

Planning for Incapacity and Disability

For

Ourselves and Family Members

I. Planning for Our Own Incapacity

A. Powers of Attorney.

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

The Power of Attorney document describes the powers being given to the agent, and the agent does not have any authority to act 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, or with a specific asset, such as a bank account. This is known as a “Limited Power of Attorney.” In contrast, a “General Power of Attorney” gives the agent very broad authority to deal with assets and finances.

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 after the person who executed it becomes incompetent. However, a Power of Attorney is only valid during the signer’s lifetime. When the signer dies, the Power of Attorney dies with him or her.

Clearly some of these provisions give broad authority to the agent, and the signer will want to give such broad powers only to someone he or she absolutely trusts.

Most standard forms of General Powers of Attorney do not include optional provisions, such as the right to make gifts, that in certain appropriate situations might be very useful. Some of the optional provisions to be considered are described below.

1. Support of Spouse/Partner. If the person making the Power of Attorney wishes to allow the spouse or partner to have the funds available for his or her own needs, then this should be specified.

2. Gifting. If gifting provisions are not included, any gifts made by the agent may be treated as a breach of fiduciary duty. Therefore, a person should consider including gifting provisions.

For instance, spouses might consider giving each other a Power of Attorney that includes provisions allowing assets to be transferred into just one of the spouse’s names. Then, if one spouse becomes ill and needs Medicaid to assist

with his or her long-term care expenses, the healthier spouse can use the Power of Attorney to transfer assets into the healthier spouse's sole name. This could be very helpful later if planning is done to preserve assets for the healthy spouse, while allowing the ill spouse to receive Medicaid.

As another example, 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.

3. Authority to Change Estate Planning Provisions. The client should consider provisions to change beneficiary designations, create or modify Trusts, and disclaim assets. An agent named in a Power of Attorney cannot modify a Will.

4. Nomination of Fiduciaries. Despite good planning, a client sometimes becomes involved in a court proceeding such as a conservatorship, guardianship, family law proceeding, or other litigation. The client can name whom he or she would like to serve if a conservator, guardian, or guardian-ad-litem is appointed by the court.

B. Advance Directives.

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 health care decisions necessary. 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.

The Advance Directive replaces the Directive to Physicians and the Health Care Power of Attorney. In 1993, Oregon combined the two different documents into one document, the Advance Directive. The Durable Power of Attorney for Health Care expired automatically after seven years, unless the person was unable to make health care

decisions at the end of the seven-year period. Therefore, we strongly recommend that people update their planning by using the Advance Directive form.

The Advance Directive form has two main parts, which correspond to the documents used prior to 1993. Under Part B of the Advance Directive, a health care representative may be appointed to make health care decisions in the event of temporary or permanent incapacity. An alternate health care representative may also be appointed. Health care representative(s) must act in accordance with the desires of the person appointing them, to the extent those desires are known.

Part C of the Advance Directive gives an opportunity to give instructions to the health care representative and physician about tube feeding or life support.

The law governing Advance Directives allows the person signing it to make additional instructions beyond what is set out in the form itself. Some people give specific instructions about matters such as hospice care, pain control, visitors, and home death.

C. Declaration for Mental Health Treatment.

Another document utilized in Oregon is the Declaration for Mental Health Treatment. This document allows someone, in advance, to select a representative to make mental health treatment decisions, and/or to give specific directions regarding future mental health treatment. The Advance Directive does not cover mental health treatment.

D. POLST.

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.

II. Planning for Incapacity of Family Members

A. Protective Proceedings.

Protective proceedings refer to a proceeding initiated under Oregon Revised Statute, Chapter 125, and most commonly refer to Guardianships and Conservatorships. Due to the time constraints of this presentation, and space limitation for written materials, the following is intended to serve as a reference for protective proceedings, and does not address the substantive law of each topic.

1. Controlling Law. The Probate Court has exclusive jurisdiction over protective proceedings. Oregon Revised Statute, Chapter 125, authorizes any interested person to file a petition for the appointment of a fiduciary, defines the scope of the fiduciary's authority, and provides the requirements for the

administration, settlement and closing of protective proceedings. The Rules of Civil Procedure, Uniform Trial Court Rules, and supplementary local rules also apply to protective proceedings.

2. Guardianships. The appointment of a Guardian is appropriate when the proposed protected person is incapacitated and no longer able to make informed decisions regarding medical care or placement.

a. Incapacity. The Court may appoint a Guardian upon a finding by clear and convincing evidence that the proposed protected person is a minor or incapacitated.

Oregon Revised Statute 125.005(5) defines incapacity as “a condition in which a person’s ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person’s physical health or safety. Meeting the essential requirements for physical health and safety means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur.”

b. Less Restrictive Alternatives. The appointment of a Guardian is not appropriate if there is a less restrictive plan available, such as an Advance Directive that appoints a Health Care Provider to direct medical care. The appointment of a Guardian abridges the protected person’s civil liberties, and as such should be considered as a last resort.

c. Authority. Once appointed, and unless limited by the Court, the general powers of a Guardian include having custody of the protected person, making placement decisions, providing for the protected person’s care, comfort and maintenance, and directing medical care. In addition, the Guardian may under certain circumstances receive money deliverable to the protected person and apply the money towards certain expenses, make funeral and burial arrangements, direct end-of-life decisions in regards to artificially administered nutrition and hydration, and make decisions regarding the disposition of remains and anatomical gifts.

Oregon Revised Statute 125.320 limits the scope of the Guardian’s authority, and provides the Guardian may not: authorize the sterilization of the protected person; use the protected person’s funds to pay the Guardian, or the Guardian’s spouse, parent or child for the room and board of the Protected Person *without* prior Court approval; or, place the protected person in a mental health treatment facility, a nursing home or other residential facility *without* first filing a notice of placement with the Court.

d. Minors. Guardianship of a minor can be established in probate court or juvenile court. One difference in filing a petition in probate court is that, unlike a protective proceeding involving an adult, a Court Visitor is not appointed. The Guardian of a minor has the powers of a parent with legal custody, but is not required to support the minor beyond that which can be provided from the minor's estate.

e. Termination. The Court may terminate a Guardianship upon finding the protected person has died, regained capacity, termination of the proceeding is in the best interests of the protected person, or in the case of a minor when he or she has reached the age of majority.

2. Conservatorships. The appointment of a Conservator is appropriate when the proposed protected person is incapacitated and no longer able to manage his or her financial affairs and property.

a. Incapacity. The Court may appoint a Conservator upon a finding by clear and convincing evidence that the proposed protected person is a minor or financially incapable, and has money or property that needs protection or management.

Oregon Revised Statute 125.005(3) 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 retardation, 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, benefits and income."

b. Less Restrictive Alternatives. The appointment of a Conservator is not appropriate if there is a less restrictive plan available, such as Durable Power of Attorney that nominates an Agent or a Trust that nominates a Successor Trustee.

c. Authority. Once appointed, and unless limited by the Court, the Conservator has broad authority over the financial affairs of the protected person. With this being said, there are several acts that require prior Court approval. The most common include the sale of protected person's residence, a release or transfer of future interests and survivorship interests, creating a revocable or irrevocable trust, changing beneficiaries under insurance or annuity policies, liquidating the cash surrender value of insurance or annuity policies, exercising a disclaimer, or authorizing, directing or ratifying any annuity or contract for life care.

d. Bonding. Unless waived, the Conservator is required to file a bond with the Court, representing the value of the estate plus one year's estimated income. In some circumstances, the Court may waive the requirement of Bond for good cause shown, or alternatively, the Conservator can request the assets of the estate be placed in a restricted account to be withdrawn only upon prior order of the Court.

e. Minors. A Conservatorship for a minor is most commonly established to manage and protect funds received from an inheritance, a personal injury settlement or wrongful death proceeds from the death of parent. The process and requirements of approving settlements and distribution of wrongful death proceeds are beyond the scope of this discussion.

f. Termination. The Court may terminate a Conservatorship upon finding the protected person has died, regained capacity, termination of the proceeding is in the best interests of the protected person, in the case of a minor when he or she has reached the age of majority, or estate assets fall below \$10,000.

3. Temporary Proceeding. The appointment of Temporary Guardian and/or Conservator may be appropriate when there is an immediate and serious danger to the proposed protected person's life or health, or assets, and immediate action is required. A Temporary Fiduciary is appointed for a period not exceeding thirty days, although the Temporary Fiduciary's authority may be extended for good cause shown. Oregon Revised Statute 125.600 provides the rules pertaining to Temporary Fiduciaries.

4. Contested Proceedings. Any interested person has the right to object to the appointment of a fiduciary. If the proposed protected person files an objection, the Court may appoint an attorney to represent him or her. Upon receiving objections, the Court will hold a hearing on the petition.

With the exception of Temporary Proceedings, Multnomah County now requires mandatory mediation for all contested probate matters. A party may seek to waive mandatory mediation for good cause. The rules governing mediation in probate matters can be found at Multnomah County Supplementary Local Rule 12.045.

5. Protective Orders. The Court may enter a Protective Order that has the effect of protecting the protected person, without the appointment of a fiduciary. Protective Orders are governed by Oregon Revised Statute 125.650, which provides that the petition seeking the Protective Order must comply with the requirements prescribed for petitions seeking the appointment of a fiduciary, and that a Protective Order may be entered if grounds exist for the appointment of a fiduciary.

III. Planning for Family Members to Receive Public Benefits

A. The World of Government Benefits.

The world of government benefits is vast, and a full description of the benefits available to disabled individuals is beyond the scope of these materials.¹ Broadly speaking, however, government benefits for the disabled can be divided into two categories: “means-tested” or “needs-based” benefits, which impose strict financial eligibility limits, and “entitlement” benefits, which generally do not.

Following is an overview of some of the most common government benefits programs available to disabled individuals. Note that each of these programs has complex rules (well beyond what is included here), and that those rules should be closely analyzed in deciding whether and when to use a SNT. This overview is not intended to provide comprehensive details on eligibility rules for the various programs, but rather to identify their general characteristics for basic SNT planning purposes.

1. Means-Tested Benefits

a. Supplemental Security Income (“SSI”). Supplemental Security Income (“SSI”) is a federal program of cash assistance for aged, blind, or disabled individuals who have little income and few assets. Eligibility depends upon status (age, disability, etc.) and financial need, but is not related to an individual’s work history (i.e., an individual need not have “paid into the system” in order to qualify). The SSI program provides monthly checks from the federal government of up to \$674 for an individual (in 2010). Typically, a person who is eligible for SSI benefits automatically qualifies for Medicaid benefits as well.

SSI is administered by the Social Security Administration (SSA), through local Social Security branch offices. To be eligible for SSI, a single individual cannot have “countable resources” worth more than \$2,000 (in 2010). Additionally, a single individual cannot have “countable income” in a month of more than the federal benefit rate (“FBR”). The FBR for an individual is \$674 (in 2010).

b. Medicaid Medicaid is a joint federal-state program of medical assistance. Medicaid is not a single program, but rather, a group of programs, each of which has unique benefits, rules, and eligibility requirements. As with SSI, eligibility for Medicaid is based upon financial need (low income and assets). Unlike SSI, however, Medicaid does not provide cash benefits to beneficiaries. Rather, Medicaid pays for a variety of health care and long-term care services through its different

¹ For more information on Medicaid in Oregon, see the OSB Elder Law Section’s 2005 CLE Materials, entitled “Tools of the Trade for the Elder Law Practitioner.”

programs, all of which are administered in Oregon by the Oregon Department of Human Services (“DHS”). \

2. Entitlement Benefits

a. Social Security Disability Insurance (“SSDI”). Social Security Disability Insurance (“SSDI”) is a federal insurance program that pays cash benefits to disabled workers under the age of 65. The monthly payment amount depends on an individual’s work record and the amount he or she paid into the Social Security system while working. Disabled individuals who receive SSDI for at least 24 months automatically qualify for Medicare benefits (see below).

Like SSI, SSDI is administered by the Social Security Administration, through local Social Security branch offices. Unlike SSI, however, eligibility for SSDI does not depend on an individual’s assets or *unearned* income. Thus, a disabled individual can own any amount of resources without jeopardizing his or her eligibility for SSDI benefits.

b. Medicare. Medicare is a federal health insurance program providing basic coverage to individuals over age 65, as well as certain disabled individuals under age 65 who have received SSDI benefits for at least 24 months.

Medicare consists four basic “parts,” A-D, which provide hospital insurance, medical insurance, and prescription drug coverage. Medicare recipients must pay monthly premiums, co-payments, and deductibles, which vary depending on the particular “parts” in which they are enrolled.

Medicare is administered federally by the Centers for Medicare and Medicaid Services (“CMS”). However, the Social Security Administration is responsible for determining Medicare eligibility and processing the monthly premium payments required of Medicare recipients.

Unlike Medicaid, Medicare is not means-tested. Accordingly, a disabled individual can qualify for (or retain) eligibility for Medicare regardless of asset and income levels.

B. Estate Planning with Special Needs Trust

There are two primary types of Special Needs Trusts; “first-party” trusts, and “third-party” trusts. The most important distinction between first-party and third-party SNTs is the source of the funds comprising the trust estate: first-party trusts are funded with money that belongs to the beneficiary (i.e., the disabled person), and third-party trusts are funded with money that belongs to someone else, such as a parent or family member of the beneficiary.

1. Generally. Parents, grandparents and other family members often want to set money aside for the benefit of a disabled individual. The determination of whether a SNT is appropriate depends on whether the disabled person is receiving, or is expected to receive, means-tested government benefits. In some situations, the individual may not be receiving means-tested benefits, and may be physically disabled but otherwise able to manage his or her finances. In these cases, if the person's health condition is stable and is not expected to worsen (thereby possibly triggering a need for needs-based public benefits such as assistance with long-term care), it may be appropriate to simply leave assets outright to the disabled person. More often, however, a trust—either a SNT or some other type of trust—is desirable.

a. Third Party Special Needs Trusts. Special needs trusts created and funded by a third party for a disabled individual are distinguished from first-party special needs trusts by the source of the assets comprising the trust estate. In a third-party special needs trust, the source of the funding is someone *other than the disabled person*. For this reason, the funds remaining in a third-party special needs trust are not subject to recovery under payback rules at the disabled person's death.² Instead, assets remaining in third-party SNTs may be distributed in whatever manner the settlor desires; e.g. onto other family members.

i. Testamentary Special Needs Trusts. The most common type of third party SNT is a testamentary SNT, which is generally incorporated into the will or trust of someone with a disabled child, relative or friend. These types of SNTs are funded upon the death of the testator or settlor.

ii. Inter vivos (Lifetime) Special Needs Trusts. In some cases, clients may want to fund a special needs trust for a disabled child, relative, or friend immediately, rather than waiting to fund a SNT on their death. For example, it may be that a number of relatives and friends want to leave money to benefit a disabled child. In anticipation of this, a “stand-alone” special needs trust may be established to collect and receive the gifts from the friends and family and eliminate the need for each donee to establish (and pay for) a separate SNT in their estate planning documents. Or, it may be that a wealthy client would prefer to make lifetime gifts to a disabled person for estate planning purposes, or fund a SNT with a life insurance policy with the intention that the proceeds will provide enough funds to care for the disabled child in the event of their death. In these situations, an inter vivos special needs trust may be established to accomplish these goals.

² OAR 461-135-832(15); 20 CFR § 416.1212

b. First-Party Trusts (a.k.a. “Payback Trusts”)

i. Background and General Requirements. In the Omnibus Reconciliation Act of 1993 (“OBRA ‘93”), Congress enacted new provisions specifically addressing the use of trusts designed to preserve (or establish) eligibility for certain means-tested public benefits (specifically, Medicaid). OBRA ‘93 restricted the use of many types of trusts created by (or on behalf of) a Medicaid recipient using the recipient’s own funds—namely, first-party trusts.

However, in that same Act, Congress specifically created a new type of trust that *can* be funded with a Medicaid recipient’s own funds, and in which the assets are *not* considered available for purposes of Medicaid eligibility. Under the provisions of OBRA ‘93, in order for the assets in a first-party trusts to be considered *unavailable*, the trust must:

- be created for the benefit of a disabled person as defined by the Social Security Administration;
- be created for the benefit of an individual under the age of 65;
- contain the disabled person’s own assets;
- be established by a parent, grandparent, legal guardian (or Conservator in Oregon), or a court;
- provide that any State that has provided Medicaid assistance to the disabled person will receive all amounts remaining in the trust upon the disabled person’s death, up to the total amount of Medicaid assistance provided.

ii. Payback. The most distinctive feature of a first-party SNT is the payback requirement. Unlike third-party Trusts, all first-party SNTs must provide that upon the death of the beneficiary, any remaining trust assets will be distributed to the State(s) that have provided Medicaid assistance to the disabled person, up to the total amount of Medicaid assistance provided. When the individual has received Medicaid benefits in more than one State, the trust must provide that the funds remaining in the trust are distributed to each State in which the individual received Medicaid, based on the State’s proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual’s behalf. FCIA ‘99 does not require payback of SSI, but does require the payback of Medicaid.

C. Planning for Medicaid for Long-Term Care.

Medicaid operates under a variety of program names in Oregon, and provides a wide variety of services for different groups of Oregonians. For the purpose of our discussion, these materials focus on one program, namely Oregon Supplemental Income Program Medical (OSIPM), which provides assistance to individuals who are in need of long-term care.

1. Controlling Law. The Social Security Act of 1965 created Medicare and Medicaid to provide health insurance to the elderly (those over the age 65) and for lower income families. Medicaid was established as Title XIX of the Social Security Act, and can be found at 42 USC 7.

Oregon Revised Statute, Chapter 411, is the enabling statute that gives the Oregon Department of Human Services the authority to administer and supervise all public assistance programs, and to set eligibility rules for those programs. Oregon Administrative Rules, Chapter 461, establish the eligibility standards.

2. Delivery. In the Metro area, Medicaid benefits are accessed differently depending in which county the applicant resides. For example, Multnomah County residents are serviced through Multnomah County Aging and Disability Services; Clackamas County residents are serviced through Clackamas County Social Services; and, Washington County residents are serviced through the Department of Human Services, Seniors and People with Disabilities.

3. Coverage. Medicaid is a health insurance program that offers a wide variety of services, including doctor visits, hospital stays, medical transportation, medical equipment and supplies, prescriptions, limited vision and dental care, hearing aids and long term care services (in-home services, adult day care, adult foster home, residential facility care, assisted living facility care, and nursing home care) to certain aged, blind, and disabled individuals. Medicaid does not issue cash payments; rather, it sends payments directly to the Medicaid recipient's health care providers.

4. Eligibility. To be eligible for Medicaid, the Medicaid applicant must meet three eligibility requirements. These include: (1) Disability; (2) Income; and, (3) Resources:

a. Disability. The Medicaid applicant will be assessed to identify his or her ability to perform activities of daily living (eating, dressing, grooming, bathing, personal hygiene, mobility (ambulation and transfer), toileting, behavior and cognition). This assessment is known as the Client Assessment and Planning System (CA/PS assessment). The information gained from the assessment is used to determine the service priority level. If the Medicaid applicant's service priority level is between levels 1-13

(with 1 being the most dependent), he or she will meet the disability requirement.

b. Income. In order to qualify for Medicaid, the applicant's *gross* monthly income cannot exceed \$2,022. This amount is known as the income cap, and is set by the Department of Human Services by administrative rule. This amount is adjusted each year and can be found on the Elder Law Section page of the Oregon State Bar website at <http://www.osbar.org/sections/elder/elderlaw.html>.

Only the applicant's income is considered; if the applicant is married, the spouse's income is not considered. If the applicant's gross income exceeds \$2,022, an Income Cap Trust will be required in order for the applicant to meet the income requirement.

5. Income Cap Trust. The sole purpose of the Income Cap Trust is to qualify the Medicaid applicant for benefits. The Income Cap Trust is executed by the Medicaid applicant or by an agent acting under a Durable Power of Attorney. The Trust agreement itself is straightforward; the bulk of the work comes in completing the distribution schedules. An example of an Income Cap Trust is provided by the Department of Human Services, and can be found at <http://www.dhs.state.or.us/spd/tools/program/osip/incap>. Once executed, the Trustee establishes a bank account which acts as a funnel, to receive the Medicaid recipient's income each month, and distribute funds as authorized by Oregon Administrative Rule 461-145-0540, and referenced on the attached distribution schedules. The state of Oregon is the first beneficiary of the Income Cap Trust and, upon the Medicaid recipient's death, will receive any balance of the account.

6. Resources. The resource limit for a single person is \$2,000. Under the Medicaid rules, some resources are counted for eligibility purposes and other resources are considered exempt. Examples of countable assets include cash, bank accounts, IRA's, investments, real property, second vehicles, and cash values for life insurance policies. Examples of exempt resources include a home (if the client or spouse lives in it), one vehicle, medical equipment, irrevocable burial plans (if purchased after Medicaid eligibility and paid for through Income Cap Trust deductions, the excluded amount is limited to \$5,000) or up to \$1,500 in a burial account, burial space, burial merchandise, personal property, and term life insurance. For a complete review of how specific assets treated, please see Oregon Administrative Rule 461-140-0010 *et seq.*

If the Medicaid applicant is married, all resources are counted regardless of how they are owned (e.g. by the applicant, by the spouse or jointly). In addition to the \$2,000 retained by the applicant, the spouse is allowed to retain an additional amount, known as the community spouse resource allowance, between \$21,912 and \$109,560. The formula for calculating the community spouse resource allowance can be found at Oregon Administrative Rule 461-160-0580.

Any amounts that exceed the resource limits for the applicant and the spouse must be spent down before the applicant will qualify for Medicaid services.

a. Special Needs Trust. In the event the Medicaid applicant is over resources and is under the age of sixty-five (65), a special needs trust may be established to preserve the funds for the beneficiary's supplemental needs. In this instance, the Special Needs Trust is referred to as a "payback" trust because it is being funded with the Medicaid applicant's assets (and not those of a third party), and upon his or her death the remaining assets are paid back to the state of Oregon. A payback Special Needs Trust can only be created by a parent, grandparent, the Court, or a Conservator. The beneficiary of a Special Needs Trust is deemed disabled and, therefore, unable to establish the trust themselves. Once the trust is drafted and signed, the trustee administers it pursuant to the trust's terms. Please review Oregon Administrative Rule 461-145-0540(9)(a) for rules pertaining to payback Special Needs Trusts.

In cases where a beneficiary does not have parents or grandparents to fund the trust, the Court must appoint a conservator for the limited purpose of creating and funding the trust. Usually, the conservator is the same person who will then act as Trustee. In some counties, the Court requires the Conservator to remain in place (and not discharged), so the beneficiary has a conservator and a trustee. Once appointed, the conservator obtains a bond, remains under the jurisdiction of the Court, and is required file annual accountings with the Court.

6. Transfers. A Medicaid applicant is not able to transfer assets for less than fair market value as a means of spending down to the allowable resource limit. At the time of application, the Medicaid applicant will be asked about any transfers during what is known as the five year look back period. If such transfers have been made, the Medicaid applicant may be disqualified from receiving benefits for certain period of time. The rules regarding transfers are complex, but generally speaking, there are certain transfers that are not considered disqualifying. These include transfers to a spouse, transfers for the sole benefit of a disabled child, or to a caregiving child if the standards of Oregon Administrative Rule 461-140-0242(3)(c)(C) are met. Please review Oregon Administrative Rules 461-140-0210 through 0242 for the rules pertaining to transfers and the length of disqualification.

7. Ongoing Eligibility. Once the applicant has been approved for Medicaid, the caseworker will determine the amount of the Medicaid recipient's liability (the amount he or she will pay each month for the services he or she is receiving). Medicaid rules provide for standard deductions from the applicant's income, and in certain circumstances, a married Medicaid applicant is able to transfer a portion of his or her income to his or her community spouse, to ensure that he or she has enough income to meet his or her monthly living expenses.

The Medicaid caseworker will stay in contact to ensure the Medicaid recipient is receiving the appropriate level of services, and will reassess the Medicaid recipient's financial eligibility and physical need for services each year. When the Medicaid recipient dies, the state will have a claim against his or her estate up to the value of services provided. If the Medicaid recipient is survived by a spouse, the claim will not become payable until the death of the surviving spouse.

These materials provide a basic overview of Medicaid eligibility requirements. For more advanced planning techniques, please review the Elder Law CLE materials from 2008 titled "Advancing the Plan."