

# **ELDER LAW, GUARDIANSHIP, AND SPECIAL NEEDS PLANNING**

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## **1. Decision Making for Finances.**

Most people understand the need to have a will, so that if they pass away, their assets will go to their chosen beneficiary. Most people do not realize that they also need to take steps to make sure someone can manage their assets if they become incapacitated, and are unable to make important financial decisions.

a. Power of Attorney. A power of attorney is a document you can sign to appoint another person to make important financial decisions for you in the event you become incapacitated. The person you appoint is called your “agent.”

There are two ways to obtain a power of attorney. You can purchase a form at a legal stationery store, or you can have an experienced elder law attorney prepare the power of attorney.

The stationery store form is inexpensive. The disadvantage to this form is it gives only very limited authority to manage your finances. An experienced elder law attorney can provide a power of attorney that will give your agent flexibility to make important financial decisions if you are not able to make them yourself, such as disability planning, creating trusts, and tax planning. The attorney will make sure to prepare a power of attorney that gives your agent the ability to assist you with long-term care cost planning.

You should consider naming one or more alternate agents, in the event your first choice is unable or unwilling to serve in that role.

A power of attorney must be signed by a person who is legally competent. This means the signer must have the ability to understand the nature and importance of the document. If someone already has Alzheimer's Disease, or dementia, or has suffered a stroke, it may be too late to sign a power of attorney. Therefore, it is important to sign a power of attorney while a person has mental capacity to understand the document.

When deciding who should be your agent, remember that the most important qualities are honesty and good financial management skills. The main disadvantage to having a power of attorney is, a dishonest agent could use the power of attorney to misappropriate your assets. Therefore, only appoint the most trustworthy people to serve in this role. There are also professional trust companies that may agree to serve as your agent.

b. Conservatorship. A conservatorship is a court order that gives one person the ability to make financial decisions for another. When a person cannot make financial decisions, someone needs to be appointed to pay the bills, sign contracts, manage investments, and other transactions. A conservatorship is normally used when a person becomes unable to make important financial decisions for him or herself, and did not sign a power of attorney while competent.

There are several disadvantages to a conservatorship. It is a public proceeding, so people have the ability to review the finances of the ill person. It is expensive. You can easily spend several thousand dollars to obtain a conservatorship and pay for the required bond. Each year, the conservator must file an accounting with the court, and renew the bond, all of which is expensive. Finally, the authority granted to a conservator is less than the authority granted to an agent under a power of attorney prepared by an experienced elder law attorney.

The main advantage to a conservatorship is court oversight, and the surety bond. If the ill person does not have a trusted person to manage finances using a power of attorney, the conservatorship may be preferable to a power of attorney.

c. Joint Bank Accounts. You can name someone as a joint owner with you on a bank account. That person would have the ability to use funds in the account for your benefit, if you ever became incapacitated. There are several problems with this strategy. First, the joint owner automatically becomes the sole owner of the account when you pass away. This may not be consistent with your estate plan. Second, the assets in the account could be at risk in the event the joint owner got divorced or sued for any reason. For this reason, while it may be appropriate to name a joint owner on the working checking account, it is usually not recommended for larger accounts and other assets, such as real estate or investments accounts.

d. Social Security Representative Payee. Social Security will appoint a representative payee to receive the Social Security benefits due an incapacitated person. The representative payee is responsible for the funds, and has to account to the Social Security Administration each year for the use of these funds.

## 2. Decision Making for Health Care.

The recent Terri Schiavo case illustrates the importance of specifying one's wishes about end-of-life health care. Ms. Schiavo lived in Florida and experienced health problems that left her comatose and on a feeding tube. Her husband believed she would not have wanted her life prolonged through the use of a feeding tube. Other members of her family believed that she would have wanted the feeding tube. The husband and other family were involved in a long, highly-publicized court battle over whether Ms. Schiavo would continue to be fed through a tube. Unfortunately, Ms. Schiavo never signed a health care directive specifying her wishes about end-of-life care. If she had, her wishes would have been honored, and her family would not have had to fight over the type of care she received.

In Oregon, there are three documents commonly used to specify your wishes about health care decisions in the event you are not able to communicate those wishes: a living will, a durable power of attorney for health care, and an advance directive for health care. A POLST form and guardianship are ways in which others can make health care decisions for you. All of these methods are listed below.

a. Living Will. Also called a Directive to Physicians, a living will is a document stating that you do not want life-sustaining treatment if two doctors certify that you are in a terminal condition, and that life-sustaining treatment will only postpone the moment of your death. This document was widely used in the late 1980's and early 1990's. The main problem with a living will was that it did not appoint someone to review medical records and communicate your wishes about end-of-life care to medical staff.

b. Durable Power of Attorney for Health Care. The Durable Power of Attorney for Health Care was designed to supplement the living will. This document allowed a person to appoint an agent to communicate with health care providers and make decisions about end-of-life care. The main problem with this document is that it expires seven years after it is signed. A secondary problem is that the form was ambiguous, requiring the person to write the word "yes" to indicate that he or she did not want life support or tube feeding.

c. Advance Directive for Health Care. The Advance Directive for Health Care was authorized by the Oregon legislature in 1993. This form combines the best features of the living will and the power of attorney for health care. It allows you to appoint a health care representative to make decisions about health care for you in the event you are unable to do so. It also lets you give instructions to your health care representative so he or she will have a clear understanding of your wishes. The form does not automatically expire after a certain period of time, and can be good for your entire life. It also allows you to make additional comments about end-of-life decisions. An advance

directive for health care is the best way to ensure that your wishes about health care would be respected if you faced a life-threatening illness or injury.

d. POLST – Physician’s Orders for Life-Sustaining Treatment. This is a document on bright pink paper that can be placed in a person’s medical chart. It sets forth physician’s orders concerning certain types of end-of-life care. It must be signed by the doctor. Some people obtain completed POLST forms and post them on the refrigerator so they can be seen by paramedics in the event of a medical emergency.

e. Guardianship. A guardianship is a court order allowing one person to make health care and placement decisions for an incapacitated person. If you have not appointed someone to make health care decisions for you (for example, by signing an advance directive for health care), it may be necessary to seek the appointment of a guardian. People who suffer from dementia, Alzheimer’s Disease, or other illnesses affecting the ability to make important decisions often need the assistance of a guardian to make placement decisions.

A guardianship is expensive – it can cost several thousand dollars to secure the appointment of a guardian by the court. It is far better to rely upon the advance directive for health care to appoint someone to make health care decisions for an incapacitated person. Even if you sign an advance directive for health care, a guardianship will sometimes be necessary to make placement decisions.

### **3. Estate Planning.**

Estate planning is a process by which you can make sure your assets go to your desired beneficiaries after you pass away. Elder law attorneys use the following tools and strategies to create an estate plan:

a. Gifts. Sometimes people prefer to transfer some of their assets to beneficiaries during their lifetime. Making gifts during one’s life can have important tax consequences, so it is important to seek the advice of a CPA or attorney before making any significant gifts. Be aware that the IRS imposes a gift tax payable by the giver of the gift, for any gift in excess of \$13,000 per person per year. Also, there can be adverse capital gains tax consequences if you make gifts of assets (such as stock or real estate) that have gone up in value since you purchased them. For any gift larger than \$13,000 per person per year, or involving assets that have gone up in value, seek the advice of a CPA or attorney. In addition, anyone who may need long-term care in the future should speak with an experienced elder law attorney before making any significant gifts of assets. There are rules that penalize people seeking eligibility for assistance with long-term care costs who have made significant gifts of their assets. These rules are discussed later in this materials.

b. Joint Accounts with Right of Survivorship. Under Oregon law, a joint account automatically passes to the surviving joint owner when one owner passes away. This is a very good way for married couples and committed life partners to make sure joint

accounts pass to the survivor when one spouse or partner passes away. However, it is not usually a good plan to name a child or any other person as a joint owner of your assets, for the following reasons:

(1) If you name your child joint on a bank account, and the child gets divorced, it is possible that your funds in the account could be brought into the divorce proceeding.

(2) If your child is sued for any reason, for example, as a result of a car accident, the assets in the joint bank account could be at risk in the lawsuit.

(3) Assets in a joint account are not controlled by your will. They pass automatically to the surviving joint owner, which could result in intended beneficiaries being accidentally disinherited.

c. Beneficiary Designations. There are many assets, such as life insurance, IRA accounts, and certificates of deposit, which allow you to name a “pay-on-death” beneficiary. After you pass away, the asset subject to the beneficiary designation is paid directly to the named beneficiary. This is a good way to pass assets to a beneficiary in a simple situation. For example, if you have only one beneficiary, naming him or her as the pay-on-death beneficiary is a simple, effective way to transfer this asset. However, it does not work well for multiple beneficiaries. It is also not always clear what happens to the asset if a desired beneficiary does not survive you. So, if you have multiple beneficiaries, it is usually better to have the asset pass according to the terms of your will. A will allows you to clearly state what will happen to a particular asset in the event a beneficiary passes away before you.

Naming someone as the pay-on-death beneficiary of an asset does not subject your asset to the claims of your beneficiary’s creditors during your lifetime. It also does not put your asset at risk if your beneficiary is involved in a divorce. For this reason, a beneficiary designation is a safer choice than a joint ownership designation.

Always pay careful attention to beneficiary designations on retirement accounts. There can be significant tax considerations in the naming of beneficiaries on retirement plans, such as IRA and 401K accounts. An experienced estate planning or elder law attorney will discuss these considerations with you.

d. Will. A will is a document you can sign to specify who will receive your assets after you pass away. It allows you to appoint a personal representative to gather your assets, pay your bills and taxes, and distribute the remaining assets to your beneficiaries. It is an extremely useful document and is normally part of every estate plan.

A will should be prepared by an attorney. Do not use will kits or forms purchased from legal stationery stores. It is too easy to make a mistake in the execution of your will that could invalidate your estate plan.

The only disadvantage to having your assets pass to your beneficiaries according to the terms of a will is that your estate will have to go through probate. Probate is a court-supervised distribution of your assets to your beneficiaries. Probate and probate avoidance are discussed later in these materials.

e. What Happens if You Die Without a Will? If you pass away without a will, the State has a will for you. The “state’s will” is referred to as “intestate succession.” Under intestate succession, your assets pass to your “next-of-kin” in accordance with an order of priority set forth in state law. For example, if you are married and have no children, state law provides that your assets pass to your spouse. If you have children, and your spouse passes away before you, your assets pass in equal shares to your children. If you have a spouse and children from a prior marriage, your assets pass one-half to your spouse and one-half to your children, in equal shares. If you have no spouse, children, or grandchildren, your assets will pass to your parents. If your parents predecease you, your assets will pass to your siblings. If you have no relatives at all, your assets pass to the state of Oregon.

Even if the beneficiaries under intestate succession would be the same as your beneficiaries under a will, you should still sign a will. The administration of an “intestate” estate (that is, the estate of a person who died without a will) is more expensive and time-consuming than the administration of an estate where there is a will.

f. Living Trust. A living trust is like a will, with one distinct advantage: the living trust avoids the cost and delay of probate. A living trust also avoids the need for a conservatorship since your assets are in a trust that name successor trustees if you should be unable to act. Title of your assets is transferred into the name of your trust. You normally name yourself as trustee, so you retain complete authority and control over all of your assets. The trust avoids probate because, in the trust document, you name a successor trustee to manage assets in the event you become incapacitated or pass away. The successor trustee is authorized to pay bills, pay taxes, manage and liquidate investments, and distribute assets to the beneficiaries named in the trust document, without court supervision.

A living trust is more expensive than a will, but typically costs far less than a probate. It avoids the 6 to 9 month delay caused by probate. It prevents disclosure of your assets in the probate court records.

g. Special Needs Trusts. People with disabilities sometimes rely on government benefits to pay for basic needs such as health insurance, housing, and long-term care. The value of these benefits can be substantial. Many public benefit programs are means-tested, meaning the beneficiary’s assets and income must be below certain levels. Very often, these programs require the person’s assets to be less than \$2,000.

For many people, the receipt of an inheritance is an opportunity to improve their lives. But for a disabled person receiving public benefits, the inheritance can actually

worsen their life by terminating eligibility for benefits. The disabled person now has to pay health insurance, housing, the cost of personal attendants, and other basic needs from the inherited funds. Within a short time, the inheritance can be exhausted. The disabled person can now reapply for public benefits assistance, but will not have any funds to pay for supplemental needs that could improve her quality of life.

Fortunately, there is a way to leave assets to a disabled person while preserving her eligibility for public benefits. Assets left to a disabled person in the form of a special needs trust do not have to be spent down to \$2,000 in order to maintain public benefits eligibility. The funds in the special needs trust can pay for “extras,” or “special needs,” that would improve the disabled person’s quality of life, such as travel expenses, cell phone, cable television, tickets to the symphony or sporting events, and many other things not provided by public benefit programs. The disabled person retains her government benefits to pay for the basic necessities of life.

A special needs trust is created in a will or trust, usually by the parent of the disabled person as part of their estate plan. The parent specifies that any bequest for the disabled child be held in a special needs trust. The parent selects a trustee, who has the responsibility to use the funds for the benefit of the disabled person.

It is also possible to create a special needs trust with assets presently owned by a disabled person, or with proceeds from the settlement of a personal injury case. However, there are additional restrictions when the disabled person uses his or her own money to set up the trust.

An inheritance left directly to a disabled person can actually worsen his or her quality of life by terminating public benefits. An inheritance left to a special needs trust for the benefit of the disabled person allows public benefits eligibility to be maintained, and establishes a fund to improve his or her quality of life.

#### **4. Probate and Probate Avoidance.**

Probate is a court supervised transfer of assets from a deceased person to his or her beneficiaries. Probate is needed to transfer assets out of the name of a deceased person that do not otherwise pass to the beneficiaries, for example, by beneficiary designation or through a living trust.

##### **a. Overview of Probate Procedure.**

(1) Court Petition. Once a person has passed away, the process of transferring his or her assets to beneficiaries through the probate process begins with the filing a petition to admit the decedent’s will to probate, and to appoint a personal representative. If the decedent did not have a will, this fact is reported to the court. The petition contains factual information about the decedent (name, age, date of birth, county of residence, date and place of death). It lists the beneficiaries under the will and their

addresses. The court filing fee is normally between \$400 and \$600. If the court approves the petition, it will accept the will for probate, and authorize the personal representative to manage the assets of the estate. The personal representative is not authorized to distribute the assets to the beneficiaries until the end of the process, which usually takes 6 to 9 months.

(2) Notice to Interested Persons. The personal representative has a duty to seek out and inform interested parties that the decedent's estate is being administered. This is so beneficiaries and creditors can make claims against the estate, or challenge the will.

As part of this responsibility, the personal representative is required to publish a notice to interested persons in a local newspaper once each week for three consecutive weeks. The personal representative must also send a specific legal form of notice to the beneficiaries listed under will. The same notice must be sent to the "heirs." An heir is someone who would inherit the decedent's property in the event the decedent did not have a will. Many times the heirs are the same as the beneficiaries under the will, but sometimes an heir will be left out of the will. The law requires that heirs be notified so they can decide whether or not to challenge the will.

The notices listed above must be published or mailed within 30 days after the personal representative has been appointed.

(3) Inventory. Within 60 days after being appointed, the personal representative must file with the court a list of the decedent's assets. This is called the Inventory.

(4) Four month waiting period. The publication of notice in the newspaper starts a four-month waiting period. During this time creditors, claimants, heirs, and other interested persons may present claims against the estate, or challenge the will. At the end of this time, the personal representative has to file an affidavit with the court detailing the steps taken to seek out creditors and claimants.

(5) Final Accounting. Once the four month creditor-claim period described above has elapsed, the personal representative may file a final accounting of the estate. This is a detailed statement of all estate business. The accounting lists all assets of the estate as of the date the decedent passed away. It lists all funds received and spent. It describes all important transactions related to the estate, such as the sale of real estate. It lists all assets remaining in the estate at the time of the accounting, and sets forth how the assets are to be distributed in accordance with the decedent's will, or in accordance with the law of intestate succession ("the State's will"). The personal representative files the accounting with the court along with receipts, cancelled checks, and other documentation, and also sends the accounting to the beneficiaries of the estate. The beneficiaries have 20 days to review the accounting, and raise any objections they may have to the conduct of estate business.

(6) Distributions. If there are no objections, the personal representative can request that the court approve the accounting and authorize distribution of the estate assets. The Judge approves the accounting by signing an order approving final accounting and general judgment of distribution. This document authorizes the personal representative to make distribution of estate assets. The personal representative has to obtain signed distribution receipts from each beneficiary. Once the personal representative files the distribution receipts with the court, the Judge will close the estate and release the personal representative from further reporting obligation to the court.

b. Problems with Probate. All of the procedures detailed above are designed to provide maximum information to people interested in an estate (heirs, beneficiaries, and creditors), and to maintain court oversight of the whole process. The problem is that all of these procedures are costly. Probate typically costs at least 2 to 4 percent of the value of a decedent's estate. It is time consuming – the process detailed above takes a minimum of 6 to 9 months. The beneficiaries have to wait for their share of the estate until the end of the process. Finally, all of the information in the probate court files is available for review by the public. The probate files contain a wealth of information about the decedent's assets and who is going to receive them. There is a real privacy advantage to avoiding probate so this information is not made public.

c. Probate for Small Estates. Oregon provides an abbreviated version of probate for smaller estates, defined as real property valued at less than \$150,000 and personal property (such as bank accounts, bonds, etc.) of less than \$50,000. The small estate procedure typically costs no more than half the cost of a regular probate, and can normally be completed in four or five months. It still requires filing important information about finances and beneficiaries with the court, so this information will become part of the public record.

e. A Living Trust is the Best Way to Avoid Probate. If you decide you want to avoid probate, the living trust discussed above is the best way to do so. It has all of the flexibility and thoroughness of a will, none of the disadvantages of joint ownership and beneficiary designations, and it transfers property quickly and privately to the beneficiaries after the person who established the trust has passed away. It is more expensive than a will, but typically costs much less than probate. Always work with an experienced elder law or estate planning attorney to set up a living trust. "Kits" or forms available from legal stationery stores normally fail to achieve your estate planning goals.

## **5. Planning to Reduce or Eliminate Estate Taxes.**

Planning to reduce estate taxes should always be considered where people own assets valued in excess of \$1,000,000. There are many ways to reduce and eliminate gift and estate taxes. You should always work with a qualified CPA or experienced estate planning attorney when planning to reduce or avoid these taxes. Some of the most common ways to avoid both gift and estate taxes are listed below.

a. Gift Tax. You can gift \$13,000 per person per year without owing gift taxes. It is best to give cash gifts instead of appreciated securities or real estate. If you wish to give away assets involving capital gains issues, seek tax advice before doing so. Remember that gift taxes are paid by the giver of the gift.

b. Federal Estate Tax. Taxes that are assessed against estates valued in excess of the exemption amount, which varies depending on when the deceased person passed away. Federal estate tax rates are approximately 45% percent of each dollar over the exemption amounts. The exemption amounts are listed below:

- (1) \$3.5 million for 2009.
- (2) unlimited for 2010.
- (3) \$1 million for 2011.

c. Oregon Inheritance Tax. This tax is similar to the federal estate tax, except the exemption amount is less than the federal exemptions. This means many estates that are not subject to federal estate tax will be subject to Oregon inheritance tax. The Oregon exemption amount is \$1 million for 2009. The Oregon legislature has not yet determined the exemption amounts for 2010 and beyond.

d. Ways to Reduce or Eliminate Estate and Inheritance Taxes.

(1) Lifetime Tax-Free Gifts. If your estate is in excess of the taxable limits listed above, one way to reduce future estate taxes is to begin transferring funds to your beneficiaries during your lifetime. You can transfer a maximum of \$13,000 per person per year, free of gift tax. If you are married, your spouse can likewise transfer \$12,000 per person per year, for a total of \$26,000 per person per year. If you have several beneficiaries, it is possible to substantially reduce the value of your estate by making the maximum annual tax-free gift to each beneficiary over a period of several years.

It is worthwhile to consult with an experienced estate planning or elder law attorney when considering a gifting plan to reduce estate taxes. There may be better options for your particular situation. Also, always consult with a CPA or attorney if you wish to give more than \$13,000 per person per year, or if you wish to give something other than cash, such as appreciated securities or real estate.

(2) Credit Shelter Trust. A credit shelter trust is the best way to reduce estate taxes for married couples. It takes advantage of the fact that each spouse can shelter the full exemption amounts listed above. The credit shelter trust essentially

doubles the amount of assets that can be protected from estate and inheritance taxes. If your assets (or your parents' assets) exceed \$1,000,000 in value, speak with an experienced estate planning or elder law attorney about credit shelter trust planning.

Prior to October 1, 2003, estate planners generally assumed that the Oregon and federal exemption amounts would always be the same. This had been the case prior to 2003. To help balance the state budget, at the end of September 2003, the state legislature enacted exemption limits that were less than the federal exemption amounts. Credit shelter trust plans drafted prior to this change in the law may result in an unexpected Oregon inheritance tax liability. Anyone who has a credit shelter trust plan (also referred to as an "a/b trust") drafted prior to October 1, 2003 should confer with their attorney to see if it needs to be revised.

(3) Charitable Gifts and Bequests. If you have a taxable estate, you can make charitable gifts and bequests to reduce your estate and inheritance tax liability. Charitable gifts during lifetime reduce the size of your estate, thereby reducing the amount subject to tax. A charitable bequest in your will or trust is a deduction against the size of your taxable estate. For example, someone passing away in 2009 with a \$1,100,000 million estate would normally owe Oregon Inheritance tax. If the decedent's will or trust included a \$100,000 bequest to a charity, the value of the estate would be reduced to \$1 million, and there would be no Oregon Inheritance tax due. Estates over the federally taxable limit can also reduce or eliminate estate taxes using charitable bequests.

## **6. Long-Term Care Cost Planning.**

(a) What is Long-Term Care? When a person lacks the ability to perform "activities of daily living" ("ADLs"), they may need long-term care. Activities of daily living are generally defined as bathing, dressing, mobility, eating, toileting, and cognition.

(b) Where is Long-Term Care Provided? Long-term care can be provided in a variety of settings: in the home, assisted living facilities, residential care facilities, adult foster homes, and nursing homes. All of these options are expensive, and since the care may continue for a long time, careful planning is needed to insure that the needs of the ill person and his or her family will be met.

(c) Medicare Provides Surprisingly Little Help with Long-Term Care Costs.

(1) Medicare Defined. Medicare is health insurance for people age 65 and older, or who have permanent kidney failure, or ALS (Lou Gehrig's Disease). Medicare has two parts – Part A, and Part B.

(2) Medicare Part A. Medicare Part A is basically hospital insurance. It also includes a limited benefit for "skilled care" in a skilled nursing facility. To qualify,

you have to spend at least 3 days in the hospital, and then be discharged to a skilled nursing facility. In this case, Medicare Part A will pay for days 1-20. There is a \$133.50 per day co-payment for days 21-100. Most Medicare supplement policies cover the \$133.50 daily co-pay. One problem is that most people are only considered to require skilled care for 7 to 10 days. Then, they are downgraded to intermediate care, and Medicare stops paying. The patient is then responsible for the full cost of care, usually between \$4,000 to \$5,000 per month.

(3) Medicare Part B. Medicare Part B pays for doctors' services. There is no long-term care benefit to Medicare Part B. Medicare beneficiaries pay a premium of \$96.40 per month, which is withheld from the Social Security check.

d. Sources of Payment for Long-Term Care:

(1) Personal Funds. With costs averaging \$4,000 to \$6,500 per month, even solidly middle-class families are at risk of impoverishment due to long-term care costs.

(2) Long-Term Care Insurance. This is fine if the ill person already has coverage. Once a person is diagnosed with an illness that could result in the need for long-term care, it is normally too late to purchase this type of insurance. Unless purchased prior to age 65, the premiums for long-term care insurance can be quite expensive.

(3) Veteran's Benefits. One very helpful program available through the Veterans Administration is the Aid and Attendance program. To qualify, the veteran must have served during wartime, and now require long-term care. The need for long-term care does not have to be related to any service-connected injury. This is a means-tested program, meaning the veteran's assets must be below certain levels to qualify, so people with substantial assets will not benefit from Aid and Attendance.

(4) Medicaid. Medicaid pays over 60% of the long-term care costs in the United States.

e. Medicaid Safety Net.

Medicaid is a joint federal/state program that helps pay long-term care expenses for people who qualify. There are three tests to qualify for Medicaid: one based on level of disability; one based on level of income; and the final test based on level of assets. An applicant must meet all three tests in order to qualify for help with long-term care costs through the Medicaid program.

(1) Disability Test. An applicant must require assistance with activities of daily living: bathing, dressing, eating, mobility, toileting, and cognition. In recent years, state rules have required an applicant to need fairly substantial assistance with ADLs to

meet this test. The State of Oregon Seniors and People with Disabilities Services Division, which administers the Medicaid program in Oregon, rates an applicant's level of disability on a scale of 1 through 18, with 1 being most disabled, and 18 being not disabled at all. Currently, an applicant must fall within categories 1 through 13 to qualify for Medicaid long-term care assistance. This means many people who need assistance with some ADLs will not immediately qualify for assistance even if they meet the financial eligibility tests described below.

(2) Income Test. In order to qualify for Medicaid long-term care assistance in Oregon, an applicant's income must be below \$2,022 per month. This is true even if the applicant has no other funds, and care costs far exceeding \$2,022 per month. If the applicant's income exceeds this amount, the only way for him or her to qualify for Medicaid long-term care assistance is to create a special type of trust known as an income cap trust. An experienced elder law attorney can help an applicant with too much monthly income create this special type of trust.

(3) Resource Test. The final test for Medicaid eligibility is based on the applicant's assets. If the applicant is married, the assets of his or her spouse are also considered available to pay for care costs, and thus must be disclosed on the application for benefits. The amount of assets an applicant can keep depends on whether or not the applicant is married.

(a) Resource Test for Unmarried Person. An unmarried person can keep only \$2,000, plus certain "exempt" assets described below, and qualify for Medicaid assistance.

(b) Resource Test for Married Couple. The healthy spouse gets to keep additional assets to maintain his or her place in the community. This amount of assets is known as the community spouse resource allowance. The healthy spouse is generally entitled to keep all of the "exempt" assets described below, plus one-half of the investments and savings, subject to minimum and maximum figures.

(i) Minimum spousal resource allowance: \$21,912.

(ii) Maximum spousal resource allowance: \$109,560.

Examples of the above-listed minimum and maximum amounts are as follows:

(i) Marital assets total \$100,000, the healthy spouse must spend this down to \$50,000 before the applicant will qualify for benefits.

(ii) Marital assets total \$30,000, the healthy spouse gets to keep the minimum of \$21,912 spousal allowance.

(iii) Marital assets total \$300,000, the healthy spouse must spend down to the maximum resource allowance of \$109,560.

(c) “Exempt” Assets. Exempt assets are not counted as part of the Medicaid “means-testing” process. These assets do not need to be “spent down” in order for the applicant to qualify for Medicaid assistance. The primary exempt assets are:

- (i) The family home, so long as the applicant or spouse lives there, and so long as the total home equity is under \$500,000.
- (ii) One car.
- (iii) Funds placed in an irrevocable burial plan. If the plan is revocable, this amount is limited to \$1,500.
- (iv) Tangible personal property.

(f). Medicaid Planning Strategies to Protect the Healthy Spouse. The rule that a healthy spouse must generally spend one-half of his or her assets before the ill spouse can qualify for Medicaid can lead to serious financial distress for the healthy spouse. For example, the rules would require a married couple with \$50,000 in savings to spend down to \$25,000. Experienced elder law attorneys use several planning strategies to increase the amount of income and assets a healthy spouse is permitted to retain and still qualify for Medicaid assistance.

(1) Increasing the Amount of Income the Health Spouse May Retain. Medicaid rules allow the healthy spouse to have \$1,750 in income. If the healthy spouse’s income is below \$1,750, Medicaid will allow some of the ill spouse’s income to be paid to the healthy spouse so he or she will have \$1,750 per month. An experienced elder law attorney can sometimes go to court and ask a Judge to increase the amount of income the healthy spouse is permitted to retain.

(2) Increasing the Amount of Assets the Healthy Spouse May Retain. In the example listed above, a healthy spouse had \$50,000. The general rule would require him or her to spend down to \$25,000. An experienced elder law attorney can sometimes go to court and ask a Judge to increase the amount of assets the healthy spouse is permitted to retain.

(3) Combination Strategy. Frequently, if we seek a court order to increase the amount of assets the healthy spouse is allowed to retain, we will also ask the court to increase the amount of income the healthy spouse can keep. The “court order” strategy is one of the most helpful methods of preventing spousal impoverishment due to long-term care costs.

(g) Asset Transfers. Upon hearing that they must spend assets down in order to qualify for Medicaid long-term care assistance, many people think about giving away assets to their children. Medicaid rules discourage asset transfers by imposing periods of ineligibility for benefits (or “penalty periods”) where people give away assets. The

duration of the “penalty period” is one month of ineligibility for Medicaid assistance for each \$6,494 given away. If an applicant for Medicaid gives away \$64,940, he or she will be ineligible for Medicaid assistance for 10 months. This “penalty period” does not begin until the applicant has satisfied all other conditions for Medicaid eligibility. This is an extremely difficult set of conditions to meet. Since Medicaid has the ability to ask for information about transfers of assets for five years prior to the application, it is critical to work with an experienced elder law attorney if an older person is thinking about making gifts.

Geoff Bernhardt, J.D.

University of Oregon School of Law, 1992

Geoff has been helping individuals and families address the legal and financial consequences of aging for 15 years. He has been a guest speaker regarding estate planning and elder law for the Multnomah Bar Association, the Oregon Gerontological Association, the Alzheimer’s Association, the Oregon State Bar, the Oregon Chapter of the National Multiple Sclerosis Society, the Office of the Long-Term Care Ombudsman and the Oregon Law Institute. Additionally, the Oregon State Bar sought Geoff’s assistance in writing a book on Elder Law for Oregon attorneys. Geoff was honored by the Oregon State Bar in 1998, 2000, 2003, 2004, 2005, and 2008 for educational services to Oregon Elder Law Attorneys. Geoff is a prior recipient of the Multnomah County Legal Aid Senior Law Project Outstanding Volunteer Award. Geoff is a shareholder in his firm, the Law Offices of Geoff Bernhardt, specializing in elder law, estate planning, probate, guardianships and conservatorships. He is on the Education Committee of the Oregon Gerontological Association and on the Program Committee of Oregon Chapter of the National Multiple Sclerosis Society. He is also on the Executive Committee serves as secretary of the Elder Law Section of the Oregon State Bar.

Julie Lohuis, J.D.

University of Oregon School of Law, 2004

Julie joined the Law Offices of Geoff Bernhardt as an associate in October of 2006. Prior to joining the firm, she worked for two years in the Hillsboro office of Legal Aid Services of Oregon where she worked primarily on administrative law. At Legal Aid she represented seniors, and it was her work with her clients that inspired her to specialize in elder law. Since joining the Law Offices of Geoff Bernhardt, she has focused on Elder Law, Estate Planning, Probate, Guardianships and Conservatorships. Julie graduated in 2000 from the University of Oregon with a B.A. in Sociology and Spanish. She received her law degree from the University of Oregon in 2004. Julie volunteers with the Senior Law Project and the Clackamas County Senior Center. In 2008 she contributed an article to the Elder Law Section Newsletter. Julie is also a member of the Queen’s Bench Board of the Portland chapter of Oregon Women Lawyers.