LEGAL AND FINANCIAL PLANNING FOR SENIORS AND THEIR FAMILIES

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

I. LONG-TERM CARE PLANNING

Few individuals or couples have enough income to pay for the high monthly cost of nursing home care ($2000-$5000). If no planning is done, the couple will often exhaust their savings (resources) before applying for Medicaid.

By utilizing the state and federal laws governing eligibility for Medicaid, much can be done toward preserving the estate and/or preventing impoverishment of the spouse remaining in the community.

A. Long-Term Care Options and Costs

Long-term care needs 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**.

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.**

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.

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 **$60**.

B. Who Pays For Long-Term Care Expenses?

1. Health Insurance and Medicare. Health insurance, including Medicare, is primarily focused upon the payment of hospital and physician care for illness or accidents. Few health insurance carriers cover long-term care expenses. If they do, it is usually only for **skilled** care (the services of a doctor or nurse available 24 hours a day). Even if the insurance covers long-term care, it is often limited to a certain number of days (often only 100 days or less).

2. Long-Term Care Insurance. This is a new and growing industry that should be watched with interest and with concern. Long-term care policies frequently contain limitations or exclusions that prevent them from being an effective mechanism for funding care for an extended period of time. Policies sold in Oregon must now include coverage for alternatives to nursing home care.

3. Private Pay. Currently, just under half of the cost of long-term care in Oregon is paid from personal or family funds. The funds of both spouses are considered **available** to pay for care. The assets of adult children are not available assets unless they have signed as a guarantor for the nursing home expenses.

4. Medicaid. The Medicaid program is the second largest source of payment for long-term care in Oregon. Medicaid is a joint Federal and State program. Medicaid covers the full range of long-term care services, including skilled, intermediate and custodial care, adult foster home and in-home services.

Medicaid eligibility is based upon financial need. Institutionalized individuals whose income is at or below $1656.00 (300% of the SSI standard) (since January 2003) and whose assets are below $2000.00 for an individual and $18,132.00 (since January 2003) for a couple will be eligible. Couples with assets above $18,132.00 may be required to split their assets and spend down before eligibility.

C. Medicaid Eligibility and Benefits

1. Income.

a. Eligibility Level. In 1991, (as a result of Ballot Measure 5 cutbacks) Oregon changed the Medicaid eligibility rules to require that an applicant's monthly income be less than $1656.00. Prior to July, 1991, Oregon's "Medically Needy" program covered nursing home residents whose incomes were over this limit, but were not enough to pay for

their nursing home expenses. Now, a Medicaid applicant whose monthly income is more than $1656.00 cannot qualify for Medicaid assistance for long-term care, no matter how much the care costs are.

Income consists of such fixed items as Social Security, pensions, certain VA benefits, workers compensation, fixed annuities and real property contracts. Only the income of the institutionalized spouse is considered. The community spouse's income will not be counted when determining income eligibility.

b. Income Cap Trust. A special trust is now available to assist those individuals over the Medicaid Income Level to obtain Medicaid eligibility. The trust was created through a joint effort between elder law attorneys and the State. Your client should consult an experienced elder law attorney if he or she is over the Medicaid income level.

2. Resources. An individual can have up to $2000 in cash or other non-exempt resources. An additional $1500 can be set aside in an interest-accumulating savings account dedicated as a "burial fund."

Jointly held liquid assets, such as joint bank accounts, are considered available to the Medicaid applicant. However, the state cannot force a co-owner to sell a jointly held parcel of real property. A life estate interest in real property is an available asset. Value will be established by considering the fair market value for the property and life expectancy of the Medicaid applicant.

The value of a resource is determined by its "equity value." Equity value is the fair market value of the resource minus encumbrances. "Fair market value" is defined as "the amount a resource can be expected to sell for on the open market". The State uses the county tax appraised value for real property and the blue book for automobiles. These values can be successfully disputed by presenting evidence of actual fair market value (i.e. real estate appraisal).

3. Exempt Resources. Certain resources are exempt and not counted in determining eligibility for Medicaid benefits. These include the person's home, one motor vehicle, household items, personal effects, medical equipment, "hardgoods" for burial (including burial space, casket, liner, headstone), and a funeral or burial fund up to $1500.

4. Penalty for Transfer of Resources. Your client may desire to give away or transfer property or other assets to a family member, friend or charity as part of his or her estate planning goals. Unfortunately, a very complex set of rules governs a future Medicaid applicant's ability to transfer property. Simply put, a transfer of resources may make your client or his or her spouse **ineligible** for Medicaid benefits for a period of time.

a. Period of Ineligibility. The disposal of a resource for less than fair market value, by the applicant or spouse, will result in a period of time in which **both** applicant and spouse are ineligible for Medicaid benefits. This period equals the time during which the uncompensated value of the transferred asset could have been used to pay for care at the average private pay rate in the State of Oregon, currently $4300 per month.

FOR EXAMPLE: A transfer of assets worth $43,000 would result in 10 months of ineligibility. In other words, that $43,000 could have been used to pay for care in a nursing facility for 10 months.

The state is allowed to ask a Medicaid applicant about any transfer of assets made during the **36-month period** before applying for Medicaid (called the "look back period"). Any transfer made before that time does not effect Medicaid eligibility. However, transfers made during the 36-month period will be subject to the period of ineligibility. The period for transfers to or from irrevocable trusts is **60 months.**

b. Exempt Transfers. There are transfers, which are exempt from the above rules and will **not** result in a period of Medicaid ineligibility. These include transfers to a spouse, transfers to a blind or disabled child, and transfer of the primary residence to a care giving son or daughter, or a sibling with an equity interest (certain conditions must exist).

5. Protecting the Spouse Who Remains at Home.

a. Spousal Impoverishment Rules. The Medicare Catastrophic Coverage Act of 1988, (**"MCCA"**), significantly changed previous Medicaid laws, providing greater protection to the income and resources available for the maintenance of the spouse who remains at home (the "community spouse"). Prior to MCCA, a spouse's eligibility for Medicaid often resulted in the **impoverishment** of the community spouse.

b. Treatment of Resources. The non-exempt assets ("available resources") of both spouses are pooled together, regardless of how title is held. The equity value of pooled resources are "deemed" available to the institutionalized spouse subject to the spousal impoverishment rules discussed below.

The community spouse is allowed to keep the exempt assets and some of the non-exempt assets. The amount of non-exempt assets which the community spouse is permitted to keep is subject to a limit referred to as the "community spouse resource allowance" or "CSRA."

The community spouse may retain half of the couple's combined assets. The value of the assets is determined at the beginning of the continuous period of care. The amount allowed the community spouse is subject to a minimum ($18,132.00) and maximum ($90,660.00).

Once the community spouse's resource allowance has been calculated, the excess resources must be **spent down** before the institutionalized spouse can be eligible for Medicaid benefits.

IMPORTANT NOTE: Much is currently being done by elder law attorneys to allow the community spouse to keep more than 1/2 of the couple's assets. The process known as a "Revision of the Community Spouse Resource

Allowance" should be evaluated in every case, before the spouse begins spending down the assets.

Once the institutionalized spouse has been determined eligible for Medicaid benefits, there is no need for future assessment of the community spouse's resources. The community spouse may accumulate additional resources without affecting eligibility.

c. Treatment of Income. The institutionalized spouse's monthly income determines (with two small deductions) the maximum that he or she can be required to contribute to the cost of care. Therefore, the community spouse's monthly income, regardless of the amount, will not influence the amount the couple will pay to the nursing home.

Conversely, if the community spouse's monthly income is low enough, it will reduce the amount the couple pays the nursing home. In other words, the community spouse has no duty to contribute his or her monthly income, but has a statutorily defined right of support.

Medicare Catastrophic Act of 1988 allows the community spouse to receive a significantly larger share of the institutionalized spouse income than previously allowed. The community spouse is entitled to an amount sufficient to raise his or her monthly income to $1493.00 (since April 2002). In determining the allowance, all of the community spouse's monthly income, for all sources, will be considered. If all available income is less than the allowance, the institutionalized spouse's income will be used to make up the difference. (In addition, the community spouse is entitled to an additional allowance for his or her shelter expenses).

IMPORTANT NOTE: Elder law attorneys are currently using court orders to increase the income allowance of the community spouse, above Medicaid levels. Again, any spouse in this situation should have an elder law attorney review his or her income and assets.

6. Estate Recovery – Recovery by State of Oregon.

The State of Oregon may have a claim against the (expanded) estate of a deceased Medicaid recipient. The claim cannot be collected until the death of the surviving spouse. The claim is limited to those assets transferred to the surviving spouse upon the death of the Medicaid recipient.

a. Law Governing Estate Recovery. OBRA '93 requires States to establish estate recovery programs. 42 USC '1396p. The federal law defines "estate" to include all real and personal property and other assets included within the individual's estate as determined under State probate law. It also allows the States to expand the definition of estate recovery to non-probate assets. (The State of Oregon has had an aggressive estate recovery program in place for many years). The estate recovery is for nursing facility services, home and community-based services and related hospital and prescription drug services provided to individuals age 55 or older. If there is a surviving spouse, the estate

claim is not collected at the death of the first spouse. If there is a minor or disabled child, the estate claim is not collected. There is a possibility that the state's ability to recover may soon expand to include the costs of institutionalized care received prior to the recipient reaching age 55.

b. Hardship Provisions. OBRA '93 requires the States to incorporate hardship provisions in their estate recovery programs. Transmittal #63 issued by the Health Care Financing Administration (HCFA) [now the Center for Medicare & Medicaid Services or ACMS@] in September, 1994, provides for "special consideration of cases in which the estate subject to recovery is (1) the sole income producing asset of survivors (where such income is limited), such as a family farm or other family business; (2) a homestead of modest value; (3) other compelling circumstances."

c. Expanded Estate Recovery Rules. The 1995 Oregon legislature also enacted a law governing estate recovery, and this has been subsequently implemented in the rules. The new law expands estate recovery to allow recovery against any real or personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including but not limited to property passing by joint tenancy, survivorship, Revocable Living Trust or other arrangement. The State of Oregon takes the position that the claim survives, and can be made against the estate of the surviving spouse if it can be traced back to the estate of the recipient at the time of the recipient's death. Therefore, if a recipient wishes to avoid a State claim he/she should consider transferring assets such as the home to the name of the surviving spouse.

7. Planning Strategies. Careful planning can go a long way toward preserving the couples' resources and preventing the impoverishment of the community spouse. Many of these same tools can also be used to plan for the unmarried individual.

a. Spend Down. Often referred to as "split and spend down," this planning approach combines the Community Spouse Resource Allowance (discussed above) with spend down strategies to both prevent the impoverishment of the community spouse and expedite Medicaid eligibility for the institutionalized spouse.

The Resource Assessment is the beginning of the planning process. This "snapshot" of the couple's combined resources determines the amount the community spouse may have while the institutionalized spouse qualifies for benefits. Generally, the community spouse is best off with the highest possible allowance.

The Resource Assessment "freezes" the couples' available assets at the time the **continuous period of care begins**. Spend down or transfers made subsequent will not change the figures produced by the Assessment.

Once the Resource Assessment is complete, the community spouse may transfer "her share" (the community spouses' resource allowance) into her own name. The remaining amount, "his share" may be left in the name of the institutionalized spouse, or preferably, their joint names. This amount must then be spent down before the institutionalized spouse will be eligible for Medicaid benefits.

b. Exempt Resources. Spend down often begins by purchasing or **maximizing** exempt resources. Some examples are:

(i) Purchase a residence;

(ii) Repair the existing residence;

(iii) Purchase car (with long-term warranty);

(iv) Personal property (appliances, clothing, home entertainment);

(v) Medical equipment;

(vi) Burial goods and merchandise;

(vii) Travel

c. Converting Resources Into Income. Monthly income in the sole name of the community spouse is not considered available to the institutionalized spouse. Therefore, the community spouse may convert a non-exempt resource into an income source (i.e. real estate contract) or she may use non-exempt assets to purchase an irrevocable income source (i.e. single premium, immediate annuity).

IMPORTANT NOTE: While an annuity can be a very attractive planning tool, be sure it fits your particular circumstances. Be sure to "run the numbers." The extra income provided by the annuity may reduce the amount of the community spouse income allowance or bring her monthly income over the income cap.

d. Transfers by Gift. The gifting of assets should be considered a dramatic form of planning. While it may preserve assets, it also can be a significant risk.

Gifts can be made to a community spouse with no period of ineligibility for Medicaid. Gifts to individuals other than a spouse, will trigger the period of ineligibility discussed above. Again, there is a 36-month look back period.

Either spouse may therefore give away (or sell for less than fair market value) an asset as long as both are prepared to wait out the ineligibility period. This has been referred to as the **transfer and wait** strategy.

e. Transfers to Trust. In the past, transferring assets to a specialized form of trust could protect some of the assets. Congress recently changed the rules governing trusts when it passed OBRA 1993, effective August 1993. These new rules have substantially restricted the use of trusts for long-term care planning purposes.

IMPORTANT NOTE: ***Special Needs Trusts***. The trust rules changed by

OBRA 93 are trusts funded with assets **owned or previously owned** by the Medicaid applicant or spouse. The rules governing trusts which are funded by assets owned by third parties, with no legal duty of support (i.e. parents of adult children, children, grandparents) were not changed. Therefore, the commonly used "Special Needs Trust" established by a parent for the benefit of an adult disabled child is still an available and effective estate planning tool. (See discussion below.)

f. Divorce. A legal division of assets through a court order in a divorce will protect the assets of the spouse in the community, who will no longer figure into the equation for purposes of Medicaid eligibility. Although this is not a recommended strategy, in appropriate cases clients should be advised that this is one option available to them.

If a spouse is diagnosed to be in the early stages of a progressive disease such as Alzheimer's Disease or Parkinson's Disease, some couples will choose to enter into a Postnuptial Agreement. This can spell out which assets and income should be used first for long-term care. It can also specify how the assets should be divided in the event a petition for dissolution of marriage or legal separation is filed.

g. Staying Off Medicaid. Finally, the best plan may be not to apply for Medicaid benefits. Some disadvantages include discrimination against Medicaid patients, not all facilities accept Medicaid, and impact of estate recovery upon the death of the surviving spouse.

E. Using Irrevocable Trusts In Long-Term Care Planning

1. Trusts In General.

a. OBRA '93 made a number of changes that affect the use of trusts. The applicable Oregon rule is OAR 461-145-540. Generally speaking, restrictions on the use of distributions from trusts will be disregarded. The portion of the trust that could be used for the benefit of the individual is considered available.

b. Assets placed in revocable trusts are still treated as being available to the individual and his or her spouse.

c. For assets that are unavailable because they have been transferred to an irrevocable trust, and for payments that have been made to others from a revocable trust, there is a special look-back period of 60 months rather than 36 months. After that time, the transferred assets are not considered available for Medicaid eligibility and the client can apply and receive benefits (if otherwise eligible).

2. Spousal Annuitized Trusts.

a. As noted above, Congress exempted certain trusts from the restrictive rules intended to chill the use of trusts in Medicaid planning. One type of trust that is allowed is a trust created by an individual "for the sole benefit of" his or her spouse.

This type of trust is intended to hold the couple's assets in excess of the community spouse resource allowance. By the terms of the trust the income and assets in the trust cannot be available for the benefit of the institutionalized spouse. However, the trust assets can be made available to the community spouse alone, during his or her lifetime. To insure that the assets are solely for the benefit of the community spouse as required by statute to meet the exception, the terms of the trust must require that the income and assets are distributed to the community spouse within the community spouse's actuarial lifetime, as determined by tables published by the Centers for Medicare and Medicaid Services (CMS). This approach is a variation of the annuity technique described above in Section VIII-D, and is thus often called the "spousal annuitized trust."

However, there has been a recent policy shift in Oregon SPD. They are moving toward counting the Spousal Annuitized Trust as an available resource. Any planning that contemplates one of these trusts should be carefully considered in light of changing policy.

3. Testamentary Trusts.

a. Family members wishing to benefit an elderly or disabled individual may leave a share in a testamentary special needs trust, and thereby preserve the individual's eligibility for Medicaid. This trust would limit distributions to special needs. Special needs include many types of goods and services, such as supplemental nursing care not provided by public assistance programs, recreation and transportation, experimental medical treatments and psychological support services. Distributions cannot be made for basic living expenses including food and shelter.

4. Irrevocable Income-Only Trusts.

a. Assets in an income-only trust created by an individual with his or her own assets for his or her own benefit or that of the spouse will not be considered available. There will be a 60-month look-back period, and the income will be considered available.

5. Income Cap Trusts.

a. A trust created to divert the income in excess of the income eligibility limit in an income cap state is allowed. See above.

6. Special Needs Trusts.

a. Special needs trusts created by third parties with funds of a third party are still viable under the new law.

b. Living trusts set up by nominal third parties such as a court, a fiduciary, or someone at the request of an individual or his or her spouse are all treated as being set up by the individual. (It is generally believed that Congress intended to render donee trusts ineffective. Donee trusts are trusts voluntarily created and funded by donees following gifts to the donee by the trust beneficiary). However, there are two important exceptions:

(i) A trust containing the assets of an individual under the age of 65 who is disabled, and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or court, if the State will receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on the individual's behalf.

(ii) A trust containing the assets of a disabled individual which is established and managed by a non-profit association, called a pooled trust, if the State will receive the amounts remaining in the account upon the death of the beneficiary equal to the total medical assistance paid on the individual's behalf. ARC of Oregon operates a pooled trust. Information can be obtained by calling 1-877-581-2726.

II. PLANNING FOR ELDERLY AND DISABLED PERSONS

The goal of estate and incapacity planning is to help design and determine your future. Fewer people can now rely upon a close and supportive family to be there in times of need. You must therefore rely upon advance planning, which includes the implementation of estate and incapacity planning tools.

The following is a summary of the areas that should be planned for and some of the tools available to facilitate an effective, advance plan.

A. Planning For Incapacity

Planning for incapacity is often overlooked, and yet there is a 65% chance that each of our clients will experience some period of incapacity and a 25% chance of suffering a long period of incapacity. The best method of planning is to use the following legal tools to appoint a **surrogate** or **substitute decision-maker** to assist the client when, and if, the time comes.

1. Planning Tools for Health Care Decisions.

a. Advance Directive. The Directive is your client's statement that if death is imminent, because of a terminal disease or injury, your client does not want artificial life support procedures used to postpone the natural moment of death.

In addition, your client can designate another person, a family member or friend, (called "health care representative") to act legally on behalf of your client to make health care decisions. The health care representative will be authorized to make any health care decision your client could have made (with some limited exceptions, i.e.: sterilization). This includes the authority to withdraw life support procedures, such as respirators or artificial nutrition and hydration.

The Advance Directive replaces the "Directive to Physicians" and the

"Health Care Power of Attorney." These two forms, if already signed, remain effective. However, after November 4, 1993, the new "Advance Directive" should be used.

b. Guardianship. A guardian may be appointed by the court 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.

A temporary guardian can be appointed without notice and time for filing objections if the court determines that an emergency exists and that the welfare and life of the ward is at risk without appointment.

2. Planning Tools for Financial Decisions.

a. General Power of Attorney. Your client can designate another person, a family member or friend (called "attorney-in-fact"), to act legally on your client's behalf. Simply put, the attorney-in-fact has the power to sign your client's name to any legal document.

Oregon law provides that a power of attorney will continue beyond disability or incapacity ORS 127.005. However, it is best to specifically address the issue of incapacity. This is known as a **durable** power of attorney.

b. Bank - Power of Attorney. Most local banks allow your client 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 your client 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 your client become incapacitated.

Joint ownership also makes the account available to the joint owner and his/her creditors. Upon your client'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) provide for a **representative payee** or **fiduciary** to receive benefits on behalf of the beneficiary.

e. Revocable Living Trust. The Revocable Living Trust is an excellent way to plan for decision-making if your client becomes incapacitated. The trust appoints a

decision-maker (successor trustee) if your client become incapacitated. The trust document can incorporate specific instructions about how funds will be used if your client becomes incapacitated.

> **PRACTICE NOTE**: Recently, we are seeing an evolution in the drafting of Revocable Living Trusts. The primary purpose of the trust is no longer simply probate avoidance. Now, more focus is being placed upon the client's "quality of life." As discussed above, many people are no longer able to rely upon a close and supportive family to be there in times of need. One alternative is to draft, as part of a good living trust, language that provides direction and assurance that the trustee will use trust funds to promote the highest quality of life. This is especially important if the client is no longer able to make those decisions for him or herself.

f. 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 or a bank. The conservator is empowered to take possession of the protected persons' assets and income, and provides for payment of the person's expenses. The conservator has all the powers that the person would individually possess to manage financial affairs.

A finding of incapacity is not required to implement a conservatorship. In fact, a client may request and consent to the appointment of a conservator. Conversely, if your client is incapacitated, he or she no longer has the ability to utilize the other tools listed above and the conservatorship may be necessary.

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.) However, the conservatorship does not require the appointment of a court visitor. Also, a conservator is required to be bonded - a guardian currently is not.

C. Final Planning - Wills and Revocable Trusts

1. Last Will and Testament.

a. What is a Will? A Will is "a written legal expression by which a person makes disposition of his or her property." Blacks Law Dictionary.

A Will becomes effective upon the death of the testator (maker of the Will). The Will can be amended or revoked any time prior to death. Fiduciaries appointed by the Will have no power nor duties until death. Beneficiaries of the Will acquire no rights nor interest in the testator's estate until death.

A Will directs the probate court regarding many issues:

(i) Revoking prior Will and codicils;

(ii) Appointing fiduciaries, including personal representatives (formally known as executor or executrix), guardians for minor children and trustees of testamentary trusts;

(iii) Waiver of a bond for the personal representative. This will be required by the court if not expressly waived by the Will. (This paragraph alone can often pay for the cost of the Will);

(iv) Directing the payment of debts, taxes and expenses of probate. This can also be used to direct the payment of extraordinary expenses such as transportation or shipping expenses relating to personal property;

(v) Bequests of specific tangible personal property; and

(vi) Division and distribution of the residuary (remaining) estate.

b. What a Will is Not.

A Will is not a "living will." A "living will" is the common name for a Directive to Physicians, now the Advance Directive. The Directive is a written statement directing the withholding or withdrawal of life-sustaining procedures.

A Will is not a power of attorney. A Will has no legal effect until the death of the testator. It cannot appoint a surrogate financial or health-care decision-maker during the testator's lifetime.

A Will does not "avoid probate." A common misconception is the belief that simply having a valid Will avoids the need for probate. Since a Will has no legal effect until the death of the testator, title to real and personal property remains in the name of the testator upon his/her death. Therefore, probate is necessary to transfer the title of the testator's property to the beneficiaries. Simply put, the Will directs the probate process - it does nothing to avoid it.

c. Requirements.

(i) **Capacity.** Any person who is 18 years of age or is lawfully married, and is of sound mind, may make a Will.

(ii) **Sound mind.** The Oregon Court of Appeals has ruled that the determination of testamentary capacity must focus on the **moment** the Will is executed.

(iii) **Incapacity.** A person declared incapacitated, with a court appointed guardian or conservator, may still execute a valid Will.

(iv) **Testimony and Attestation.** A Will must be in writing and executed in the presence of at least two witnesses. If the testator is unable to sign her name, ORS 112.235 allows "some other person" to sign the testator's name. Witnesses to a Will must either see the testator sign or hear the testator acknowledge the signature. Each witness must "attest" the Will by signing his or her name.

(v) **Amendment or Revocation.** Because a Will has no legal effect until the death of the testator, it can be amended or revoked at any time prior to death. A Will can be revoked or altered by the creation of another Will. Simple amendments can be accomplished by use of a Codicil.

A Will may be revoked by being burned, torn, canceled, obliterated or destroyed, with the intent and purpose of the testator of revoking the Will. A Will may also be revoked by the subsequent marriage or divorce of the testator.

Partial revocation of a Will is not recognized in Oregon. The Will must be revoked in its entirety. Changes and markings made after the Will was executed will be ignored.

2. Revocable Living Trusts. A Revocable Living Trust has been called the "**Cadillac**" of estate planning tools. Its popularity comes from its ability to both **plan for incapacity** during life and **avoid probate** upon death.

a. What is a Revocable Living Trust? Referred to by many names, such as family trust, intervivos trust, "loving trust," a Revocable Living Trust is an agreement that your client's property and assets will be managed and distributed in the manner he or she desires, both during lifetime and upon death. Its primary benefit is to allow your client to manage and control the trust as long as he or she is able.

It is referred to as a "living" trust because it is established during your client's lifetime and, in most cases, goes into effect immediately. It is a "revocable" trust because your client is free to revoke or amend the trust at any time as circumstance change.

If, due to an accident or illness, your client becomes incapable of managing his or her own financial affairs, your client may appoint the person(s), often a spouse or another client, to step in and take over the management of the trust without court approval or supervision. Not only does your client decide who the "**successor trustee**" is, but also instructs the successor trustee how to use funds for his or her benefit. Your client also defines the term "incapacity" and selects the person or doctor who will make that decision.

b. Probate Avoidance. Probate is a court-supervised process providing for the payment of debts and taxes, and the transfer of probate property when your client dies. Probate property is what your client owns, in his or her own name without survivorship

rights. Many people mistakenly believe that having a Will avoids probate. A Will simply directs the probate process - it does nothing to avoid it.

A living trust prevents the need for probate because your client has directed the distribution of assets in the trust document. Your client has also appointed a successor trustee to pay debts and taxes, and to distribute the estate.

c. Personal Needs and Quality of Life Planning. The Revocable Living Trust is flexible and can be tailored to your client's specific needs, desires and financial resources. This includes the ability to make provisions for **care** and **comfort**. Specific instructions about care and comfort are also important when the successor trustee is an institution (bank or trust company), or when a family member is very busy or geographically remote.

The following personal issues can be included in your client's trust document:

(i) Specify that you prefer to be cared for at home. (Even if the cost of such care would be significantly greater than the cost of nursing or other long-term care.)

(ii) Authorize the trustee to provide additional services and care monitoring if you become hospitalized or require placement in a long-term care facility.

III. 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 loses, attorney fees, and fees for a conservator or guardian ad litem incurred in bring the action.

1. Actions Against The Abuser.

a. 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:

(i) Assault, under the provisions of ORS 163.160, 163.165, 163.175 and 163.185.

(ii) Menacing, under the provisions of ORS 163.190.

(iii) Recklessly endangering another person, under the provisions of ORS 163.195.

(iv) Criminal mistreatment, under the provisions of ORS 163.200 and

163.205.

(v) Rape, under the provisions of ORS 163.355, 163.365 and 163.375.

(vi) Sodomy, under the provisions of ORS 163.385, 163.395 and 163.405.

(vii) Unlawful sexual penetration, under the provisions of ORS 163.408 and 163.411.

(viii) 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

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

(i) 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.

(ii) 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.

(iii) 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.

2. Actions Against Person "Permitting" Abuse.

a. 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.

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

(i) **A financial institution**, as defined by ORS 706.008, which includes banks and trust companies.

(ii) **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).

(iii) **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.

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

These materials are designed to acquaint you with some basic aspects of estate planning. They provide general information only and are not meant to advise you about your particular legal needs. Every situation is different. These materials should not be used as a substitute for individual advice from an attorney knowledgeable in estate planning.

Copyright, Fitzwater & Meyer, 2003

APPENDIX A

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.

APPENDIX B

ESTATE PLANNING CHECKLIST

PLANNING FOR INCAPACITY:

_____ Power of Attorney for Finances

_____ Revocable Living Trust

_____ Advance Directive

_____ Declaration for Mental Health Treatment

_____ Nomination of Guardian and Conservator

_____ Long-Term Care Planning

PLANNING FOR DEATH:

_____ Will

_____ Revocable Living Trust

_____ Testamentary Trust for Minors or Adults Who Need Help with Management

_____ Testamentary Trust for Estate Tax Planning

_____ Special Needs Trust for Disabled Person Receiving Public Benefits

_____ Beneficiary Designations

_____ Joint Ownership

_____ Funeral Plans and Burial Instructions

DISCLAIMER: The information contained in this website is based on Oregon law and is subject to change. It should be used for general purposes only and should not be construed as specific legal advice by Fitzwater & Meyer, LLP, or its attorneys. Neither this website nor use of its information creates an attorney-client relationship. If you have specific legal questions, consult with your own attorney or call us for an appointment.

© Fitzwater & Meyer, LLP, 2003