of such funds must be to a surviving spouse, then to OHA or DHS for estate recovery claims if any, and then a prioritized list of relatives followed by heirs. The affidavit or declaration must:

(a) State where and when the depositor died;

(b) State that the total deposits of the deceased depositor in all financial institutions in Oregon do not exceed $25,000;

(c) Show the relationship of the affiant or declarant to the deceased depositor; and

(d) Embody a promise to pay the expenses of last sickness, funeral expenses, and just debts of the deceased depositor out of the deposit to the full extent of the deposit if necessary, in the order of priority prescribed by ORS 115.125, and to distribute any remaining moneys to the persons that are entitled to the moneys by law. See ORS 708A.430(3) which is substantially similar to ORS 723.466(3).

The Oregon Bankers Association requested this bill to clarify that OHA and DHS must submit a declaration under these sections no earlier than 46 days after the death of the depositor and no later than 76 days after the death of the depositor. This is not a substantive change.

Attorneys should make sure they consider the use of affidavit process along with Driver & Motor Vehicle Services inheritance affidavits and to avoid the costs and delay of a probate or small estate affidavit when assisting clients with transfers of assets after a death.
https://olis.oregonlegislature.gov/LIZ/2023R1/Measures/Overview/HB2447

HB 2509

Bill Title: Relating to the transfer of recorded brands.

Catchline/Summary: Modifies process for transfer of recorded brand following death of brand holder.
2023 Oregon Laws Chapter 408
Effective January 1, 2024

Practice notes: Transfer of recorded animal brands in Oregon at the death of the holder is controlled by ORS 604.041(2), which, other than an increase to the brand transfer fee in 2021, had not been updated since it was adopted in 1981. As a result, the statute allowed for transfer only “by will or the laws of descent and distribution” and required either “an order of a court having jurisdiction of the decedent’s estate directing such transfer” or “an affidavit of the person entitled by the laws of descent and distribution to have the brand.” The Oregon Department of Agriculture has interpreted these requirements to mean a recorded brand must be transferred by will or to the heirs, not the devisees, of the deceased holder.

This bill updates ORS 114.535 to expressly allow the affiant of a small estate affidavit to transfer a recorded brand and updates ORS 604.041(2) to provide for transfer of a brand by a personal representative, an affiant under a small estate affidavit, or a person entitled by the laws of descent and distribution to have the brand. Attorneys should pay special attention to the fact that ORS 604.041(2)(c) still requires the transfer of the brand “no later than six months following the date of death of a holder of a recorded brand.”
https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/HB2509

SB 99

Bill Title: Relating to aging adults.

Catchline/Summary: Prohibits certain facilities that provide long term care from taking specified actions based in whole or in part on resident’s actual or perceived sexual orientation, gender identity, gender expression, or human immunodeficiency virus status. Imposes new requirements on facilities that provide long term care, with respect to care of residents who are lesbian, gay, bisexual, transgender, queer, intersex, asexual, Two Spirit, nonbinary, or other minority gender identity or sexual orientation or who have human immunodeficiency virus. Permits Department of Human Services to impose civil penalties or take other administrative action for violation of provisions. Requires facility to ensure administrators and staff receive specified training. Requires entity that contracts with facility to provide services or supports to residents of facility to provide specified training to entity’s staff persons. Excuses from compliance with requirements any requirement that is incompatible with professionally reasonable

Continued on page 4

Legislation

Continued from page 3

clinical judgment of management or staff of facility or with state or federal law. Requires training required for facilities be completed by Long Term Care Ombudsman, deputy ombudsmen, and designees of ombudsmen. Establishes LGBTQIA2S+ subcommittee of Governor's Commission on Senior Services. Specifies membership and duties of subcommittee.

2023 Oregon Laws Chapter 567
Effective January 1, 2024

Practice notes: This bill provides a basic floor of protections for LGBTQIA2S+ residents of long term care facilities, residential care facilities—including assisted living facilities—and adult foster homes, and requires staff training to support those requirements. The bill also provides a non-exclusive remedy of civil penalties and other administrative action against facilities that violate those protections or employ or contract staff who do so. The bill finally creates a subcommittee in the Governor's Commission on Senior Services to examine and address ongoing issues for older LGBTQIA2S+ Oregonians.

Attorneys who represent individuals in care facilities should be aware of and prepared to use this new tool to protect their clients. Additionally, attorneys who represent guardians and conservators should note that the definitions and protections in the bill are based on the wishes of the individual, not any family member, fiduciary, or other party. This reemphasizes the importance of educating fiduciaries and potential fiduciaries on Oregon's substituted judgment decision-making standard, articulated for guardians in 125.315(h) and (i):

> (h) In making decisions for the protected person, the guardian shall make the decisions the guardian reasonably believes the protected person would make if the protected person were able, unless doing so would unreasonably harm or endanger the welfare or personal or financial interests of the protected person. To determine the decision the protected person would make if able, the guardian shall consider the protected person's previous or current instructions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable by the guardian.
>
> (i) If the guardian cannot make a decision under paragraph (h) of this subsection because the guardian does not know and cannot reasonably determine the decision the protected person would make if able, or the guardian reasonably believes the decision the protected person would make would unreasonably harm or endanger the welfare or personal or financial interests of the protected person, the guardian shall act in accordance with the best interest of the protected person. In determining the best interest of the protected person, the guardian shall consider:
> (A) Information received from professionals and persons that demonstrate sufficient interest in the welfare of the protected person;
> (B) Other information the guardian believes the protected person would consider if the protected person were able; and
> (C) Other factors a reasonable person in the circumstances of the protected person would consider, including consequences for others.

https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/SB99

SB 308

Bill Title: Relating to decedent's estates.

Catchline/Summary: Changes title of "small estate affidavit" to "simple estate affidavit." Modifies eligibility for simple estate affidavit to include estate of decedent dying testate if value of specific bequests does not exceed specified amount and residual beneficiary is decedent's inter vivos trust.

2023 Oregon Laws Chapter 17
Effective January 1, 2024

Practice notes: The critical substantive change here is a significant simplification in the use of pour-over wills to corral missed assets and post-death benefits into trusts. This is no reason to get sloppy with funding trust in the estate planning process, but it significantly reduces the cost in funds and time when clients do not follow through or acquire assets after funding a trust that do not get properly titled or designated to the trust.

The relevant new statutory language will be ORS 114.510(1)(b):

> (b) The decedent died testate and:
>
> (A) Not more than $75,000 of the fair market value of the estate is attributable to specifically devised personal property;
>
> (B) Not more than $200,000 of the fair market value of the estate is attributable to specifically devised real property; and
>
> (C) The balance of the fair market value of the estate is attributable to property that is devised to the trustee of a trust

Continued on page 5

Legislation

Continued from page 4

of which the decedent was a settlor, as defined in ORS 130.010, and which came into existence prior to the decedent's date of death.

It is essential to note that there is no limit placed on amount of assets that can be transferred to a trust using a simple estate affidavit.

Attorneys will need to update all forms and templates that reference a "small estate affidavit" to reflect the new "simple estate affidavit" nomenclature. Additionally, we should expect to see a new form from the courts with the changed name additional language related to the new pour-over will category.
https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/SB308

SB 309

Bill Title: Relating to publication of notice to interested persons.

Catchline/Summary: Modifies number of weeks notice to interested persons in decedent's estate must be published.

2023 Oregon Laws Chapter 18
Effective January 1, 2024

Practice notes: In recognition of the changing ways society interacts with newspapers, this bill changes the current requirement that notice of a probate be published once in each of three consecutive weeks to a requirement that notice be published once. This change helps reduce the cost of publication to estates without meaningfully impacting the rights of creditors or others who would receive notice by publication. It will be important for attorneys to clarify with the newspapers in which they publish notice that only one week of publication is needed from January 1, 2024, forward.
https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/SB309

SB 498

Bill Title: Relating to estate tax treatment of natural resource property; and prescribing an effective date.

Catchline/Summary: Allows exclusion from taxable estate for value of interest in farm, forestry, or fishing business.

2023 Oregon Laws Chapter 286
Effective September 24, 2023

Practice notes: From 2007 to 2015, the legislature created and tweaked an estate tax credit for "natural resource property," defined as:

(A) Real property used as forestland or as forestland homesites, not to exceed 5,000 acres, or that is in farm use
(B) Timber or trees
(C) Crops, fruit or other horticultural products, both growing and stored
(D) Forestry business or farm business equipment
(E) Livestock, poultry, fur-bearing animals, bees, dairying animals, equines, aquatic species, birds or other animal species, including stored products or by-products
(F) Nursery stock as defined in ORS 571.005
(G) Boats, gear, equipment, vessel licenses or permits, commercial fishing licenses or permits, and other real or personal property used in the operation of a fishing business
(H) Real or personal property used to process and sell the catch of a fishing business in fresh, canned, or smoked form directly to consumers, including a restaurant with seating capacity of fewer than 15 seats at which catch from the fishing business is prepared and sold
(I) An operating allowance
(J) Any other tangible and intangible personal property used in the operation of a farm business, forestry business, or fishing business

The existing credit essentially allows for an estate to cancel the tax caused by passing up to $7.5 million of such property. Claiming the credit requires the total estate not exceed $15 million, the property account for at least 50% of the estate, the property go to a family member, and the decedent or a member of their family operated a farm, forestry, or fishing business from the property for five of the eight years preceding the decedent's death and it must continue to be used as such by a family member for five of the eight years following the death. The purpose of the credit is to ease the passing of "family farms" and similar agricultural enterprises from one generation to the next.

This bill creates a new estate tax exemption of up to $15 million for the same types of property that can be taken in the alternative. The new exemption requires:

(a) The property is held by a decedent for at least five years before the death of the decedent;

Continued on page 6

Legislation

Continued from page 5

(b) During at least 75 percent of the days of each of the five calendar years immediately prior to date of the decedent's death, the decedent or any family member of the decedent materially participated in the farm business, forestry business, or fishing business;
(c) The interest is transferred, as a consequence of the decedent's death, to one or more family members of the decedent and is subsequently owned by family members of the decedent for at least five consecutive calendar years beginning with the calendar year immediately following the date of the decedent's death; and
(d) During at least 75 percent of the days of each of the five calendar years immediately following the date of the decedent's death, any family member of the decedent materially participates in the farm business, forestry business, or fishing business.

Of particular note are the doubling of the value of the property that can be passed and the lack of any restriction on the total value of an estate claiming the exemption. Attorneys should also be aware of the change from five out of eight years before and after death to 75% of the days in each of the five years before and after death, and the lack of definition or precedent regarding interpretation of the 75% of days requirement.

This exemption applies to the estates of decedents who died on or after July 1, 2023. Attorneys working with estates containing such property should consult with appropriate tax professionals to assist clients in selecting whether to use the credit, the exemption, or neither.
https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/SB498

SB 556

Bill Title: Relating to management of resources for benefit of persons in custody of Department of Human Services, and declaring an emergency.

Catchline/Summary: Prohibits Department of Human Services from using specified moneys received on behalf of child in care for maintenance costs. Directs department to maintain separate accounts for each child on whose behalf moneys are received. Specifies types of expenses that may be paid from account. Authorizes department, upon request, to instead pay moneys directly into specified accounts for child's benefit. Creates exceptions. Declares emergency, effective on passage.
2023 Oregon Laws Chapter 576
Effective July 31, 2023

Practice notes: The major thrust of this bill is aimed at ensuring that DHS does not use funds, benefits, payments, proceeds, settlements, awards, inheritances, wages, or any other moneys received by the department on behalf of a child who has been removed from their home and placed in DHS custody to meet its existing obligations to support those wards. The bill accomplishes this by prohibiting the use of such funds for payments to a foster parent or relative caregiver for the costs of providing a child with food, clothing, housing, daily supervision, personal incidentals, and transportation. The bill requires any such resources to be maintained in a separate account for the benefit of the child on behalf of whom they are received, and provides a list of expenses for which the resources can be used.

This becomes relevant to elder law in the contexts of both disability benefits and transfers to children as heirs, beneficiaries, devisees, etc. in probate and trust administration work. Attorneys should be aware they can request any funds which might be or have been received by DHS be distributed to
(A) An Oregon Uniform Transfers to Minors Act account under ORS 126.805 to 126.886 that delays transfer of the custodial property until the child attains 25 years of age;
(B) An account established under ORS 178.335 within the Oregon 529 Savings Network in the name of the child;
(C) An ABLE account established under ORS 178.380 with the child named as the designated beneficiary;
(D) A trust established under ORS chapter 130, if the trust names the child as the sole beneficiary and appoints an independent, qualified trustee; or
(E) Any other privately held account described by the department by rule.
https://olis.oregonlegislature.gov/LIZ/2023R1/Measures/Overview/SB556

SB 528

Bill Title: Relating to protective proceedings, and declaring an emergency.

Catchline/Summary: Modifies provisions relating to protective proceedings.

This bill did not pass but raises issues that elder law attorneys should be aware of and following. There were two important and

Continued on page 7

Legislation

Continued from page 6

completely distinct incarnations of this bill, both being driven by Disability Rights Oregon (DRO). DRO is the federally funded and designated protection and advocacy entity for Oregon, charged with protecting and advocating for the rights of all individuals in the state with disabilities.

SB 528, as introduced, would have created new requirements for both the appointment and the continuation of protective proceedings. The major thrust of these requirements was to provide more information to respondents and protected persons and to limit the authority and duration of any fiduciary appointment to the minimum necessary to protect the individual. DRO put the legislation forward in response to concerns brought to them generally by adults with intellectual and developmental disabilities under improperly initiated or administered guardianships and/or conservatorships.

A number of attorneys raised concerns in the initial public hearing on SB 528 about the negative practical impacts of the new requirements on protected persons and fiduciaries alike. Among the greatest concerns were:

- new, more extensive requirements around "exploring" less restrictive alternatives prior to filing
- introduction of a requirement to explore "supported decision making" without any legal framework for making supported decision making possible
- a requirement for motions to continue protective proceedings every five years with the same procedural and substantive requirements as the initial petition
- a requirement that all guardianships be limited
- numerous changes to the structure of ORS 125 that would include vulnerable youth guardianships (an immigration tool) in the requirements being added in ways that are incompatible with the circumstances of those guardianships
- DRO continuing to expand the required use of its separate notice website, outside of File & Serve notice and instead of simple mail notice
- Significant expansion of circumstances under which appointment of counsel for a respondent/protected person is required and in-person hearings must be held, without any provision for paying or otherwise providing the attorneys to meet that requirement
- A requirement that all courts select and appoint visitors without input from parties
- The impact of all these changes on the willingness of family members, friends, and other lay persons to step in as fiduciaries and the impact on the willingness of professionals to serve as fiduciaries, in an environment where it is already very hard to find viable fiduciaries

Although this bill did not move forward, the concerns that led to its introduction have not been cured, and this matter will continue to come up. More extensive conversation is available in the testimony for the January 26, 2023, hearing at the OLIS link below.

In March an amendment was introduced that completely deleted and replaced the text of SB 528 and made it into a bill requiring appointment of counsel for a respondent or protected person in functionally all cases and transferring responsibility for providing that representation to DRO. This was in part an attempt to address the looming logistical problems of implementing 2021 SB 578 when it goes into effect statewide in January of 2024. 2021 SB 578 requires the court to appoint counsel for all respondents and protected persons in cases where a hearing is scheduled and:

(A) The respondent or protected person requests that counsel be appointed;
(B) An objection is made or filed to the petition or motion by any person;
(C) The court has appointed a visitor under ORS 125.150, 125.160 or 125.605, and the visitor recommends appointment of counsel for the respondent or protected person; or
(D) The court determines that the respondent or protected person is in need of legal counsel.

Again, there was significant concern and discussion about the impacts of the expansion of mandatory appointed counsel, which can be reviewed in the testimony for the March 29, 2023, hearing. https://olis.oregonlegislature.gov/LIZ/2023R1/Measures/Overview/SB528 ■

Also of interest: HB 2032

House Bill 2032 expands eligibility for Oregon Registered Domestic Partnerships to partners of any sex. The bill goes into effect January 1, 2024.

https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/HB2032

Rules implementing new definitions of income and assets under Section 8 program go into effect January 1, 2024

By Julie Nimnicht, Attorney at Law, and Darin Dooley, Attorney at Law

Julie Nimnicht practices with the Law Ofices of Geoff Bernhardt and Julie Nimnicht in Portland. She assists clients with all aspects of estate planning and administration, protective proceedings, and Medicaid planning. She is the current Chair of the Elder Law Section Executive Committee and the newsletter subcomitee.

Darin Dooley is a partner in the Lake Oswego firm Draneas Huglin Dooley LLC. His practice focuses on estate planning, elder law, Medicaid, special needs planning, probate, trust administration, and estate tax planning. He chaired the Elder Law Section Executive Committee in 2019 and currently serves on the newsletter subcmmittee.

The Housing Opportunity Through Modernization Act of 2016 (HOTMA), Public Law 114–201, was enacted on July 29, 2016. However, its provisions have no effect until implemented by the Department of Housing and Urban Development (HUD). HOTMA redefines family income, gives HUD expanded discretion to determine how family income is determined, and imposes an asset limit of $100,000[1] for eligibility determination. HUD published proposed rules to implement income and asset provisions for HOTMA on September 17, 2019.[2] HUD issued the final rules on February 14, 2023[3] implementing sections 102, 103, and 104, effective on January 1, 2024.

The July 2022 issue of the *Elder Law Newsletter* contained an article regarding the effects of special needs trusts on Section 8 housing.[4] The article cited HOTMA, which was law at the time, and discussed the definitions of income and assets under Sections 102, 103, and 104. However, because HUD had not yet promulgated the rules referenced herein, some of the definitions cited in the July 2022 article have since changed. Starting in January 2024, it will be important to refer to the new rules when interpreting the treatment of distributions from a special needs trust for clients receiving Section 8 benefits. We have highlighted some of the changes below.

Income

HOTMA contains a new definition of income.[5] For an irrevocable trust excluded from the definition of net family assets under § 5.603(b), the final rule defining income excludes distributions of the principal of the trust, as well as distributions of income from the trust when the distributions are used to pay the costs of health and medical care expenses for a minor. Section 102 codifies income and asset exclusions including increasing the imputed asset threshold from $5,000 to $50,000 used to determine imputed income from resources. Amounts above $50,000 but below $100,000 are subject to imputed income from resources.

Other excluded income includes Supplemental Security Income (SSI) back payments during the period they would be excluded for SSI eligibility purposes, deferred Veterans Affairs (VA) benefits, VA aid and attendance benefits, and other exclusions as established by the Secretary of Housing and Urban Development.

Resources

HOTMA contains an increase in the assets an individual or family can have. Section 104 increases the limit on assets to $100,000.[6] However, people who have special needs trusts (SNTs) also generally rely on SSI and/or Medicaid and are unlikely to have $100,000 in available assets, unless they own a home in their name, in which case they wouldn't be in subsidized housing.

Compliance

The income requirements (§102–which includes the imputed income over $50,000 provision and trust income provisions) and asset rules (§104–notably, the $100,000 resource limit) are effective January 1, 2024. However, at the end of September, HUD issued Notice H 2023–10, which delayed the final mandatory compliance with §§102 and 104 until January 1, 2025. It does not delay the actual implementation of those sections by any given public housing agency (PHA). This should mean that when a PHA is ready to be in compliance, they must be, but the must be in full compliance no later than January 1, 2025. The Notice states, "Each [public housing agency] will set its own compliance date as early as January 1, 2024, but no later than January 1, 2025."

Continued on page 9

Section 8 *Continued from page 6*

As a result, the implementation of the new income and asset requirements will likely be somewhat inconsistent from county to county for much of 2024.

Amounts held in an Achieving a Better Life Experience (ABLE) account, contributions to an ABLE account, and distributions from an ABLE account for qualified disability expenses must all be disregarded for purposes of determining eligibility for federal benefits or the amount of benefits. This is true both before and after HOTMA.[7]

The Housing Choice Voucher program, also known as Section 8, was created by Congress in 1974. It is income based and is designed to provide rental assistance through housing vouchers to eligible, very-low-income families, persons with disabilities, and elderly individuals.

Takeaways

- SNT distributions that avoid reportable income for Medicaid and/or SSI can result in an increase in rent for a tenant in HUD-assisted housing or in loss of eligibility for a rental subsidy, or even for the housing itself.
- SNT beneficiaries will primarily be concerned with preserving a resource or stream of income for their benefit while protecting access to Medicaid and SSI. They may need to accept the fact that an SNT can have a negative effect on rent subsidies if needed to protect Medicaid or SSI.
- ABLE accounts may be a solution, instead of or combined with an SNT. Some people may be better off paying for their own housing.
- Have a plan to monitor the SNT beneficiary's income.
- Consider amending the SNT to require distribution of trust principal before income, after considering tax consequences.
- Distribute from the SNT to the ABLE account up to the yearly amount.
- Be prepared for confusion and pushback by housing agencies.
- Cite 24 CFR 5.609(b)(2)(i)(A) and the *DeCambre*[8] decision that only distributed income from an SNT should be counted.
- See the link for HOTMA Income and Income Exclusion Resource Sheet: https://files.hudexchange.info/resources/documents/Income-and-Exclusions-Resource-Sheet.pdf ■

Endnotes

1. (Adjusted for inflation) 24 CFR 5.618
2. 24 FR 48820-48842
3. 88 FR 9600; 24 CFR Parts 5, 92, 93, 570, 574, 882, 891, 960, 964, 966, 982
4. https://elderlaw.osbar.org/files/2022/07/July_2022.pdf
5. 42 USC § 1437a(b)(4)
6. 42 USC § 1437n(e)
7. 24 CFR 5.609(c)(17); NOTICE PIH 2019-09
8. *DeCambre v. Brookline Housing Authority* 95 F.Supp.3d 35 (2015)

Court visitor information now available online

The court visitor process varies widely across the state because ORS 125 defers to each circuit much of the qualification of visitors, fee, and process for appointment. In an effort to collect each circuit's process for getting a visitor appointed, the Oregon Judicial Department (OJD) has created a document that summarizes the process, fee, and any other comments regarding appointment in almost every circuit. This information was gathered as part of OJD's protective proceeding self-assessment report in 2022 and was confirmed to reflect the most current changes this summer. The chart will be updated with any future changes.

The chart is hosted on the OJD statewide visitor information page: https://www.courts.oregon.gov/programs/family/guardianship-conservatorship/Pages/Court-Visitor-Training.aspx

A direct link to the chart is at https://www.courts.oregon.gov/programs/family/guardianship-conservatorship/Documents/Circuit%20Court%20Visitor%20Info%20List%20-%20July%202023.pdf

Information provided by Jeffrey Petty, Probate Legal Policy Advisor, Oregon Judicial Department

Update

Residency requirement for laws on medical aid in dying

By Kevin Díaz, Attorney at Law

Kevin Díaz is the chief legal advocacy officer and general counsel for Compassion & Choices. His work focuses on improving healthcare and expanding choice for the end of life throughout the United States. Previously Díaz served as the legal director for the American Civil Liberties Union of Oregon.

In their last legislative sessions, both Oregon and Vermont removed residency restrictions from their respective medical aid in dying laws. The legislative changes were in response to two recent federal lawsuits brought by Compassion & Choices. A third lawsuit in New Jersey was filed on August 29, 2023.

The laws authorize and regulate medical aid in dying—the process by which a terminally ill, mentally competent adult with a prognosis of six months or less to live may lawfully request, be evaluated for, and ultimately receive a prescription from their doctor for medication they may opt to self-ingest in order to end their life. Most laws also contain language restricting the practice to residents of their respective state.

Implications of legislative changes for patients in Oregon

This past session the legislature passed SB 2279 (2023), which eliminated the Oregon residency requirement in Oregon's Death with Dignity Act. This change limits the risk to out-of-state clients from Oregon authorities if the client completes the entire process within the state.

This means that all steps in the somewhat lengthy process must take place while both the patient and healthcare providers authorized under the Oregon Death with Dignity Act (Act) are physically present in the state. This includes all requests, evaluations, writing and filling the prescription, and self-ingestion.

For non-residents who access medical aid in dying in Oregon, but who reside in a jurisdiction where the practice is also authorized, there is some risk in going through the process and filling a prescription in Oregon, but then self-ingesting at their home in another state. Arguably, that risk is so low that it would not be a barrier in most people's cost-benefit analysis. California, Colorado, Hawaii, Maine, Montana, New Jersey, New Mexico, Vermont, Washington State, and Washington, D.C., are the other jurisdictions where medical aid in dying has been authorized. As noted above, Vermont removed its residency requirement this year and there is a current pending challenge to New Jersey's residency requirement. The most significant risks associated with non-residents accessing medical aid in dying in Oregon arise with the potential application of criminal law of jurisdictions that have not authorized the practice. This is true for everyone involved in the process, but this article focuses on the concerns of patients, their friends, and loved ones. Medical personnel have additional regulatory and licensing concerns that must be considered and are beyond the scope of this article. Many states have statutes that specifically criminalize assisting a suicide. For example, Idaho's criminal code authorizes injunctive relief to prevent anybody "reasonably believed" to be assisting in the "act or instance of taking one's life." Idaho Code Ann. § 18-4017. Indeed, criminal statutes like the one found in Idaho appear to be drafted intentionally to encompass the practice of medical aid in dying. Thus, it is a distinct possibility that a district attorney who is unfriendly to the practice of medical aid in dying, with authority in a jurisdiction that criminalizes assisted suicide, and arguably medical aid in dying, could attempt to apply these laws to an individual who helps a friend or family member travel to Oregon to access the option.

Advising clients

Because of the possibility of liability from other jurisdictions, several considerations should be discussed with non-residents who consider traveling to Oregon to access medical aid in dying.

Advise clients that the protections enumerated by the Act do not extend

Continued on page 11

Residency

Continued from page 10

beyond Oregon. Non-residents interested in accessing medical aid in dying should be encouraged to complete all portions of the process, from intake appointments to the ingestion of the medication, in a jurisdiction where the option has been authorized. Individuals who complete any steps of the process out of state add a heightened risk of liability for their physicians and anybody else assisting them with the process.

Practitioners should engage an attorney licensed to practice in the non-Oregon jurisdiction in question to determine the applicability of criminal and civil liability for any friends or family members who might assist the terminally ill person outside of Oregon. They should also ensure that a patient's travel to Oregon and use of the Act does not inadvertently change their place of residence and thereby upend any estate planning documents. These attorneys must consider whether the state's courts would have territorial jurisdiction over this conduct. Practitioners must know that states which have adopted the model penal code are likely to have a statute that directly addresses whether the state has criminal jurisdiction over conduct legal within the state where it occurred but illegal within the home state. Under § 1.03 of the Model Penal Code such prosecutions would be impermissible. Territorial Applicability, Model Penal Code § 1.03, reads, in pertinent part:

(1) Except as otherwise provided in this Section, a person may be convicted under the law of this State of an offense committed by his own conduct or the conduct of another for which he is legally accountable if:

(a) either the conduct that is an element of the offense or the result that is such an element occurs within this State; **...**

(2) Subsection (1)(a) does not apply when either causing a specified result or a purpose to cause or danger of causing such a result is an element of an offense and the result occurs or is designed or likely to occur only in another jurisdiction where the conduct charged would not constitute an offense, unless a legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result.

Hospice care

It is highly recommended that any patient who will self-ingest in Oregon be enrolled in local hospice care, if possible. Doing so helps ensure they receive the care needed during the requisite evaluation and waiting periods and also helps reduce any potential interventions from law enforcement regarding the cause of death.

Ultimately, the ability of terminally ill patients to travel significant distances and to insulate their healthcare providers and loved ones from any legal liability by self-ingesting medication away from home creates a significant hurdle that many will not be able to overcome. But for those in adjoining states the ability to maintain the continuum of care with their existing Oregon physicians is a welcome relief when one is already grappling with end-of-life decisions.

Further information

Practitioners should consider ethical, professional liability, and cross jurisdictional issues that may arise. Available resources include the Oregon State Bar Ethics hotline, the Professional Liability Fund, and practitioners in a client's home state.

Additional public education materials can be found on the Compassion & Choices website at https://www.compassionandchoices.org/legal-advocacy/residency-restrictions. ■

Practitioners are welcome to contact Compassion & Choices attorneys for a free consultation.

EPPDAPA protective orders, part 2

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 stop abuse and prevent future abuse. This article follows up on "Petitioning for an EPPDAPA protective order," published in the February 2023 edition of this newsletter (https://elderlaw.osbar.org/files/2023/02/February_2023.pdf). It expands upon and continues from the "Other issues" section of the prior article, which provided information on the basic requirements and procedures for obtaining and serving an initial, uncontested ex parte EPPDAPA restraining order. While EPPDAPA protects more than just Oregon's elders, they are the focus of this article.

To refresh, here are some of the relevant definitions that are used herein:

- A "petitioner" is the (alleged) victim of abuse, in whose favor the restraining order is sought or granted. See also ORS 124.005(10).
- A "respondent" is the (alleged) abuser, against whom the restraining order is sought or granted.
- A "guardian petitioner" is a guardian or guardian ad litem who files an EPPDAPA petition on behalf of a petitioner. See also ORS 124.005(4).

Contested hearings

Following service of the EPPDAPA order and other required documents, the respondent has 30 days within which to request a hearing to contest the order. If the restraining order was obtained by a guardian petitioner, the petitioner (alleged victim of abuse; see definitions above) may also request a hearing to contest the order. ORS 124.020(9)(a).

The hearing must be held within 21 days of the request. ORS 124.015(1). The court may extend that time by up to five days if either party is represented by an attorney, so that an unrepresented party can obtain representation. ORS 124.015(3).

In practical terms, however, despite the mandatory phrasing of ORS 124.015(1) and the limitations of ORS 124.015(3), on agreement of the parties, courts are often willing to reset the contested hearing to allow time for settlement discussions, discovery, or other good cause. The EPPDAPA order remains in effect while the hearing is pending. Proof of service must be filed before the contested hearing is conducted. ORS 124.015.

At the contested hearing, the petitioner or guardian petitioner who filed the petition bears the burden of proof and must prove all statutory elements by a preponderance of the evidence. ORS124.010(2). Under ORS 124.020(1), those elements are: (1) the petitioner is an elderly person or person with a disability; (2) the petitioner has been the victim of abuse committed by the respondent within 180 days preceding the filing of the petition; and (3) there is an immediate and present danger of further abuse to the petitioner. (See the prior article for further discussion of each of these required elements.) As with the original ex parte proceeding, the showing may be made by testimony of the petitioner, their guardian or guardian ad litem, witnesses to the abuse, or adult protective services (APS) workers who investigated the abuse. ORS 124.020(3).

If you intend to call witnesses to testify, make sure to communicate with them about the hearing date and serve any necessary subpoenas well in advance, keeping in mind the often very tight timelines provided by ORS 124.015. APS policy typically requires an investigator to be subpoenaed to testify in court proceedings, and APS investigators will generally accept service via email and waive the witness fee. Oregon Administrative Rules obligate APS investigators to maintain the confidentiality of the identity of certain individuals and

Continued on page 13

EPPDAPA *Continued from page 12*

The usual contested hearing is a zero-sum game, resulting in either the continuation or dismissal of the entered EPPDAPA order. Like other legal proceedings, neither party can be certain of a favorable result.

other information obtained during an investigation. OAR 411-020-0030. However, an exception is provided within those rules for information disclosed to a court under court order. OAR 411-020-0030(5)(g). In this author's experience, the APS investigator will often ask to open their testimony by reading a statement to the court regarding their confidentiality obligations. The attorney should then ask if the APS investigator conducted an investigation into allegations of abuse related to the petitioner, followed by a request to the judge to order the APS investigator to testify in response to the attorney's questions related to that investigation.

Most judges will conduct the contested hearing along the lines of any other hearing in a civil matter. The petitioner (or guardian petitioner) will first present their case, followed by the respondent (or an objecting petitioner), and followed again by any rebuttal the petitioner (or guardian petitioner) chooses to make. It is this author's experience that it is generally to the petitioner's (or guardian petitioner's) advantage to simplify and avoid over-proving the case.

In cases with few or no witnesses, other than the parties themselves, whose testimony—even of the same events—can be quite divergent, non-testimonial evidence can often be the deciding factor in EPPDAPA proceedings. Where financial abuse is alleged, such evidence might include bank and credit card statements, copies of checks, etc. Where physical abuse is alleged, the court might be swayed by time-stamped photographs of injuries, medical records, and the like. Litigating attorneys should, of course, be prepared to make or respond to any evidentiary objections.

At hearing, if the petitioner (or guardian petitioner) has made the ORS 124.020(1) showing by a preponderance of the evidence, the court will enter an order continuing the EPPDAPA order. The continuation order does not extend the effect of the order beyond one year from the EPPDAPA order's original entry date.

If the petitioner (or guardian petitioner) has not met the required burden, the court will enter an order dismissing the EPPDAPA order. The court may also modify the EPPDAPA order by lifting or adding restrictions for the respondent, if the facts presented by the parties warrant it. As part of its ruling on the contested hearing, the court may also award attorney fees and costs against any party. ORS 124.015(2)(b).

Potential settlement

The usual contested hearing is a zero-sum game, resulting in either the continuation or dismissal of the entered EPPDAPA order. Like other legal proceedings, neither party can be certain of a favorable result. The risk of the unknown, the specific circumstances of a case, and the relationships between the parties can often mean the best result is a negotiated one. When an EPPDAPA order has already been entered, the court may approve a settlement agreement intended to end any abuse. ORS 124.015(4). Potential settlement provisions can include, for example:

- the return of money or property to the petitioner, or payment of attorney fees
- limitations on the respondent's visits with the petitioner, such as supervised visitation (perhaps even paid for by the respondent and defining who may serve as satisfactory supervisors), and/or advanced scheduling requirements
- "taboo" topics—subjects the respondent agrees not to raise with petitioner during visits and to redirect the conversation if petitioner raises them (for example, the petitioner's finances or estate plan)
- the respondent's agreement to refrain from using profanity or speaking ill of certain people (such as the petitioner's doctors and care providers, or guardian, conservator or other fiduciary) in the petitioner's presence

Continued on page 14

EPPDAPA *Continued from page 13*

The EPPDAPA order is effective for one year from the date of entry. However, the order can be renewed by the court on a showing of good cause, whether or not any further abuse has occurred.

- the petitioner's agreement not to initiate contact with respondent at all, or via other than certain approved means (whether by telephone, email, etc.)

Keep in mind, the court may only approve an agreement that restrains a party if the other party had petitioned for and obtained an EPPDAPA order. ORS 124.015(4). If the agreement provides for the dismissal of the EPPDAPA order, the petitioner's (or guardian petitioner's) motion for approval of the order or for dismissal of the proceeding must be notarized. ORS 124.030(2)(b). Outside of these few restrictions, and keeping in mind the court's and judge's interest in seeing that the petitioner is protected, the parties and their attorneys are free to craft agreements that creatively address the specific concerns arising from the relationship between the petitioner and the respondent.

Renewal

The EPPDAPA order is effective for one year from the date of entry. ORS 124.020(1). However, the order can be renewed by the court on a showing of good cause, whether or not any further abuse has occurred. ORS 124.020.

What constitutes good cause will vary on a case-by-case basis. Some examples:

- Previous violations of the order or other attempts by the respondent to contact the petitioner
- The petitioner's anxiety regarding the pending expiration of the order and the possibility that the respondent may no longer be restrained from contacting them
- In cases where the order was obtained by a guardian petitioner, the petitioner's own interest in or attempts to contact the respondent despite the order

The process for renewing an EPPDAPA restraining order is nearly identical to the initial application process for the original order. The petitioner (or guardian petitioner) files a renewal application followed by an ex parte appearance, on the same or the next judicial day, to make their case for good cause. If successful, the court will enter a renewal order.

Service of the renewal order, together with the renewal application, original order, and other documents, on the respondent (and petitioner, if renewal is sought by a guardian petitioner) is not addressed in the EPPDAPA provisions of ORS Chapter 124. However, most courts expect it and it is highly recommended so as to preserve the ability to seek contempt sanctions for violation of an order that has been renewed. Readers are encouraged to review the "Filing the petition," "The initial hearing," and "Service" sections of the prior article for more detail.

Some, but not all, counties have their own form of renewal application that can be obtained by contacting a clerk (often in the family law department). The Oregon Judicial Department (OJD) publishes a packet containing the EPPDAPA renewal application and related forms at https://www.courts.oregon.gov/forms/Documents/EPPDAPA%20Renewing%20a%20Restraining%20Order%20Full%20Packet.pdf.

As suggested in the prior article, the protections afforded by EPPDAPA proceedings differ from civil actions for abuse under ORS 124.100. While the relief afforded may seem less robust (no treble damages, for one), the expediency of EPPDAPA proceedings and the ability to enforce against violations through criminal contempt proceedings are key advantages to be considered in addressing any allegation of abuse, particularly when the abuse is ongoing. ■

Long term care insurance: a dismal future

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.

The traditional long term care insurance (LTCI) market is extremely limited, available only to those with sufficient income to pay steadily rising premiums. Your wealthier clients might still be persuaded by their circumstances and financial advisors to buy a new long term care insurance policy.

Those clients with existing policies and advanced age will want to keep the protection if they can afford it, or accept one of the reduced benefit options that will be offered with the next steep rate increase notice. Certainly, long term care providers (and continuing care retirement communities) will encourage their applicants to keep existing policies.

The National Association of Insurance Commissioners (NAIC) predicts that the new hybrid life insurance/annuity products with permitted long term care expense withdrawals might find a sustainable market. However, there is no clear transparent analysis to advise consumers of the pros and cons and costs of such products. On June 7, 2023, the New York Department of Financial Services published a 24-page report on the LTCI market. It mentions these products in a couple of footnotes, but includes no analysis.

https://www.dfs.ny.gov/system/files/documents/2023/06/dfs_ltc_report_20230607.pdf

State-run LTCI experiment in Washington

The Washington legislature in 2019 passed the Long Term Care Services and Support Act, establishing the first government-administered long term care program. The LTC benefits are funded by a new employee tax, which took effect July 1,2023, and are administered through the Washington Cares Fund. https://wacaresfund.wa.gov

Beginning July 2026, each person who is eligible to receive the Waashington Cares Fund benefit can access services and supports costing up to $36,500. The benefit amount will be adjusted annually up to inflation.

Near-retirees who have earned partial benefits will have access to a percentage of the total amount depending on how many years they worked.

The long term care benefit is funded with a payroll tax of fifty-eight cents per $100 of earnings. It can be used for any kind of long term care services in the home or a facility. The availability of the funds will give a family time to plan for more extensive services and reduce the general fund expenditures on the Medicaid program. Only Washington residents can claim the benefit, and it is not portable.

Washington set up several exemptions from the Cares Fund tax: military spouses, self-employed (who can elect to opt in), federal employees, and those who purchased private long term care insurance policies by November 1, 2021. So far, 473,000 people have requested exemptions. Many private long term care insurance policies were sold in the state of Washington as the November 1, 2021, deadline approached. https://www.npr.org/sections/health-shots/2022/04/17/1093113623/washington-long-term-care

Those with private long term care insurance policies purchased before November 1, 2021, could apply for an exemption (and avoid the tax), or stay in the program and have both sources of funds—Cares fund $36,500 and private LTCI—available as needed.

Continued on page 16

LTCI *Continued from page 15*

Will other states follow Washington?

Washington's public policy approach to a state-run long term care program funded by a specific tax might become a model for other states. However, the reaction to this innovation has been mixed. The benefit is small, the wait for payoff is long, and opposition from employee groups who wanted to be exempt from the tax was so strong that rollout was delayed a couple years and a several of these groups were made exempt. Other states may wait to see what happens in Washington.

In conclusion

The problem of finding and paying for, long term care will not go away. The private market mechanism of insurance for long term care risks has failed to solve the problem for all but those whose income permits the payment of significant premiums—a distinct minority of Americans. ■

Previous articles in the series on LTCI

Long term care insurance: its history and current status
July 2022, p. 8

Long term care insurance: Advising clients who have policies
October 2022, p. 8

Long term care insurance: purchasing a policy
February 2023, p. 9

Long term care insurance: claims
May 2023, p. 10

Long term care insurance: death of the insured and estate recovery
August 2023, p. 4

Thank you!

The newsletter committee expresses our sincere thanks to retired elder law attorney **Cynthia Barrett** for her in-depth six-part series on long term care insurance. Beginning with an overview of the history of the long term care insurance industry in our July 2022 issue and culminating in this month's issue with a discussion of the future of long term care insurance policies and coverage, Ms. Barrett's articles are replete with helpful resources and tips for advising current and prospective policy holders about their rights, handling benefits claims, and addressing estate recovery issues after the policy holder's death.

All of our articles are written by volunteers who have generously devoted their time to educating their peers on matters of interest to our community. We are grateful to Cynthia Barrett and all of our volunteer contributors who have shared their knowledge and expertise over the years.

Julie Nimnicht, Chair
Jacek Berka
Darin Dooley
Brian Haggerty
Alana Hawkins
Theressa Hollis
Leslie Kay
Laura Nelson
Nathan Rudolph

Professional Opportunities

Disability Rights Oregon

Staff Attorney, Guardianship Program
https://www.droregon.org/job-listings/staff-attorneys-guardianship

Supervising Attorney, Guardianship program
https://www.droregon.org/job-listings/supervising-attorney-guardianship

Health Law Fellowship
https://www.droregon.org/job-listings/health-disability-law-fellow

Staff Attorney, Multnomah Civil Commitments
https://www.droregon.org/job-listings/staff-attorney-multnomah-civil-commitment-program

Staff Attorney, Crime Survivor Program
https://www.droregon.org/job-listings/staff-attorney-crime-survivor

Cloud security: Best practices for vetting vendors

By Rachel Edwards, PLF Practice Management Attorney

***Rachel Edwards** was in private practice for four years before joining the Professional Liability Fund in 2016. Her areas of practice included Social Security disability, family law, adoption, and estate planning cases.*

In her role as a practice management attorney for the PLF, she provides assistance to Oregon attorneys to reduce their risk of malpractice claims and enhance their enjoyment of practicing law. Her assistance is free and confidential.

Ms. Edwards writes for the PLF's inPractice blog and posts technology and practice management tips on X.

Lawyers rely significantly on the cloud to store and share client data. According to the *ABA TechReport 2022*, cloud usage by lawyers increased from 60% in 2021 to 70% in 2022. Solos had an even larger increase in usage from 52% in 2021 to 84% in 2022. In the world we live in today, a law firm's data might be spread out across multiple types of cloud storage. Common examples for law firms include practice management software, document storage or management software, and data backup software.

In addition to the challenges that come with choosing what option best fits your firm's needs, lawyers have ethical obligations that apply when using cloud storage. The *Oregon State Bar Formal Ethics Opinion 2011-188* states that lawyers may store client information and materials on a third-party server if the lawyer complies with the duties of competence and confidentiality to reasonably keep the client's information secure. This requires lawyers to ensure the vendor will reliably secure client data and keep information confidential, otherwise known as "vetting the vendor." This duty is constantly evolving. Lawyers can be kept apprised of industry standards and make their assessment based on the technology available at the time by continually reevaluating the protective measures used by the third-party vendor.

The question then becomes: "How do I vet the vendor to ensure compliance with my ethical duties when storing client data in the cloud?" There are several factors to consider.

Legal-specific

A product built for use by law firms may have been developed with some ethical considerations in mind as it applies to lawyers. However, you still need to perform your due diligence. If a vendor is not legal-specific, ask them if they are accustomed to working with law firms and understand your ethical duties.

Business version

Use the business version of any cloud program. Business versions are generally more secure than personal versions.

Location

It is important to determine the location of the vendor's headquarters, data storage, and backup. Sometimes the storage and/or backup are with a different vendor, so be sure you know where everything is stored and any policies that apply. The geographic location should be separate from your own in case of a widespread disaster. The vendor should take precautions for disasters in its own area, such as backing up in multiple geographic locations. The physical storage sites must be secure. The highest level of security is a Tier Four Data Center Facility.

Backup

Investigate what data is backed up, where, and how the vendor backs up the data. Data should be backed up in multiple locations throughout the United States. The vendor should have an automatic and continuous backup system in place. Understand the terms for retrieval of backup data, including ensuring that all data is available for retrieval at any time, how long it takes to retrieve, and in what format you will receive it.

Terms of service

The terms of service should be clear and describe in detail their service obligations, data usage and privacy, breach response and notification policies, and backup plans. It should include an agreement by the vendor to preserve the confidentiality

Continued on page 18

Cloud

Continued from page 17

and security of the materials, and immediately notify the lawyer of any breaches or outside requests for information. It should also state clearly that your data belongs only to you. Review the terms annually and any time you are made aware of changes to the product.

Security considerations

Cloud vendors should abide by certain industry standards to ensure proper security. Look for the following information when vetting a cloud vendor:

Secure login requirements. The vendor should offer multifactor authentication after you enter your username and password.

Intrusion detection and virus protection software. These should be used on the vendor's servers.

Advanced Encryption Standard (AES) 256-bit data encryption. Encryption scrambles data to make it unreadable. AES 256-bit encryption is a strong form of encryption widely used for protecting sensitive data.

Internet connection. The vendor should require using a 2048-bit SSL certificate and secure HTTPS connection when a user connects to the service via a web browser. This language refers to encryption of data when connecting through the internet.

Standard for information security management. The International Organization for Standardization (ISO) is an independent nonprofit that provides standards for information security. The ISO/IEC 27001 certification requires companies to comply with strict standards relating to data security. The System and Organization Control (SOC) 2 Type II report is an auditing report received by a company that has met industry standards for things like security, availability, and confidentiality.

Encryption policies

Know the vendor's encryption policies. Encryption can happen at several levels, but not all vendors encrypt data at every level. A good cloud vendor encrypts your data at three different stages:

- before it leaves your computer
- in transit to the provider's server
- when it is stored on the provider's server

Only a few vendors offer encryption at all three stages. Many providers offer encryption at the second and/or third stage, but this means that the provider can access your data.

Read the encryption policies to determine when data is encrypted. Be cautious about choosing a provider who doesn't offer encryption before it leaves your database and determine who has access and for what purposes. For example, many cloud storage providers include a provision in their terms of service that allows them to turn over data to law enforcement or any other entity if they are served with the proper documents. This could lead to a breach of your confidentiality obligations and malpractice exposure. If only you have the decryption key, they can't turn over data. If possible, depending on the type of program, you may consider using third-party software to encrypt the data yourself before you upload.

Auditing

The provider's server facilities should be audited at least annually for security certifications. The auditing should be done by an independent third party. Ideally you should have access to the audit. Ask whether the vendor experienced any breaches in the past and if so, how did they investigate and respond?

Reputation

Do an internet search for the vendor. Read their online reviews and any applicable articles. Also speak to colleagues who may have used the vendor to discuss their experience.

Termination of services

You should have the option to terminate services immediately. And if the company shuts down or you choose to discontinue their services, what is the process for retrieving your data? Regardless of how service was terminated, determine if any copies of client data are kept on their servers. You want the data to be sanitized, meaning all traces of your firm's client data is removed from the cloud provider's servers.

In conclusion

This list is not exhaustive. It will continue to change as technology and security threats evolve, and it is incumbent on lawyers to do their due diligence when vetting any vendor. If you don't have in-house IT, find a third-party IT professional who can help you determine the best cloud options for your firm. Contact the Professional Liability Fund at 503.639.6911 and ask to speak to a practice management attorney for additional assistance. ■

Finding the right residence for individuals under guardianship

By Jennifer Roney, Registered Nurse

Jennifer Roney is a Registered Nurse and a Long Term Care Placement Specialist. She is the owner of Portland-based All About Seniors, Inc., a service that provides RN assessments, support resources, and care facility placements.

Jennifer's more than 40 years of experience in the skilled nursing area includes positions as nursing director and facility administrator.

When not working, she enjoys her 1915 farmhouse and a rural lifestyle.

When it comes to finding the right residence for a person who is under guardianship in Oregon, careful consideration must be given to various factors. As a placement agent who collaborates with a guardian, an elder law attorney, and the family, I believe it is helpful to understand the process. This article is a general outline of the steps and key professionals involved.

Assemble the team

The first step required in the placement process is to assemble the team. Typically, the guardian, elder law attorney, and family have all met and are ready to go forward. The professional to add in is the placement agent. In Oregon the placement agent is a professional registered by the Department of Human Resources. Their background and experience will vary, but at a minimum they are knowledgeable in the field of elder care.

A placement agent will play a very helpful role in the placement process. Their experience and knowledge of the local landscape of care facilities as well as their network of care providers allows them to navigate the process quickly and efficiently, leading to identification of the right living situation for the individual under guardianship.

The professional fees for the services of the placement agent are paid by the facility or living situation chosen and are not passed on to the person being placed. However, if the protected person is a Medicaid recipient, these professional service fees will require payment from another source such as the family or the guardian.

Evaluate the protected person

Next, a comprehensive evaluation of the person for placement is needed. Some of the many factors that will be considered are medical conditions, cognitive abilities, activities of daily living, mobility, cultural and religious preferences, geographical location, and financial resources. The placement agent is able to gather and compile this information from the guardian, the medical records, family members, the protected person, and current care providers.

Identify the options

Consideration will then be given to a full range of living options that capture the ability to meet the needs and goals identified in the evaluation process above. These options may include adult care homes, residential care facilities, assisted living communities, memory care facilities, nursing facilities, and possibly in-home care.

This process will create a fine-tuned list of options the placement agent will then contact directly. There will then be a direct conversation with each of these potential providers to review the specific needs and goals and determine if they are able, as well as interested, in moving forward. The outcome of this process will produce a list of optimal facilities to be considered.

Review the options

At this point, the placement agent will call for a conference with the guardian to conduct a review of these optimal facilities. The review will consider how each one will specifically meet the needs of the person for placement. The pros and cons, unique features, pricing, special programs, and more will be factors. The placement agent will also provide the guardian with the county and state regulatory evaluation records for each potential residence. Based on all this information, the guardian will prioritize the list of options to those of their greatest interest.

Continued on page 20

Residence

Continued from page 19

Finding the right living situation for an individual under guardianship in Oregon requires careful consideration, collaboration, and adherence to legal requirements.

Visit the facilities

The placement agent will then make arrangements for on-site visits. These visits provide opportunities for even more detailed questions and discussion.

At the completion of the visits, the guardian generally takes a period of time to analyze the information gathered. This is an opportunity too for the guardian to discuss the options further with the elder law attorney and family. The placement agent may also be involved in these discussions. The goal of the guardian at this point is to assure that all parties needing to give input have had an opportunity to do so before a final decision is made.

Address conflicting opinions

My experience has been that at this point in the process any family-related conflicts about placement that have not yet arisen will surface, and the intensity may be exacerbated by the nearness of the final decision. This is a time to potentially bring in the services of a family counselor or mediator if one is not already involved. However, ongoing open communication throughout the placement process diminishes the likelihood of a major conflict.

Implement the decision

The guardian will now arrive at a final decision, which will be reviewed with the elder law attorney to ensure that all legal requirements are satisfied. Once that is done, the placement agent will work in coordination with the guardian to plan the upcoming move. A transition plan will be developed that details the logistics of the move, and also addresses the medical and emotional needs of the protected person. Consultation will occur with their physician as necessary. The placement agent will make a plan for follow-up after the move.

In conclusion

Finding the right living situation for an individual under guardianship in Oregon requires careful consideration, collaboration, and adherence to legal requirements. By evaluating the person's needs, engaging in effective communication with all parties involved, exploring all suitable living situations, and considering legal and financial aspects, a successful placement can be achieved. This process prioritizes safety, well-being, and quality of life for the protected person, to ensure they receive the care and support they need and deserve. ■

Resources

Long term care placement agents

Oregon DHS Long Term Care Resources
https://ltcr.oregon.gov/Agents?page=1&sortOrder=Name&pageSize=12

Oregon Senior Referral Agency Association (OSRAA)
https://osraa.com/

Counselors and mediators

Oregon Counseling
Directory of licensed therapists and counselors in Oregon
https://oregoncounseling.org

Psychology Today
Online directory of therapists, psychiatrists, and counselors
https://psychologytoday.com

Mediate.com
https://mediate.com

Oregon Mediation Association
https://ormediation.org

Guardians

Guardian/Conservator Association of Oregon
https://www.gcaoregon.org/index.html

The Aging and Disability Resource Connection connects older adults to legal and other crucial services

By Adrienne Goins and Dawn Rustrum, Oregon Department of Human Services

If an older adult told you they needed help with long term care options, access to free meals sites, or information about other local resources and supports, would you know how to help them? Would you know who could help them? When seeking information about services to address aging or disability needs, the Aging and Disability Resource Connection (ADRC) of Oregon provides information and referral services to help people navigate state and community services to get the support they need.

The ADRC, which is a program within the Oregon Department of Human Services, offers services throughout the state that streamline access to the aging and disability service delivery system. The ADRC has free personalized assistance that is available over the phone, at the ADRC offices, and in some cases, through home visits. While the ADRC specializes in resources and information for older adults, people with disabilities, veterans, and family caregivers, it serves everyone with a need, regardless of age, disability status, or income level.

When to refer to the ADRC

Sometimes people who visit an attorney's office need more than legal advice. They may also need help with home-delivered meals, housing, transportation, in-home care, or other types of assistance. A referral to the ADRC of Oregon can help them find the support they need. The ADRC maintains a database of more than 5,000 state and local resources. When someone calls the ADRC, highly trained and knowledgeable staff will provide information about public and private services and programs, including free, low cost, or self-pay options, based on the caller's specific circumstances so they can choose the options that work best for their situation. The ADRC resource database is also available online so older adults, people with disabilities and their families can search for resources on their own, at any time.

For people who need more comprehensive guidance, such as choosing long term care options, the ADRC staff provide a service called Options Counseling that identifies the most appropriate solution, such as in-home options or a residential care setting. For example, if someone determines it's best to stay in their own home, the ADRC could assist them with identification of options for hiring an in-home care provider to assist with activities such as bathing, dressing, and housekeeping. People who are transitioning from the hospital to home or from a nursing facility to a community setting can also call the ADRC to explore options that meet their needs. Staff can also aid them in setting up the services they select.

Older adults may also need legal services for unique situations or specialty areas. While the ADRC does not provide direct legal advice or support, the staff can help people access legal assistance by finding and making referrals to services.

Legal help for older adults

Access to legal services can support older adults in leading lives that are independent and safe. The Legal Assistance Program provides services for adults aged 60 and older and who have the greatest social or economic need. In Oregon, the Legal Assistance Program is operated through a network of Area Agencies on Aging (AAA).

Oregon's AAAs receive federal funding and some local matching funds to pay for legal services prioritized by the Older Americans Act of 1965 (Title III-B). The AAAs use these funds to contract with local legal aid organizations or other law firms to provide funded services and reimburse lawyers for providing these services.

Continued on page 22

ADRC

Continued from page 21

However, available funding usually only covers a relatively small number of individuals each year.

Within the Legal Assistance Program, certain types of help are prioritized over others. As funding allows, services are provided for legal issues related to:

- Maintaining income and public benefits
- Access to health care
- Help with health care billing disputes
- Long-term care, either at home or in a licensed care facility
- Access to food benefits (SNAP program)
- Improper eviction or help with subsidized housing
- New access to utilities, shut-offs, or payment plans
- Protective services in the event of abuse or neglect
- Legal defense against unwanted guardianship proceedings
- Age discrimination

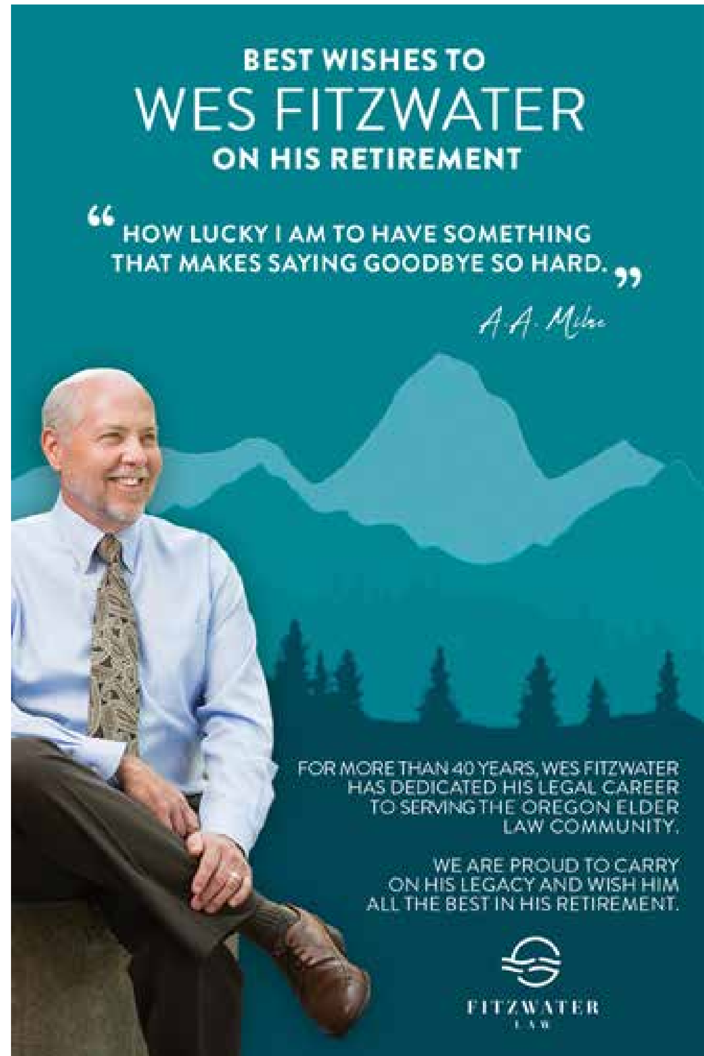
When someone calls the ADRC for legal help, staff will collect information such as their age, the city in which they live, and the type of legal help they need. If Legal Assistance Program services are available in the person's area, the ADRC staff will provide that information or other resources on how to find a lawyer.

How to contact the ADRC

Most ADRC locations are open during regular business hours of Monday to Friday from 8 a.m. to 5 p.m., though there are a few exceptions. People who need help can call 1.855.673.2372 to speak with the ADRC staff and get personalized support.

Resources, such as the long-term care planning toolkit, a searchable database and care needs checklists can be found on the ADRC website at: www.ADRCofOregon.org. ■

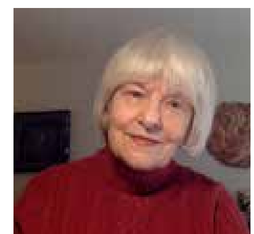
Watch this brief video to learn more about the ADRC of Oregon: https://www.youtube.com/watch?v=175kFr1HNjY



This is my last issue as editor of the *Elder Law Newsletter*

When I started working for the Elder Law Section in the spring of 2000, I had experience with writing, editing, graphic design, and project management— but not with the legal profession. I am not a lawyer, so it was essential that a newsletter committee would work with me to suggest topics and authors and to review articles for legal accuracy.

Over the years, thanks to the volunteers who have served on the committee and the many authors who have contributed to the newsletter, I have learned a lot about the practice of elder law and the resources available for elders. I know I am better prepared for the future, thanks to all of you who have educated me.



I have the greatest respect for your professionalism, and your genuine concern for your clients.

It has been an honor to work with you.

Carole Barkley

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. An index of articles is at https://elderlaw.osbar.org/index-of-elder-law-newsletter-articles/

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

Aging and Disability Resource Connection of Oregon
https://www.adrcoforegon.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 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

Guide to Transportation for Seniors
A helpful visual guide to getting older and getting around
https://www.seniorliving.org/research/transportation-guide/

Guardianship and the Right to Visitation, Communication, and Interaction
Legislative fact sheet from the American Bar Association Commission on Law and Aging
https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-40/issue-2-november-december-2018/guardianship-visitation/

How to add a Legacy Contact for your Apple ID
A Legacy Contact is someone you choose to have access to the data in your Apple account after your death.
https://support.apple.com/en-us/HT212360#:~:text=On%20your%20iPhone%2C%20iPad%20or,ID%2C%20or%20your%20device%20passcode

Jimmo v. Sebelius Settlement Agreement Fact Sheet
The settlement agreement clarifies that when skilled services are required in order to provide care that is reasonable and necessary to prevent or slow further deterioration, coverage cannot be denied based on the absence of potential for improvement or restoration.
https://www.cms.gov/medicare/medicare-fee-for-service-payment/snfpps/downloads/jimmo-factsheet.pdf

Some ways attorneys can locate the most recent deed to a property

First American DataTree® Property Data Reseach

This is a fee-based service. First American also has a free service. Call their local office to sign up for "Ignite."

Ticor
Establish a relationship with a Ticor title officer/escrow and ask for a Ticor express account. You might just get it by registering: https://admin-express.ticortitle.com/

Fidelity National Title

Provides the service for $10 per deed.

WFG National Title Insurane

To get information for Oregon, Washngton, Colorado, and Nevada properties, set up a free ValueCheck account on the WFG website.

Important elder law numbers

as of
October 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 .... $2,465/month; $3,715.50/month Excess shelter allowance .... Amount above $739.50/month SNAP utility allowance used to figure excess shelter allowance .... $469/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 premium .... Varies 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

The *Elder Law Newsletter* is published quarterly by the Oregon State Bar's Elder Law Section: Julie Nimnicht, 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:
Julie Nimnicht, Chair .... julie@elderlawpdx.com; 503.548.4000
Jacek Berka .... jacek@whitneysmithlawfirm.com; 541.885.9669
Darin Dooley .... darin@draneaslaw.com; 503.496.5500
Brian Haggerty .... bhaggerty@newportlaw.com; 541.265.8888
Alana Hawkins .... alana@kuenylaw.com; 503.949.6703
Theressa Hollis .... TheressaH@Fitzwaterlaw.com; 503.786.8191
Leslie Kay .... leskayvida@gmail.com; 503.333.3005
Laura Nelson .... lnelson@samuelslaw.com; 503.226.2966
Nathan Rudolph .... nrudolph@smvllp.com; 503.248.9535