

LEGAL AND FINANCIAL TOOLS

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The following is a brief summary of some of the legal and financial tools used to assist the elderly and the disabled. The first group, referred to as **planning tools**, can be established ahead of time to provide for substitute or surrogate decision making when a crisis arises. The second group, **crisis tools – guardianship/conservatorship**, are court procedures that allow for immediate action and/or decision-making when no preplanning has been done. The final group, **elder abuse tools**, are statutes authorizing legal actions for the recovery of funds and property after the fact.

I. PLANNING TOOLS

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.

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 powers of attorney

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, you may wish to inquire further and rule out the possibility of elder abuse. Some of the following questions may be appropriate:

- a. Was the power of attorney prepared by an attorney (follow up with the attorney to verify that the principal was independently represented and competent)?
- b. 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)?
- c. 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?
- d. Was there a valid disability or estate planning reason for the transfer? Is this consistent with the principal’s Will?

B. Bank - Power of Attorney

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

C. Bank - Joint Accounts

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

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

D. 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.

E. Revocable Living Trust

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

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

II. CRISIS TOOLS – GUARDIANSHIP/CONSERVATORSHIP

A. Guardianship

The court may appoint a guardian when an individual lacks the capacity to make adequate decisions involving their care and safety. The guardian maintains full responsibility for the physical care and welfare of the ward. For example, the guardian may decide where the ward resides and what medical care the ward will receive.

The powers and duties of a guardian are contained in ORS Chapter 125. The powers of a guardian can be limited to specific actions. In fact, the current public policy is to impose the least restrictive alternative upon the ward. In practice, however, few guardianships are limited.

B. Temporary Guardianships

ORS 125.600 allows the appointment of a temporary guardian in an emergency situation, which is defined as "**an immediate and serious danger to life or health or danger to the estate.**" It requires "**clear and convincing**" evidence of that emergency, two days' advance notice of application to the court, except where the emergency necessitates an immediate appointment. The length of a temporary guardianship is 30 days, with a potential 30-day extension.

C. Conservatorship

A conservator may be appointed by the court if, based upon medical testimony, it is determined that the individual lacks the capacity to manage his/her financial resources. The conservator can be an individual, bank, trust company or professional fiduciary. The conservator is empowered to take possession of the protected person's assets and

income, and provides for payment of the person's expense. The conservator has all the powers that the person would individually possess to manage financial affairs, with or without prior court approval.

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 been appointed as a conservator) **does not** have the authority to handle real property transactions for the protected person.

D. 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.

III. CIVIL ACTIONS FOR 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).

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