



# Families & Aging A Guide to Legal Concerns

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*This publication can only give general information, not legal advice!*

# Families & Aging

## A Guide to Legal Concerns

Aging brings susceptibility to physical and mental disabilities. Once disability occurs, special legal problems arise. Many services, including legal services, may help disabled persons, their families, and caregivers to cope.

A major fear of aging is the loss of self-determination. We treasure the right to make our own personal and financial decisions. Nevertheless, we all need to consider the very real possibility of being physically or mentally unable to make decisions on our own at some future time. Planning for that eventuality is the best way to preserve our self-control to the greatest extent possible.

Begin your planning with thoughtful effort. List the specific help you want and your goals and values. Protective services, such as power of attorney, guardianship, conservatorship, and representative payee, can and should be tailor-made for the person benefiting from them.

If you are planning for a loved one who is unable to help with decisionmaking, get as many professional opinions as possible, from the person's physician and attorney, as well as social service agencies. Combine that advice with your knowledge of the person's beliefs and desires to put together a plan that allows him or her the maximum personal freedom and dignity.

Older Oregonians can receive special services that are publicly funded; many of these services are not limited to low-income seniors. To learn about available services, contact the local office of the Senior Services Division, Area Agency on Aging or the local senior center.

Effective planning mixes sensitivity and good advice. Obtain competent legal and financial advice about your particular situation. This publication can only give you general information, *not* legal advice!

If you have a *general* question which is not answered in the publication, please write or call:  
Alzheimer's Disease and Related Disorders  
Association of Columbia-Willamette  
1015 N.W. 22nd Avenue  
Portland, Oregon 97210 (229-7115)  
For *specific* advice consult your lawyer.

*Our thanks to the caregivers and family members of the Alzheimer's Disease and Related Disorders Association, Columbia-Willamette Chapter, for providing the legal questions that come from their personal experiences, and for initiating the development of this publication.*

# Abuse

**What is “abuse”?** Abuse is commonly thought of as physical violence. Oregon law defines it much more broadly and breaks it down into two categories—nursing home abuse and community abuse. Both include physical abuse, but also include neglect or abandonment which may lead to harm. In addition, inadequate staffing at a nursing facility is defined as abuse.

Persons who do not technically fit into the legal definition of abused may receive assistance if protection or assistance is needed to maintain their physical or financial well-being. Any abuse or need for protection should be reported as discussed below.

**What if a disabled senior is abused?** Contact the local Senior Services Division office and give as much information as possible. An investigation and appropriate action will follow. Senior Services Division staff realize that the stress of caring for someone with a disease such as Alzheimer’s disease may prompt abuse; thus, they try to relieve family stress and to view the family in the best possible light.

Any interested person may petition for appointment of a guardian or conservator to protect the disabled person’s financial or personal interests. The abuse victim, or a lawyer acting for the victim, may get a court order to stop further abuse.

**What can an abused or mistreated caregiver do?** Consult the disabled person’s physician to see if medical treatment to control the behavior is appropriate or if any current medication might be causing the abusive behavior. Consider the circumstances that provoke the mistreatment and alter them. Perhaps a different approach to sensitive issues is all that’s necessary. Random abusiveness is a serious problem and may ultimately require institutional care, but frequently can be addressed by other techniques.



## Asset protection and preservation

**Does disability affect legal competence and autonomy?** Some disabilities may cause mental incompetence, an inability to make rational decisions. A person declared by a judge after a court hearing to be incompetent will need a guardian or conservator (or both) to protect person or property. Civil commitment may be necessary in extreme cases if the person is a danger to self or others.

A judge must find a person has an incapacitating condition in order to appoint a guardian or conservator, but such an appointment by itself is not a declaration of incompetency.

To help evaluate legal capacity and determine what protective services are needed, an attorney must meet with the disabled person and the family or other caregiver. If a disability entails a deteriorating mental condition, legal capacity may change and require reevaluation by an attorney together with the family and treating physician.

The autonomy of a disabled person should be maintained to the maximum extent possible. Even if a guardian or conservator is appointed, the person can continue to make as many decisions as is reasonable. The law will protect the autonomy of a disabled person as long as he or she is mentally competent. An attorney or other advocate may be necessary to make the legal system work as it should in this regard.



**What is a power of attorney and how does it work?** A power of attorney helps a person handle financial affairs. It is a written and notarized document that may be created for a specific purpose (such as selling a house or cashing special checks) or it may be general and used to authorize all business transactions (including buying, selling, and managing property; paying and receiving money, and investing funds). More than one person may be given a power of attorney if each performs a different task for the disabled person.

The person giving power of attorney to another must understand the effect of what he or she is doing. A physically disabled person who is still mentally competent may revoke a power of attorney at any time. A power of attorney is automatically cancelled when a person dies, so it cannot substitute for a will. If, however, a person becomes mentally incompetent after giving someone a power of attorney, the person given the power of attorney may continue to act on behalf of the disabled person unless a conservator for the person revokes the power or if the power of attorney states it is revoked upon such disability.

If the power of attorney relates to real property, it should be registered in the county recorder's office of the county where the property is located. Although not required, it is often most practical to give a power of attorney to someone living near the assets and the disabled person. The power of attorney should comply with the laws of the state where property is located.

The person giving authority under a power of attorney to another should anticipate that person's temporary absence or illness with a backup arrangement for a substitute.

**When is a conservator or guardian needed? What are their duties?** When a disabled person cannot make decisions or take actions without help, a guardian or conservator may be needed. One person may perform both roles; with small estates, a guardian may be all that is needed.

Duties of a guardian and conservator overlap, but they focus on different decisions about a protected person's care and affairs. A guardian is a court-appointed decision-maker in regard to another person's living arrangements and health care treatment; a conservator is a court appointed money manager.

If the disabled person has more money than she or he needs to live on, owns real estate, or has dependents, a conservator may be needed. In practice, many banks and businesses resist transactions authorized by only a power of attorney. Appointment of a conservator, especially for out-of-state transactions, simplifies estate management.

Only a conservator should make financial decisions for an incompetent person, unless a power of attorney was given while the person was competent and it has not been revoked. A conservator must make prudent investments, manage real and personal property to avoid waste and loss, and disburse funds to support the protected person and any dependents. The conservator may allow the protected person to handle personal finances. However, the conservator must make decisions affecting property.

A conservator posts a bond (if required by the court), makes an inventory and appraisal of the estate assets, and makes an annual accounting to the court. A judge may require additional accounting if there is evidence of abused power or misused funds. A conservator may receive a fee and be reimbursed for expenses incurred for estate management and for the accounting.

A guardian decides personal affairs for a person needing care and supervision. If a person is incompetent, only a guardian may make decisions about medical care and treatment. If the protected person has few assets, a guardian may handle finances, take reasonable care of the person's property, and receive any funds owed to the person. Guardians post a bond (if required by the court), and make an annual report to the court. Neither a guardian or a conservator must use their own personal funds to take care of the protected person.

**How is a guardianship or conservatorship established?** Both guardianships and conservatorships require legal proceedings. Any interested person may ask a judge to appoint a guardian or conservator to begin making decisions in the disabled person's best interests. A lawyer or Senior Services Division representative can help petition the court, make proper notification, and show why protection is advised.

A specific person is recommended for appointment in the petition. It is helpful to the court if the incapacitated person previously stated his or her preference in a power of attorney or letter of preference. If someone objects to the proposed conservator or guardian, a hearing will be held. The judge will assign a visitor (a social worker or other health care professional or a trained volunteer in some counties) to interview the disabled person, the proposed conservator or guardian, and the physician or representatives of the institution providing care, and then to report findings to the court.

The judge then makes a decision on the appropriateness of a guardian or conservator and letters of administration are issued designating their authority.

**What if a disabled person will not agree to having a guardian or conservator and wants no help?** A guardian or conservator may be appointed against a person's wishes if a judge is convinced the person cannot independently handle personal or financial affairs because of some incapacity. (The judge may also decide the person is incompetent: Remember, however, that incompetence is not the same as incapacity.)

**What if a guardian or conservator is not acting appropriately?** You may petition the court to evaluate suspicious actions. You may wish to first contact the local Senior Services Division or Area Agency on Aging office for help and a review of the problem.

**Does a guardianship or conservatorship ever end?** Yes. Termination is automatic at the protected person's death or upon resignation approved by a judge. If the protected person prefers a different guardian or conservator, the

judge may revoke the existing appointment and make a new one. Sometimes a change solves problems and induces cooperation.

A guardianship or conservatorship will also terminate if the protected person's condition improves so that court intervention is no longer necessary. A conservatorship can end at the time the estate assets are under \$10,000.

**What informal methods can be used to protect and manage property?** What if the spouse responsible for finances begins to lose mental powers? He or she buys "crazy" items, forgets where or why money was spent, and bills go unpaid. Appropriate protective methods depend upon the size of the estate, the stage of the disability and whether a power of attorney was given before the disability affected competence.

Informal arrangements include limiting available cash, advising businesses not to extend credit, and removing the person's name from joint accounts and credit cards. To remove a joint owner's name, however, requires his or her permission. Credit card accounts can be paid and closed and joint account assets withdrawn and redeposited without permission of the joint owner.

If the mentally incapacitated joint owner will not turn over control and is wasting assets, a conservatorship may be necessary. If a power of attorney is already in effect, and if it allows such decisions, the person holding the power of attorney may turn over control to the other joint owner.

If one joint owner is able to manage property and is trusted by the other owner, nothing may need to be done. However, when only the disabled owner knows how to manage the property, the other owner may need professional management advice.



Both owners must consent to the mortgage or transfer of jointly-owned property. If one owner is not mentally competent, a power of attorney given before the disability, or a conservator appointed after the disability, is necessary to act for the disabled owner. In the early stages of a disabling disease, an owner of real or personal property who is still mentally competent may give a power of attorney that authorizes the other owner or someone else to make management decisions.

Another method to protect property is a trust that gives property to someone else on behalf of the disabled person, the beneficiary. The trust beneficiary has no management responsibility. The person setting up the trust (this may be the disabled person) appoints a manager, called a trustee. A trustee may thus pay bills, arrange for care, and give cash to the beneficiary. In this way, the person creating the trust avoids proving or publicizing the beneficiary's incapacity. A lawyer's help is important in setting up a trust so that all interests involved are protected.

An additional method is a joint account that requires funds to be spent only for the benefit of the legal owner. This is accomplished by the owner of the account giving another person signature authority over the account. The person with such authority has management powers over the account and full access to it for deposits and withdrawals, but can use funds only for the owner's benefit and will not automatically own the account as a survivor if the beneficiary dies.

**What is a representative payee and how does it work?** If disability makes it hard for a person to manage pension or public benefit income, a relative or caregiver may become a *representative payee* to receive and disburse funds for the disabled person. Social Security, the Veterans Administration, and other agencies may appoint a representative payee if a beneficiary is unable to manage funds, and they prefer to appoint a spouse, relative, or friend. These agencies will provide the help necessary to set up this very useful procedure.

**How can I plan for my own possible incapacity?** Before physical or mental problems develop, decide how you want to be cared for if you become disabled. Do you have a trustworthy friend or relative? Write that person a *letter of preferences*, which specifically states your concerns and preferences for your care. You may also give someone a power of attorney that takes effect upon your disability; or you may name a person as your preferred guardian and conservator.

Other ways to insure that your property and care are managed as you want include joint bank accounts, trusts, and a Directive to Physician (more commonly known as a *living will*). Set these up now. Always talk with your possible future caregivers as you make your plans.

## Autopsy

**Who may consent to an autopsy?** When a person dies in a hospital or in an attended death, the next of kin may consent to autopsy. Without such consent, only a judge may order an autopsy. Next of kin are usually the spouse, children, or parents. Hospital policies vary when the next of kin disagree over an autopsy.

## Criminal activity

**What can happen if someone with dementia is involved in criminal activity?** Using a defense of diminished mental capacity, the person may be able to avoid prosecution because of inability to understand his or her actions.

**Are relatives and caregivers liable for criminal activity of a person with dementia?**

Generally, no. There is potential civil liability if people were aware of criminal propensities yet took no reasonable action to prevent the criminal behavior or to warn potential victims. Reasonable actions may include restraints or medications for more extreme cases.

## Driving problems

**What if dementia or another disability prevents safe driving?** Get a doctor's statement, stating why the disability jeopardizes driving. Send it to the Department of Motor Vehicles (Attention: Medical), 1905 Lana Avenue N.E., Salem, Oregon 97314; phone 378-6958. The Department will write and notify the driver of their intent to suspend the license.

The individual who receives such notice has the opportunity of an administrative hearing to present evidence of his or her ability to drive. The Department of Motor Vehicles may request re-examination of a driver within 60 days if a report of erratic driving is received.

**Who is liable if an incompetent or disabled person wrecks the family car?** Friends and family may be responsible if they were negligent. If a husband allowed his wife to drive knowing that she is not competent, he could be found negligent and responsible for any injuries or damage. An injured person would have to prove that the husband knew his wife was not competent to drive. By way of further example, a daughter may be liable for leaving keys out, knowing her father was in the house but not competent to drive.

Find out whether your insurance covers an accident if an incompetent person is driving your car. Many policies deny coverage if the car is driven without permission. Most insurance policies limit coverage to all household members with valid licenses. Arrange for a policy change to cover the possibilities.





## Financial assistance for medical care

**If a disabled older person cannot afford needed care, what help is available?** Call the local Senior Services Division or Area Agency on Aging office for an appointment to talk with a caseworker. This is the only way to get correct information about what is available for a specific person. Many people have inaccurate ideas about services and eligibility.

Available services include housekeeping and companion care, allowances for medical necessities (such as a wheelchair and eyeglasses), and funds for food, telephone, laundry, moving and nursing home care.

The senior center and the Retired Senior Volunteer Program (R.S.V.P) may also offer special help.

**What are the qualifications for Medicaid?** Medicaid is a program of medical assistance for certain groups of needy and low-income people. To learn about eligibility requirement and available services and to make application, talk with a Senior Services Division or Area Agency on Aging caseworker. If you are refused Medicaid assistance, find out why. You may reapply or ask for a reconsideration or hearing. Gaining an advocate to help you in this process will substantially aid you in receiving the assistance you are entitled to.

A person eligible for Supplemental Security Income (SSI) is automatically eligible for medical assistance and state services in Oregon. However, such assistance must be applied for separately.

The basic eligibility for Medicaid (as of January 1985) in Oregon is as follows: A person may have \$1,600 (\$2,400 for a couple) in fixed or liquid resources, i.e. cash, stocks, bonds, and certificates of deposits; household and personal items with a fair market value of \$2,000; equity in a car up to \$4,500; a life or burial insurance policy with \$1,500 face value; and monthly income below the SSI maximum, which changes regularly and is currently about \$340. There are some "special needs" which may increase the income you can have and still qualify for Medicaid.

Your home of any value will not disqualify you as long as you or your spouse are living in the home or can show the likelihood of returning after a stay in a hospital, nursing home or other facility. There are *no* liens or claims placed on a home for Medicaid assistance until both spouses die or move out.

Complicated calculations determine whether income exceeds the SSI maximum. Some medical needs are deductible, such as a housekeeper's wage and board. Always assume you might be eligible and have an advocate review your application if you are close to the limit.

You may have valuable personal possessions and still be eligible under the above guidelines. *Resource* values are based on today's actual resale prices or fair market value.

A common problem involves funeral care contracts that include a burial plot. If this contract (worth considerable value to you) is an irrevocable trust, it is not a resource because it cannot be sold. Do not assume, therefore, that you must give away or sell personal belongings to receive help.

**What financial assistance is available from the Veterans Administration?** An important resource for assistance for veterans is the Veterans Administration. The Veterans Aid and Attendance program can help offset nursing care and medical costs. Any person who has served in wartime should inquire about the program to determine if he or she qualifies. (World War I: April 16, 1917 through April 1, 1920. Those who

served in Russia would qualify for more service time. World War II: December 7, 1941 through December 31, 1946. Korea: June 27, 1950 through January 31, 1955. Vietnam: August 5, 1964 through May 7, 1975.) In general, the program can provide up to \$877 per month (at 1985 levels) of either nursing or other medical costs. The following example illustrates how it can assist a couple who otherwise would be in a difficult financial position.

*Mr. and Mrs. Jones have an income of \$1,000 per month. Mr. Jones is a veteran who served in wartime and requires nursing care at the cost of \$1,000 per month. The Aid and Attendance program will not consider the value of their personal residence, but will consider Mr. Jones' life expectancy, income available (\$1,000), and the necessary medical costs (\$1,000) in determining his eligibility. In this example, the net income of the couple is zero dollars per month when the necessary medical costs are considered. Mr. and Mrs. Jones qualify for the maximum of \$877 assistance per month. The result is that the Joneses only need to pay \$123 of their income for the nursing care, leaving Mrs. Jones \$877 a month to meet her living expenses. If their net income was higher, the amount they would qualify for would be proportionately reduced.*

It would also be helpful to check with the following in determining eligibility for assistance: American Legion, American Red Cross, Disabled American Veterans, Oregon Department of Veterans Affairs, Paralyzed Veterans of America, and Veterans of Foreign Wars.

**If medical care requires all of one spouse's share, should a couple divide their estate? How is this done?** Estate division is a way to plan so that public assistance will finance future medical care. Division between spouses can be made at any time. The division of property with anyone not a spouse, i.e. children or other family, must be made at least two years before applying for Medicaid assistance. If made less than two years in advance, a person's eligibility is adversely affected.

Estate division is not a good idea if the estate is too small, doesn't need protection to qualify the couple for assistance, or cannot maintain the healthy spouse.

A lawyer can help with estate division and may offer several suggestions. For instance, a couple can divide cash into two bank accounts, one for each spouse; or deeds and titles can be changed to single ownership after an equal division of assets is made. If a division is planned, the agreement of an incompetent spouse will require a conservator.

**Will divorce or separation make a couple eligible or increase the public assistance available?** Divorce involves great emotional and practical cost for the couple and rarely increases the aid available to an institutionalized spouse. In addition, separation or divorce may cause assets to be divided in such a way as to cause ineligibility.





After one month of institutional care, spouses are considered separated for purposes of Medicaid eligibility. Thus, income is considered separately. The institutionalized spouse may become eligible for assistance if the independent spouse's resources are not volunteered for the care of the institutionalized spouse.

An institutionalized person's income and resources must be used for care, although some of it may be available for the independent spouse. The independent spouse will receive part of the institutionalized spouse's income, if necessary, to pay living expenses, up to the maximum SSI income.

Since the SSI income standard is a complicated calculation, the independent spouse cannot know how much of the institutionalized spouse's income will be available for living expenses without contacting the Senior Services Division or Area Agency on Aging office. Each couple's situation is different, and only a caseworker can answer eligibility questions.

Finally, if a couple is divorced or legally separated six months before applying for SSI, their income is not combined even if they live together.

**If a spouse is institutionalized, will the partner lose their home or personal possessions to pay for care?** No. To be eligible for public assistance and Medicaid, a person may own a home and have limited income, cash, and personal property. The spouse may continue to live in the home, keep many personal belongings, and have some cash in the bank. The home will be free of state liens until both spouses have died or the home is sold. If all proceeds from a sale are reinvested in another home, state assistance will not be affected; if only a portion of proceeds is reinvested, eligibility may be affected.

**May property be given away?** Yes, but beware: Gifts can have serious consequences under tax laws and for public assistance eligibility. Get advice before giving away any property because it may be unwise and unnecessary to do so. Gifts should be planned well in advance of the time when care will be needed, and future cost increases for care should be carefully considered. Valuable property that is given away within two years of applying for public assistance will be considered a resource for purposes of eligibility.

**How does a move to another state affect eligibility for public assistance?** Although an older person may benefit from a move to another state, all moves should be carefully planned. Talk to a caseworker in the local Senior Services Division or Area Agency on Aging office before moving a loved one into Oregon. The caseworker can help plan the move to avoid negative economic consequences.

Usually, it's important to wait until the end of a month to move and to obtain a letter that sets a closing date for assistance received in the other state. Arrange for an intake appointment as close to the closing date as possible. Oregon will not begin assistance until the other state has closed its case. An unplanned move may cause an ineligibility period.

## Living will

**What is a living will?** If you have no reasonable chance to recover from an illness or injury, and do not wish to be kept alive by artificial means or heroic measures, you may execute a *living will* (in Oregon called “Directive to Physicians”). The living will tells your doctor and family that you want to exercise your right to die naturally and allows them to let you do so without personal liability.

A living will takes effect only after you have been diagnosed as having an illness or injury from which you cannot recover.

In Oregon, a living will is only valid if it is executed properly. The Oregon statute (ORS 97.055) gives the specific language to be used. Get legal advice about how to execute such a will. You may obtain a copy of the Directive to Physicians from the Department of Vital Records, 1400 S.W. 5th, Portland, OR 97201.

Give copies or duplicate originals of the Directive to Physicians to your doctor and to your closest relatives or friends. Keep the original in a place where it can be easily found.

## Medical care

**What if someone refuses to get medical help?** Most doctors or hospitals will treat a mentally disabled person in an emergency. Many will also do so with a spouse’s or other family member’s consent. If they refuse to act without additional authority, a guardian must be appointed.

If the person can be enticed to see a doctor for any reason, alert the doctor of suspected problems. Members of an Alzheimer’s support group may have ideas for getting treatment without taking legal action.

A guardianship is usually necessary to approve treatment if the person is mentally unable to make rational decisions, refuses to get help, and needs treatment. If no one is available to serve as guardian, an involuntary commitment may be needed if the person presents a clear danger to himself or others, or is unable to meet his or her basic needs.

**When someone does not see a problem, or refuses to take action, what can a family member or an outsider do?** Anyone with information about the medical or financial needs of a disabled person who feels protection is necessary may petition in state court for the appointment of a guardian or conservator. Senior Services Division and other agencies may file such a petition if the circumstances are serious enough. Talk to people at these agencies when a person lives alone, or is in poor health and may need protection. Family members must be notified of any action in court (except with a temporary guardianship) and may object, but their consent is not necessary if the court finds the needs of the disabled person warrant its intervention.

**Who makes decisions when family members disagree about needed care and the disabled person cannot decide?** No one person has such authority unless a guardian has been appointed, or a care contract for the disabled person is in effect. Senior Services Division or Area Agency on Aging, however, will attempt to ensure the person receives assistance if it is advised of the problem.

**Who decides what kind of care a disabled person needs? What are the person’s legal rights?** Everyone has many opportunities to influence decisions about the care needed. If a person objects to medical or institutional care, the law allows a judge to decide the least restrictive care alternative (see “definition of terms”) available to meet a person’s needs.

Oregon law respects the person’s right to live independently and to make decisions about care. In severe situations, however, a guardian or conservator may need to be appointed to protect the person’s interests.



## Nursing home care

**Can a person be forced to live in a nursing home?** Yes, if a guardian decides that an individual's best physical and mental interests would be served by placement in a nursing home. Under very limited circumstances, a court could order a civil commitment to a nursing home based on the same general guidelines.

**What should be considered before selecting a nursing home or adult foster care home?** Before selecting a home, visit several. Ask questions about care and staff-resident ratio. Talk to the staff and residents. The goal should be to select a quality facility that best meets the needs of your family member.

Study the written contract that must be signed before the resident moves in. It should describe in detail responsibilities, liabilities, and the care to be provided.

Have an attorney or another careful reader review the contract. Does everyone understand and agree about the care to be provided, its cost, and the relationships described for the resident, caregiver, and home?

Sometimes terms in the contract may be illegal or against the resident's interests. For example, if the home asks the resident or family to sign a waiver of notice if a transfer is contemplated, this waiver is illegal and cannot be enforced. Other provisions are simply undesirable; if the signed contract contains undesirable terms, however, they are probably enforceable.

Read the contract carefully to make sure that it meets everyone's needs and expectations. Be a careful consumer: Shop until you find the home that suits the needs of your relative and family.

### **May an institution refuse to continue care?**

Yes. The contract may allow this or the resident, family, or the State may refuse, or fail, to pay for care. Contracts may allow such refusal if required care becomes too intense, if the resident and family did not disclose the true level of care needed, or if the resident becomes a behavior problem.

Oregon has very strict rules relating to transfer of residents, even for nonpayment. Sufficient notice must be given to correct any payment due. Consult a knowledgeable attorney if a problem arises.

**May a person just walk out of an adult foster care or nursing home?** Yes, in many cases. Institutions are liable if a patient is improperly restrained, but usually will not restrain someone involuntarily unless a judge, guardian, or doctor has ordered it.

**What are the rights of a nursing home resident?** A detailed listing of residents' rights is incorporated into the Nursing Home Patients Bill of Rights (found in ORS 441.605). These include the right to be:

- fully informed of all residents' rights and facility rules.
- fully informed about available services and any additional charges not covered by Medicare or Medicaid.
- informed by a physician about one's medical condition and given the opportunity to participate in medical treatment.
- transferred or discharged only for medical reasons, for the welfare of the resident or other residents, or for non-payment and to be given reasonable notice prior to any transfer or discharge.
- encouraged and *assisted* while in the facility to exercise rights as a citizen and to voice grievances without fear of restraint, discrimination, or reprisal.
- allowed to manage personal finances or given a quarterly report in writing if the facility is designated to do so.
- free from mental and physical abuse and to be assured that no chemical or physical restraints will be used except on a physician's orders.
- assured that medical and personal records are kept confidential.
- treated with dignity and respect.
- allowed to associate and communicate privately with persons of the resident's choice.

**What are the family's rights and liabilities when a family member is in a nursing home?** Financial and personal relationships involving a nursing home resident are not automatically given up. For example, a family member has the right to visit a resident, unless the resident objects, or the physician limits contact with visitors or with a particular individual. The nursing home contract will set out the family's liabilities, including the cost of care.

If questions or problems develop, discuss them with the long-term-care ombudsman in your county, or contact the Senior Services Division office.

**What recourse is available if a nursing home fails to provide adequate care?** A family's recourse for a nursing home failing to provide adequate care will vary depending on the nature of the nursing home's actions. A nursing home has a statutory duty to provide care consistent with state and federal law. It also has both expressed and implied contractual obligations to its residents. In addition, it has a legal duty to provide care which is consistent with generally accepted community standards. If it fails to provide adequate physical or nursing services, rehabilitative or any other service, many steps are available to a family.

The Long-term-Care Ombudsman Program (see page 19) will provide assistance in the investigation and resolution of complaints. Also, the Senior Services Division will investigate any failure to provide care that is a threat to the resident's health or well-being. In addition, Legal Aid Services can assist in advocacy for improved resident care. Finally, a private attorney may be able to represent a resident's needs in any negotiations to improve care or litigation over damages resulting from inadequate care.



## Selecting a lawyer

Ultimately it is up to you to judge the ability of an attorney to help you plan for your needs. You want to be inquisitive and assertive. Talk to your professional contacts about lawyers they know and might recommend. Doctors, dentists, clergy, accountants, and other business people often deal with lawyers and can make good recommendations.

Whether you find a lawyer from a direct referral or other means, find out about the lawyer's experience. Does it include estate planning, familiarity with the type of disability you are concerned with, and with the State and Federal programs that can assist in providing for financial needs? Can you see a sample of the lawyer's work (with due regard to client confidentiality)?

Above all, you must feel comfortable that the lawyer understands your needs and will follow through to meet them. A concerned but somewhat inexperienced lawyer may be able to do a better job than a very experienced but over-worked one.

The Oregon State Bar Association Lawyer Referral Service (1-800-452-7636) will refer you to an attorney in your area. You will be entitled to a half-hour consultation for a reduced fee. Then you can decide if you want that attorney to do further work for you.

## Wills

**May someone with memory or other mental problems make a will?** Maybe. Consult a lawyer. A person with a conservator or guardian may execute a will if competent; incapacity does not necessarily affect the ability to make a will. A person signing a will needs to know the nature of the estate, who his or her natural heirs are, and the effect of the will in distributing property.

**What happens if there is no will?** Property is distributed to relatives as determined by state inheritance laws. If there are no relatives, the property goes to the state. Of course, bills are always paid before any distribution of an estate, with or without a will.

If the deceased has a spouse and no children, the spouse inherits everything. If the deceased had children, the children receive half and the surviving spouse receives half. The children receive everything if no spouse survives. If a person had no children and no spouse, surviving parents and then brothers and sisters inherit; the state's inheritance formula continues through more remote kin and, finally, to the state.

**Are survivorship rights in jointly owned property, life insurance policies, and trusts adequate substitutes for a will?** Maybe. A will disposes of *all* property owned, yet the above methods may affect only *specific* property. If there is other property, a will is needed to control who gets it unless the state's rules allow desired results. A will can permit a personal representative to handle probate without posting a bond and it can reduce probate expenses.

**Is a will expensive? How do I have one prepared?** Wills usually are not expensive and can save probate and tax expenses. (See *Selecting a lawyer.*)

**Can a person write his or her own will?** In Oregon, a valid will is a written document which you may write yourself. It requires witnesses and certain steps to be taken in order to be legally acceptable. An attorney's advice is highly recommended because if the will is not signed with all of the proper formal steps, it will *not* be valid.



**May a will be changed?** Yes, if the maker is mentally competent. Typical reasons to change a will include change of mind, death or birth of beneficiaries, divorce or remarriage of the maker, tax law changes, or changes in the property owned.

**To change a will, may the maker write in new terms and initial the changes?** *No!* To change a bequest, the will must be rewritten and executed properly. Otherwise, your marks revoke the bequest and invalidate the new provisions. The property may go to the estate residuary heir or be disbursed using state inheritance rules, as though no will existed. Make no changes or marks on a will unless you intend to revoke it. Consult a lawyer about changes you want to make.

**If a will made prior to a divorce leaves property to an ex-spouse, is a new will needed?** Divorce automatically revokes any of the will's provisions for an ex-spouse. Unless a person wants the state's inheritance rules or any residuary clause to be followed, a new will is necessary.

**If a will leaves a gift to someone who has died, what must be done?** Consult a lawyer. Usually, a death revokes the gift, unless the person's heirs were also named as beneficiaries.

**A loved one just died and I'm in charge. What do I do?** It depends. First obtain competent legal advice.

The circuit court will supervise the transfer of property and settlement of the estate through probate. Sometimes no probate is necessary:

- A \$30,000 estate (if no more than \$20,000 is in real property and \$10,000 is in personal property) may be handled by a small estate affidavit filed with the court;
- survivorship rights allow transfer by filing a death certificate;

- certain wages owed the decedent automatically belong to the family;
- certain bank deposits may be paid to the family;
- motor vehicles may be transferred to surviving relatives by affidavits;
- personal effects may be divided among surviving family unless there are items of unusual value.

Still other methods exist. Creditors must be satisfied first. No property may be given away until creditors' claims are settled.

Death taxes (Oregon inheritance and Federal estate) may be due, whether or not probate occurs. Oregon Department of Revenue and the Internal Revenue Service publish helpful information and forms.

Oregon requires an inheritance tax return for every person except for a small estate when an affidavit is submitted to the court. Federal estate tax returns are generally unnecessary if the estate is worth less than \$400,000.

State and federal tax rates are changing. In general, if total assets are less than \$400,000, no taxes are due. If more assets are involved, depending upon their disposition, taxes may be due.

If the person received any public assistance or government benefits, call the local agency to notify them immediately.



## A guide to family or friends of elders with brain disease

The following are suggested areas of exploration to aid you in assisting relatives or friends and their attorneys in situations involving commitment, conservatorship, and guardianship. Investigate the following areas:

**Relatives' perception of the problem.** What is your relative's perception of the problem? If he or she is in a mental health facility, is the confinement involuntary or voluntary? Has your relative been served with any legal documents? If so, secure a copy of the documents. Has your relative been visited by a court investigator, a social worker (adult protective services), a community mental health worker, or an attorney? Get the names, titles, and phone numbers of these people. What did they say? Does your relative have any idea what person or incident gave rise to the situation?

Does your relative have any property (real estate, stocks, other assets)? Is your relative able to manage this property? Is anyone else assisting your relative?

Is your relative able to handle routine tasks such as balancing checkbooks, paying bills, etc.? Is anyone assisting him or her? If someone is assisting your relative in handling financial affairs, does your relative trust this person? Is the person acting in your relative's best interests?

**Legal procedures and due process rights.** Has a formal legal proceeding (a petition filed in court) been initiated? What kind of proceeding? It is important to get copies of all available documents. Don't forget to obtain an authorization to disclose information. Have similar proceedings been brought against your relative in the past?

Does your relative wish to contest (oppose) the proceedings? Does he or she already have an attorney? If not, assist your relative in retaining a lawyer or requesting appointment of counsel, probably the public defender, or a court-appointed attorney for persons with low incomes. Has a hearing been scheduled? You should contact the attorney appointed by the court without delay to offer assistance.

**Designing less restrictive alternatives.** Based on conversations with your relative and his or her attorney, investigation, and personal observation, assess the unmet needs of your relative. What resources (public benefits, social services, community resources, informal assistance, counseling, medical treatment, and legal alternatives to guardianship, conservatorship or commitment), can be assembled to meet the needs of your relative? Is your relative interested in taking advantage of these services? Can the advocate provide assistance in these areas?



## Definition of terms

**Accounting.** An annual financial report that a guardian (when required by terms of the appointment) and a conservator are required to submit to the court outlining any actions which have been taken (monies received, bills paid, property sold) on behalf of the protected person. This procedure functions as a safeguard to protect the interests of the protected person and maintain court supervision of the conservator or guardian.

**Civil commitment.** The confinement of a mentally ill person to a mental health facility or other appropriate facility (such as a nursing home) as a means of protecting that individual or the community. This can be done by court order, if the person is found by the court to be a danger to self or others, and is limited in duration to six months.

**Conservatorship.** An appointment by a court of a person to take charge of and manage another's property and finances.

**Due process.** Basic legal rights provided in the U.S. Constitution, including the right to notice of proceedings under legal standards which are neither vague nor arbitrary, right to hearing, right to representation by counsel, right to cross examine witnesses, right to present evidence, right to jury trial.

**Guardianship.** A court procedure in which a person is appointed by a judge to take charge of an individual incapable of self care when such appointment is necessary or desirable as a means of providing continuing care and supervision.

**Incompetency.** A legal determination by a court that a person is incapable of rational decision-making. Such a determination makes actions by a declared incompetent person voidable.

**Least restrictive alternative doctrine.** A legal principle which requires the state to use the least drastic means available to achieve its purpose. In other words, if requiring an individual to attend weekly therapy sessions would accomplish the purpose of adequately treating a person's brain disease and protect both the person and the community, this "least restrictive alternative" should be favored over the more drastic remedy of confinement or the appointment of a guardian or conservator.

**Protected person.** An individual for whom a guardian or conservator has been appointed.

**Trust.** A trust is a legal procedure that transfers property from one person (the grantor) to another person (a trustee) for the benefit of a third (the beneficiary). The grantor and the beneficiary may be the same person. The trustee does not own the property, but only manages it in whatever manner and for whatever length of time specified in the trust document. The trustee is held to a high level of responsibility in carrying out the terms specified by the trust document on behalf of the beneficiary. Trusts are effective management tools for handicapped or disabled persons as a means of fulfilling their wishes in the future, when they may not have the capacity to exercise the judgment to do so.

## Resources

### **Legal advice, representation, and referral:**

The local senior services center and legal aid office. Legal aid offices are usually restricted to providing services to low income people. Many of these offices have panels of private attorneys who volunteer their services or provide services on a reduced fee basis. If you do not qualify for service from them, ask for any referrals they may make. In addition, Oregon, as well as every other state, receives special moneys through the Federal Older Americans Act to provide legal services to all people over 60, regardless of income.

### **In-home services, foster home care, Oregon Project Independence funds, and Medicaid:**

Local Senior Services Division Office of the State of Oregon Department of Human Resources.

### **Nursing home problems:**

Senior Services Division or Long-Term Care Ombudsman, 160 G, Office of the Governor, State Capitol Building, Salem, Oregon 97310. Toll-free telephone number: 1-800-522-2602.

### **To report or investigate abuse of elders:**

Local Senior Services Division Office or Area Agency on Aging; local police, sheriff, or other law enforcement official; or local district attorney.

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The Oregon State University Extension Service provides education and information based on timely research to help Oregonians solve problems and develop skills related to youth, family, community, farm, forest, energy, and marine resources.

Extension's home economics program offers educational opportunities to help individuals and families manage their resources to meet needs for food, clothing, finance, shelter, parenting, and human relationships.

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This publication was prepared by Vicki L. Schmall, Extension gerontology specialist, Oregon State University; Janet McGinnis, attorney at law, Oregon Legal Services Corp.; Vincent Salvi, attorney at law, Portland, Oregon; Griffith C. Steinke, attorney at law, Salem, Oregon. The authors acknowledge the contributions of Molly A. Weinstein, attorney at law and legal services developer, Advocacy Assistance Grant, Senior Services Division, Salem; and Tim Nay, MSW, attorney at law, Family Support Project, Neurological Sciences Center, Good Samaritan Hospital Medical Center, Portland, Oregon.

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