ELDER LAW: PLANNING FOR AGING AND DISABILITY

Presented by
Geoff Bernhardt and Julie Nimnicht
Attorneys at Law

January 2022

Law Offices of Geoff Bernhardt & Julie Nimnicht, P.C.
5603 S Hood Avenue • Portland, OR 97239
503.548.4000 Fax 503.548.4003
info@elderlawpdx.com www.elderlawpdx.com

This guide is intended to help older people and their families who are dealing with the legal and financial consequences of aging. It covers issues such as making financial and health care decisions for someone with declining capacity; wills, trusts, and probate; disability planning, Medicare and Medicaid, and paying for long-term care. Applying the knowledge found in this guide and working with a team of experts in the field of aging will greatly increase the likelihood that your loved one will receive good quality care and avoid going broke in the process. More information about all of these issues can be found at our website, www.elderlawpdx.com.

1. Decision Making for Finances

Most people understand the need to have a will, so that when they pass away, their assets will go to their chosen beneficiary. Most people do not realize that they also need to take steps to make sure someone can manage their assets if they become incapacitated and are unable to make important financial decisions. A power of attorney is the best way to do this.

a. Power of Attorney. A power of attorney is a document you can sign to appoint another person to make important financial decisions for you in the event you become incapacitated. The person you appoint is called your "agent."

There are two ways to obtain a power of attorney. You can get a form online, or you can have an experienced elder law attorney prepare the power of attorney.

The online form is inexpensive. The disadvantage to this form is it gives only very limited authority to manage your finances. An experienced elder law attorney can provide a power of attorney that will give your agent flexibility to make important financial decisions if you are not able to make them yourself, such as disability planning, creating trusts, and tax planning. The attorney will make sure to prepare a power of attorney that gives your agent the ability to assist you with long-term care cost planning.

You should consider naming one or more alternate agents, in the event your first choice is unable to serve in that role.

Don't wait too long to get a power of attorney! A power of attorney must be signed by a person who is legally competent. This means the signer must have the ability to understand the nature and importance of the document. If someone already has Alzheimer's Disease or dementia, or has suffered a stroke, it may be too late to sign a power of attorney. Therefore, it is important to sign a power of attorney while a person has mental capacity to understand the document.

When deciding who should be your agent, remember that the most important qualities are honesty and good financial management skills. The main disadvantage to having a power of attorney is that a dishonest agent could misappropriate your assets. Therefore, only appoint the most trustworthy people to serve in this role. There are also professional trust companies that may agree to serve as your agent.

b. Conservatorship. A conservatorship is a court order that gives one person the ability to make financial decisions for another. When a person cannot make financial decisions, someone needs to be appointed to pay the bills, sign contracts, manage investments, and handle other transactions. A conservatorship is normally used when a person becomes unable to make important financial decisions for him or herself, and did not sign a power of attorney while competent.

There are several disadvantages to a conservatorship. It is a public proceeding, so people have the ability to review the finances of the ill person. It is expensive. You can easily spend several thousand dollars to obtain a conservatorship and pay for the required bond. Each year, the conservator must file an accounting with the court and renew the bond, all of which is expensive. Finally, the authority granted to a conservator is less than the authority granted to an agent under a power of attorney prepared by an experienced elder law attorney.

The main advantage to a conservatorship is court oversight and the surety bond. If the ill person does not have a trusted person to manage finances using a power of attorney, the conservatorship may be preferable to a power of attorney.

c. Joint Bank Accounts. You can name someone as a joint owner with you on a bank account. That person would have the ability to use funds in the account for your benefit if you ever became

incapacitated. There are several problems with this strategy. First, the joint owner automatically becomes the sole owner of the account when you pass away. This may not be consistent with your estate plan. Second, the assets in the account could be at risk in the event the joint owner got divorced, files for bankruptcy, or has other legal problems. For this reason, while it may be appropriate to name a joint owner on the working checking account, it is usually not recommended for larger accounts and other assets, such as real estate or investments accounts.

2. Decision Making for Health Care

The well-known Terri Schiavo case illustrates the importance of specifying one's wishes about end-of-life health care. Ms. Schiavo lived in Florida and experienced health problems that left her comatose and on a feeding tube. Her husband believed she would not have wanted her life prolonged through the use of a feeding tube. Other members of her family believed that she would have wanted the feeding tube. The husband and other family were involved in a long, highly-publicized court battle over whether Ms. Schiavo would continue to be fed through a tube. Unfortunately, Ms. Schiavo never signed a health care directive specifying her wishes about end-of-life care. If she had, her wishes would have been honored, and her family would not have had to fight over the type of care she received.

In Oregon, there are three documents commonly used to specify your wishes about health care decisions in the event you are not able to communicate those wishes: a living will, a durable power of attorney for health care, and an advance directive for health care. A POLST form and guardianship are ways in which others can make health care decisions for you. All of these methods are listed below.

a. Living Will. Also called a Directive to Physicians, a living will is a document stating that you do not want life-sustaining treatment if two doctors certify that you are in a terminal condition, and that life-sustaining treatment will only postpone the moment of your death. This document was widely used in the late 1980's and early 1990's. The main problem with a living will was that it did not appoint someone to review medical records and communicate your wishes about end-of-life care to medical staff.

b. Durable Power of Attorney for Health Care. The Durable Power of Attorney for Health Care was designed to supplement the living will. This document allowed a person to appoint an agent to communicate with health care providers and make decisions about end-of-life care. The main problem with this document is that it expires seven years after it is signed. A secondary problem is that the form is ambiguous, requiring the person to write the word "yes" to indicate that he or she did not want life support or tube feeding.

c. Advance Directive for Health Care. The Advance Directive for Health Care was authorized by the Oregon legislature in 1993. This document combines the best features of the living will and the power of attorney for health care. It allows you to appoint a health care representative to make decisions about health care for you in the event you are unable to do so. It also lets you give

instructions to your health care representative so he or she will have a clear understanding of your wishes. The advance directive does not automatically expire after a certain period of time, and can be good for your entire life. It also allows you to make additional comments about end-of-life decisions. An advance directive for health care is the best way to ensure that your wishes about health care would be respected if you faced a life-threatening illness or injury.

In addition to end-of-life decision making, the Oregon Legislature recently changed the advance directive statute to give the health care representative authority to consent to placement in a dementia facility for an unlimited period of time. Previously, this type of treatment required a legal guardianship.

d. POLST – Portable Orders for Life-Sustaining Treatment. This is a document on bright pink paper that can be placed in a person's medical chart. It sets forth physician's orders concerning certain types of end-of-life care. It must be signed by the doctor. Some people obtain completed POLST forms and post them on the refrigerator so they can be seen by paramedics in the event of a medical emergency. POLST forms can also be registered at www.orpolstregistry.org, allowing medical staff to access your POLST forms in an emergency.

e. Guardianship. A guardianship is a court order allowing one person to make health care and placement decisions for an incapacitated person. If you have not appointed someone to make health care decisions for you (for example, by signing an advance directive for health care), it may be necessary to seek the appointment of a guardian. People who suffer from dementia, Alzheimer's Disease, or other illnesses affecting the ability to make important decisions often need the assistance of a guardian to make placement decisions. In fact, the most common scenario for a guardianship involves a person with dementia who is living at home and needs to be placed in supervised care outside the home, but is not willing to leave voluntarily. A care facility does not have the right to hold someone against his or her will, and will normally require the appointment of a legal guardian to give this consent. Family members should consider obtaining a guardianship in advance of placement in care outside the home to avoid the stress of having to obtain a guardianship on an emergency basis later on.

A guardianship is expensive – it can cost several thousand dollars to secure the appointment of a guardian by the court. It is far better to rely upon the advance directive for health care to appoint someone to make health care decisions for an incapacitated person. Even if you sign an advance directive for health care, a guardianship will sometimes be necessary to make placement decisions.

3. Estate Planning

Estate planning is a process by which you can make sure your assets go to your desired beneficiaries after you pass away. Elder law attorneys use the following tools and strategies to create an estate plan:

a. Gifts. Sometimes people prefer to transfer some of their assets to beneficiaries during their lifetime. Making gifts during one's life can have important tax consequences, so it is important to seek the advice of a CPA or attorney before making any significant gifts. Be aware that the IRS imposes a gift tax payable by the giver of the gift for any gift in excess of $16,000 per person per year. Also, there can be adverse capital gains tax consequences if you make gifts of assets (such as stock or real estate) that have gone up in value since you purchased them. For any gift larger than $16,000 per person per year, or involving assets that have gone up in value, seek the advice of a CPA or attorney. In addition, anyone who may need long-term care in the future should speak with an experienced elder law attorney before making any significant gifts of assets. There are rules that penalize people seeking eligibility for assistance with long-term care costs who have made significant gifts of their assets. These rules are discussed later in these materials.

b. Joint Accounts with Right of Survivorship. Under Oregon law, a joint account automatically passes to the surviving joint owner when one owner passes away. This is a very good way for married couples and committed life partners to make sure joint accounts pass to the survivor when one spouse or partner passes away. However, it is not usually a good plan to name a child or any other person as a joint owner of your assets, for the following reasons:

(1) If you name your child joint on a bank account and the child gets divorced, it is possible that your funds in the account could be brought into the divorce proceeding.

(2) If your child is sued for any reason, for example, as a result of a car accident, the assets in the joint bank account could be at risk in the lawsuit.

(3) Assets in a joint account are not controlled by your will. They pass automatically to the surviving joint owner, which could result in intended beneficiaries being accidentally disinherited. This is a very common source of problems.

c. Beneficiary Designations. There are many assets, such as life insurance, IRA accounts, and certificates of deposit, that allow you to name a "pay-on-death" beneficiary. After you pass away, the asset subject to the beneficiary designation is paid directly to the named beneficiary. In deciding whether to name pay-on-death beneficiaries on your accounts, you should work with an experienced elder law or estate planning attorney to make sure the beneficiary designations are consistent with your overall estate plan and to get the best tax result.

Naming someone as the pay-on-death beneficiary of an asset does not subject your asset to the claims of your beneficiary's creditors during your lifetime. It also does not put your asset at risk if your beneficiary is involved in a divorce. For this reason, a beneficiary designation is a safer choice than a joint ownership designation.

Always pay careful attention to beneficiary designations on retirement accounts. There can be significant tax considerations in the naming of beneficiaries on retirement plans, such as IRA and 401k accounts. An experienced estate planning or elder law attorney will discuss these considerations with you.

d. Will. A Will is a document you can sign to specify who will receive your assets after you pass away. It allows you to appoint a personal representative to gather your assets, pay your bills and taxes, and distribute the remaining assets to your beneficiaries. It's an extremely useful document and is normally part of every estate plan.

A will should be prepared by an attorney. Do not use will forms purchased from legal stationery stores or from the internet. It is too easy to make a mistake in the execution of your will that could invalidate your estate plan.

A will is a relatively inexpensive and effective way to specify who will receive your assets after you pass away. The main disadvantage to having your assets pass to your beneficiaries according to the terms of a will is that your estate will have to go through probate. Probate is a court-supervised distribution of your assets to your beneficiaries. Probate and probate avoidance are discussed later in these materials.

e. What Happens If You Die Without a Will? If you pass away without a will, the State has a will for you. The "state's will" is referred to as "intestate succession." In this situation, your assets pass to your "next-of-kin" in accordance with an order of priority set forth in state law. For example, if you are married and have no children, state law provides that your assets pass to your spouse. If you have children, and your spouse passes away before you, your assets pass in equal shares to your children. If you have a spouse and children from a prior marriage, your assets pass one-half to your spouse and one-half to your children, in equal shares. If you have no spouse, children, or grandchildren, your assets will pass to your parents. If your parents predecease you, your assets will pass to your siblings. If you have no relatives at all, your assets pass to the state of Oregon.

Even if the beneficiaries under intestate succession would be the same as your beneficiaries under a will, you should still sign a will. The administration of an "intestate" estate (that is, the estate of a person who died without a will) is more expensive and time-consuming than the administration of an estate where there is a will.

f. What Happens to Your Will If You Get Married or Enter Into a Registered Domestic Partnership? Oregon law provides that getting married or registering as a domestic partner revokes your will. Thus, it is important to sign updated estate planning documents right away after getting married or entering into a registered domestic partnership.

g. Living Trust. A living trust is like a will, with one distinct advantage: the living trust avoids the cost and delay of probate. A living trust also avoids the need for a conservatorship since your assets are in a trust that name successor trustees if you should be unable to act. Ownership of your assets is transferred into the name of your trust. You normally name yourself as trustee, so you retain complete authority and control over all of your assets. The trust avoids probate because, in the trust document, you name a successor trustee to manage assets in the event you become incapacitated or pass away. The successor trustee is authorized to pay bills, pay taxes, manage and liquidate

investments, and distribute assets to the beneficiaries named in the trust document, without court supervision.

A living trust is more expensive than a will, but typically costs far less than a probate. It avoids the 6-to-9-month delay caused by probate and prevents disclosure of your assets in the probate court records.

h. Special Needs Trusts and Estate Planning for a Disabled Beneficiary. People with disabilities sometimes rely on government benefits to pay for basic needs such as health insurance, housing, and long-term care. The value of these benefits can be substantial. Many public benefit programs are means-tested, meaning the beneficiary's assets and income must be below certain levels. Very often, these programs require the person's assets to be less than $2,000.

For many people, the receipt of an inheritance is an opportunity to improve their lives. But for a disabled person receiving public benefits, the inheritance can actually worsen their life by terminating eligibility for benefits. The disabled person now has to pay health insurance, housing, the cost of personal attendants, and other basic needs from the inherited funds. Within a short time, the inheritance can be exhausted. The disabled person then has to go through the arduous process of reapplying for government benefits. Finally, the disabled person is faced with the bleak prospect of spending the rest of his or her life having no more than $2,000 to pay for needed goods and services.

Fortunately, there is a way to leave assets to a disabled person while preserving eligibility for public benefits. Assets left to a disabled person in a special needs trust do not have to be spent down to $2,000 in order to maintain public benefits eligibility. The funds in the special needs trust can pay for "extras," or "special needs," that would improve the disabled person's quality of life, such as travel expenses, cell phone, cable television, companion care, tickets to the symphony or sporting events, and many other things not provided by public benefit programs. The disabled person retains government benefits to pay for the basic necessities of life.

A special needs trust is created in a will or trust, usually by the parent of the disabled person as part of their estate plan. The parent specifies that any bequest for the disabled child be held in a special needs trust. The parent selects a trustee, who has the responsibility to use the funds for the benefit of the disabled person. The parent also selects the "remainder" beneficiaries of the trust, who will inherit any remaining trust assets after the disabled beneficiary passes away.

It is also possible to create a special needs trust with assets presently owned by a disabled person, or with proceeds from the settlement of a personal injury case. However, there are additional restrictions when the disabled person uses his or her own money to set up the trust.

An inheritance left directly to a disabled person can actually worsen his or her quality of life by terminating public benefits. An inheritance left to a special needs trust for the benefit of the disabled person allows public benefits eligibility to be maintained and establishes a fund to improve his or her quality of life. If you have a disabled loved one, speak with an experienced elder law attorney to find out if a special needs trust should be part of your estate plan.

4. Probate and Probate Avoidance

Probate is a court-supervised transfer of assets from a deceased person to his or her beneficiaries. Probate is needed to transfer assets out of the name of a deceased person that do not otherwise pass to the beneficiaries, for example, by beneficiary designation, joint ownership, or through a living trust.

a. Probate Procedure. Probate begins with the filing of a court petition to admit the will to probate and appoint an executor or "personal representative." There is a court filing fee of between $500 and $1,000. Notice must be provided to estate beneficiaries, family members, creditors, and the State of Oregon, and must also be published in a local newspaper. A list of assets must be filed with the court. In the middle of the process, there is a four-month waiting period to see if anyone will challenge the will and to allow creditors to present claims. At the end of the process, a final accounting is filed with the court and interested parties have 20 days to object. If there are no objections, the court will then authorize distribution of estate assets to the beneficiaries.

b. Problems with Probate. All of the procedures detailed above are designed to provide maximum information to persons and entities interested in an estate (heirs, beneficiaries, creditors, and the state), and to maintain court oversight of the whole process. The problem is that all of these procedures are costly and time-consuming. Probate takes 6 to 9 months, and generally costs between 2% and 3% of the value of estate assets. The beneficiaries have to wait for their share of the estate until the end of the process. Finally, all of the information in the probate court files is available for review by the public. The probate files contain a wealth of information about the decedent's assets and who is going to receive them. There is a real privacy advantage to avoiding probate so this information is not made public.

c. Probate for Small Estates. Oregon provides an abbreviated version of probate for smaller estates, defined as real property valued at less than $200,000 and personal property (such as bank accounts, bonds, etc.) of less than $75,000. The small estate procedure typically costs no more than half the cost of a regular probate and can normally be completed in four or five months. It still requires filing important information about finances and beneficiaries with the court, so this information will become part of the public record.

d. A Living Trust Is the Best Way to Avoid Probate. If you decide you want to avoid probate, the living trust discussed above is the best way to do so. It has all of the flexibility and thoroughness of a will with none of the disadvantages of joint ownership and beneficiary designations, and it transfers property quickly and privately to the beneficiaries after you pass away. It is more expensive than a will, but typically costs much less than probate. Always work with an experienced elder law or estate planning attorney to set up a living trust. Forms available from legal stationery stores or the internet normally fail to achieve your estate planning goals. In our experience, most people who set up a living trust to avoid probate do so in part to save on probate costs, but mostly to make things easier for their loved ones after they have passed away.

5. Planning to Reduce or Eliminate Estate Taxes

Planning to reduce estate taxes should always be considered where people own assets valued in excess of $1,000,000. There are many ways to reduce and eliminate gift and estate taxes. You should always work with a qualified CPA or experienced estate planning or elder law attorney when planning to reduce or avoid these taxes. Some of the most common ways to avoid both gift and estate taxes are listed below.

a. Gift Tax. You can gift $16,000 per person per year without owing gift taxes. It is best to give cash gifts instead of investments or real estate. If you wish to give away investments or real estate, seek tax advice before doing so. Remember that gift taxes are paid by the giver of the gift.

b. Federal Estate Tax. This tax is assessed against estates valued in excess of the exemption amount, which varies depending on when the deceased person passed away. Federal estate tax rates are approximately 40% of each dollar over the exemption amounts. The current federal estate tax exemption amount is $12,060,000 as of 2022. Estates valued at less than this amount are not subject to the federal estate tax.

c. Oregon Estate Tax. This tax is similar to the federal estate tax, except the Oregon exemption amount is less than the federal exemption. This means many estates that are not subject to federal estate tax will be subject to Oregon estate tax. The Oregon exemption amount is $1 million for decedents dying in 2022. The tax rate is between 10% and 16% of the value of the estate which is over the $1 million exemption.

d. Ways to Reduce or Eliminate Estate Taxes:

(1) Lifetime Tax-Free Gifts. If your estate is in excess of the taxable limits listed above, one way to reduce future estate taxes is to begin transferring funds to your beneficiaries during your lifetime. You can transfer a maximum of $16,000 per person per year, free of gift tax. If you are married, your spouse can likewise transfer $16,000 per person per year, for a total of $32,000 per person per year. If you have several beneficiaries, it is possible to substantially reduce the value of your estate by making the maximum annual tax-free gift to each beneficiary over a period of several years.

It is worthwhile to consult with an experienced estate planning or elder law attorney when considering a gifting plan to reduce estate taxes. There may be better options for your particular situation. Also, always consult with a CPA or attorney if you wish to give more than $16,000 per person per year, or if you wish to give something other than cash, such as investments or real estate.

(2) Credit Shelter Trust. A credit shelter trust is the best way to reduce estate taxes for married couples. It takes advantage of the fact that each spouse can shelter the full exemption amounts listed above. The credit shelter trust essentially doubles the amount of assets that can be protected from estate taxes. If your assets (or your parents' assets) exceed $1,000,000 in value, speak with an experienced estate planning or elder law attorney about credit shelter trust planning. Note that estate tax laws change frequently and you should confer with your attorney every few years to make sure your plan complies with the most recent law changes.

(3) Charitable Gifts and Bequests. If you have an estate over $1 million, you can make charitable gifts and bequests to reduce your estate tax liability. Charitable gifts made during your lifetime reduce the size of your estate, thereby reducing the amount subject to tax. A charitable bequest in your will or trust is a deduction against the size of your taxable estate. For example, someone passing away in 2022 with a $1,100,000 million estate would normally owe Oregon estate tax. If the decedent's will or trust included a $100,000 bequest to a charity, the value of the estate would be reduced to $1 million, and there would be no Oregon estate tax due.

6. Long-Term Care Cost Planning

a. What is Long-Term Care? When a person lacks the ability to perform "activities of daily living" ("ADLs"), they may need long-term care. Activities of daily living are generally defined as bathing, dressing, mobility, eating, toileting, and cognition.

b. Where is Long-Term Care Provided? Long-term care can be provided in a variety of settings: in the home, assisted living facilities, residential care facilities, adult foster homes, and nursing homes. All of these options are expensive, and since the care may continue for a long time, careful planning is needed to insure that the needs of the ill person and his or her family will be met.

c. Medicare Provides Surprisingly Little Help with Long-Term Care Costs.

(1) Medicare Defined. Medicare is health insurance for people age 65 and older, or who have permanent kidney failure, or ALS (Lou Gehrig's Disease). Medicare has two main parts that are relevant to long-term care – Part A and Part B.

(2) Medicare Part A. Medicare Part A is basically hospital insurance. It also includes a limited benefit for "skilled care" in a skilled nursing facility. To qualify, you have to spend at least 3 days in the hospital, and then be discharged to a skilled nursing facility. In this case, Medicare Part A will pay for days 1—20. There is a $194.50 per day co-payment for days 21—100. Most Medicare supplement policies cover the $194.50 daily co-pay. One problem is that most people are only considered to require skilled care for 7 to 10 days. Then, they are downgraded to intermediate care, and Medicare stops paying. The patient is then responsible for the full cost of care, which in Oregon is approximately $9,551 per month.

(3) Medicare Part B. Medicare Part B pays for doctors' services. There is no long-term care benefit to Medicare Part B. For 2022, most Medicare beneficiaries pay a premium of $170.10 per month, which is withheld from the Social Security check. Some beneficiaries pay a higher premium based upon their income.

d. Sources of Payment for Long-Term Care:

(1) Personal Funds. With costs averaging $9,551 per month, even solidly middle-class families are at risk of impoverishment due to long-term care costs.

(2) Long-Term Care Insurance. This is fine if the ill person already has coverage. Once a person is diagnosed with an illness that could result in the need for long-term care, it is normally too late to purchase this type of insurance. Unless purchased prior to age 65, the premiums for long-term care insurance can be quite expensive.

(3) Veterans Benefits. One very helpful program available through the Veterans Administration is the Aid and Attendance program. To qualify, the veteran must have served during wartime and must now require long-term care. The need for long-term care does not have to be related to any service-connected injury. This is a means-tested program, meaning the veteran's assets must be below certain levels to qualify, so people with substantial assets will not benefit from Aid and Attendance.

(4) Medicaid. Medicaid pays over 60% of the long-term care costs in the United States.

e. Medicaid Safety Net:

Medicaid is a joint federal/state program that helps pay long-term care expenses for people who qualify. There are three tests to qualify for Medicaid: one based on level of disability; one based on level of income; and the final test based on level of assets. An applicant must meet all three tests in order to qualify for help with long-term care costs through the Medicaid program.

(1) Disability Test. An applicant must require assistance with activities of daily living: bathing, dressing, eating, mobility, toileting, and cognition. In recent years, state rules have required an applicant to need fairly substantial assistance with ADLs to meet this test. The State of Oregon Seniors and People with Disabilities Services Division, which administers the Medicaid program in Oregon, rates an applicant's level of disability on a scale of 1 through 18, with 1 being most disabled, and 18 being not disabled at all. Currently, an applicant must fall within categories 1 through 13 to qualify for Medicaid long-term care assistance. This means many people who need assistance with some ADLs will not immediately qualify for assistance even if they meet the financial eligibility tests described below.

(2) Income Test. In order to qualify for Medicaid long-term care assistance in Oregon, an applicant's gross income must be below $2,523 per month. This is true even if the applicant has

no other funds and care costs far exceeding $2,523 per month. If the applicant's income exceeds this amount, the only way for him or her to qualify for Medicaid long-term care assistance is to create a special type of trust known as an income cap trust. An experienced elder law attorney can help an applicant with too much monthly income create this special type of trust.

(3) Resource Test. The final test for Medicaid eligibility is based on the applicant's assets. If the applicant is married, the assets of his or her spouse are also considered available to pay for care costs and thus must be disclosed on the application for benefits. The amount of assets an applicant can keep depends on whether or not the applicant is married.

(a) Resource Test for Unmarried Person. An unmarried person can keep only $2,000, plus certain "exempt" assets described below, and qualify for Medicaid assistance.

(b) Resource Test for Married Couple. The healthy spouse gets to keep additional assets to maintain his or her place in the community. This amount of assets is known as the community spouse resource allowance. The healthy spouse is generally entitled to keep all of the "exempt" assets described below, plus one-half of the investments and savings, subject to minimum and maximum figures.

(i) Minimum spousal resource allowance: $27,480.

(ii) Maximum spousal resource allowance: $137,400.

Examples of the above-listed minimum and maximum amounts are as follows:

(i) Marital assets total $100,000, the healthy spouse must spend this down to $50,000 before the applicant will qualify for benefits.

(ii) Marital assets total $30,000, the healthy spouse gets to keep the minimum of $26,076 spousal allowance.

(iii) Marital assets total $300,000, the healthy spouse must spend down to the maximum resource allowance of $137,400.

(c) "Exempt" Assets. Exempt assets are not counted as part of the Medicaid "means-testing" process. These assets do not need to be "spent down" in order for the applicant to qualify for Medicaid assistance. The primary exempt assets are:

(i) The family home, so long as the applicant or spouse lives there, and if the applicant lives in the home alone, so long as the total home equity is under $636,000.

(ii) One car.

(iii) Funds placed in an irrevocable burial plan. If the plan is revocable, this amount is limited to $1,500.

(iv) Tangible personal property.

f. Medicaid Planning Strategies to Protect the Healthy Spouse. The rule that a healthy spouse must generally spend one-half of his or her assets before the ill spouse can qualify for Medicaid can lead to serious financial distress for the healthy spouse. For example, the rules would require a married couple with $60,000 in savings to spend down to $30,000. Experienced elder law attorneys use several planning strategies to increase the amount of income and assets a healthy spouse is permitted to retain and still qualify for Medicaid assistance.

(1) Increasing the Amount of Income the Healthy Spouse May Retain. Medicaid rules allow the healthy spouse to keep all of his or her income. If the healthy spouse's income is less than $2,177.50 per month, Medicaid will allow some of the ill spouse's income to be paid to the healthy spouse each month, so he or she will have at least $2,177.50 per month in income. An experienced elder law attorney can sometimes petition the State of Oregon Department of Human Services to increase the amount of income that can be paid from the ill spouse to the healthy spouse, based upon the healthy spouse's particular circumstances.

(2) Increasing the Amount of Assets the Healthy Spouse May Retain. In the example listed above, a healthy spouse had $60,000. The general rule would require him or her to spend down to $30,000. An experienced elder law attorney can sometimes petition the State of Oregon Department of Human Services to increase the amount of assets the healthy spouse is permitted to retain, based upon the particular circumstances of the healthy spouse. For example, if the healthy spouse has high housing expenses, this can sometimes be used as a basis to increase the amount of income and assets the healthy spouse is allowed to retain.

(3) Medicaid Qualifying Annuities. In some circumstances, a healthy spouse who has $60,000 and has been told by Medicaid to spend down to $30,000 before the ill spouse can receive benefits can use the $30,000 in "spend down" funds to create an income stream or private pension for the healthy spouse. If done correctly, this is a valid spend-down strategy and can provide a continuing benefit to the healthy spouse. The rules regarding Medicaid Qualifying Annuities are very complicated and change frequently. Thus, this strategy should only be pursued with the assistance of an experienced elder law attorney.

g. Asset Transfers. Upon hearing that they must spend assets down in order to qualify for Medicaid long-term care assistance, many people think about giving away assets to their children. Medicaid rules discourage asset transfers by imposing periods of ineligibility for benefits (or "penalty periods") where people give away assets. The duration of the "penalty period" is one month of ineligibility for Medicaid assistance for each $9,551

given away. If an applicant for Medicaid gives away $95,510, he or she will be ineligible for Medicaid assistance for 10 months. This “penalty period” does not begin until the applicant has satisfied all other conditions for Medicaid eligibility. This is an extremely difficult set of conditions to meet. Since Medicaid has the ability to ask for information about transfers of assets for five years prior to the application, it is critical to work with an experienced elder law attorney if an older person is thinking about making gifts.

Law Offices of

Geoff Bernhardt & Julie Nimnicht

Geoff Bernhardt, J.D.

University of Oregon School of Law, 1992

Since 1993, Geoff has guided individuals and families as they address the legal and financial consequences of aging. He has served as an Adjunct Professor of Elder Law at Lewis and Clark Law School in Portland, Oregon. He was President of the Oregon State Bar Elder Law Section in 2012. His guest speaking engagements on estate planning and elder law include the Multnomah Bar Association, the Oregon Chapter of the National Multiple Sclerosis Society, the Office of the Long-Term Care Ombudsman, and AARP-Oregon.

Geoff is a shareholder in his firm, the Law Offices of Geoff Bernhardt & Julie Nimnicht, which specializes in elder law, estate planning, probate, guardianships and conservatorships.

The Oregon State Bar received Geoff's assistance in writing a book on Elder Law for Oregon attorneys. The Bar also honored Geoff for his educational services to Oregon Elder Law Attorneys in 1998, 2000, 2003, 2004, 2005, 2008, 2011, 2012, and 2013. Geoff is a prior recipient of the Multnomah County Legal Aid Senior Law Project Outstanding Volunteer Award.

Julie Nimnicht, J.D.

Lewis & Clark Law School, 2009

Julie Nimnicht joined the Law Offices of Geoff Bernhardt & Julie Nimnicht in 2011. She is a caring and determined advocate for seniors, assisting clients with all aspects of estate planning and administration, protective proceedings, and Medicaid planning. Prior to joining the firm, Julie worked with an estate planning firm where she focused on probate administration and guardianship and conservatorship proceedings.

During law school Julie clerked for the Oregon Department of Justice in the labor and employment section, and later for the Pacific Environmental Advocacy Center where she worked on Clean Water Act litigation cases. She also served on the editorial board of the *Environmental Law* review as the notes and comments editor. She earned her J.D. from Lewis & Clark Law School and has a bachelor's degree from New York University.

From 2013 to 2017, Julie served on the development committee for Guardian Partners, an organization that trains volunteers to assist the court system by monitoring guardianship cases to ensure that there is no abuse, exploitation, or neglect of elderly or disabled adults. She is also a member of the Oregon State Bar, the Multnomah Bar Association, and Oregon Women Lawyers, and currently serves as a member of the Oregon State Bar Elder Law Section executive committee.