

## LAW PRACTICE

## Elder Law

## GUARDIAN AUTHORITY TO LIMIT ACCESS TO PROTECTED PERSONS

**2019 Oregon Laws Ch. 198 (HB 2601)**

HB 2601 places some limits on a guardian's authority to limit protected person's preferred associations with third parties. The changes made by this bill include, but are not limited to:

- Prohibiting a guardian from limiting "a protected person's preferred associations" unless specifically allowed by a court or if "necessary to avoid unreasonable harm to the protected person's health, safety or well-being." The bill provides no definition of "preferred associations," but does state that, for protected persons who cannot communicate, "preferred associations" will be presumed based on prior relationships.
- Creating a motion process to challenge restrictions on association with a mandatory hearing, which can result in removal as guardian and an award of attorney fees and costs associated with the motion if a guardian is found to have unreasonably limited association.
- Requiring the guardian to do a number of things.
- Adding an item to the annual guardian's report regarding any limitations on association.

**Practice Tip:** *Given the extensive nature of these changes, attorneys should review the statute in detail, update the letter sent to*

*newly appointed or prospective guardians regarding their duties as guardian, update guardian report forms, and send a letter to all existing guardian clients to advise them of these changes before they go into effect on January 1, 2020.*

## NOTICE OF APPOINTMENT OF GUARDIANS

**2019 Oregon Laws Ch. 77 (SB 376)**

SB 376 adds a notice requirement after the appointment of a guardian similar to the notice of appointment of a personal representative. After a guardian is appointed, the guardian must send notice to the entities listed in ORS 125.060 (3) (and therefore ORS 125.060 (8)) and file proof of service within 30 days of appointment.

SB 376 also adds requirements related to the annual guardian's report. If a guardian indicates a guardianship should not continue or does not provide "adequate information in the report supporting the continuing need for the guardianship," the court shall order the guardian to provide supplemental information or move to terminate the guardianship. If the guardian fails to provide information or file the motion to terminate within 30 days, such failure is made grounds for removal of the guardian, and the court is required to hold a show cause hearing. The court is required to send notice of any order issued under these new provisions.

**Practice Tip:** These changes likely mean attorneys should be advising guardian clients to provide greater detail in annual reports indicating why a guardianship should continue. It is unclear exactly what information will be required and attorneys would be well advised to reach out to their local probate departments for guidance on how each county intends to implement this provision as there is no standard articulated in the bill.

## DECEDENTS WHO HAD BEEN ABUSED OR NEGLECTED BY A PARENT OR STEPPARENT

### 2019 Oregon Laws Ch. 461 (SB 474)

SB 474 makes a number of changes including preventing parents who are found to have abused or neglected their children from receiving damages from a wrongful death action.

**Practice Tip:** Elder law attorneys who deal with probate administrations, especially those with wrongful death and/or personal injury claims, need to be aware of this change in parent and stepparent forfeiture timelines. The changes related to intestate estates are effective in estates commenced prior to the effective date of the statute if the estate is pending on the effective date. This means that attorneys representing personal representatives need to assess their open intestate estates to ensure these rules do not apply and attorneys representing heirs or potential heirs need to reevaluate whether forfeiture rules apply.

SB 474 took effect on June 20, 2019.

## ABUSE OF “ELDERLY PERSONS”

### 2019 Oregon Laws Ch. 93 (SB 729)

The current definition of “elderly person” in ORS 124.005, which provides definitions for restraining orders based on abuse of elderly persons and persons with disabilities, has an exclusion for persons who are covered by the long-term care resident abuse reporting requirements in ORS 441.640-441.665. SB 729 removes that exception, making all persons 65 years old or older “elderly persons” for purposes of ORS 124.005 -124.040. This bill allows persons age 65 or older who are residents in long-term care settings to access the same restraining order protections available to all other persons age 65 or older.

## BISHOP V. WATERS FIX

### 2019 Oregon Laws Ch. 345 (SB 783)

SB 783 changes the prior requirement to notify the Attorney General of an elder abuse proceeding to clarify that failure to provide such notice is not a jurisdictional defect.

**Practice Tip:** The current (before January 1, 2020) service requirement in ORS 124.100 (6) has been interpreted by the Oregon Court of Appeals as being a jurisdictional issue, requiring dismissal of claims where notice was not served on the Attorney General within 30 days of commencing the action. *Bishop v. Waters*, 280 Or App 537, 548-549 (2016).

SB 783 expressly states “Failure to mail a copy of the complaint or pleading is not a jurisdictional defect and may be cured at any time prior to the entry of judgment.” The bill further prohibits the court from entering judgment until proof of mailing to the Attorney General is filed. The bill does not apply to actions initiated before the effective date, regardless of whether a judgment has been entered or not.

## SENIOR PROPERTY TAX DEFERRAL PROGRAM

### 2019 Oregon Laws Ch. 488 (HB 2460)

HB 2460 generally provides that a transferee of tax-deferred homestead is only liable for amounts of outstanding deferred property taxes if the transferee is using homestead more than 90 days following taxpayer's death and is a potential recipient of homestead.

**Practice Tip:** *The OSB Elder Law Section put this bill forward during the 2019 legislative session. This is a fix for situations where a property involved in the senior tax deferral program is underwater at the death of the owner. Prior to passage of this law, the letter of the statute seemed to suggest an heir was jointly and severally liable for the deferred property tax debt, even if that heir took no beneficial interest in the property or any other property of the estate. The Oregon Department of Revenue issued a number of tax demands to heirs under these circumstances. The bill ensures that an heir is only jointly and severally liable if they occupy, lease, or use the property for more than 90 days after the death of the deferral program participant, receive the property from the estate, or receive the property by gift or assignment from an insolvent owner.*

HB 2460 took effect on September 29, 2019.

## REVERSE MORTGAGES

### 2019 Oregon Laws Ch. 591 (HB 2587)

HB 2587 does two basic things. First, it switches the prohibition on pledging a property with outstanding debt under the program as security for a reverse mortgage to a prohibition on accessing the program if there is an existing reverse mortgage. Second, the bill exempts reverse mortgages executed on or after July 1, 2011 (i.e., after the previous exemption expired) and before January 1, 2017, provided the equity in the homestead is 40% or more. The January 1, 2017, date

is based on a change in federal standards for reverse mortgages that went into effect on or after that date and requires an analysis of the borrower's ability/willingness to pay taxes and requires a life-expectancy set-aside for those taxes if there are concerns. This federal change makes it extremely unlikely that any senior with a reverse mortgage executed on or after January 1, 2017, would qualify for the program.

**Practice Tip:** *These changes are important to keep in mind for estate planning and Medicaid planning, as both a reverse mortgage and the senior property tax deferral program can both be useful tools in those processes.*

HB 2587 took effect on September 29, 2019.

## NONCHARITABLE BUSINESS PURPOSE TRUSTS

### 2019 Oregon Laws Ch. 162 (HB 2598)

HB 2598 permits the creation of certain noncharitable business purpose trusts. This bill came forward to address concerns of owners of purpose-driven businesses who want to ensure the purpose of their business carries on after they retire or die. This bill creates a new type of trust called a stewardship trust with several specific traits, including the new positions of "trust enforcer" and "trust stewardship committee."

**Practice Tip:** *This could be a powerful new estate/succession planning tool for business owners with a passion for serving their communities who want to ensure that service lives on. However, attorneys will need to be very careful and specific in drafting to ensure that all of the statutory requirements are properly embodied in the trust to ensure it is able to take advantage of the new provisions. Additionally, attorneys representing a settlor, or any fiduciary involved in a stewardship trust, should send a detailed letter to their client(s) outlining their duties under the trust.*

*Attorneys also need to be very careful in representing parties related to a stewardship trust to avoid conflicts of interest that might arise from serving more than one party. As this is a brand new type of trust in Oregon, it will be important for attorneys to look to other states, such as Delaware, where similar trusts have been attempted and to share with each other as appropriate documents are developed.*

## NO-ASSET PROBATES

### 2019 Oregon Laws Ch. 414 (HB 3006)

HB 3006 establishes procedures for probate in cases where there are no assets in the probate estate, but a personal representative (PR) is needed to pursue a wrongful death claim, obtain medical records, or deal with other affairs of the decedent. The bill waives or defers many requirements of the probate process that don't make sense in the absence of assets.

See the Estate Planning section for more information.

## REVISIONS TO SMALL ESTATE STATUTES

### 2019 Oregon Laws Ch. 165 (HB 3007)

HB 3007 modifies the process for use of the small estate affidavit (affidavit) in probate proceedings involving estates with less than \$75,000 in personal property and \$200,000 in real property.

See the Estate Planning Section for more information.

## PERSONAL INJURY AND WRONGFUL DEATH PROBATES

### 2019 Oregon Laws Ch. 166 (HB 3008)

HB 3008 addresses the probate process for cases where there is a personal injury (PI) or wrongful death (WD) claim attached to the decedent.

See the Estate Planning section for more information.

## UNIFORM PRUDENT INVESTOR ACT

### 2019 Oregon Laws Ch. 546 (SB 361)

SB 361 was proposed to address concerns over comments promulgated with the Uniform Prudent Investor Act and at the legislative hearings when

Oregon adopted its prudent investor act that created an ambiguity regarding whether environmental, social, and governance factors can be considered by trustees when investing.

The bill clarifies that trustees can consider any factors the trust directs them to consider regarding how to invest, "including whether to engage in one or more sustainable or socially responsible investment strategies in addition to or in place of other investment strategies, with or without regard to investment performance." The bill also added two new circumstances to be considered when selecting investments. First, "the intent, desire and personal values of the settlor, including the settlor's desire to engage in sustainable or socially responsible investment strategies that align with the settlor's social, environmental, governance or other values or beliefs to the extent known by the trustee." Second, "the needs of the beneficiaries, including but not limited to the beneficiaries' personal values and desire that the trustee engage in sustainable or socially responsible investing strategies that align with the beneficiaries' social, environmental, governance or other values or beliefs, as well as the financial needs of the beneficiaries."

## UNCLAIMED PROPERTY

### 2019 Oregon Laws Ch. 678 (SB 454)

SB 454 transfers the administration of Uniform Disposition of Unclaimed Property Act, unclaimed estates and escheating funds from Department of State Lands to State Treasurer.

**Practice Tip:** *Elder law attorneys need to watch for upcoming administrative rules and policies related to this change in administration of the unclaimed property act to ensure they are following correct procedures for checking for unclaimed property and retrieving any such property as appropriate for clients and estates.*

SB 454 took effect on September 29, 2019. Operative dates start phasing in July 1, 2021.