

INCAPACITY AND ELDERLAW ISSUES FOR REAL ESTATE PROFESSIONALS

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With the aging of America's population and the significant transfer of wealth that will occur in the near future, real estate professionals will be required to acquire a completely different set of skills to deal with the elderly client on a personal level. The demographics suggest (see Appendix) that real estate professionals will more frequently face the question of whether a client has the capacity to make certain legal choices.

I. LEVELS OF INCAPACITY

A client's legal capacity or competency to perform a particular act is a threshold question that must be one of a real estate professional's first considerations. The professional should understand the standards for the capacity required to perform certain legal acts and what steps can be taken to maximize a client's independence and protect against elder abuse.

Whether a person has the capacity to perform a particular act is examined as of the time of the act. Even if several signs point to mental incompetence, it is possible for a person to have "lucid intervals" during which he or she has requisite capacity to enter into a contract or make a testamentary disposition of property. *Uribe v. Olson*, 42 Or App 647, 651 (1979); *Gentry v. Briggs*, 32 Or App 45, 50 (1978). However, clear and convincing proof is required to show that the legal act was performed during a lucid interval. *Gentry v. Briggs*, 32 Or App at 50.

A. Testamentary Capacity

For a person to be considered as having sufficient mental capacity to make a valid Will, the person must:

1. Be able to understand the nature of the act;
2. Know the nature and extent of the person's property;
3. Know, without prompting, the claims of people who are or might be the natural objects of the person's bounty; and
4. Be aware of the scope and reach of the provisions of the document. *Kastner v. Husband*, 231 Or 133, 135-36 (1962).

Mental competency to make a Will is determined at the precise moment that the Will is executed. Gentry v. Briggs, 32 Or App 45, 49, 573 P2d 322, rev denied 282 Or 189 (1978), Ingraham v. Meindl, 216 Or 373, 376, 339 P2d 447 (1959); Whitteberry v. Whitteberry, 9 Or App 154, 158, 496 P2d 240 (1972).

B. Contracts, Deeds, Lifetime Gifts, Power of Attorney and Trusts

A person must possess greater competency to execute a deed than to execute a Will. *First Christian Church v. McReynolds*, 194 Or at 72. A person can enter into a valid contract if the person's reasoning ability enables the person to understand the nature and effect of the act. *Kruse v. Coos Head Timber Co.*, 248 Or 294, 306 (1967). Lack of capacity is not proved simply because a person is easily influenced and is a dependent person, or because the person states that he or she does not understand a contract. A person of below average intelligence can enter into a binding legal contract. The relevant question is whether the person is capable of understanding the act itself. Conveying an inter vivos gift requires the same degree of capacity as making a contract. *Kugel v. Pletz*, 22 Or App 249, 251 (1975).

C. Capacity of Persons Subject to Guardianship and Conservatorship

ORS 125.005 defines "**incapacitated**" as:

"a condition in which a person's ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirement for the person's physical health or safety.

'**Meeting the essential requirement for physical health and safety**' means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur."

ORS 125.005 defines "**financially incapable**" as:

"a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental deficiency, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance.

"**Manage financial resources**," means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income."

"Incapacitated" persons who are unable to make decisions about their health and safety may require a court-appointed **Guardian**. An inability to manage financial resources

may require the appointment of a **Conservator**. In both instances, the rights and the decision-making abilities of the person are substantially reduced.

Supreme Court Justice Douglass once said that we all have the "right to folly." Put another way, we all have the right to make the wrong decisions. The issue, therefore, is not whether we have made the wrong decision, but with what capacity the decision was made.

For example, is bouncing a few checks evidence of incapacity? Probably not, if it were, we may all be in trouble. On the other hand, overdrafts during the past few months, together with an increased history of unpaid bills, misplaced funds, unexplained gifts, susceptibility to influence and related problems may be evidence of an "inability to manage financial resources."

Except for the language of the statute, there are no clear rules for determining capacity. Each case must be evaluated independently. The Court places weight in the opinions of doctors, psychologists, public social workers, private case managers, family and friends (in my opinion, in that order). The Court (or the Court visitor) will attempt to contact all relevant parties to get an overall picture of the individual's capacity.

(For a detailed discussion about conservatorship, see page 11 below.)

II. THE REAL ESTATE PROFESSIONAL'S ROLE IN ASSESSING CAPACITY

A real estate professional can take steps to maximize the chances of finding the requisite capacity of elderly or infirm clients. One step is for the real estate professional to use a functional approach to determine capacity. In this approach, the real estate professional assesses capacity by observing the client's decision-making process as it relates to the substance of the act to be taken. This approach contrasts with the conventional objective tests of capacity that are unrelated to the act. One commentator identifies six factors that can be applied in using the functional approach:

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

Examples of other ways to empower the elderly client are:

1. Meet privately with the client, possibly after an introduction by a family member or trusted friend if that person set up the initial meeting.
2. Create a relaxing and comfortable interview environment; converse about a topic that interests the client.
3. Conduct the interview at the client's best time of day.
4. Encourage questions.
5. Reassure the client that one purpose of the meeting is for the professional and the client to become acquainted. Remind the client that the client's decisions, and not those of a family member, will control the outcome of the meeting.
6. Use indirect questions to assess capacity. Asking questions such as the identity of the President of the United States can be intimidating and put the client on the spot. Asking other equally topical questions in the course of seemingly casual conversation can be just as helpful without unsettling an already defensive or uncomfortable older client.
7. Take verbatim notes.
8. When preparing written materials for elderly clients, the real estate professional should:
 - a. Use short words, sentences, and paragraphs;
 - b. Use active verbs; avoid passive voice;
 - c. Avoid technical legal terms as much as possible; where unavoidable, define terms in non-technical language when they first appear;
 - d. In a contract or other document, use the names of the parties. Do not use legal role names such as "trustee" or "settlor" to identify parties;
 - e. Avoid double negatives.
 - f. Use various type sizes and spacing, paragraphs, numbering, and bold facing or underlining to break the letter or document into easily readable sections.

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

The real estate professional should be familiar with the community resources that are available to the elder client. If the professional concludes that a client may lack the capacity required to take the desired action, the professional should talk to the client and family about enlisting the help of a professional, such as an elder law attorney, social worker, geriatric nurse, family therapist, or similar practitioner with expertise and experience with the elderly.

To prepare to deal with questions of client competency, a real estate professional can take several steps:

1. Know the legal standards governing competency and incapacity and the legal distinction between the two;
2. Know the standards for appointment of a guardian or conservator;
3. Consult the any applicable rules of professional conduct when confronted with a questionably competent client;
4. Understand the real estate professional's role in assessing a questionably competent client; and
5. Develop and use techniques designed to empower the elder client.

III. LEGAL TOOLS FOR FINANCIAL DECISION-MAKING UPON INCAPACITY

A. General Durable Power of Attorney

1. Generally. A power of attorney is a written instrument in which one person, as “principal”, appoints another to serve as his or her agent or “attorney-in-fact.” A power of attorney confers upon the agent the authority to act in place of the principal for the purposes stated in the instrument. The principal must have the legal capacity to execute the document. *(For a discussion about the capacity needed to execute a power of attorney, see page 2 above.)*

2. “Durable” Power of Attorney. Under the common law, a power of attorney was not a useful tool for dealing with a person’s assets in the event of incapacity or cognitive impairment because of the requirement that the principal remain capacitated in order for the actions of his or her agent to be valid. This shortcoming was remedied by the Oregon Legislature. ORS 127.005 now provides that a power of attorney will continue beyond disability or incapacity.

It is not necessary for a power of attorney to specifically address the issues of incapacity in the document. However, many documents do specifically address the

issue and are known as “**durable**” power of attorney.

3. General vs. Special Powers – Gifting Powers. The power of attorney will be held to grant only those powers that are specifically enumerated in the document. The agent may neither go beyond nor deviate from the powers specifically conferred by the principal in the instrument. For example, the agent has no power to make a gift of the principal’s property unless a gifting power is expressly conferred in the instrument.

Normally, an agent’s self-dealing would be a breach of the agent’s fiduciary duty to the principal. However, at times, an agent’s transfer of the principal’s property into his or her own name may be necessary in order to accomplish appropriate disability or estate planning goals. For example, it is not uncommon for spouses to create power of attorneys for each other. Often these documents include special powers allowing the “well spouse” to later transfer the “ill or institutionalized spouse’s” property or assets into the sole name of the “well spouse.”

Any special power granted must be specifically addressed in the document. Therefore, a recitation authorizing the transfer of property without consideration should include language specifically authorizing the agent to transfer the principal’s property into his or her sole name (or the names of others) without consideration and a general (or specific) description of the property subject to the special power.

IMPORTANT NOTE: When faced with special powers allowing transfers without consideration, the careful real estate agent may wish to inquire further and rule out the possibility of elder abuse. Some of the following questions may be appropriate:

1. Was the power of attorney prepared by an attorney (follow up with the attorney to verify that the principal was independently represented and competent)?
2. What is the current mental state of the principal (in other words, is this a very recently signed document by someone with questionable mental capacity)?
3. If a gifting power is to a spouse, how long have they been married? Is this a second marriage? Do they have children from previous marriages?
4. Was there a valid disability or estate planning reason for the transfer? Is this consistent with the principal’s Will?

B. Representative Payee

When a person becomes unable to manage his/her resources, several public programs (such as Social Security and/or Railroad Retirement) provide for a **representative**

payee or **fiduciary** to receive benefits on behalf of the beneficiary. This authority is limited to the receipt and distribution of the public benefits only and **does not** give the payee authority over other assets belonging to the person. For example, a representative payee does not have the authority to sell real property belonging to the person.

C. Revocable Living Trust

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

The issues involving gifting or transfers without consideration during the lifetime of the trustor are similar to those found in powers of attorney (see page 10 above). Such powers are “special powers” and must be specifically addressed in the trust document.

D. Conservatorship

1. Generally. A conservator may be appointed by the court if, based upon medical testimony, it is determined that the individual lacks the capacity to manage his/her financial resources. (*For a detailed discussion about capacity in conservatorships, see page 3 above*).

The conservator can be an individual, bank, trust company or professional fiduciary. The conservator is empowered to take possession of the protected person’s assets and income, and provides for payment of the person’s expense. The conservator has all the powers that the person would individually possess to manage financial affairs, with or without prior court approval. (*See the discussion of a conservator’s powers at page 12 below.*)

The procedures for the establishment of a conservatorship are similar to that of guardianship. (In fact, the two powers are often requested at the same time.) Unlike guardianship, the appointment of a conservator does not require an investigation by a Court Visitor. The appointment of a conservator does, however, require that the conservator be bonded.

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

2. Emergency Conservatorship. Normally, the procedure for the appointment of a permanent conservator takes approximately 20-30 days to complete. A temporary or emergency conservator can be appointed immediately, without notice and time for filing objections, if the Court determines that an emergency exists and that the assets and property of the protected person are at risk. This procedure is often used to stop and prevent abuse to the protected person's estate. ORS 125.600.

3. Rights of a Protected Person.

a. **ORS 125.455(1)**. A protected person, if mentally competent, **may** perform the following actions:

- (1) Make Wills;
- (2) Change beneficiaries of life insurance and annuity policies;
- (3) Exercise a power of appointment ; and/or
- (4) Elective right to share in the estate of a deceased spouse.

b. **ORS 125.455(2)**. A protected person **cannot** perform the following actions:

- (1) Convey or encumber real property (or any property of the estate);
and
- (2) Make any contract or election affecting the estate.

IMPORTANT NOTE: Title to all property of the protected person is in the protected person and not in the conservator. ORS 125.420.

QUERY: Can a person subject to a Conservatorship change his or her Revocable Living Trust? If a protected person cannot "make any contract," can that same person change a revocable trust? If revocable trusts are governed by the law of contracts, then, arguably the answer is no? However, does it make sense that a protected person can change his or her Will, but not his or her Revocable Living Trust?

4. Conservator's Actions Requiring Prior Court Approval.

a. **ORS 125.430**. A protected person's **principal residence** may be sold by a conservator **only** with the prior approval of the court.

b. **ORS 125.450**. Any sale or encumbrance to a conservator, the spouse, agent or attorney of the conservator, or any corporation or trust in which the conservator has a substantial beneficial interest, or any transaction that is otherwise affected by a

substantial conflict of interest is **voidable** unless the transaction is approved by the court after the filing of a motion with the court seeking approval of the transaction.

c. **ORS 125.440**. A conservator may perform the following acts only with prior court approval:

- (1) Convey or release contingent or expectant interests of the protected person in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.
- (2) Create revocable or irrevocable trusts of property of the estate.

5. Conservator's Actions Authorized Without Prior Court Approval. ORS 125.445 authorizes a conservator to perform the following acts without the need of prior court approval:

- (a) Acquire or dispose of real property assets of the conservatorship estate (except for the principal residence of the protected person) for cash or on credit, at public or private sale;
- (b) Acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;
- (c) Manage, develop, improve, exchange, partition, change the character of or abandon an estate asset;
- (d) Make ordinary or extraordinary repairs or alternations in buildings or other structures, demolish any improvements or raze existing or erect new party walls or buildings;
- (e) Subdivide, develop and dedicate land to public use, adjust boundaries, dedicate easements to public use without consideration;
- (f) Enter into a lease as lessor or lessee, with or without option to purchase or renew;
- (g) Grant an option or take an option;
- (h) Insure estate assets from damage or loss;
- (i) Borrow money to be repaid from estate assets or otherwise and mortgage or pledge property of the protected person as security therefor.
- (j) Pay, settle or contest claims against the estate; and

- (k) Execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the conservator.

IV. CIVIL ACTIONS FOR ELDER ABUSE

ORS 124.100 allows for a civil action to be brought against a person who has caused physical or financial abuse to an elderly or incapacitated person, for damages including economic and non-economic losses, attorney fees, and fees for a conservator or guardian ad litem incurred in bring the action.

A. Actions Against The Abuser

1. For Physical Abuse. An action may be brought under ORS 124.100 for physical abuse if the defendant engaged in conduct against an elderly or incapacitated person that would constitute any of the following:

- (a) Assault, under the provisions of ORS 163.160, 163.165, 163.175 and 163.185.
- (b) Menacing, under the provisions of ORS 163.190.
- (c) Recklessly endangering another person, under the provisions of ORS 163.195.
- (d) Criminal mistreatment, under the provisions of ORS 163.200 and 163.205.
- (e) Rape, under the provisions of ORS 163.355, 163.365 and 163.375.
- (f) Sodomy, under the provisions of ORS 163.385, 163.395 and 163.405.
- (g) Unlawful sexual penetration, under the provisions of ORS 163.408 and 163.411.
- (h) Sexual abuse, under the provisions of ORS 163.415, 163.425 and 163.427.

In addition, an action may be brought for physical abuse if the defendant used any unreasonable physical constraint on the plaintiff or subjected the plaintiff to prolonged or continued deprivation of food or water.

Also, an action may be brought for physical abuse if the defendant used a physical or chemical restraint, or psychotropic medication on the plaintiff without an order from a physician licensed in the State of Oregon

2. For Financial Abuse. (1) An action may be brought under ORS 124.100 for financial abuse in the following circumstances:

- (a) When a person wrongfully takes or appropriates money or property of an elderly or incapacitated person, without regard to whether the person taking or appropriating the money or property has a fiduciary relationship with the elderly or incapacitated person.
- (b) When an elderly or incapacitated person requests that another person transfer to the elderly or incapacitated person any money or property that the other person holds or controls and that belongs to or is held in express trust, constructive trust or resulting trust for the elderly or incapacitated person, and the other person, without good cause, either continues to hold the money or property or fails to take reasonable steps to make the money or property readily available to the elderly or incapacitated person.
- (c) When a person has at any time engaged in conduct constituting a violation of a restraining order regarding sweepstakes that was issued under ORS 124.020.

B. Actions Against Person “Permitting” Abuse

1. Person “Permitting Abuse”. ORS 124.100 (4) states that a civil action may be brought against a person for **permitting** another person to engage in physical or financial abuse if the **person knowingly acts** or **fails to act** under circumstances in which a **reasonable person should have known of the physical or financial abuse**.

IMPORTANT NOTE: This is a very broad section of the statute with little statutory guidelines. This author is aware of at least one title and escrow company currently being sued under this section.

2. Exempt Persons Under the Statute. The following persons or institutions are exempt from action under ORS 124.100(4):

- (a) **A financial institution**, as defined by ORS 706.008, which includes banks and trust companies.
- (b) **A health care facility**, as defined in ORS 442.015, which include hospitals and long-term care facilities. However, not including establishments furnishing primarily residential care or treatment not meeting federal intermediate care standards – see ORS 442.015(14)(d).
- (c) **Any facility licensed or registered under ORS chapter 443**, which includes home health facilities, such as residential care facilities, adult

foster homes, in-home care agencies, developmental disability child foster homes and hospice.

- (d) **Broker-dealers** licensed under ORS 59.005 to 59.541 referring primarily to brokers dealing in securities (stock brokers).

APPENDIX

DEMOGRAPHICS

Here are a few of the statistics reflecting the changing demographic profile of the elderly population in the coming decades:

- The Census Bureau refers to the “human tidal wave” that will “change the face of America” beginning in 2010. From 2010 to 2020, the number of those 65 years and older will increase from 40 million to 53 million. During the succeeding decade, the elderly population will expand by another 17 million, bringing the total elderly to 70 million in 2030 (more than the current populations of France and Belgium combined).
- Generally, predictions are that the progressive concentration of elderly in the South and **West** will continue. The Census Bureau projects that the elderly population will double in seven western states (including Oregon) by 2020.
- The number of elderly needing nursing home care will be 3.4 million in 2010 and reach between 4.3 and 5.3 million in 2030.
- The “oldest old” (85+) is the fastest-growing part of the population. In 2000, there was an estimated 4.3 million persons over 85. This number is projected to reach 6 million by 2010. These numbers will skyrocket to 18.8 million by 2050 (more than the current population of Australia).

Important Note: Over 45% of those over the age of 85 years suffer from a diagnosed dementia.

For more information contact the U.S. Census Bureau or go online at www.census.gov/socdemo/www/agebrief.html.

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