Basic Estate Planning 2018

Cosponsored by the Estate Planning and Administration Section

Friday, November 16, 2018
8:30 a.m.–4:45 p.m.

5.75 General CLE credits and 1 Abuse Reporting credit
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OREGON STATE BAR
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935
# TABLE OF CONTENTS

Schedule ................................................................. v

Faculty ................................................................. vii

1. **The Role of the Professional Liability Fund** .................................................. 1–i
   — John Berge, *Professional Liability Fund, Tigard, Oregon*

2A. **A Summary of Recent Oregon Attorney Malpractice Claims** ..................... 2A–i
    — Philip Jones, *Duffy Kekel LLP, Portland, Oregon*

2B. **Things I Wish I’d Known When I Was in Practice: A Trust Officer’s Perspective on Administering Trusts and Estates** ............................... 2B–i
    — Marcia Jory, *US Trust, Portland, Oregon*

2C. **Cutting the Learning Curve—Twenty (Plus) Tips and Traps** ..................... 2C–i
    — Katherine Zelko, *Attorney at Law, Portland, Oregon*

3A. **Guardianship for Adults and Alternatives** ........................................... 3A–i
    — Tim McNeil, *Davis Pagnano McNeil & Vigna LLP, Portland, Oregon*

3B. **Conservatorship** ............................................................................... 3B–i
    — Richard Pagnano, *Davis Pagnano McNeil & Vigna LLP, Portland, Oregon*

4. **Escheats: Intestate Estates Without Heirs and Estates with Missing Heirs or Devisees** .......................................................... 4–i
   — Michael Grant, *Department of Justice Civil Enforcement Civil Recovery, Salem, Oregon*
   — Sally Peacock-Wells, *Oregon Department of State Lands, Salem, Oregon*

5. **Presentation Outline: Issue Spotting for New Estate Planning Attorneys** .......... 1–i
   — Amy Bilyeu, *Wyse Kadish LLP, Portland, Oregon*
   — Julie Meyer Rowett, *Yazzolino & Rowett LLP, Portland, Oregon*
   — Katharine West, *Wyse Kadish LLP, Portland, Oregon*

6. **Presentation Slides: Basic Estate Planning with Life Insurance** .................... 6–i
   — Melissa May, *Duffy Kekel LLP, Portland, Oregon*

7. **Of Minds and Means: Capacity and Undue Influence** ................................ 7–i
   — Stephen Owen, *Attorney at Law, Portland, Oregon*

8. **The New Oregon Advance Directive** ...................................................... 8–i
    — Christopher Hamilton, *McGinty Belcher & Hamilton Attorneys PC, Salem, Oregon*

9. **Mandatory Abuse Reporting for Oregon Attorneys** .................................. 9–i
    — Daniel Atkinson, *Oregon State Bar, Tigard, Oregon*
SCHEDULE

7:30  Registration

8:30  Mistake Discovered! The Role of the PLF
   ♦ Mistake discovered (yours or another’s)
   ♦ PLF involvement
   ♦ PLF claims in the estate planning area
   John Berge, Professional Liability Fund, Tigard

9:00  Cutting the Learning Curve—Tips for New Practitioners
   ♦ Client interactions: selection, critical issues to discuss, traps to avoid, and more
   ♦ What I wish I’d known when I was in practice—a trust officer’s perspective on administering
     trusts and estates
   ♦ Avoiding mistakes that cause malpractice problems
   Philip Jones, Duffy Kekel LLP, Portland
   Marcia Jory, US Trust, Portland
   Katherine Zelko, Attorney at Law, Portland

10:00 Break

10:15 Guardianships and Conservatorships: Important Issues and Recent Developments
   ♦ Guardianships: alternatives, when guardianship is appropriate, procedure for appointing a
     guardian
   ♦ Conservatorships: recent changes in the law, accounting, consideration of a protected person’s
     estate plan
   ♦ Using conservatorships to bring elder financial abuse litigation
   ♦ Closing of conservatorships and disposition of a de minimis estate
   Tim McNeil, Davis Pagnano McNeil & Vigna LLP, Portland
   Richard Pagnano, Davis Pagnano McNeil & Vigna LLP, Portland

11:15 Escheats: Intestate Estates Without Heirs and Estates with Missing Heirs or Devisees
   ♦ Oregon’s escheat statutes
   ♦ The Department of State Lands’ (DSL) role in investigating and administering intestate
     estates without heirs
   ♦ Attorney obligations when encountering full or partial escheat situations
   ♦ Reporting intestate estates, missing heirs, and unclaimed property to the DSL
   Michael Grant, Department of Justice Civil Enforcement Civil Recovery, Salem
   Sally Peacock-Wells, Oregon Department of State Lands, Salem

Noon  Estate Planning and Administration Section Annual Business Meeting

12:05 Lunch

1:00  Issue Spotting for New Estate Planning Attorneys
   ♦ Creditor and beneficiary issues
   ♦ Unequal/unequal plans/gifts
   ♦ Choice of fiduciary
   Amy Bilyeu, Wyse Kadish LLP, Portland
   Julie Meyer Rowett, Yazzolino & Rowett LLP, Portland
   Katharine West, Wyse Kadish LLP, Portland
1:45  Fundamentals of Planning with Life Insurance
   ✦ Elements and types of life insurance
   ✦ Taxation of life insurance
   ✦ When, why, and how to plan with irrevocable life insurance trusts
   Melissa May, Duffy Kekel LLP, Portland

2:30  Of Minds and Means: Capacity and Undue Influence
   ✦ “Capacity” under the law
   ✦ Assessing capacity
   ✦ When are influences “undue”?  
   Stephen Owen, Attorney at Law, Portland

3:00  Break

3:15  The New Oregon Advance Directive—Changes for 2019 and Beyond
   ✦ HB 4135, the 2018 advance directive bill
   ✦ The temporary form, effective January 1, 2019
   ✦ The Advance Directive Adoption Committee
   Christopher Hamilton, McGinty Belcher & Hamilton Attorneys PC, Salem

3:45  Mandatory Abuse Reporting for Oregon Attorneys
   ✦ Recognizing elder and child abuse
   ✦ Mandatory reporting requirements and the exceptions
   ✦ Protecting privilege and confidentiality
   Daniel Atkinson, Oregon State Bar, Tigard

4:45  Adjourn
FACULTY

Daniel Atkinson, Oregon State Bar, Tigard. Mr. Atkinson is an Assistant General Counsel in the Oregon State Bar Client Assistance Office. Prior to joining the bar, he spent ten years in private practice at two small general practice firms, first in Silverton and then in Portland.

John Berge, Professional Liability Fund, Tigard. Mr. Berge has been a claims attorney with the PLF since 2014. Prior to that, he was in private practice focusing on civil litigation in a wide range of areas, including insurance defense, real property, foreclosure and collection, estate disputes, and general litigation.

Amy Bilyeu, Wyse Kadish LLP, Portland. Ms. Bilyeu’s practice emphasizes estate planning and administration for small and large taxable estates, as well as business succession planning, income and gift tax planning, charitable planning, and estate planning for noncitizens. She is a chapter coauthor of Administering Oregon Estates (OSB Legal Pubs 2012). Ms. Bilyeu has taught continuing legal education seminars for the Oregon State Bar and others on both estate planning and administration matters. Ms. Bilyeu holds an LL.M. in Taxation from the University of Washington School of Law. She is licensed to practice in Oregon and Washington.

Michael Grant, Department of Justice Civil Enforcement Civil Recovery, Salem. Mr. Grant has worked as an Assistant Attorney General in the Oregon Department of Justice since 1998. He is also the Assistant Attorney-in-Charge of the Department of Justice’s Civil Recovery Section. Mr. Grant’s work includes probate, civil litigation, bankruptcy, and other debtor-creditor issues.

Christopher Hamilton, McGinty Belcher & Hamilton Attorneys PC, Salem. Mr. Hamilton focuses his practice on estate planning and elder law. His estate planning practice includes trusts, wills, powers of attorney, advance directives for health care, and other tools to achieve client protection. His elder law practice includes guardianships, conservatorships, Medicaid applications and planning, income cap trusts, supplemental needs trusts, and similar tools. He is chair of the Oregon State Bar Elder Law Section Legislative Committee and a member of the OSB Estate Planning and Administration Section and the Marion County Bar Association. Mr. Hamilton provides education on elder law and estate planning issues to families and professionals, including monthly free legal events at Center 50+ and the Alzheimer’s Network. Mr. Hamilton holds a Certificate in Dispute Resolution from Willamette University College of Law.

Philip Jones, Duffy Kekel LLP, Portland. Mr. Jones practices primarily in the areas of estate planning, estate and gift taxation, estate and trust administration, fiduciary income taxation, tax procedure, tax controversies, and estate and trust litigation. He is a Fellow of the American College of Trust and Estate Counsel and a member of the Estate Planning Council of Portland. He served for 20 years as an Adjunct Professor of Law at Lewis & Clark Law School, where he taught Estate & Gift Taxation and Federal Tax Procedure. He is the author of numerous articles in the Journal of Taxation and other publications. He has argued cases on behalf of taxpayers in the Oregon Supreme Court, the United States Tax Court, the Ninth Circuit Court of Appeals, and the United States Supreme Court. Mr. Jones is admitted to practice law in Oregon and Washington.

Marcia Jory, US Trust, Portland. Ms. Jory is a Managing Director and Senior Trust Officer with U.S. Trust, Bank of America Private Wealth Management. She works with individuals, families, and advisors to help ensure that trust, estate, retirement, and financial planning needs are addressed and issues are resolved. She serves as a resource for complex trust and fiduciary issues for trust officers throughout the West Division. She serves on the American Bankers Association Trust Schools Advisory Board and is past president of the Portland Estate Planning Council. Ms. Jory holds the Certified Trust and Financial Advisor (CTFA) designation (sponsored by the American Bankers Association Institute of Certified Bankers) and is a past member of the CTFA Program Advisory Board. Note: Ms. Jory does not provide legal advice in her role at U.S. Trust.
Melissa May, *Duffy Kekel LLP, Portland*. Ms. May advises clients regarding tax-efficient transfers of their assets to their family members and other beneficiaries. Her practice focuses on estate planning and administration of estates and trusts. She also advises nonprofit organizations and their founders and funders. She is an Adjunct Professor of Law at Lewis and Clark Law School and a member of the Oregon State Bar Estate Planning and Administration, Nonprofit Organizations, and Real Estate & Land Use sections. She authored the chapter on “Charitable Trusts” in *Administering Trusts in Oregon* (OSB Legal Pubs 2018). Ms. May is admitted to practice in Oregon and is an inactive member of Florida and Virginia bars.

Tim McNeil, *Davis Pagnano McNeil & Vigna LLP, Portland*. Mr. McNeil’s practice encompasses all of the basic elements of elder law, including long-term care and estate planning, guardianship and conservatorship, and probate. Mr. McNeil is a former member of the Oregon State Bar Pro Bono Committee and was the 2005 Senior Law Project Volunteer of the Year. Mr. McNeil is a frequent speaker at elder law–related CLE seminars.

Stephen Owen, *Attorney at Law, Portland*. Mr. Owen’s practice emphasizes probate, trust, and elder law litigation matters, including cases involving contested conservator and guardian proceedings. Mr. Owen also acts as a neutral mediator in these types of cases.

Richard Pagnano, *Davis Pagnano McNeil & Vigna LLP, Portland*. Mr. Pagnano has focused his practice on estate planning and elder law for his entire law career. He serves on the Guardian/Conservator Association of Oregon board of directors, and he is past chair of both the Estate Planning and Administration Section and the Elder Law Section. He has made a number of presentations to professional and nonprofessional groups on probate, estate planning, and elder law issues. He has written articles that have appeared in (and been quoted as an elder law expert in) The Business Journal, The Oregonian, and Willamette Week. Mr. Pagnano is the 1993 and 1996 recipient of the Senior Law Project Outstanding Volunteer Service awards.

Sally Peacock-Wells, *Oregon Department of State Lands, Salem*. Ms. Peacock-Wells is an estate representative with the Oregon Department of State Lands. Her duties include all aspects of administering intestate estates where there are no known heirs or a valid will. Ms. Peacock-Wells previously was a paralegal for a private law firm handling personal injury cases, estate planning, and business litigation.

Julie Meyer Rowett, *Yazzolino & Rowett LLP, Portland*. Ms. Rowett’s expertise includes estate planning and administration, protective proceedings, special needs planning, Medicaid, and planning for long-term care. She is a member of the Oregon State Bar Estate Planning and Administration Section and Elder Law Section and the National Academy of Elder Law Attorneys. Ms. Rowett is a frequent presenter at continuing legal education events, speaking on topics such as Medicaid, income cap trusts, and guardianships. She is one of the 2013 recipients of the Multnomah Bar Association Senior Law Project Volunteer of the Year.

Katharine West, *Wyse Kadish LLP, Portland*. Ms. West focuses her practice on estate planning, estate and trust administration, protective proceedings, and related probate court matters. She is chair of the Oregon State Bar Estate Planning and Administration Section CLE planning committee and a chapter editor for *Administering Oregon Estates*. Ms. West is licensed to practice in Oregon and California.

Katherine Zelko, *Attorney at Law, Portland*. Ms. Zelko practices primarily in estate planning and administration. She is a member of the Estate Planning Council of Portland and is the organizer of an estate planning and administration study group geared toward attorneys who are sole or small firm practitioners. Ms. Zelko holds an LL.M. in Taxation from the University of Denver.
Chapter 1
The Role of the Professional Liability Fund

JOHN BERGE
Professional Liability Fund
Tigard, Oregon

Contents

1. Discovery of a Possible Mistake ................................................................. 1–1
   a. Your Mistake ............................................................................. 1–1
   b. Some Else’s Mistake ................................................................. 1–1

2. PLF Involvement .............................................................................. 1–1
   a. Suspense File ........................................................................ 1–1
   b. Claim File—Nonlitigation .......................................................... 1–1
   c. Claim File—Litigation ............................................................... 1–2

3. Types of Claims ............................................................................. 1–2
   a. Failure to Satisfy a “Promise” to Testator to Achieve a Certain Result or Supply a Certain Benefit .............................................................................. 1–2
   b. Elder Abuse (ORS 124.005 et seq.) ................................................. 1–3
   c. Scrivener Errors—ORS 112.238 ..................................................... 1–3

4. Resources Available .................................................................... 1–3
The Role of the Professional Liability Fund

1. Discovery of a Possible Mistake:

a. Your Mistake

1) Disclose – ORPC 1.7 (Conflict of Interest); ORPC 1.4 (communication)
2) Continue Representation ORPC 1.16 (Declining or Terminating Representation)
   a) Waivable [ORPC 1.7(b)(1-4)] (Conflict of Interest – current client)
   b) Not waivable
   c) Even if waivable, should you continue?

b. Someone Else’s Mistake

1) Within context of representing the same client
   - Disclose to client after discussion with the other attorney(s) involved
   - Clarify your scope of representation with your client [In Re Weidner 310 Or 757; 801 P2d 828 (1990)]
   - ORPC 1.4(a) (duty to inform client)
   - ORPC 1.6(a) (no disclosure without clients informed consent)
   - ORPC 1.0(g) (informed consent)

2) While representing a different client
   - Disclose to your client [ORPC 1.4(a)]
   - Clarify scope of representation with your client
   - Consider reporting to the OSB or PLF (ORPC 8.3)

2. PLF Involvement:

a. Suspense file

A suspense file is essentially a placeholder acknowledging you have informed the PLF of facts and circumstances that may give rise to a claim. In most situations, with few exceptions, if a claim is later made, the Plan year associated with the claim will be the Plan year in which the suspense file was opened.

b. Claim file – Non-Litigation

“Claim” means a demand for damages, or written notice to a Covered Party of an intent to hold a Covered Party liable as a result of a covered activity.
1) Claim against a Covered Party – Possible Repair

a) Formal

Formal repair requires the Claimant’s consent to the PLF hiring a defense panel attorney with expertise in estate planning, at PLF expense, to represent the Claimant within a limited scope of representation in an effort to correct the problem.

b) Informal

An informal repair involves the PLF Claims Attorney and, at times, a defense panel member, at PLF expense, advising the Covered Party on possible options for repair.

2) Process the claim

The Claims Attorney communicates with both the Covered Party and the Claimant (or Claimant’s counsel) to develop an understanding of the underlying representation, the allegations of malpractice and possible damage. The Claims Attorney attempts to resolve the claim directly with the Claimant (or Claimant’s counsel), without the necessity of litigation.

3) Third Party attempt to discover information from a Covered Party

Estate Planning attorneys receive requests for information, both formal and informal from current clients, former clients, or adverse parties involved in litigation, or in anticipation of litigation.

a) Claims attorney provides some assistance to the Covered Party

b) Defense Panel attorney hired to assist the Covered Party in responding to any effort to compel information from the Covered Party (document production or deposition).

c. Claim file – Litigation

3. Types of Claims:

a. Failure to satisfy a “promise” to testator to achieve a certain result or supply a specific benefit.

1) Tax management

2) Specific requests [Hale v. Groce, 304 Or 281, 744 P2d 1289 (1987)].
b. Elder Abuse (ORS 124.005 et seq.)

1) Mandatory Reporting (124.050(9)(r))
2) Detecting Elder Abuse
   a) Questions without others present
   b) Independent Medical Exam
   c) Timing – was the person impaired at the crucial time
3) Protecting – allowing another to engage in abuse

c. Scrivener Errors – ORS 112.238

1) Forgotten provisions
2) Bad math
3) Irregularities in execution

4. Resources Available

   a. PLF informational call
   b. OSB Ethics Advice
   c. In-house General Counsel
Chapter 2A

A Summary of Recent Oregon Attorney Malpractice Claims

PHILIP JONES
Duffy Kekel LLP
Portland, Oregon
The Professional Liability Fund has kindly provided a list of common malpractice claims against attorneys that the Fund has received in recent years in connection with estate planning matters. The PLF files are confidential and thus details are not available, but the PLF has provided brief summaries of some of the claims they have recently experienced. By including a claim in this brief summary, no indication is made whether the claim was valid or if damages were actually paid. Instead, this is merely a list of some cases in which allegations of malpractice were made. In each of these cases, an attorney was alleged to have engaged in one or more of the following acts:

- Undertaking to prepare a deathbed will where there were significant changes regarding beneficiaries. In these cases, the lawyer may be vulnerable to attack unless there is good evidence to show that the client had capacity and fully understood the result of the changes.

- Changing a will or trust, but forgetting that the changes required other changes in the same document or in other documents, such as the renumbering of other paragraphs because of cross-references, or other references to the same property elsewhere in the document. In these cases, the actions of the attorney may have caused confusion about the testator’s intent because the various provisions were inconsistent. When making a change, all of the dispositive provisions and all of the boilerplate need to be re-examined.

- Confusion about who is preparing a certain tax return, or making a certain tax election, the lawyer or the accountant. Obviously, it is very important to make a list of the forms that need to be submitted and to confirm, in writing, who is taking responsibility for filing each type of form. Late filings and late elections can result in penalties and interest, and often the damages cannot be repaired.

- Representing an unsophisticated personal representative or trustee without making sure that the fiduciary understands the duties and responsibilities to be undertaken and fulfilled. This comes down to good selection of clients, or of careful education of clients, or both.

- Confusion about who the lawyer is representing. As in every area of the law, being clear about who the client is, and who is not, is important, particularly when more than one family member is involved. Sometimes, even the lawyer is not sure of who the client is. An engagement letter will often prevent this problem, and a letter to the other parties explaining that the attorney does not represent them will also help.

- Not considering whether an action taken will result in a claim against an estate by the Department of Human Services. Extra care must be taken whenever a client or a beneficiary is receiving government benefits, and often an expert in that field needs to be consulted.

- Failure to be aware of dishonesty on the part of a personal representative, trustee, or conservator, and failure to take action regarding suspicious activities. Oftentimes, the attorney will be blamed for not noticing red flags.
• Failure to anticipate tax consequences and failure to provide advice in that regard. This could include income tax, gift tax, estate tax, and/or generation skipping tax.

• Failure to understand what constitutes a valid disclaimer. If the disclaimer does not comply with the federal and state statutes governing disclaimers, tax consequences may occur, or the disclaimer might be invalid or ineffective.

• Failure to fund a trust; or failure to recognize which assets belong in which trust (the marital trust, the bypass trust, or the survivor’s trust), and failure to maintain those distinctions over time.
Chapter 2B

Things I Wish I’d Known When I Was in Practice: A Trust Officer’s Perspective on Administering Trusts and Estates

Marcia Jory
US Trust
Portland, Oregon
Things I wish I’d known when I was in practice

A trust officer’s perspective on administering trusts and estates

Marcia Jory
Managing Director, Senior Trust Officer
US Trust, Bank of America Private Wealth Management
Portland, Oregon
November 16, 2018

Disclosure

Important:
This brief summary is for discussion purposes only. It does not contain legal, tax, investment, or insurance advice and cannot be relied upon for implementation and/or protection from penalties. Always consult with your independent attorney and tax advisor for legal and tax advice.


Investment Products:

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The views and opinions expressed in this presentation are my own and do not necessarily represent those of Bank of America Corporation or any of its subsidiaries.

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Practical provisions in Trusts and Testamentary documents that are important to fiduciaries in the interpretation and administration of the governing instrument:

- **Naming convention for trusts established after the death of the first spouse:**
  - Use of generally understood terms benefit professionals working on the engagement. Examples: “Credit Shelter” or “By Pass” trust to denote the portion utilizing the exemption amount.
  - In states with state estate/inheritance taxes, consider use of “[State] QTIP” or other convention
  - Clarity of trust names makes it easier for the CPAs and the fiduciary to track funding and other activity in the accounts

- **Identification of Corporate Fiduciary**
  - Don’t guess – call the company and make sure the proper legal name is used to identify a corporate fiduciary
  - Include language anticipating corporate mergers/acquisitions

- **Fiduciary Compensation:**
  - Remember not only to include it – but consider how it is to be paid if there is more than one person serving in a fiduciary role

- **Multiple Fiduciaries/Trustees**
  - In addition to compensation, what are the duties and responsibilities when more than one fiduciary is serving
    - Unanimity required or majority rules? What if there is a “tie”?
    - If duties are delegated among the fiduciaries, how is that communicated to 3rd parties?

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Practical provisions in Trusts and Testamentary documents that are important to fiduciaries in the interpretation and administration of the governing instrument (cont’d):

- **Bifurcation** of responsibilities (administrative trustee/investment advisor/Trust protector/discretionary advisor/etc.)
  - While recognized by many state statutes, corporate fiduciaries may have a preferred way to handle bifurcated trusts. Check before naming a corporate fiduciary.

- **Successor Trustees**
  - Anticipate contingencies and enable a trusted individual to nominate a successor trustee if all named successors are unable/unwilling to serve
  - Be very clear under what circumstances (other than resignation/death) a successor trustee will come into existence
  - Try to avoid having to ask the court to name a successor – time consuming & costly

- **Trustee Removal**
  - What grounds will give rise to a right to remove a trustee?
  - Who will have that removal right?
  - What limitations are there in nominating a successor?

- **What constitutes incapacity?**
  - Who is empowered to determine “incapacity”?
Particular Issues/Considerations

- **Special/Supplemental Needs trust**
  - Consider the fiduciary’s need to have extensive knowledge of state & federal benefits and eligibility requirements to be effective
  - Supplemental Needs trustee should have expertise to ensure distributions do not jeopardize the beneficiary’s eligibility for public and private benefits
  - Recognize the significant potential administrative duties required: program applications, court-ordered accountings, court oversight
- **Incentive trust**
  - Education incentives
  - Employment incentives
  - Moral incentives (including “disincentives”)
  - ISSUES:
    * Incentive provisions in Discretionary Distribution trusts
    * Incentive provisions in Mandatory Distribution trusts
  - Corporate Fiduciary concerns:
    * Monitoring beneficiary behavior
    * Increased litigation risks
  - SOLUTIONS:
    * Utilize incentive language linked to independently-verified objectives
    * Seek guidance via a letter of wishes/memorandum from the grantor
    * Use precatory incentive language
    * Provide for enforcement by an individual co-trustee

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Particular Issues/Considerations

- **Concentrations**
  - Fiduciaries have a duty to diversify
  - Corporate fiduciary v Individual fiduciary
- **Residence Trusts**
  - If fund only with a residence, recognize “concentration” issue
  - If fund only with a residence, consider how the expenses associated with the property will be covered
    * Property taxes
    * Maintenance/upkeep
    * Insurance (building/contents; replacement value?; earthquake?; flood?)
  - Fiduciary obligation to monitor the property at least annually
  - Consider how the fiduciary can meet the monitoring obligation if property is outside the fiduciary’s location (CF, a corporate fiduciary may have offices in multiple states)
- **Discretionary Distribution provisions**
  - Identify currently permissible beneficiaries of income and/or principal
  - Consideration of outside resources
- **Specialty Assets** (real estate; closely held businesses; oil/gas/mineral rights; farm/ranch/timberland; LPs/LLCs/FLPs)
- **Change of Situs** for administration/governing law
Particular Issues/Considerations

- Termination provisions
  - Make sure they work
  - Include early termination provisions

- Be sure the document covers your client’s objectives
  - Consider: is there a need to include all the “form book” clauses/provisions that may be suggested in resources consulted to assist in the preparation of client documents

- Avoid conflicting provisions
Chapter 2C

Cutting the Learning Curve—
Twenty (Plus) Tips and Traps

KATHERINE ZELKO
Attorney at Law
Portland, Oregon

Contents

Introduction ................................................................. 2C–1
Client Selection and Intake ............................................. 2C–1
Crucial Concepts for Clients to Understand. ...................... 2C–2
Selected Drafting Issues .............................................. 2C–4
Document Control ...................................................... 2C–6
Introduction. Estate planning is one of the most challenging - and rewarding - areas of legal practice. The learning curve is steep and never levels off completely. These materials contain some tips from my experience and that of other practitioners which we hope will boost you up that learning curve.

Client Selection and Intake

1. Always meet the potential client(s) in person. Be alert to the possibility of undue influence, elder abuse, and overly controlling spouses or children. Elderly or vulnerable clients may be brought to your office by a child or other helper. Make it clear in advance that you will need to meet with the potential client alone to assess his or her capacity to make estate planning decisions.

2. Use a comprehensive information-gathering questionnaire for all clients. Personally, I use the PLF form (osb.plf.org) with modifications: ask about significant debt and liabilities, ask about excess personal liability coverage (umbrella coverage), digital assets, burial plots, and long-term care insurance.

3. There are some types of people who are not worth taking on as clients, or at least warrant your careful consideration before you take them on. They include people who:
   • Just want you to review the Wills they prepared from an internet website
   • Are overly concerned with avoiding taxes or creditors
   • Have been fired by or have fired other lawyers before coming to you
   • Are cagey about their assets or relationships
   • Are argumentative about fees or the time needed for you to do a good job
   • Are overly anxious, indecisive, or obsessive

   Trust your instincts.

4. There are estate planning situations that require particular expertise:
   • Second (third, fourth) marriages. Not only are there ethical traps (see below), but special care is needed to construct an estate plan that will work.
   • Premarital and postmarital agreements, for the same reasons.
   • Irrevocable Trusts
   • Noncitizen spouses and/or assets in foreign countries
   • Wealthy clients, both because tax planning is needed and because the dollars are worth litigating over. If there are large retirement plans which need to be administered in trusts for the benefit of a surviving spouse or children, you need to know how to preserve the “stretch” - the ability to draw from the retirement plan over the life expectancy of the trust beneficiary.
   • Clients who have large businesses and need buy-sell planning.
5. Checking for conflicts is subtler in estate planning matters. Generally there are no adverse parties involved, but check for potential conflicts with the client’s employer, with co-owners of the client’s property or businesses, and members of the client’s family.

6. To do your job properly, you will need to keep confidential information like birth dates and social security numbers in your files, as well as other sensitive personal information. Have procedures in place to safeguard this information. Ask clients at the outset of the relationship about how they want you to send drafts of documents, leave voicemail messages (or not) at home or work, email them (both spouses or one?), and agree on a password for emailed documents.

Crucial Concepts for Clients to Understand.

7. **Estate Planning Isn’t Just a Will.**
   - Death is not the only issue. So is incapacity. Durable powers of attorney, nominations of guardians and conservators, and health care directives of all kinds are just as vital to a complete estate plan. Control over disposition of the client’s remains, organ donation, and ownership over burial plots and crypts can be very contentious, too.
   - Wills don’t control all the assets. Forms of ownership and beneficiary designations take precedence. Discuss the pros and cons of joint accounts, joint ownership, and TOD and POD accounts. Some clients go overboard with probate avoidance techniques and do not remember the disadvantages: exposure of assets to a child’s creditors, unequal or unintended distribution of the client’s assets after death, and lack of funds in the estate to pay creditors, taxes, and administration expenses.

8. **Wills Don’t Avoid Probate and Probate Doesn’t Mean Estate Taxes.** Clients are often confused about what Wills are for, what Probate is, and what the relationship is between Wills, Probate, and Estate Taxes. It helps to explain these concepts early in the first discussion with the clients.

9. **The Spouse Who Survives Wins and Other Joint Representation Issues.**
   - The most common estate planning arrangement for married couples or domestic partners is to leave all assets to the surviving spouse, and for the surviving spouse to leave the assets to their children at his or her death. Clients tend to think that because they have executed Wills that are mirror versions of each other’s, there is an agreement that the surviving spouse will not change his or her Will. Clients must be told that this is not true, absent a contract. See ORS 112.270. In other words, the spouse who survives controls the ultimate disposition of the marital assets.

   - Practitioners disagree about whether a contract to make or not change a Will is advisable. A trust for the surviving spouse is preferable, but may simply be too expensive an estate plan for couples who are not wealthy. The important thing is that
the discussion take place so that clients understand how property passes at death and that in the absence of a contract, the surviving spouse has no legal obligation to follow the original plan. Then you can discuss the possible solutions with them and if none of them are practical now, at least the clients will be aware of the issues in the future, and you will have protected yourself.

- Explain the potential conflict of interest between spouses, the fact that you cannot keep secrets between spouses if you represent both of them, and obtain their waiver of the conflict before proceeding. The PLF has a sample Joint Representation Consent Letter in its library of forms. The American College of Trust and Estate Counsel has a guide to engagement letters available to nonmembers at its website: [www.actec.org/assets/1/6/ACTEC_2017_Engagement_Letters.pdf](http://www.actec.org/assets/1/6/ACTEC_2017_Engagement_Letters.pdf). Note that this guide is not necessarily consistent with Oregon ethics rules.

- I try to be direct and concrete about these subject in my letters to and conversations with my clients (I think you must do both) in second marriage situations where the risk of conflict is high. Form engagement and consent letters are necessarily generic and clients, especially unsophisticated ones, will sign them without reading them. Add some plain language. For example:

  I cannot keep secrets between you: if one of you tells me something that affects your estate plan, I cannot keep it secret from the other.

Or on the subject of contracts not to change a will:

Many couples in your situation plan to have all property pass to the surviving spouse at the first death, expecting to have the surviving spouse leave his or her estate equally between your children. However, it is possible for either of you to change your Will at any time, before or after the other's death, to provide only for your own children or for a new spouse or in any other way you choose. Unless you specifically agree in writing not to change your Wills, there is no contract between you not to change your Wills, or for the survivor of you to leave his or her property in any way whatsoever. This not only puts at risk the children of the first spouse to die, but can also leave the surviving spouse uncertain about his or her obligation to follow the deceased spouse's wishes.

Even if you had a contract not to change your Wills, there are so many ways such a contract can be undermined that it is not adequate protection for the children of the first spouse to die. The only way to effectively protect your children, if you are the first to die, is not to leave your assets to your spouse, but in trust for your spouse for his or her lifetime, with the remainder passing to your children, or variations on that plan.

- A recent Formal Ethics Opinion, No. 2018-194, is required reading for estate planners. It is a good review of current client conflicts and the extent to which they can be effectively waived. In a nutshell, the Opinion concluded that in a second marriage situation, the attorney representing both spouses should not advise both spouses as to
whether they should waive their elective share rights and could not prepare a document for both of them waiving these rights. The Opinion discussed only elective share rights, but could easily apply to other issues that arise in post-marital planning.

10. **Choosing Fiduciaries Wisely.** Explain the duties of personal representatives, trustees, attorneys-in-fact, and other fiduciaries, and the fact that there is no court supervision of attorneys-in-fact and trustees. Clients often want to name their children in order of preference by age, or by geographical proximity, when the important criteria are honesty, fair-mindedness, and financial competence.

11. **Naming Guardians for Minor Children.** Sometimes disagreement over who will be guardian for the children can prevent a parents from ever finishing their Wills. It can help take the pressure off them if you explain that (a) the court will appoint the most suitable person under the circumstances and that the nomination in their Wills is only one factor in the court’s decision (see ORS 125.200) and (b) their nomination of guardian does not need to be in their Wills but can be done by a separate document that they can amend or replace from time to time.

12. **Name the Trustee of the Trust for Children as the (Contingent) Beneficiary of Life Insurance Policies.** Help your clients fill out beneficiary designations properly, lest they name their spouse as primary beneficiaries and their minor children as secondary or contingent beneficiaries. Naming the Trustee of the trust for children as the secondary or contingent beneficiary (a) makes the funds available to the Trustee sooner than if the funds were paid to the estate, and (b) avoids exposure to creditors in the parent’s estate. See ORS 743.046(1) and ORS 130.150(2). Similar considerations apply to beneficiary designations for qualified retirement plans, IRAs, and annuities, but are more complicated because of minimum distribution rules.

**Selected Drafting Issues**

13. **Specific Devises.** Specific gifts can be a minefield, especially if the client is literal-minded (or controlling) and the gifts are large. Ask the client:
   • What if you do not own this asset at the time of your death? What if it has been replaced with another asset, or sold?
   • What if the intended recipient predeceases you?
   • What if the intended recipient does not want it?
   • What if this asset is the largest asset in your estate?
   • Should the recipient pay the estate tax on this asset?
   • If there is a mortgage on the asset, should it be paid off or assumed by the beneficiary?
Become familiar with the rules on specific devises, especially:

- ORS 112.260 (leaving a list of tangible personal property referenced in the Will)
- ORS 112.385 (nonademption of specific devises)
- ORS 115.255 (discharge of encumbrances)

and

- ORS 116.007(2): “Unless the will otherwise provides, income from the assets of a decedent’s estate after the death of the testator and before distribution, including income from property used to discharge liabilities, shall be determined in accordance with the rules applicable to a trustee under ORS chapter 129 and this section and distributed as follows:

  “(a) To specific legatees and devisees, the income from the property bequeathed or devised to them respectively, less taxes, ordinary repairs, and other expenses of management and operation of the property, and an appropriate portion of interest accrued since the death of the testator and of taxes imposed on income, excluding taxes on capital gains, that accrue during the period of administration.”

This provision has been interpreted to require that the specific devisee is responsible for expenses related to the specifically devised property if there is no income during administration, or insufficient income. So deal with the issue in the Will by leaving the devisee a sum of money along with the property, or provide for payment of the expenses from the residue of the estate.

14. **Tax Apportionment Clauses.** Think about this issue in every case. Full apportionment means all devisees share the estate tax burden, even if a devisee only received a stamp collection. Payment of all taxes from the residue means that the residuary beneficiaries pay the estate taxes attributable to specific devises and property passing outside the Will, even if it’s a $1 million insurance policy payable to the decedent’s boyfriend.

15. **Business Entities.** Does the client own an interest in an S Corporation? If so, be sure the trusts for her children will not disqualify the S Election; they must meet the criteria under Internal Revenue Code Sec. 1361(d)(3) and the regulations thereunder. Does the client have interests in LLCs or partnerships which will pass to a trust? Will the trust have “phantom income” from a business entity? Distributions to a trust from a pass-through business entity are not the same as the taxable income that the trust will have to report. Will the trust have other assets to pay taxes if distributions are not sufficient?

Take a look at the operating documents for the business entity. Are there provisions which govern the death of an owner? Does the entity permit transfer on death (TOD) registration?
It is a good idea to check, or have your client check, the title to real estate held in a business entity. Often it has not been transferred to the entity. Also, check the business registration at the Corporation Division website. Often the entity has been administratively dissolved, the officers are not named correctly or there are other errors. For example, the registrant of an assumed business name may be the client personally, rather than the client’s LLC or corporation.

16. **Joint Living Trusts.** The pitfalls of joint trusts in taxable estates have been extensively discussed. For example, see Stephen Klarquist’s article in the January 2008 Elder Law Section Newsletter, *Drafting Trusts for the Taxable Estate.* But even in nontaxable estates, it’s important for the trust document to describe the rights of the spouses in the trust property so that it is clear what is included in the estate of the first spouse to die for estate tax purposes and which thus receives a new basis equal to date of death value. In most cases, each spouse will have an undivided ½ interest in each trust asset. For example, see the joint trust in Barbara Jo Smith’s materials in *Broad Brush Taxation* (2017 Oregon State Bar CLE).

If married clients have moved to Oregon from a community property state, be sure the joint trust preserves the community property character of property brought from the prior state. Community property receives a 100% basis step-up (or down) on the first death. IRC Section 1014(b)(6). It is not certain that residents of a non-community property state like Oregon can take advantage of this rule, but until there is a decisive case or ruling, at least do nothing to destroy the community property character.

17. **Forms.** I was not able to find any low or no-cost, up to date, Oregon-specific estate planning forms. The Estate Planning and Administration Section has undertaken a forms drafting project with the first release expected in 2020.

**Document Control**

18. **Should you keep original documents?** There is no clear answer. Keeping originals is often best for the client, but a long-term responsibility for the attorney. See ORS 112.800 *et seq.* for the duties of persons holding original Wills.

19. **Give Clients a List of Executed Documents** summarizing the name of the document, who is named in the document as fiduciaries, where the original document(s) will be kept, and who has copies.

20. **Multiple Originals of the Durable Power of Attorney.** My rule of thumb is to have 3 originals, in case one original is lost (remember that you cannot record a copy of a power of attorney if real estate needs to be sold). But there should not
be too many originals that will have to be retrieved and destroyed if the client wishes to revoke the DPOA.

21. **Keep copies in your file of draft documents**, as well as records of critical conversations and decisions, as evidence of the clients’ intent.

22. **Explanations of the client’s rationale** for excluding someone from a Will, or not naming someone as guardian for the children, or similar explanations that can be hurtful or defamatory are better left in a letter rather than the Will itself.

23. **Multiple Codicils or Amendments**. Some day, someone will have to read and administer the Will or Trust, and dealing with multiple amendments is confusing and can cause errors. Restate the entire Will or Trust if there more than a few changes.

24. **Don’t assume** you know what a document says. Wills, trusts, and durable powers of attorney tend to follow standard forms and it is easy to assume that there is nothing out of the ordinary in a document that looks like the usual boilerplate.
FORMAL OPINION NO 2018-194
Conflicts of Interest, Current Clients: Representing Husband and Wife in Preparation of Estate Plan Involving Waiver of Elective Share

Facts:

Married Couple approaches Lawyer jointly and asks Lawyer to represent both of them in the matters described below.

Married Couple have been married for 15 years and both have children from their previous marriages. They have no children from their current marriage.

Married Couple own their house as tenants by the entirety, but have kept the majority of their assets separate. Spouse A has substantially more assets than Spouse B. They inform Lawyer that it is their individual intent that they would prefer that their estate plans provide that their separate assets be distributed to their children by their previous marriages and their jointly owned assets pass to the surviving spouse by right of survivorship.

Because of the value of Spouse A’s separate property, it is clear to Lawyer that Spouse B would have an elective share claim if Spouse A were to die first. An elective share claim would defeat Married Couple’s current intentions for their estate plan.

Married Couple do not have a prenuptial agreement.

Questions:

1. May Lawyer provide information to Married Couple as to their respective elective share rights under ORS 114.600 to 114.725?

2. May Lawyer advise both Spouse A and Spouse B as to whether they should waive their elective share rights as provided in ORS 114.620(1)?

3. May Lawyer prepare an agreement to mutually waive the elective share rights of Married Couple?
4. After Spouse A and Spouse B have executed an agreement to waive the elective share, may Lawyer advise Married Couple concerning their estate plan?

Conclusions:

1. Yes.

2. No, qualified.

3. No, qualified.

4. Yes.

Discussion:

Oregon RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.
1. **Lawyer May Provide Information about the Elective Share and Its Potential Waiver to Both Spouses.**

Under Oregon’s elective share statute, a surviving spouse may elect to receive a percentage share of the decedent’s estate according to a formula based on the length of the marriage. ORS 114.605. Absent a waiver of that right, the elective share will override a contrary provision in the decedent’s will. ORS 114.605. However, that legal right can be waived. Under ORS 114.620, a spouse may enter into a written agreement, before or after the marriage, to waive his or her elective share. Such agreement to waive the elective share is a type of prenuptial or postnuptial agreement. *In re Estate of Richard B. Wilber*, 165 NH 246, 75 A3d 1096, 1099 (2013).

Providing general information about the elective share does not create a significant risk that Lawyer’s responsibility to one client will be materially impaired by his responsibilities to the other. Each spouse has a fiduciary obligation to the other requiring full disclosure and fairness. *Day v. Vitus*, 102 Or App 97, 792 P2d 1240, *rev den*, 310 Or 281 (1990); *Matter of Marriage of Eltzroth*, 67 Or App 520, 526, 679 P2d 1369 (1984); *Bauer v. Bauer*, 1 Or App 504, 464 P2d 710 (1970). Providing information about the elective share and its waiver to both spouses is consistent with each spouse’s duty to each other. Therefore, it does not create a significant risk of impairing Lawyer’s obligation to either spouse for Lawyer to provide such information to both spouses.

2. **Advice to Waive Elective Share Presents a Current-Client Conflict Of Interest.**

Spouses often seek joint representation in estate planning. Typically, the interests of the spouses will be aligned for such purposes. However, there are exceptions in which simultaneous representation would be prohibited. OSB Formal Ethics Op No 2005-86. For example, “spouses with children by prior marriages may have very different opinions concerning how their estates should be divided.” OSB Formal Ethics Op No 2005-86. Thus, an attorney was reprimanded for representing both spouses in revising their estate plans in *In re Plinski*, 16 DB Rptr 114 (2002). In that case, the spouses’ interests were adverse because
they had children from prior marriages, their respective estates were of different values, they had ongoing financial disagreements, and one spouse was, for reasons of health and disposition, likely susceptible to pressure from the other. *In re Plinski*, 16 DB Rptr 114.

An agreement to waive the elective share presents such conflicting interests. As with any prenuptial or postnuptial agreement, it requires one or both spouses to give up potentially valuable legal rights. Such agreement may be particularly fraught with issues that could impair a lawyer’s ability to provide competent and diligent representation to both spouses. By definition, it contemplates that the spouses might leave the majority of their estates to others. One or both spouses may wish to provide for children from another marriage. There may be a potential imbalance between the spouses’ respective estates, such that the right to an elective share could be more important to one spouse than the other. One spouse may be more sophisticated than the other; one may be in better health and more likely to benefit from the elective share. Waiver elective shares might even require renegotiation of the terms of a prenuptial agreement. Any of those factors creates “a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.” Oregon RPC 1.7(a)(2).

Some conflicts may be waivable with informed consent confirmed in writing. Oregon RPC 1.7(b)(1) allows such waiver if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.” Comment 15 to ABA Model RPC 1.7 notes that “[c]onsentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest.” The *Restatement (Third) of the Law Governing Lawyers* § 122, comment g(iv), explains:

The general standard . . . assesses the likelihood that the lawyer will, following consent, be able to provide adequate representation to the clients. The standard includes the requirements both that the consented-to conflict not adversely affect the lawyer’s relationship with either client and that it not adversely affect the representation of either client. In general, if a reasonable and disinterested lawyer would conclude
that one or more of the affected clients could not consent to the conflicted representation because the representation would likely fall short in either respect, the conflict is nonconsentable.

Were Lawyer to represent both spouses with respect to an agreement to waive the elective share, Lawyer would be literally representing both sides of an agreement likely to benefit one client more than the other. Such conflict may be waivable in limited circumstances, but it is perilous. The Oregon Supreme Court observed, in a case where an attorney drafted an employment contract while representing both the employer and the employee, that “[i]t is never proper for a lawyer to represent clients with conflicting interests no matter how carefully and thoroughly the lawyer discloses the possible effect and obtains consent.” In re Jans, 295 Or 289, 295, 666 P2d 830 (1983). The court explained:

“It is of the utmost importance that the attorney representing both parties to a transaction reflect upon the rationales behind conflict of interest proscriptions. It is not sufficient that the attorney believes himself able adequately to represent potentially differing interests, or even that all parties have consented. The possibility of subconsciously favoring the interests of either party, the appearance of impropriety that may arise from even the slightest dissatisfaction, the likelihood of receiving confidential information from one party that is damaging or helpful to the other, and the possibility that a court will subsequently disagree with the attorney’s decision that he was able adequately to represent both interests—all dictate extreme caution in these situations.

The temptation to represent potentially conflicting interests is particularly difficult to resist in family disputes. Often the attorney is the ‘family lawyer’ and has represented husband, wife, and even the children on previous occasions. . . . If the parties have not clearly understood the lawyer’s ethical responsibilities ab initio, the ensuing rancor may be directed toward him.”

In re Jans, 295 Or at 295 n 7 (quoting Robert Aronson, Conflict of Interest, 52 Wash L Rev 807, 826–27 (1977)); see also In re Robertson, 290 Or 639, 648, 624 P2d 603 (1981) (lawyer is disciplined for representing both buyer and seller of real property).
Comment 30 to ABA Model RPC 1.7 notes that “[a] particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality.” Attorney-client privilege is typically waived among clients who are jointly represented. OEC 503(4)(e). Such lack of confidentiality may make it difficult for Lawyer to explore whether one spouse has concerns about waiving the elective share, since that spouse may be reluctant to fully share those concerns with the other spouse. That, in turn, impairs Lawyer’s ability to fully advise each spouse.

In addition to potentially impairing the lawyer’s ability to represent the spouse who might object to waiving the elective share, the conflict also creates risk for the other spouse. A spouse may make certain estate planning decisions based on what he or she believes to be other spouse’s waiver of the elective share. A later finding that the waiver was invalid, due to the attorney’s conflictive representation, would likely frustrate the decedent’s estate plan that counted on that waiver of elective share.

Under the facts as presented here, the conflict is very likely to be nonconsentable. The facts listed are likely to impair Lawyer’s ability to give complete, competent, and diligent advice to both spouses as to waiver of the elective share. In particular, the existence of children from previous marriages and the imbalance between the spouses’ separate estates heightens their need for thorough and independent advice. One may reasonably expect Lawyer’s ability to render such advice to be impaired by Lawyer’s duties to the other spouse.

There may be other circumstances in which a lawyer could reasonably believe that he or she could provide competent and diligent representations to both parties to an agreement to waive the elective share. That is more likely if the elective share appears unlikely to substantially affect the estate plan,¹ the spouses do not have children from

¹ It is not always clear, at the time an estate plan is created, whether a devise is likely to be more or less than the elective share. The value of the estate and the devise may be changed by fluctuating values of joint and separate assets, unforeseen expenses, and other inheritances or gifts. Additionally, the statutory percentage of the elective share changes with the length of the marriage.
prior marriages, their separate assets are similar in value, they are both highly sophisticated and unlikely to be susceptible to pressure, and they are similarly positioned with respect to life expectancy. See In re Plinski, 16 DB Rptr 114 (2002). Additionally, OSB Formal Ethics Opinion No 2005-86 sets forth a list of factors that, in rare circumstances, might allow for joint representation during a divorce. Although that opinion addressed different circumstances, some of the listed factors may be applicable here, including:

(3) The marital estate must not contain substantial assets or liabilities;

(4) The parties must have fully agreed on the disposition of all assets and liabilities [or, here, waiver of the elective share] before consulting the lawyer;

(5) The lawyer must be in a position to conclude that each party has provided full disclosure of all assets . . .

To sum up, the more important the elective share appears to be to either spouse, the less likely the conflict is to be waivable, and vice versa.

A lawyer weighing the totality of these factors might reasonably believe that he or she could competently and diligently represent both spouses with respect to an agreement to waive the elective share. Even in a case in which the conflict is waivable, the lawyer would still be required to obtain both clients’ informed consent pursuant to Oregon RPC 1.7(b).

3. **Preparation of Agreement Waiving Elective Share.**

The same analysis applies with respect to preparing the agreement to waive the elective share. Once Lawyer has undertaken to represent both spouses with respect to estate planning, there is a conflict if he represents either spouse with respect to drafting an agreement to waive the elective share. For example, an attorney drafted a property settlement on behalf of divorcing spouses in *Matter of Marriage of Eltzroth*, 67 Or App 520. The lawyer “acted only as a scrivener” and “did not provide independent advice to either party.” *Matter of Marriage of Eltzroth*, 67 Or App at 526. Nonetheless, the court of appeals noted that it did “not con-
done the conduct of the attorney in continuing to represent both parties” to the agreement. *Matter of Marriage of Eltzaroth*, 67 Or App at 526 n 7.

This conflict may be avoided if Lawyer has not yet undertaken representation of one of the spouses with respect to estate planning. As attorney for only one of the spouses, Lawyer may prepare an agreement mutually waiving the elective share on behalf of the spouse that Lawyer represents. It is not mandatory that both parties to a prenuptial or post-nuptial agreement be represented by counsel, although that is a factor in determining whether such agreement is enforceable. *Matter of Marriage of Leathers*, 98 Or App 152, 779 P2d 619 (1989), *rev den*, 309 Or 625 (1990).

4. *Advice Concerning Estate Plan after Execution of Agreement to Waive Elective Share.*

Once the issue of waiver of the elective share has been eliminated by execution of an agreement, Lawyer may represent Spouse A and Spouse B in preparation of their estate planning, absent other circumstances that would create a conflict of interest under Oregon RPC 1.7.

**Approved by the Board of Governors, March 2018.**

**COMMENT:** For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* chapter 9 (economic and personal conflicts), chapter 10 (multiple-client conflicts) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* chapter 8 (conflicts of interest) (2000).
Chapter 3A
Guardianship for Adults and Alternatives

Tim McNeil
Davis Pagnano McNeil & Vigna LLP
Portland, Oregon

Contents

I. General Background—Guardianships and Less Restrictive Alternatives 3A–1
   A. Protective Proceedings 3A–1
   B. Civil Rights and Less Restrictive Alternatives 3A–1

II. The Intake Process and Case Evaluation 3A–2
   A. The Attorney-Client Relationship 3A–2
   B. Conflict Check 3A–3
   C. Evaluate the Client 3A–3
   D. Assess the Need for a Guardianship 3A–3
   E. Obtain all Necessary Information 3A–4
   F. Attorney Fees 3A–4

III. Court Filings, Service, and Notices 3A–4
   A. Petition for Appointment of Guardian 3A–4
   B. Notice to Respondent 3A–5
   C. Notice to Interested Persons 3A–5
   D. Appointment of Court Visitor 3A–6
   E. Proof of Service 3A–6
   F. Limited Judgment Appointing Guardian 3A–6
   G. Follow up with Guardian 3A–7
   H. Petition for Attorney Fees 3A–7

IV. The Powers and Duties of a Guardian 3A–8
   A. Rights of the Protected Person 3A–8
   B. Specific Powers of the Guardian 3A–9
   C. Limitations of the Guardian’s Powers (ORS 125.320) 3A–9
   D. Guardian’s Report 3A–10
   E. Termination of the Guardian’s Authority 3A–10

Form 1—Guardianship/Conservatorship Information Sheet 3A–11
Form 2—Petition for the Appointment of Guardian of an Adult for an Indefinite Period 3A–17
Form 3—Limited Judgment Appointing Guardian (No Objection) 3A–21
Form 4—Duties of a Guardian 3A–23
Form 5—Guardian’s Report 3A–25
I. GENERAL BACKGROUND – GUARDIANSHIPS AND LESS RESTRICTIVE ALTERNATIVES.

A. Protective Proceedings

All guardianships, conservatorships and other protective proceedings fall under the jurisdiction of the probate court. See generally ORS 111.085. The probate court may appoint a guardian on behalf of a person in a circumstance in which a person is found to be incapacitated. The statutory definition of incapacitated as set forth in ORS 125.005(5) is:

“Incapacitated” means a condition in which a person’s ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person’s physical health or safety. “Meeting the essential requirements for physical health and safety” means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur.

Some potential clients have difficulty understanding the difference between a guardian and conservator, especially when some states broadly use the term “guardian” to define the role of the conservator. At the risk of oversimplifying, it may be helpful to advise clients that the guardian “guards” the person by taking care of health and placement issues, while the conservator “conserves” the funds by taking care of finances.

During the intake and case evaluation process, the attorney will determine if there is a need to seek appointment of a guardian, conservator, or both. In many cases, there is a need for appointment of both a guardian and a conservator. These roles may be filled by one person or it may be a situation where two different people should be appointed as guardian and conservator. In other cases, only a guardianship is necessary because the only issues present relate to health care and placement. While guardianships and conservatorships are intertwined, this chapter will focus on guardianship cases exclusively.

Case evaluation is critical. While attorneys are not expected to diagnose any particular medical condition, the question of proving incapacity by a standard of clear and convincing evidence is ever present, and the conditions which are the cause of incapacity should be considered and examined right from the start of the case.

B. Civil Rights and Less Restrictive Alternatives

When considering a guardianship the attorney must first answer the question of “can an alternative be found which will eliminate the need for court involvement and not impose upon the civil liberties of the respondent?” In fact, ORS 125.055(2)(g) requires a petitioner for guardianship to describe “less restrictive alternatives to the appointment of a fiduciary that have been considered and why the alternatives are inadequate, . . .” A guardianship proceeding is a process that greatly curtails or even removes a person’s basic fundamental civil rights, and should be taken very seriously. Most courts will not grant a guardianship unless there is an
undisputed need for protection and there are no other reasonable alternatives. What are the alternatives to a guardianship proceeding?

1. **Advance Directive for Health Care.** ORS Chapter 127 sets forth the requirements for an advance directive for health care. This document allows management of health care (including placement) and access to medical records. If the respondent has executed an advance directive, the health care representative may be able to effectively manage the respondent’s health care needs without the need for a guardianship. However, if the respondent is in conflict with the health care representative, or has appointed multiple representatives, an advance directive for health care may not be an effective alternative to guardianship.

2. **Declaration for Mental Health Treatment.** ORS 127.736 provides a form for designation of a representative for mental health treatment. It authorizes the representative to admit the principal to a health care facility for mental health treatment for up to 17 days (a health care representative appointed in an advance directive for health care also has this authority) The declaration may avoid the need for temporary guardianships and should be considered in the appropriate circumstances.

3. **Family Involvement.** Are family members able to provide care and work together? In many cases, family members are able to work together to provide for the physical needs of the respondent without the need for court involvement.

4. **Other Professional Assistance.** Has the family worked with professionals such as social workers and placement specialists to address the concerns of the respondent? Often professionals who specialize in these issues can navigate family dynamics and assist in finding an appropriate placement for the respondent. This type of action is more appropriate when the respondent is not in immediate danger.

5. **Durable Powers of Attorneys/Estate Planning/Revocable Trusts.** These types of alternatives do not relate directly to avoiding a guardianship. They are used to avoid a conservatorship where appropriate.

II. THE INTAKE PROCESS AND CASE EVALUATION

A. **The Attorney-Client Relationship.**

The first step to take when considering a guardianship is to establish the attorney-client relationship. This can be surprisingly difficult, but it is critical to identify the client. It is not uncommon to have a group of family members or friends of the respondent attend the initial appointment. If this happens, take a moment to clarify the scope of representation and inform the client that the presence of a non-client will breach the attorney client privilege. It is good practice to obtain a Release of Information from your client, allowing you to discuss the case with others as you deem necessary, and allowing others to discuss the case with you. This may
help to prevent any disputed issues or claims against you concerning your unauthorized release of confidential attorney client information.

### B. Conflict Check.

Potential conflicts of interest are prevalent in protective proceedings due to the potential for adverse interests between spouses, siblings, parents and children. Pay attention for potential developing conflicts as the case unfolds. If there is a potential future conflict between clients, write a letter explaining the potential conflict and asking both parties to sign indicating that you have fully informed them of the potential conflict. Review the Oregon Rules of Professional Conduct, Rule 1.7 carefully when considering this type of representation. Sample letters are available through the Professional Liability Fund.

Another common scenario is when an existing client has diminished capacity and a spouse, sibling, parent, or friend wishes to pursue a guardianship. In guardianship proceedings, a petitioner is an adverse position in relation to a respondent. An attorney cannot represent both petitioner and respondent due to these conflicting positions, While Rule 1.14 of the Oregon Rules of Professional Conduct allows a lawyer to take reasonably necessary protective action when the client is at risk of substantial physical, financial or other harm, this rule does not resolve the conflict of interest between a petitioner and a respondent. The most straightforward way to address this problem is to refer the family member to another attorney specializing in guardianships and conservatorships.

### C. Evaluate the Client.

Is the potential client someone that you would like to work with for many years? Is the potential client credible? Does the potential client understand the complexity of the situation and demonstrate a willingness to follow directions? Does the client have an existing fiduciary relationship, such as power of attorney, with the protected person? It is good practice to run a cursory background check through the Oregon Judicial Information Network (OJIN) to check for convictions or pending court cases. A check for bankruptcy proceedings or federal court cases through the PACER system is accessible online.

### D. Assess the Need for a Guardianship.

After you have ruled out all less restrictive alternatives, assess the strength of your case. Discuss the facts in detail with your client to help you determine that you can meet your burden of proof as set forth in statute and in the Schaefer case. Schaefer v. Schaefer, 183 Or App 515 (2002). Can you establish a nexus between the condition that has impaired the respondent and the respondent’s inability to manage the respondent’s care and safety? Evaluate the case from the worst case scenario, and make sure that the client understands the pitfalls.

#### 1. Assess the Potential for Objections. Once you are confident you can meet your burden of proof, discuss the possibility of objections with the client. Is the protected person hostile to the proposed action? Are other family members in opposition? Is there another family member that
wishes to serve as guardian? Will filing trigger family issues or a potential disinheritance? If objections are anticipated, discuss ways to minimize the risk with your client. Will open communication with other siblings prior to filing be helpful? Can you consider using a professional fiduciary to diffuse family tensions? If you can identify the need for a professional fiduciary from the beginning, this can save your time and expense of filing an amended petition in response to an objection.

2. **Mediation.** Multnomah County now has mandatory mediation for all objections in probate matters. See Multnomah County SLR 12.045 for a complete description of the procedures and rules related to mediation.

E. **Obtain all Necessary Information.**

Complete information about the protected person and all persons who may have an interest in the case is necessary. A completed Guardianship/Conservatorship Information Sheet (Form 1-1) is essential, and many attorneys have a potential client complete this form prior to the first interview. Another useful form is the “Guardianship Checklist” published by the Professional Liability Fund and available on the PLF website.

F. **Attorney Fees.**

ORS 125.095 requires court approval of attorney fees before payment from assets of the protected person. There is no guarantee that fees will be awarded, and it is nearly certain that fees will not be awarded if the court denies the petition for guardianship. For these reasons, it is important to have a fee agreement with the client. The client needs to assume the ultimate responsibility for payment of your fees.

Do not accept fees from the funds of the protected person without court approval. Take care to examine the source of your funds. For example, a spouse may write you a retainer check from an account with the protected person as joint owner. Accepting this payment without court approval may violate ORS 125.095 because the funds are at least partially owned by the protected person.

III. **COURT FILINGS, SERVICE AND NOTICES.**

A. **Petition for Appointment of Guardian.**

ORS 125.055 sets forth all the requirements for the Petition for Appointment of Guardian of an Adult for an Indefinite Period (Form 1-2). Failure to include all required statutory information could result in rejection of the petition or requirement for correction. Note that recent legislation effective January 1, 2018, amended ORS 125.055 to require (1) an explanation of less restrictive alternatives to the appointment of a fiduciary that have been considered and why the alternatives are inadequate, and “A statement that indicates whether the petitioner is petitioning for plenary authority or specified limited authority for the person nominated as fiduciary.” The petition sets the stage for your case and it is important to have full, complete and
accurate information. Make sure that your petition tells the story of your case in detail. If necessary, consider filing supplemental affidavits if they will help provide a clear picture of the situation.

The filing fee for a guardianship is now $117. If you are filing a conservatorship together with your guardianship, the fees will increase based on the size of the protected person’s estate. The fees for the court visitor vary from county to county. In addition, the procedure for appointing the court visitor varies from county to county. In many counties, the attorney is responsible for selecting and submitting the Order Appointing Visitor. If this is the case, provide an Order Appointing Visitor to the court. Failing to do so can result in unnecessary delay of your case.

B. Notice to Respondent.

ORS 125.060 requires personal service for a respondent 14 years of age or older. Use of a private process server is recommended as the presence of a uniformed sheriff’s deputy may cause unnecessary distress for the respondent.

ORS 125.070(3) sets forth the statutory Respondent’s Notice that is personally served on the respondent. The notice must be printed in at least 14 point type. Check your local rules as well. Some counties require that the notice contain specific information as to the availability of low cost or free legal services for seniors. ORS 125.070(4) sets forth the Respondent’s Objection Form. The Respondent’s Objection Form is printed on blue paper and attached to the Respondent’s Notice.

C. Notice to Interested Persons.

Read ORS 125.060 carefully and often. The notice requirements are very broad. The primary notice is given to the spouse, parents, and adult children. However, the statute has many additional requirements including:

1. Any person who is cohabiting with the respondent and who is interested in the affairs or welfare of the respondent;
2. Any trustee, health care representative or agent under a financial power of attorney;
3. Any known attorney for the respondent;
4. If the person is in a nursing home or residential facility, the Long Term Care Ombudsman;
5. If the person receives Veteran’s Benefits or money paid through the Department of Veteran’s Affairs, the Regional Office of the US Department of Veteran’s Affairs;
6. If the respondent is receiving moneys paid or payable for public assistance provided under ORS chapter 411 by the State of Oregon through the Department of Human Services, a representative of the department;
7. If the respondent is receiving moneys paid or payable for medical assistance provided under ORS chapter 414 by the State of Oregon
Chapter 3A—Guardianship for Adults and Alternatives

through the Oregon Health Authority, a representative of the authority. OAR 407-043-1101 states that mailing or service of notices or documents on the Department shall be considered notice on the Oregon Health Authority. Therefore, the one notice sent to the Department of Human Services also satisfies this notice requirement;

8. If the person is a resident of a mental health treatment facility or a residential facility for individuals with developmental disabilities, or if the guardian intends to place the respondent in such a facility, to Disability Rights Oregon.

9. Any other person that the court requires.

10. If there is any doubt err on the side of caution and provide notice. Failure to provide a required notice can result in additional delay.

D. Appointment of Court Visitor.

The court visitor’s report carries substantial credibility with the court. The court visitor is appointed after the filing of the petition. The procedures for the appointment of the court visitor vary from county to county. In some counties, the court selects and appoints a Court Visitor in response to a guardianship petition. In other counties, the petitioner must select a court-approved Court Visitor and file proposed order appointing the selected person. A list of approved visitors may be available on the court’s website, or the petitioner may contact the probate clerk for the list and a description of county practices. After appointment, the court visitor investigates the circumstances of the case. Generally, the court visitor interviews the respondent in person. The court visitor also interviews the petitioner, listed relatives, and all persons listed as having information to support the finding of incapacity. The court visitor submits a report to the court which informs the court of the visitor’s conclusions and recommendations as to the appropriateness of appointing a guardian. The court visitor’s report is filed prior to the appointment of a guardian. In most cases, the court visitor completes the report during the objection period.

E. Proof of Service.

File the appropriate Proof of Service upon the respondent. If you use a process server to personally serve the respondent, the process server will provide the Proof of Service to file with the court. You also need to file the appropriate Proof of Service of Notice of Time for Filing Objection to Petition for Appointment of Guardian.

F. Limited Judgment Appointing Guardian.

Submit an appropriate limited judgment based on Form 1-3. In addition, submit a Certificate of Compliance in accordance with UTCR 5.100, which informs the court regarding the position of any adverse party with regard to the proposed judgment. If there is no adverse or objecting party, the proposed judgment need not be reviewed by any other party prior to submission to the court. (Note: This certificate is required to be submitted with all proposed orders and judgments, including Court Visitor Orders). Order your Letters of Guardianship. Procedures vary from county to county. In some counties, the first Letters of Guardianship are
free. If you need additional copies of the Letters of Guardianship, pay the appropriate fees to the court when requesting the extra Letters.

G. **Follow up with Guardian.**

Upon appointment, send the guardian a detailed letter outlining the specific powers and duties of guardian. Some counties send a general duties letter to the guardian upon appointment. This is generally not sufficient. The guardian needs a more detailed and specific letter addressing the unique facts of your case. See below for more information. The Professional Liability Fund publishes a sample “Duties of Guardian.”(Form 1-4)

1. **The Guardian’s Report.** In your letter, advise the client of the due date of the annual Guardian’s Report. Calendar the date in your file to send the report well in advance of the due date. It is a good idea to send the guardian two blank copies of the Guardian’s Report (Form 1-5). The first copy can serve as a draft copy and the second copy can be the final version. The report form changed in January 2018. The court will reject submissions on the old form. To make certain that your form is current, compare it to ORS 125.325 or contact the court probate clerk.

2. **Guardianship Class.** The Circuit Courts in Lane, Clackamas, and Multnomah Counties require guardians to sign up for a guardianship class within fifteen days of appointment and to take the class within sixty days of appointment. The class currently costs $100, and can be taken online or in person. Guardian Partners is the organization that provides the class and receives the fee.

H. **Petition for Attorney Fees.**

After appointment of the guardian, you may be ready to petition for your attorney fees and costs. ORS 125.095(2)(c) establishes that “Prior court approval is required before the payment of fees from the funds of a person subject to a protective proceeding when the payment is to any attorney who has provided services relating to a protective proceeding, including services provided in preparation or anticipation of the filing of a petition in a protective proceeding.” ORS 125.098(2) establishes factors for the court to consider in the determination of whether to award attorney fees, while ORS 125.098(3) directs the court to consider the same factors as well as additional ones in the determination of the amount of an award of attorney fees. A fee petition should specifically address each factor, even if only to state that a specific factor does not apply. Of all of the factors, “the benefit to the person subject to the protective proceeding by the party’s actions in the proceeding, . . . shall be given the greatest weight in the court’s consideration.”¹

1. **Service of Fee Petition.** UTCR 9.060(4) directs that the fee petition must be served on all persons described in ORS 125.475(5), which re-directs the reader to ORS 125.060(3). The statute requires notice on the

¹ ORS 125.098(2)(a)
Chapter 3A—Guardianship for Adults and Alternatives

respondent, and any other person who has filed an appearance or Request for Notice. Read the statute carefully to be sure all required notices are properly sent. A Notice of Time for Filing Objections to Petition for Payment of Attorney Fees and Costs must be served along with the Petition.

2. **Proof of Service.** Submit a Proof of Service of Notice of Time for Filing Objections to Petition for Payment of Attorney Fees and Costs. Provide 15 days for filing objections along with 3 days for mailing the Notice. After the notice period has run, and if no objections have been filed, submit an Order Approving Payment of Attorney Fees and Costs and a Certificate of Compliance in accordance with UTCR 5.100.

3. **Guardian Fees and Costs.** Much like the attorney’s requirement for court approval, the guardian must also have prior court approval for guardianship fees See ORS 125.095(2)(b). If the guardian is going to request a fee, it is efficient to request such fees at the same time of filing the attorney’s Petition for Payment of Attorney Fees and Costs. The guardian should also file a Statement in Support of Request for Guardianship Fees. The issue of reimbursement of costs advanced by the guardian varies from county to county. Many counties require court approval for reimbursement of costs.

IV. THE POWERS AND DUTIES OF A GUARDIAN

A. **Rights of the Protected Person.**

The statutes require that the court enter the least restrictive order possible. “The court shall make a guardianship order that is no more restrictive upon the liberty of the protected person than is reasonably necessary to protect the person.” ORS 125.305(2). Under the terms of ORS 125.300(3), the protected person retains all of his or her legal and civil rights, “except those that have been expressly limited by court order or specifically granted to the guardian by the court.” Basic rights include, but are not limited to:

1. Right to vote.
2. Right to marry.
3. Right to contact and obtain counsel.
4. Right to seek termination of the guardianship or review or modify any aspect of the guardianship.
5. If mentally competent, the right to enact estate planning including making or changing a will, changing beneficiaries of a life insurance policy or annuity.
6. Right to receive notices concerning any aspect of the guardianship proceeding, including attorney fee petitions, accountings, intent to change placement, and any other relevant proceeding. Be sure to send direct notice to the respondent of all future actions which require notice.

**B. Specific Powers of the Guardian.**

It is important that the guardianship limited judgment have a general recitation of the powers of the guardian, although it is not required that all powers of the guardian are listed within the limited judgment. ORS 125.315 lists the general powers and duties of a guardian, including, but not limited to:

1. Health care.
2. Placement/residence.
3. Care, comfort and maintenance.
4. Disposition of remains.
5. Finances. Pursuant to ORS 125.315(f) and 125.320(2), the guardian may receive money and personal property deliverable to the protected person and apply the money and property for the support, care and education of the protected person. The statute directs that the guardian shall exercise care to conserve any excess for the protected person. The court may require the guardian to post a bond if the guardianship will clearly involve financial management.

**C. Limitations of the Guardian’s Powers (ORS 125.320).**

1. **Use of the Protected Persons Funds.** The guardian may not use the protected person’s funds to pay the guardian, or the guardian’s spouse, parent or child, for the room and board of the protected person without court approval. Carefully review ORS 125.221(4).

2. **Conflicts of Interest.** Review ORS 125.221 for any issues which can arise concerning conflict of interest by the guardian in the expenditure of the protected person’s funds.

3. **Placement.** The guardian must file a Notice of Intent to Place the protected person (Form 1-6) and give proper notice pursuant to ORS 125.065. Note that as of January 1, 2018, statutory guidelines for changing the placement or a protected person changed. All placement changes, not just moves to care facilities, will require notice. The notice must be filed and served at least 15 days prior to the change in placement, unless the guardian determines that the placement change must occur in less than 15 days in order to protect the
immediate health, welfare or safety of the protected person or others. If these circumstances exist, they must be articulated in the move notice, and the notice must be filed or served no later than two judicial days after the move. A court order authorizing the move is not required.


ORS 125.325 requires the filing of a Guardian’s Report within 30 days after the anniversary of the guardian’s appointment. A statutory form is reproduced as Form 1-5. The court is not required to approve the report or take any other action on the report. The report must also be served upon:

1. The protected person.

2. Any other fiduciary other than the guardian who has been “appointed” for the protected person (beyond a court appointed conservator, it is prudent to include any trustee, health care representative or any other fiduciary).

3. Any person who is a party or has required notice.

4. Department of Veterans Affairs if the protected person is receiving Veteran’s Administration benefits.

5. Any other person the court requires.

E. Termination of the Guardian’s Authority.

The authority of the guardian ends upon the death, resignation or removal of the fiduciary. Upon termination of the guardian’s authority, if the need for a guardian still exists, a petition to appoint a successor guardian must be filed and served in the same manner as the original petition. Under ORS 125.090(2), the court has authority to terminate the guardianship if the protected person has died, if the need for a guardianship no longer exists due to restoration of capacity, or the best interest of the protected person would be served by the termination of the guardianship.
Form 1—GUARDIANSHIP/CONSERVATORSHIP
INFORMATION SHEET

Information about the person who needs a guardian and/or a conservator:

Name: __________________________________________________________________
Address: __________________________________________________________________
Telephone: __________________________________________________________________
Social Security No.: __________________________________________________________________
Date of Birth: __________________________________________________________________
Age: __________________________________________________________________
Current Location: __________________________________________________________________
County: __________________________________________________________________
If in a hospital or care facility, when admitted: __________________________________________________________________
Your relationship to the person: __________________________________________________________________

Information about the person’s spouse: [Check here if the person is not married: ________]

Name: __________________________________________________________________
Address: __________________________________________________________________
Telephone: __________________________________________________________________
Age: 18 or older _____ Under 18 years ______

If the person lives with a domestic partner, friend, or relative, information about him or her:

Name: __________________________________________________________________
Relationship: __________________________________________________________________
Age: 18 or older _____ Under 18 years ______

Information about the children or other closest living relatives of the person [For example, parents, brothers and sisters, aunts and uncles, or nieces and nephews]:

Name: __________________________________________________________________
Address: __________________________________________________________________
Telephone: __________________________________________________________________
Relationship: __________________________________________________________________
Age: 18 or older _____ Under 18 years ______

Name: __________________________________________________________________
Address: __________________________________________________________________
Telephone: __________________________________________________________________
Relationship: __________________________________________________________________
Age: 18 or older _____ Under 18 years ______
Name: ____________________________________________________________
Address: _______________________________________________________________________________________________________
Telephone: _______________________________________________________________
Relationship: _____________________________________________________________
Age: 18 or older ______ Under 18 years ______

Name: ____________________________________________________________
Address: _______________________________________________________________________________________________________
Telephone: _______________________________________________________________
Relationship: _____________________________________________________________
Age: 18 or older ______ Under 18 years ______

Name: ____________________________________________________________
Address: _______________________________________________________________________________________________________
Telephone: _______________________________________________________________
Relationship: _____________________________________________________________
Age: 18 or older ______ Under 18 years ______

Name: ____________________________________________________________
Address: _______________________________________________________________________________________________________
Telephone: _______________________________________________________________
Relationship: _____________________________________________________________
Age: 18 or older ______ Under 18 years ______

(If more space is needed, add information on the back of this page)

Has there been a guardian or conservator for the person before?                  Yes___ No___

Has the person ever signed a power of attorney, advance directive for health care, trust or other
document naming someone to make financial, medical or personal decisions?          Yes___ No___

Who was named to make decisions? (If more than one person, add information on the back of this page)

Name: __________________________________________________________________
Address: ________________________________________________________________
Telephone: _______________________________________________________________
Relationship: _____________________________________________________________
Type of document or decision maker: _______________________________________

Information about the person’s current doctors(s): (If more than one, add information on the back of this page)

Name: ____________________________________________________________
Address: _______________________________________________________________________________________________________
Telephone: _______________________________________________________________

Information about the person’s lawyer(s): (If more than one, add information on the back of this page)

Name: ____________________________________________________________
Address: _______________________________________________________________________________________________________
Telephone: _______________________________________________________________
Briefly describe the person’s physical and mental condition: _____________________________

<table>
<thead>
<tr>
<th>Does the person need help making medical and health care decisions?</th>
<th>Yes___ No___</th>
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<tbody>
<tr>
<td>If yes, please give examples showing why the person needs this type of help: ________________</td>
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<table>
<thead>
<tr>
<th>Does the person need help to take care of basic physical needs like food, shelter, clothing and personal cleanliness?</th>
<th>Yes___ No___</th>
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<tbody>
<tr>
<td>If yes, please give examples showing why the person needs this type of help: ________________</td>
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<tr>
<th>Does the person need to stay in a care facility, or be moved to a care facility?</th>
<th>Yes___ No___</th>
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<td>If yes, please give examples showing why the person needs to be in a care facility: ________________</td>
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<th>Does the person need help to respond to other problems?</th>
<th>Yes___ No___</th>
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<tr>
<td>If yes, please describe the other problems: ________________</td>
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What other kinds of help and services have been tried in the past year? [For example, help with housekeeping or bathing: someone setting up the medication or balancing the checkbook; medical or mental health treatment]

<table>
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<tr>
<th>Does the person need help making decisions about finances and property?</th>
<th>Yes___ No___</th>
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<tr>
<td>If yes, please give examples showing why the person needs this type of help: ________________</td>
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Who else has personal experience with the situations you described? [For example, caregivers, case managers, other family members, friends and neighbors]

| Name: __________________________________________________________________ |
| Address: ________________________________________________________________ |
| Telephone: ______________________________________________________________ |
| Relationship: ____________________________________________________________ |

| Name: __________________________________________________________________ |
| Address: ________________________________________________________________ |
| Telephone: ______________________________________________________________ |
| Relationship: ____________________________________________________________ |

Is there an immediate, life-threatening problem? | Yes___ No___ |

If yes, what is the harm that will come to the person if there is not an emergency guardianship or conservatorship? _____________________________
The court requires sworn statements from people with personal knowledge of the emergency situation. Who would be willing and able to provide those statements?

Name: __________________________________________________________________
Address: __________________________________________________________________
Telephone: __________________________________________________________________
Relationship: __________________________________________________________________

Name: __________________________________________________________________
Address: __________________________________________________________________
Telephone: __________________________________________________________________
Relationship: __________________________________________________________________

Who should be the guardian and/or conservator?

Name: __________________________________________________________________
Address: __________________________________________________________________
Telephone: __________________________________________________________________
Date of Birth: __________________________________________________________________
Age: __________________________________________________________________
Relationship: __________________________________________________________________

Has the proposed guardian and/or conservator filed for bankruptcy, been convicted of a crime, or had any occupational or professional license revoked? Yes___ No___

If yes, please explain: __________________________________________________________________

Information about the income and assets of the person who needs a guardian and/or a conservator:

<table>
<thead>
<tr>
<th>Income</th>
<th>Source</th>
<th>Monthly Amount</th>
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<tbody>
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Does the person have money or other assets worth more than $10,000? Yes___ No___

Does the person receive benefits from the U.S. Department of Veterans Affairs? Yes___ No___

Does the person receive Medicaid assistance (Oregon Health Plan), food stamps, or other public assistance from the Oregon Department of Human Services? Yes___ No___

Please answer the following questions if the person needs a conservator. Note: A conservator is usually needed if the person who cannot manage his or her finances has assets worth more than
$10,000 or if money or property has to be recovered. If the finances are already being managed by someone else, like a trustee, please describe the arrangement: ___________________

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<th>Real Property:</th>
<th>Address</th>
<th>Value</th>
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<tr>
<th>Bank Accounts:</th>
<th>Bank or Institution</th>
<th>Account Number</th>
<th>Balance</th>
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<th>Brokerage Accounts:</th>
<th>Broker</th>
<th>Account Number</th>
<th>Balance</th>
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<th>Retirement Plans/IRAs:</th>
<th>Company or Bank</th>
<th>Account Number</th>
<th>Cash Value</th>
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<th>Annuities/Company Life Insurances:</th>
<th>Policy Number</th>
<th>Cash Value</th>
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<th>Vehicles:</th>
<th>Year, Make and Model</th>
<th>Value</th>
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<th>Other Assets:</th>
<th>Description</th>
<th>Value</th>
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Form 2—PETITION FOR THE APPOINTMENT OF GUARDIAN OF AN ADULT FOR AN INDEFINITE PERIOD

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF ________

PROBATE DEPARTMENT

In the Matter of the Proposed Guardianship of ) No. _____________

) PETITION FOR THE APPOINTMENT OF
) A GUARDIAN OF AN ADULT FOR AN
) INDEFINITE PERIOD

___________ petitions the court to appoint [him/her or proposed fiduciary] as guardian for

__________ , respondent, and presents the following information to the court:

1. The following information is given with regard to respondent:
   Name: ___________________________________________________________
   Age/Date of Birth: _________________________________________________
   Currently located at: ________________________________________________
   County: __________________________________________________________
   Telephone Number: _________________________________________________
   Residence address: _________________________________________________
   County: __________________________________________________________

2. Petitioner is respondent’s [relationship or interest of petitioner].

3. The following information is given with regard to the proposed guardian:
   Name: ___________________________________________________________
   Age: _____________________________________________________________
   Address: __________________________________________________________
   Telephone Number: _________________________________________________

The proposed guardian is respondent’s [relationship or interest], and is qualified, suitable, and willing to serve as guardian.

4. The proposed guardian has not been convicted of any crime, has not filed or received protection under the bankruptcy laws, and has not had a state professional or occupational license revoked or canceled [if there has been a conviction or a bankruptcy, etc., revise accordingly and add an explanation].
5. The proposed guardian is not a public or private agency that provides services to respondent, and is not an employee of such an agency.

6. Respondent is not presently able to meet the essential requirements for [his/her] health care. [Add specific allegations about medical and health care decisions.]. Respondent is not presently able to meet the essential requirements for [his/her] physical health and safety. [Add specific allegations about health and safety concerns, including whether the person needs to be in a residential facility]

7. Less restrictive alternatives than guardianship are not available or effective in this case. [Explain why other alternatives such as Advance Directive for Health Care will not effectively protect respondent.]

8. Petitioner seeks plenary/limited authority for the guardian. The guardian should be authorized to make medical and health care decisions for respondent. The guardian should be authorized to make decisions about where respondent lives and about the services respondent receives. The proposed guardian plans to [maintain respondent in his/her current living situation] seeks authority to place respondent in [facility name and location] or another appropriate care facility.

9. Respondent’s treating physicians are:

<table>
<thead>
<tr>
<th>Name</th>
<th>Address and Telephone Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

10. In addition to petitioner and the above doctors, the following people have information to support a finding that respondent is incapacitated:

<table>
<thead>
<tr>
<th>Name and Relation</th>
<th>Address and Telephone Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

11. Based on petitioner’s reasonable inquiry, respondent has not named a fiduciary under a power of attorney, an advance health care directive or otherwise. No other court has ordered guardianship or conservatorship, and no trust exists. If any fiduciaries are found, petitioner will notify the court of their names and addresses. [Or Respondent has named the following fiduciaries:
12. Respondent [is/is not] receiving moneys paid or payable by the Department of Veterans Affairs or by the State of Oregon Department of Human Services.

13. Respondent receives income from [source of payment] of approximately $[amount] per month, for a total annual income of $[amount].

14. A general description of the respondent’s assets, income, and other property and the approximate values is as follows:
   A. Real Property: [value];
   B. Bank Accounts: [values and locations];
   C. Investments: [values and locations]; and
   D. Personal Belongings: [value].

Petitioner estimates that the total value of respondent’s assets known to petitioner is $[amount].

15. The guardian will exercise financial authority in accordance with ORS 125.315(f) and 125.320(2) and in coordination with respondent’s representative payee.

16. The persons entitled to notice of this proceeding, in addition to respondent, are:

<table>
<thead>
<tr>
<th>Name and Relation</th>
<th>Address and Telephone Number</th>
</tr>
</thead>
</table>

17. Pursuant to ORCP 68, Petitioner shall seek reasonable attorney’s fees and costs. The basis for an award of fees shall be ORS 125.095.

WHEREFORE, petitioner requests a limited judgment:
1. Appointing a court visitor [or Appointing [name] as court visitor];
2. Appointing [proposed guardian] as guardian for [respondent], to serve without bond;
3. Directing that Letters of Guardianship issue to [proposed guardian].

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.
DATED this day of __________, 20__.  

[Petitioner] PETITIONER

PETITIONER:
[Name, address, and telephone number]

ATTORNEY FOR PETITIONER:
[Name, OSB number, address, telephone number, fax number, and e-mail address]
FORM 3—LIMITED JUDGMENT APPOINTING GUARDIAN (NO OBJECTION)

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF______________
PROBATE DEPARTMENT

In the Matter of the Guardianship [and Conservatorship] of:
NAME,

No. __________________
LIMITED JUDGMENT
APPOINTING PERMANENT
GUARDIAN [AND
CONSERVATOR] OF AN
ADULT FOR AN INDEFINITE
PERIOD
Respondent.

This matter came before the court upon the petition of _____________________ for the appointment of a Guardian for _________________________.

1. It appears to the court from the records and files herein that:

(a) Venue for this protective proceeding is properly in this county, and no other court in this state has acquired jurisdiction over this proceeding;

(b) Notice of this protective proceeding has been given to the persons entitled to such notice under Oregon law; and,

(c) The time for filing objections has expired and no objections have been filed.

2. There is clear and convincing evidence that:

(a) __________________, Respondent, is [incapacitated/a minor];

(b) The appointment of a Guardian is necessary to provide continuing care and supervision for Respondent; and,

(c) __________________ is the most suitable person to serve as Guardian for. [He/She] is qualified and has consented to act as respondent's Guardian.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED THAT:
(a) __________________ is appointed as Guardian for _________________________.

1. Medical and Health Care. The Guardian may consent, refuse consent, withhold or withdraw consent to health care and to services for the protected person. The Guardian will
make health care decisions that are consistent with the protected person's desires and values to the extent reasonable and possible.

2. **Residence and Placement.** The Guardian may establish the protected person's place of abode. *If appropriate, insert language about placement, for example, "and, notice having been given in the petition the Guardian shall have the power to continue the protected person's placement in [care facility]."*

3. **Finances.** Pursuant to ORS 125.315(f) and 125.320(2), the Guardian may receive money and personal property deliverable to the protected person and apply the money and property for support, care and education of the protected person. The Guardian shall exercise care to conserve any excess for the protected person.

4. **General Duties.** The Guardian shall arrange for the care, comfort, and maintenance of the protected person.

   *[If appropriate, add additional duties and/or limitations.]*

   (b) Letters of Guardianship, to which a copy of this limited judgment shall be attached, shall be issued to ________________________________________________

   ____________________________________________  ________________________________
   Date                                             Circuit Court Judge

GUARDIAN:
[Name, address, and telephone number]

SUBMITTED BY ATTORNEY FOR GUARDIAN:
[Name, OSB number, address, telephone number, fax number, and e-mail address]
FORM 4—DUTIES OF A GUARDIAN

The purpose of this handout is to summarize your duties as a Guardian. The following list describes the principal duties of a Guardian after appointment by the Court:

1. Take custody of the Protected Person, which entails an element of control over the activities of that person, including, for instance, determining where he or she lives.

2. Provide for the safety, care, comfort, maintenance, and, if necessary, the training and education of the Protected Person.

3. Take reasonable care of the Protected Person's clothing, furniture, and personal effects.

4. When appropriate, make health care decisions on behalf of the Protected Person, always seeking to carry out the known wishes of the Protected Person, or if those wishes be not known, then to act in the best interests of the Protected Person.

5. Make funeral arrangements in advance and control disposition of the remains of the Protected Person in the event of death. [Advance payment of funeral expenses is very important if the Protected Person's long term health care costs may be paid for by the Medicaid program. Alternatively, establish a savings account for an appropriate amount in the Protected Person's name and mark on the face of the account book "Dedicated to funeral services" or the like.] Determine if the Protected Person is a registered organ donor.

6. If a conservator has been appointed for the Protected Person, work with the appointed conservator to see that the Protected Person has adequate funds to provide for his or her support, care, and education.

7. The Guardian must make an annual report to the Court, due 30 days after the anniversary of appointment as Guardian. The first report is due____________________________. Mark your calendar for each anniversary.

8. Pursuant to ORS 125.320(3), you must file a statement with the Court (and a copy to the Protected Person, any conservator, the Long-Term Care Ombudsman, any attorney who has represented the Protected Person during the proceedings, and anyone else entitled to notice) giving notice in advance of your intention to move the Protected Person to a new residence or placement. If the Protected Person is to be placed in a mental health treatment facility, Disability Rights Oregon must be notified. Hospitalization for medical care does not require notice. If the placement is an emergency, give any required notice as soon as possible, but the life and safety of the Protected Person is more important than the paperwork.

9. Contact an attorney if a conflict arises between you and a health care representative under an Oregon Medical Advance Directive about health care decisions, or if a conflict arises between you and (other) family members about funeral arrangements and disposition of the body or anatomical gifts.

I HAVE READ THIS DOCUMENT PROVIDED BY MY ATTORNEY, AND I UNDERSTAND THAT I MUST FULFILL THESE DUTIES AS GUARDIAN.

____________________________
____________________________
Guardian Date

---

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FORM 5—GUARDIAN'S REPORT

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF ________________
PROBATE DEPARTMENT

In the Matter of the Guardianship of  ) No. ______________
) ________________
) GUARDIAN’S REPORT
) A protected person.

I am the Guardian for the Protected Person named above, and I make the following report to the Court as required by law:

1. My name is ________________________________.

2. My address and telephone number are: ________________________________
   ___________________________________________________________________
   ___________________________________________________________________

3. The name, if applicable, and address of the place where the Protected Person now resides: ________________________________
   ___________________________________________________________________

4. The Protected Person is currently residing at the following type of facility or residence:
   ___________________________________________________________________

5. The Protected Person is currently engaged in the following programs and activities and receiving the following services:
   ___________________________________________________________________
   ___________________________________________________________________
   ___________________________________________________________________
   ___________________________________________________________________

6. I was paid for providing the following items of lodging, food, or other services to the Protected Person:
   ___________________________________________________________________
   ___________________________________________________________________

7. The name of the persons primarily responsible for the care of the Protected Person at the Protected Person’s place of residence are: ________________________________
   ___________________________________________________________________

8. The name and address of any hospital or other institution where the Protected Person is now admitted on a temporary or permanent basis are: ________________________________
   ___________________________________________________________________
9. The Protected Person’s physical condition is as follows: ______________________
   ______________________
   ______________________

10. The Protected Person’s mental condition is as follows: ______________________
    ______________________
    ______________________

11. I made the following contacts with the Protected Person during the past year: ___
    ______________________
    ______________________

12. I made the following major decisions on behalf of the Protected Person during the past year: ______________________
    ______________________
    ______________________

13. I believe the guardianship should continue because: ______________________
    ______________________
    ______________________

14. At the time of my last report, I held the following amount of money on behalf of the Protected Person: ______________________

15. A true copy of this report will be given to the Protected Person, any conservator for the Protected Person, and any other person who has requested notice.

16. Since my last report:
   (a) I have been convicted of the following crimes (not including traffic infractions): N/A
   (b) I have not filed for or received protection from creditors under the federal Bankruptcy Code.
   (c) I have not had a professional or an occupational license revoked or suspended.
   (d) I have not had my driver license revoked or suspended.

17. Since my last report, I have delegated to the persons named below the following powers over the Protected Person for the following periods of time: NONE

   I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

   DATED this ___ day of ________, 20__. _______________________________ [Guardian]
   Guardian
Chapter 3B
Conservatorship

Richard Pagnano
Davis Pagnano McNeil & Vigna LLP
Portland, Oregon

Contents

a. Legal Basis for Obtaining Relief .............................................. 3B–1
b. Who May Obtain Relief ........................................................... 3B–1
c. Jurisdiction and Venue ............................................................ 3B–1
d. Filing for Conservatorship ...................................................... 3B–2
e. Who Should Be Given Notice .................................................. 3B–3
f. How to Give Notice ............................................................... 3B–4
g. What the Notice Must Include (ORS 125.070) ............................ 3B–5
h. How to Make or File Objections ............................................ 3B–6
i. The Hearing ............................................................................. 3B–6
j. Standard for Appointment ...................................................... 3B–6
k. Temporary (Emergency) Conservatorships .............................. 3B–6
l. Temporary (Emergency) Notice .............................................. 3B–7

Form 1—Conservatorship Petition ............................................. 3B–9
Form 2—Notice to Respondent .................................................. 3B–17
Form 3—Notice to Interested Persons ....................................... 3B–21
Form 4—Limited Judgment Appointing Conservator .................. 3B–23
a. Legal Basis for Obtaining Relief

In an elder law or estate planning practice, it is fairly common for a client to ask you to assist them to establish a conservatorship for their elderly mother or father or for their disabled son or daughter. This section will discuss establishing a conservatorship for the financially incapable person in order to manage and conserve their assets. This is appropriate when the person is unable themselves to manage their money, assets, and real property. Chapter 125 defines a person who is financially incapable as a condition in which a person is unable to manage their financial resources effectively for reasons including mental illness, mental retardation, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power, or disappearance. See ORS 125.005(3). In general practice, a conservatorship is typically brought because a respondent is no longer able to manage their assets due to a cognitive decline such as dementia or Alzheimer’s disease. Sometimes, due to a person’s diminished capacity or medical frailty, that person is being taken advantage of by a family member or grifter, requiring the appointment of a conservator to stop the abuse.

b. Who May Obtain Relief

Under Chapter 125, any person who is interested in the affairs or welfare of a respondent may file a petition for the appointment of a fiduciary or other protective order. After a petition has been filed to create the protective proceeding, the court may appoint a conservator with the powers specified in Chapter 125. See ORS 125.010(1) & (2).

NOTE: In order to be an “interested person,” (interested in the affairs or welfare of the respondent), must the person be related by blood, marriage, or adoption? The answer is no. Although family may be interested, creditors, devisees, beneficiaries, and others having a property right or claim against the estate of a respondent may also be an interested person.

NOTE: This process may also be used to obtain a protective order to protect the estate or welfare of a respondent or protected person. See ORS 125.005(8).

NOTE: There are times when a family member does not have the temperament or ability to serve. Serving as a conservator for one’s mother or father can put a significant strain on the familial relationship. Professional fiduciaries are well suited to intervene to carry the water so that normal family relationship may continue.

c. Jurisdiction and Venue

The probate courts in this state (and commissioners provided for in Chapter 111) have exclusive jurisdiction over protective proceedings. ORS 125.015(1).

It should be noted, however, that if an Oregon probate court becomes aware of another protective proceeding in another state for the same respondent or protected person, the Oregon court is required to notify and consult with the other court in order to determine whether it is in
the best interest of the respondent or protected person to continue proceedings in this state or terminate the Oregon proceeding and transfer the matter to the out of state court. ORS 125.015(2).

Generally, a protective proceeding must be commenced in the county where the respondent resides or is present. However an important exception that permits the practitioner to commence the proceeding in this state, even if the respondent or protected person is not located in this state, can be found at ORS 125.020(3). That statute permits the proceeding to be commenced in the county where property of the respondent or protected person is located.

PRACTICE TIP: The venue statute referred to above is important for cases in which the protected person is residing outside of this state but has real property in this state which needs to be sold, but the respondent has lost the ability to manage and sell the real property themself.

d. Filing for Conservatorship

First of all, it is important to note that the Oregon Rules of Civil Procedure and the Oregon Evidence Code apply to protective proceedings unless otherwise noted. See ORS 125.050.

PRACTICE TIP: In my experience, the key difference between the rules of civil procedure and Chapter 125 has to do with how and when notice is given and the time frame for filing objections to such notice. Further explanation concerning the notice required to be given follows below.

All of the requirements for a guardianship and conservatorship petition may be found in ORS Chapter 125 starting at 125.055(2) and in the attached example of a conservatorship petition. The requirements for each type of petition are almost identical. Since an example petition has been provided with these materials, rather than state each pleading requirement separately, I am only going to focus on key issues and differences and recent changes made to the law.

Your conservatorship petition must contain the factual information that supports why a conservatorship for the respondent is warranted. Based on medical privilege, this should not be a letter from the respondent’s doctor or health care provider, but a recitation of the facts and circumstances that give rise to the need to appoint someone else to manage a respondent’s financial resources or property. A new requirement beginning in 2018 is the requirement to plead whether any less restrictive alternatives have been contemplated or pursued. The petitioner must inform the court as to why the lesser restrictive means did not or would not work. ORS 125.055(2)(g).

PRACTICE TIP: A very common less restrictive alternative to conservatorship is use of a power of attorney (POA). Unfortunately, many conservatorships are necessitated by misuse of a POA. If so, it is fairly easy to explain that a less restrictive alternative was tried but did not work due to theft by
the POA, necessitating the type of court oversight that will prohibit future theft. In some cases, the person or persons were previously appointed to serve as POA by a much younger respondent, and no longer wish to serve or are themselves physically or mentally unable to serve.

Another issue that must be addressed in a conservatorship petition which seems a bit unnecessary is whether the conservator intends to place the respondent in a mental health treatment facility, nursing home, or other residential facility. Unnecessary, since a conservator under Oregon law does not have placement authority. The statutes require the allegation to be pled however and in our experience, the courts require the allegation to be included in a conservatorship petition. ORS 125.05(2)(h). Another important allegation is the pleading of the nature and extent of the respondent’s known assets and income. In other words, the assets that the petitioner or person nominated to serve as conservator will be managing and bonding. ORS 125.055(2)(i). A conservatorship petition must also include petitioner’s estimate of value for the conservatorship estate. ORS 125.055(4).

Finally, another change in the law for 2018 is an allegation about whether the petitioner is asking that the conservator be given plenary authority or specified limited authority for the person who is nominated to serve as a fiduciary. ORS 125.055(2)(k).

**PRACTICE TIP:** Generally, a conservator will need plenary authority in order to do its job. That is to say a conservator will need to access and marshal all assets of a protected person in order to effectively protect and conserve the estate for the protected person’s benefit. An example of a case where plenary authority would not be necessary would be a case in which a conservator is appointed for purposes of selling a home or other real property located in this state. In such case, then one only need to plead for authority to be able to sell, transfer, and convey the real property, as the local conservator does not plan to exercise control over other assets.

e. **Who Should be Given Notice**

When setting up a conservatorship, it is important to provide notice to the statutorily required interested persons. You are required to exercise reasonable diligence in locating the identities and addresses of the persons required to be given notice. ORS 125.060(1). Notice of the filing of a conservatorship petition must be given to:

- The respondent, provided he or she is fourteen years of age;
- The spouse, parents and adult children of the respondent;
- If no spouse, parent or adult child, then notice must be given to the person or persons most closely related to the respondent;
- Any person cohabiting with the respondent who is interested in the affairs or welfare of the respondent;
- Any person who has been nominated to serve as a fiduciary, or who is serving as a fiduciary including a trustee, health care representative, and power of attorney.

In addition to the above, if the respondent is a minor:
- To the person who has exercised principal responsibility for the care and custody of the respondent during the 60-day period preceding filing of the petition;

In addition to the above, if the respondent is receiving money:
- From the United States Veteran’s Administration, then notice must be given to the United States Department of Veterans Affairs regional office that has responsibility for the payments;
- For public assistance provided by the State of Oregon under chapter 411, then notice must be given to a representative of the Department of Human Services;
- For medical assistance provided by the State of Oregon under chapter 414, then notice must be given to a representative of the Oregon Health Authority;

In addition to the above, if the respondent is in the legal and physical custody of the Department of Corrections, notice must be given to the attorney general and person in charge of the correctional facility where the respondent is residing. If the respondent is a foreign national, then notice must be given to the consulate for respondent’s country and to any other person that the court may require. See ORS 125.060(2).

It is probably worth noting that anyone entitled to notice under Oregon law as set forth above would be considered an interested person with standing for purposes of the conservatorship proceeding.

f. How to Give Notice

Notice of the filing of a conservatorship petition must be personally served on any respondent who is at least 14 years of age. If respondent is also a minor, the petition must also be personally served on the minor’s parents. A court visitor may not serve notice of a petition for conservatorship. The required notice must be legible to the proposed protected person and must be printed in type size equal to at least 12-point type. ORS 125.065(1).

Interested persons required to be given notice other that the proposed protected person or the minor’s parents may be given notice by mail to their last known address. If the identity or address of the person or persons cannot be ascertained with reasonable diligence, then notice may be given by publication once each week for three weeks in the county where the hearing is to be held. The last publication must be at least 15 days before the final date for filing objections. ORS 125.065(2).
The effective date of the notice given, whether by personal service or mail must be at least 15-days before the final date set for filing objections to the conservatorship. The court can set a different method or time for giving notice for good cause shown. Proof of providing notice must be filed with the court in the proceeding before a court is allowed to rule on a petition. See ORS 125.065(3), (4), & (5).

g. What the Notice Must Include (ORS 125.070)

Notice to Interested Persons: The notice must include the name, address, and telephone number of the petitioner and the relationship of the petitioner to the proposed protected person, together with a copy of the petition. In addition you must include a statement about where objections may be made and the deadline for making or filing any objection. If a hearing has been set, you must also include the date, time, and place of any hearing. See attached form for an example.

Notice to the Proposed Protected Person: In addition to the above requirements, notice to a respondent must include an explanation of the purpose and possible consequences of having a conservator appointed, and a statement that the financial resources of the respondent may be used to pay court approved expenses of the proceeding. The petitioner must also include information about any free or low-cost legal representation or services available in the area. The notice must also include a statement concerning the visitor’s role, if a visitor is appointed by the court. See attached form.

PRACTICE TIP: Generally, a conservatorship proceeding does not include the appointment of a court visitor as is the case with guardianships in Oregon. If an objection to the proposed conservatorship is filed, however, then a court will often appoint a court visitor to investigate the allegation in the petition and report back to the court in short order about whether the proposed protected person requires the services of a conservator. The visitor will often then be available to testify at any hearing held on the objections.

Under 125.070 (2) notice to respondent must also include a statement about the rights of a respondent as follows:

- The right to be represented by counsel.
- The right to file a written or oral objection with the court.
- The right to request a hearing.
- The right to present evidence and cross-examine any witnesses at hearing.
- The right to request at any time that the power of the conservator be limited.
- The right to request at any time that the conservator be removed or that the authority of the conservator be modified.
**h. How to Make or File Objections**

Any interested person may present objections to a conservatorship petition. An interested person is defined in the statutes as someone having an interest in the affairs or welfare of the proposed protected person including, but not limited to:

- Any person entitled to receive notice.
- Any step-parent or step-child of the proposed protected person.
- Any other person the court may allow.

*See ORS 125.075(1).*

Objections to a conservatorship petition filed by an interested person must generally be in writing (most courts do not allow oral objections except for objections made by a proposed protected person) and must be filed within the 15-day notice period provided by the petitioner. Practitioners may wish to check with their local court to determine if any special procedures apply. If objections are timely made by an interested person, the court shall schedule a hearing on the objections. It is the petitioner’s responsibility to provide notice regarding the hearing to all persons entitled to notice under ORS 125.060(3) of the date, time and place scheduled for the hearing, at least 15-days prior to the hearing. ORS 125.075(3).

**i. The Hearing**

The court may require a hearing on any petition or motion filed in a protective proceeding. A hearing must be held on any objection filed to a conservatorship petition if the objection is not withdrawn before the date set for hearing.

A respondent or proposed protected person may appear in person or through counsel at any hearing. The court may appoint counsel for a respondent if a hearing is necessary unless the respondent is already represented. ORS 125.080.

**PRACTICE TIP:** Practitioners should consult their client about who will testify if objections are filed to their petition at the time of filing the petition in order to be better prepared to proceed to hearing, if necessary.

**j. Standard for Appointment**

After a conservatorship petition has been filed, a court may appoint a conservator and make other protective orders as may be necessary, provided the court finds by clear and convincing evidence that the respondent is financially incapable, or a minor, and has money or property that requires management or protection. ORS 125.400.

**k. Temporary (Emergency) Conservatorships**

Upon a showing that there is an immediate and serious danger to the estate of a respondent and that the welfare of respondent requires immediate action in order to protect it, a conservator may be appointed by the court on an emergency basis for a period not to exceed 30...
The court must make a specific finding of financial incapability, plus the existence of an immediate or serious threat to the welfare and estate of a respondent by clear and convincing evidence. Plead accordingly.

A temporary or emergency appointment may be extended for up to 30 additional days for a total of 60 days if good cause is shown. A temporary conservator must be appointed for a specific purpose such as to stop the sale of real property or lock down a bank or brokerage accounts. ORS 125.600(2) & (3).

Your petition must include the emergency allegations about the financial harm to be done to the respondent or his or her estate unless the immediate appointment of a temporary conservator takes place.

I. Temporary (Emergency) Notice.

Generally, your Notice must be given to the persons required to be given notice under ORS 125.060(2) in the manner prescribed by 125.065 at least two days before the appointment of a temporary conservator. This requirement of notice before appointment may be waived by the court for good cause shown. If prior notice is given, it must include the time and place set for the hearing. If prior notice is waived, then the required notice must issue within two days of the appointment of a temporary conservator.

PRACTICE TIP: Practitioners should consider waiving the prior two-day notice if such notice would result in further financial abuse of a proposed protected person. Under statutory law, hearings on objections to the appointment of an emergency or temporary conservator must be heard by the court within two days from the date the objections are filed. ORS 125.605(5). Be prepared to try your temporary conservatorship case quickly.
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF _________________

Department of Probate

In the Matter of the Proposed Conservatorship of

RESPONDENT,

Respondent.

PETITION FOR APPOINTMENT OF A CONSERVATOR OF AN ADULT FOR AN INDEFINITE PERIOD
Value of Estate: $641,000
Fee: $558; ORS 21.180(1)(b)

PETITIONER, a professional fiduciary, petitions the court to appoint it as indefinite conservator for RESPONDENT, and presents the following information to the court:

1.

The following information is given with regard to respondent:

Name: RESPONSPECTENT
Age/Date of Birth: ___ / _________________
Currently located at: _____________________
County: _____________________
Residence Address: same as above
2.

The petitioner and proposed conservator is a professional fiduciary, which was contacted by the respondent's daughter to assist the respondent with managing and protecting her property for her benefit.

3.

The following information is given with regard to the proposed fiduciary:

- **Name:** PETITIONER
- **Age:** N/A
- **Address:** _____________________ _____________________
- **Telephone Number:** (____) _____-________

The proposed conservator is a professional fiduciary, and is qualified, suitable, and willing to serve as conservator. See the professional fiduciary’s Disclosure Statement attached to this petition. If PETITIONER, is appointed to serve as conservator, the primary decision maker will be ________________ and the primary contact person will be _____________.

4.

The proposed conservator has never been convicted of any crime, has not filed or received protection under the bankruptcy laws, and has not had a state professional or occupational license revoked or canceled.

5.

The proposed conservator is not a public or private agency that provides services to respondent, and is not an employee of such an agency.
6.

Respondent is an 85 year-old woman who is suffering from cognitive decline and memory impairment due to dementia. She currently resides in her own home but is unable to understand how or why to pay her bills. Her daughter has been helping her pay her bills online for some time but would prefer that a third party assume management of respondent's finances through conservatorship, which will provide court oversight and protection. Respondent has difficulty maintaining personal and residential hygiene, and providing for her own health and safety. However, the respondent's daughter has hired caregivers who assist the respondent with these deficits. If appointed, the conservator believes the respondent's conditions may be better managed through increased in-home services without the need for a guardian at this time.

7.

Based on the above, respondent is unable to make appropriate decisions or to manage her financial resources, i.e., to take the actions necessary to obtain, administer, and dispose of her personal property, tangible property, benefits and/or income. Respondent is confused about the amount of money in her accounts and is unable to figure out how to pay her bills. Appointment of a conservator is necessary because respondent has assets that require management and need protection from others. Respondent is financially incapable and has money or property that requires both management and protection. Respondent owns a home that is not being properly maintained. There is no less restrictive way to make sure the proposed protected person's assets are managed and protected so that she has funds to pay for her care.

8.

The conservator should be given the authority to protect all of the proposed protected person’s assets. Additionally, the petitioner requests that the court revoke any powers of attorney
that may have been given by respondent to any other party in order to ensure court oversight over all management of the protected person's estate.

9.

Petitioner has made reasonable inquiries but is unable to determine whether the respondent has a current physician.

10.

In addition to the petitioner, the following people have information to support a finding that respondent is financially incapable:

<table>
<thead>
<tr>
<th>Name and Relationship</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Daughter, ____________</td>
<td>(____) <em><strong>-</strong></em>_____</td>
</tr>
<tr>
<td>Visiting Angels, ______</td>
<td>(____) <em><strong>-</strong></em>_____</td>
</tr>
</tbody>
</table>

11.

Based on petitioner’s reasonable inquiry, respondent has not named any fiduciaries under a power of attorney, an advance health care directive, or otherwise. No other court has ordered guardianship or conservatorship for this proposed protected person. If any fiduciaries are found, petitioner will notify the court of their names and addresses.

12.

Based on petitioner's reasonable inquiry, respondent does not have an attorney.

13.

A general description of the respondent’s assets, income, and other property known to the petitioner at this time in need of protection is as follows: real and personal property valued at approximately $641,000.00.
14.

The petitioner requests that the proposed protected person's residence valued at $441,000.00 and located at ________________________________, be restricted from sale and that the court set the bond at $200,000.00 to cover all known and unrestricted assets.

15.

To petitioner’s knowledge, respondent is not receiving money paid or payable by the United States through the State of Oregon through the Adult and Family Services Division of the Department of Human Resources. Respondent may be receiving money paid or payable by the Department of Veterans Affairs as her husband served in the Air Force.

16.

The persons or entities entitled to notice of this proceeding, in addition to respondent are:

__________________, daughter
__________________, son
__________________
__________________

US Department of Veterans Affairs
Portland Regional Office
First & Main Building
100 SW Main Street, Floor 2
Portland, OR 97204

17.

Venue for this protective proceeding lies in ________________ County because the respondent is located and resides in this county.

18.

Petitioner does not intend to place the respondent in a care facility as petitioner is requesting conservatorship only and will not have placement authority if appointed as conservator.
19.

Petitioner is entitled to have its reasonable attorney fees and costs in this protective proceeding paid out of respondent’s funds.

WHEREFORE, petitioner requests a limited judgment:

1. Appointing PETITIONER, as conservator for RESPONDENT;

2. Revoking any financial powers of attorney that may have been executed by the respondent;

3. Restricting the protected person's residence located at ______________________
   ______________________, so that it may not be sold, transferred, or
   encumbered without prior court approval;

4. Setting the conservator's bond at $200,000.00; and

5. Directing that Letters of Conservatorship issue to PETITIONER, in the manner
   required by law upon filing and approval of the bond herein.

DATED this ____ day of October, 2018.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

PETITIONER

____________________
By: _________________, President

Petitioner/Proposed Fiduciary

PETITIONER

____________________
tel (____) _____-________
Attorney for Petitioner and Proposed Fiduciary
Richard A. Pagnano, OSB #893304
Davis Pagnano McNeil & Vigna, LLP
1890 US Bancorp Tower
111 SW Fifth Avenue
Portland, OR 97204-3604
tel (503) 452-5050
fax (503) 452-5054
eml richard@theelderlawfirm.com
IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _________________

Department of Probate

In the Matter of the Proposed Conservatorship of

RESPONDENT,

                     Respondent.

No. ______________

NOTICE TO RESPONDENT
OF TIME FOR FILING
OBJECTIONS TO
APPOINTMENT OF
CONSERVATOR

TO:  RESPONDENT

PETITIONER, who is a professional fiduciary, has asked a judge to give it the power to make decisions for you. The judge has been asked to give this person, agency or business the authority to make the following decisions for you:

✓ Financial decisions, including decisions on paying your bills and decisions about how your money is spent.

Other decisions: None.

YOU MUST TELL SOMEONE AT THE COURTHOUSE BEFORE NOVEMBER ____, 2018, IF YOU OPPOSE HAVING SOMEONE ELSE MAKE THESE DECISIONS FOR YOU.

**OBJECTIONS:**

You can write to the judge if you do not want someone else making decisions for you. The judge’s address is _________________ County Courthouse, Probate Department, _________________, _________________, OR 97_____.

You have the right to object to the appointment of the conservator by saying you want to continue to make your own decisions. If you do not want another person, agency or business making decisions for you, you can object. If you do not want PETITIONER, to make these decisions for you, you can object. If you do not want your money to be used to pay for these expenses, you can object.

You can object any time after the judge has appointed a conservator. You can ask the judge at any time to limit the kinds of decisions that the conservator makes for
you so that you can make more decisions for yourself. You can also ask the judge at any time to end the conservatorship.

**THE HEARING:**

The judge will hold a hearing if you do not want a conservator, do not want this particular person to act as your conservator or do not want your money used this way. At the hearing, the judge will listen to what you and others have to say about whether you need someone else to make decisions for you, who that person should be and whether your money should be spent on these things. You can have your witnesses tell the judge why you do not need a conservator and you can bring in records and other information about why you think that you do not need a conservator. You can ask your witnesses questions and other witnesses questions.

As of the date on this notice, no hearing on the appointment of the conservator has been set.

**LEGAL SERVICES:**

You can call a lawyer if you don’t want someone else making decisions for you. If you don’t have a lawyer, you can ask the judge whether a lawyer can be appointed for you.

There may be free or low-cost legal services or other relevant services in your local area that may be helpful to you in the conservatorship proceeding. For information about these services, you can call ______________________________
at this telephone number, (503) _____-_______, and ask to talk to people who can help you find legal services or other types of services.

**OBJECTION FORM:**

You can mark the blue sheet (Respondent’s Objection) that is attached to this form if you do not want someone else to make your decisions for you. You can show the blue sheet to your attorney or you can mail it to the judge.

DATED this ____ day of October, 2018.

DAVIS PAGNANO MCNEIL & VIGNA, LLP

________________________________________
Richard A. Pagnano, OSB #893304
Of Attorneys for Petitioner and Proposed Conservator

**Petitioner/Proposed Fiduciary**

PETITIONER

________________________________________

________________________
tel (____) _____-________

**Attorney for Petitioner and Proposed Fiduciary**

Richard A. Pagnano, OSB #893304
Davis Pagnano McNeil & Vigna, LLP
1890 US Bancorp Tower
111 SW Fifth Avenue
Portland, OR 97204-3604
tel (503) 452-5050
dist (503) 452-5054
eml richard@theelderlawfirm.com
FORM 3 - Notice to Interested Persons

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF _________________

Department of Probate

In the Matter of the Proposed Conservatorship of

RESPONDENT,

Respondent.

No. 18PR-00190

NOTICE OF TIME FOR FILING OBJECTIONS TO APPOINTMENT OF CONSERVATOR

To: _____________________ _____________________
_____________________ _____________________
_____________________ _____________________
US Department of Veterans Affairs
Portland Regional Office
First & Main Building
100 SW Main Street, Floor 2
Portland, OR 97204

NOTICE IS HEREBY GIVEN that PETITIONER, has filed a petition asking the court to appoint it as conservator for RESPONDENT, respondent. A true copy of the Petition for Appointment of a Conservator of an Adult for an Indefinite Period accompanies this notice.

The petitioner and proposed conservator is a professional fiduciary who was asked by the respondent's daughter to assist respondent with her finances.

Any objections must be made or filed in the conservatorship proceeding in the above court on or before October ____, 2018. Objections may be made in writing or in person, orally, at:

____________ County Courthouse
Probate Department
If the court receives objections, the judge will hold a hearing. As of the date on this notice, no hearing on the decision to appoint a temporary conservator with authority to restrict assets has been set.

NOTICE: If you wish to receive copies of future filings in this case, you must inform the court and the person named as petitioner in this notice. You must inform the court by filing a request for notice and paying any applicable fee. The request for notice must be in writing, must clearly indicate that you wish to receive future filings in the proceedings, and must contain your name, address, and phone number. You must notify the person named as petitioner by mailing a copy of the request to the petitioner. Unless you take these steps, you will receive no further copies of the filings in the case.

DATED this ____ day of October, 2018.

DAVIS PAGNANO MCNEIL & VIGNA, LLP

Richard A. Pagnano, OSB #893304
Of Attorneys for Petitioner and Proposed Conservator

Petitioner/Proposed Fiduciary
PETITIONER

________________________________________
tel (____) _____-________

Attorney for Petitioner and Proposed Fiduciary
Richard A. Pagnano, OSB #893304
Davis Pagnano McNeil & Vigna, LLP
1890 US Bancorp Tower
111 SW Fifth Avenue
Portland, OR 97204-3604
tel (503) 452-5050
tel (503) 452-5054
eml richard@theelderlawfirm.com
FORM 4 - Limited Judgment Appointing Conservator

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _________________

Department of Probate

In the Matter of the Conservatorship of

RESPONDENT,

A Protected Person.

LIMITED JUDGMENT
APPOINTING CONSERVATOR
AND SETTING BOND

This matter came before the court upon the petition of PETITIONER, for its appointment as conservator for respondent RESPONDENT; the court having reviewed the allegations of the petition, the records and files herein, and being otherwise fully advised in the circumstances herein, finds by clear and convincing evidence that:

1. Venue is properly in this court, and no other court in this or any other state has acquired jurisdiction in this matter.

2. All notices required by ORS 125.060 have been given to the persons and entities entitled to notice in the manner required by those statutes. No objections were filed.

3. Respondent is financially incapable and the appointment of a conservator is necessary to provide management and protection for respondent’s financial resources.

4. PETITIONER, is qualified and suitable to act as a conservator and is willing to serve.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED THAT:
a. PETITIONER, is appointed as conservator for RESPONDENT, and shall have the general powers and duties of a conservator under Oregon law;

b. The appointment of PETITIONER, as conservator is made in reliance upon the representation by PETITIONER, that _________________ will personally act as the primary decision maker for the protected person. In the absence of emergency circumstances making such notification impossible, PETITIONER, shall notify the court and all interested persons not less than 90 days in advance of a proposed change of the person acting as primary decision maker. In emergency circumstances where advance notice is not possible, PETITIONER, shall notify the court and all interested persons not less than 3 business days after _________________ ceases to act as the primary decision maker for the protected person. Upon such notice and without prior hearing, the court may remove PETITIONER, as conservator or take such other action as the court deems appropriate for the welfare of the protected person. Failure by PETITIONER, to comply with these notice requirements will result in the immediate removal of PETITIONER, as conservator.

c. Any forms of power of attorney executed by RESPONDENT are hereby revoked;

d. The protected person's residence at ________________________________, is restricted and may not be sold, transferred, or encumbered without prior court approval;

e. The bond is set at $200,000.00 to cover known estimated income and unrestricted assets and may be adjusted when the inventory is filed; and

f. Letters of Conservatorship shall be issued to PETITIONER, upon filing and approval of the surety bond required herein.
Submitted by
Richard A. Pagnano, OSB #893304

Conservator
PETITIONER

tel (____) _____ - _______

Attorney for Conservator
Richard A. Pagnano, OSB #893304
Davis Pagnano McNeil & Vigna, LLP
1890 US Bancorp Tower
111 SW Fifth Avenue
Portland, OR 97204-3604
tel (503) 452-5050
fax (503) 452-5054
eml richard@theelderlawfirm.com
Chapter 4

Escheats: Intestate Estates Without Heirs and Estates with Missing Heirs or Devisees

Michael Grant
Department of Justice Civil Enforcement Civil Recovery
Salem, Oregon

Sally Peacock-Wells
Oregon Department of State Lands
Salem, Oregon

Contents

I. Department of State Lands .................................................. 4–1
II. Common School Fund ........................................................ 4–1
III. Attorney Obligations When Confronted with Intestate Estates Without Heirs (Or Missing Heirs) .................................. 4–2
IV. DSL Contact Information .................................................. 4–2
   A. Address for Notice .......................................................... 4–2
   B. DSL Estate Administrator Email Address ............................. 4–2
   C. Reporting Missing Heir Funds to DSL ................................. 4–2
   D. Contact Information for DSL Estate Administration Unit ........ 4–3
   E. Unclaimed Property Contact Information ............................. 4–3
   F. Oregon Department of Justice Contact Information ............... 4–3
V. Statutes .............................................................................. 4–3
   A. ORS Chapter 112 ............................................................. 4–3
   B. ORS Chapter 113 ............................................................. 4–4
   C. ORS Chapter 114 ............................................................. 4–7
   D. ORS Chapter 116 ............................................................. 4–8
   E. Common School Fund Statutes ........................................... 4–9
   F. Unclaimed Property Statutes .............................................. 4–9

Oregon’s Estates Program (Department of State Lands) ........................................ 4–11
Common School Fund Benefits Oregon Schools (Department of State Lands) ........ 4–13
Unclaimed Property: Do We Have Your Money? (Department of State Lands) .......... 4–15
Presentation Slides ................................................................. 4–19
I. Department of State Lands

A. 1859 Oregon Constitution Creates Board of Commissioners for the sale of school, and University lands, and for the investment of funds arising therefrom.” (Article VIII, Section 5).

B. It was renamed as the State Land Board in 1899. The State Land Board has three members: The Governor, the Secretary of State and the State Treasurer.

C. The Department of State Lands (DSL) acts on behalf of the State Land Board. Among other things, it administers many state lands, the Common School Fund and handles unclaimed property.

II. Common School Fund

A. Statutes: ORS 327.403 through 327.474

B. Provides Funding to Oregon Public Schools

C. Information sheet at the end of materials describes the program in more detail, including the anticipated distributions for 2018. Over $57 million is expected to be distributed to 197 K-12 Districts.

D. Intestate estates without heirs escheat to the State of Oregon and are deposited into the Common School Fund.

E. DSL administers intestate estates without heirs.
III. Attorney Obligations When Confronted with Intestate Estates Without Heirs (Or Missing Heirs)

A. Notify DSL within 48 hours after you learn that a decedent died wholly intestate and without a known heir. ORS 113.238(1)

B. Do not dispose of estate assets without DSL written authorization. ORS 113.238(2)

C. You cannot file a petition to administer estate unless DSL gives written authorization. This must be attached to your petition to administer such an estate. ORS 113.085(4)

D. Missing Heirs: Give written notice to DSL and file proof of delivery with the court. ORS 113.045

E. Missing Heirs: The missing heir or devisee’s portion escheats to DSL. ORS 112.055(2). In that case, your petition for distribution should seek to pay that person’s share to DSL.

IV. DSL Contact Information

A. Address for Notice:

   Estates Administrator
   Oregon Department of State Lands
   775 Summer Street NE, Suite 100
   Salem, OR 97301-1279

B. DSL Estate Administrator Email Address: estates@dsl.state.or.us

C. Reporting Missing Heir Funds to DSL

   1. You can use a cover letter to provide us any information you have about the missing heir you do not need a special form. If you do not have a birth date or social security number you do not need to do additional work to acquire them.

   2. DSL requires that you provide us with an order to escheat or final distribution that has been filed with the court. It will need to have either the judge’s signature or the court’s stamp showing the date of receipt.

   3. DSL would like to have any other information you have regarding the estate that will help it if the heir comes forward at a later date. This should include a copy of the will and death certificate if you have them. If you do not have a death certificate, provide the date of death of the decedent.
D. Contact Information for DSL Estate Administration Unit:

1. Website: [www.oregon.gov/dsl/Money/Pages/Estates.aspx](http://www.oregon.gov/dsl/Money/Pages/Estates.aspx)

2. Personnel:
   a) Greg Goller, Estate Representative, 503-986-5247; Cell 503-881-6477; Email: greg.goller@dsl.state.or.us
   b) Sally Peacock- Wells, Estate Representative, 503-986-5299; Cell 503-856-6090 Email: sally.wells@dsl.state.or.us
   c) Chris Andrews, Trust Property Specialist, 503-986-5287 Email: christopher.andrews@dsl.state.or.us
   d) Patrick Tate, Estate Administrator, 503-986-5248 Email: patrick.tate@dsl.state.or.us

E. Unclaimed Property Contact Information:

1. Website: [www.oregonup.us](http://www.oregonup.us)
2. Telephone: (503) 986-5200
3. Email address: claims@dsl.state.or.us

F. Oregon Department of Justice Contact Information:

1. Address: 1162 Court Street NE, Salem OR 97301
2. Michael Grant, Assistant Attorney General
   (503) 934-4400

V. STATUTES

A. ORS Chapter 112

112.055 Escheat. (1) If, after diligent search and inquiry that is appropriate to the circumstances, taking into account the value of the decedent’s estate, no person takes under ORS 112.025 to 112.045, the net intestate estate escheats to the State of Oregon.

   (2) If a devisee or a person entitled to take under ORS 112.025 to 112.045 is not identified or found, the share of that person escheats to the State of Oregon.

   (3) If a devisee or a person entitled to take under ORS 112.025 to 112.045 is not identified or found:

      (a) The Department of State Lands has the same preference as the missing devisee or person for the purpose of appointment as personal representative under ORS 113.085;

      (b) Title to property of the decedent that would vest in the missing devisee or person under ORS 114.215 vests in the Department of State Lands; and
(c) The Department of State Lands has all of the rights of the missing devisee or person for
the purposes of ORS chapters 111, 112, 113, 114, 115, 116 and 117, including but not limited to
the following:
   (A) The right to contest any will of the decedent under ORS 113.075; and
   (B) The right to information under ORS 113.145. [1969 c.591 §23; 2003 c.395 §2; 2015
c.387 §5]

112.058 Preferences and presumptions in escheat proceedings. (1) In any proceeding to
determine the escheat share of the estate of a decedent whose estate is wholly or partially subject
to probate in this state:
   (a) No preference shall be given to any person over escheat; and
   (b) After diligent search and inquiry appropriate to the circumstances, the following
presumptions apply in a proceeding to determine whether a missing person has died:
      (A) A missing person whose death cannot be proved by other means lives to 100 years of
age.
      (B) A missing person who was exposed to a specific peril at the time the person became
missing has died if it is reasonable to expect from the nature of the peril that proof of death
would be impractical.
      (C) A missing person whose absence is unexplained has died if the character and habits of
the person are inconsistent with a voluntary absence for the time that the person has been
missing.
      (D) A missing person known to have been alive who has not been seen or heard from for
seven years has died if the person has been absent from the person’s usual residence, the absence
is unexplained, there are other persons who would have been likely to have heard from the
missing person during that period were the missing person alive, and those other persons have
not heard from the missing person.
   (2) In any proceeding described by subsection (1) of this section, a missing person who is
presumed to be dead is also presumed to have had two children in addition to any known
descendants of the person unless the presumption of death arises by reason of the application of
subsection (1)(b)(B) or (C) of this section. [2003 c.395 §4; 2016 c.42 §5]

B. ORS Chapter 113

113.045 Information of escheat to Department of State Lands. (1) Upon appointment, a
personal representative shall deliver or mail to the Department of State Lands a copy of the
petition filed under ORS 113.035, and a copy of any last will of the decedent, if the personal
representative has not identified and found all heirs and devisees of the decedent. The personal
representative shall file proof of the delivery or mailing with the court.
   (2) If at any time after the appointment of a personal representative it appears that any heir or
devicee of the decedent cannot be identified and found, the personal representative shall
promptly deliver or mail to the Department of State Lands a notice indicating that an heir or
devicee cannot be identified and found. The personal representative shall file proof of the
delivery or mailing with the court.
   (3) This section does not affect the requirements of ORS 113.085 (3). [1969 c.591 §84; 2003
c.395 §11; 2007 c.284 §9; 2017 c.169 §10]
113.085 Preference in appointing personal representative. (1) Except as provided in subsection (3) of this section, upon the filing of the petition under ORS 113.035, if there is no will or if there is a will and it has been proved, the court shall appoint a qualified person the court finds suitable as personal representative, giving preference in the following order:
   (a) The personal representative named in the will.
   (b) If the surviving spouse of the decedent is a distributee of the estate, the surviving spouse of the decedent or the nominee of the surviving spouse of the decedent.
   (c) If the person is a distributee of the estate, a person who would be entitled to property of the decedent under intestate succession.
   (d) Any other distributee of the estate.
   (e) The Director of Human Services or the Director of the Oregon Health Authority, or an attorney approved under ORS 113.086, if the decedent received public assistance as defined in ORS 411.010, received medical assistance as defined in ORS 414.025 or received care at an institution described in ORS 179.321 (1) and it appears that the assistance or the cost of care may be recovered from the estate of the decedent.
   (f) The Department of Veterans’ Affairs, if the decedent was a protected person under ORS 406.050 (10) and the department has joined in the petition for such appointment.
   (g) Any other person.

(2) Before the court appoints a personal representative under subsection (1)(b) to (g) of this section, the court may require the petitioner to make a reasonable attempt to notify persons of higher priority than the proposed personal representative under subsection (1)(b) to (g) of this section.

(3) Except as provided in subsection (4) of this section, the court shall appoint the Department of State Lands as personal representative if it appears that the decedent died wholly intestate and without known heirs. The Attorney General shall represent the Department of State Lands in the administration of the estate. Any funds received by the Department of State Lands in the capacity of personal representative may be deposited in accounts, separate and distinct from the General Fund, established in the State Treasury. Interest earned by such account shall be credited to that account.

(4) The court may appoint a person other than the Department of State Lands to administer the estate of a decedent who died wholly intestate and without known heirs if the person filing a petition under ORS 113.035 attaches written authorization from the Department of State Lands approving the filing of the petition by the person. Except as provided by rule adopted by the Director of the Department of State Lands, the department may consent to the appointment of another person to act as personal representative only if it appears after investigation that the estate is insolvent. [1969 c.591 §88; 1971 c.421 §1; 1971 c.675 §1; 1973 c.370 §1; 1987 c.158 §17a; 1987 c.425 §1; 1989 c.966 §2; 1995 c.106 §2; 2001 c.102 §3; 2001 c.900 §15; 2003 c.395 §12; 2005 c.381 §20; 2005 c.625 §56; 2009 c.595 §76; 2009 c.602 §2; 2009 c.828 §7; 2011 c.720 §57; 2013 c.36 §33; 2013 c.688 §14; 2015 c.381 §5; 2017 c.169 §13]

113.105 Bond for personal representative. (1)(a) Except as provided in subsections (2) to (4) of this section, the personal representative may not act, and letters may not be issued to the personal representative, until the personal representative provides a bond to the clerk of the court. The bond must be for the security and benefit of all interested persons and must be conditioned upon the personal representative faithfully performing the duties of the position. The bond must be executed by a surety qualified under ORCP 82 D to G.
Chapter 4—Escheats: Intestate Estates Without Heirs and Estates with Missing Heirs or Devises.

(b) The amount of the bond set by the court under this subsection must be adequate to protect interested persons. In setting the amount of the bond, the court shall consider:

(A) The nature, liquidity and apparent value of the assets of the estate.

(B) The anticipated income during administration.

(C) The probable indebtedness and taxes.

(2) Subsection (1) of this section does not apply if:

(a) The will provides that no bond is required, but the court may, for good cause, require a bond notwithstanding any provision in a will that no bond is required;

(b) The personal representative is the sole heir or devisee, but the court may, for good cause, require a bond notwithstanding the fact that the personal representative is the sole heir or devisee; or

(c) The personal representative is the Department of State Lands, the Department of Veterans’ Affairs, the Director of Human Services, the Director of the Oregon Health Authority or an attorney approved under ORS 113.086.

(3) Upon a request by the personal representative, the court may waive the requirement of a bond if:

(a) The request states the reasons why the waiver is requested; and

(b) The request describes the known creditors of the estate.

(4) The court may waive or reduce the requirement of a bond to the extent that:

(a) The personal representative provides written confirmation from a financial institution that property of the estate is held by the financial institution subject to withdrawal only on order of the court; or

(b) The court restricts the sale, encumbrance or other disposition of property of the estate without prior court approval.

(5) Nothing in this section affects the provisions of ORS 709.240, relating to a trust company acting as personal representative. [1969 c.591 §90; 1971 c.421 §2; 1973 c.369 §1; 1973 c.797 §425; 1989 c.682 §1; 2001 c.900 §16; 2003 c.395 §13; 2005 c.625 §72; 2009 c.595 §77; 2009 c.828 §8; 2017 c.169 §15]

113.235 Appointment of estate administrators by Director of Department of State Lands. The Director of the Department of State Lands shall appoint one or more estate administrators to act for the Department of State Lands in administration of any estate in which the Department of State Lands is appointed personal representative. An estate administrator appointed under this section is an employee of the Department of State Lands. [2003 c.395 §7]

113.238 Requirements and prohibitions related to certain decedents who die intestate and without heirs. (1) A person who has knowledge that a decedent died wholly intestate, that the decedent owned property subject to probate in Oregon and that the decedent died without a known heir shall give notice of the death within 48 hours after acquiring that knowledge to the Department of State Lands.

(2) Except as provided by ORS 708A.430 and 723.466, a person may not dispose of or diminish any assets of the estate of a decedent who has died wholly intestate, who owned property subject to probate in Oregon and who died without a known heir unless the person has prior written approval of the Department of State Lands. The prohibition of this subsection:

(a) Applies to a guardian or conservator for the decedent; and
(b) Does not apply to a personal representative appointed under ORS 113.085 (4) or to an
affiant authorized under ORS 114.520 to file an affidavit under ORS 114.515.

(3) For purposes of this section, a known heir is an heir who has been identified and found.
[2003 c.395 §8; 2009 c.541 §3; 2017 c.169 §23]

113.242 Authority of estate administrator. (1) An estate administrator of the Department of
State Lands appointed under ORS 113.235 may take custody of the property of a decedent who
died owning property subject to probate in Oregon upon the department receiving notice that:
(a) The decedent died wholly intestate and without a known heir as described in ORS
113.238 (3); or
(b) The decedent left a valid will, but no devisee has been identified and found.
(2) For any estate described in subsection (1) of this section, an estate administrator of the
Department of State Lands appointed under ORS 113.235 may:
(a) Incur expenses for the funeral of the decedent in a manner suitable to the condition in life
of the decedent;
(b) Incur expenses for the protection of the property of the estate;
(c) Incur expenses searching for a will or for heirs or devisees of the decedent;
(d) Have access to the property and records of the decedent other than records that are made
confidential or privileged by statute;
(e) With proof of the death of the decedent, have access to all financial records of accounts or
safe deposit boxes of the decedent at banks or other financial institutions; and
(f) Sell perishable property of the estate.
(3) The reasonable funeral and administrative expenses of the Department of State Lands
incurred under this section, including a reasonable attorney fee, shall be paid from the assets of
the estate with the same priority as funeral and administration expenses under ORS 115.125.
[2003 c.395 §9; 2016 c.42 §21; 2017 c.169 §51]

C. ORS Chapter 114

114.505 Definitions for ORS 114.505 to 114.560. As used in ORS 114.505 to 114.560:
(1) “Affiant” means the person or persons signing an affidavit filed under ORS 114.515.
(2) “Claiming successors” means:
(a) If the decedent died intestate, the heir or heirs of the decedent, or if there is no heir, an
estate administrator of the Department of State Lands appointed under ORS 113.235;
(b) If the decedent died testate, the devisee or devisees of the decedent; and
(c) Any creditor of the estate entitled to payment or reimbursement from the estate under
ORS 114.545 (1)(d) who has not been paid or reimbursed the full amount owed such creditor
within 60 days after the date of the decedent’s death.
(3) “Estate” means decedent’s property subject to administration in Oregon. [1973 c.710 §2;
1977 c.239 §1; 1979 c.340 §1; 1979 c.467 §3; 1989 c.228 §1; 2003 c.395 §14; 2005 c.22 §92;
2015 c.146 §2]

114.520 Authorization from Department of State Lands required for filing of affidavit by
creditor if decedent dies intestate and without heirs; rules. (1) If a decedent dies intestate and
without heirs, a creditor of an estate who is a claiming successor may not file an affidavit under
ORS 114.515 unless the creditor has received written authorization from an estate administrator
of the Department of State Lands appointed under ORS 113.235. Except as provided by rule adopted by the Director of the Department of State Lands, an estate administrator shall consent to the filing of an affidavit under ORS 114.515 by a creditor only if it appears after investigation that the estate is insolvent.

(2) A creditor of an estate who is subject to subsection (1) of this section may give written notice to an estate administrator of the Department of State Lands informing the estate administrator that the creditor intends to file an affidavit under ORS 114.515. Upon receiving the notice permitted by this subsection, the estate administrator shall investigate the assets and liabilities of the estate. Within 30 days after receiving the notice required by this subsection, the estate administrator shall either:

(a) Give written authorization to the creditor for the filing of an affidavit by the creditor under ORS 114.515; or

(b) Inform the creditor that the Department of State Lands will file an affidavit as claiming successor under ORS 114.515.

(3) If a decedent dies intestate and without heirs, a creditor of an estate who is a claiming successor and who files an affidavit under ORS 114.515 must notate at the top of the affidavit that the affidavit is being filed by a creditor of the estate. If the affidavit contains the notation required by this subsection, the clerk of the probate court may not accept the affidavit for filing unless there is attached to the affidavit written authorization for the filing of the affidavit by the creditor from an estate administrator of the Department of State Lands. The written authorization may be a copy of a memorandum of an interagency agreement between the Department of State Lands and another state agency. [1997 c.88 §2; 2003 c.395 §15]

D. ORS Chapter 116

116.193 Order of escheat. If it appears to the court, at any time after the expiration of four months after the date of the first publication of notice to interested persons, that there is no known person to take by descent the net intestate estate, the court shall order that the estate escheat to the State of Oregon and that the whole of the estate, after payment of claims, taxes and expenses of administration, be distributed to the Department of State Lands. There shall be no further proceeding in the administration of the estate, and the estate shall summarily be closed. [1969 c.591 §186]

116.203 Disposition of unclaimed assets. If a report filed in the estate proceeding by the personal representative not less than 30 days after the date of entry of the judgment of distribution shows that payment or delivery of property in the possession of the personal representative or under the control of the personal representative cannot be made to a distributee entitled thereto, either because the distributee refuses to accept the property or because the distributee cannot be found, the court may direct the personal representative to pay or deliver the property to the Department of State Lands, to be placed in the escheat funds of the state. The personal representative shall take the receipt of the Department of State Lands stating from whom the property was received, a description of the property and the name of the person entitled to the property. The person entitled thereto may apply for and recover the property in the manner provided for recovery of escheat funds. [1969 c.591 §187; 2003 c.576 §378]
116.253 Recovery of escheated property. (1) Within 10 years after the death of a decedent whose estate escheated in whole or in part to the state, or within eight years after the entry of a judgment or order escheating property of an estate to the state, a claim may be made for the property escheated, or the proceeds thereof, by or on behalf of a person not having actual knowledge of the escheat or by or on behalf of a person who at the time of the escheat was unable to prove entitlement to the escheated property.

(2) The claim shall be made by a petition filed with the Director of the Department of State Lands. The claim is considered a contested case as provided in ORS 183.310 and there is the right of judicial review as provided in ORS 183.480. The petition must include a declaration under penalty of perjury in the form required by ORCP 1 E, or an unsworn declaration under ORS 194.800 to 194.835, if the declarant is physically outside the boundaries of the United States, and shall state:

(a) The age and place of residence of the claimant by whom or on whose behalf the petition is filed;

(b) That the claimant lawfully is entitled to the property or proceeds, briefly describing the property or proceeds;

(c) That at the time the property escheated to the state the claimant had no knowledge or notice thereof or was unable to prove entitlement to the escheated property and has subsequently acquired new evidence of that entitlement;

(d) That the claimant claims the property or proceeds as an heir or devisee or as the personal representative of the estate of an heir or devisee, setting forth the relationship, if any, of the claimant to the decedent who at the time of death was the owner;

(e) That 10 years have not elapsed since the death of the decedent, or that eight years have not elapsed since the entry of the judgment or order escheating the property to the state; and

(f) If the petition is not filed by the claimant, the status of the petitioner.

(3) If it is determined that the claimant is entitled to the property or the proceeds thereof, the Director of the Department of State Lands shall deliver the property to the petitioner, subject to and charged with any tax on the property and the costs and expenses of the state in connection therewith.

(4) If the person whose property escheated or reverted to the state was at any time a patient of a state institution in Oregon for persons with mental illness or of the Eastern Oregon Training Center, the reasonable unpaid cost of the care and maintenance of the person while a ward of the institution, regardless of when the cost was incurred, may be deducted from, or, if necessary, be offset in full against, the amount of the escheated property. The reasonable unpaid cost of care and maintenance shall be determined in accordance with ORS 179.701.

(5) For the purposes of this section, the death of the decedent is presumed to have occurred on the date shown in the decedent’s certified copy of the death record or in any other similar document issued by the jurisdiction in which the death occurred or issued by an agency of the federal government. [Formerly 120.130; 2003 c.395 §18; 2003 c.576 §380a; 2007 c.70 §23; 2007 c.284 §3; 2009 c.595 §83; 2013 c.36 §34; 2013 c.218 §15; 2013 c.366 §61]

E. Common School Fund Statutes: ORS 327.403 – 327.474

F. Unclaimed Property Statutes: ORS 98.302 – 98.436
NOTIFYING DSL
If you or your organization are dealing with a deceased individual who has no known heirs or a valid will — even if you only suspect this to be the case — you are required by Oregon law to contact the Estates Program in the Oregon Department of State Lands within 48 hours.

**Estate Administrator**
**Oregon Department of State Lands**

775 Summer St., NE
Suite 100
Salem, OR 97301-1279
(503) 986-5287
estates@dsl.state.or.us

[www.oregonstatelands.us](http://www.oregonstatelands.us)

Contact the Estates Program to schedule presentations to businesses and professional associations.

*Oregon’s Estates Program*

Administering estates of persons who have died without a will and known heirs.
OREGON’S ESTATES PROGRAM – NOTIFICATION AND ADMINISTRATION

Oregon law requires the Oregon Department of State Lands (DSL) to be notified within 48 hours upon the death of a person who appears to have no heirs or a valid will. This notification may be provided by a variety of sources, including county medical examiners, landlords, nursing home administrators, hospitals, funeral homes, law enforcement agencies, neighbors, friends and attorneys.

Upon notification of such a death, the Estates Program staff takes immediate steps to gather information about the deceased and search for a valid will and heirs. This often includes searching and inventorying the deceased’s residence and possessions. DSL also makes arrangements for the decedent’s remains and acts on behalf of the deceased to close out personal affairs.

DSL diligently seeks to locate rightful heirs. If the search for heirs is unsuccessful, the agency is appointed in the appropriate court as personal representative to administer the estate. DSL protects the property from any unlawful attempts by others to claim the deceased’s assets. Other responsibilities include maintaining an inventory of real and personal property, and selling or managing assets in a manner that benefits the estate.

MISSING HEIRS

Oregon Law requires that DSL is notified during probate of cases where some heirs or beneficiaries of a will cannot be found during the administration of the estate. In these cases, the probate court will require the missing heir’s share be remitted to DSL.

COMMON SCHOOL FUND

All assets from estates are held in the Common School Fund (CSF) for up to 10 years, and may be recovered by proven heirs during this time period. If no heirs come forward within the appropriate time frame, the assets become a permanent part of the CSF and may not be recovered.

The CSF is a constitutional fund dedicated to Oregon’s K-12 public schools. Earnings from the fund are distributed twice annually to the state’s 197 school districts. Since statehood, at which time the fund was established, hundreds of millions of dollars have benefited Oregon schoolchildren. The CSF’s value is over $1 billion, and distributions to schools since 2005 have averaged $48 million annually.

“After an elderly tenant died, I was alerted to the Estates Program at DSL, whose staff helped settle the estate and start the process of cleaning out the apartment. The deceased had quite a collection of musical instruments, and I was so grateful for their quick work and careful attention to these items. The staff were a huge help to me, and I appreciate their good work on behalf of people who die without heirs or a will.”

Salem Landlord
$57.63 Million Earmarked for State’s 197 K-12 Districts in 2018

Since Oregon became a state in 1859, a little-known fund—the Common School Fund—has provided hundreds of millions of dollars for Oregon public schools.

Common School Fund distributions are considered local revenue in the state funding formula, and the dollars are not insignificant. In a district such as Corvallis, their 2018 share of $979,238 supports the equivalent of 11 full-time teaching positions; in Bend 20; and in Medford 15.5.

The 2018 distribution is approximately $100 per student.

State Land Board Oversees Common School Fund

The act of Congress admitting Oregon to the Union in 1859 granted sections 16 and 36 of every township for the use of schools. Nearly 3.4 million acres—roughly the size of Connecticut—came under state ownership.

Our “land-rich, cash-poor” state quickly sold many school lands, as state officials felt private ownership of these lands would yield more for schools through property taxes and other economic benefits. In the late 1800s, land swindlers also cheated Oregon out of thousands of acres. As a result, less than a fourth of Oregon’s original acreage—about 750,000 acres—remains in state ownership.

2018 Common School Fund Distributions

A sampling of districts and the impact of their distributions

<table>
<thead>
<tr>
<th>School District</th>
<th>Distribution</th>
<th>Equal to*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Astoria</td>
<td>$180,534</td>
<td>2 full-time teachers</td>
</tr>
<tr>
<td>Bend</td>
<td>$1,760,970</td>
<td>20</td>
</tr>
<tr>
<td>Coos Bay</td>
<td>$300,394</td>
<td>3.5</td>
</tr>
<tr>
<td>Corvallis</td>
<td>$979,238</td>
<td>11</td>
</tr>
<tr>
<td>Hood River</td>
<td>$386,813</td>
<td>4.5</td>
</tr>
<tr>
<td>Medford</td>
<td>$1,353,344</td>
<td>15.5</td>
</tr>
<tr>
<td>Ontario</td>
<td>$234,900</td>
<td>3</td>
</tr>
<tr>
<td>Pendleton</td>
<td>$296,641</td>
<td>3.5</td>
</tr>
<tr>
<td>Portland</td>
<td>$5,154,814</td>
<td>59</td>
</tr>
<tr>
<td>Salem</td>
<td>$4,187,498</td>
<td>48</td>
</tr>
</tbody>
</table>

*Based on the 2017 annual statewide average of $87,025 per teacher for salary and benefits; figures are rounded
“Protecting and enhancing the Common School Fund is arguably the most important thing we do as a state agency,” says Vicki Walker, director of the Department of State Lands, the administrative arm of the Land Board. “Our goal is to have every education advocate understand its role in funding K-12 schools.”

Inputs into the fund include revenues from state-owned trust lands, and from estates that transfer to the state from people who die without a will and known heirs. All unclaimed money the state receives is held in the Common School Fund until the rightful owner is located.

**Goal is to grow the fund significantly over time**

As the Common School Fund grows, so do distributions to Oregon school districts. Since 2000, distributions have ranged from a low of $13 million in 2004 to a high of $70 million in 2017.

The Department of State Lands is strategically managing the fund’s real estate assets to increase revenues to schools. Divesting of non-producing lands, investing in high-quality lands, and ensuring that state land leases reflect market values are among the agency’s strategies.

“Every dollar helps Oregon schools,” Walker says. “Through balancing revenue enhancement and resource protection, our goal is to provide sustainable funding for schools forever.”

Common School Fund distributions are sent to school districts twice a year. By law, fund distributions cannot benefit current students at the disadvantage of future students, or vice-versa.

The Land Board’s Real Estate Asset Management Plan calls for a “clear commitment to creating a consistent stream of revenue to increase annual distributions to schools.” It also recognizes the need to strategically dispose of selected land assets and acquire assets with high performance potential.

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8/18
Do we have your money?

Oregon is holding millions of dollars in unclaimed assets

- Insurance Proceeds • Bank Accounts
- Utility Deposits • Stock Dividends
- Safe Deposit Box Contents • Tax Refunds
What is Unclaimed Property?
Mostly, it’s money, but it can be any financial asset that has not been claimed by the owner or has not had any owner-generated activity for a specific time period (one to three years for most items). Examples include:

- payroll checks
- refunds
- overpayments
- money orders
- bank accounts
- mutual funds and securities

Unclaimed property is not land or other real estate.

Oregon’s unclaimed property laws date to 1957, and were established to protect the consumer and provide a central registry of unclaimed property. The Oregon Department of State Lands (DSL) administers the unclaimed property program and works to reunite as many people as possible with their money or possessions.

Why does Unclaimed Property go to DSL?
Organizations and businesses throughout the United States are required to report unclaimed property to Oregon based on the owner’s last known address. If the amount is $100 or more, they must make a good faith effort to contact the owner before reporting. Any company or organization that writes checks, drafts or warrants has the potential to have unclaimed property to report.

Typically, unclaimed property occurs when:

- People lose or forget to cash a check, or overpay a final bill.
- A person’s address changes and mail forwarding ends.
- An account holder dies and heirs are unaware of the account.

What does DSL do with the funds?
Unclaimed property is held in trust forever in the Common School Fund for claim by rightful owners or their heirs. The money is not spent by the department. Investment earnings from the fund are sent twice a year to Oregon’s 197 K-12 public school districts. Recent annual distributions have ranged from $35.2 million in 2000 to $70 million in 2017.

Check for your name
It’s easy and free to search for your name and file a claim online. To ensure privacy of the owner and to discourage fraudulent claims, listings only show dollar ranges. Most accounts have a value of $250 or less. Simple claims are normally processed within 45 days. Complex claims involving large sums, stock transfers or deceased original owners may take up to 120 days for a response. If you find names of family or friends, refer them to the website, as they must respond for themselves.

Go to either of these links to start your unclaimed property search:

- www.oregonup.us
- www.oregon.gov/dsl

Track your claim
You may register before you file a claim to easily track your claim’s status. The owner listing and claim status are updated daily. Your claim is automatically recorded in the database when you file online, but no action will be taken until DSL receives your completed claim form in the mail.

DSL holds more than half a billion dollars for nearly 3 million owners. The state receives about $50 million annually in unclaimed funds, and returns about half that amount to people who file claims.
Tips to keep track of your accounts

- Keep your accounts active through customer-initiated contact with the holder (your bank for example) at least once every two years.
- Keep accurate and current records of all accounts, insurance policies, certificates of deposit, safe deposit boxes, stocks and bonds.
- Notify family members of the location of accounts and records.
- Update your current or recent employers, financial institutions, investment managers and regular merchants whenever you change your address.

Complying with Oregon’s Unclaimed Property law

If you own a business or think your organization (including public agencies and nonprofits) might have unclaimed property to report:

- Go to www.oregon.gov/dsl
- Email holder@dsl.state.or.us

Oregon Department of State Lands
Unclaimed Property Section
775 Summer St. NE, Suite 100
Salem, OR 97301-1279
Phone: (503) 986-5200 • Fax: (503) 378-4844
Email: claims@dsl.state.or.us
www.oregonup.us • www.oregon.gov/dsl
ESCHEAT: INTESTATE ESTATES WITHOUT HEIRS AND ESTATES WITH MISSING HEIRS OR DEVISEES

BASIC ESTATE PLANNING AND ADMINISTRATION CLE
NOVEMBER 16, 2018

Sally Peacock-Wells
Oregon Department of State Lands
Michael Grant
Assistant Attorney General
Oregon Department of Justice

Department of State Lands

- 1859 Oregon Constitution Creates Board of Commissioners for the sale of school, and University lands, and for the investment of funds arising therefrom. (Article VIII, Section 5).
- It was renamed as the State Land Board in 1899. The State Land Board has three members: The Governor, the Secretary of State and the State Treasurer.
- The Department of State Lands acts on behalf of the State Land Board. Among other things, it administers many state lands, the Common School Fund and handles unclaimed property.
- Common School Fund Statutes: ORS 327.403 – 327.484
Escheatment

- Total Escheat: If someone dies intestate and without heirs, their estate escheats or passes to the State of Oregon and is deposited into the Common School Fund. ORS 112.055(1).
- Partial Escheat (missing persons): If an heir or devisee is not identified or found, their share escheats to the State of Oregon. ORS 112.055(2).
Notice to DSL

- Any person who has knowledge that a decedent died wholly intestate, decedent died **without a known heir** and **without a valid will** shall give notice of the death within 48 hours of acquiring that knowledge to the Estate Administrator of the Oregon Department of State Lands. ORS 113.238

Notice to DSL

- ORS 113.238 also generally prohibits the disposition or diminishment of estate assets in this situation, unless DSL approves in writing.
  - This also applies to guardians and conservators.
- It is preferable that you give this notice to DSL in writing. The written materials contain DSL’s address.
Chapter 4—Escheats: Intestate Estates Without Heirs and Estates with Missing Heirs or Devisees

DSL'S AUTHORITY AFTER RECEIVING NOTICE
(ORS 113.242)

- Incur bural expenses.
- Incur expenses to protect estate.
- Incur expenses to search for will and heirs.
- Access to financial and other records.
- Sell perishable property.
- If a will or heirs are found, DSL’s claim for the above-services is entitled to equal priority as funeral and administrative costs.
- Bank Affidavit.

DSL'S INITIAL INVESTIGATION

Complete intake investigative information including SSN, DOB, DOD, address, location of death, etc.

Contact funeral home, Medical Examiner’s office, friends, caregivers, other points of contact who might have more information on the deceased, their relationships, and their finances.

Research sites like Accurlnt, Ancestry, newspaper archives; State Library, VA etc. to search for heirs.

Research for assets and liabilities; financial statements, vehicles, real property records, DHS-EAU liens, tax liens, creditor bills, etc.
DSL’s Evaluation of Intestate/No-Heir Cases

- Evaluate estate with team members/Estate Administrator.
- Based on preliminary information, is it cost-effective to go on-site (to decedent’s residence) to further the investigation and continue administration or is it better to take a different course of action (i.e. waive DSL’s position)
- Based on preliminary information, is the estate solvent? Is it likely that there will be funds remaining after paying all creditors under ORS 115.125 to benefit the Common School Fund?

Full Probate Cases When Decedent Dies Intestate and Without Heirs

- “[T]he court shall appoint [DSL] as personal representative if it appears that the decedent died wholly intestate and without known heirs.” ORS 113.085(3)
- Estate Administrator for DSL may authorize the appointment of another person to act as personal representative if:
  - After investigation the estate administrator determines the estate is insolvent;
  - The estate administrator determines that the appointment is the most cost-effective method to administer the estate and protect the assets of the estate. ORS 113.085(4).
DSL’s Administration of Full Probate Cases

- Represented by the Oregon Department of Justice
- File a petition to administer intestate estate.
- DSL is not required to post a bond. ORS 113.105(2)(c)
- Administered like a regular probate—publication of notice, inventory, accountings, property is sold, claims are paid or denied, taxes are paid and tax returns are filed.
- DSL also conducts an heir search.

DSL Administration of Full Probate Cases

- If heirs are identified, they are asked to file a petition to be appointed as the successor personal representative.
- If no heirs are found, DSL petitions to have estate escheat to the State of Oregon. ORS 116.193
**SMALL ESTATES**

- DSL is the claiming successor if the decedent died intestate without heirs. ORS 114.505(2)(a).
- If the estate is solvent, DSL will file a small estate affidavit and administer the estate.
- Administered in the same manner as any other small estate.
- Estate escheats if no heirs are found.

**SMALL ESTATES:**

**CREDITORS FILING AS CLAIMING SUCCESSOR**

- A creditor of an intestate estate may not file a small estate affidavit without written authorization from DSL. ORS 114.520(1).
- If the creditor wishes to file a small estate affidavit, it may give written notice to DSL. This informs DSL that the creditor intends to file the affidavit.
- DSL investigates the assets and liabilities of the estate, and within 30 days after receipt of the notice either:
  - Gives written authorization to the creditor to file a small estate affidavit; or
  - Informs the creditor that DSL will file a small estate affidavit.
Recovery of Escheated Assets

- Missing heirs may assert a claim to the escheated funds within 10 years after the decedent died or within eight years after entry of the judgment escheating the property to the state. ORS 116.253

Estate Attorney’s Obligations (Full Probate—Intestate—No Heirs)

- Notify DSL within 48 hours after you learn that a decedent died wholly intestate, decedent died **without a known heir** and **without a valid will**. ORS 113.238
- Do not dispose of estate assets without DSL written authorization. ORS 113.238
- You cannot file a petition to administer estate unless DSL gives written authorization. This must be attached to your petition to administer the estate. ORS 113.085(4)
Estate Attorney’s Obligation: Missing Heir or Devisee

› Give written notice to DSL and file proof of delivery with the court. ORS 113.045
› The missing heir or devisee’s portion escheats to DSL. ORS 112.055(2). In that case, your petition for distribution should seek to pay that person’s share to DSL.

Estate Attorney’s Obligation: Intestate Small Estates With No Heirs

› Typically an issue when you represent a creditor who wants to file a small estate affidavit.
› Must obtain written authorization from DSL to file the small estate affidavit. ORS 114.520
Miscellaneous Issues

• What if Heir or Devisee Does not Accept Distribution? ORS 116.203 (Court may direct personal representative to distribute funds to DSL to be placed in escheat funds)
• Trusts: If a beneficiary cannot be found and the trust does not identify a residual beneficiary, what happens to their share?

Unclaimed Property

• Uniform Disposition of Unclaimed Property Act (ORS 98.302 et seq.)
• Not the subject of this CLE.
• General Concept: When the owner of personal property cannot be located, the person or entity holding the unclaimed property may be required to turn it over to DSL. Thereafter, the owner can submit a claim to DSL to recover the property.
• The personal representative of the decedent’s estate can submit the claim to DSL.
Unclaimed Property

• Don’t forget to check DSL’s Unclaimed Property Page to see if DSL is holding funds for you, your family, or your clients.

  • www.oregonup.us
  • claims@dsl.state.or.us
  • Telephone: 503-986-5200

DSL Estate Administration Unit
Contact Information

• Estate Administration Unit
• www.oregon.gov/dsl/Money/Pages/Estates.aspx
• Greg Goller, Estate Representative, 503-986-5247;
  Cell 503-881-6477;  Email: greg.goller@dsl.state.or.us
• Sally Peacock- Wells, Estate Representative, 503-986-5299;
  Cell 503-856-6090  Email: sally.wells@dsl.state.or.us
• Chris Andrews, Trust Property Specialist, 503-986-5287
  Email: christopher.andrews@dsl.state.or.us
• Patrick Tate, Estate Administrator, 503-986-5248
  Email: patrick.tate@dsl.state.or.us
Chapter 5

Presentation Outline: Issue Spotting for New Estate Planning Attorneys

AMY BILYEU
Wyse Kadish LLP
Portland, Oregon

JULIE MEYER ROWETT
Yazzolino & Rowett LLP
Portland, Oregon

KATHARINE WEST
Wyse Kadish LLP
Portland, Oregon
1) Reconsidering probate avoidance
   a. Why probate isn’t always bad
   b. Notice
   c. Venue to resolve disputes
   d. Avoiding misconceptions about fiduciary actions
   e. No need to transfer assets during lifetime
   f. Probate assets available to pay bills

2) Creditor issues
   a. How creditors are paid without probate
   b. Identifying the universe of debts

3) Beneficiary issues
   a. Public benefits
   b. Incapacity
   c. Minors
   d. Insolvency

4) Issues with specific bequests
   a. Will taxes or administrative expenses be charged against some or all specific gifts?
   b. If not, is there a residue to pay bills?
   c. Property that is sold/disposed of before death
   d. What happens if the beneficiary doesn’t survive

5) Getting to know the cast of characters
   a. Understanding family relationships
   b. Understanding beneficiary issues
   c. Listening for what the client isn’t saying
6) Unequal/unusual gifts
   a. Equal isn’t always fair, and fair isn’t always equal
   b. When to consider a letter explaining the plan
   c. Understanding reasons behind unusual gifts

7) Choosing fiduciaries
   a. Default to oldest/local child not always best option
   b. Co-fiduciaries
   c. When to consider corporate or professional fiduciary

8) Healthcare issues
   a. Explaining how and when the advance directive comes into play
   b. Choosing a health care representative
   c. Keeping health care representatives informed

9) Defining terms
   a. What is “income”? 
   b. Defining specific property
A life insurance policy is a contract between the policy owner and an insurance company. The owner pays premiums and, upon the death of the insured, the company pays cash to the beneficiary designated by the owner.
The Owner and Insured may be the same person

The Owner designates the Beneficiaries

Proceeds ("death benefits") are paid to the Beneficiaries when the Insured dies

Parties

- Insurance Company
- Policy Owner
- Insured
- Beneficiaries

Owner and Insured

The Insured may own a policy insuring her own life

A third party with an insurable interest in the life of the Insured may own a policy

A person with an “insurable interest” is one who would experience financial loss or hardship if the Insured died

Individual family members, business entities, and trustees all may have insurable interests in an Insured’s life
The beneficiaries may be individuals, entities, or the trustee of a trust.

If no beneficiary is designated, the default beneficiary is specified in the policy—usually the estate of the Insured.

Beneficiary files a claim form and submits proof of the Insured’s death.

Death benefits usually are paid in a lump sum.
Why Do People Buy Life Insurance?

- Income Replacement
- Estate Tax Payments
- Cross-Purchase Agreements or Other Business Planning
- Special Family Situations

Types of Life Insurance Policies

- Term Life Insurance
- “Permanent” Life Insurance
  - Whole Life
  - Universal Life
  - “Second-to-die” Life Insurance
Term Life Insurance

Policy is effective for a set term (10, 20, 30 years)
May be renewable at the end of the term (usually with higher premiums)
Some may be converted into permanent policies
Premiums are much less expensive than permanent insurance
No savings or investment component; no cash value

“Permanent” Life Insurance

Generally, life insurance that continues indefinitely so long as premiums are paid
Savings or investment component
Most policies will allow the owner to borrow against the policy, if the cash value is sufficient
Premiums are considerably more expensive than term insurance
Whole Life Insurance

- Permanent policy that stays in effect so long as premiums are paid
- Consistent, "level" premiums for traditional whole life policies
- Guaranteed cash value accumulation

Universal Life

- Permanent policy that stays in effect so long as premiums are paid
- Flexible premiums
- Flexible death benefits
- Flexible savings and investment options
Second-to-Die ("Survivorship") Life Insurance

- Insures the lives of two people (often spouses)
- Death benefits are paid upon the second insured’s death
- Generally less expensive than two individual policies

Taxation of Life Insurance

Income Tax

Wealth Transfer Taxes
- Gift Tax ($11.2 million combined federal exclusion; no Oregon gift tax)
- Estate Tax ($11.2 million combined federal exclusion; $1,000,000 Oregon exclusion)
- Generation-Skipping Transfer Tax ($11.2 million federal exclusion—in addition to gift and estate tax exclusion; no Oregon GST tax
**Income Tax**

General Rule: IRC § 101—“gross income does not include amounts received . . . under a life insurance contract, if such amounts are paid by reason of the death of the insured.”

**Exception: Transfer for value rule**

Note: “dividends” and interest received on a permanent life insurance policy are included in Owner’s gross income if they exceed premiums paid.

**Transfer for Value Rule**

- IRC § 101(a)(2)

- If the Owner transfers an interest in an insurance policy in exchange for any valuable consideration, the exclusion from gross income is limited. Only the amount of consideration paid, plus any additional premiums paid by the transferee, will be excluded from gross income.

  **Important:** exceptions to the transfer for value rule allow many common transactions, including the gift of a policy to an ILIT.
Transfer for Value Rule: Primary Exceptions

Internal Revenue Code § 101(a)(2); Treas. Reg. § 1.101-1

The transfer for value rule does not apply to the following types of transfers of insurance policies (or interests in policies):

(A) A transfer where the transferee’s basis in the policy is “determined in whole or in part by reference to” the transferor’s basis in the policy; and

(B) Transfers to certain parties, including:
   - the Insured
   - the Insured’s partner(s)
   - the Insured’s partnership
   - a corporation, if the Insured is a shareholder or officer of the corporation

Gift Tax applies to a transfer of a life insurance policy and to payments of premiums on a policy owned by another person.

Estate Tax applies to any life insurance policy owned by the decedent at the time of his death—including the proceeds of a policy owned by the decedent where decedent is the Insured.

Generation-Skipping Transfer Tax applies to any transfer of a life insurance policy (or an interest in a policy) to a “skip person.”
**Gift Tax**

*Gift Tax* applies to a transfer of a life insurance policy. Report the fair market value of the policy as of the date of transfer; see Form 712 issued by the insurance company.

*Gift Tax* applies to payments of premiums on a policy owned by another person (including the trustee of an ILIT).

File IRS Form 709 to report taxable gifts.

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**$15,000 Gift Tax Annual Exclusion**

- **Present Interest**
- **Gifts in Trust**

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**$11.2 million exemption**
Remember: A gift may qualify for the annual exclusion only if it is a gift of a “present interest” in property
—IRC § 2503(b)

Generally, gifts in trust are not gifts of a present interest because the beneficiary does not have the immediate ability to use and enjoy the property
$11.2 million exemption

Available for lifetime gifts that do not qualify for the annual exclusion or other gift tax exclusions

The use of the gift tax exemption reduces the estate tax exemption but has no effect on the GST tax exemption

The value of a life insurance policy on another, living person’s life is included in the owner’s gross estate (but the value of a term policy is minimal)

Life insurance proceeds are included in the owner’s gross estate

If the Insured owns a policy on his own life, all proceeds paid upon the Insured’s death are included in his gross estate for federal and state estate tax purposes

File IRS Form 706 and Oregon OR-706 for decedents whose gross estates exceed the exemption amounts

File IRS Form 706 and Oregon OR-706 for decedents whose gross estates exceed the exemption amounts
IRC § 2033

A decedent’s gross estate includes the value of any property in which the decedent owned an interest, to the extent of that interest.

IRC § 2042

Life insurance proceeds are included in the Insured’s gross estate to the extent
- received by the Insured’s executor; or
- received by another person, if the Insured held any “incidents of ownership” of the policy at the time of his death.
Incidents of Ownership

For purposes of IRC § 2042, “incidents of ownership” include the following:
- actual ownership of the policy
- the right to change the policy beneficiaries
- the right to borrow against a policy or withdraw its cash value
- the power to change the ownership or enjoyment of a policy or its proceeds

Any of those powers or rights are “incidents of ownership” whether they may be exercised by the Insured alone or must be exercised with another person’s consent.

IRC § 2035

Proceeds of an insurance policy transferred within three years of the Insured/former Owner’s death are included in the Insured’s gross estate.
Generation-Skipping Transfer Tax

GSTT applies to transfers to or for the benefit of “skip persons”
- Grandchildren or more remote descendants of the donor are skip persons, as are most members of the “grandchild generation” who are not direct descendants
- Any unrelated transferee more than 37.5 years younger than the donor is a “skip person”

Tax is imposed when a direct skip, taxable distribution, or taxable termination is made

Exemption is allocated at the time of the initial transfer

$11.2 million federal exemption (in addition to gift and estate tax exemption)

Report generation-skipping transfers on IRS form 706 or 709

Direct Skip

A gift made directly to a skip person

A gift to a trust where all beneficiaries are skip persons
**Taxable Distribution**

A distribution from a trust to a skip person

**Taxable Termination**

The termination of an interest in trust property (upon an event such as the lapse of time, a person’s death, etc.) is a taxable termination if, following that event, only skip persons have an interest in the trust property.
Irrevocable Life Insurance Trusts

Why do clients need ILITs?
When should you consider using an ILIT?

Why Use an ILIT?

- Estate Tax Planning
  A properly structured and administered ILIT will allow death benefits to be excluded from the Insured’s gross estate (and can exclude the proceeds from beneficiaries’ gross estates, too)

- Irrevocable Designation of Proceeds
  The original Owner of the policy/creator of the ILIT may be assured that the proceeds will be administered as directed in the trust agreement
When to Consider an ILIT

- Client owns life insurance policy with high death benefit, or intends to purchase a policy
- Oregon resident’s gross estate (including life insurance) exceeds $1,000,000
- Owner does not intend to borrow against the policy or cash it in
- Owner is willing to irrevocably relinquish control of the policy and death benefits
- Trustee is willing to comply with administration requirements
Designing Irrevocable Life Insurance Trusts

Parties to an ILIT

- **Grantor**/Trustor/Settlor creates the ILIT
- Trustee holds the ILIT property and administers the trust
- Beneficiaries receive distributions or other benefits of the ILIT property
Grantor

AKA “Settlor” or “Trustor”—the creator of a trust

For income tax purposes, a trust “grantor” as described in IRC §§ 671-678 is taxed on the income of the trust

If no individual is the “grantor” as described in IRC §§ 671-678, the trustee is responsible for filing fiduciary income tax returns and paying any income taxes due

Many ILITs will not have taxable income during the grantor’s lifetime

Trustee

The trustee is responsible for holding and investing trust property, paying life insurance premiums, etc.

The trustee may be required to give “Crummey” notices each time life insurance premiums are paid or other contributions are made to the ILIT

After the death benefits are paid, the trustee will administer and distribute the funds as directed in the trust agreement.
Table of Contents

1. Introduction to Estate Planning
2. Basic Concepts
3. Types of trusts
4. Trust Administration
5. Estate Taxes
6. Conclusion

1. Introduction to Estate Planning

- Definition of Estate Planning
- Importance of Estate Planning

2. Basic Concepts

- Estate Planning Process
- Estate Planning Objectives

3. Types of trusts

- Revocable Trusts
- Irrevocable Trusts
- Special Purpose Trusts

4. Trust Administration

- Trustee Duties
- Trustee Reporting Requirements

5. Estate Taxes

- Federal Estate Tax
- Gift Tax
- Generation-Skipping Transfer (GST) Tax

6. Conclusion

- Summary of Key Points
- Future Directions in Estate Planning
Income Tax Considerations

Most ILITs are grantor trusts for income tax purposes, while the grantor is living.
- see IRC § 677(a)(3)
- any trust income will be taxed to the grantor
- ILIT is unlikely to earn income during the Insured’s lifetime

Gift Tax

The transfer of an existing life insurance policy to an ILIT is a gift.
- The gift amount is the value of the policy at the time of the transfer, which often is the “interpolated terminal reserve” value
- The insurance company will issue Form 712 showing the applicable value

Paying an insurance premium for trust-owned life insurance is a gift.
- The gift amount is the amount of cash transferred to the ILIT trustee or paid to the insurance company

Gifts to ILITs do not automatically qualify for the gift tax annual exclusion.
“Crummey” withdrawal rights allow a gift in trust to qualify as a gift of present interest

Treas. Reg. § 25.2503-3(b): the donee must have the “unrestricted right to the immediate use, possession, or enjoyment of property” or the income therefrom, for the gift to qualify for the gift tax annual exclusion.

Give the beneficiaries the unrestricted right to withdraw trust property but make the right exercisable only for a limited time period (typically 30 to 60 days).

A Crummey withdrawal right is a general power of appointment. The lapse of this general power of appointment results in the beneficiary’s deemed gift to the trust, to the extent the value of the lapsed power exceeds the greater of $5,000 or 5% of the value of the trust assets. (IRC § 2514) Therefore, Crummey withdrawal powers should lapse only to the extent of the “five or five” amount each year.

Query: With an $11.2 million federal estate tax exemption, and no Oregon gift tax, how important is the gift tax annual exclusion for many clients?

Consider making Crummey withdrawal rights “optional”—allow a donor to specify whether Crummey powers apply to each transfer to the ILIT.

GST Considerations

Ordinary Crummey withdrawal rights in an ILIT with multiple beneficiaries are not sufficient to qualify the gifts for the GST tax annual exclusion.

The annual exclusion from GST tax is available if:
- all gift tax annual exclusion requirements are met,
- the skip person is the only trust beneficiary, and
- the trust property will be included in the skip person’s gross estate for estate tax purposes.

Allocating GST exemption to all transfers to an ILIT with skip person beneficiaries will allow all death benefits to pass free of GST tax.
Distributions During Insured’s Lifetime

If all goes according to plan, the trustee is unlikely to make distributions to beneficiaries while the Insured is living.

Consider using flexible distribution provisions to allow early termination/unwinding of the ILIT.

Selected ILIT Considerations After the Insured’s Death

- Income tax
- Estate Tax
- GST Tax
- Distribution Provisions
**Income Tax**

There is no income tax on the insurance proceeds themselves (unless there has been a transfer for value or another exception to IRC § 101 applies).

Going forward, the ILIT will be subject to income tax on all income earned on the life insurance proceeds.

Fiduciary income tax returns must be filed annually.

**Estate Tax**

If the Insured did not possess any incidents of ownership in the insurance policy at the time of her death, and if:

- she survived the transfer of the policy by at least three years, or
- she never owned the policy

the proceeds paid to the ILIT will not be included in the Insured’s gross estate for estate tax purposes.

Don’t allow ILIT to pay Insured’s debts or taxes—use loans or asset purchases instead.

Consider holding proceeds in further trust to exclude them from beneficiaries’ gross estates as well.
When possible, the ILIT trustee should apply for and purchase the life insurance policy

- Grantor/Insured contributes cash to the ILIT
- Trustee uses those funds to pay the insurance premiums
- If the Insured never owned the policy (and never had incidents of ownership), IRC §§ 2042 and 2035 do not apply

Generation-Skipping Transfer Tax

Consider the GST consequences of the ILIT:

- Did the transferor allocate GST exemption to his transfers to the ILIT?
- If not, GST exemption may be allocated automatically at the transferor’s death
- If the transfer did not allocate GST exemption to the ILIT and the exemption is consumed by other transfers, the ILIT may be liable for payment of GST tax
Distribution
Provisions

Same considerations as any other irrevocable trust—purposes and timing of distributions

Also consider a contingent QTIP trust, if a married grantor is transferring an existing policy to the ILIT

Hold the proceeds in a non-QTIP trust for the surviving spouse’s lifetime, to avoid estate tax at spouse’s death

Administering Irrevocable Life Insurance Trusts

Paying Premiums

Receiving Gifts

Trustee Duties
**Trustee Duties**

- Fiduciary duties
- Investment of ILIT property
- Recordkeeping
- Fiduciary income tax returns
- ORS Chapter 130 requirements

**Receiving Gifts**

The Insured (or other transferors) may make additional gifts to the ILIT after the initial transfer of an insurance policy and/or cash.

If Crummey powers apply, the trustee must promptly notify the beneficiaries of their withdrawal rights.

If a beneficiary exercises her Crummey power, the trustee must distribute trust property to that beneficiary to satisfy the withdrawal right.
Paying Insurance Premiums

Assuming the ILIT has sufficient funds, the trustee should pay the life insurance premiums from the trust property.

Some grantors pay premiums directly to the insurance company:
- those payments are gifts to the ILIT that owns the policy
- if applicable, the trustee should issue Crummey notices to the beneficiaries each time the premiums are paid, even if not paid via the ILIT

Questions?

Melissa May
Duffy Kekel LLP
mmay@duffykekel.com
Chapter 7

Of Minds and Means: Capacity and Undue Influence

Stephen Owen
Attorney at Law
Portland, Oregon

Contents

I. Capacity Matters ............................................................... 7–1
   A. Introduction ......................................................... 7–1
   B. Recognizing Diminished Capacity .......................... 7–1
   C. Assessment of Capacity .......................................... 7–2
   D. Working with Clients with Potential Diminished Capacity .... 7–3
   E. Documentation Regarding Capacity Issues ............. 7–4
   F. Legal Standards of Capacity ...................................... 7–4

II. Undue Influence ............................................................. 7–8
   A. Introduction ......................................................... 7–8
   B. Defining Undue Influence Under Oregon Law .......... 7–8
   C. Evidence of the Use of Undue Influence ................. 7–12
   D. The Existence of a Confidential or Fiduciary Relationship. 7–13
   E. Suspicious Circumstances ....................................... 7–15
   F. Conclusion .............................................................. 7–17

“A Client’s Capacity Is Defined in Many Ways” by Darin Dooley ........ 7–19
I. CAPACITY MATTERS

A. Introduction

Whenever an attorney comes in contact with a person in regard to legal representation a determination of capacity is being made. This is true whether it is a prospective client or a long term one. Most times this determination follows the first rule of law in this area. That is to say a person is presumed to possess legal capacity unless it is shown that the person’s capacity is compromised. Van v. Van, 14 Or App 575, 578, (1973). Because so much of what an attorney reviews in both estate planning touches on legal capacity matters, counsel should be able to recognize signs of diminished capacity and how to proceed when such issues arise. Knowing how to proceed requires the ability to recognize and interpret indicia of diminished capacity and evaluate such in light of the elements of various forms of legal capacity. The attorney’s response is further enhanced by a basis of knowledge of the various definitions and determinations of a person’s capacity under statutory law and for various legal transactions.

B. Recognizing Diminished Capacity

Interactions with your client that raise concerns about capacity generally seem self-evident under an ‘I know it when I see it’ test. However, a practitioner in this area should key into specific areas of cognitive status and resulting conduct in order to address specific determinations of levels of capacity. A thorough examination of these issues is addressed in a joint publication by the American Bar Association in conjunction with the American Psychological Association entitled “Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers.” This publication is available free of charge at the APA’s website (https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf) and includes helpful worksheets and other materials. While a comprehensive review of symptoms of diminished capacity is outside the scope of this presentation, certain areas of cognitive abilities should be reviewed in assessing capacity whenever such issues arise.

These areas include memory, communication, comprehension, orientation, and significant changes in the client’s abilities and functional capabilities. Changes in the cognitive abilities of a long-term client may be more evident, but even with a new client there should be an attempt to establish a baseline of your observations of the client’s capacity issues. It is also useful to keep in mind that a determination of capacity is based upon what a person can do, not what they should do. Focus on the decisional making ability and not the propriety of the decisions if they are based upon intact cognitive reasoning. Note also the ethical duty to maintain, to the extent possible, a normal attorney client relationship with a client with diminished capacity. RPC 1.14 (a).

Also recognize that many factors can affect how a person presents and whether concerns about capacity can be explained in other ways. A person’s physical abilities and educational or cultural backgrounds may affect how they express themselves and have little to do with their cognitive capacity. Temporary conditions can likewise affect how a person
presents at a given time and such conditions may pass or can be treated. Examples include emotional distress, fatigue or delirium.

C. Assessment of Capacity:

When working with a client, an attorney should take steps to assess the requisite capacity of potentially diminished capacity clients. This should start from the initial contact with the client. It is important to note who contacted the attorney to set up an appointment. If it was a third party that contacted you, why? What is the third party’s understanding of the potential client’s situation? Are there issues with being able to directly communicate with the potential client, and if so, what are they? Was there another prior estate planning attorney whose services are no longer being used, and if so why? These initial considerations will start the basis for an assessment of the client capacity.

In continuing to work with a client there will need to be additional observation and assessment in regard to the client’s capacity. This is not only necessary to advance the client’s goals, but also to assess the attorney’s potential ethical duties to the client. Oregon Rule of Professional Conduct 1.14 addresses an attorney’s duties and responsibilities in dealing with a diminished capacity client. ORPC 1.14 is taken directly from the ABA’s Model Rules. “In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.” Comment 6 to the ABA’s Model Rule 1.14.

This commentary appears to mirror one commentator’s approach in this area that is set forth in detail in the “Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers” referenced above. In this article by Peter Margulies, Margulies describes six factors (five of which Comment 6 to Rule 1.14 expressly refers to) to assess capacity regarding a client’s capacity to undertake an action. These factors are:

1. The person's ability to articulate their reasoning behind the decision;
2. The variability of the person's state of mind;
3. The person's ability to appreciate the consequences of the decision;
4. The substantive fairness of the action being considered;
5. Consistency of the act or transaction with the person's lifetime values;
6. The irreversibility of the decision.

In this approach, a person assesses capacity by observing the client’s decision-making process as it relates to the substance of the act to be taken. The first three factors are a functionality assessment regarding the cognitive ability of the person and the last three factors are considered more substantive as they are assessing the decision or action itself. This approach contrasts with the conventional objective tests of capacity that are unrelated to the specific action at hand. Once counsel has an understanding of the client’s cognitive
abilities, such should be documented and applied to the legal definition of the capacity necessary to carry out a specific action.

In the appropriate case, counsel may consider consulting with and referring a client to a medical professional in regard to further evaluate a client’s cognitive functioning. Recognize however that such an evaluation may not be assessing specific legal capacities and the fact that the referral was made can itself be an issue in estate planning matters as set forth below.

All of this is to say that counsel working with a diminished capacity client should be continually considering the client’s circumstances and decision-making process in order to assess capacity. Based on the interactions with the client an attorney should be able come to some form of their assessment of the cognitive abilities of their client and be able to document such. Such assessment is necessary to further the client’s goals and, in some instances, ethically protect the client interests.

D. Working with Clients with Potential Diminished Capacity:

When capacity becomes an issue with a client, counsel should consider the following when interacting with a client:

1. Meet privately with the person, possibly after an introduction by a family member or trusted friend if that person set up the initial meeting.
2. Create a relaxing and comfortable interview environment, converse about a topic that interests the client.
3. Conduct the interview at the person’s best time of day.
4. Encourage the client to ask questions and state concerns.
5. Reassure the person that one purpose of meetings with counsel is to become better acquainted.
6. Use indirect questions regarding any concerns involving diminished capacity. Asking questions such as the identity of the President of the United States can be intimidating and put an elderly person on the spot. Asking other equally topical questions in the course of seemingly casual conversation can be just as helpful without unsettling an already defensive or uncomfortable older person.
7. Document your interaction with the client. Take verbatim notes as much as possible regarding evidence of the requisite factors for the capacity to undertake an act. For instance, the reciting of names of heirs, descriptions of assets held, etc.
8. When preparing written materials for elderly persons, one should consider:
   a. Use short words, sentences, and paragraphs;
   b. Use active verbs; avoid passive voice;
   c. Avoid technical legal terms as much as possible; where unavoidable, define terms in non-technical language when they first appear;
   d. To the extent possible in documents, use the names of the parties, when appropriate do not use legal role names such as “trustee” or “settler” to identify parties;
   e. Avoid the use of double negatives.
f. Use various type sizes and spacing, paragraphs, numbering, and bold facing or underlining to break the letter or document into easily readable sections.

**E. Documentation Regarding Capacity Issues**

There are several different schools of thought on the extent and ways that a practitioner should document matters touching on cognitive capacity. However, at one level there is agreement; the attorney dealing with a client should document in file notes and memorandum their interaction with the client and the level of the client’s abilities in regard to the task at hand. Files should reflect the date and time of meetings and, if not meeting solely the client, who else was attending. Take notes, and whenever possible verbatim notes of what the client said. For example, the client’s ability to name each of her children and grandchildren without prompting is obviously important when documenting testamentary capacity.

If an estate plan significantly differs from a previous plan or disinherits a person who might be presumed to be a beneficiary, make sure to document the articulated reasons from the client. In this instance, some practitioners believe it is a good idea to have the client state their reasoning in their own words in a document that can be stored with the estate planning documents. Such a document can be a powerful tool in dispelling a challenge to an estate plan.

Many counsel familiar with challenging estate plans do not advocate video or tape recording the client for later use in the face of a challenge to the estate plan. The general nature of such taping and the awkwardness of such situations can generally be used to argue that a person was more impaired than they actually were. In addition, if taping is done in only certain cases, it leads to an argument that the attorney was significantly concerned about this specific client’s capacity.

There are also cognitive tests and outside professionals to consider. Most commentators do not advocate that attorneys administer cognitive tests to their clients. Practitioners in this area are not generally qualified to attempt to undertake administering even simplified cognitive tests to their clients. As noted above an attorney may also consider referring a client to a medical professional for an evaluation in cases where the issue of capacity is a concern. But recognize that the outcome of such evaluations may not reflect what the attorney and client believe was the status of the matter at the time. And again, a person latter challenging the plan will note that the drafting attorney was worried about capacity to the point of having the client evaluated. However, it may be that the evaluation would settle all doubts regarding capacity, but such evaluations are rarely clear cut in any resulting litigation process.

**F. Legal Standards of Capacity**

Legal capacity is the determination that an individual possesses a certain cognitive ability to complete a transaction. In estate planning these transactions include the creation
Chapter 7—Of Minds and Means: Capacity and Undue Influence

and execution of a will, trust instrument, power of attorney or advance health care directive. A person’s legal capacity to be able to legally take these actions depends on the nature of the act in question. Different acts require different thresholds of capacity, thus making a determination of capacity a sliding scale. Arguably testamentary capacity is at the lowest end of this scale and contractual capacity is at the top.

Note that case law and statutes in this area sometimes will use the words “capacity”, and “competency” either as interchangeable or as distinct concepts, or use one exclusively over the other. Some of this may just be the evolution of language over time in case law and statutes. However, a broad overview of how these terms are used suggest that competency is a yes/no status proposition and capacity is a sliding scale assessment of a party’s mental ability to execute an action. So, if a person lacked testamentary capacity, she would be incompetent to execute a will. (Another example of this distinction is the age of majority. While a minor may have high level of mental capacity, they are incompetent to enter into a contract simply due to their minority status.)

Whether a person has the capacity to perform a particular act is examined as of the time of the act. Even if several signs point to mental incapacity, it is possible for a person to have “lucid intervals” during which he or she has requisite capacity to enter into a contract or make a testamentary disposition of property. *Uribe v. Olson*, 42 Or App 647, 651, 601 P.2d 818 (1979); *Gentry v. Briggs*, 32 Or App 45, 49, 573 P2d 322, rev den’d 282 Or 189 (1978). However, clear and convincing proof is required to show that the legal act was performed during a lucid interval. *Gentry v. Briggs*, 32 Or App at 50.

1. Testamentary Capacity

In the estate planning context, the most significant measure of capacity is testamentary capacity, which controls the ability to execute a will or revocable trust. In regard to wills, the only capacity requirement under the Oregon statutes is that a person be “of sound mind” to be able to create a will. ORS 112.225. The legal concepts regarding what it means to be of “sound mind” all come from Oregon case law. As to trusts, a person must have “the capacity” to create a trust, ORS 130.158(1)(a), and to a revocable trust, this level of capacity is defined as the same as the capacity to make a will. ORS 130.500.

Testamentary Capacity is typically referred to as the lowest level of capacity to perform a legal act. This form of capacity is primarily referring to the execution of a will or trust. *ORS 112.225; ORS 130.155; ORS 130.500*. For a person to be considered as having sufficient mental capacity to make a valid testamentary transfer, the person must:

a. Be able to understand the nature of the act; [What does a will or trust do?]

b. Know the nature and extent of the person's property;

c. Know, without prompting, the claims of people who are or might be the natural objects of the person's bounty; and

d. Be aware of the scope and reach of the provisions of the document. [What does your will or trust do?]

Mental competency to make a will is determined at the precise moment that the will is executed. Gentry v. Briggs, 32 Or App 45, 49, 573 P2d 322, rev denied 282 Or 189 (1978); Ingraham v. Meindl, 216 Or 373, 376, 339 P2d 447 (1959); Whitteberry v. Whitteberry, 9 Or App 154, 158, 496 P2d 240 (1972). “Evidence of incapacitation prior or subsequent to the time of the will's execution is relevant but it lacks the probative value of evidence revealing his mental condition at the material time. Its value diminishes the more removed it is from the crucial date. Thus, the testimony of attesting witnesses and, next to them, of those present at the execution of the will is to be accorded 'great weight' in cases of this kind.” In the Matter of Johnson's Estate, 24 Or App. 897 (547 P.2d 658, Or. App., (1976)

2. Capacity regarding Contracts, Deeds, Lifetime Gifts, and Power of Attorney

The capacity to enter into or execute contracts, deeds, lifetime gifts, and a power of attorney is substantially similar. A person must possess greater competency to execute a deed than to execute a will. First Christian Church v. Mcreynolds, 194 Or. 68, 72, 241 P.2d 135 (1952). Conveying an inter vivos gift requires the same degree of capacity as making a contract. Kugel v. Pletz, 22 Or App 249, 251 (1975). A person can enter into a valid contract if the person's reasoning ability enables the person to understand the nature and effect of the act. Kruse v. Coos Head Timber Co., 248 Or 294, 306 (1967). Lack of capacity is not proved simply because a person is easily influenced and is a dependent person, or because the person states that he or she does not understand a contract. A person of below average intelligence can enter into a binding legal contract. The relevant question is whether the person is capable of understanding the act itself.

“The test of mental capacity to make a deed requires that a person shall have ability to understand the nature and effect of the act in which he is engaged and the business which he is transacting. * * * [A] grantor must be able to reason, to exercise judgment, to transact ordinary business and to compete with the other party to the transaction.”
First Christian Church v. Mcreynolds, 194 Or. 68, 72-3, 241 P.2d 135 (1952) (internal citations omitted).

3. Capacity of Persons Subject to Guardianship and Conservatorship:

ORS 125.005 defines "incapacitated" as:
"a condition in which a person's ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirement for the person's physical health or safety

'Meeting the essential requirement for physical health and safety' means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur"
ORS 125.005 defines "financially incapable" as:

"a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental deficiency, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance.

‘Manage financial resources,’ means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income."

Incapacitated persons who are unable to make decisions about their health and safety may require a court-appointed Guardian. An inability to manage financial resources may require the appointment of a Conservator. Due to the nature of the acts in question, arguable a higher level of incapacity must be shown in a guardianship matter as opposed to a conservatorship only. In the Matter of Schaefer, 183 Or. App. 513, 52 P.3d 1125 (2002) (guardianship proof). In re Brown, 260 Or App 275, 306, 317 P.3d 301 (2013); In the Matter of Grimmett, 193 Or. App. 427, 89 P.3d 1238(2004) (conservatorship proof). The definition of incapacity for guardianship requires the petitioner to prove three things: "(1) the person to be protected has severely impaired perception or communication skills; (2) the person cannot take care of his or her basic needs to such an extent as to be life or health-threatening; and (3) the impaired perception or communication skills cause the life-threatening disability. Thus, a person who is unable to care for herself because of physical deterioration cannot for that reason be subjected to a guardianship, nor can a person who has trouble processing information if she can still take care of herself. The key is the nexus between the inability to process and communicate information, on the one hand, and the inability to perform essential functions, on the other." In the Matter of Schaefer, 183 Or. App. 513, 517, (2002).

As in a guardianship proceeding, a petitioner in a conservatorship proceeding must show a causal connection between incapacity and a cognitive impairment (or to a status condition as listed in the statute. ORS 125.005(3)). "Accordingly, the statute requires the court to determine whether a person is ‘unable to manage [his] financial resources * * * effectively’ for reasons related to the person's legal capacity.” In re Brown, 260 Or App 275, 306, 317 P.3d 301 (2013).

Any transfer of property interest by a person who is subject to a conservatorship or guardianship is can be questioned due to the issue of capacity. However, the fact that a guardianship has been imposed upon a person does not presume to make them incompetent. ORS 125.300(2). In addition, a person subject to a protective proceeding, “if mentally competent” can make wills and change certain beneficiary designations. ORS 125.455(1). Even with such provisions in Oregon Law, it may be wise that any transaction with a person subject to a protective proceeding be handled with at least the knowledge, if not the active participation, of the appointed fiduciary. Seeking court authority on issues regarding major transactions should also be considered.
II. UNDUE INFLUENCE

A. Introduction:

Undue influence is one of the most commonly raised concepts in regard to challenges to an estate plan. At its most basic definition undue influence is a tool used by a person to wrongfully dictate actions that benefit themselves at the expense of another. Under Oregon Law the concept of acting wrongfully is the key to defining when undue influence has occurred. Because of this, the context surrounding a decision by a person to leave property to another determines whether undue influence has occurred. Due to an emphasis on “wrongful” conduct as generally determined by circumstances, the determination of whether undue influence was used to exploit someone presents many interesting challenges.

The backdrop to this discussion is the somewhat difficult to define equitable notion that the law will not allow improper means to control the disposition of property. This has lent itself to case law that is sometimes less than precise. One example of this are cases that define undue influence as a type of fraud, e.g. In re Reddaway's Estate, 214 Or. 410, 329 P.2d 886 (1958), and others that define fraud as a type of undue influence, e.g. In re Smith's Estate, 212 Or. 481, 320 P.2d 273 (1958). While many of these examples arise in this area of the law, a working understanding of the concept of undue influence can be divined from Oregon Law.

B. Defining Undue Influence under Oregon Law:

Present day analysis of undue influence in Oregon law begins with the case of In re Reddaway's Estate, 214 Or 410, 418, 329 P.2d 886 (1958). In Reddaway the Oregon Supreme Court defined the approach that the Oregon Courts would take in reviewing a matter alleging undue influence.

“In Reddaway, the Supreme Court noted that there are two distinct approaches to analyzing undue influence. In one approach, the basic question is whether the testator was induced to execute an instrument that, in reality, did not express the testator's wishes but the wishes of another. The other approach, and the one the court ultimately adopted, focuses not on the testator's freedom of will but on the nature of the influencer's conduct in persuading the testator to act as he does. Under that approach, undue influence denotes something wrong, according to the standards of morals which the law enforces in the relations of men, and therefore something legally wrong, something, in fact, illegal. Under this ‘moral standard’ approach, the consequences of upholding the influenced gift are important. It would be expected that there would be less concern with the influencer's motive in a contest between him and the state claiming by escheat than there would be in a contest between him and the donor's deserving spouse.”


Undue influence is not duress or lack of consent on the part of the donor. The court is not ultimately concerned about whether the donor wanted to transfer the property, the question is what actions did the donee take, or fail to take, in order to accomplish the transfer of property to the donee’s benefit. The focus in undue influence cases should be on "the unfairness of the advantage which is reaped as a result of wrongful conduct. **Equity acts because there is a want of conscience on the part of the donee, not want of consent on the part of the donor." *Penn v. Barrett*, 273 Or. 471, 475, 541 P.2d 1282 (1975).

These cases point out that undue influence is just a method or tool of a person to facilitate the wrongful transfer of property. The bad act is the wrongful transfer of property; the tool or method used to facilitate the transfer is the undue influence. The ultimate question is not whether undue influence occurred, it is whether a wrongful transfer of property occurred. At its core, the answer to this question will hinge upon a moral determination of the actions taken by a donee to cause a transfer of property to occur.

This moral determination also points out the importance of the relationship between the donor and donee involved in a transfer of property. It is the nature of this relationship that will be a major focus of whether the transfer between the parties was improper. This is especially true in regard to the ability to prove the existence of undue influence as a basis for the wrongful transfer of property. Most wrongful transfers are apparent. A robbery, extortion or theft are apparent when they occur or soon thereafter. Cases involving undue influence are rarely apparent while the wrongful conduct is occurring due to the nature of the relationship of the parties and the circumstances under which the wrongful transfers are discovered.

This also emphasizes one of the biggest problems associated with the investigation and prosecution of a legal case alleging undue influence as a tool for the wrongful transfer of property. The problem consists of the fact that, in every transfer

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1 For simplicity, as set forth herein, the term “donor” means any person who transfers property or a property right to another. This would include all transfers whether by a gift, contract, deed, and devise in a will or beneficial interest in a trust. On the other side, the term “donee” means any person receiving property or a property right, regardless of the type of transfer.
induced by undue influence, the transfer or creation of a right to property has already occurred and the actions necessary to facilitate the transfer were actually performed by the donor. That is to say, the deed was signed, the will was executed or the donor wrote the checks. Parties including adverse witnesses and certainly the donee and their attorney will steadfastly deny any wrongdoing on the simple fact that the donor “gave” the property away. Yet Oregon law focuses on the actions of the donee rather than the consent of the donor to determine whether a wrongful transfer has occurred.

The emphasis on the wrongful nature of the donee’s conduct is why this area of law is dominated by cases involving persons involved in a confidential or fiduciary relationship. The actions of a person who owes no duty to another party and gains an economic advantage over that other party in a typical transaction is not generally seen as performing a legal wrong in our society. However, when a person who stands in a position of trust to another benefits from that relationship, the law is more apt to presume an element of wrongfulness and will require the donee to establish the fairness of the transaction.

If the donee can establish the ultimate fairness of the transaction then there was no wrongful transfer. Of course, the donee will attempt to do this by continually trying to show evidence of the voluntary donative intent of the donor and the consent to the transfer to the donee.

Therefore, in the typical case alleging undue influence you will be faced with strongly contested and emotional arguments. There will be one party, the person claiming undue influence, taking the position that the mindset of the donor is not a factor in the case because the focus should be on the donee’s actions. However, the donee will argue that the mindset of the donor is the only thing that does matter because the donor knowingly and fairly transferred the property. These factors can make cases alleging undue influences difficult to resolve efficiently.

All of this leads to the conclusion that the definition of undue influence is a matter of interpretation of the circumstances in which the parties operated. Undue influence also has the added complication that to define it, the fact-finder must make a judgment of the wrongfulness of a party’s conduct. In Oregon, that fact-finder will usually be a judge. In some cases, this might be easy, in the bulk of the cases alleging undue influence it will be much harder.

The Oregon Court of Appeals has summarized the relevant law in this area as follows:

“Undue influence has been defined as unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare. When undue influence is exerted by one party to a contract on the other party and that influence induces assent, the contract is voidable by the victim of the influence. Moreover, when there is a confidential relationship between the parties, only slight evidence is necessary to
establish undue influence. Finally, when there is a confidential relationship coupled with suspicious circumstances, an inference of undue influence arises. That inference may be sufficient to establish undue influence.”


The element of dominance by the undue influencer over the donor is discussed with varying emphasis in different cases. Some cases refer to this dominance as a separate distinct element required to be proven by the person claiming undue influence. Sangster v. Dillard, 144 Or. App. 210, 216, 925 P.2d 929 (1996); In the Matter of The Estate of Sommers, 182 Or. App. 121, 126, 47 P.3d 911 (2002). Other cases cite this element as a factor in determining whether a confidential relationship existed between the parties. Kugel v. Pletz, 22 Or. App. 248, 252-3, 538 P.2d 962 (1975); Doneen v. Craven, 204 Or. 512, 522, 284 P.2d 758 (1955). Ramsey v. Taylor, 166 Or. App. 241, 262-3, 999 P.2d 1178 (2000). A thorough review of the case law in this area shows a consensus with the often-cited concept that a confidential or fiduciary relationship can rise to a level that results in a sense of trust and confidence by one party in the other and a resulting superiority by the other party. See e.g. Kugel v. Pletz, 22 Or. App. 248, 252-3, 538 P.2d 962 (1975) quoting Doneen v. Craven, Executor et al, 204 Or. 512, 522, 284 P.2d 758 (1955). Therefore, one alleging undue influence should attempt to prove “a confidential relationship existed between the testator and the beneficiary, such that the beneficiary held a position of dominance over the testator;” Harris v. Jourdan, 218 Or App. 470, 491, rev. den 344 Or 558 (2008).

Regardless of the semantics of this issue, a person trying to undo a transfer based upon undue influence will have to show some form of a relationship existing between the donor and donee. This relationship can be one of dominance or one of a fiduciary nature. The relationship must be one where the donor should have some expectation that the donee will not act against the donor’s welfare. If a confidential relationship between the parties exists, only minimal evidence is necessary to show undue influence. If there is a confidential relationship coupled with suspicious circumstances, an inference of undue influence arises. This inference alone is enough to establish a wrongful transfer induced by undue influence.

With this framework in mind, the investigation of a case involving allegations of undue influence will always involve inquiry into the nature of the relationship of the parties and the circumstances surrounding any transactions. This analysis will include determining the existence of a confidential or fiduciary relationship between the parties and the suspicious nature of any circumstances surrounding the transactions or transfers in question. Only by reviewing these factors can a determination of the wrongful use of undue influence be made.
C. Evidence of the Use of Undue Influence:

1. Direct Evidence:
   Direct evidence of undue influence is rare. *In re Estate of Urich*, 194 Or. 429, 445, 242 P.2d 204 (1952). The nature of the conduct generally involves isolation of the victim and secrecy on the part of the perpetuator. The caregiver that now owns the elderly person’s residence is not likely to jump up in the courtroom and confess that he acted wrongfully in convincing the elder person to give it to him.

   However, direct evidence does exist and it can be the most powerful evidence produced. Testimony from other family members, caregivers, friends or professionals can show the nature of the relationship between the parties and the involvement of the donee in the transfers or estate plan. Statements of the donor prior to the transfer showing a different donative intent can be used to show a change in the donor’s state of mind. Telephone records and care facility logs can show length and frequency of contacts between parties. Records from banks, investment companies, accountants and lawyers will often show the level of involvement of a party in the affairs of the victim. Medical records can show the donor’s dependence and susceptibility to influence. This direct evidence is the most difficult for the wrongful beneficiary to explain away.

   Due to the nature of cases involving undue influence, the search for direct evidence can be difficult. The bulk of the cases alleging undue influence come to light after the victim is either deceased or incapacitated to the point where they cannot effectively advocate for themselves. The fruits of undue influence are more often than not discovered long after the fact. For example, when the testamentary plan of a decedent was changed to leave everything to a neighbor or the conservator discovers previous transfers to one child to the exclusion of the other children of the protected person. The victim is or can be incapable of assisting anyone looking into the transfers and the donee is not going to be stepping forward to admit the wrongfulness of their conduct. In this context there typically is little in the way of direct evidence to show that the transfers were improper.

2. Presumptions and Inferences:
   This lack of direct evidence of undue influence is also the basis for long held precedents in Oregon law in regard to transfers of assets from donors to donees that occupy confidential or fiduciary relationships. The law imposes a duty upon such donees when certain factual circumstances are met, to rebut an inference of undue influence. This is because of the ability of one who stands in a position of trust to abuse such trust. Allegations of undue influence in cases involving persons in a confidential or fiduciary relationship set forth a common-sense rule of law. If a person allegedly acting on behalf of another ends up benefiting him or herself during the relationship, they must be able to show the absolute fairness of such transactions.

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“Ordinarily, the burden of proving undue influence rests upon the party alleging it. However, where a fiduciary relationship exists between donor and donee, there is a presumption of undue influence and the donee is required to produce evidence sufficient to establish that the gift was the free and voluntary act of the donor and that the transaction was fair and equitable. ** It is not the existence of the confidential relationship alone that constitutes undue influence, but it is the wrongful use thereof which invalidates the conveyance. ** A gift between persons occupying confidential relations toward each other is, if its validity is attacked, always jealously scrutinized by a court of equity, and unless found to have been made freely, voluntarily, and with a full understanding of the facts, will be invalidated. The existence of confidential or fiduciary relations imposes upon the recipient of a gift the onus of establishing its absolute fairness **. “

Evans et al. v. Anderson, 186 Or. 443, 471, 207 P.2d 165 (1949) (internal citations and quotation marks omitted)

This is not to say that undue influence can only occur in the context of a confidential or fiduciary relationship. As stated above, however, it is in such cases where the wrongfulness of the alleged conduct stands out. In addition, if a confidential or fiduciary relationship can be shown between the parties, a party alleging a wrongful transfer by means of undue influence receives the benefit of Oregon case law. This benefit consists of a placing a duty upon the alleged wrongdoer to rebut an inference or presumption of undue influence if certain conditions are shown.

D. The Existence of a Confidential or Fiduciary Relationship:

One early step in analyzing a potential case involving undue influence is to determine whether the parties occupied a confidential or fiduciary relationship. The relationship can be a classic fiduciary relationship such as trustee or attorney in fact, or it can be a confidential relationship that is a form of a fiduciary relationship. Some level of trust between the parties primarily defines a confidential relationship. “The Oregon cases have used the term ‘fiduciary relationship’ interchangeably with ‘confidential relation’ though technically they are different. No good reason appears why, in the present context, the same rule with respect to burden of proof should not apply to both.” Geiger v. Palmer, 249 Or. 123, 130, 437 P.2d 750, (1968).


Many persons accused of undue influence defend their actions by claiming that they were not a superior or dominant influence in the donor’s life. However, “[d]ominance does not necessarily require proof of an authoritative, controlling person
bullying or directing the actions of a subservient one. It may exist more subtly such as by suggestion or persuasion or by fostering a sense of need and dependence.” *Sangster v. Dillard*, 144 Or. App. 210, 216, 925 P.2d 929 (1996) (internal citations and quotations omitted).

“We have found dominance where the testatrix is isolated from the outside world and relies almost exclusively on the beneficiary to meet her daily needs. *Carlton v. Wolf*, 21 Or. App. 476, 477, 483, 535 P.2d 119 (1975) (beneficiary routinely bathed and helped into bed elderly testatrix, who lived alone, had broken hip and suffered from variety of health problems); see also *Wismer v. U.S. National Bank*, 112 Or. App. 650, 651 and n 2, 829 P.2d 1052 (1992) (beneficiary lived alone with testator, provided transportation and did chores, yard work and cooking); *In re Estate of Elise Rosenberg*, 196 Or. 219, 232, 246 P.2d 858 (1952) (beneficiary tended to all personal needs, took care of correspondence and was sole companion to ill, bedridden testatrix).” *Id.* at 216-17


The nature of the relationship will determine the existence of a confidential relationship. Family members, including spouses, typically share a confidential relationship, but the existence of the confidential relationship will not be presumed due solely to the family relationship. See *McKee v. Stoddard*, 98 Or. App. 514, 780 P.2d 736 (1989).


### E. Suspicious circumstances:

When there is a confidential relationship between the donor and the donee, and suspicious circumstances exist, there is a presumption of undue influence, and the donee must prove that the transaction was fair. *Penn v. Barrett*, 273 Or. 471, 541 P.2d 1282 (1975); *In re Reddaway’s Estate*, 214 Or. 410, 329 P.2d 886 (1958). The Oregon courts have relied upon this presumption or inference to require a donee in a confidential relationship to rebut such an inference when certain “suspicious circumstances” are shown.

Suspicious circumstances include:3 (1) participation by the donee in the procurement of the gift; (2) lack of independent and disinterested advice to the donor; (3) secrecy and haste in the transfer or gift; (4) change in the donor's attitude toward others; (5) change in the donor's plan of disposing of property; (6) an unjust and unnatural gift; and (7) the donor's susceptibility to influence. *In re Reddaway’s Estate*, 214 Or. 410, 329 P.2d 886 (1958). *Van Marter v. Van Marter*, 130 Or. App. 500, 504, 882 P.2d 134 (1994). Not all factors need to be present. *Id.*

1. **Participation in the Procurement of the Transfer**: This factor looks at the involvement of the donee in facilitating the actions necessary to effect the gift. Such circumstances include the donee typing up documents, finding and hiring professionals for the donor, driving the donor to institutions to transfer funds, and contacting institutions to inquire about steps necessary to transfer property. One question that can be raised here is whether the transaction would have occurred had it not been for the donee’s actions.

2. **Lack of Independent and Disinterested Advice**: This is one of the most significant factors on the list. The presence of an informed, independent and disinterested professional acting on behalf of a donor will go a long way to dispel any

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3 **A Note on Isolation**: Isolation of the donor is typically a factor found in cases involving undue influence and isolation touches upon all of the suspicious circumstances listed herein. This isolation can be a factor of the donor’s personal circumstances or brought upon the donor by actions of the donee. Either way a person with limited contacts with others is a persistent factor in where undue influence is alleged.
notion of undue influence. On the flip side, the lack of such advice will weigh heavily against a donee.

Typically the independent advice the courts are looking for will come from an attorney, accountant or other financial advisor. However, if the donee was the one that chose the professional, drove the donor to the appointment, and sat in on the appointment, there can be a finding of no independent advice on the part of the donor. See *Mckee v. Stoddard*, 98 Or. App. 514, 522, 780 P.2d 736 (1989). The courts have found suspicious circumstances where a testator is taken to a beneficiary's attorney rather than his or her own attorney to prepare a will. *Sangster v. Dillard*, 144 Or. App. 210, 219, 925 P.2d 929 (1996), *mod. on other grounds* 146 Or. App. 105, 931 P.2d 815 (1997). *But see Doneen v. Craven*, 204 Or. 512, 523, 284 P.2d 758 (1955) (no procurement merely by driving testator to attorney's office and looking on during execution of will, where beneficiary did not select attorney and testator received independent advice).

3. **Secrecy and Haste**: Secrecy will almost always be a factor in cases involving undue influence. It is not likely that heirs will just sit by if they are aware that all of mom’s assets are being gifted away or the will has been changed to disinherit someone. In addition, an element of haste is often used to deter reflection on the propriety of the gift or restrict the ability of the donor to seek independent advice. The donor can be told that something bad will happen if the changes or transfers do not occur quickly. The sense of urgency is fostered to help facilitate the transfer or gift.

4. **Unexplained Change in Attitude Toward Others**: Circumstances showing a drastic change in the attitude towards people who used to be a major part of the donor’s life raises suspicions. These people are typically other family members or friends, but can also include professionals such as attorneys or accountants. However, if evidence outside the control of the donee exists to explain the changes in attitude, this factor will be diminished. *Anderson v. Hagedorn*, 171 Or. App. 425, 15 P.3d 582 (2000). If the donee fostered the change in attitude, this factor will weigh against him or her.

5. **Unexplained Change in Testamentary Plan**: A change in a long held testamentary plan or actions that render the plan ineffectual will weigh against a donee. This holds true even if the estate plan leaving 100% of your estate to your only daughter isn’t changed, but the fact that the donee gifted away all of his assets prior to death made such a plan an empty gesture.

6. **Unnatural or Unjust Gift**: Our society has certain expectations of the propriety of who is entitled to receive gifts from another. Gifts outside these notions can raise suspicions. This factor is much more prevalent when a natural heir is excluded to the benefit of someone viewed as not a natural object of the donor’s affections or generosity. However, “[a] person may make a legally effective disposition of his estate which reasonable men would regard as unfair. He may favor his mistress over his wife, or he may disinherit a deserving son, and the law will not concern itself with his moral duty. But if he does make an unfair or unnatural disposition it is a circumstance to be weighed
in determining whether improper influence had been used. In re Reddaway's Estate, 214 Or. 410, 424, 329 P.2d 886 (1958) (internal citations omitted).

7. The Donor’s Susceptibility to Influence: A donor’s advanced age, declining physical and cognitive status, coupled with a dependence for care, weighs against a donee claiming a donor was acting freely and voluntarily. This is the only factor that looks at the donor’s mental state in determining whether undue influence was used by a donee. Another issue that may arise here is the use of emotion to influence the donor. A donee may attempt to use fear, guilt, anger, love, greed or prejudice to influence another’s actions. A donor’s background and circumstances may make such tactics more effective. A court will also consider a donor’s capacity under this factor. However, incapacity is not a necessary prerequisite to being susceptible to undue influence. See e.g. In re Howard, 304 Or. 193, 743 P.2d 719 (1987).

These seven factors set forth by the courts in Oregon are not an exclusive list. Any suspicious circumstance involving a gift or transfer between such parties should be scrutinized. No single factor listed is controlling under the case law. The importance of any single set of circumstances has to be reviewed on a case by case basis.

F. Conclusion:

Reviewing allegations of undue influence in Oregon is a matter of judging the conduct of a person who benefited from a relationship with another. The nature of that relationship and the circumstances surrounding any transaction will determine whether the transaction was wrongful. It is the wrongful actions of the person that benefited from the transaction that the courts are concerned with. If the parties enjoy a confidential or fiduciary relationship, the donee has a duty not to wrongfully benefit from the relationship. A person dealing with an elderly or incapacitated person can take certain simple steps to avoid suspicious circumstances surrounding a transfer or property. Failure to take such steps can lead to a finding of financial abuse on the part of the donee in securing such a transfer. A wrongful transfer can be voided and damages can be awarded on behalf of the donor. Such damages arise from the conduct of the donee in wrongfully acting against the interests of the donor.

The determination of the wrongfulness of the donee’s actions will hinge on some form of a moral judgment or an equitable notion of what is fair. Yet one person’s calculation of what is appropriate or fair, may not be the same as the next person’s. The courts are the final arbitrators of such disputes. However, due to the nature of such conflicts, these determinations can be extremely difficult and problematic to resolve. Any person dealing with financial transactions involving a vulnerable person in this day and age would be well served to address these issues in every case.
A Client’s Capacity Is Defined in Many Ways

By Darin Dooley, Attorney at Law

The question of a client’s capacity presents an ethical dilemma for attorneys and other practitioners. What compounds the attorney’s difficulty in assessing client capacity is the fear of malpractice exposure and professional discipline resulting from the outcome of a decision he or she facilitates. Even without a prior clinical assessment by a medical or mental health professional, family members often report during intakes that the client exhibits some level of cognitive impairment. Attorneys must balance the opposing bioethical principles of client autonomy and client welfare in capacity assessments.

Legal capacity

The legal requirements for capacity are primarily based on case law, but are also codified in statutes. Oregon statutes provide the following definitions:

**Incapacitated** is a condition in which a person’s ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person currently lacks the capacity to meet the essential requirements for the person’s physical health or safety. ORS 125.005(5)

**Financially incapable** is a condition in which a person is unable to manage his or her financial resources effectively for reasons that include mental illness, mental deficiency, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power, or disappearance. ORS 125.005(3).

However, under the advance-directive statutes:

**Incapable** means that in the opinion of the court in a proceeding to appoint or confirm authority of a health care representative, or in the opinion of the principal’s attending physician, a principal lacks the ability to make and communicate health-care decisions to health-care providers, including communication through persons familiar with the principal’s manner of communicating if those persons are available. ORS 127.505

**Capable** means not incapable. Id. Capable adults may make their own health care decisions. ORS 127.507. See also ORS 441.098.

Presumption of capacity

Oregon law presumes a person to be competent absent an adjudication of incompetence. A diagnosis of dementia by itself does not mean a person lacks the requisite capacity to act. Memory disorders, personality changes, and impaired reasoning may be symptoms of dementia, and may be severe enough to interfere with the client performing daily activities. Only when the effects of dementia or other conditions prevent the client from having the necessary understanding for a specific act has the presumption of capacity been overcome.

Capacity for specific acts

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The requirements for capacity to perform a specific act cover a spectrum, as discussed below.

**Testamentary capacity**

The standard for testamentary capacity in Oregon is well established. The person must (1) be able to understand that by signing the will he or she is disposing of his or her assets at death; (2) know the nature and extent of his or her property. An exact accounting is not required, however; (3) know, without prompting, who his or her heirs are; and (4) be cognizant of the scope and reach of the provisions of the document.

Even if a testator suffers from dementia or other conditions to the extent that testamentary capacity may be impaired, there can be lucid moments during which testamentary capacity exists. A will is valid if capacity exists at the time of the execution, notwithstanding the dementia of the testator before and after execution. The Oregon Court of Appeals has defined a “lucid interval” as “[a] temporary restoration of testamentary capacity.” However, clear and convincing proof is required to show that a legal act is performed during a lucid interval.

The capacity to create, amend, revoke, or add property to a revocable trust is the same as the capacity to make a will. ORS 130.500. This seems to be at odds with the common law requirement that the trustor must have the legal capacity to execute the conveyance(s) to fund the trust. Arguably, a revocable trust as a will substitute can be viewed as a testamentary document designed to avoid probate so that the testamentary capacity is the appropriate standard.

**Capacity to execute a durable power of attorney for finances**

A power of attorney for finances creates an agency relationship. This agency relationship presumes the principal has the ability to understand and approve the authority given to the agent to act on the principal's behalf. The capacity to execute a valid power of attorney requires that at the time of the execution of the document the grantor is able to comprehend the nature of the business in which he or she is engaged. The grantor needs to understand the purpose, intent, and effect of granting authority to the agent, but not necessarily be able to perform every act under the power granted to the agent.

**Capacity to execute deeds, contracts, and make lifetime gifts**

The same basic standard applies to executing a deed, entering into a contract, or making a lifetime gift. The capacity required in all three situations is greater than testamentary capacity. Presumably, this is because of the irrevocable nature of acts taken under deeds, contracts, and lifetime gifts. The capacity to make a deed requires that the grantor have the ability to understand the nature and effect of the act in which he or she is engaged and the business that he or she is transacting. The grantor must be able to reason, exercise judgment, and compete with the other party to the transaction. Note that Oregon’s transfer-on-death deed is unique in relation to other statutory deeds. The capacity required to make or revoke a transfer-on-death deed is the same as that required to make a will. ORS 93.948 et seq. A person can enter into a contract if he or she has the ability to understand the nature and effect of the act. Even if a person is easily influenced, is dependent on others, states that he or she does not understand
the contract itself, or has below-average intelligence, the individual can enter into a legal contract. The test of contractual capacity is measured as of the time of execution of the contract. An inter vivos gift requires the same degree of capacity needed to enter into a contract.

**Capacity to make healthcare decisions**

A capable adult is authorized by statute to make healthcare decisions. ORS 127.507. See also ORS 441.098. There is a presumption that an adult has the requisite mental capacity to give informed consent even if a guardian has been appointed for the person. ORS 125.300.

The standard for mental capacity to consent to or refuse proposed medical treatment is the ability to understand the basic information necessary for informed consent and to understand the nature and consequences of authorizing treatment. The Oregon Supreme Court has found that a physician must take into account the mental state and capabilities of the patient when explaining a proposed treatment. The court held that the concept of informed consent presupposes that the patient is capable of understanding the risks of a proposed treatment and alternatives, and also of using that information in a rational decision-making process.

**Capacity to retain counsel**

The capacity to retain counsel is analogous to the capacity to contract. In general, attorneys owe a duty of competent and diligent representation to their clients. ORPC 1.1, 1.3, and 1.6. When the client’s capacity is diminished, for whatever reason, the attorney should attempt to maintain a normal attorney-client relationship, as far as reasonably possible. ORPC 1.14. A respondent in a protective proceeding has the right to contact and retain legal counsel. ORS 125.300(3) and ORS 125.080(3).

**Capacity in guardianship/conservatorship protective proceedings**

When working with a client with diminished capacity who is under either a guardianship or a conservatorship, the attorney needs to be very familiar with the statutes that define the term “incapacitated person” and the case law that interprets these statutes. Clear and convincing evidence is required to show the respondent is incapacitated, and the appointment of a guardian is necessary to provide continuing care and supervision of the incapacitated person. ORS 125.305(1).

There is no requirement that a person lack legal mental capacity before being subject to the appointment of a conservator. ORS 125.005(3). A conservator may be appointed if it is shown by clear and convincing evidence that the respondent is financially incapable and has money and property that require management or protection. ORS 125.400.

**Documenting capacity**

In *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, the American Bar Association warns attorneys against administering clinical assessment tools such as the Mini-Mental Status Exam unless trained to do so. The handbook also cautions against video recording a client who is executing a legal transaction. The video may exaggerate cognitive impairment to a viewer or finder of fact. Unless the attorney video records all clients, opposing
counsel may argue that the recording proves incapacity. Instead, the handbook emphasizes the following criteria for attorney capacity assessments, creating a “sliding scale” of capacity:

1. Ability to articulate reasoning behind the decision. Can your client articulate the reasons for his decision and are the reasons consistent with your client’s goals and objectives?
2. The extent to which the client’s cognition fluctuates from time to time.
3. The client’s ability to understand the consequences of a decision.
4. The substantive fairness of the decision. We cannot “look the other way” if a client is being taken advantage of in a blatantly unfair transaction. Judging fairness risks substituting the attorney’s own values and beliefs over the client’s, so self awareness and caution must be used.
5. The consistency of a decision with a client’s known long-term commitments and values. Although we all can change our values over time, a decision consistent with our client’s long-term perspective may be easier to support.
6. Irreversibility of the decision. “The law historically has attached importance to protecting parties from irreversible events. Doing something that cannot be adjusted later calls for caution on the part of the attorney.”

The first three factors are “functional” in that they reflect the cognitive functioning of the individual. These may be supported by observing signs of diminished capacity. The latter three are “substantive” in that they look at the content and nature of a decision itself. Under this approach, the latter three factors may be thought of as a sliding scale of capacity.

The greater the concerns under these three substantive variables, the greater the level of function needed under the first three variables. That is, the higher the risk, measured by the client’s values and the finality and fairness of an act, the more the attorney needs to ensure decisional capacity. While doctors and other health care professionals can offer capacity evaluations based on their training and experience, ultimately the determination of capacity is in the hands of attorneys and the courts.

Darin Dooley is a Portland attorney with the Law Offices of Nay & Friedenberg. Darin practices in the areas of estate planning, elder law, Medicaid, special needs planning, probate, estate tax planning, and trust administration. He is a member of the Oregon State Bar Estate Planning and Administration and Elder Law sections, the Multnomah Bar Association, and the Elder Law Section Executive Committee.

Footnotes
2. See Kastner v. Husband, 231 Or 133, 372 P2d 520 (1962), In re Phillips’ Will, 107 Or 612, 213 P 627 (1923). See also, In re Bond’s Estate, 172 Or. 509, 519 (1943)
3. *In re Provolt's Estate*, 175 Or. 128, 151 P.2d 736 (1944)
4. *Gentry v. Briggs*, 32 Or App 45 at 50, note 1
7. *Scott v. Hall*, 177 Or 403, 163 P2d 517 (1945)
11. *First Christian Church v. McReynolds* at 72
12. *Id.* at 73
14. *Id.*
19. *Id.* at 454
20. *Id.* at 1087.
Chapter 8

The New Oregon Advance Directive

Christopher Hamilton
McGinty Belcher & Hamilton Attorneys PC
Salem, Oregon

Contents

Presentation Slides: The New Oregon Advance Directive ........................................... 8–1
Form for Appointing Health Care Representative and Alternate Health Care Representative .... 8–9
Advance Directive (State of Oregon) ................................................................................. 8–13
Advance Directive Additional Instructions Sample Language ........................................ 8–19
Sample Letter to Agent and Alternative Agent Regarding Advance Directive ..................... 8–25
VA Advance Directive Durable Power of Attorney for Health Care and Living Will ............... 8–27
The New Oregon Advance Directive
Changes for 2019 and Beyond

Christopher D. Hamilton
McGinty Belcher & Hamilton, Attorneys, PC
694 High St. NE
Salem, OR 97301
(503) 371-9636
Christopher@McGinty-Belcher.com

Road Map

• Brief history of HB 4135
• The Advance Directive Adoption Committee
• Basic Requirements for an Advance Directive Form
• The new statutory Form for Appointing Health Care Representative and Alternate Health Care Representative
• The temporary form for an Advance Directive
Brief History of HB 4135, the 2018 Advance Directive Bill

• Product of work by a number of groups since 2015
• Compromise legislation, components added to address concerns from multiple interest
• Began the process of updating Oregon’s advance directive
  • Easier to understand
  • Easier to use

Brief History of HB 4135, the 2018 Advance Directive Bill

• Created Advance Directive Adoption Committee
• Created new statutory Form for Appointing Health Care Representative and Alternate Health Care Representative
• Created temporary form for Advance Directive
• Established requirements for future forms for an Advance Directive
Advance Directive Adoption Committee

• Adopt form of Advance Directive only, not the Form for Appointing Health Care Representative and Alternate Health Care Representative
• Review the Advance Directive form at least every four years
• Propose any necessary changes.
• 13 members, including attorneys recommended by the Bar who are expert in
  • Elder law and advising individuals on how to execute an advance directive
  • Estate planning and advising individuals on how to make end-of-life decisions; and
  • Health law.
• Proposed Changes must be ratified by the Legislative Assembly during an odd-numbered year regular session in the manner required for passage of bills and signed by the Governor.

Basic Requirements for Advance Directive

• Statement of purposes of the advance directive, including:
  • Appointing a health care representative to make health care decisions if incapable;
  • Default priority of health care representative appointment in ORS127.635 (2);
  • Values, beliefs, and preferences with respect to health care decisions;
  • Preferences with respect to placement in a care home or a mental health facility; and
  • Not a POLST, as defined in ORS 127.663.
Basic Requirements for Advance Directive

- A statement explaining advance directive must be:
  - Accepted by principal using signature or other applicable means; and
  - Either witnessed and signed by at least two adults or notarized.
- A statement explaining appointment of representative or alternate must be accepted by representative or alternate
- A statement explaining that the advance directive, once executed, supersedes any previously executed advance directive. (no longer optional)
- The name, date of birth, address and other contact information of the principal.
- The name, address and other contact information of representative and alternates.

Basic Requirements for Advance Directive

- Opportunity to state values, beliefs, and preferences with respect to health care decisions, by checklist, narrative, and/or other means, regarding:
  - When the principal wants all reasonably available health care necessary to preserve life and recover;
  - When the principal wants all reasonably available health care necessary to treat chronic conditions;
  - When the principal wants to specifically limit health care necessary to preserve life and recover, including artificially administered nutrition and hydration, cardiopulmonary resuscitation and transport to a hospital; and
  - When the principal desires comfort care instead of health care necessary to preserve life.
Basic Requirements for Advance Directive

• A section where the principal and the witnesses or notary may accept by signature or other means, including electronic or verbal means, the advance directive.

• A section where any health care representative or any alternate health care representative appointed by the principal may accept the advance directive by signature or other means, including electronic or verbal means.

Additional Requirements for Advance Directive

• In adopting the form of an advance directive under this section, the committee shall use plain language, such as “tube feeding” and “life support.” As used in this subsection:
  • “Life support” means life-sustaining procedures.
  • “Tube feeding” means artificially administered nutrition and hydration.

• In adopting the form of an advance directive under this section, the committee shall use the components of the form for appointing a health care representative or an alternate health care representative set forth in section 5 of this 2018 Act.

• The principal may attach supplementary material to an advance directive. In addition to the form of an advance directive adopted under this section, supplementary material attached to an advance directive under this subsection is a part of the advance directive.
Additional Requirements for Advance Directive

• The Oregon Health Authority shall post the form of an advance directive adopted under this section on the authority’s website.
• Currently valid Advance Directives will continue to be valid and Advance Directives inadvertently executed on old forms will have full effect.
• Current templates and forms used with clients to appoint health care representatives or create new Advance Directives should be replaced with the temporary form effective January 1, 2019

New Statutory Form for Appointing Health Care Representative and Alternate Health Care Representative

• Equivalent to the current form’s Parts A (Important Information), B (Appointing a Health Care Representative), D (Declaration of Witnesses), and E (Acceptance by Health Care Representative).
• Replaced “physician” with “health care provider,” defined as
  • “a person licensed, certified or otherwise authorized or permitted by the laws of this state to administer diagnosis, treatment or care of disease, injury and congenital or degenerative conditions, including the use, maintenance, withdrawal or withholding of life-sustaining procedures and the use, maintenance, withdrawal or withholding of artificially administered nutrition and hydration in the ordinary course of business or practice of a profession [or a health care facility].”
• Not subject to proposals by Advance Directive Adoption Committee
Temporary Form for the Advance Directive

• Includes the Form for Appointing Health Care Representative and Alternate Health Care Representative
• Adds the equivalent of Part C (Giving Health Care Instructions) of the current form

Questions?

Christopher D. Hamilton
McGinty Belcher & Hamilton, Attorneys, PC
694 High St. NE
Salem, OR 97301
(503) 371-9636
Christopher@McGinty-Belcher.com
FORM FOR APPOINTING HEALTH CARE REPRESENTATIVE
AND ALTERNATE HEALTH CARE REPRESENTATIVE

This form may be used in Oregon to choose a person to make health care decisions for you if you become too sick to speak for yourself. The person is called a health care representative.

• If you have completed a form appointing a health care representative in the past, this new form will replace any older form.

• You must sign this form for it to be effective. You must also have it witnessed by two witnesses or a notary. Your appointment of a health care representative is not effective until the health care representative accepts the appointment.

• If you become too sick to speak for yourself and do not have an effective health care representative appointment, a health care representative will be appointed for you in the order of priority set forth in ORS 127.635 (2).

1. ABOUT ME.
Name: ____________________________ Date of Birth: __________
Telephone numbers: (Home) __________ (Work) __________ (Cell) __________
Address: __________________________
E-mail: __________________________

2. MY HEALTH CARE REPRESENTATIVE.

I choose the following person as my health care representative to make health care decisions for me if I can’t speak for myself.

Name: ______________________ Relationship: ______________________
Telephone numbers: (Home) __________ (Work) __________ (Cell) __________
Address: __________________________
E-mail: __________________________

I choose the following people to be my alternate health care representatives if my first choice is not available to make health care decisions for me or if I cancel the first health care representative’s appointment.

First alternate health care representative:

Name: ______________________ Relationship: ______________________
Telephone numbers: (Home) __________ (Work) __________ (Cell) __________
Address: __________________________
E-mail: __________________________
Second alternate health care representative:

Name: ____________________________  Relationship: ____________________________
Telephone numbers: (Home) __________ (Work) __________ (Cell) __________
Address: ____________________________
E-mail: ____________________________

3. MY SIGNATURE.
My signature: ____________________________  Date: ____________________________

4. WITNESS.
COMPLETE EITHER A OR B WHEN YOU SIGN.

A. NOTARY:
State of ________________  )
    )ss
County of ________________  )

Signed or attested before me on ________________, 20___, by ____________________________

______________________________
Notary Public - State of Oregon

B. WITNESS DECLARATION:
The person completing this form is personally known to me or has provided proof of identity, has signed or acknowledged the person’s signature on the document in my presence and appears to be not under duress and to understand the purpose and effect of this form. In addition, I am not the person’s health care representative or alternate health care representative, and I am not the person’s attending health care provider.

Witness Name (print): ____________________________
Signature: ____________________________
Date: ____________________________

Witness Name (print): ____________________________
Signature: ____________________________
Date: ____________________________
5. **ACCEPTANCE BY MY HEALTH CARE REPRESENTATIVE.**

I accept this appointment and agree to serve as health care representative.

Health care representative:

Printed name: ________________________________
Signature or other verification of acceptance: __________________
Date: ________________________________

First alternate health care representative:

Printed name: ________________________________
Signature or other verification of acceptance: __________________
Date: ________________________________

Second alternate health care representative:

Printed name: ________________________________
Signature or other verification of acceptance: __________________
Date: ________________________________
ADVANCE DIRECTIVE
(STATE OF OREGON)

This form may be used in Oregon to choose a person to make health care decisions for you if you become too sick to speak for yourself. The person is called a health care representative. If you do not have an effective health care representative appointment and become too sick to speak for yourself, a health care representative will be appointed for you in the order of priority set forth in ORS 127.635 (2).

This form also allows you to express your values and beliefs with respect to health care decisions and your preferences for health care.

• If you have completed an advance directive in the past, this new advance directive will replace any older directive.

• You must sign this form for it to be effective. You must also have it witnessed by two witnesses or a notary. Your appointment of a health care representative is not effective until the health care representative accepts the appointment.

• If your advance directive includes directions regarding the withdrawal of life support or tube feeding, you may revoke your advance directive at any time and in any manner that expresses your desire to revoke it.

• In all other cases, you may revoke your advance directive at any time and in any manner as long as you are capable of making medical decisions.

1. ABOUT ME.
Name: ________________________ Date of Birth: ________________
Telephone numbers: (Home) __________ (Work) __________ (Cell) __________
Address: ________________________
E-mail: ________________________

2. MY HEALTH CARE REPRESENTATIVE.
I choose the following person as my health care representative to make health care decisions for me if I can’t speak for myself.

Name: ________________________ Relationship: ________________________
Telephone numbers: (Home) __________ (Work) __________ (Cell) __________
Address: ________________________
E-mail: ________________________

I choose the following people to be my alternate health care representatives if my first choice is not available to make health care decisions for me or if I cancel the first health care representative’s appointment.
First alternate health care representative:

Name: ______________________  Relationship: ______________________
 Telephone numbers: (Home) ______________ (Work) ___________ (Cell) __________
 Address: ____________________________
 E-mail: ______________________________

Second alternate health care representative:

Name: ______________________  Relationship: ______________________
 Telephone numbers: (Home) ______________ (Work) ___________ (Cell) __________
 Address: ____________________________
 E-mail: ______________________________

3. **INSTRUCTIONS TO MY HEALTH CARE REPRESENTATIVE.**

If you wish to give instructions to your health care representative about your health care decisions, initial one of the following three statements:

__ To the extent appropriate, my health care representative must follow my instructions.

__ My instructions are guidelines for my health care representative to consider when making decisions about my care.

__ Other instructions: ____________________________

4. **DIRECTIONS REGARDING MY END OF LIFE CARE.**

In filling out these directions, keep the following in mind:

- The term “as my health care provider recommends” means that you want your health care provider to use life support if your health care provider believes it could be helpful, and that you want your health care provider to discontinue life support if your health care provider believes it is not helping your health condition or symptoms.
- The term “life support” means any medical treatment that maintains life by sustaining, restoring or replacing a vital function.
- The term “tube feeding” means artificially administered food and water.
- If you refuse tube feeding, you should understand that malnutrition, dehydration and death will probably result.
- You will receive care for your comfort and cleanliness no matter what choices you make.
C. Statement Regarding End of Life Care.

You may initial the statement below if you agree with it. If you initial the statement you may, but you do not have to, list one or more conditions for which you do not want to receive life support.

___ I do not want my life to be prolonged by life support. I also do not want tube feeding as life support. I want my health care provider to allow me to die naturally if my health care provider and another knowledgeable health care provider confirm that I am in any of the medical conditions listed below.

D. Additional Directions Regarding End of Life Care.

Here are my desires about my health care if my health care provider and another knowledgeable health care provider confirm that I am in a medical condition described below:

a. Close to Death.

If I am close to death and life support would only postpone the moment of my death:

INITIAL ONE:

___ I want to receive tube feeding.
___ I want tube feeding only as my health care provider recommends.
___ I DO NOT WANT tube feeding.

INITIAL ONE:

___ I want any other life support that may apply.
___ I want life support only as my health care provider recommends.
___ I DO NOT WANT life support.

b. Permanently Unconscious.

If I am unconscious and it is very unlikely that I will ever become conscious again:

INITIAL ONE:

___ I want to receive tube feeding.
___ I want tube feeding only as my health care provider recommends.
___ I DO NOT WANT tube feeding.

INITIAL ONE:

___ I want any other life support that may apply.
___ I want life support only as my health care provider recommends.
___ I DO NOT WANT life support.
c. **Advanced Progressive Illness.**

If I have a progressive illness that will be fatal and is in an advanced stage, and I am consistently and permanently unable to communicate by any means, swallow food and water safely, care for myself and recognize my family and other people, and it is very unlikely that my condition will substantially improve:

INITIAL ONE:
___ I want to receive tube feeding
___ I want tube feeding only as my health care provider recommends.
___ I DO NOT WANT tube feeding.

INITIAL ONE:
___ I want any other life support that may apply.
___ I want life support only as my health care provider recommends.
___ I DO NOT WANT life support.

d. **Extraordinary Suffering.**

If life support would not help my medical condition and would make me suffer permanent and severe pain:

INITIAL ONE:
___ I want to receive tube feeding.
___ I want tube feeding only as my health care provider recommends.
___ I DO NOT WANT tube feeding.

INITIAL ONE:
___ I want any other life support that may apply.
___ I want life support only as my health care provider recommends.
___ I DO NOT WANT life support.

E. **Additional Instruction.**

You may attach to this document any writing or recording of your values and beliefs related to health care decisions. These attachments will serve as guidelines for health care providers. Attachments may include a description of what you would like to happen if you are close to death, if you are permanently unconscious, if you have an advanced progressive illness or if you are suffering permanent and severe pain.

5. **MY SIGNATURE.**

My signature: ____________________________ Date: ________________
6. **WITNESS.**

COMPLETE EITHER A OR B WHEN YOU SIGN.

**A. NOTARY:**

State of______________  
County of______________

Signed or attested before me on ________________, ____, by____________________

____________________

Notary Public - State of Oregon

**B. WITNESS DECLARATION:**

The person completing this form is personally known to me or has provided proof of identity, has signed or acknowledged the person’s signature on the document in my presence and appears to be not under duress and to understand the purpose and effect of this form. In addition, I am not the person’s health care representative or alternate health care representative, and I am not the person’s attending health care provider.

Witness Name (print):______________________________
Signature:________________________________________
Date:___________________________________________

Witness Name (print):______________________________
Signature:________________________________________
Date:___________________________________________
7. **ACCEPTANCE BY MY HEALTH CARE REPRESENTATIVE.**

I accept this appointment and agree to serve as health care representative.

Health care representative:
Printed name: ________________________________
Signature or other verification of acceptance: __________________________
Date: __________________________

First alternate health care representative:
Printed name: ________________________________
Signature or other verification of acceptance: __________________________
Date: __________________________

Second alternate health care representative:
Printed name: ________________________________
Signature or other verification of acceptance: __________________________
Date: __________________________
Initial next to the instructions you want followed:

__ HIRING AND DISCHARGE OF DOCTORS. I authorize my health care representative to hire and discharge doctors and other health care personnel on my behalf.

__ MEDICAL RECORDS. Effective immediately, my health care representative shall be considered my "personal representative" as that term is used in the federal Health Insurance Portability and Accountability Act ("HIPAA"). My health care representative may review my medical records and may authorize their release to those persons whom my health care representative designates. I authorize my physicians and other health care professionals to discuss my medical condition with my health care representative and those designated by my health care representative.

__ HOSPICE CARE. My health care representative may authorize and arrange for hospice care on my behalf.

__ PAIN CONTROL. If I am terminally ill or otherwise close to death, I desire to be kept pain-free, even if pain medication might make me less responsive or impair my respiration or other bodily functions.

__ END OF LIFE. I wish to die at home and not in a hospital or other care facility. If I am in the final stages of life, I wish to be transferred to my home even if there is a risk that the transfer itself may accelerate my time of death.

__ DEMENTIA AND QUALITY OF LIFE. If I have been diagnosed with advanced dementia requiring 24-hour care, I want no life-prolonging measures, including antibiotics.

__ SPOON FEEDING. The quality of my life is of supreme importance to me, even at the end. When the time comes, I do not want any extraordinary measures taken to extend my life. This includes any spoon feeding by staff if I am at a stage of dementia or failing health in which the offering of food by spoon to the mouth elicits an automatic response to take in the food. Should this be a conflict at the facility, I direct my health care representative to move me back home or to a homelike setting and have either family or a trusted friend be with me. I do not wish to be kept alive because I am having an automatic memory response to a utensil with food placed on my lips.
I am appointing a health care representative to make all medical and placement decisions for me and to protect my interests without the necessity of a court appointed guardian. My representative shall have all powers granted to a health care representative under Oregon Revised Statutes, Chapter 127, as amended, and, in addition, under all circumstances, shall have the same authority over my physical and mental health care as I would have if capable, regardless of whether such powers are inherently vested in law. My representative’s authority includes, but is not limited to: the right to receive and review medical records, to consent to disclosure of such records, to consent to or withhold medical treatment, to consent to or direct my admission to or retention in a health care facility for care or treatment, and to consent or withhold life support, consistent with the instructions in this Advance Directive.

I would prefer to stay in my home as long as possible. But I leave all long term care placement decisions, including whether or not I can remain in my home, to my health care representative. At any time that I am incapable of giving or withholding informed consent for medical care, including mental health and dementia care, my health care representative shall have the express authority to authorize or withhold any and all medical and psychiatric care, including psychoactive medications, and authorize my admission to, or retention in, a facility, hospital, or specialized dementia care unit for care or treatment.

If necessary, in order to obtain the opinion of a physician or other specialist regarding my physical or mental condition or to obtain medical records or other information, I waive any physician-patient privilege or other privilege which otherwise would protect me against the disclosure of confidential information and authorize the release of any requested medical information to my health care representative. It is my intent that this authorization be deemed to satisfy any HIPAA Privacy Regulations and I waive any irregularities as to form or content. I understand that I may revoke this authorization at any time.

I am not opposed to temporary life support measures, for a short period of time for diagnostic purposes, or where my chances of recovery are well identified, and based strictly on quality of life. I do not wish to be subjected to the indignities of deterioration, dependence, and hopeless pain. Therefore, if the situation should arise which has not been covered herein, in which there is no reasonable expectation of my recovery, I REQUEST that I be allowed to die and not be kept alive by artificial means or “heroic measures.”

I want sufficient pain medications, and anti-anxiety medications, if necessary, to ensure my comfort even if the administration of such medications may hasten the
moment of my death and I direct my health care representative to authorize and
monitor the administration of such medications.

Finally, I wish to be cremated, not buried and my remains returned to my
representative for final disposition. I do not want a funeral or other formal memorial
service held in my memory. I request instead that my family and close friends gather for
a meal and remind each other of great times we have had. I authorize my health care
representative to make and/or carry out any necessary funeral arrangements consistent
with these instructions. It is my intent that this authorization concerning disposition of
my remains act as and be accepted as the written authorization presently required by
ORS 97.130 (or its corresponding future provisions) or any other provision of Oregon
Law, authorizing me to name a person to have authority to dispose of my remains.
Sample Language Regarding Blood Transfusions
Jehovah’s Witnesses

1. I am one of Jehovah's Witnesses, and I direct that NO TRANSFUSIONS of whole blood, red cells, white cells, platelets, or plasma be given me under any circumstances, even if healthcare providers believe that such are necessary to preserve my life. I refuse to predonate and store my blood for later infusion.

2. Regarding minor fractions of blood: (initial those that apply)

   __ I REFUSE ALL
   __ I REFUSE ALL EXCEPT:____________________________________________________
   ______________________________________________________
   ______________________________________________________
   ______________________________________________________
   __ I may be willing to accept some minor blood fractions, but the details will have to be discussed with me if I am conscious or with my health-care agent in case of my incapacity.

3. Regarding medical procedures involving the use of my own blood, except diagnostic procedures, such as blood samples for testing: (initial those that apply)

   __ I REFUSE ALL
   __ I REFUSE ALL EXCEPT:____________________________________________________
   ______________________________________________________
   ______________________________________________________
   ______________________________________________________
   __ I may be willing to accept certain medical procedures involving my blood, but the details will have to be discussed with me if I am conscious or with my health-care agent in case of my incapacity.

4. I give no one (including my agent) any authority to disregard or override my instructions set forth herein. Family members, relatives, or friends may disagree with me, but any such disagreement does not diminish the strength or substance of my refusal of blood or other instructions.

My signature: _______________________________ Date:____________________
Sample Language Regarding Last Rites and Life Support
Catholic

Because of my Catholic belief in the dignity of the human person and my eternal destiny with God, I ask my family, physicians, lawyer, pastor, and friends to fully inform me of my condition and prognosis, if I should become irreversibly and terminally ill, so that I can prepare myself spiritually for death. I also ask that those caring for me take immediate steps to see that I am attended by a Catholic priest and receive the Sacraments and Anointing of the Sick and Viaticum.

I would not be opposed to temporary mechanical life support measures such as oxygen if my chances of recovery are fairly well defined. I believe nutrition and hydration are generally beneficial, whether being administered orally or with assistance. Therefore, they are not to be withheld or withdrawn from me unless there is clear evidence, in the judgment of my physicians and my representative, that they would cause me harm, be disproportionate, or be excessively burdensome. If my attending or treating physician and another consulting physician along with my representative have determined that I have a terminal illness, or am at the end-stage of a condition or in a persistent vegetative state and there is no reasonable medical expectation of my recovery from such condition, then I request and direct: 1) that my pain and anxiety be alleviated; 2) that no excessively burdensome nor disproportionate means be used to prolong my life; and 3) that nothing should be done with the intent of causing my death. If I am at the end of a known terminal illness, I do not wish to be resuscitated if I am not breathing or if I have no pulse. If I have a heart attack or some sudden or traumatic incident, my health care representative has my permission to approve certain kinds of measures to save my life.
Sample Letter to Agent and Alternative Agent Regarding Advance Directive

[Date]

[Agent Name]  [Alternate Agent Name]
[Address]  [Address]
[City, State Zip]  [City, State Zip]

Re:  Advance Directive – [Name of Principal]

Dear [Agent First Name] and [Alternate Agent First Name]:

As part of [his/her] estate planning, [Name of Principal] signed an Oregon Advance Directive. The Advance Directive allows [First Name of Principal] to designate persons to act as [his/her] health care representatives. [He/She] has designated [First Name of Agent] as [his/her] primary health care representative and [First Name of Alternate Agent] as [his/her] alternate health care representative. This means that if [First Name of Principal] becomes incapacitated and is unable to communicate [his/her] wishes regarding medical treatment, you would have the authority to step in and make those decisions for [him/her]. If you were unable to perform that role, [First Name of Alternate Agent] would be called upon to act as [First Name of Principal]’s representative.

Your “substitute” decision making would be based upon the actions [First Name of Principal] would take if [he/she] was able to communicate as expressed to you and as [he/she] has expressed in [his/her] Advance Directive and additional instructions attached to the form. I would encourage you to have a discussion with [First Name of Principal] about [his/her] end of life wishes.

I have enclosed a full copy of [First Name of Principal]’s Advance Directive for your files and an original of page 6, which is the “Acceptance by My Health Care Representative.” If you are willing to accept the responsibility of acting as [First Name of Principal]’s health care representative (or alternate), please sign and date the acceptance form in your copy and in the original. A postage-paid envelope is enclosed for you to return the original signature page to my office.

Thank you for your attention to this matter.

Very truly yours,

[Firm]

[Attorney]

Enclosures
cc: Client
This advance directive form is an official document where you can write down your preferences for your health care. If someday you can't make health care decisions for yourself anymore, this advance directive can help guide the people who will make decisions for you.

You can use this form to:
- Name specific people to make health care decisions for you
- Describe your preferences for how you want to be treated
- Describe your preferences for medical care, mental health care, long-term care, or other types of health care

When you complete this form, it's important that you also talk to your doctor, family, and other loved ones who may help to decide about your care. You should explain what you meant when you filled out the form.

A health care professional can help you with this form and can answer any questions that you have. If you need more space for any part of the form, you may attach extra pages. Be sure to initial and date every page that you attach.

**PART I: PERSONAL INFORMATION**

<table>
<thead>
<tr>
<th>NAME (Last, First, Middle):</th>
<th>LAST FOUR DIGITS OF SSN:</th>
</tr>
</thead>
<tbody>
<tr>
<td>STREEET ADDRESS:</td>
<td></td>
</tr>
<tr>
<td>CITY, STATE, ZIP:</td>
<td></td>
</tr>
<tr>
<td>HOME PHONE WITH AREA CODE:</td>
<td>WORK PHONE WITH AREA CODE:</td>
</tr>
<tr>
<td>MOBILE PHONE WITH AREA CODE:</td>
<td></td>
</tr>
</tbody>
</table>

**Privacy Act Information and Paperwork Reduction Act Notice**

The information requested on this form is solicited under the authority of 38 C.F.R. §17.32. It is being collected to document your preferences for your health care in the event that you can’t speak for yourself anymore. The information you provide may be disclosed outside the VA as permitted by law. Possible disclosures include those that are described in the “routine uses” identified in the VA system of records 24VA10P2, Patient Medical Records-VA, published in the Federal Register in accordance with the Privacy Act of 1974. This is also available in the Compilation of Privacy Act Issuances. You may choose to fill out this form or not. But without this information, VA health care providers may not understand your preferences as well. If you don’t fill out this form, there won’t be any effect on the benefits you are entitled to receive. The Paperwork Reduction Act of 1995 requires us to let you know that this information collection follows the clearance requirements of section 3507 of this Act. We estimate that it will take you about 30 minutes to fill out this form, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information you write down. A Federal agency may not conduct or sponsor, and a person is not required to respond to a collection of information, unless it displays a current valid OMB control number. The OMB Control No. for this information collection is 2900-0556.
PART II: DURABLE POWER OF ATTORNEY FOR HEALTH CARE

This section of the advance directive form is called a Durable Power of Attorney for Health Care. It lets you appoint a specific person to make health care decisions for you in case you can’t make decisions for yourself anymore. This person will be called your Health Care Agent.

Your Health Care Agent should be someone:
- You trust
- Who knows you well
- Who is familiar with your values and beliefs

If you get too sick to make decisions for yourself, your Health Care Agent will have the authority to make all health care decisions for you. This includes decisions to admit and discharge you from any hospital or other health care institution. Your Health Care Agent can also decide to start or stop any type of health care treatment. He or she can access your personal health information, and medical records, including information about whether you have been tested for HIV or treated for AIDS, sickle cell anemia, substance abuse or alcoholism.

NOTE: If you wish to give general permission for VA to share your medical records or health information with others, you can complete VA Form 10-5345 (Request for and Authorization to Release Medical Records or Health Information). You can get VA Form 10-5345 from your VA health care provider or you can get it using a computer from this website http://www4.va.gov/vaforms/medical/pdf/vha-10-5345-fill.pdf.

A - HEALTH CARE AGENT

Place your initials in the box next to your choice. Choose only one.

Initials

I don't wish to appoint a Health Care Agent right now.
(Skip this section and go to Part III, Living Will.)

Initials

I appoint the person named below to make decisions about my health care if I can’t decide for myself anymore.

Name (Last, First, Middle):

Relationship to Me:

Street Address:

City, State, Zip:

Home Phone with Area Code:

Work Phone with Area Code:

Mobile Phone with Area Code:
# Chapter 8—The New Oregon Advance Directive

## VA ADVANCE DIRECTIVE: DURABLE POWER OF ATTORNEY FOR HEALTH CARE AND LIVING WILL

<table>
<thead>
<tr>
<th>NAME (Last, First, Middle)</th>
<th>LAST FOUR DIGITS OF SSN:</th>
</tr>
</thead>
</table>

### B - ALTERNATE HEALTH CARE AGENT

Fill out this section if you want to appoint a second person to make health care decisions for you, in case the first person isn’t available.

<table>
<thead>
<tr>
<th>Initials</th>
<th>If the person named above can’t or doesn’t want to make decisions for me, I appoint the person named below to act as my Health Care Agent.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Name (Last, First, Middle):</th>
<th>Relationship to Me:</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Street Address:</th>
<th>City, State, Zip:</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Home Phone with Area Code:</th>
<th>Work Phone with Area Code:</th>
<th>Mobile Phone with Area Code:</th>
</tr>
</thead>
</table>

### PART III: LIVING WILL

This section of the advance directive form is called a Living Will. This section of it lets you write down how you want to be treated in case you aren’t able to decide for yourself anymore. Its purpose is to help others decide about your care.

### A - SPECIFIC PREFERENCES ABOUT LIFE-SUSTAINING TREATMENTS

In this section, you can indicate your preferences for life-sustaining treatments in certain situations. Some examples of life-sustaining treatments are:

- CPR (cardiopulmonary resuscitation)
- a breathing machine (mechanical ventilation)
- kidney dialysis
- a feeding tube (artificial nutrition and hydration)

Think about each situation described on the left and ask yourself, “In that situation, would I want to have life-sustaining treatments?” Place your initials in the box that best describes your treatment preference. **You may complete some, all, or none of this section. Choose only one box for each statement.**

<table>
<thead>
<tr>
<th>Yes.</th>
<th>I would want life-sustaining treatments.</th>
<th>I’m not sure. It would depend on the circumstances.</th>
<th>No.</th>
<th>I would not want life-sustaining treatments.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>If I am unconscious, in a coma, or in a vegetative state and there is little or no chance of recovery.</th>
<th>Initials</th>
<th>Initials</th>
<th>Initials</th>
</tr>
</thead>
<tbody>
<tr>
<td>If I have permanent, severe brain damage that makes me unable to recognize my family or friends (for example, severe dementia).</td>
<td>Initials</td>
<td>Initials</td>
<td>Initials</td>
</tr>
</tbody>
</table>
### VA ADVANCE DIRECTIVE: DURABLE POWER OF ATTORNEY FOR HEALTH CARE AND LIVING WILL

<table>
<thead>
<tr>
<th>NAME (Last, First, Middle)</th>
<th>LAST FOUR DIGITS OF SSN:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes. I would want life-sustaining treatments.</td>
</tr>
</tbody>
</table>

If I have a permanent condition where other people must help me with my daily needs (for example, eating, bathing, toileting).

<table>
<thead>
<tr>
<th>Initials</th>
<th>Initials</th>
<th>Initials</th>
</tr>
</thead>
</table>

If I need to use a breathing machine and be in bed for the rest of my life.

<table>
<thead>
<tr>
<th>Initials</th>
<th>Initials</th>
<th>Initials</th>
</tr>
</thead>
</table>

If I have pain or other severe symptoms that cause suffering and can't be relieved.

<table>
<thead>
<tr>
<th>Initials</th>
<th>Initials</th>
<th>Initials</th>
</tr>
</thead>
</table>

If I have a condition that will make me die very soon, even with life-sustaining treatments.

<table>
<thead>
<tr>
<th>Initials</th>
<th>Initials</th>
<th>Initials</th>
</tr>
</thead>
</table>

Other:

<table>
<thead>
<tr>
<th>Initials</th>
<th>Initials</th>
<th>Initials</th>
</tr>
</thead>
</table>

### B - MENTAL HEALTH PREFERENCES

This section is optional. You may skip this section if you do not have a serious mental health problem or if you do not want to write down your preferences for mental health care. If you have a serious mental health condition, you might want to write down medications that have worked for you in the past and that you would want again, or you might want to write down the mental health facilities or hospitals that you like and those that you don’t like. If you need more space, you may attach extra pages and use this space to refer to attached pages. Be sure to initial and date every page that you attach.
**VA ADVANCE DIRECTIVE: DURABLE POWER OF ATTORNEY FOR HEALTH CARE AND LIVING WILL**

<table>
<thead>
<tr>
<th>NAME (Last, First, Middle)</th>
<th>LAST FOUR DIGITS OF SSN:</th>
</tr>
</thead>
</table>

**C - ADDITIONAL PREFERENCES**

This section is optional. In this space, you can write other important preferences for your health care that aren't described somewhere else in this document. For example, these might be social, cultural, or faith-based preferences for care, or preferences about treatments such as feeding tubes, blood transfusions, or pain medications. If you need more space, you may attach extra pages and use this space to refer to attached pages. Be sure to initial and date every page that you attach.

**D - HOW STRICTLY YOU WANT YOUR PREFERENCES FOLLOWED**

Place your initials in the box next to the statement that reflects how strictly you want others to follow your preferences. Choose only one.

<table>
<thead>
<tr>
<th>Initials</th>
<th>Statement</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>I want my preferences, as expressed in this Living Will, to serve as a <strong>general guide</strong>. I understand that in some situations, the person making decisions for me may decide something different from the preferences I express above, if they think it's in my best interests.</td>
</tr>
<tr>
<td></td>
<td>I want my preferences, as expressed in this Living Will, to be followed strictly, even if the person making decisions for me thinks that this isn't in my best interests.</td>
</tr>
</tbody>
</table>
## VA ADVANCE DIRECTIVE: DURABLE POWER OF ATTORNEY FOR HEALTH CARE AND LIVING WILL

<table>
<thead>
<tr>
<th>NAME (Last, First, Middle)</th>
<th>LAST FOUR DIGITS OF SSN:</th>
</tr>
</thead>
</table>

### PART IV: SIGNATURES

#### A - YOUR SIGNATURE

*By my signature below, I certify that this form accurately describes my preferences.*

<table>
<thead>
<tr>
<th>SIGNATURE</th>
<th>DATE</th>
</tr>
</thead>
</table>

#### B - WITNESSES’ SIGNATURES

Two people must witness your signature. VA employees may be witnesses if they are members of:

- The Chaplain Service
- The Social Work Service
- Nonclinical employees (e.g., Medical Administration Service, Voluntary Service, or Environmental Management Service)

*Other employees of your VA facility may not sign as witnesses to your advance directive unless they’re in your family.*

**Witness #1**

I personally witnessed the signing of this advance directive. I am not appointed as Health Care Agent in this advance directive. I am not financially responsible for the care of the person making this advance directive. To the best of my knowledge, I am not named in the person’s will.

<table>
<thead>
<tr>
<th>SIGNATURE:</th>
<th>DATE:</th>
</tr>
</thead>
</table>

Name *(Printed or Typed):*

Street Address:

City, State, Zip:

**Witness #2**

I personally witnessed the signing of this advance directive. I am not appointed as Health Care Agent in this advance directive. I am not financially responsible for the care of the person making this advance directive. To the best of my knowledge, I am not named in the person’s will.

<table>
<thead>
<tr>
<th>SIGNATURE:</th>
<th>DATE:</th>
</tr>
</thead>
</table>

Name *(Printed or Typed):*

Street Address:

City, State, Zip:
### VA ADVANCE DIRECTIVE: DURABLE POWER OF ATTORNEY FOR HEALTH CARE AND LIVING WILL

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<tr>
<th>NAME (Last, First, Middle)</th>
<th>LAST FOUR DIGITS OF SSN:</th>
</tr>
</thead>
</table>

#### PART V: SIGNATURE AND SEAL OF NOTARY PUBLIC (Optional)

This VA Advance Directive form is valid in VA facilities without being notarized. However, you may need to have it notarized to be legally binding outside the VA health care setting. Space for a Notary's signature and seal is included below.

On this _____ day of ________________, in the year of ______, personally appeared before me _______________________________________________________, known by me to be the person who completed this document and acknowledged it as their free act and deed. IN WITNESS WHEREOF, I have set my hand and affixed my official seal in the County of __________________, State of ________________, on the date written above.

Notary Public ___________________________ Commission Expires ________________

[SEAL]
Chapter 9

Mandatory Abuse Reporting
for Oregon Attorneys

DANIEL ATKINSON
Oregon State Bar
Tigard, Oregon

Contents

Questions and Answers About Mandatory Abuse Reporting for Lawyers .......................... 9–1
  Question 1: What Is Mandatory Abuse Reporting? .......................................................... 9–1
  Question 2: Why Require Mandatory Reports? ............................................................... 9–1
  Question 3: What Are Lawyers Required to Do? .............................................................. 9–2
  Question 4: What Is “Reasonable Cause?” ................................................................. 9–3
  Question 5: What Is “Comes In Contact?” ................................................................. 9–4
  Question 7: How Is a Lawyer Expected to Identify Child Abuse? ............................... 9–7
  Question 8: Are There Any Exceptions to the Reporting Requirement? .................. 9–8
  Question 9: What If Someone Expresses the Intent to Commit an Act of Abuse? ... 9–11
  Question 11: What Type of Report Is Required and to Whom Must It Be Made? ...... 9–13
  Question 12: Are Elder Abuse Reports Confidential? ................................................ 9–14

Warning Signs and Definitions for Vulnerable Adults (Oregon DHS) .............................. 9–15

Excerpt from What You Can Do About Child Abuse (Oregon DHS) .............................. 9–19

Presentation Slides: Mandatory Abuse Reporting for Oregon Lawyers ......................... 9–33
QUESTIONS AND ANSWERS ABOUT
MANDATORY ABUSE REPORTING FOR LAWYERS

Oregon State Bar General Counsel’s Office

Question 1: What Is Mandatory Abuse Reporting?

Four Oregon statutory schemes require certain “public and private officials” present in
the state, including lawyers, to report the abuse of persons to public authorities under certain
circumstances. See ORS 124.060 (elder abuse); ORS 419B.010 (child abuse); ORS 430.765
(person with mental illness or developmental disability); ORS 441.640 (resident of long-term
care facility). Only the first two have educational requirements for lawyers. The latter two
function similarly to the first two, but practitioners should note that a lawyer’s duty to report
under ORS 441.640 is limited to a lawyer representing the resident or their guardian or family
member. See ORS 441.630(6)(i).

Question 2: Why Require Mandatory Reports?

Oregon is in the midst of a demographic shift. As baby boomers age, our population as a
whole is aging. Each year, over 50,000 Oregonians turn 65 years old. The median age of
Oregon’s population was 30.3 in 1980, but is forecast to rise to 39.7 by 2020. With advancing
age come declining health and greater reliance on family members, caregivers and social
services. And elder abuse is a significant problem. In 2014, DHS investigated and substantiated
over 2,500 instances of elder abuse in Oregon. Nationally, one in ten elders living at home is
subject to abuse, neglect, or exploitation. Abuse reporting helps the legislature assess the need
for increased social services as the population ages.

At the same time, child abuse remains alarmingly prevalent. The field has undergone a
sea change since child abuse was explicated as a medical diagnosis in the 1960s. Scientists now
know that child abuse exacts a toll over the rest of a child’s lifetime, causing many abused
children to adopt risky coping behaviors as adults and to develop related health problems. The
child abuse reporting statute expresses the state’s policy that all citizens have a responsibility to prevent such abuse and to protect children from harm. The statute encourages voluntary reporting in situations in which reporting is not required. Mandatory reporters are a critical link in the state’s system of child protection, accounting for about three-quarters of the child abuse reports received by Oregon authorities.

**Question 3: What Are Lawyers Required To Do?**

Lawyers are included in the definitions of “public or private officials” who have duties under Oregon law to report both child abuse and elder abuse. ORS 124.050(9); ORS 419B.005(5). Many others are also included. Id. Similar laws exist in every state, and a lawyer traveling to another state should consider whether that state’s law applies to them when present in the state. It appears that Oregon’s law applies to any licensed attorney present in the state, not just members of the Oregon State Bar.

Abuse reporting is a 24-hour-per-day, seven-days-per-week responsibility. It is not limited just to information acquired in your professional practice. Reporting is required whenever a mandatory reporter has “contact” with an abuser or a victim and has “reasonable cause” to believe that abuse has occurred. ORS 124.060; ORS 419B.010(1). Voluntary reports are encouraged where possible but are not required. ORS 419B.007; OAR 411-020-0020(2).

The duty to report child abuse is personal to the mandatory reporter. See ORS 419B.010(4). A mandatory reporter is required to report even if his or her employer has internal policies or procedures for addressing reports of child abuse. Failure to report as required by the statute is a Class A violation. ORS 124.990; ORS 419B.010(5). The penalty for a Class A violation is a maximum fine of $2,000. ORS 153.018(2)(a).

Oregon Rule of Professional Conduct (RPC) 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client. RPC 1.6(b)(5) permits, but does not require, a lawyer to disclose information relating to the representation of a client when required by law. A lawyer may report abuse as required by law without violating the lawyer’s ethical duty of confidentiality to a client.
Note that when one of the exceptions to reporting applies (Question 8, below), the abuse reporting laws do not require reporting, and therefore would not permit a lawyer to disclose information protected by RPC 1.6. In addition, RPC 1.6(b)(5) permits disclosure only to the extent required by law; it does not give a lawyer permission to reveal information that the law does not require to be reported.

**Question 4: What Is “Reasonable Cause?”**

There are no reported cases applying or interpreting this term specifically in connection with the abuse reporting statutes. The Department of Human Services interprets “reasonable cause” in related statutes as being equivalent to “reasonable suspicion.” A.F. v. Dep’t of Human Res. ex rel. Child Protective Servs. Div., 251 Or App 576, 590, 98 P3d 1127 (2012); Berger v. State Office for Services to Children and Families, 195 Or App 587, 590, 98 P3d 1127 (2004). In that context, “[r]easonable suspicion’ means a reasonable belief given all of the circumstances, based upon specific and describable facts, that the suspicious physical injury may be the result of abuse.” The agency rule further explains:

“The belief must be subjectively and objectively reasonable. In other words, the person subjectively believes that the injury may be the result of abuse, and the belief is objectively reasonable considering all of the circumstances. The circumstances that may give rise to a reasonable belief may include, but not be limited to, observations, interviews, experience, and training. The fact that there are possible non-abuse explanations for the injury does not negate reasonable suspicion."

OAR 413-015-0115(37). Similarly, “reasonable suspicion” for an officer to stop an individual in the criminal law context is defined as “a belief that is reasonable under the totality of the circumstances existing at the time and place the peace officer acts.” ORS 131.605(5). The standard is an “objective test of observable facts” and requires the officer “to point to specific articulable facts that give rise to a reasonable inference that a person has committed a crime.” State v. Ehly, 317 Or 66, 80, 854 P2d 421 (1993).
By contrast, the standard of “probable cause” for arrest in the criminal law context is a higher standard than that of “reasonable suspicion.” “Probable cause” is defined by ORS 131.005(11) as a “substantial objective basis for believing that more likely than not an offense has been committed and a person to be arrested has committed it.” In *State v. Childers*, 13 Or App 622, 511 P2d 447 (1973), the court held that a police officer did not have probable cause to make a warrantless search for marijuana since he was uncertain whether he had smelled it. The court cited the probable cause standard as the existence of circumstances that would lead a reasonably prudent person to believe that an event had occurred, and distinguished it from “mere suspicion or belief ... .” Id. at 629.

Interpreting “reasonable cause” in the context of obtaining a subpoena for bank records under ORS 192.565(6), the court in *State v. McKee*, 89 Or App 94, 99, 747 P3d 395 (1987), held that a showing of reasonable cause required a recital of known facts, not mere conclusory statements. In another case, a merchant was found to have reasonable cause to detain a suspected shoplifter when the merchant saw the person leaving the store with unpaid-for merchandise partially concealed in a pocket. *Delp v. Zapp’s Drug & Variety Stores*, 238 Or 538, 395 P2d 137 (1964).1

A potential “floor” for “reasonable cause” is found in ORS 124.075 and ORS 419B.025, which provide immunity to abuse reporters for criminal and civil liability. In order to qualify for immunity, the reporter must “participat[e] in good faith” in the reporting process, and have “reasonable grounds” for the making of the report. Outside the client representation context, attorneys are well advised to use this standard for determining when to make a report of potential abuse.

**Question 5: What Is “Comes In Contact?”**

“Comes in contact” is a more unfamiliar phrase that is also not defined in the statutes or case law. A dictionary definition of “contact” includes “a touching or meeting” and “association or relationship” (as in physical or mental or business or social meeting or communication).

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1The statute applied in *Delp*, which allowed merchants to detain suspected shoplifters, has since been amended to require “probable cause” as opposed to “reasonable cause.” See ORS 131.655(1).
Webster’s Third New International Dictionary 490 (unabridged ed 1993). That definition, and common usage, suggest that a lawyer is required to report elder abuse only when the lawyer has had some kind of physical or associational contact with a person who has abused an elder or with an elder who has been abused. This does not necessarily mean “in person” contact; telephone or even email or written contact would likely suffice.

The “comes in contact” requirement does not appear to modify the “reasonable cause” requirement. In other words, the statute does not appear to require reporting only when the lawyer learns of the abuse directly from the victim or the abuser. Reliable second- or third-hand information may provide reasonable cause to believe that abuse has occurred; reporting would then be required if the lawyer had come in contact with either the abuser or the victim. For example, if a neighbor tells a lawyer that she heard from another neighbor that an elder living down the street (with whom the lawyer has occasional contact) appears to have been abused, the lawyer may have reasonable cause to believe that abuse occurred if the lawyer believes the neighbors are reliable sources of information.

It is sometimes suggested, under a broad reading of the statute and its purpose, that “contact” includes knowledge of abuse even without any physical or associational contact with the victim or the abuser. The Attorney General does not interpret the statute so broadly, opining in another context that “physicians, psychologists and social workers who serve as members of the board of directors of a self-help child abuse prevention organization, but who do not provide direct services, are not required to report suspected child abuse when they acquire that information indirectly in their official capacities as board members.” Attorney General Letter of Advice to Sen Margie Hendriksen (OP-5543) (June 12, 1984). The basis for the opinion lies primarily in the fact that the list of mandatory reporters in Oregon consists of professionals and service providers who are most likely to come into direct contact with victims or perpetrators of child abuse. “We believe that if the drafters of [the statute] had intended to impose a mandatory reporting duty, violation of which is punishable by a substantial fine ... upon persons who merely have knowledge about child abuse, from whatever source, they would have said so clearly.” Id.
Question 6:  What Is Elder Abuse?

The elder abuse reporting statute identifies the types of conduct that constitute elder abuse:

- **Infliction of Pain or Physical Injury**: Pain or injury caused by other than accidental means or apparently inconsistent with the explanation given for it. According to regulation, this includes force-feeding and all physical punishments. OAR 411-020-0002(a)(B)(ii). Physical abuse is presumed to injure and inflict pain upon someone who is non-responsive. See OAR 411-020-0002(a)(C).

- **Abandonment or Neglect**: This includes desertion as well as withholding caretaking responsibilities.

- **Sex Abuse**: Commission of a crime enumerated in the statute, including both public and private indecency.

- **Verbal Abuse**: Threatening physical or emotional harm by words or gestures. Again, it does not matter whether the victim can comprehend.

- **Financial Exploitation**: Defined in ORS 124.050(4). Wrongful taking of an elder’s property; a threat of taking that causes alarm to an elder; stealing or transferring account funds without authorization (even if jointly held); failing to use the elder’s resources effectively for their support.

- **Involuntary Seclusion**: For convenience or discipline.

- **Wrongful Use of Physical or Chemical Restraints**: Authorized medical or legal uses are excluded.

ORS 124.050(1).

DHS has published a summary of the warning signs of abuse at http://www.oregon.gov/DHS/SENIORS-DISABILITIES/ADULT-ABUSE/Pages/signs.aspx. That said, lawyers, like many mandatory reporters, may not be experts in identifying abuse, and they are not expected to be. The law does not require lawyers to conduct investigations into suspected abuse, but lawyers should make reasonable inquiries where possible to follow up on initial observations or information that appears to involve elder abuse, to ensure that they have
“reasonable cause” to believe that abuse has occurred. The intent of the statute is to get at-risk seniors into a regulatory system where the circumstances will be evaluated and, as necessary, addressed by qualified professionals. Hence, the standard for reporting is only “reasonable cause,” not “certainty.”

**Question 7:** How Is A Lawyer Expected To Identify Child Abuse?

The child abuse reporting statute likewise identifies the types of conduct that constitute child abuse:

- **Criminal assault or any physical injury to a child caused by other than accidental means,** including any injury at variance with the explanation given for it.
- **Any observable and substantial mental injury caused by cruelty** to a child.
- **Rape or sexual abuse**—commission of a crime enumerated in the statute.
- **Sexual exploitation,** including any use of a child in a live or recorded erotic performance, or allowing a child to participate in an act of prostitution.
- **Negligent treatment or maltreatment** of a child.
- **Threatened harm** to a child.
- **Buying or selling** a child.
- **Permitting a child to enter or remain in a place where methamphetamines are being manufactured.**
- **Unlawful exposure to a controlled substance** that subjects a child to a substantial risk of harm.

ORS 419B.005(1)(a). “Abuse” does not include reasonable discipline unless the discipline results in one of the conditions listed above. ORS 419B.005(1)(b).²

Lawyers, like many mandatory reporters, may not be experts in identifying child abuse and are not expected to be. The intent of the statute is to get at-risk children into a system where the circumstances will be evaluated and, as necessary, addressed by qualified professionals. The standard for reporting is only “reasonable cause,” not “certainty.” Abuse that

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² For all intents and purposes, the statute is referring to spanking that does not leave a mark or injury of any kind. More extreme or “creative” punishments often constitute abuse.
leaves physical marks is relatively easy to recognize. Some forms of neglect are also visible, such as malnutrition or young children left unattended. Other kinds of child abuse, such as mental injury, may be more difficult to detect, particularly where contact with the child is limited. The mandatory reporting law does not require lawyers to conduct investigations into suspected child abuse, but lawyers should make reasonable inquiry where possible to follow up on initial observations or information that appears to involve child abuse to ensure that they have “reasonable cause” to believe that abuse has occurred.

The Oregon Department of Human Services publishes a booklet entitled What You Can Do About Child Abuse that lawyers may find helpful. It is available on-line at http://dhsforms.hr.state.or.us/Forms/Served/DE9061.pdf. DHS will also answer questions and consult about whether a situation should be reported.

**Question 8: Are There Any Exceptions To The Reporting Requirement?**

There are three exceptions to each statutory reporting requirement. Two of them are the same in child and elder abuse contexts. The third one is different. The first two:

- Lawyers are not required to report information communicated by a person if the communication is privileged. In addition to the evidence code, the child abuse reporting statute protects as well communications that are privileged under ORS 419B.234(6).
- A lawyer is also not required to report abuse based on information communicated to the lawyer “in the course of representing a client, if disclosure of the information would be detrimental to the client.” Note that this language captures part, but not all, of the information protected by RPC 1.6 on client confidences.

Next:

- No official is required to report child abuse if the information about the abuse is acquired “by reason of a report” or “by reason of a proceeding arising out of a report” already made under the abuse reporting statute, if the official “reasonably believes that the information is already known by a law enforcement agency or the Department of Human Services.” ORS 419B.010(2) (emphasis added).

And finally:
• “An elderly person who in good faith is voluntarily under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for this reason alone, not be considered subjected to abuse by reason of neglect .”
ORS 124.095 (emphasis added).
A. Privileged Communications.

The first exception relates to statutory privileges. Lawyers are not required to report information that is “privileged under ORS 40.225 to 40.295.” ORS 40.225 is OEC 503, the lawyer-client privilege. The reference, however, encompasses thirteen other privileges: psychotherapist-patient (OEC 504), physician-patient (OEC 504-1), nurse-patient (OEC 504-2), school employee-student (OEC 504-3), clinical social worker-client (OEC 504-4), husband-wife (OEC 505), clergy-penitent (OEC 506), counselor-client (OEC 507), stenographer-employer (508A), public officer (OEC 509), disabled person-sign language interpreter (OEC 509-1), non-English speaking person-interpreter (OEC 509-2), and informer (OEC 510).

B. Information Detrimental to Client if Disclosed.

The second exception to mandatory reporting applies only to lawyers, and tracks to some extent a lawyer’s ethical obligation to protect confidential client information. Lawyers are prohibited by RPC 1.6(a) from revealing “information relating to the representation of a client.” “Information relating to the representation of a client” is defined in RPC 1.0(f) as both “information protected by the lawyer-client privilege under applicable law” and “other

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3 A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. A “confidential communication” is one that is “not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” Confidential communications include those (1) between the client or the client’s representative and the client’s lawyer or a representative of the lawyer, (2) between the client’s lawyer and the lawyer’s representative, (3) by the client or the client’s lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of a client, or (5) between lawyers representing the client. OEC 503.

4 Also included is OEC 512, “privileged matter disclosed under compulsion or without opportunity to claim privilege.”
information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”

Clearly then, “information relating to the representation” is not limited to information that is privileged because communicated by the client. Information protected under RPC 1.6 includes information learned from witnesses and other third parties as well as information imparted by the client that is, for some reason, not covered by the privilege. All that is required under RPC 1.6 is that the information be gained during the course of the professional relationship between the lawyer and the client, and either that the client has requested it be “held inviolate” or that it would be embarrassing or detrimental to the client if revealed.

In creating a statutory exception for only some of the information that would be protected by RPC 1.6, the legislature limited the reporting exception to information that would be detrimental (not merely embarrassing) to the client if disclosed. This appears to be the legislature’s way of reconciling the sanctity of the lawyer-client relationship with the interest of protecting children. The legislature appears to have concluded that mere embarrassment to a client is not sufficient justification for the lawyer to ignore abuse.

C. Information Learned from an Official Report

The final exception to the child abuse reporting requirement applies to all mandatory reporters. Reporting is not required of information learned “by reason of a report” or “by reason of a proceeding arising out of a report” made under the mandatory child abuse reporting statute. The exception applies if the reporter “reasonably believes that the information is already known by a law enforcement agency or the Department of Human Services.” This exception appears to be the legislature’s attempt to clarify that mandatory reporters do not need to report when the only information they have comes from an existing report. The language is not crystal clear, however, as it suggests that reports may be made and

5 These are the definitions, respectively, of “confidences” and “secrets” from former DR 4-101.

6 This exception does not apply in the elder abuse context.
proceedings may arise therefrom, yet the information might not be known to DHS. Although it is difficult to imagine a situation where that could actually be the case, a lawyer who learns about child abuse (involving a person with whom the lawyer has had contact) from another reporter’s report would be prudent to confirm that DHS is aware of the situation. If DHS cannot confirm its existing knowledge of the abuse, then the lawyer should report.

The effect of these statutory exceptions to the duty to report is that most of the information a lawyer will be required to report will be that learned outside the lawyer’s “official capacity.” For instance, witnessing an act of child abuse in a public place will trigger the reporting obligation, despite the fact that the lawyer may not have a lot of information to report. Similarly, information that a non-client friend or neighbor is abusing a child or is a victim of abuse must be reported.

D. Treatment by Spiritual Means Through Prayer.7

This exception is not elaborated in case law or in regulation. Practitioners should note that it is very narrow. The treatment must be “voluntary”; beliefs of the caregiver are irrelevant to the determination of whether reporting is required. The treatment must be “through prayer.” It must be “in accordance with the tenets and practices of a recognized church or religious denomination” and conducted “by a duly accredited practitioner” of the church. Here as elsewhere, attorneys should err on the side of reporting and letting DHS evaluate the situation.

Question 9: What If Someone Expresses the Intent to Commit an Act of Abuse?

The statutes mandate reporting only when there is reasonable cause to believe that abuse has already occurred. It does not require advance reporting of possible future abuse, with limited exceptions. A threat of future abuse can be “verbal abuse” of an elder. “Verbal abuse” includes “threatening significant physical harm or threatening or causing significant emotional harm to an adult ... .” OAR 411-020-0002(1)(d)(A). Also, a threat of future abuse can

7 This exception does not apply in the child abuse context.
be a threat of harm to a child, “which means subjecting a child to a substantial risk of harm to the child’s health or welfare,” ORS 419B.005(1)(a)(G), and be reportable abuse for that reason.

If the situation does not fit within either of those narrow categories, reporting may still be possible. RPC 1.6(b)(1) permits a lawyer to reveal confidential information, to the extent the lawyer reasonably believes necessary, “to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime.” There is also no lawyer-client privilege under OEC 503(4)(a) “if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.” RPC 1.6(b)(2) permits a lawyer to reveal information otherwise protected to the extent the lawyer reasonably believes necessary “to prevent reasonably certain death or substantial bodily harm,” whether or not a crime is involved. When used in reference to degree or extent, “substantial” denotes “a material matter of clear and weighty importance.” RPC 1.0(o).

It is not clear that all incidents of abuse identified in the statute constitute crimes. A lawyer whose client has expressed a clear intention to commit abuse in the future should ascertain first whether the intended conduct is a crime, or if it puts a person at risk of reasonably certain death or substantial bodily harm. If so, the lawyer may disclose information necessary to prevent the intended conduct.

A voluntary report of suspected future abuse that is not required under ORS 124.060 is subject to the same statutory confidentiality and immunity as a mandatory report. See ORS 124.075; ORS 419B.025; ORS 419B.035.

**Question 10: Are Lawyers Obligated to Report Abuse Occurring Outside Of Oregon?**

While all states have adopted some form of elder abuse prevention laws, the laws are not uniform and lawyers are not mandatory reporters in all jurisdictions. Lawyers who are licensed in multiple jurisdictions should be attentive to the statutory requirements of each jurisdiction as well as to the interplay between those statutory requirements and the disciplinary rules to which the lawyer is subject.
The scope of Oregon’s mandatory abuse reporting laws is not clear with respect to incidents occurring outside of Oregon. Nothing in the statute can be read to limit reporting only to incidents occurring within the state. The language of the statute sweeps broadly to include all victims within the protected populations and their abusers. A lawyer who wishes to act most cautiously should make a report to DHS of the out-of-state incident and allow DHS to determine whether and how to deal with the information. Reporting in that circumstance does not violate any ethical responsibility of the lawyer or violate any right of the persons involved. It is consistent with the policy behind both statutes and regulations that encourage voluntary reporting. See, e.g., OAR 411-020-0020(2).

**Question 11: What Type Of Report Is Required And To Whom Must It Be Made?**

The abuse reporting statutes require that reports be made “immediately,” ORS 124.065(1); ORS 419B.010(1), and that the report must be “an oral report by telephone or otherwise.” ORS 124.065(1); ORS 419B.015. Reports must be made to the local office of the Department of Human Services or to a law enforcement agency within the county where the person making the report is located at the time of the contact. Both ORS 124.050(6) and ORS 419B.005(4) define a law enforcement agency to mean:

- A city or municipal police department;
- A county sheriff’s office;
- The Oregon State Police;
- A police department established by a university; or
- A county juvenile department.

The report must contain, if known:

- the names and addresses of the victim and the persons responsible for the victim’s care;
- the child’s age, in the case of a child victim;
- the nature and extent of the abuse, including any evidence of previous abuse;

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8 The statewide telephone number for reporting suspected abuse is 1-855-503-SAFE (7233).
• the explanation given for the abuse; and
• any other information that might be helpful in establishing the cause of the abuse and the identity of the abuser.

ORS 124.065(1); ORS 419B.015(1). DHS and law enforcement are required to notify each other when receiving a report of possible crime or of any child abuse. ORS 124.065(2); ORS 419B.015(1)(b), (2).

**Question 12: Are Elder Abuse Reports Confidential?**

Notwithstanding Oregon’s public records law, the reports and records compiled under the abuse reporting laws are confidential and are not accessible for public inspection. ORS 124.090(1); ORS 419B.035. DHS is required to make the reports available in some circumstances and permitted to do so in other circumstances. ORS 124.090(2); ORS 419B.035. Recipients of records under DHS’s mandatory or permissive disclosure authority are also required to maintain the confidentiality of the records. ORS 124.090(3); ORS 419B.____.

The confidentiality is not absolute, as a reporter may be required to testify in court proceedings relating to the report. In criminal proceedings, the alleged abuser’s constitutional right to confront witnesses would override the statutory confidentiality.

Confidentiality may be enhanced by reporting anonymously. While there is no requirement in the statutes that reporters identify themselves, it is also clear that the statutes do not contemplate anonymous reporting, and it is likely not preferred by DHS. Law enforcement and DHS will accept anonymous reports. Because of the liability that can result from not reporting, lawyers should weigh the desire for confidentiality with the possible need for proof that a report was in fact made as required.
Physical abuse

Physical abuse is any physical injury to an adult caused by other than accidental means that may result in bodily injury, physical pain, or impairment.

Warning signs of physical abuse:
- Cuts, lacerations, punctures, wounds
- Bruises, welts, discolorations, grip marks
- Any unexplained injury that doesn't fit with the given explanation of the injury
- Any injury incompatible with the person's history of unexplained injuries
- Any injury which has not been properly cared for (sometimes injuries are hidden on areas of the body normally covered by clothing)
- Dehydration and/or malnourishment without illness-related cause
- Unexplained loss of weight
- Burns, possibly caused by cigarettes, caustics, acids or friction from ropes or chains

Neglect

Neglect is the failure of an individual who is responsible to make a reasonable effort to protect an adult from abuse or to provide the care, supervision, or services necessary to maintain the physical health and emotional well-being of an adult that creates a risk of serious harm or results in physical harm, significant emotional harm or unreasonable discomfort, or serious loss of personal dignity.

NOTE: An elderly person who in good faith is voluntarily under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner shall, for this reason alone, not be considered subjected to abuse by reason of neglect as defined in Oregon Administrative Rule 411-020-0002.

Warning signs of neglect:
Chapter 9—Mandatory Abuse Reporting for Oregon Attorneys

State of Oregon: Adult Abuse - Warning Signs and Definitions for Vulnerable Adults

- Dirt, fecal/urine smell or other health and safety hazards in adult's living environment
- Leaving an adult in an unsafe or isolated place
- Rashes, sores, lice on the adult
- Malnourishment or dehydration and/or sudden weight loss
- Untreated medical condition
- Soiled clothing or bed linens
- Poor skin condition or poor skin hygiene

Self-neglect
Self-neglect is the inability of a person to understand the consequences of his or her actions or inaction when that inability leads to or may lead to harm or endangerment to self or others.

Abandonment
Abandonment is desertion or willfully leaving an adult alone by a caregiver that would place the adult in serious risk of harm. It is a specific form of neglect.

Warning signs of abandonment:
- The desertion at a public location
- A person's own report of being abandoned

Verbal or emotional abuse
Verbal or emotional abuse includes threatening significant physical harm or threatening or causing significant emotional harm to an adult through the use of: derogatory or inappropriate names, insults, verbal assaults, profanity, or ridicule; or harassment, coercion, threats, intimidation, humiliation, mental cruelty, or inappropriate sexual comments.

Warning signs of verbal or emotional abuse:
- Humiliating, insulting, or threatening language directed at the person
- Being emotionally upset or agitated
- Being extremely withdrawn and non-communicative or non-responsive
- Unusual behavior usually attributed to dementia (e.g., sucking, biting, rocking)
- An adult's report of being verbally or emotionally mistreated

Financial exploitation
- Wrongfully taking, by means including but not limited to deceit, trickery, subterfuge, coercion, harassment, duress, fraud, or undue influence, the assets, funds, property, or medications belonging to or intended for the use of an adult
- Alarming an adult by conveying a threat to wrongfully take or appropriate money or property of the adult if the adult would reasonably believe that the threat conveyed would be carried out
- Misappropriating or misusing any money from any account held jointly or singly by an adult
- Failing to use income or assets of an adult for the benefit, support, and maintenance of the adult.

Warning signs of financial exploitation:

- Unusual or inappropriate activity surrounding investment properties or in bank accounts, including the use of ATM cards, to make large or repeated withdrawals
- Signatures on checks, etc. that do not resemble the person's signature, or signatures when the person cannot write
- Power of attorney given, or recent changes in or creation of a will or trust, when the person is incapable of making such decisions
- Unpaid bills, overdue rent, utility shut-off notices
- Excessive spending by a caregiver on himself for new clothing, jewelry, automobiles
- Lack of spending on the care of the person, including personal grooming items
- Missing personal belongings, such as art, silverware or jewelry
- Recent sale of assets and properties

The Attorney General's office also has a consumer hotline for financial fraud issues.

Sexual abuse

- Sexual contact with a non-consenting adult or with an adult considered incapable of consenting to a sexual act. Failure to object does not mean an expression of consent.
- Sexual harassment or sexual exploitation of an adult, exposing an adult to, or making an adult the subject of sexually explicit material or language.
- Any sexual contact between an employee or volunteer of a facility or a caregiver and an adult served by the facility or caregiver, unless a pre-existing relationship existed. Sexual abuse does not include consensual sexual contact between an adult and a caregiver who is the spouse or domestic partner of the adult.

Warning signs of sexual abuse:

- Unexplained vaginal or anal bleeding
- Torn or bloody underwear
- Bruised breasts
- Venereal diseases or vaginal infections
- Sudden changes in the emotional or psychological state of the person
- Abrupt changes in responses or behavior around certain people
- The person discloses that they've been abused

Involuntary seclusion

Confinement, isolation or restriction of an adult to his or her room or a specific area; or placing restrictions on an adult's ability to associate, interact, or communicate with other individuals.

NOTE: In a facility, emergency or short-term, monitored separation from other residents may be permitted if used for a limited period of time when: used as part of the care plan after other interventions have been attempted; used as a de-escalating intervention until the facility can evaluate the behavior and develop care plan interventions to meet the resident's needs; or the resident needs to be secluded from certain areas of the facility when their presence in that specified area would pose a risk.
to health or safety.

**Warning signs of involuntary seclusion:**
- An adult's report of not being allowed to see or talk with people who they would reasonably see or talk to
- Kept away from where others can go
- Not allowed to use the telephone
- Not allowed to receive or send mail

**Wrongful restraint**

A wrongful use of a physical or chemical restraint includes situations where:
- A licensed health professional has not conducted a thorough assessment prior to implementing a licensed physician's prescription for restraint;
- Less restrictive alternatives have not been evaluated prior to the use of the restraint; or
- The restraint is used for convenience or discipline.

**NOTE:** Physical restraints may be permitted if used when a resident's actions present an imminent danger to self or others and only until immediate action is taken by medical, emergency, or police personnel.

**Warning signs of physical or chemical restraint:**
- Being sedated
- Going to bed at an unusually early time or uncharacteristically early bedtime
- Bruises or remarks on both wrists, both ankles, or a strip-like mark or bruise across the chest
- An adult's report of being tied up or sedated or not allowed to move
Physical abuse

What is physical abuse?

Oregon law defines physical abuse as any injury to a child that is not accidental.

Most parents do not intend to hurt their children, but abuse is defined by the effect on the child, not the motivation of the parents.

In Oregon in FFY 2016 1,217 children were found to have been physically abused.

What about bruises?

Bruises on bony surfaces such as knees, shins, foreheads or elbows are more likely to be accidental than those occurring on the cheeks, buttocks or stomach.

Most falls produce one bruise on a single surface, while abusive bruises frequently cover many areas of the body.

Any bruising seen on babies who are not yet mobile is suspicious.

What about head and facial injuries?

Injury to the skull and brain is the primary cause of child abuse deaths. Most serious internal head injuries during the first year of life are the result of physical abuse.

Trauma to the eyes is often the result of head injuries. This could be from a direct blow to the eyes or be the result of other actions, such as shaking a child, leading to retinal hemorrhage. Injury to both eyes is a possible indicator of abuse because accidental injuries usually occur on one side of the face.

The mouth is a common target for abuse. Injuries to this area include bruises, burns, split lips, broken teeth and even fractures of the jaw.
WHAT YOU CAN DO ABOUT CHILD ABUSE

What about broken bones and injured joints?
You should be suspicious of abuse when:

- Unsuspected fractures are “accidentally” discovered in the course of an examination.
- The injury is not explained by the history given.
- Spiral fractures, which indicate twisting, are found.
- Multiple fractures exist, especially when symmetrical.
- Multiple fractures exist in various stages of healing.
- Skeletal injuries are accompanied by injuries (for example, burns) to other parts of the body.

What about poisoning?
Some parents may punish children by forcing them to swallow toxic amounts of chemicals or food.

Some problems — any of which may be fatal — are:

- Water — Drinking huge quantities of water causes seizures, convulsions, confusion, lethargy and coma.
- Hot peppers — Cause damage to the mucous membranes of the mouth and stomach and injure the nervous system. Hot peppers can also become clogged in the child’s throat, leading to breathing problems.
- Ground pepper — Becomes clogged in the throat or lungs, causing breathing problems.
- Laxatives — Cause severe dehydration, fever and bloody stools.
- Household products — Various substances are abused, including toilet bowl cleaner, lighter fluid, detergents and oil.
Physical abuse — continued

What about burns and scalds?

Although accidental burns may happen in any household, too many or improperly handled accidents can be signs of neglect.

It is not uncommon for a child to brush against a cigarette that is being held in someone else’s hand. These burns are usually found on the child’s face, arms or trunk, depending on the height of the child and the height of the person holding the cigarette.

“Doughnut” burns on the child’s buttocks are an indication that the child’s buttocks may have been pressed against the bottom of the bath tub of hot liquid so that part of the buttocks were not burned.

“Stocking” burns are those that result from a foot or hand dunked into scalding liquid. The skin is usually burned evenly.

“Scattered” burns can be caused by pouring or throwing hot liquid. These burns show varying levels of injury.

What about internal injuries?

Only a small percentage of child abuse cases report injuries to internal organs. However, internal injuries are hard to identify in child abuse cases and may be one of the underlying causes of death or may make a child more susceptible to pneumonia or other infection that may cause death.

Although there are no absolute guidelines for symptoms of internal injuries, here are some common indicators:

- Pain in stomach, chest or any internal area;
- Bruises on the chest or stomach;
- Distended, swollen abdomen;
- Tense abdominal muscles;
- Labored breathing;
- Severe chest pain while breathing;
- Nausea or vomiting (especially blood).
WHAT YOU CAN DO ABOUT CHILD ABUSE

What is Intentional Traumatic Brain Injury?

Intentional Traumatic Brain Injury describes a head injury caused by shaking the child severely or striking a child’s head against a surface. Many parents do not understand that these actions can cause severe brain injury, blindness and even death.

The most common injuries are:

• Blood clots around the brain;
• Hemorrhages of the retina;
• Fractures in the growing portion of the bone;
• Injury to the brain;
• Bruises on the extremities or bruising and injury of the chest, where the child was held while being shaken.

Is spanking child abuse?

Although not recommended, spanking is not abuse. However, a spanking that leaves marks or bruises on a child might be abuse. Spanking a baby is always a concern.

Most parents do not intend to hurt their children, but abuse is defined by the effect on the child, not the motivation of the parents.
Sexual abuse and sexual exploitation

What is child sexual abuse?
Child sexual abuse occurs when a person uses or attempts to use a child for sexual gratification. This includes incest, rape, sodomy, sexual penetration, fondling, voyeurism, etc.

In Oregon in FFY 2016, 1,045 children were found to have been sexually abused.

What is fondling?
Fondling includes touching sexual parts of the body, such as breasts, genitals or buttocks. This may include an adult having a child touch the sexual parts of his body.

What is sexual contact?
Sexual contact includes rape, sodomy, incest, sexual penetration, etc.

What is sexual harassment?
Sexual harassment includes intimidating or pressuring a child for sexual activities.

What are exposure and voyeurism?
These include someone exposing himself to a child, or exposing the genitals of a child, for the adult’s sexual gratification.

Why do children keep quiet about being sexually abused?
Persons who sexually abuse children rely on many methods to force children to keep quiet. The abuser may be subtle, telling the child he or she is doing it for her own good or promising her favors or gifts. Or he may be more blatant, such as a father warning his daughter if she tells anyone, the family will be broken up and everyone will blame her.
WHAT YOU CAN DO ABOUT CHILD ABUSE

The abuser may convince the child she is an equal partner, that he has special affection for her and will be blamed if disclosure is made.

Many abusers use threats, telling the child his pets will be hurt, that his siblings will be targeted, or even the child himself will be killed if he tells.

Children need adults to provide their basic needs: food, a place to live, clothing, access to family and loved ones. Abusers deliberately exploit that dependency to make children submit to them.

Research and experience have shown that children very rarely lie about the details of a sexual act that they have not experienced.

How often do children lie about being abused?

Research and experience have shown that children very rarely lie about the details of a sexual act that they have not experienced. It is much more common for adults to misunderstand or misconstrue a situation.

As a result, the child often blames herself for what is happening to her and feels guilty and depressed. She may create imaginary companions. Some children become aggressive and angry. Others turn to drugs and alcohol.

What is sexual abuse of teens?

Oregon law does not make all sexual activity of a teen under the age of 18 illegal.

The law includes defenses in some circumstances if the actor is less than three years older than the victim. Law enforcement and district attorneys will need to analyze each situation on a case-by-case basis.

For teens, evidence of sexual activity may be a potential indicator of sexual abuse. Consenting sexual relationships imply that both partners have the ability and capacity to make an informed choice without fear of harm or pressure. However, many teens do not have a clear understanding of the difference between consensual and abusive relationships.
Factors to consider in determining whether a relationship may be abusive include:

- If force is used;
- If there is impaired mental or emotional capacity;
- If drugs or alcohol affect the ability to make a reasonable choice;
- If there is manipulation, intimidation, implied threats or other forms of coercion;
- If there is a distinct power differential or a significant age difference.

**What is sexual exploitation?**

Sexual exploitation is using children in a sexually explicit way for personal gain; e.g., to make money, to obtain food stamps or drugs, or to gain status. It also includes sex trafficking and using children to create pornography.

*Many teens do not have a clear understanding of the difference between consensual and abusive relationships.*
Neglect

What is neglect?

Neglect is failing to provide adequate food, clothing, shelter, supervision or medical care. Chronic neglect is a persistent pattern of family functioning in which the parent or caregiver does not sustain or meet the basic needs of a child. This results in an accumulation of harm that can have long term effects on the child’s overall physical, mental or emotional development.

Neglect is the most common form of abuse and may have long-term effects. In FFY 2016, 6,590 children were victims of neglect.

For FFY 2016, neglect was the most common contributors to child fatalities.

What are the standards for supervision and protection?

Parents must provide adequate supervision, care, guidance and protection to keep children from physical or mental harm. Parents must also provide appropriate treatment for children’s problems.

Children will have minor injuries during childhood. When accidental injuries are frequent, they may be the result of neglect.

Neglect includes exposing a child to illegal activities such as:

- Encouraging a child to participate in drug sales, theft, etc.;
- Exposing a child to parental drug abuse, theft, etc.;
- Encouraging a child to use drugs or alcohol.
What are the standards for child care?

Safe child care includes:

- A designated person who can take care of a child’s individual needs;
- A plan to reach the parent in an emergency.

A child should not be left alone in situations beyond his ability to handle.

Each child must be looked at individually to make sure he or she is physically and emotionally able to handle the given responsibility. The law does not specify the age at which a child can be left alone. However, a child younger than age 10 cannot be left unattended for such a period of time as may likely endanger the child’s health or welfare (ORS 163.545).

What are the standards for food and clothing?

Children need food that allows them to grow and develop normally. Clothing and shoes should be appropriate to the environment.

What are the standards for shelter?

Children need protection from weather and safety hazards. This includes adequate heat, drinking water, sanitary facilities and space for sleeping.

What is medical neglect?

Children need adequate medical, dental and mental health care services. When a medical situation may result in serious impairment, pain or death of the child, this may be medical neglect and CPS can intervene.

Religious beliefs about spiritual care are generally honored, except when the child’s life is in danger. If a parent refuses medical attention in a serious or life-threatening situation, CPS may intervene.
WHAT YOU CAN DO ABOUT CHILD ABUSE

What is Failure to Thrive?

Failure to Thrive is a syndrome characterized by chronic malnutrition of an infant or young child. Growth is delayed and mental retardation, learning difficulties and delay in language skills are some of the long-term consequences.

Characteristics include:

- A weak, pale and listless appearance;
- Loss of body fat;
- Staring vacantly instead of smiling and maintaining eye contact;
- Sleeping in a curled up, fetal position with fists tightly closed;
- Rocking back and forth in bed as he lies on his back or banging his head repeatedly against his crib;
- Obvious delays in developmental and motor function.

What do the terms “drug exposed child” and “drug affected child” mean?

Misuse of prescription drugs or use of illegal drugs is neglect when the use directly impacts the child. While alcohol and drug use during pregnancy is never a good idea, many women do not realize the dangers drug use or addiction can present to children during pregnancy. Some affects may not be apparent at birth but can show up later.

Any alcohol or drug use by a pregnant woman means a child has been “drug exposed” during the pregnancy. When drug use creates physical, mental or behavioral problems, whether apparent at the birth of a child or as the child grows, the child may be considered “drug affected.” But these drug affects must be confirmed through medical evaluation. They can include a range of issues from major physical problems to mental or behavioral problems that emerge as late as the child’s entry into school.
Abandonment and mental injury

What is abandonment?

Abandonment is parental behavior showing intent to permanently give up all rights and claims to a child.

What is mental injury?

Mental injury and psychological maltreatment are the result of cruel or unconscionable acts or statements threatened, made, or permitted to be made by the caregiver(s), which have a direct effect on the child or it can be the caregiver’s failure to provide nurturance, protection or appropriate guidance. The caregiver’s behavior, intentional or unintentional, must be related to the observable and substantial impairment of the child’s psychological, cognitive, emotional or social well-being and functioning. In Oregon in FFY 2016, 248 children were found to be subjected to mental injury.

Some examples of mental injury include:

- Holding a child’s head in the toilet as punishment;
- Stripping a child and chaining him to a tree for punishment;
- Exposing or forcing a child to repeatedly watch domestic violence against his parent or siblings;
- Shutting a child out of the family by not buying her adequate clothing or personal items. An example would be furnishing other children’s rooms with nice things and keeping her bedroom empty.
Threat of harm

What is threat of harm?

Threat of harm is subjecting a child to a substantial risk of harm to his or her health or welfare. Severe harm is defined as significant or acute injury to a child’s physical, sexual, psychological, cognitive, or behavioral development or functioning; immobilizing impairment; or life threatening damage.

There were 6,254 founded incidents of threat of harm in Oregon in FFY 2016.

Some examples of threat of harm are:

- A child living with or cared for by a person who has a past conviction for child abuse or neglect, and whose current behavior, condition and circumstances present a substantial threat to the safety of a child;
- A newborn whose primary caregiver’s current mental or behavioral condition indicates a lack of skills necessary to provide adequate care even though the child has not suffered harm;
- A child living with a person who is involved in child pornography;
- A child whose parent or caregiver has caused death or severe harm to another child through physical abuse, and whose behaviors, conditions or circumstances have not improved.

When should domestic violence be reported as child abuse or neglect?

Domestic violence means a pattern of coercive behavior, which can include physical, sexual, economic, and emotional abuse that an individual uses against a past or current intimate partner to gain power and control in a relationship.

If you know a child is witnessing repeated or serious domestic violence and you are unsure of the impact on the child, call and consult with a CPS screener.
Domestic violence is present in all cultures, socioeconomic classes, and communities of faith. Domestic violence generally increases in intensity, severity and frequency.

The presence of domestic violence is a risk factor for children. However, not all situations of domestic violence require a report to DHS or law enforcement. DHS has the authority to intervene with families based on whether a child is being physically abused, sexually abused, neglected, suffering mental injury, or is being subjected to an activity or condition likely to result in substantial harm.

A report to DHS or law enforcement is necessary when there is reasonable cause to believe:

1. There is current domestic violence or the alleged abuser has a history of domestic violence; and

2. One of the following:

   » There is a reason to believe the child will intervene or is intervening in a violent situation, placing him at a risk of substantial harm.

   » The child is likely to be harmed during the violence (being held during the violence, physically restrained from leaving, etc.).

   » The alleged abuser is not allowing the adult caregiver and child access to basic needs, impacting their health or safety.

   » The alleged abuser has killed or inflicted substantial harm, or is making a believable threat to do so to anyone in the family, including extended family members and pets.

   » The child’s ability to function on a daily basis is substantially impaired by being in a constant state of fear.

If you believe a child is witnessing repeated or serious domestic violence and you are unsure of the impact on the child, call and consult with a CPS screener.
An additional category of abuse — child selling — was added to statute by the 1997 Oregon Legislature. This includes buying, selling or trading for legal or physical custody of a child. It does not apply to legitimate adoptions or domestic relations planning.
Mandatory Abuse Reporting for Oregon Lawyers

MARK JOHNSON ROBERTS
DEPUTY GENERAL COUNSEL
OREGON STATE BAR

AMBER A. HOLLISTER
GENERAL COUNSEL

Oregon Statutory Abuse Reporters
[summarized and condensed]

- Medical Professionals
- Audiologists and Therapists
- Police Officers, Firefighters, EMTs
- School and College Employees
- Health and Human Services Workers
- Care Providers and Legal Custodians
- Clergy and Mental Health Professionals
- Physical, Speech and Occupational Therapists
- Members of the Legislative Assembly
- Attorneys
Legislative Purpose  
[example: elder abuse reporting]

“The Legislative Assembly finds that for the purpose of preventing abuse, safeguarding and enhancing the welfare of elderly persons, it is necessary and in the public interest to require mandatory reports and investigations of allegedly abused elderly persons.”

ORS 124.055

Three quarters of all child abuse reports come from mandatory reporters.

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police</td>
<td>17%</td>
</tr>
<tr>
<td>School</td>
<td>20%</td>
</tr>
<tr>
<td>Medical</td>
<td>10%</td>
</tr>
<tr>
<td>Other mandated</td>
<td>30%</td>
</tr>
<tr>
<td>Parent/Self</td>
<td>6%</td>
</tr>
<tr>
<td>Other voluntary</td>
<td>17%</td>
</tr>
</tbody>
</table>

All voluntary 23%
Chapter 9—Mandatory Abuse Reporting for Oregon Attorneys

**Attorneys’ Abuse Reporting Duties**

- **ELDERS**
- **CHILDREN**
- **MENTAL ILLNESS/DEVELOPMENTAL DISABILITY [ORS 430.765]**
- **LONG-TERM CARE RESIDENT [ORS 441.640]**

**Your Abuse Reporting Duty**

You **must** report abuse if you have:

- **Contact** with an abuser or a victim, and
- **Reasonable cause** to believe that
- **A protected person**
- **Has Been abused,**

UNLESS an exception applies.

- This duty exists 24 hours a day, 7 days a week!
- Following an employer’s policy is not enough!
How to Report

- Immediately = without delay
- To DHS or law enforcement
- Oral report required
- Give as much as information as possible
- Explain allegation of abuse

Reporting Hotline:
1-855-503-SAFE
or call DHS Branch Offices

Report Should Include ...

- Names and addresses
- Nature and extent of the abuse
- Explanation given for the abuse
- Cause of abuse and identity of perpetrator.
CHILD ABUSE REPORTING

The Battered Child Syndrome


Foundation of child abuse as a diagnosis. Also called Tardieu's syndrome; Caffey-Kempe syndrome.
Alcoholism and Alcohol Abuse
Chronic Obstructive Pulmonary Disease (COPD)
Depression
Fetal Death
Health-related Quality of Life
Illicit Drug Use
Ischemic Heart Disease (IHD)
Liver Disease
Risk for Intimate Partner Violence

Multiple Sexual Partners
Sexually Transmitted Diseases (STDs)
Smoking
Suicide Attempts
Unintended Pregnancies
Early Initiation of Smoking
Early Initiation of Sexual Activity
Adolescent Pregnancy
Psychotropic Medications Prescribed

What is Contact?

- A touching or meeting; association or relationship
- Need not be linked to abuse BUT there must be physical or associational contact
- Receiving information in a public meeting about someone is not sufficient (AG opinion)
- Telephone or email contact?
- Can be before or after the abuse or the disclosure
Chapter 9—Mandatory Abuse Reporting for Oregon Attorneys

What is Reasonable Cause?

- Any reasonable suspicion of abuse should be reported.
- Reasonable suspicion is more than a hunch.
- It requires an ability to point to articulable facts based on the totality of the circumstances.
- Your obligation to report does not depend upon whether abuse actually occurred

Let the Experts Decide

- You do not need to investigate
- OK to comment on injury or situation and observe
- Your job is not to determine whether abuse occurred.
- Do you have a reasonable suspicion of abuse?
- Consider making a voluntary report (assuming no confidentiality issue).
- If the explanation does not suit the injury, make a report.
Child Abuse Defined—ORS 419B.005

- Any assault; any injury not caused by accident; any injury at variance with the explanation given for it.
- Any mental injury caused by cruelty
- Rape, sexual abuse, or sexual exploitation
- Neglect
- Child selling
- Presence where methamphetamines are manufactured
- Unlawful exposure to controlled substance w/ risk of harm
- Threat of harm
- Not reasonable discipline unless results in above

Warning Signs of Child Abuse

- Unexplained injury or one that doesn’t fit the explanation given for it
- Injuries in various stages of healing
- Multiple bruises or bruises on soft tissue; any bruise on a baby
- Child wary of parents or adults generally.
- Fatigue, listlessness, constant hunger
- Unusual sexual knowledge
- Inappropriately adult or infantile
Types of Child Abuse Reported—2015

- Threatened Harm: 45%
- Physical Abuse: 39%
- Sexual Abuse: 6%
- Mental Injury: 8%
- Neglect: 2%

ELDER ABUSE REPORTING
Where does elder abuse occur?

- 66% at home
- 34% care facility

Elder Abuse Defined—ORS 124.050(1)

- Financial Exploitation
- Abandonment or Neglect
- Verbal Abuse
- Willful infliction of physical pain or injury
- Any injury not caused by accident; any injury at variance with the explanation given for it.
- Sex Abuse
- Seclusion or Restraint
**Warning Signs of Elder Abuse**

- Unexplained injury or one that doesn’t fit the explanation given for it
- Elder not permitted to speak for themselves or without the presence of others.
- Being extremely withdrawn and non-communicative or non-responsive.
- Unpaid bills, overdue rent, utility shut-off notices

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**2015 Substantiated Elder Abuse**

- Financial: 30%
- Neglect: 29%
- Verbal: 22%
- Physical: 13%
- Sexual: 2%
- Other: 4%
EXCEPTIONS TO REPORTING

Exception: Certain Client Confidences

- **Attorney-Client Privileged** under ORS 40.225 (OEC 503)
- **Information communicated during representation** that is *detrimental to client* if disclosed (reconciles RPC 1.6 duty)
Chapter 9—Mandatory Abuse Reporting for Oregon Attorneys

Lawyer Confidences—RPC 1.6
[information relating to the representation of a client]

A/C Privileged

Likely Detrimental

Secrets

Embarrassing

Reporting Never Required

Reporting Always Required
Chapter 9—Mandatory Abuse Reporting for Oregon Attorneys

May I Report? Yes, if:
- Informed Consent
- Implied Authorization
- Client Intends to Commit Crime
- Prevent Death or Injury

Reporting Never Required

Some examples

- Lawyer representing person charged with child abuse who admits past acts
- Lawyer representing person charged with child abuse who expresses intention to “pay back” child for speaking with prosecutor
Some examples

- Lawyer representing wife in divorce is told by wife of physical abuse by husband of their child while meeting in a crowded restaurant. Lawyer has met the husband.
- Lawyer representing court-appointed guardian of elderly person suspects guardian is neglecting elderly person based upon interaction with protected person.

Exception: “Reasonable Discipline” [of a child!]

- “Abuse” does not include reasonable discipline unless the discipline results in one of the conditions [specifically defined to constitute abuse].”
Exception: Duplicative Reports [child abuse only]

- Report already made
  OR
- Proceeding already pending
  AND
- Reasonable belief the information is already known

Exception: Spiritual Treatment [for an elder!]

- Voluntary
- Through prayer
- Recognized church
- Duly accredited practitioner
- Reconciles “neglect” as not abuse
Chapter 9—Mandatory Abuse Reporting for Oregon Attorneys

Daniel Atkinson
Client Assistance Office
503.431.6336
1.800.452.8260 x 336
datkinson@osbar.org