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Protective proceedings: a sister (state) act

By Laura S. Nelson, Attorney at Law, and Rachel A. Brooks, Attorney at Law

Sister states Oregon and Washington have a lot in common: beautiful coastlines, rolling farmland, and jagged mountain peaks. But anyone who has sisters knows that sisters hate being told they are exactly alike. So to be fair to both, this article will highlight some of the differences in how each jurisdiction deals with protective proceedings.

By way of brief introduction, a guardianship in Washington, or a guardianship and/or conservatorship in Oregon, is a legal proceeding wherein the court appoints one person to act legally on another person's behalf. However, the two states' procedures to appoint a guardian or conservator are quite different. Laura will start with an overview of what makes Oregon special, then Rachel will discuss what works for Washingtonians.

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OREGON

If you're looking for a state flag that is two-sided, a state with more ghost towns than any other state, and the deepest lake in the United States, look no further than the great state of Oregon. As we Oregonians know, Oregon is a great place to live! It is an especially great place to live for family caregivers. Oregon ranks first in the nation in providing support to family caregivers. www.longtermscorecard.org.

Oregon takes personal liberties seriously

Oregon is pioneering the supported-decision-making initiative. Supported decision-making is a less-restrictive alternative to guardianship. It offers people the assistance they need to make their own decisions. It involves receiving assistance from trusted friends, family members, professionals, or advocates to help people understand the situations they face and choices and options they have, so they can make their own decision. Supported decision-making laws help family caregivers provide the support to their loved ones without incurring the time and cost of initiating a guardianship proceeding. More information is available on the Disability Rights Oregon website: https://droregon.org/alternatives-guardianship/

A petition for guardianship in Oregon requires that the petitioner recite all least-restrictive alternatives that have been tried, including trusts and powers of attorney, and reasons why those measures failed. Some counties in Oregon also require that contested issues in a guardianship or conservatorship matter be mediated so the parties can determine if there are any available less restrictive alternatives.

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Rachel Brooks has represented petitioners in thousands of guardianship and vulnerable-adult cases. She also represents guardians, including professional guardians, trustees, and other fiduciaries. She is the co-founder and current president of the Clark County Bar Association Elder Law and Guardianship Section.

Oregon requires professional guardians to be certified

Oregon requires professional guardians to be certified through the National Center for Guardianship Certification. A person is a professional guardian when she or he serves as a fiduciary for three or more people. In addition to certification, a professional fiduciary must submit to a criminal background check that is kept on file with each county in which the fiduciary is appointed. Finally, professional fiduciaries must make disclosures which include, but are not limited to, educational background, professional experience, fees charged, names of service providers, whether there has been a claim against their bond, and who the primary decision-maker will be. See ORS 125.240 for more requirements.

Once certified, professional fiduciaries are monitored not only by the courts but also by the Guardian/Conservator Association of Oregon (GCA), which acts in a similar function to a bar association. The GCA board adopts standards of practice for professional guardians and enforces these standards. https://www.gcaoregon.org/for-members/gca-standard-of-professionalism/

Public guardian

The Oregon Public Guardian and Conservator Program (OPGC) serves as guardian and/or conservator for adults who are unable to make decisions for themselves, and require a guardian and/or conservator. The Oregon public guardian serves in this role only as a last resort: where there is no less-restrictive alternative to guardianship to resolve the identified safety risk. https://www.oltco.org/opg/about-us. In 2012, the Public Guardian and Conservator Task Force estimated that between 1,575 and 3,175 adult Oregonians were incapacitated and needed but lacked services, and this population was growing.

Oregon due process

Guardianship is not secret

The respondent must be personally served with the petition and notice of hearing. ORS 125.065.

The respondent's adult children, spouse or domestic partner, and custodian must be served at least by mail. ORS 125.065. The court visitor may not serve the respondent. Check local rules to determine how the court visitor (if appointed) is served with copies, once he or she has been appointed.

There is a right to counsel, with no provision for appointment at public expense. Some counties maintain "bailout" lists of attorneys who provide pro bono services to respondents. Consult with local counsel to determine local practice.

The court visitor shall determine whether the respondent or protected person desires the court to appoint counsel. ORS 125.150

There is no right to a jury trial

Oregon allows temporary fiduciaries to be appointed for limited purposes.

WASHINGTON

Although we're all getting older, Washington is older than Oregon. According to U.S. Census records and estimates, in 2010, people aged 65 and older made up 10.5% of the population of Multnomah County. The median age in 2010 was 35.7 years. Jump to 2016, and the over-65 group now makes up 11.9% of the Multnomah County population, and the median age was 36.7 years. Contrast those numbers with Clark County, across the river in Washington. In 2010, 11.5% of the population was 65 or older, and the median age was 36.7. In 2016, 13.7% of the population is over 65, and the median age is 37.8. Vancouver, in particular, is a retirement destination and was recently named one of the top ten places to retire in the United States by www.livability.com.

Perhaps because of its demographics, Washington State is unique in its handling of guardianship cases.

Washington has excellent long term care

According to AARP, Washington State has the best overall long term care services in the United States. (Ore-

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gon, is ranked number 4 overall). www.longtermscorecard.org.

Washington's long term care services are excellent because the state devotes money to these services. In 2017, 64.9% of Medicaid funding supported elders and adults with disabilities.

In addition and relevant to guardianship, in many cases Washington's Medicaid long term care program pays the cost of guardianship and ongoing guardian fees. See WAC Ch. 182-513.

This culture of care and especially the funding contributes to a robust community of certified professional guardians.

Washington has a solid certified professional guardian program

Washington is one of only twelve U.S. states that require professional guardians to be certified. Washington has been certifying professional guardians since 1997. The state does not recognize "National Certified Guardians." Washington-certified professional guardians (CPGs) must be certified through an extensive process. CPGs must, at a minimum, have an associate's degree or higher plus relevant experience, submit fingerprints for a criminal background check, submit a credit report and FICO score, and complete a nine-month training program through the University of Washington. www.pce.uw.edu/certificates/guardianship. Continued education is required.

Once certified, CPGs are monitored not only by the courts but also by the Washington CPG board, which operates in a similar fashion to a bar association. The CPG board adopts standards of practice for professional guardians and enforces these standards. RCW 11.88.120, modified in 2015, requires courts to forward all complaints against CPGs received by the court to the CPG board, while the CPG board "may" send copies of grievances to the courts.

As of this writing, about twenty CPGs practice in Clark and Cowlitz counties. And, while the CPG board does not train or monitor lay guardians, Washington does have a mandatory lay-guardian training program, which takes about two hours, for family member guardians.

Learn about Washington's certified professional guardianship program and Washington's lay guardian training program at the guardianship portal: www.courts.wa.gov/guardianportal.

Washington established a public guardian program in 2007 with RCW Ch. 2.72. The Office of Public Guardian is separate from the CPG program, for cases that fall through the cracks, but resources are limited, and availability of a public guardian is not assured.

Washington due process

Washington has high due-process requirements for guardianship cases.

Guardianship is not secret

The alleged incapacitated person (AIP) must be personally served with the petition and notice of hearing. RCW 11.88.040.

The AIP's adult children, spouse or domestic partner, and custodian must be served at least by certified mail. RCW 11.88.040(2).

There is a right to counsel, who may be appointed at public expense

The AIP "shall have the right to be represented by willing counsel of their choosing," and the Guardian ad Litem must advise the AIP of this right. RCW 11.88.045(1)(a) and RCW 11.88.090(5). The attorney must not substitute her or his judgment, but shall follow the AIP's "expressed preferences." RCW 11.88.045(1)(b). AIP attorneys must be appointed by and monitored by the court. RCW 11.88.045(2).

There is a right to a trial—up to a 12-person jury trial.

The AIP has the right to request a jury trial, and the standard of proof of incapacity is "clear, cogent and convincing evidence." RCW 11.88.045(3).

There is no such thing as a temporary guardian in Washington

Washington does not appoint temporary guardians, but GALs have authority to make life-saving decisions and may ask the court for additional authority. RCW 11.88.090.

In conclusion

Just like other favorite sister pairings, Oregon and Washington have interesting similarities and differences. Both states are committed to providing protection for our most vulnerable citizens and elders, but each employs different means toward that vital goal. ■

The June 3, 2018, segment of HBO's ***Last Week Tonight with John Oliver*** covers the downside of professional guardianship with both humor and outrage, and is worth watching: https://www.hbo.com/embed/last-week-tonight-with-john-oliver/seasons/season-5/episodes/73-episode-132/videos/june-3-2018-guardianship

California's spousal impoverishment rules differ from Oregon's

By Christopher Young, Attorney at Law

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The "spousal impoverishment" provisions of the Medicare Catastrophic Coverage Act of 1988 (MCCA), Omnibus Budget Reconciliation Act of 1993 (OBRA 1993), and Deficit Reduction Act of 2005 (DRA), are intended to balance the need to maintain consistent eligibility requirements for a married Medicaid (Medi-Cal in California) recipient with the desire to avoid the devastating effects such requirements might have on the spouse. Because of delays and inconsistency in implementing these pieces of legislation in California, however, the current rules that govern spousal impoverishment differ greatly from those of other states, including Oregon.

California published draft regulations implementing MCCA transfer rules in early 1990, but never formally adopted them. Nevertheless, county Medi-Cal workers were instructed to follow the draft regulations and have been doing so ever since. California never issued regulations to implement OBRA 1993 transfer rules, leaving the draft MCCA rules "in effect." It should not surprise readers to learn that, though draft DRA regulations were released for comment in September of 2012, no further action has been taken and—with an exception addressed below—the DRA remains unimplemented in California.

In California, as elsewhere, the spousal impoverishment rules differentiate between the "institutionalized spouse," referring to the spouse receiving Medi-Cal, and the "community spouse" who is not receiving benefits. For purposes of this article, the institutionalized spouse will primarily be referred to as the "Medi-Cal recipient" or the "spouse receiving Medi-Cal." As in Oregon, California's spousal impoverishment rules are intended to protect a certain portion of the marital assets for the community spouse in a Community Spouse Resource Allowance (CSRA), and a certain amount of income for the community spouse up to a minimum monthly maintenance needs allowance (MMMNA).

Protection of certain resources for community spouses

Like Oregon, California allows the community spouse to retain a certain amount of otherwise non-exempt assets which do not exceed the maximum Community Spouse Resource Allowance (CSRA). In Oregon, the amount is limited to one-half of the value of the couple's non-exempt resources, within a current range of $25,284 and $126,420. By contrast, California concerns itself only with the higher number in the range, and does not limit the amount retained by the community spouse to only one-half of the overall value. Thus, while a couple in Oregon with total non-exempt assets of $128,420 may be able to safeguard $64,210 plus another $2,000 that may be retained by the Medi-Cal recipient (total: $66,210), the same couple in California would be able to safeguard the entire amount by allocating $126,420 to the CSRA and the remaining $2,000 as the property reserve allowed for the spouse receiving Medi-Cal benefits.

Up to this point, Oregon practitioners may simply shake their heads a bit at the disparate treatment of community spouses between the two states, but to fully understand the impact of California not yet adopting the DRA, or even OBRA 1993, one should consider the following examples that reduce what must be considered when calculating in the CSRA:

- Retirement accounts in the name of the community spouse are exempt and, therefore, are not included in calculation of the CSRA
- Retirement accounts in the name of the Medi-Cal recipient spouse are exempt if they are paying required minimum distributions or (assuming the recipient is not yet 70½) if the recipient takes "periodic payment of the principal and accumulated interest." Distributions from the account

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are countable income in such cases, but the remaining principal is exempt
- A primary residence of any value may remain exempt, and may also be transferred without penalty
- Resources acquired after eligibility by the community spouse are protected and will not affect the ongoing eligibility of the spouse receiving Medi-Cal. For example, if the community spouse inherits a substantial amount after the institutionalized spouse begins receiving Medi-Cal, the inheritance make be kept by the community spouse and will have no impact on the CSRA
- Gifting is permissive and non-cumulative, the lookback period is 30 months, and transfer penalties (if any) run from the month of transfer, regardless of need for Medi-Cal benefits at the time. By way of example, a gift of less than the average private pay rate (APPR, currently $8,841.00 in California) will incur no transfer penalty because Medi-Cal does not calculate partial-month penalties and would "round down" to zero. A gift of the same amount to another person, or to the same person on another day, will likewise incur no transfer penalty. And so forth.

These rules will sound familiar to those in Oregon whose Medicaid planning experience goes back far enough, but they may be hazardous to the health of practitioners with only post-DRA experience. While elder law attorneys sometimes speak of "pre-planning" and "crisis planning," in California virtually all planning is done at the last minute because, with no DRA yet implemented, there is no incentive to plan ahead. All of this will change when and if the DRA is ever implemented in California.

Income Protection for Community Spouses

As in Oregon, a California community spouse may retain any income received in his or her name alone. For example, if the community spouse's monthly income (in his or her name alone) is $6,500, the community spouse may keep all of it. Where the community spouse's income is not so substantial, both Oregon and California have spousal impoverishment rules which may be used by a community spouse to supplement his or her own monthly income with income diverted from the spouse receiving Medi-Cal, or by keeping more income-producing resources than he or she might otherwise be allowed.

Much of the similarity between the states when it comes to income of the community spouse ends there, however. Dady Blake, in her article on page 6, provides an excellent summary of Oregon's approach to the minimum monthly maintenance needs allowance (MMMNA), which is based on the federal range of $2,057.50 to $3,160.50 per month. California, by contrast, has adopted the maximum MMMNA allowed, and all community spouses are entitled to use the $3,160.50 income allowance, which represents the 2019 amount adjusted annually for inflation. Welfare and Institutions Code §14005.12(d)(5).

Thus, in an exception to the general rule that Medi-Cal recipients must pay nearly all of their monthly income as a share of care costs, where a California community spouse's monthly income is less than the MMMNA of $3,160.50, an allocation from the income of the spouse receiving Medi-Cal may be retained by the community spouse so that the community spouse's income reaches the $3,160.50 MMMNA. This allocation of income to the community spouse is done by the eligibility worker and does not require an administrative hearing.

As referenced above, only one provision of the DRA related to spousal impoverishment has been implemented in California: Section 6013, which sets out the "income-first" rule and made it mandatory in all states. This rule stopped the practice in California of using an administrative hearing to increase the CSRA by including income-producing property that would increase the community spouse's income to the then-current maximum MMMNA. Instead, income of the spouse receiving Medi-Cal must first be allocated to the community spouse, and only if that, too, is exhausted would additional resources be considered. While the "income-first" rule is binding on California administrative law judges, it does not preclude a community spouse from seeking a judicial determination to increase the CSRA. ■

New CLE requirement

The Oregon Supreme Court has approved a new MCLE rule (effective on Jan. 1, 2019) requiring one credit hour per reporting period on the subject of mental health, substance abuse, and cognitive impairment.

FAQ: https://www.osbar.org/_docs/mcle/MCLENewRuleChangeFAQ.pdf

How federal Medicaid long term care benefits operate at the state level

By Dady K. Blake, Attorney at Law

Dady Blake is an elder law attorney in northeast Portland. Her practice focuses on issues related to long term care costs, estate planning and administration, and guardianship and conservatorship. While in law school she worked at the NHLP/National Health Law Program on federal litigation related to Medicaid.

The Medicaid Act (Title 19 of the 1965 Social Security Act) was designed to give states the opportunity to receive federal funding for medical services to many groups of categorically eligible persons. The Act creates a foundation of regulations under which each state is able to create and administer its own program, including the ability for each state to obtain waivers for expanded coverage. 42 U.S.C.§ 1396a-u; 42 U.S.C. §1396a(a)(state plan requirements).

The waiver program under the Act authorizes states to submit plans for federal approval to expand medical services. Many states, including Oregon, use the waiver program to allow Medicaid funding for home and community-based services. There are important differences in regulations between mandated medical services, such as care in skilled care facilities, and services approved under waivers, such as community-based care. A key difference is that states must adhere to a set of regulations related to administration and eligibility for mandated services; in contrast, states have great flexibility in providing community-based waiver services. Oregon, at least for now, offers the elderly resident a wide range of community-based services in what appears to be a seamless, unified system, with no apparent differences in application of the rules.

The Medicaid Act has been amended significantly over the years, including major changes under the 2010 Patient Protection and Affordable Care Act (ACA). Under the ACA, long term care services became available to states that chose Medicaid expansion under a program referred to as "MAGI Medicaid." Qualification is based on a household's Modified Adjusted Gross Income (or MAGI) of less than 138% of the federal poverty level. Under MAGI Medicaid, long term care services are potentially available to persons 19 to 65 who are not receiving SSI or Medicare. For further discussion of MAGI Medicaid, see the Oregon State Bar publication *Elder Law 2014: Emerging Challenges*, "Medicaid after the Affordable Care Act," by Penny Davis and Monica Pacheco.

Throughout this article, I use the term "Medicaid" to apply to Medicaid coverage for long term care to the elderly. (In Oregon, the Oregon Administrative Rules refer to this coverage as OSIPM, for Oregon Supplemental Income Program, Medical). The term "community-based services" is used to cover home and community-based services authorized under a waiver(s); whereas "skilled care" refers to mandated services defined in the Medicaid Act for nursing facility services and supports.

The discussion of waivered community-based services is a simplification of the array of waivers available to states under federal law and relates primarily to the most typical type of community-based care waiver for the elderly, or "1915c" waivers (based on Section 1915c of the Social Security Act). While discussion of waivered services will be limited to community-based care, much of discussion applies to other waivered services. "Community spouse" refers to the married spouse (and in some states, registered domestic partner) of a Medicaid applicant/recipient. Numbers provided throughout are generally indexed annually unless noted otherwise. This article does not discuss all the nuances of this complex and dynamic area of law or cover all relevant topics.

Medicaid eligibility

Qualification for Medicaid is determined on two levels: a determination of need for long term care services and a determination of need for financial assistance to pay for care.

Functional need

In addition to the general requirements of old age or disability, citizenship (or qualified immigrant status), and

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state residency, the individual must meet the requirements of functional need for long term care services.

Under federal law, a state plan for medical assistance must provide certain services to any individual who is categorically eligible. 42 U.S.C. § 1396a(a)(10)(A). One of the mandated services is the provision of "nursing facility services," defined as an institution primarily engaged in providing skilled nursing care, rehabilitation services, or regular health-related care and services available only in institutions. 42 U.S.C. § 1396d(c); 42 U.S.C. §1396r(a); 42 U.S.C. § 1396r(a)(1).

In addition, through a waiver process, each state can elect to expand Medicaid coverage beyond the required nursing home facilities. A common type of waiver in the area of long term care has been the addition of home and community-based services. 42 U.S.C. §1396n(c)(1).

For an elderly person to be eligible for skilled care under federal law, he or she must require inpatient care that can only be provided in a skilled care setting. Federal law does not provide any specific functional qualifications for eligibility to be a skilled care facility; nor are states required to establish any functional criteria for eligibility. In contrast, states which provide Medicaid coverage of community-based services are required to establish detailed criteria for evaluating an applicant's support needs and capabilities. 42 USC § 1396n(c)(2)(B).

In 1988, Oregon became one of the first states to seek and be granted waivers for home and community-based care as an alternative to skilled care facilities. As a prerequisite for waiver approval, Oregon developed its Client Assessment and Planning System (CA/PS). Oregon's CA/PS details 18 categories of need assessment for care. Oregon has elected to use CA/PS for all long term care evaluations, including mandated skilled care services. Level 1 is the greatest level of support for persons determined to need "full" assistance with mobility, eating, elimination, and cognition. Level 18 is the least for persons determined to be independent as to basic daily functions, but still requiring a structured living environment for medication management. Oregon currently provides Medicaid benefits through level 13. OAR 411-015-0010.

Financial need: evaluation of resources and income

Medicaid financial eligibility is based on an evaluation of two categories of financial need: resources and income.

In general, without special authorization states are barred from imposing restrictions on nursing facility level care that are more stringent than the requirements of SSI eligibility; but they are allowed to use within limits more liberal standards for determining financial eligibility than the SSI rules with respect to income and resources. 42 USC § 1396a(r)(2).

Resources

Under federal law, there are limits and exclusions on what assets are available to pay for the applicant's medical care. 42 USC § 1382b; 42 USC § 1396r–5(c)(5). Assets not considered in the calculation of eligibility for Medicaid benefits are considered "exempt." Oregon generally uses the federal definition of exempt assets without significant expansion. OAR Chapter 461 Division 145. The most common assets that are exempt under federal law in situations where elderly clientele seek Medicaid eligibility are:

- A residence with equity of up to $585,000 to $878,000. Oregon uses the lower limit of equity. OAR 461-145-0220. Federal law restricts eligibility if the applicant's equity interest in the home exceeds a statutorily determined amount. See CMS, "2019 SSI and Spousal Impoverishment Standards." 42 USC § 1396(p)(f).
- An automobile used for transportation of any value. OAR 461-145-0360(4).
- Personal property, any value. OAR 461-145-0390.
- Burial-related assets, including pre-paid plans, insurance, and hard goods. OAR 461-145-0040 & 0050

See federal SSI Resources rules under 42 USC § 1382(b). See Oregon Administrative Rules, Chapter 461, Division 145 for complete listing.

Certain eligibility standards relating to coverage of long term services and supports, including the home-equity limitation under 42 USC § 1396(p)(f), are increased each year based on increases in the CPI for All Urban Consumers (CPI-U).

One key difference between the states is in the area of retirement plans. In Oregon, qualified retirement plans are generally classified as an available resource unless a plan qualifies as an annuity under OAR 461-145-0222(10)(c). OAR 461-145-0380; OAR 416-145-0380(4). In some states, including California, these plans are not considered as an available resource. In California, retirement plans owned by a community spouse are exempt from consideration with no requirement of distributions. Plans owned by a Medicaid recipient in California must distribute to the recipient, and all distributions are treated as

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available income; however they do not need to meet qualified annuity requirements (including the requirement that the retirement plan be actuarially sound). See further discussion of California's rules for resources in the article by Christopher Young on spousal impoverishment on page 4.

Oregon, Washington, and California use the SSI standard of asset limits:$2,000/person of non-exempt assets for an individual and $3,000 for a couple (both receiving care). OAR 461-160-0015(3)(a). The SSI resource limit is *not* subject to annual increases and has not changed since 1989.

Federal law requires that the assets of both the applicant and any spouse be considered available to pay for care subject to exclusion of exempt resources. 42 USC §1396r–5(c), 42 USC § 1396r–5(d), (f)(2).

However, there are protections for married couples. The Medicare Catastrophic Coverage Act of 1988 amended 42 USC § 1396p and 1396r–5 to provide exceptions to reduce "spousal impoverishment." The federal rules related to spousal impoverishment must be followed by all states for skilled care. Until 2014, states were not required to apply the rules for community-based care under a waiver. 42 USC § 1396r-5(h)(1)(A). Starting in 2014, the ACA amended the Medicaid Act to require that the spousal impoverishment protection rules were adhered to by states for care under community-based waivers. This provision sunsetted December 31, 2018, and reverted back to the pre-2014 rules. 42 1396r-5; ACA § 2404. As of this writing, a bill is before Congress to extend this requirement. According to a 2018 Kaiser Foundation survey of states, most states—including Oregon, California, and Washington—intend to voluntarily continue the application of the spousal impoverishment rules to community-based waiver care. https://www.kff.org/medicaid/issue-brief/potential-changes-to-medicaid-long-term-care-spousal-impoverishment-rules-states-plans-and-implications-for-community-integration/.

The spousal protection rules work to protect a community spouse by placing limits on how much the couple must spend down to qualify for Medicaid coverage. The community spouse is allowed to shelter or reserve assets referred to as the Community Spouse Resource Allowance (CSRA). 42 USC § 1396r–5(f)(1).

The CSRA is calculated based on an adjusted one-half of a couple's countable resources at the beginning of the ill spouse's continuous period of care. The federal government sets both a minimum CSRA ($25,284, 2019), below which a state's Medicaid plan cannot go, and a maximum CSRA ($126,420 in 2019) which a state's Medicaid plan cannot exceed. That is, a state's Medicaid plan cannot allow for qualification where a couple's countable resources are higher than the maximum CSRA; and a state cannot require a spend-down below the minimum CSRA, but it can raise the minimum if it chooses.

Oregon follows the federal rules without expansion and allows a community spouse to safeguard one-half of the value of the couple's total non-exempt resources, provided the number is at least equal to the federal minimum CSRA and does not exceed the federal maximum CSRA. Any excess over the maximum CSRA must be spent down to the maximum CSRA. Hence in Oregon, a couple with $200,000 of countable resources at the beginning point of care will be able to safeguard $100,000 for the community spouse (in addition to $2,000 resource allowed for the ill spouse) because half of total resources is more than the minimum CSRA and under the maximum CSRA.

Washington uses a formula the same as Oregon's. California's minimum is the same as its maximum CSRA; in the above example, in California a community spouse may retain $126,420 (i.e., the state's minimum CSRA). For further discussion, see Christopher Young's article in this newsletter.

Transfer of resources/calculation of Medicaid penalty periods

Effective October 1, 1993, a transfer made by a Medicaid applicant or the spouse for less than fair market value, done during the "look back" period of five years prior to the date of applying for Medicaid, generates a penalty period during which Medicaid will not pay for care. 42 USC § 1396p(c)(1); OBRA, 1993. Common exceptions include transfers to a spouse and to a minor or disabled child. (See exceptions at 42 USC §1396p(c)(2).) The penalty is calculated by taking the total amount of such transfers and dividing it by the state's divisor, based on a state's average cost of skilled nursing facility, which creates the number of months before Medicaid eligibility kicks in. 42 USC § 1396p(c)(1)(E)(I).

In Oregon, the divisor for gifts and transfers is $8,784 per month (2018). And the starting date for calculating the penalty period begins the later of the date of transfer or the date when the applicant is receiving care and would otherwise qualify for Medicaid. OAR 461-140-0296. 42 USC § 1396p (c)(1)(D)(ii).

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A key aspect of the Medicaid waiver program is the great flexibility allowed each state in its administration and provision of community-based services.

Our neighbors California and Washington have slightly higher divisors. Washington calculates the penalty on a per-day basis of $323, the state-wide average daily cost of care. California uses $8,841 (effective until May 2019) and runs penalty periods concurrently where there are multiple transfers. The penalty period begins on the first day of the month of the transfer (and not the later of the date of transfer or when the applicant is otherwise qualified for Medicaid.)

Income limits

Under federal law, only the gross income, before any deductions or withholdings, of the Medicaid recipient is considered for determination of eligibility. The income of a spouse of a married recipient is not considered. 42 USC § 1396r-5. At a minimum, states generally must cover skilled care for persons who qualify for SSI. 42 USC § 1396s(f); §209(b) of 1972 Social Security Act.

Most states, including Oregon, choose to increase the income limit to 300% of SSI, as allowed under federal law in a "special income rule." 42 USC § 1396a(a)(10)(ii)(V). Currently, to qualify in Oregon, an applicant must have gross income at or under 300% of the SSI federal benefit rate, or $2,313. (2019) OAR 461-155-0250. States that use the income rule/300% of SSI for skilled care, can apply the rule to eligibility for community-based care, but are not required to do so. 42 USC § 1396a(a)(10)(ii)(VI); 42 CFR § 435.217.

According to a 2018 Kaiser Foundation survey (not yet released for publication), most states, including Oregon, use the same rules of income eligibility for mandated and waivered services. States vary in how they deal with persons whose income is more than the maximum allowed. Oregon uses a fairly common eligibility tool: an "income cap trust." OAR 461-145-0540.

As noted above, under federal law, the income of the community spouse is not considered available for paying the cost of the ill spouse's long term care. Additionally, to ensure that the community spouse has enough income to live on, federal law requires that states allow the community spouse to achieve a Minimum Monthly Maintenance Needs Allowance (MMMNA), set by federal law as a percentage of the federal poverty level for a two-person household and adjusted annually for inflation ($2,057.50 in 2018; to be adjusted 7/1/19).

To the extent that the community spouse's own income is below the MMMNA, his or her income can be supplemented post-Medicaid eligibility with the recipient's income and/or the couple's assets to bring income up to a maximum of $3,160.50 per month (2019). 42 USC § 1396r-5(d)2-5. Adjustments are allowed under federal law for the community spouse's living expenses. Federal law requires the use of "income first," such that before additional resources can be safeguarded for a community spouse, the recipient's income must first be used.

Oregon follows the federal rules without expansion. The community spouse's income allowance is determined by adding to MMMNA, the community spouse's excess housing costs up to the maximum. OAR 461-160-0620(3)(d). The excess is determined by taking total housing costs over the utility allowance of the Supplemental Nutritional Assistance Program (SNAP, aka food stamps) ($617.25/2019) OAR 461-160-0420(4)(d)(A).

Home and community-based services waivers

A key aspect of the Medicaid waiver program is the great flexibility allowed each state in its administration and provision of community-based services. With some exceptions, states can apply different income and resource standards to waivered care. (See discussion above related to spousal impoverishment.) Federal law allows for a modification of a state's community-based coverage without prior federal approval when a state's community-based services exceeds projected enrollment. Otherwise, modification can occur, but only after federal approval. 42 CFR $441.355. A state may

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Medicaid

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terminate its waiver at any time upon notice to recipients and the Secretary of Health and Human Services. 42 CFR § 441.307. States can use a range of cost-containment strategies to control state spending on community-based services, such as quotas and wait lists. Community-based services also do not need to be statewide; states can pick geographical areas or populations. 42 USC § 1396n(c)(3).

While waivers provide great flexibility, there is still a statutory requirement that the use of community-based waivers be cost-effective, such that the state's average per capita expenditures for home and community-based waiver services must not exceed the state's reasonable estimate of the cost of average per-capita expenditures that would have been incurred by the state without the waiver(s). 42 USC §1396n (c) (2)(D).

Oregon initially provided Medicaid coverage CA/PS levels 1 through 17. In 2003, due to budget difficulties, Oregon eliminated levels 10 through 17. Later that year, the levels were partially restored up to level 14 by the Oregon legislature. See *Watson v. Weeks*, 436 F.3d 1152 (9th Cir., 2006)(challenging Oregon's limiting of priority levels; the court finding, in part, no private right of action under 42 USC § 1396(a)(17)(use of "reasonable standards").

Currently in Oregon, Medicaid coverage of long term care is available for CA/PS levels 1 through 13 and does not cover levels 14-18. OAR 411-015-0015(1). Effectively, Oregon does not provide Medicaid benefits for persons who only need assistance with eating, bathing, or dressing, or minimal level assistance with mobility issues. In the future, when Oregon faces budget shortfalls due to rising enrollment or budget constraints, be prepared for the CA/PS levels to be reduced further.

Despite the leeway allowed under federal law for community-based care, Oregon provides a unified and seamless integration of skilled care and home and community-based services for long term care, without the use of waitlists or (at least perceived) quotas, or the use of separate financial or functional criteria.

In contrast, California is relatively new to using Medicaid coverage for community-based facilities. Unlike Oregon, there is no statewide community-based care waiver in California to extend benefits to those who, while in need of placement, are not in need of a skilled nursing facility. In 2009, California initiated a pilot project to evaluate assisted living as an alternative to skilled nursing placement in fifteen California counties. The five-year pilot program was extended in 2014 and is set to expire February 28, 2019, unless renewed again. The pilot reportedly has a cap of 3,700 residents (though funding has been allocated for an additional 2,000), and a substantial waitlist.

Washington also provides home and community-based care services under an approved waiver(s) which provides Medicaid benefits similar to Oregon in foster homes, assisted living facilities, and home-based settings. However, there are significant differences in Washington's rules and availability of community-based care. For example, facilities that accept Medicaid payments are able to decide whether to accept Medicaid payment immediately, or months—or even years—after paying privately. As a practical matter, there are also only a few assisted living facilities that accept Medicaid, and they typically require at least 24 months of private pay.

The big picture

Overall, to date Oregon has provided its residents access to Medicaid benefits for community-based care with limited use of cost-control measures. It may be that its ability to do so successfully has been in part due to its use of the more stringent rules related to financial eligibility and its expansion of estate recovery. ■

Sources of Further Information

Detailed discussion of assessment process under CA/PS found in OSB CLE *Elder Law 2013: Basics to Build On*, Chapter 1, § I(A): "Understanding Medicaid & Long Term Care in Oregon," Michael J. Edgel; Julie Meyer-Rowett.

Medicaid Act Statutes: 42 USC §§ 1396a-v; Medicaid Regulations: 42 CFR §§ 430.0-456.725; SSI provisions found at: 42 USC §§ 1382-1383d; SSI regulations: 20 CFR §§ 416.101-416.2227

Current numbers related to Oregon Medicaid eligibility are available at the Oregon State Bar website at https://elderlaw.osbar.org.

CMS annual updates are found at https://www.medicaid.gov/medicaid/

Estate Recovery: A tale of two states

Oregon

By Dady Blake, Attorney at Law

The Medicaid Act, as amended by the Omnibus Budget Reconciliation Act of 1993, requires that each state seek recovery of assistance provided for nursing home or community-based waiver services for any recipient who was 55 years of age or older when the individual received such assistance. 42 USC § 1396p(b)(1)(B)). Recovery is barred by federal law until after the death of any spouse, minor, blind, or disabled child. 42 USC §1396p(b)(2). Additionally, all states are required to provide for submission of a hardship waiver under 42 USC §1396p(b)(3). Federal law provides that the term "estate" include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and may include, at the state's option, an expanded definition of estate. 42 USC § 1396p(b)(4).

Oregon uses the expanded, permissive definition of "estate" authorized by 42 USC § 1396p(b)(4)(B). Specifically, it defines "estate" to include "all real and personal property and other assets in which the deceased individual had any legal title or interest at the time of death including assets conveyed to a survivor, heir or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust or other similar arrangement." ORS 416.350(6).

In *Nay v. Dept. of Human Services*, the court of appeals rejected the Oregon Department of Human Services' assertion that Oregon law creates an interest at the time of death in property that a Medicaid recipient or his or her spouse had transferred before death. 267 Or. App. 240, 260–62, 340 P.3d 720 (2014); affirmed, 360 OR 668 (2016)(concerning OAR 461-135-0832 and 461-135-0835).

As Christopher Young explains in his article, California makes things quite simple: effective January 2017, estate recovery in California is limited to assets in the deceased beneficiary's probate estate. ■

California

By Christopher Young, Attorney at Law

January 1, 2017, marked a dramatic change in California's estate recovery rules with enactment of SB 833 and the re-definition of "estate" for recovery purposes, essentially eliminating estate recovery of nonprobate transfers for Medi-Cal recipients who died on or after that date.

The change is codified in California's Welfare and Institutions Code §14009.5, which provides that it is the intent of California's legislature, with the amendments made by SB 833, to:

(1) Limit Medi-Cal estate recovery only for those services required to be collected under federal law;
(2) Limit the definition of "estate" to include only the real and personal property and other assets required to be collected under federal law;
(3) Require the State Department of Health Care Services to implement the option in the State Medicaid Manual to waive its claim, as a substantial hardship, when the estate subject to recovery is a homestead of modest value, subject to federal approval;
(4) Prohibit recovery from the estate of a deceased Medi-Cal member who is survived by a spouse or registered domestic partner; and
(5) Ensure that Medi-Cal members can easily and timely receive information about how much their estate may owe Medi-Cal when they die.

The real and personal property "and other assets required to be collected under federal law" refers to 42 USC §1396p(b)(4), which states in relevant part:

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual—
(A) *shall include* all real and personal property and other assets *included within the individual's estate*, as defined for purposes of State probate law; and
(B) *may include,* at the option of the State…any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement. [Emphasis added.]

Thus, while Oregon uses an expansive definition of "estate," those nonprobate transfer options listed in subsection (B), above are now available to California Medi-Cal recipients without threat of estate recovery. This has had the largest impact on treatment of primary residences, which, while exempt for

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Estate recovery

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eligibility purposes, previously required an ownership transfer to prevent estate recovery. Now, for instance, if the Medi-Cal recipient places the residence into a living trust it will pass outside of probate and avoid an estate recovery claim.

Other assets greatly affected by this change are retirement accounts of the Medi-Cal recipient, which under current Medi-Cal eligibility regulations remain exempt if the account is disbursing "periodic payments of interest and principal." While current beneficiary designations to avoid reversion to an owner's probate estate are critical, such accounts may now be left even to non-spouse beneficiaries without risk of an estate recovery claim.

Welfare and Institutions Code §14009.5's limit on estate recovery claims other than those "services required to be collected under federal law" references 42 USC §1396p(b)(1)(B), which states that for those age 55 and older "the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of nursing facility services, home and community-based services, and related hospital and prescription drug services," or more items or services at the discretion of the state. Thus, under California's new estate recovery rules, ordinary doctor visits and prescriptions—unless related to skilled nursing or home and community-based services—will not be subject to recovery.

California practitioners were surprised by the prohibition on recovery "from the estate of a deceased Medi-Cal member who is survived by a spouse or registered domestic partner," because such claims were common, as in Oregon, where the recipient's property transferred to a surviving spouse at death (though California never attempted to apply the Oregon spousal transfer rule set aside in *Nay v. Dept. of Human Services*.) However, given the ease of nonprobate transfers of property, whether or not to a spouse or registered domestic partner, it should be the rare instance where this prohibition is the sole basis for avoiding estate recovery.

Waiver of an estate recovery claim as a substantial hardship, "where the estate subject to recovery is a homestead of modest value," is another change to California's estate recovery procedures which expands traditional estate recovery hardship waivers. Welfare and Institutions Code §14009.5(f)(5) defines *homestead of modest value* to mean "a home whose fair market value is 50% or less of the average price of homes in the county where the homestead is located, as of the date of the decedent's death."

Finally, California is now making it simpler to gauge what exposure a Medi-Cal recipient might have to estate recovery, by permitting recipients or their representatives to submit, not more than annually, a DHCS form 4017, along with a $5.00 processing fee.

Estate recovery rules differ between Oregon and California like night and day, and whether Oregon will ever go the direction California did in 2017 remains to be seen. It is encouraging to see that both states have passed legislation protecting ABLE Account balances remaining at the death of the disabled beneficiary from estate recovery, but this brings up an important reminder, and some interesting planning ideas, for those practitioners who draft first-party special needs trusts:

Medicaid payback provisions in first-party special needs trusts are not impacted by relaxed estate recovery rules. The requirement enshrined in 42 USC §1396p(d)(4)(A), that the state must "receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual" by state Medicaid plans, means that practitioners must carefully consider alternatives to fully funding such trusts. If the beneficiary has sufficient capacity, one such strategy in California might be to purchase an exempt residence outside of the special needs trust, and to place that residence in a living trust to avoid exposure of its net value to estate recovery at the death of the beneficiary. ■

New tools help financial professionals prevent elder abuse

By Darlene Pasieczny, Attorney at Law

Darlene Pasieczny ("Pah-shetch-nee") is a fiduciary and securities litigation attorney at Samuels Yoelin Kantor LLP. She represents clients in Oregon and Washington in trust and estate disputes, elder financial abuse, and securities litigation. Darlene also represents investors nationally in FINRA arbitration with claims against financial advisors to recover losses caused by portfolio mismanagement, unsuitable investments, excessive trading, and other securities law violations.

It's not hard to imagine the scenarios: A financial advisor gets an unexpected call from an elderly long-time client, asking for an unusual withdrawal or transfer from a bank or brokerage account. A family member comes to the advisor's office with a power of attorney document and two-sentence doctor's note that the client has cognitive issues, and instructs the advisor to initiate withdrawals or transfers. Something just doesn't feel right. The request doesn't fit into the client's established financial plan, the explanation doesn't quite make sense, or something about the conversation makes the advisor concerned about the client's well-being. Fortunately, financial advisors now have new tools to address such situations.

Financial advisors are in a unique position to recognize potential financial elder abuse. The advisor's gut feeling about a suspicious request could be a critical first line of defense in preventing irreparable harm. Once money or securities are withdrawn or transferred out of an account, it can be extremely expensive and time-consuming to recover from the wrongdoer through civil litigation or law enforcement. It may be impossible to collect from the person who has already spent the funds, or transferred assets to an overseas account. Loss of retirement savings is an immediate threat to the health, safety, and financial independence of our elderly clients, friends, and family members.

But financial advisors are not mandatory reporters of suspected financial abuse under Oregon's Elderly Persons and Persons with Disabilities Abuse Prevention Act. ORS 124.050(9). In addition, a complex framework of state and federal laws and regulations, aimed at protecting the privacy of financial information and an individual's control over his or her assets, creates a tricky situation for professionals who try to stay in compliance, but worry about potential exploitation of their clients.

Recently enacted Oregon law and rules implemented by the Financial Industry Regulatory Authority (FINRA) now empower financial professionals in Oregon to take critical actions, including short temporary holds on suspicious disbursement requests, to allow time for investigation without costly court orders. Oregon's new law also enhances the state's ability to get involved, by now requiring certain financial professionals to report suspected financial exploitation.

This article explains the key parts of these amendments to the Oregon Securities Law relating to stockbrokers and investment advisors, ORS 59.480 – ORS 59.505, and FINRA Rules 2165 and 4512 relating to stockbrokers and brokerage firms.[1] It also briefly discusses amendments to the Oregon Bank Act relating to employees of certain banks, credit unions, and trust companies: ORS 708A.670–ORS 708A.680.

Financial exploitation of elders is a recognized national problem

The National Adult Protective Services Association reports that 90% of financial abusers are family members or trusted others, and abuse is vastly underreported —only an estimated one out of 44 cases.[2] Common forms of financial abuse by family members include misuse of a power of attorney or joint bank account, and threats to abandon the vulnerable person.

Elder investors and their retirement accounts are a particular target for bad actors. The North American Securities Administrators Association (NASAA), whose members are state securities regulators, has long focused on protecting elder investors from unscrupulous sellers of securities. In its 2018 Enforcement Report, NASAA identified sales of unregistered securities as a prominent scheme that targets elder investors.[3] The most often reported of these were promissory

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notes, real estate investment programs, affinity fraud (sales scams targeting a particular community or group), and Regulation D offerings (private placements exempt from SEC registration, and certain disclosure and reporting requirements). Common Regulation D offerings are hedge funds, LP interests, or LLC interests. Especially during a low-interest-rate market, professional fraudsters may target elder investors to withdraw their well-managed funds with the promise of higher returns in such "alternative" investments, which might actually be inappropriately risky, illiquid, or an outright scam.

NASAA began working in 2015 on a model act that would empower industry participants and help state regulators detect and prevent exploitation. Called the Model Act to Protect Vulnerable Adults from Financial Exploitation, NASAA members voted to adopt it in January 2016. Since then, 19 states including Oregon have enacted legislation or regulations based on NASAA's Model Act.[4]

Oregon introduced legislation based on the Model Act in 2017 through Senate Bill 95 to amend the Oregon Securities Law, and also introduced complementary legislation through House Bill 2622 to amend the Oregon Bank Act.

Oregon securities professionals: new mandatory and permissive conduct

New statutes ORS 59.480–59.505 (Financial Exploitation of Vulnerable Persons) became effective January 1, 2018. For purposes of these new statutes, the term "vulnerable person" has the same meaning as the definition in ORS 124.100(1)(e):

- An elderly person [age 65 years or older]
- A financially incapable person [as defined in ORS 125.005(3)]
- An incapacitated person [as defined in ORS 125.005(5)
- A person with a disability [as defined in ORS 124.100(1)(d)] who is susceptible to force, threat, duress, coercion, persuasion or physical or emotional injury because of the person's physical or mental impairment

While borrowing some language from the description of "financial abuse" under ORS 124.110, including "wrongful taking," new ORS 59.480(1)(a) specifically uses the term "financial exploitation" and defines it with some additional clarity:

- Wrongfully taking assets, funds or property belonging to or intended for the use of another person
- Alarming another person by conveying a threat to wrongfully take or appropriate money or property of the person, if she or he would reasonably believe that the threat conveyed would be carried out
- Misappropriating, misusing or transferring without authorization any money from any account held jointly or singly by another person
- Using the income or assets of another person for purposes other than the support and maintenance of the person without her or his consent

Mandatory. New ORS 59.485(1) provides that "qualified individuals" must report suspected financial abuse to Oregon's Department of Consumer and Business Services (DCBS) "as soon as practicable." For purposes of this mandatory reporting, "qualified individuals" means brokers and investment advisors who are not otherwise employed by a trust company, bank, or credit union, and those who serve in a supervisory, compliance, or legal capacity for a broker-dealer or investment advisor firm. ORS 59.485(1), (4). The standard that triggers such mandatory reporting is a "reasonable cause to believe that financial exploitation of a vulnerable person with whom the qualified individual comes into contact has occurred, has been attempted or is being attempted[.]" ORS 59.485(1). Reporting may be oral or in writing, and an online report can be filed through DCBS's website.[5]

Once DCBS receives a report, it must forward it immediately to the Department of Human Services (DHS). ORS 59.485(3). If it reasonably appears that a securities violation is occurring, then DCBS must promptly open an investigation. *Id*. If it reasonably appears that a crime has been committed or attempted, DCBS must notify law enforcement. Id. The key here is that the mandatory reporter does not need to try to figure out what other agencies should be contacted. Once the report is received by DCBS, the department takes it from there.

Permissive. Under the same triggering standard of "reasonable cause" a qualified individual may also notify "any third party who was previously designated by the vulnerable person to receive information from the qualified individual, or whom the qualified individual is otherwise permitted to notify under state or federal law or customer agreement." ORS 59.490(1). However, the qualified individual is prohibited from notifying a third party who is the suspected abuser. ORS 59.490(2).

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Mandatory. Specific to FINRA-licensed brokers and broker-dealer firms, newly amended FINRA Rule 4512 (Customer Account Information) now mandates taking reasonable efforts to obtain the name and contact information of at least one Trusted Contact Person (TCP), who is at least 18 years of age. The customer must be informed about the purpose of identifying a TCP, which includes allowing the broker or firm to contact the TCP about possible financial exploitation, information about the customer's account, or to inquire about the customer's health status or confirm contact information. If you recently opened a brokerage account or updated an existing account, you should see a section in your account information for naming a TCP.

Permissive. New ORS 59.495 allows a broker-dealer or investment advisor to *delay a disbursement* from the account of a vulnerable person, or an account on which the vulnerable person is a beneficiary, so long as there is a reasonable belief of potential financial exploitation and certain conditions are met: (1) within two days of the disbursement request, written notification of the delay and its reason is given to all parties authorized to transact business on the account (but not given to suspected abusers), as well as to DCBS and DHS; and (2) an internal review of the suspected financial exploitation is conducted and the results reported to DCBS and DHS. ORS 59.495(1)(b). The delay cannot be longer than the earlier of 15 business days or the date on which the internal review determines the disbursement will not result in financial exploitation. ORS 59.495(2). On request of DCBS, the delay can be extended, but not beyond the earlier of 25 business days after the date the delay began, or an order terminating the delay is entered by a court or DCBS. ORS 59.495(3). DCBS or the securities professional can still seek a court order to delay or enjoin disbursement, ORS 59.495(4), but the new law allows a valuable "pause" without the time and cost of going to court.

Permissive. New FINRA Rule 2165, effective February 5, 2018, also allows permissive delays in disbursements[6] of funds or securities from the account of a "specified adult," so long as (1) the broker or brokerage firm has a reasonable belief that financial exploitation has occurred or been attempted, or may or will occur or be attempted; (2) within two business days, notice of the delay is given to account holders and identified TCP (but not given to suspected abusers); and (3) an internal review is immediately initiated. A specified adult is age 65 or older, or age 18 or older and who the broker or firm believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. The temporary hold may not be longer than 15 business days, although it can be extended further or terminated by court order or state securities regulator. FINRA has explained that where a questionable disbursement involves less than all the assets in an account, the hold should not be a blanket "freeze" on the entire account. Rather, each disbursement should be examined separately, and disbursements that are not suspicious, e.g., regular bill payments, not delayed.[7]

Mandatory. FINRA-licensed firms must have and follow written supervisory procedures reasonably designed to achieve compliance with new Rule 2165, must develop and document training about the new rule, and must retain records regarding disbursement delays in compliance with existing record retention rules.

Pursuant to new ORS 59.500, so long as they act "in good faith, with reasonable cause, and exercising reasonable care," qualified individuals are not liable under Oregon law for disclosing information under the new statutes, in failing to notify a vulnerable person of information disclosures to agencies or previously identified third parties, or in delaying a disbursement according to the new statute. However, any person who "violates or who procures, aids or abets the violation of" the new statutes is subject to civil penalties up to $1,000.00 per violation of the mandatory reporting under ORS 59.485, and up to $20,000.00 per violation of the permissive delay of disbursements requirements or reporting to identified third parties. ORS 59.995.

While the civil penalties are capped dollar amounts, qualified individuals not acting "in good faith" may be found liable for significantly more damages under other civil claims. For example, common law negligence, breach of fiduciary duty, civil claims under the Oregon Securities Law, or even the elder financial abuse civil statute, with its remedy of treble damages and attorney fees, for "permitting" another person to engage in financial abuse. ORS 124.100(2).[8]

Oregon trust companies and financial institutions: new permissive conduct

Brokers and investment advisors employed by trust companies and "financial institutions" as defined by ORS 706.008 (e.g., certain banks and credit unions) are expressly exempt from the mandatory reporting requirement under ORS 59.485. However, ORS 708A.670–ORS 708A.680, effective October 1, 2017, permits trust companies and financial institutions to

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New tools for financial professionals

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place temporary holds on certain actions where the institution "reasonably believes" there may be potential financial exploitation of a "vulnerable person" (as defined by ORS 124.100(1)(e). The same applies if the institution has received information from DHS, law enforcement, or a district attorney's office that causes it to have such reasonable belief.

Pursuant to ORS 708A.675(1) (emphasis added), the institution may:

(a) Refuse a transaction with or involving the vulnerable person;

(b) Refuse to permit the withdrawal or disbursement of funds contained in a vulnerable person's account;

(c) **Prevent a change in ownership of a vulnerable person's account**;

(d) Prevent a transfer of funds from a vulnerable person's account to an account owned wholly or partially by another person; or

(e) **Refuse to comply with instructions given to the financial institution by an agent or attorney-in-fact under a power of attorney signed or purported to have been signed by the vulnerable person**.

Subsections (c) and (e) of the statute are stronger protections than the limitation on securities professionals to only delay disbursements. Note that a "vulnerable person's account" is defined in the Oregon Bank Act as an account that is owned by the vulnerable person, whether individually or with one or more other persons, or where a vulnerable person is a beneficiary of the account, "including of a formal or informal trust account, a payable on death account, a conservatorship account or guardianship account." ORS 708A.670(5). The Oregon Securities Law permissive delay on disbursements is not so expressly clear on what an account "on which a vulnerable person is a beneficiary" means. See ORS 59.495(1).

In order to do any of the actions permitted under ORS 708A.675(1), the institution must make a reasonable effort to notify (orally or in writing) all parties authorized on the account about the action, unless the institution (in its discretion) determines that such notice could compromise "an investigation of or response to the suspected financial exploitation." ORS 708A.675(3). The authority of the institution to do any of the permitted actions expires on the earlier of 15 business days, internal determination that the transaction or act will not result in financial exploitation, or upon court order. ORS 708A.675(4). With "reasonable belief" of potential financial exploitation continuing, the institution may extend the duration of authority, apparently indefinitely, unless otherwise directed by court order. ORS 708A.675(5).

If the actions authorized by ORS 708A.675(1) and (5) were done in "good faith," the institution and its employees are expressly immune from "criminal, civil and administrative liability." ORS 708A.675(6).

Financial professionals truly are in important positions to help protect Oregon's vulnerable adults from financial abuse. While some may initially bristle at the idea of further regulation, these changes provide affirmative tools that could help save a client from a devastating financial loss. ■

Endnotes

1. FINRA Rules may be accessed at: https://www.finra.org/
2. http://www.napsa-now.org/policy-advocacy/exploitation/
3. 2018 NASAA Enforcement Report available at: http://www.nasaa.org/46133/nasaa-releases-annual-enforcement-report-4/
4. For a full list of states that have enacted legislation or regulations based on NASAA's Model Act, see http://serveourseniors.org/about/policy-makers/nasaa-model-act/update/ Additionally, some states enacted statutes prior to the Model Act that incorporate some of its elements. See, e.g., Washington State, RCW 74.34.215 (Financial Exploitation of Vulnerable Adults) (allowing permissive temporary holds on disbursal of funds).
5. The DCBS reporting page is accessible at https://dfr.oregon.gov/business/licensing/financial/securities/Pages/suspected-financial-exploitation.aspx
6. FINRA is clear that permissive delays are limited to disbursements of funds or securities from an account. New Rule 2165 does not apply to an order to sell or buy securities held within the account, so long as the funds or securities are kept within the account.
7. http://www.finra.org/industry/frequently-asked-questions-regarding-finra-rules-relating-financial-exploitation-seniors
8. Note that ORS 124.115(1)(d) specifically excludes broker-dealers licensed under ORS 59.005 to 59.505 from actions brought under ORS 124.100, unless the person is the financial abuser and is convicted of a crime by reason of the conduct.

October 5, 2018

Photos from the Elder Law Section CLE program: *Preparing Clients for the Future*

Melanie Maurice and Stephanie Carter provided an update on advance directives and health care.

Darin Dooley presented an overview of government benefit programs.

Allison Martin Rhodes and Peter Jarvis discussed how to predict and avoid conflicts of interest.

Julie Nimnicht described events that affect eligibility for benefits.

Monica Pacheco provided information on ABLE accounts

Mark Johnson Roberts detailed the requirements for reporting elder and child abuse.

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Resources for elder law attorneys

Events

Medicaid Applications: A Step-by-Step Process that Works
January 23, 2019/10:00-11:30 a.m. PT
Eldercounsel Webinar
https://law.eldercounsel.com/medicaid-applications

Lawyer Wellness Summit
January 25 2019/9:00 a.m. to Noon
OSB Center, Tigard
https://www.osbar.org/resources/OSBWellnessSummit.html

How to Fix a Broken Trust: Decanting, Reformation, and Other Tools
WebCredenza Audio Seminar
February 5, 2019/10:00–11 a.m. PT
https://or.webcredenza.com/program?id=93547

31st Annual Elder Law Institute
Practising Law Institute Seminar
March 20, 2019
New York, NY, and Webcast
https://www.pli.edu/Content/Seminar/31st_Annual_Elder_Law_Institute/_/N-4kZ1z0zgl0?Ns=sort_date%7c0&ID=348185

Elder Law Section unCLE Program
May 3, 2019
Eugene

NAELA Annual Conference
May 9 to 11, 2019
Fort Worth, TX
https://www.naela.org ■

Websites

Elder Law Section website
https://elderlaw.osbar.org
The website has links to information about federal government programs and past issues of the Section's quarterly newsletters.

National Academy of Elder Law Attorneys (NAELA)
www.naela.org
A professional association of attorneys dedicated to improving the quality of legal services provided to elders and people with special needs

National Center on Law and Elder Rights
https://ncler.acl.gov
Trainings and technical assistance on a broad range of legal issues that affect older adults

OregonLawHelp
www.oregonlawhelp.org
Helpful information for low-income Oregonians and their lawyers

Aging and Disability Resource Connection of Oregon
www.ADRCofOregon.org
Includes downloadable *Family Caregiver Handbook*, available in English and Spanish versions

Administration for Community Living
https://www.acl.gov
Information about resources that connect older persons, caregivers, and professionals to federal, national, and local programs

Big Charts
http://bigcharts.marketwatch.com
Provides the price of a stock on a specific date

American Bar Association Senior Lawyers Division
https://www.americanbar.org/groups/senior_lawyers/

National Elder Law Foundation
http://www.nelf.org
Certifying program for elder law and special-needs attorneys

National Center on Elder Abuse
https://ncea.acl.gov
Guidance for programs that serve older adults. Practical tools and technical assistance to detect, intervene, and prevent abuse

Elder Law Marketing 101
https://blog.eldercounsel.com/elder-law-practice-marketing-101
This blog from eldercounsel.com suggests ways to attract and retain elder law clients.

Multnomah County Senior Law Project
https://oregonlawhelp.org/organization/senior-law-project
Free half hour legal consultations with attorneys at Multnomah County Senior Centers. ■

Publications

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

Guardianship and the Right to Visitation, Communication, and Interaction
Legislative fact sheet from the American Bar Association Commission on Law and Aging
https://www.americanbar.org/content/dam/aba/administrative/law_aging/2018-05-24-visitation-legislative-factsheet.authcheckdam.pdf ■

Important elder law numbers

as of
January 1, 2019

Supplemental Security Income (SSI) Benefit Standards	Eligible individual ..... $771/month Eligible couple..... $1,157/month
Medicaid (Oregon)	Asset limit for Medicaid recipient ..... $2,000 Long term care income cap..... $2,313/month Community spouse minimum resource standard ..... $25,284 Community spouse maximum resource standard . ..... $126,420 Community spouse minimum and maximum monthly allowance standards..... $2,057.50/month; $3,160.50/month Excess shelter allowance ..... Amount above $617.25/month SNAP (food stamp) utility allowance used to figure excess shelter allowance ..... $436/month Personal needs allowance in nursing home ..... $63.10/month Personal needs allowance in community-based care..... $172/month Room & board rate for community-based care facilities..... $599/month OSIP maintenance standard for person receiving in-home services ..... $1,271 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2018..... $8,784/month
Medicare	Part B premium ..... $135.50/month* Part D premium ..... Varies according to plan chosen Part B deductible ..... $185/year Part A hospital deductible per spell of illness..... $1,640 Skilled nursing facility co-insurance for days 21–100 ..... $170.50/day * Premiums are higher if annual income is more than $85,000 (single filer) or $170,000 (married couple filing jointly).

Oregon State Bar

Elder Law Section

Save the date!

The Section's annual unCLE program will be held **Friday, May 3** in Eugene.

This unique program provides elder law practitioners the opportunity to get together for a day-long session of brainstorming, networking, and the exchange of ideas on many topics.

Newsletter Committee

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