

# Working with a Questionably Competent or Incapacitated Client:

Protecting Elders, Bystander Liability, Fiduciaries

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# Topic Overview:

- 1. Aging Demographic, Elder Abuse, Bystander Liability
- 2. Capacity - the “Questionably Competent Client”?
- 3. Powers of Attorney
- 4. Revocable Living Trusts
- 5. Guardianship and Conservatorship
- 6. Working with Fiduciaries

# Aging Demographic

- Every day, for the next 19 years, more than 10,000 Baby Boomers will reach age 65
- There are currently 6.1 million Americans over 85 years old; this group will increase to 20.8 million by 2050
- **A national study has determined that 38-45% of people age 85+ have experienced some degree of cognitive impairment**
- By the year 2052, an estimated \$40.6 trillion will change hands as Baby Boomers pass on their accumulated assets to their heirs

*-statistics by the Census Bureau and the National Institute on Aging*

# Civil Actions for Elder Abuse

- ORS 124.100 allows for a civil action to be brought against a person who has caused physical or financial abuse to an elderly or incapacitated person
- The damages to be awarded shall be **triple** the actual damages
- An action can be brought when:
  - 1. a person wrongfully takes money or property of an elderly or incapacitated person OR
  - 2. A person holds or controls money belonging to a vulnerable person and the other person, without good cause, continues to hold the money or property

# Bystander Liability

- ORS 124.100(5) states that a civil action may be brought against a person for permitting another person to engage in physical or financial abuse if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical or financial abuse
- **IF YOU KNOW OR SUSPECT THAT ELDER ABUSE IS OCCURRING, CALL THIS NUMBER:  
1-855-503-SAFE(7233)**
- Look for '**red flags**' like the party suffers from cognitive impairment, or the elements of the transaction are not commercially sound or fair

## Topic 2: Diagnostic Capacity vs. Legal Capacity

- Diagnostic Capacity –
  - Symptoms, Diagnosis, Treatment Plan and Prognosis
- Legal Capacity
  - Legal Standard → does the person possess the cognitive ability to complete a particular transaction?
    - Sliding scale for threshold

# Oregon Notary Public Guide

*“The person signing a document*

- *knows what is being signed, and*
- *is able to understand the action taken,*
- *and is in fact the person whose signature is on the document”*

# Testamentary Capacity

*For a person to have sufficient mental capacity to make a valid testamentary transfer, the person must:*

- a. be able to understand the nature of the act;*
- b. know the nature and extent of his/her property;*
- c. know, without prompting, the people who are the natural objects of his/her bounty; and*
- d. be aware of the scope and reach of the provisions of the document.*

## Capacity of persons subject to Guardianship and Conservatorship

ORS 125.005 defines incapacitated as: *“a condition in which a person’s ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirement for the person’s physical health or safety”*

**Financially incapable: a person is unable to manage “those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income”**

# Contracts, Deeds, Lifetime Gifts, and Powers of Attorney

- *“The test of mental capacity to make a deed requires that a person shall **have ability to understand the nature and effect of the act** in which he is engaged and the business which he is transacting. \*\*\*[A] grantor must be able **to reason, to exercise judgment, to transact ordinary business and to compete with the other party to the transaction.**”*

-First Christian Church v. McReynolds, 194.Or. 68, 72-3,  
241 P.2d. 135 (1952)

# A Functional Approach To Capacity

- 1. The client's ability to articulate reasoning behind the decision
- 2. The client's ability to understand the consequences of the decision
- 3. The variability of the client's state of mind
- 4. The irreversibility of the decision
- 5. The substantive fairness of the transaction
- 6. A substantial change in the Estate Plan

# Get Some Help

- Other Financial professionals
- Attorney
- Family members (if appropriate)
- Appointed fiduciaries
- Cognitive assessment

## Topic 3: Powers of Attorney

- “Durable Power of Attorney”
  - For financial matters (not for health care)
  - You (“principal”) delegate authority to handle your financial matter to another person (“agent”)
  - Can appoint a successor agent
  - *Usually* becomes effective at signing
  - The document itself describes the specific powers given to your agent

[Redacted]

[Redacted]

## DURABLE POWER OF ATTORNEY

I, **DAVID D. JONES**, of Oregon City, Oregon, appoint **JEAN R. JONES** as my Agent and attorney-in-fact to act on my behalf and for my benefit. If **JEAN R. JONES** is unable or unwilling to serve as my Agent and attorney-in-fact, I name **JESSE J. JONES** as my Agent and attorney-in-fact. If **JESSE J. JONES** is unable or unwilling to serve as my Agent and attorney-in-fact, I name **DANIEL J. JONES** as my Agent and attorney-in-fact ("my Agent"), to act on my behalf and for my benefit, with power and authority to:

1. Support. Make expenditures for my health, education, support, maintenance, and general welfare, and to use such sums as are necessary for my spouse's own care, support, and maintenance, as needed to supplement my spouse's own income.
2. Managing and Disposing of Assets. Take possession of, retain, change the form of, manage, maintain, improve, lease, grant options on, encumber, sell, convey, exchange, or otherwise dispose of any of my real or personal property or any interest in property, in any manner and on any terms my Agent considers to be in my best interests...

## Important questions to ask when presented with a Power of Attorney:

- Was the document prepared by an attorney?
- What is the date the document was signed?
- When does the power of attorney become effective?
- Does the Agent's action personally benefit the Agent?
- Why isn't the Principal signing the document?

# Topic 4: Revocable Living Trusts

- A Revocable Living Trust (“RLT”)
  - established during lifetime
  - goes into effect immediately
  - can be changed or revoked as long as capacity
  - distributes your assets in the manner you desire
  - eases administration by avoiding probate

# Key Players

- Settlor: the person who creates the RLT
- Trustee: the person who manages the trust assets
- Beneficiary: the person for whom the trust assets are used

# Settlor capacity vs. incapacity

- While you have **capacity** you can serve as trustee of your own trust (i.e., you manage your finances and spend assets much the same way as before)
- Once **incapacity** is established, the successor trustee can take over management of the assets and use those assets for your benefit
  - RLTs often avoid the need for a conservatorship.
  - The RLT itself will usually dictate how to determine and prove a lack of capacity

## Topic 5: Guardianship and Conservatorship

- The Oregon Revised Statutes governing Guardianships and Conservatorships can be found [here](https://www.oregonlegislature.gov/bills_laws/ors/ors125.html) ([https://www.oregonlegislature.gov/bills\\_laws/ors/ors125.html](https://www.oregonlegislature.gov/bills_laws/ors/ors125.html))

# Vocabulary

- **Guardian**: the person appointed by the Court to make personal and health-care decisions for a minor or incapacitated person
- **Conservator**: the person appointment by the Court to manage the finances of a person who is unable to do so

## Topic 6: Working with Fiduciaries

Litigation against fiduciaries is on the rise

Breach of one or more of the legal duties is actionable, often exposing the fiduciary to personal liability for the financial harm done

# A Fiduciary MUST:

- **Preserve and protect assets**
- **Keep funds titled in name of principal only - separate from fiduciary's own personal funds**
- **Use assets to benefit only the principal. No gifts, loans or transfers to third-parties**
- **Keep scrupulous records of all income and expenses**
- **Preserve and protect the Estate Plan**

# Thank you for your time.

If you have further questions or concerns, please feel free to contact me.



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