

## 2014 NAPSA CONFERENCE

# LEGAL INCAPACITY: Working With a Questionably Competent Client

Presented by  
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With the aging of America's population and the significant transfer of wealth that will occur in the near future, professionals working with seniors will be required to acquire a completely different set of skills to deal with the elderly client on a personal level. The demographics suggest that you will more frequently face the questions of client capacity and possible elder abuse.

## I. THE AGING DEMOGRAPHIC

**The Census Bureau refers to the “human tidal wave” that will “change the face of America.”**

**Every day, for the next 19 years, more than 10,000 Baby Boomers will reach age 65!**

- **Population over 62 years:**  
There are currently 44.2 million Americans in the 62-84 years age group. This group is expected to increase to 47.3 million in 2020, jumping up to 61.8 million in 2030 and to 65.8 million by 2050, **an increase of 113%**.
- **Population over 85 years:**  
Who the Census Bureau refers to as the “**oldest old**” is projected to be the fastest growing part of the elderly population into the next century. There are currently 6.1 million Americans over 85 years. This group is expected to increase to 9.6 million by 2030, 15.4 million by 2040 and 20.8 million by 2050, **an increase of 288%**.  
[www.census.gov/population/www.pop-profile/elderpop.html](http://www.census.gov/population/www.pop-profile/elderpop.html).

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- **Life Expectancy**

- The Actuarial Life Table (Period Life Table 2004) published by the Social Security Administration reports that out of 100,000 people born in the U.S:
  - 82,947 will live to reach age 62 years (83%)
  - 50,000 will live to reach age 78.5 (50%)
  - 29,492 will live to reach 85 years (29%)

<http://www.ssa.gov/OACT/STATS/table4c6.html>

**Transfer of Wealth** – Many economists believe that America is sitting on the edge of what is expected to be the “**greatest transfer of wealth in our history.**” Today’s retirees constitute one of the wealthiest segments of the U.S. population with more personal wealth than any previous generation. Economists believe that bequests of this wealth will significantly boost the resources of the 76 million Baby Boomers (1946-1961) (currently ages 47-62). That means **by the year 2052, an estimated \$40.6 trillion will change hands** as Baby Boomers and their parents pass on their accumulated assets to their heirs. <http://www.insurancejournal.com/magazines/west/2004/02/23/features/37126.htm>

- **Prevalence of Dementia** - The National Institute on Aging reports finds that the “**prevalence of cognitive impairment is significant**” in older Americans, especially with advancing age. Symptoms of memory loss, language disturbance, decline in judgment and reasoning, and personality change increase with age. A national study has determined that **38 percent** (up to 45% in some racial groups) of **people age 85 and older** had **some degree of cognitive impairment** short of dementia.

## I. THE QUESTIONABLY COMPETENT CLIENT

### A. Capacity is a Threshold Decision

*“Whenever a professional comes in contact with a client regarding a transaction – a determination of capacity is being made.”* Fitzwater Meyer Hollis & Marmion, LLP. *Representing Your Client Through Diminishing Mental Capacity*, OSB CLE Basic Estate Planning and Administration, June 25, 2010.

A client's legal capacity or competency to perform a particular act is a threshold question that must be one of the professional's first considerations. The professional should begin with the assumption that the client is competent. *Cloud v. U.S. Bank*, 280 Or 83, 90 570 P2d 350 (1977). That is to say a person is presumed to possess legal capacity unless it is shown that the person's capacity is compromised.

Interactions with your client that raise concerns about capacity generally seem self evident under an ‘I know it when I see it’ test. However, the professional should key into specific areas of cognitive status and resulting conduct in order to address specific determinations of levels of capacity.

## **B. Oregon Notary Public Guide**

The very first paragraph of the Oregon Notary Public Guide reads:

“The main function of the notary is to witness a legal proceeding so that the courts and other interested parties can be certain **that the person signing a document knows what is being signed, is able to understand the action taken, and is in fact the person whose signature is on the document.**” Chapter 1, page 4. Emphasis added.

## **C. Legal Standards of Capacity**

Legal capacity is the determination that an individual possesses a certain cognitive ability to complete a transaction. A person’s 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.

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 incompetence, it is possible for a person to have “lucid intervals” during which he or she has the requisite capacity to enter into a contract or make a disposition of property. *Uribe v. Olson*, 42 Or App 647, 651 (1979); *Gentry v. Briggs*, 32 Or App 45, 50 (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**

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;
- 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.  
*Kastner v. Husband*, 231 Or 133, 135-36 (1962).

Mental capacity 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).

## 2. 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. McCreynolds*, 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. McCreynolds*, 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, arguably 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). *In The Matter Of Grimmett*, 193 Or. App. 427, 89 P.3d 1238 (2004) (conservatorship). In both Conservatorships and Guardianships the rights and the decision-making abilities of the protected person are substantially reduced. The incapacity must be shown by clear and convincing evidence. *Id.*; *ORS 125.305*; *ORS 125.400*;

#### **D. Are They Really Incapacitated?**

A person does not necessarily lack capacity just because he or she is making bad decisions. We all have the right to make bad decisions. One U.S. Supreme Court Justice called it the “*right to folly*.” The legal issue, therefore, is not whether a person has made the wrong decision, but the capacity of the person making the decision.

For example, bouncing a few checks is not necessarily evidence of incapacity. On the other hand, overdrafts for the past few months, together with an increased history of unpaid bills, misplaced funds, unexplained gifts, a susceptibility to influence, and related problems may be evidence of an “*inability to manage financial resources*.”

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 incompetence, it is possible for a person to have “*lucid intervals*” during which he or she has the required capacity to enter into a contract or sign a Will or Trust.

Unfortunately, many people believe that a medical diagnosis of dementia (such as Alzheimer's Disease) is the same thing as a *legal* finding of incapacity. This is not true. Until a court legally determines that the individual is incapacitated, that person retains the right to make his or her own decisions, including the right to refuse assistance, placement, and medical treatment.

#### **E. The Professional's Role in Assessing Capacity**

The professional can take steps to maximize the chances of finding the requisite capacity of elderly or infirm clients. One step is to use a functional approach to determine capacity. In this approach, the professional assesses capacity by observing the client's decision-making process as it relates to the substance of the act to be taken. This approach contrasts with the conventional objective tests of

capacity that are unrelated to the act. One commentator identifies six factors that can be applied in using the functional approach:

1. The client's ability to articulate reasoning behind the decision;
2. The variability of the client's state of mind;
3. The client's ability to understand the consequences of the decision;
4. The irreversibility of the decision;
5. The substantive fairness of the transaction;
6. Consistency of the act or transaction with the client's lifetime commitments.

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

1. Meet privately with the client, 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 client's best time of day.
4. Encourage questions.
5. Reassure the client that one purpose of the meeting is for the professional and the client to become acquainted. Remind the client that the client's decisions, and not those of a family member, will control the outcome of the meeting.
6. Use indirect questions to assess capacity. Asking questions such as the identity of the President of the United States can be intimidating and put the client 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 client.
7. Take verbatim notes.
8. When preparing written materials for elderly clients, the professional should:
  - 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. In a contract or other document, use the names of the parties. Do not use legal role names such as "trustee" or "settlor" to identify parties;
  - e. Avoid 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.

Gorn, *A Guide to Representing Older Clients*, cited in *1 Serving Elderly Clients* 5 (LRP Publications 1995).

## **F. Cognitive Assessment**

Based on the interactions with the client, a professional should be able to come to some form of assessment of the cognitive abilities of their client. Most individuals are not generally qualified to attempt to undertake administering even simplified cognitive tests to their clients. The professional might consider consulting with and referring a client to a medical professional in regard to further evaluate a client's cognitive functioning. Once the professional 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.

## **III. DEALING WITH INCAPACITY – THE LEGAL TOOLS**

The legal tools available to deal with incapacity can be simply divided as “planning tools” and “crisis tools.”

Planning tools are established by a client when he or she is competent and capable of appointing a **surrogate** or **substitute decision-maker** to assist the client when, and if, the time comes. Having incapacity planning tools in place often saves both time and significant expense – truly the “*ounce of prevention.*”

Crisis tools are those legal methods available to make decisions for a person how has become incapacitated and, likely, has no planning tools in place. Crisis tools, most often, involve family members hiring attorneys and a Court appointing a substitute decision-maker. As a result, these tools are complex, expensive and take control away from the person – “*the pound of cure.*”

### **A. Legal Tools - Health Care Decisions**

#### **1. The Oregon Advance Directive**

If a person becomes sick and unable to make health care decisions, someone else may be required to make those decisions. If he or she does not have the appropriate legal tool in place, it may be necessary for a court to appoint another person (a guardian) to make health care and medical decisions.

The Oregon Advance Directive form allows a person to choose someone to make health care and medical decisions when he or she is unable to make those decisions. A spouse, partner, family member, or friend (called "health care representative") can be designated to act legally to make health care decisions. This document has no effect until the person signing the Advance Directive is incapable of making health care decisions.

The health care representative will be authorized to make most necessary health care decisions. This can include the authority to withdraw life support procedures, such as respirators or artificial nutrition and hydration. The Advance Directive is a statement to the family and the doctor regarding life support. This is an opportunity to direct that if death is imminent because of a terminal disease or injury, a person does or does not want artificial life support procedures used to postpone the natural moment of death.

**Copies of the Oregon Advance Directive form are available for free download on our website at [http://www.fitzwatermeyer.com/clientresources/4\\_3.pdf](http://www.fitzwatermeyer.com/clientresources/4_3.pdf).**

## **2. P.O.L.S.T.**

The Physicians Order For Life-Sustaining Treatment is an order signed by the doctor at the direction of the ill individual, or his or her health care representative or guardian. The POLST is a tool to *implement* the ill individual's desires regarding life-sustaining measures.

## **3. Guardianship**

A guardian is a person named by the court who has the authority and duty to make personal and health care decisions for a minor (under 18 years) or adult incapacitated person (the "protected person"). A guardian may determine where the protected person will reside and what medical care he or she will receive. The court may appoint a guardian either with unlimited authority, or only for specific actions.

A guardian generally does not make financial decisions. The court may appoint a conservator to manage the finances of the protected person.

**Common Terms Used In A Guardianship Proceeding.** Oregon law divides the functions of a court-appointed surrogate decision-maker into guardianship of a minor or protected person and conservatorship to manage a minor's or protected person's estate. However, it is common for a person to need both a guardian and a conservator.

**Guardian:** The person appointed by the court to make personal, medical, health care, and placement decisions for a minor (under 18 years) or an adult incapacitated person.

**Conservator:** (see below) The person appointed by the court to manage the finances of a person who is unable to do so for reasons such as minority, mental illness, physical disability, or chronic intoxication.

**Fiduciary:** A person appointed by the court to act as a guardian, conservator, temporary guardian, temporary conservator, or a combination or limitation of each.

**Professional Fiduciary:** A person paid to act as a fiduciary for three or more minors or protected persons at a time, who are not related to the fiduciary.

**Respondent:** A person for whom a guardianship and/or conservatorship is proposed.

**Protected Person:** A person (formerly respondent) for whom a guardian and/or conservator has been appointed.

**Court Visitor:** A neutral, trained individual who is assigned by the court to interview the people involved in the guardianship proceeding and report back to the court.

**How Is A Guardian Appointed?** The petitioner, usually with the assistance of an attorney, begins the guardianship appointment process by filing a petition with the court. The petition must contain specific facts supporting allegations of incapacity.

A copy of the petition must be personally served on the respondent, together with information about the right to object to the petition, the right to request a hearing, and the right to retain an attorney. The petitioner must also notify the respondent's spouse, parents, adult children, cohabitant, trustee, health care representative, and attorney for the respondent, if any.

If anyone files an objection to the petition, the judge will hold a hearing. At the hearing, the judge will decide whether a legal basis exists for appointing a guardian, and if so, who will serve as guardian. Few objections are actually filed.

If no one files an objection, 15 days after service, the petitioner's attorney can submit an order for the judge to sign, which order appoints a guardian for the respondent (protected person).

**What If It Is An Emergency?** Oregon law allows the appointment of a temporary guardian in an emergency situation, which is defined as "an immediate and serious danger to life or health or danger to the estate." It requires "clear and convincing" evidence of that emergency, and two days' advance notice of application to the court, except where the emergency necessitates an immediate appointment. The duration of a temporary guardianship is 30 days, with a possible 30-day extension. During this 30-day temporary appointment period, the guardian can petition the court for permanent appointment.

## **B. Legal Tools - Financial Decisions**

### **1. Power Of Attorney**

A “Power of Attorney” usually refers to a Durable Power of Attorney (for Finances.) This is a legal document in which you delegate to another (your “agent” or “attorney-in-fact”) the authority to deal with your finances and assets. Usually a Power of Attorney becomes effective when you sign it, although you may indicate that it is not to be used unless you ask your agent to use it, or unless you become incapacitated.

The Power of Attorney document describes the powers you are giving to your agent, and your agent does not have any authority to act on your behalf outside the scope of such powers. Sometimes a Power of Attorney only allows the agent to deal with a specific matter, such as the sale of a particular piece of real estate. This is known as a “Limited Power of Attorney.” In contrast, a “General Power of Attorney” gives your agent very broad authority to deal with your assets and finances.

Most standard forms of General Powers of Attorney do not include optional provisions, such as the right to make gifts, which in certain appropriate situations might be very useful. For instance, if spouses gave each other a Power of Attorney that included provisions allowing assets to be transferred into just one of the spouse’s names, and one spouse becomes ill and needs Medicaid to assist with his or her long-term care expenses, the healthier spouse could use the Power of Attorney to transfer assets into the healthier spouse’s name alone. This would help to preserve assets for the healthy spouse, while allowing the ill spouse to more easily plan for Medicaid. Or, if an individual has a taxable estate and has been making annual gifts in order to reduce the potential for estate taxes upon his or her death, the individual’s agent could continue to make such annual gifts on his or her behalf if such gifting power were specifically granted in the Power of Attorney. In these examples, having appropriate language in your Power of Attorney could potentially save you thousands of dollars. We can help you decide which optional provisions should be included in your Power of Attorney.

In Oregon, a Power of Attorney for Finances is “durable” unless specifically stated otherwise in the document. This means that the Power of Attorney remains valid even if you become incompetent. However, a Power of Attorney is only valid during your lifetime. When you die, the Power of Attorney dies with you.

### **2. Bank - Power Of Attorney**

Most local banks allow your client to appoint an attorney-in-fact for a bank account or group of accounts at that bank or branch. Contact the bank to obtain their forms for this purpose.

### **3. Bank - Joint Accounts**

A bank officer may recommend that your client put an account in joint names or ownership with a family member or friend. This will allow the joint owner to have access to the account should your client become incapacitated.

Joint ownership also makes the account available to the joint owner and his/her creditors. Upon your client's death, the account becomes the sole property of the surviving joint owner (despite the terms of a Will or Trust).

### **4. Representative Payee**

When a person becomes unable to manage his/her resources, several public programs (such as Social Security) provide for a **representative payee** or **fiduciary** to receive benefits on behalf of the beneficiary.

### **5. Revocable Living Trust**

A Revocable Living Trust is an estate planning document that allows your assets to be managed and distributed in the manner you desire, both during your lifetime and upon death. It is referred to as a "living" trust because it is established during lifetime and, in most cases, goes into effect immediately. It is a "revocable" trust because you are free to revoke or amend the trust at any time as your circumstances change.

The Revocable Living Trust is an excellent way to plan for decision-making if you become incapacitated. The trust appoints a decision-maker (successor trustee) to step in when, and if, you are unable to manage your own financial affairs. The trust document can incorporate specific instructions about how funds will be used if you become incapacitated.

**How Does A Revocable Living Trust Work While I Am Able To Manage My Finances?** A Revocable Living Trust is created during your lifetime, and your assets are placed in the Trust while you are alive. You can name yourself as trustee of the Trust. This means that you can manage your own income and assets much the same as you have always done, and file individual tax returns like before. You can revoke or amend the Trust at any time, and the terms of the Trust are set entirely by you.

If you want help in managing your estate now, even though you still have mental capacity, the trust document allows you to name a trustee or co-trustee to handle the Trust. Further, you have an opportunity to appoint someone to serve as your trustee or co-trustee and then see if he or she handles things responsibly and according to your wishes. If you are dissatisfied with the way your trustee or co-trustee handles your Trust, you can take over as trustee yourself, name a new trustee, modify the powers you have given to the trustee, or revoke the Trust altogether.

**What Happens If I Become Incapacitated?** In the Revocable Living Trust, you can specify under what circumstances a successor trustee takes over management of the Trust. This is usually when the person who created the Trust becomes incapacitated. You can spell out in the Trust how incapacity must be established. Typically, a determination of incapacity requires one or two letters from a physician. Once incapacity is established, the successor trustee, who has been named by you in the Trust, can take over management of the assets.

A Revocable Living Trust avoids the need for a court order establishing a conservatorship if at some time in the future you become unable to manage your own financial affairs, either temporarily or permanently. While naming an agent in a Power of Attorney for Finances can often accomplish this, Powers of Attorney are not as reliably recognized by financial institutions.

**How Does The Revocable Living Trust Work At My Death?** Your successor trustee will have the authority to take over management of the Trust and follow your instructions as spelled out in the Trust. Assets that are owned by the Trust will avoid probate entirely, which, in turn, can avoid significant costs and delays at your death. People with real property in more than one state can avoid multiple probates with the use of a Trust.

Another advantage of a Trust is that your financial affairs are kept completely private. A Trust eliminates the need for a court proceeding, and other than tax returns, there is no public record.

**Who Should Be My Successor Trustee?** Your successor trustee should be someone who is trustworthy, responsible with investments, good with paperwork, and preferably a good communicator. This can be an adult child, other relative, friend, or professional fiduciary.

**What Are The Disadvantages Of A Revocable Living Trust?** A Revocable Living Trust is not necessary in every case. It typically costs \$1000 to \$2,000 more for a Trust package than a comparable Will package. It may not be necessary to incur this additional cost for people who are younger, healthy, and do not have a large estate. However, some people in these circumstances still choose a Trust because they want to make things easier for their families in the event of an untimely death.

There is more paperwork involved in finalizing a Revocable Living Trust than a Will because title to most of the assets is transferred into the Trust. Some people find this cumbersome and confusing.

In short, a Revocable Living Trust, while often very helpful and cost-effective, is not always necessary. An experienced attorney can help you decide if it meets your individual needs.

## **6. CONSERVATORSHIP**

A conservator is a person appointed by the court with the authority and duty to manage the financial affairs of a person needing protection, such as a minor (under 18 years) or an incapacitated adult (the “protected person”).

A conservator may be appointed for an adult if a judge determines that the individual lacks the capacity to manage his/her financial resources. The conservator can be an individual (i.e. family member or trusted friend), bank, trust company, or professional fiduciary. The conservator is empowered to take possession of the protected person's assets and income, and provides for payment of the protected person's expenses.

The conservator becomes the sole financial decision-maker for the protected person. The protected person loses all control of his or her property and assets, except for a few limited powers in certain situations. Sometimes a protected person may be competent to make a Will, or change beneficiaries of life insurance and annuity policies. The conservator may also give the protected person access to a limited amount of funds for personal use.

**When Is A Conservatorship Required?** A conservator is necessary when an individual lacks the capacity to manage his or her financial resources. Oregon law defines "financially incapable" in ORS 125.005 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."*

The court evaluates information from doctors, psychologists, public social workers, private case managers, family, and friends to assist in determining whether the person is "financially incapable."

**How Is A Conservator Appointed?** The procedure for the establishment of a conservatorship is similar to that of guardianship. In fact, the two powers are often requested at the same time. Unlike guardianship, the appointment of a conservator does not require an investigation by a court visitor. The appointment of a conservator does, however, require that the conservator be bonded.

**IMPORTANT NOTE:** The authority of a "guardian" (where a conservator has not been appointed) is primarily for health and personal decisions. Some limited financial powers exist. However, generally speaking, a guardian cannot handle financial matters in excess of \$10,000. Therefore, a guardian, **who has not been appointed as a conservator**, does not have the authority to handle real property transactions for the protected person.

The petitioner (typically the proposed conservator), usually with the assistance of an attorney, begins the conservatorship appointment process by filing a petition with the court. The petition must contain specific facts supporting allegations of incapacity.

A copy of the petition must be personally served on the respondent, along with information about the right to object, the right to request a hearing, and the right to retain an attorney. The petitioner must also notify the respondent's spouse, parents, adult children, cohabitant, trustee, health care representative, or attorney of the respondent, if any.

If anyone files an objection to the petition, the judge will hold a hearing. At the hearing, the judge will decide whether a legal basis exists for appointing a conservator, and if so, who the most appropriate person is to serve as conservator. Few objections are actually filed.

If no one files an objection, 15 days after service, the petitioner's attorney can submit an order for the judge to sign, which order appoints a conservator for the respondent (minor or protected person).

**What If It Is An Emergency?** Normally, the procedure for the appointment of a permanent conservator takes approximately 20-30 days to complete. A temporary or emergency conservator can be appointed immediately, within two to three days, if the court determines that an emergency exists and that the assets and property of the protected person are at risk. This procedure is often used to stop and prevent financial abuse to the protected person's estate.

Oregon law allows the appointment of a temporary conservator in an emergency situation. Examples of situations requiring a temporary conservator include irreparable financial abuse, or where emergency access to funds is necessary to pay for medical treatment. Appointment of a temporary conservator can also be used to freeze or limit access to bank accounts and investments while an investigation into elder abuse is being conducted. Temporary conservatorships are less common than temporary guardianships, but the process is similar.

## **IV. WORKING WITH FIDUCIARIES**

Litigation against fiduciaries, including agents under power of attorney, trustees of Revocable or Irrevocable Trusts and even court appointed Conservators is on the rise. As discussed above, the aging of our society and the large shift of wealth that will occur in the next 30 years is increasing both the number of fiduciaries acting on behalf of incapacitated adults and the temptation to breach those duties when large sums of money are involved.

### **A. The Fiduciaries**

#### **1. Agent under Powers of Attorney**

A power of attorney is a written instrument in which one person, as "principal", appoints another to serve as his or her agent or "attorney-in-fact." A power of attorney confers upon the agent the authority to act in place of the principal for the purposes stated in the instrument.

The fiduciary duties of an agent under power of attorney are generally governed by (and in the order of) (a) the document, (b) ORS 127.002-127.045 and (c) applicable case law.

## **2. Trustee of Revocable Living Trust**

The Revocable Living Trust is an excellent way to provide for decision-making if the settlor becomes incapacitated. The trust appoints a decision-maker (successor trustee) upon the incapacity of the settlor. The trust document can incorporate specific instructions about how funds will be used if your client becomes incapacitated.

The fiduciary duties of a trustee of a Trust are generally governed by (and in the order of) (a) the document, (b) the Uniform Trust Code, ORS Chapter 130 and (c) applicable case law.

## **3. Court-Appointed Conservator**

A conservator may be appointed by the court if, based upon medical testimony, it is determined that the individual lacks the capacity to manage his/her financial resources. The conservator can be an individual, bank, trust company or professional fiduciary. The conservator is empowered to take possession of the protected person's assets and income, and provides for payment of the person's expenses. The conservator has all the powers that the person would individually possess to manage financial affairs, with or without prior court approval.

## **B. The Duties And Liabilities Of a Fiduciary**

A fiduciary has accepted the duty and liability to act in the best interests of the principal. Whether an agent, a trustee or a conservator, fiduciaries are bound by similar legal obligations. Breach of one or more of these legal duties are actionable, often exposing the fiduciary to personal liability for harm done.

A fiduciary must:

1. Preserve and protect the assets of the principal and entity.
2. Keep scrupulous records of all income and expenses. Be prepared to provide a full accounting as required by law.
3. Keep funds "titled" in the name of the principal or entity. Keep all funds entirely separate from fiduciary's own personal funds.
4. Use the property for the benefit of the principal, beneficiary or protected person only.
5. No gifts, loans or transfer to a third-party with specific, written authority in the document or by the court.
6. Preserve and protect the "**Estate Plan**" of the principal, settlor or protected person.

### **Practice Tip: Powers of Attorneys**

When faced with an agent under a power of attorney who is requesting transfer of property to himself or herself without adequate consideration (or a property sale that benefits the agent), the careful professional may wish to inquire further and rule out the possibility of elder abuse. Some of the following questions may be appropriate:

1. Was the power of attorney prepared by an attorney (follow up with the attorney to verify that the principal was independently represented and competent)?
2. What is the current mental state of the principal (in other words, is this a very recently signed document by someone with questionable mental capacity)?
3. If the POA provides a gifting power is to a spouse, how long have they been married? Is this a second marriage? Do they have children from previous marriages?

## **V. UNDUE INFLUENCE UNDER OREGON LAW**

Undue influence is one of the most commonly raised concepts in litigation regarding challenges to estate planning documents and financial abuse of a person. 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.

Reviewing allegations of financial abuse of a vulnerable person in Oregon is typically 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 of 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 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.”

*Smith v. Ellison*, 171 Or. App. 289, 293, 15 P.3d 67 (2000)(internal citations and quotation marks omitted).

#### **A. 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.

#### **B. 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:<sup>2</sup> (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

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<sup>2</sup> **A Note on Isolation:** Isolation of a vulnerable person 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 vulnerable person's personal circumstances or brought upon them by actions of an abuser. Either way a person with limited contacts with others is a persistent factor in the financial abuse of vulnerable persons.

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 notion of undue influence. On the other 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 is not 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. This factor also allows a judge to determine what is "natural" and "just."

**7. The Donor's Susceptibility to Influence:** A donor's advanced age, declining physical and cognitive status, coupled with 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.

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.

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## **WESLEY D. FITZWATER**

Wes Fitzwater is a partner in the law firm of Fitzwater Meyer Hollis & Marmion, LLP, an 11-attorney firm emphasizing estate planning and elder law. Wes focuses upon the crisis issues faced by the elderly and their families, including incapacity, guardianship and conservatorship, long-term care, and end-of-life concerns.

Wes is a frequent speaker to senior groups as well as Oregon attorneys. He is an author and instructor on topics including long-term care, incapacity, guardianships and conservatorships, legal ethics and professionalism. He is the co-editor of the Oregon State Bar publication entitled *The Elder Law Handbook*, a reference book for Oregon attorneys.

**Past Chair:** Oregon State Bar Elder Law Section

**Past Chair:** Oregon State Bar Estate Planning and Administration Section

**Member:** Clackamas County Adult Abuse Response and Prevention Team

no we did get it

### **Awards**

In 1988, Wes received the **Firm Award** from the **Multnomah County Senior Law Project** for "outstanding demonstration of leadership and commitment to ensuring legal redress for the low-income elderly."

In 1989, Wes received the **OSB President's Public Service Award**, given by the President of the Oregon State Bar for "outstanding volunteer law-related service to the public."

In 1993, Wes received an Award from the **Multnomah County Board of Commissioners** for his work with senior citizens in Multnomah County.

In 2000, Wes Fitzwater and Donna R. Meyer, received the **Volunteer of the Year** award from the Alzheimer's Association for several years of speaking to and providing training to Alzheimer's support groups.

In 2006, Wes received the **OSB President's Membership Service Award**, given by the President of the Oregon State Bar for "volunteer law-related services on behalf of Oregon's lawyers."

In 2012, 2013 and again in 2014, Wes was selected as a "**Oregon Super Lawyer**" by superlawyers.com.