

***THE CONSERVATOR'S DUTY TO PRESERVE AND PROTECT THE ESTATE PLAN,***  
**Guardian Conservator Association Annual Conference, Wilsonville Holiday Inn,**  
**Wilsonville, Oregon, May 17, 2002**

**Prepared and Presented By: Wesley D. Fitzwater, Attorney at Law, FITZWATER & MEYER, LLP**

**ORS 125.425 (2)**  
**Powers of conservator to pay expenses**  
**of protected person and dependents.**

A conservator may expend or distribute income or principal of the estate without prior court authorization or confirmation for the support, education, care or benefit of the protected person and the dependents of the protected person if those amounts are reasonably necessary for the support, education, care or benefit of the protected person with due regard to:

1. The size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to manage the affairs of the protected person and the estate that has been conserved for the protected person;
2. The accustomed standard of living of the protected person and members of the household of the protected person; and
3. Other funds or sources used for the support of the protected person. [1995 c.664 s.39]

**ORS 125.460**  
**Consideration of estate plan of protected person.**

In investing the estate, selecting assets of the estate for distribution and utilizing powers of revocation or withdrawal available for the support of the protected person and exercisable by the conservator or the court, the conservator and the court shall take into account any known estate plan of the protected person, including the Will of the protected person, any revocable trust of which the protected person is settlor, and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the death of the protected person to another or others that the protected person may have originated. The conservator may examine the Will of the protected person. [1995 c.664 s.46]

## **ORS 116.133**

### **Distribution; order in which assets appropriated; abatement.**

1. If the Will expresses an order of abatement, or the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (2) of this section, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

2. Except as provided in ORS 112.405 as to the shares of pretermitted children, and in ORS 114.105 as to the share of the surviving spouse who elects to take against the Will, shares of distributees abate without any preference or priority as between real and personal property in the following order:

- a. Property not disposed of by the Will.
- b. Residuary devises.
- c. General devises.
- d. Specific devises.

[1969 c.591 s.180]

### **WHAT CONSTITUTES AN "ESTATE PLAN"?**

#### **TRADITIONAL ESTATE PLANNING TOOLS**

- **LAST WILL AND TESTAMENT**
- **REVOCABLE LIVING TRUST**
- **OTHER TRUSTS**

#### **JOINT OWNERSHIP (WITH RIGHT OF SURVIVORSHIP)**

- **BANK ACCOUNTS**
- **INVESTMENT ACCOUNTS**
- **REAL PROPERTY**
- **SAVINGS BONDS**
- **STOCKS AND BONDS**
- **AUTOMOBILE TITLE**

#### **ARRANGEMENTS FOR PAYMENT OR TRANSFER UPON DEATH**

- **POD AND ITF ACCOUNTS**

- LIFE INSURANCE
- ANNUITIES
- IRA, 401K
- LIFE ESTATES

## LONG-TERM CARE OPTIONS AND COSTS

Long-term care can range from around the clock medical treatment to simply requiring assistance with the daily activities of life. In the past, a nursing facility was the only option for care outside the home. Today, Oregon leads the nation in providing alternatives to the traditional nursing home-type care.

1. Nursing Home Care. Nursing homes, licensed by the State, provide several different levels of nursing care to residents. These range from intensive nursing and rehabilitative care for people with unstable medical conditions to routine care for people with chronic medical problems. Current estimated costs range from **\$3000** to **\$4500** per month, depending on the level of care needed.

2. Adult Foster Care. An adult foster home provides care to five or fewer residents. The operator or resident manager lives in the home. Personal care, cooking and cleaning are provided. Other types of care depend upon the qualifications and license of the provider. Estimated costs range from **\$1850** to **\$2500** per month.

3. Residential Care. Residential care facilities serve six or more residents and have staff on duty around the clock. Meals and housekeeping services are provided, but the amount of personal care and supervision varies.

“**Assisted Living**” is a particular type of residential care, with its own administrative rules. The focus is on providing care through a social model that emphasizes independence.

Estimated costs for residential care range from **\$1000** to **\$3000** per month.

4. In-Home Services. A range of services can be provided at home, from a short visit to meet a particular need for assistance, to live-in help. In-home services, generally, are not licensed by the state, although some providers carry their own license. Estimated costs vary according to the hours of service and the type of provider used. Estimated costs range from **\$100** to **\$10000** per month.

5. Adult Day Care. Adult day care is available in a variety of settings ranging from freestanding programs to nursing homes or senior centers. It often functions as respite care, to allow a regular caregiver, such as a spouse, to have a break or to continue working. Daily charges are now about **\$40** to **\$80**.

(SAMPLE – MOTION FOR APPROVAL OF SPENDING PLAN)

**IN THE CIRCUIT COURT OF THE STATE OF OREGON**  
**FOR THE COUNTY OF MULTNOMAH**

Department of Probate

IN THE MATTER OF THE CONSERVATORSHIP FOR:  <b>(PROTECTED PERSON),</b>  Protected person.	) ) <b>No. 0000-00000</b> ) ) <b>MOTION FOR APPROVAL</b> ) <b>OF CONSERVATOR'S</b> ) <b>SPENDING PLAN AND</b> ) <b>AUTHORITY TO CHANGE</b> ) <b>NATURE OF TWO JOINT</b> ) <b>BANK ACCOUNTS</b>
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(*Conservator*), the conservator for (*Protected Person*), moves this Court for an Order approving the Conservator's plan of spending assets of the Conservatorship and for an Order allowing the Conservator to change the nature of two jointly-held bank accounts. These motions are based upon the following facts and relevant law:

**I. MOTION TO APPROVE SPENDING PLAN**

**A. Introduction**

1. The conservator has filed its Inventory of the assets of the conservatorship estate. For the purposes of this motion, these assets can be divided into three distinct categories: (1) jointly-held accounts or accounts payable on death to a designated beneficiary; (2) assets specifically devised by the protected person's Will and (3) the remainder of the assets. A breakdown of assets by the above categories is attached as Exhibit A.

2. These categories of assets are important because they reflect upon the estate plan of the protected person. Therefore, the manner or order in which these assets

are spent and used for the needs of the protected person will have an impact upon the interests of the heirs and beneficiaries of the protected person's estate.

3. The purposes of this motion are two-fold: first, to obtain this court's review and approval of the conservator's plan for spending conservatorship assets and, second, to provide notice of this plan and time for filing objections to all the persons and organizations who may have an interest in the estate plan of the protected person.

**B. The Estate Plan Of (*Protected Person*)**

4. The estate plan of the protected person consists of (a) ( his/her) Will and (b) certain jointly-held bank accounts, an annuity and accounts payable on death to designated beneficiaries.

a. The Will. The Will of the protected person disposes of ( his/her) estate, upon death, as follows:

*(INSERT RELEVANT WILL PROVISIONS)*

A copy of the entire Will of (Protected person) is attached as Exhibit B to this Motion.

b. Joint and POD Accounts. In addition to the protected person's Will, she established, prior to ( his/her) incapacity, various jointly-held bank accounts, an annuity with a designated beneficiary and a bank account payable on death (POD) to a designated beneficiary. As such, these accounts contain a right of survivorship interest in the joint owner or designated beneficiary. Pursuant to ORS 125.460, these accounts are to be considered part of the protected person's estate plan.

**C. The Protected Person's Care Needs And Expenses**

5. The protected person is receiving 24-hour in-home care and significant

medical services. (His/her) care and medical needs cost approximately (*insert cost*) per month. This cost exceeds (his/her) income from social security and civil service pension totaling (*insert income*). Therefore, the conservator must utilize income and principal from the above assets to provide for the protected persons' continuing care. Depending upon (his/her) life expectancy, it is possible that a significant portion of the conservatorship' assets will be liquidated and used for the protected person's continuing care and medical needs.

#### **D. Conservatorship Duties And Relevant Law**

6. The following Oregon statutes and case law govern the conservator's duties to both expend funds for the support and care of the protected person and to protect ( his/her) estate plan.

a. ORS 125.425(2) provides that:

*"A conservator may expend or distribute income or principal of the estate without prior court authorization or confirmation for the support, education, care or benefit of the protected person and the dependents of the protected person if those amounts are reasonably necessary for the support, education, care or benefit of the protected person with due regard to:*

*(a) The size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to manage the affairs of the protected person and the estate that has been conserved for the protected person;*

*(b) The accustomed standard of living of the protected person and members of the household of the protected person; and*

(c) *Other funds or sources used for the support of the protected person."*

b. ORS 125.460 provides that:

*"In investing the estate, selecting assets of the estate for distribution and utilizing powers of revocation or withdrawal available for the support of the protected person and exercisable by the conservator or the court, the conservator and the court shall take into account any known estate plan of the protected person, including the will of the protected person, any revocable trust of which the protected person is settlor, and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the death of the protected person to another or others that the protected person may have originated. The conservator may examine the will of the protected person."*

c. A conservator does not have discretionary rights to a joint account and may not change the nature of the account. The conservator may, however, use the joint account funds for the essential care, support and maintenance of the ward. Strain v. Rossman, 47 Or.App. 57,614 P.2d 102 (Or. App. 1980); Elardo v. Carr, 118 Or. App. 407, 847 P.2d 892 (Or.App. 1993).

d. In relation to probate estates, ORS 116.133 provides that:

*"(1) If the will expresses an order of abatement, or the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (2) of this section, the shares of the distributees abate as may be found necessary to give effect to the*

*intention of the testator."*

*(2) Except as provided in ORS 122.405 as to the shares of pretermitted children, and in ORS 114.105 as to the share of the surviving spouse who elects to take against the will, shares of distributees abate without any preference or priority as between real and personal property in the following order:*

*(a) Property not disposed of by the will.*

*(b) Residuary devises.*

*(c) General devises.*

*(d) Specific devises."*

7. The conservator finds neither statute nor case law establishing an order for abatement (order for spending down) of conservatorship assets being used for the care needs and expenses of the protected person. However, since the conservator is charged to protect the estate plan of the protected person (ORS 126.460) and the order for abatement for probate estates is governed by statute (ORS 116.133), it appears consistent that the conservator should abate assets in the same order as a probate estate. Therefore, the **appropriate order** for spending by the conservator should be:

(a) **SPENT FIRST** - residuary assets;

(b) **SPENT SECOND** - specifically-devised assets; and

(c) **SPENT LAST** - jointly-held accounts, annuities with designated beneficiaries and accounts payable upon death to a designated beneficiary.

#### **E. Conservator's Proposed Spending Plan**

8. As stated above, it is possible that a significant portion of the



conservatorship assets could be liquidated and used for the protected person's continuing care needs and expenses. Due to the nature of the conservatorship assets, the protected person's estate plan may be substantially affected by the spending plan of the Conservator. For this reason, the Conservator seeks approval of this Court, after notices to all interested parties, approving the following spending plan:

Assets of the estate will be spent in the following order:

- a. Assets Comprising the "Residue" of the Estate - **to be spent 1st.**

The conservator believes that the following assets comprise the residue of the estate and should be spent first by the conservator:

*(LIST ASSETS COMPRISING RESIDUE)*

- b. Assets specifically devised by Will - **to be spent 2nd.** The conservator believes that the following assets comprise the specific devises and should be spent second by the conservator, only when those assets comprising the "residue" of the estate, as set forth in paragraph a. above, have been fully exhausted:

*(LIST SPECIFIC BEQUESTS)*

- c. Jointly-held accounts or accounts payable upon death to a designated beneficiary - **to be spent last.** The conservator believes that the following assets comprise the jointly-held accounts or accounts payable upon death to a designated beneficiary and should be spent third by the conservator, only when those assets comprising the "residue" of the estate, as set forth in paragraph a. above, and those assets comprising the specific devisees, as set forth in paragraph b., above, have been fully exhausted:

*(LIST JOINTLY-HELD AND ASSETS WITH DESIGNATED  
BENEFICIARY)*

**II. MOTION TO CHANGE CHARACTER OF TWO JOINT ACCOUNTS**

9. The following bank accounts are jointly-held accounts:

*(LIST ACCOUNTS)*

As jointly-held accounts, it is difficult for the conservator to take sole possession of the accounts or to have complete control of these funds. For these reasons, the conservator requests an order of this court allowing the conservator to change the nature of these accounts from jointly-held accounts into accounts in the sole name of the conservatorship, but payable upon death to the joint owner. More specifically, the *(DESCRIBE SPECIFIC CHANGES REQUESTED)*. In this fashion, the Conservator shall have sole and complete control of the account and the estate planning function of the account will be preserved.

**III. NOTICE TO INTERESTED PERSONS AND  
TIME FOR FILING OBJECTIONS**

10. The following persons named above shall be given notice of this motion:

**Name and Address:**

**Reason Why Entitled to Notice:**

*(LIST ALL PARTIES ENTITLED TO NOTICE IN THE CONSERVATORSHIP AND  
THOSE INTERESTED IN THE ESTATE PLAN OF THE PROTECTED PERSON)*

11. Notice to the above persons shall include a copy of this Motion, the proposed Order, attached exhibits and a notice allowing a period of 15 days in which to file objections, if any.

**WHEREFORE**, the Conservator moves for an order of the Court, as follows:

1. Approving the Conservator's spending plan as set forth in paragraph 6. above;
2. Allowing the Conservator to change the nature of the two jointly-held bank accounts as set forth in paragraph 7., above.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2004.

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Conservator

*(VERIFICATION BLOCK)*

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