Chapter 1

Understanding Medicaid and Long-Term Care in Oregon

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I. INTRODUCTION

A basic understanding of Medicaid is important for attorneys advising elderly or disabled clients. Medicaid is a health insurance program that provides medical insurance to aged, blind, and disabled individuals, as well as families with dependent children whose income and resources are insufficient to meet the costs of necessary medical services. Since Medicaid was originally enacted, Congress has expanded coverage to other groups of people including children and pregnant women. Medicaid now covers the majority of the nation's long-term care costs. More recently, Medicaid is experiencing a new expansion through the enactment of the Affordable Care Act.

Medicaid is joint program funded and administered through a partnership between the state and federal governments. The Centers for Medicare & Medicaid Services (CMS) is the federal agency charged with working with states to administer Medicaid services. Oregon is one of 48 states that operate their Medicaid program under a waiver allowed by section 1915(c) of the Social Security Act. This waiver allows the state of Oregon to offer community-based long-term care services with the goal of enabling eligible individuals to remain in the least restrictive and least costly setting consistent with their service needs. OAR 461-015-0000. Community-based care in Oregon includes adult foster care, assisted living facilities in-home services, residential care facilities, specialized living facilities, and independent choices. OAR 461-001-0000(17).

Recently, Oregon announced that CMS has approved Oregon's request to expand home- and community-based services for seniors and people with physical and developmental disabilities. The approval of Oregon's Community First Choice Option, or K plan, will give Oregon authority to expand community-based services. A copy of the amended K plan can be found at http://www.oregon.gov/dhs/k-plan/Pages/index.aspx. It appears that the K plan will allow for expanded in-home support services.

Medicaid covers a wide variety of services and has a variety of program names in Oregon. For example, the Oregon Health Plan (OHP) provides important health insurance for Supplemental Security Income (SSI) recipients, children, disabled adults, and pregnant women. Another Medicaid program, Oregon Supplemental Income Program Medical (OSIPM), assists individuals with long-term care costs. Although the different Medicaid programs share many basic eligibility requirements, there are important differences between them. These materials will focus on individuals who are in need of assistance with long-term care, otherwise referred to as OSIPM.

Congress established Medicaid as Title XIX of the 1965 Amendment to the Social Security Act. Title XIX of the Social Security Act is found in 42 USC Chapter 7. A good reference for exploring the Social Security Act is the Compilation of the Social Security Laws found at http://www.ssa.gov/OP_Home/ssact/ssact.htm. The website is easy to use and includes citations to the Social Security Act and to Section 42 of the United States Code.

ORS Chapter 411 is the enabling statute that gives the Oregon Department of Human Services the authority to administer and supervise all public assistance programs and to set eligibility rules for those programs. The administrative rules that primarily govern the eligibility standards for Medicaid are found throughout Oregon Administrative Rules (OAR) chapter 461. Within chapter 461, divisions 110, 115, 135, 140, 145, and 160 contain the majority of the Medicaid eligibility rules. Divisions 001 and 101 of chapter 461 also provide helpful definitions and acronyms used throughout all the eligibility rules. OAR chapter 411, division 015, also contains important eligibility requirements related to disability.

> **Practice Tip:** The best way to stay informed regarding the frequent changes in the administrative rules is to sign up to receive notices of temporary and permanent rulemaking for chapters 461 and 411. This can be done through the Department of Human Services website or by contacting Annette Tesch at annette.tesch@state.or.us. The notices

arrive in email format, and there is a summary on page 1 of the notice listing the rules that are affected by the action.

II. ESTABLISHING ELIGIBILITY: DISABILITY, INCOME, AND RESOURCES

Individuals who need assistance with long-term care costs (OSIPM) must qualify under three eligibility tests in order to receive assistance from Medicaid in Oregon. Those three eligibility tests include disability, income, and resources. In the following discussion of the eligibility tests, all references to "Medicaid" refer to OSIPM program requirements.

A. Disability

The Medicaid application process should be completed within 45 days. During this time period, the caseworker assigned to assess eligibility will visit the applicant and evaluate the need for long-term care based on the applicant's disabilities. This assessment is sometimes called the CAPS assessment. The assessment reviews activities of daily living, which include eating, dressing/grooming, bathing/personal hygiene, mobility (ambulation and transfer), elimination, and cognition/behavior. OAR 461-015-0006(1). The assessment only evaluates how the applicant functioned during the thirty days prior to the assessment date and how the applicant is likely to function in the thirty days following the assessment date. OAR 461-015-0006(2)(b).

Practice Tip: Although the time frame is thirty days prior to the assessment date and thirty days looking forward, evidence of how the applicant functioned without support from caregivers can and should be considered. When assessing cognition, the caseworker should consider how the individual would function without supports. OAR 461-015-0006(5)(a). A common example of this is when an applicant moves into a foster home two months prior to the assessment and has improved due to assistance he or she is receiving from a care provider in the home. Information about how the applicant was functioning in the home prior to the move is important evidence regarding the applicant's need for care related to cognition. For example, weight loss due to skipping meals is evidence of lack of judgment because the applicant no longer has insight into his or her health and safety needs. Leaving burners on after every meal is evidence of lack of memory because he or she needs prompting from a caregiver to turn off the burners.

Activities of daily living are defined at OAR 461-015-0006. Some of the activities of daily living are broken down into subcategories. For example, cognition includes eight different categories: adaptation, awareness, judgment/decision-making, memory, orientation, demands on others, dangers to self or others, and wandering. Within each of these categories an individual is assessed as being either an assist or a full assist. The use of assist and full assist is consistent throughout the activities of daily living except in the area of mobility. Within mobility, the subcategory of ambulation has three different possibilities: minimal assist, substantial assist, and full assist. During the assessment, the caseworker assigns a need for assistance to each activity of daily living. The different need levels are combined and the CAPS computer program gives the applicant a score, also called a service priority level.

The classification of an activity of daily living is important because a slight change can influence the service priority level assigned to the individual. There are 18 possible service priority levels that can be assigned and currently only levels 1–13 are eligible for long-term care services. OAR 411-015-0015(1). Levels 1–13 include the following:

(1) Requires Full Assistance in Mobility, Eating, Elimination, and Cognition.

(2) Requires Full Assistance in Mobility, Eating, and Cognition.

(3) Requires Full Assistance in Mobility, or Cognition, or Eating.

(4) Requires Full Assistance in Elimination.

(5) Requires Substantial Assistance with Mobility, Assistance with Elimination and Assistance with Eating.

(6) Requires Substantial Assistance with Mobility and Assistance with Eating.

(7) Requires Substantial Assistance with Mobility and Assistance with Elimination.

(8) Requires Minimal Assistance with Mobility and Assistance with Eating and Elimination.

(9) Requires Assistance with Eating and Elimination.

(10) Requires Substantial Assistance with Mobility.

(11) Requires Minimal Assistance with Mobility and Elimination.

(12) Requires Minimal Assistance with Mobility and Assistance with Eating.

(13) Requires Assistance with Elimination.

Individuals who require assistance with only bathing and dressing are no longer covered because they are ranked at levels 16 and 17. For this reason, it is very important to accurately report the need for care in mobility, eating, elimination, and cognition at the assessment.

> **Practice Tip:** It is common that an individual, because of embarrassment or memory loss, underreports care needs. If you believe this may occur, consider having a family member or care provider who is familiar with the actual care needs present at the assessment. The family member or care provider can provide supplemental information to the caseworker if the applicant is unable to speak accurately. This can often prevent the needless denial of services.

The caseworker completes a disability assessment annually, even after the initial approval for Medicaid benefits. If the caseworker denies benefits based on a service priority level, it is a good idea to immediately request and review a copy of the CAPS assessment. If the client chooses to appeal a disqualification and is currently receiving benefits, they have only 10 days to request "aid paid pending." Aid paid pending allows the individual to continue receiving benefits pending the outcome of the appeal and can be very important in maintaining continuity of coverage during the appeal. The risk of requesting aid paid pending is that the individual has to repay benefits received from the date of disqualification if the appeal is not successful. If aid paid pending is not requested there are only 45 days to request an appeal. Appeals are handled through the Office of Administrative Hearings.

B. Income

The second test for Medicaid eligibility is income. In order to qualify for Medicaid services in Oregon, an individual must have income that is at or under 300% of the SSI standard. OAR 461-135-750. Three hundred percent of the SSI standard is referred to as the "income cap" and is currently set at $2,130. The income cap is adjusted each year. The current cap is published on the Elder Law Section page of the Oregon State Bar website at http://www.osbar.org/sections/elder/elderlaw.html. If an individual has income over the income cap, he or she can qualify for Medicaid by creating an income cap trust. OAR 461-145-0540.

1. Income Defined. For Medicaid purposes, all assets are divided into two general categories: income and resources. When deciding if an income cap trust is necessary, the first step is to correctly identify all assets that are income. There is no general definition of income in the Oregon Administrative Rules. Instead division 145 of chapter 461 lists specific types of assets and classifies the particular asset as either a resource or income.

The definitions often classify income as both earned and unearned. For purposes of the income cap, this distinction is not important because both sources of income are counted toward the income cap.

Practice Tip: Clients often do not accurately identify their income. A better practice is to have the client to break down his or her source of income by type and frequency of receipt. Clients often identify resources such as IRAs as income, since they receive regular monthly or yearly distributions. However, under the relevant rules, IRAs are correctly classified as a resource and the required minimum distributions do not count toward the client's income.

2. Income Cap Trust. If the gross income exceeds $2,130 per month, an income cap trust is required in order for the client to qualify for Medicaid. Keep in mind that you must consider gross income, not net income. A client can be under the $2,130 income cap after taxes and deductions of health insurance premiums but still require an income cap trust because the gross income is over $2,130. A sample income cap trust published by the State of Oregon is attached as Appendix A.

a. VA Aid and Attendance Benefits Excluded. Generally, an income cap trust is necessary if the client's gross income exceeds the income cap. The gross income should include all income sources. However, veterans' benefit payments are excluded from gross income when determining eligibility for long-term care of Title XIX waivered services. OAR 461-145-0580(2)(a)(A). If the veterans' benefit payment puts the client over the income cap, then an income cap trust is not necessary. The client does not get to keep the entire veterans' benefit payment and still contributes to the cost for care each month.

b. The Distribution Plan. The content of the income cap trust is fairly straightforward. The bulk of the work in drafting an income cap trust comes in calculating the distribution schedules, which lay out a specific budget for how the income cap trustee is to spend the Medicaid recipient's income each month. The distribution schedules should include the following.

i. Personal Needs Allowance. Nursing home residents receive only $30 of their monthly income for personal needs allowance. The amount has not changed for many years. Clients in community based care currently receive $157.30 per month. The personal needs allowance for community-based care is indexed up yearly. A client who receives veterans' benefits is allowed a $90 per month personal needs allowance. OAR 461-160-0620(3)(c)(B).

ii. Room and Board. Nursing home residents do not pay room and board. Clients in community-based care currently pay $552.70 per month. This amount is indexed up yearly. It is important to identify if the client is receiving skilled nursing care or community-based care because clients may not understand the distinction.

iii. Reasonable Administrative Costs. Administrative costs allowed in an income cap trust include trustee fees, reserve for administrative fees including bank service charges, copy charges, postage, accounting and tax preparation fees, future legal expenses, income taxes attributable to trust income, and conservatorship and guardianship fees and costs. However, the reasonable administrative costs may not exceed a total of $50 per month. Practically speaking, this is usually included on the distribution schedule as a trustee fee of $50 per month. It is almost impossible to allow other administrative costs since the cap of $50 is so low.

iv. Community Spouse and Family Monthly Maintenance Needs Allowance. The "community spouse" is the term used to refer to the spouse who is not receiving Medicaid benefits and is living independently. The community spouse is guaranteed a minimum monthly maintenance needs allowance (MMMNA) of $1,939. The department can increase this amount to $2,898 if the community spouse has high shelter costs. These minimum and maximum monthly maintenance needs allowances are indexed up annually. If the community spouse's income is under the MMMNA, then the income from the Medicaid client is transferred to the community spouse each month.

Example: Santiago has moved to a foster home and needs assistance with his care costs. Santiago has gross income of $3,400 per month. Santiago's income includes Social Security

and two different pensions. Santiago's wife, Michelle, is living in the home and has Social Security income of $900 per month. Michelle has monthly expenses exceeding $1,939 per month due to a mortgage on the home and high prescription costs for her medications. A review of her monthly expenses shows that she needs at least $2,898 per month to pay her bills. The income cap trust should include a deduction for community spouse monthly maintenance needs allowance of $1,998 per month. $1,998 + $900 = $2,898 (the maximum monthly maintenance needs allowance). Do not automatically assume that the community spouse only needs the minimum amount of $1,939 per month. Increasing the community spouse allowance to an appropriate amount can significantly improve the quality of life for the community spouse.

v. Medicare and Other Private Medical Insurance Premiums. The Medicaid client can deduct health insurance premiums for Medicare and supplemental health insurance premiums. Most clients have a supplemental private policy in addition to the Medicare coverage. Medicaid allows the trust to pay the Medicare and supplemental health insurance premiums for the community spouse as well.

Continued Example: Santiago and Michelle both have a supplemental Medicare insurance policy that costs $140 per month each. Santiago has sufficient income to pay both premiums out of his income. Santiago's income cap trust can also pay his Medicare part B premium of $110 per month and Michelle's part B premium of $110 per month.

vi. Other Incurred Medical Costs. The income cap trust can pay for medical costs allowed under OAR 461-160-0030 and 461-150-0055. The costs that can be deducted include medical and dental care, psychotherapy, rehabilitation services, hospitalization, outpatient treatment, prescription drugs and over-the-counter medications, medical supplies and equipment, dentures, hearing aids, prostheses, and prescribed eyeglasses. The income cap trust can also cover private pay costs of community-based care and nursing home care. Generally, most medical expenses are covered by this rule. If the medical expenses cannot be paid off in one month, the schedules should allow for installment payments over as many months necessary in order to pay off the medical bills in full.

vii. Contributions to Reserves for Child Support, Alimony, and Income Taxes. If the client has child support or alimony obligations, this should also be deducted from the gross income. Income taxes can also be deducted, especially if automatically withheld from the income source.

viii. Monthly Contributions to Reserves of Payments for the Purchase of an Irrevocable Burial Plan. The department recently changed the administrative rules to limit the value of the irrevocable burial plan purchased with funds from an income cap trust to $5,000. OAR 461-145-0540(9)(c)(G).

Practice Tip: If the client is considering the purchase of an irrevocable funeral plan valued over $5,000, the client should purchase that plan as part of the spend-down prior to the creation of the income cap trust. If the irrevocable plan is under $5,000, it is better practice to include it as part of the income cap trust. This will free up funds for the client to use on other needs during the spend-down period.

ix. Contributions for Home Maintenance. The income cap trust can make contributions to a reserve or payments for home maintenance if the client plans to return to the home. In order to make deductions for this expense, the client must meet the criteria found in OAR 461-155-0660 or OAR 461-160-0630. OAR 461-160-0630 allows a home maintenance deduction for up to six months if a physician has documented that the client is likely to return home within six months, the amount of the deduction is reasonable in relation to the applicable shelter standard, and the department determines that maintaining the home is an essential part of the plan for the client's relocation to a less restrictive living situation.

This test is more restrictive than the test used when determining whether or not the home can be excluded as a resource. In order to exclude the home as a resource, the client only needs to have a subjective intent to return to the home. Therefore, you can have a situation where the home is excluded as a resource because the client intends to return after a temporary absence but a maintenance deduction is denied because lack of documentation from a physician. It is not clear if this strict standard is lawful. Oregon can be no more restrictive than the SSI program with its rules regarding eligibility. 42 USC §1396a(r)(2)(A).

c. Tax Identification Number. There is no clear rule as to whether or not a taxpayer identification number is required for an income cap trust. Some practitioners obtain a tax identification number because banks require the number for irrevocable trusts. Having a number for the income cap trust can assist the trustee when working with bank representatives to open the account. Other practitioners do not obtain a tax identification number because an income cap trust is a grantor trust and the income cap trust account should use the beneficiary's Social Security number. Banks vary on requirements for income cap trust.

C. Resources

The third and most complicated eligibility test for Medicaid eligibility in Oregon is the resource test. These materials will cover how to determine basic resource eligibility under the Oregon administrative rules. For more advanced planning techniques, please review the materials from the 2008 Oregon State Bar CLE seminar titled *Elder Law 2008: Advancing the Plan.*

The first step in determining eligibility under the resource rules is to calculate the amount of available resources. Medicaid rules separate "available" resources from "excluded" resources. Excluded assets are not considered when a client's eligibility and benefits level are determined. OAR 461-140-0010. It is helpful to understand what resources to exclude first, since this list is shorter and fairly straightforward. Once you know what resources to exclude, all other resources are considered available and count toward eligibility.

1. Excluded Resources. If an asset is excluded, the applicant, or the applicant's spouse, may keep the asset and still qualify for Medicaid. The following resources are excluded.

a. The Home. The home is not counted for Medicaid eligibility purposes if the client or the spouse of the client occupies the home and the equity in the home is $536,000 or less. OAR 461-145-0220(2)(a)(B). Generally speaking, the tax assessed value of the home can be used to determine the equity of the home. In recent months, where equity values have fallen below the tax assessed value, a comparative market analysis or professional assessment could be used to show a value of under $536,000.

A home can now be counted as a resource if the client has equity in the home of more than $536,000, unless one of the following requirements is met:

i. The spouse of the client occupies the home;

ii. The child[1] of the client occupies the home;

iii. The client is legally unable to convert the equity value in the home to cash;

iv. The home equity is excluded under OAR 461-145-0250 (rule for income-producing property).

Even if over $536,000 in value, the exceptions to the home equity rule are broad enough to allow exclusion of the entire equity value in most cases. However, this rule should be monitored for future changes, as the equity limit is relatively new.

[1]OAR 461-145-0220 has a narrow definition of "child." A child in this section of the rule means a biological or adoptive child who is under the age of 21 or a child who is disabled according to Social Security criteria.

Next, the home is also excluded if the client is absent to receive care in a medical institution and he or she provided evidence that he or she will return to the home. OAR 461-145-0220(3)(c)(A). The evidence must reflect "the subjective intent of the client, regardless of the client's medical condition." A letter from a doctor is not necessary, and a written statement from a competent client is sufficient to prove the requisite intent. This subjective standard directly contradicts the objective standard for the income cap trust deduction discussed above.

The home may also be excluded if the client is temporarily absent to receive care in a medical institution and the home is occupied by the client's spouse, child, or relative dependent on the client for support. OAR 461-145-0220(3)(c)(B). The child must be less than 21 years of age or, if over the age of 21, blind or an individual with a disability as defined by SSA criteria.

Finally, the value of the home is excluded pending the sale of the home. The client needs to make a good faith effort to sell the home at fair market value.

> **Practice Tip:** Although Oregon's real estate market is improving, it is not uncommon for clients to go on Medicaid pending the sale of the residence. Upon the sale of the property, the department may request payment of its claim for benefits provided to the Medicaid recipient. This is a voluntary payment, and the department has no claim until the death of the client and the client's spouse. Some title companies include the claim in the closing statements and identify it as a "lien." The claim is not a lien and repayment is completely voluntary. Most clients choose to take control of the sale proceeds and defer payment of any claim until after their death.

b. The Car. The value of one car is excluded from the resource calculation. The total value of the vehicle is excluded if "used for employment or necessary and continuing medical treatment." OAR 461-145-0360. This definition is interpreted broadly. Medicaid caseworkers generally automatically exclude the value of one car during the resource assessment. If a client has two cars, Medicaid allows the client to exclude the value of the more expensive car.

c. Burial Plans. The value of an irrevocable burial plan is excluded, regardless of the value. An exception to this is if the plan is purchased after Medicaid eligibility and is paid for through an income cap trust deduction. If this is the case, the plan is limited to $5,000. For this reason, if the client is considering a more expensive irrevocable plan, he or she should purchase the plan prior to Medicaid eligibility. Clients can convert a revocable burial plan to an irrevocable burial plan. This is often done during the Medicaid application process.

If a client does not wish to purchase a plan, he or she can set aside up to $1,500 as a burial fund in a separate account. OAR 461-145-0040(3)(a)(D). A burial fund for up to $1,500 can also be established for the client's spouse.

Burial space and burial merchandise are also excluded resources. OAR 461-145-0050. The burial space can be designated for the client, the spouse, children, siblings, parents, and the spouse of any of these people.

d. Personal Property. Personal belongings are excluded resources. OAR 461-145-0390. Personal belongings include household furnishings, clothing, heirlooms, keepsakes, and hobby equipment. There is no limit on the value of personal property that is excluded. Older administrative rules limited the value of personal property to $2,000.

e. Term Life Insurance. All term life insurance that has no cash surrender value is excluded. OAR 461-145-0320. Clients are often unaware of the difference between the face value and the cash value of the life insurance policy. This should be clarified as quickly as possible to avoid creating a period of ineligibility due to excess resources from cash value on life insurance.

f. Other Circumstances. Resources are also considered unavailable in the following circumstances:

i. The client has a legal interest in the resource but the resource is not in the client's possession and the client is unable to gain possession of it;

ii. The resource is jointly owned with others not in the financial group who are unwilling to sell their interest in the resource and the client's interest is not reasonably saleable;

iii. The client verifiably lacks the competence to gain access to or use the resource and there is no legal representative available to act on the client's behalf;

iv. The client is a victim of domestic violence and attempting to use the resource would subject the client to risk of domestic violence or the client is using the resource to avoid the abusive situation;

v. The resource is included in an irrevocable or restricted trust and cannot be used to meet the basic monthly needs of the financial group. OAR 461-140-0020(2).

These circumstances should always be reviewed in cases where the client does not have access to funds. For example, Medicaid eligibility can be established during the time a conservatorship is in process in order to gain access to assets the client is incapable of managing. This rule may also be applicable in cases of elder abuse when the money has been unlawfully transferred to an abuser.

Finally, resources are not considered available during the time the owner does not know he or she owns the resource. OAR 461-140-0020(3). This rule is important when clients, in good faith, forget about the existence of a resource. This is not uncommon if a client has declining capacity and does not accurately report all assets to a caseworker.

2. Available Resources. An asset that is not excluded is countable, and its value is used in determining the eligibility and benefit level of a client. OAR 461-140-0010(6). To determine the total amount of available resources, add up all available resources as of the date continuous care started. The total amount of available resources as of the date continuous care started is then used to determine the total amount of resources the client can keep. The resource test for unmarried individuals is different than the resource test for married couples.

a. Unmarried Clients. An unmarried applicant is subject to a resource limit of $2,000. OAR 461-160-0015(4)(a). This amount has not changed for many years, and previous CLE materials are helpful in describing how an unmarried applicant can permissibly spend down his or her resources to reach the $2,000 limit.

b. Married Clients. Congress enacted the Medicare Catastrophic Coverage Act of 1988 in part to protect the community spouse from impoverishment. This law protects the healthy/community spouse from impoverishment by allowing the community spouse to retain his or her own income and also an increased amount of resources. The amount of resources the community spouse can maintain is referred to as the community spouse resource allowance (CSRA).

i. Resources of Community Spouse. Medicaid uses a formula found at OAR 461-160-0580 to determine the amount of resources a community spouse is allowed to maintain. The first step in determining the community spouse resource allowance is to determine the total amount of available/countable resources for both spouses as of the first date of continuous care. The second step is to divide this amount in half. The third step is to see if this amount is subject to the minimum or maximum resource allowance. The current maximum resource allowance is $115,920. The current minimum resource allowance is $23,184. These numbers are indexed up annually. This formula is best understood through examples.

Example 1: Salvador and Isabel have $100,000 in available resources as of the date Salvador enters a nursing facility. Half of $100,000 is $50,000. $50,000 is more than $23,184 and less than the maximum of $115,920, so the community spouse resource allowance is $50,000. Isabel will need to spend down $48,000. Salvador will be eligible for Medicaid when Isabel has $50,000 in her name. Salvador can retain $2,000 in his name.

Example 2: Diego and Frida have $300,000 in available resources as of the date Frida enters a foster care home. Half of $300,000 is $150,000. $150,000 is over the maximum allowed, so Diego is allowed a community spouse resource allowance of $115,920. Diego and Frida will need to spend down $182,080 (the difference between $300,000 and $115,920 minus $2,000). Frida will be eligible for Medicaid when Diego has $115,920 in his name. Frida can retain $2,000 in her name.

Example 3: Nestor and Cristina have $30,000 in available resources as of the date Nestor enters an assisted living facility. Half of $30,000 is $15,000. This is under the minimum amount required, so Cristina is allowed a community spouse resource allowance of $23,184. Nestor and Cristina will need to spend down $4,616 (the difference between $30,000 and $23,184 minus $2,000). Nestor will be eligible for Medicaid when Cristina has $23,184 in her name. Nestor can retain $2,000 in his name.

Practice Tip: The above examples assume that we have neatly moved joint assets into separate ownership between the community spouse and the Medicaid spouse by the time Medicaid benefits start. In reality, this is not usually the case. The spend-down process can be messy and traumatic for couples, and often assets are still jointly owned at the time of the Medicaid application. The ill spouse can still go onto Medicaid at this point. Simply point out to the caseworker that the total resources in the bank accounts are the community spouse resource allowance plus the $2,000 for the Medicaid spouse. OAR 461-160-0580(3) states that the client and/or the client's spouse have 90 days to finish transferring the community spouse resource allowance to the community spouse's name. The 90 days can be extended for good cause. An example of good cause is a court-ordered transfer of resources through a conservatorship.

ii. Income of Community Spouse. The income of the community spouse is not counted when determining eligibility for an institutionalized spouse. However, the income of the community spouse is relevant to the total amount of resources the community spouse can retain.

It is possible to increase the amount of resources the community spouse can retain above the community spouse resource allowance. This is important in situations where the community spouse resource allowance is not sufficient to support the community spouse. To determine whether or not the community spouse can keep additional resources, we have to apply the "income-first rule." Currently, federal law mandates that the states apply the income-first rule to agency calculations. Whether or not the income-first rule must be applied to court order is an open question that is unresolved in Oregon. The State of Oregon is currently requiring the use of the income-first rule in all court orders to increase the community spouse resource allowance. These authors are unaware of any successful challenges to this policy.

iii. The Income-First Rule and Increasing the CSRA. The community spouse's income is not subject to any cap when determining eligibility for an ill spouse. However, it is subject a minimum amount in order to avoid spousal impoverishment. Currently, the minimum monthly maintenance needs allowance (MMMNA) is $1,939. OAR 461-160-0620. This amount can be increased up to $2,898 through agency approval, without the need for a court order. You can increase the monthly maintenance needs allowance above $2,898 with a court order. If you run out of income, then you can shift additional resources, effectively increasing the community spouse resource allowance.

Income-First Rule Example 1: Juan enters a nursing facility with an income of $1,900. Eva has income of $700 per month. Juan keeps $30 per month for his personal needs allowance and pays a health insurance premium of $60 per month, leaving $1,810 available to deem to Eva. Juan moves $1,239 of his income each month to Eva in order to bring her income up to the monthly maintenance needs allowance of $1,939 ($1,239 + $700 = $1,939). Juan pays his remaining $571 to the nursing facility each month as his "patient liability."

Income-First Rule Example 2: Same facts as above except that Eva has a mortgage of $1,000 per month. She also has high prescription costs to manage her own health care needs. A review of her monthly expenses shows that she needs at least $2,510 per month to meet her basic needs. In this case, Juan moves all of his remaining income of $1,810 to Eva each month. This brings Eva's income up to $2,510 each month, and Juan no longer has a patient liability. Juan and Eva do not need a court order to accomplish this transfer of income.

Income-First Rule Example 3: Same facts as above except that Eva now has monthly costs of $2,700 per month. If Juan moves all of his remaining available income of $1,810 per month, Eva's income of $2,510 is still not enough to meet her monthly expenses. Eva has a previously set community spouse resource allowance of $90,000, based on $180,000 in available resources as of the date Juan entered continuous care. The department calculates that this amount of resources will generate $52.50 in additional income per month, brining Eva's monthly income to $2,562.50 per month.[2] There is still a deficit of $137.50 per month ($2,700 – $2,562.50 = $137.50). The additional $90,000 in resources is needed to generate income for Eva sufficient to bring her up to her monthly maintenance needs allowance. Juan and Eva do not need a court order for Medicaid to approve the increased community spouse resource allowance. No spend-down would be necessary in this case.

Practice Tip: The example above relies on a situation where a spouse is in a nursing home. For practical purposes, it is more common to increase the community spouse resource allowance in cases where the ill spouse is in community-based care. This is because less income is available to the community spouse because of room and board ($552.70 per month) and personal needs allowance ($157.30 per month). With more of the Medicaid spouse's income accounted for, there is less to deem to the community spouse.

iv. Exception to the Income-First Rule. OAR 461-160-0620(4) now allows a waiver of the income-first rule "if the Department determines that the resulting community spouse resource allowance would create an undue hardship on the spouse of the client." Although there are no standards set forth in the rule, things to consider when requesting a waiver include the following.

(A) The Age of the Community Spouse. A younger age argues in favor of a waiver because he or she is likely to outlive the ill spouse and therefore suffer a reduction in income upon the death of the ill spouse.

(B) A Source of Income That Will Disappear. If the ill spouse has a source of income that will end upon his or her death, then the community spouse is more likely to face impoverishment. It is helpful to know if pensions will continue upon the death of the recipient or if the pension will be reduced.

(C) High Monthly Expenses. If the community spouse has high monthly expenses that will continue upon the death of the ill spouse and the reduction in income upon the death of the ill spouse will not be enough to cover those expenses.

[2] $90,000 invested in a one-year CD at a rate of .07% percent generates $630 in income per year or $52.50 per month. Investment rate for one-year CD from www.bankrate.com.

(D) Other Factors. Is the community spouse likely to need long-term care in the future? Is the community spouse resource allowance on the lower end?

There is no formal procedure for requesting a waiver of the income-first rule. A written request should be sent directly to a policy analyst in Salem for a quicker result.

3. Is It Income or a Resource? Assets are divided into two categories, income and resources. An asset may not be counted as a resource and as income in the same month. OAR 461-140-0010(7). Therefore, we classify the asset as discussed above and determine eligibility for services. Unfortunately, the two types of assets are now subject to a great deal of confusion because in some instances the assets are treated as income and in other cases they are treated as resources. Practitioners should carefully evaluate client assets and make sure that DHS is not treating any asset as both income and a resource.

III. POST-ELIGIBILITY PLANNING ISSUES: THE ESTATE PLAN AND THE HOUSE

A. The Estate Plan

Once a client is found to meet the requirement listed above, he or she will be eligible to start receiving Medicaid OSIPM benefits. There are post-eligibility Medicaid estate planning considerations that should be reviewed with the client at this point. This is primarily true for married couples who have a community spouse living in the home and with the support of the CSRA.

Many long-time married couples have wills leaving everything to the surviving spouse. Even if they do not have wills, they may own assets jointly with right of survivorship, essentially achieving the same result. Once one spouse becomes Medicaid-eligible, the other spouse may want to reevaluate whether or not the Medicaid spouse should receive the entire estate upon his or her death. Receiving the estate as a (now) single person would trigger ineligibility, requiring a spend-down of all the resources to less than $2,000. If the Medicaid spouse lives in a care facility, this includes the sale and spending of the proceeds from the house.

Many couples want to avoid the scenario above and revise the estate plan to avoid such a result. There are several strategies to consider when updating the estate plan of the community spouse.

1. Disinheritance. Some clients may wish to bypass the Medicaid spouse altogether in favor of the children. This is an aggressive planning option. Oregon recently revised its elective share statute found at ORS 114.600–114.725. The statutes are attached as Appendix B. For many long-time married couples, the Medicaid spouse is entitled to elect a third of the augmented estate. Even if the Medicaid spouse is unable or unwilling to elect his or her share, the State of Oregon will request the appointment of a conservator under ORS Chapter 125 to elect on his or her behalf. Such a request will likely be successful. At that point, the disinheritance was not successful and the estate administration has incurred the additional cost of a conservatorship.

2. Providing for the Elective Share. In order to avoid litigation, some clients elect to provide for the elective share up to the percentage amount provided for in ORS 114.605. The remaining portion passes freely without concerns for rapid spend-down by the Medicaid spouse at private pay rates. Some clients elect to leave the remaining share directly to their children. Others provide for the remainder to pass to a testamentary special needs trust for the benefit of the Medicaid spouse. If the elective share portion is spent on private care costs, the remaining special needs trust is intended to provide for the spouse's supplemental needs for the remainder of his or her lifetime.

In many cases, the Medicaid spouse is financially incapable and the revised estate plan is an excellent opportunity to provide for management of his or her share of the estate. Instead of leaving the share outright to a spouse who is unable to manage the share, the community spouse can name a trustee of the share and avoid a potential conservatorship.

Be aware of the augmented estate as defined in ORS 114.630. Many times, the community spouse's CSRA is made up of assets that will pass by beneficiary designations and not by will or trust. If the will or trust provides for the elective share, only assets subject to that document will be part of the calculation of that share. Thus, the plan may not fully provide for the correct percentage when calculating the augmented estate. Consider drafting to provide for calculation of the share using the definition found in ORS 114.630.

B. The House

Another post-eligibility planning issue is how to title the house. The house is often the primary asset for a couple, and careful planning can impact quality of life for the community spouse and the ultimate success of the estate plan.

The majority of married couples own their home jointly with rights of survivorship. This creates several issues with Medicaid. First, the community spouse may have hurdles to sell the home during his or her lifetime if the Medicaid spouse is incapacitated. In many cases, there is no effective power of attorney, and a court order might be necessary to sell the home. Therefore, if the Medicaid spouse has capacity at the time of planning, it is recommended that he or she meet with independent counsel to discuss the transfer of his or her interest to the community spouse. Such a transfer is allowed pursuant to OAR 461-140-0242(2)(b).

Second, if the home remains in joint ownership, it passes automatically to the Medicaid spouse after the death of the community spouse. Even if there is an updated estate plan, it passes outside of that plan. For that reason, it is advisable to transfer the house to the community spouse's to ensure that the estate plan moves forward as intended.

Recently, there have been indications from the department that it intends to assert an interest in the proceeds from the sale of the house, even if sold when in the name of the community spouse. The department has gone as far as issuing notices of disqualification to the Medicaid spouse if the community spouse does not give him or her half the sale proceeds for spend-down. Caseworkers are telling applicants that the sale proceeds will be split, even in cases where the Medicaid spouse is no longer on title. There has been no rule change to support these actions. There is no recent policy memorandum giving guidance on the department's position. There is also no statutory authority for the department to claim the proceeds. Despite this worrisome trend, it is likely still prudent in many cases to transfer the Medicaid spouse's interest to the community spouse. Lacking statutory authority, the department may not prevail on its attempt to claim the proceeds. Furthermore, the transfer of the house protects not just the lifetime proceeds but also the estate planning considerations.

IV. ESTATE RECOVERY

Medicaid estate recovery is the process by which states recoup, from the estates of deceased Medicaid recipients, some of the costs of running their Medicaid programs. Ever since the inception of Medicaid in 1965, states have had the legal authority to implement estate recovery programs. Today, all states are required by federal law to have them. 42 USC 1396p(b)(1).

In Oregon, Medicaid is administered by the Oregon Department of Human Services (hereafter "DHS") and is governed by both federal and state law. Oregon law also requires DHS to seek recovery from the estates of deceased recipients. ORS 414.105. The branch of DHS tasked with administering Oregon's estate recovery program is the Estate Administration Unit.[3]

When Medicaid recipients die, their estates are required to pay back some or all of the medical assistance received during life. The concept of estate recovery is sometimes confusing because, when

[3]The Estate Administration Unit is a subdivision of Oregon DHS's Office of Payment Accuracy and Recovery but should not be confused with the Personal Injury Liens Unit (also a subdivision of OPAR), which deals with liens against personal injury settlements of Medicaid recipients.

people think of Medicaid, they (correctly) think of individuals with modest means, and the idea of an "estate" is at odds with that image. Medicaid does impose strict limits on the assets and income of recipients. In fact, individuals with financial resources in excess of $2,000 generally do not qualify for Medicaid assistance. However, as discussed above, some assets are considered to be "exempt" for purposes of Medicaid eligibility, and it is these exempt assets that are most commonly pursued in estate recovery. The largest and most important of these is the home. A Medicaid recipient can own a home and still qualify for Medicaid if the home is used as his or her primary residence (and/or the primary residence of his or her spouse). OAR 461-145-0220(2).

A. Not a Lien

One of the most common misconceptions about the estate recovery program is that DHS places liens on the homes of Medicaid recipients. This is not the case. Although the home is, more often than not, the primary asset in most Medicaid recipients' estates, Oregon DHS does not use a lien mechanism to recover its costs. Instead, DHS makes "claims" against the estates of deceased recipients, just as any other creditor (such as a hospital or credit card company) might do. The only difference is that DHS's estate recovery claim is given priority over the claims of most other creditors, so that in insolvent estates DHS gets paid before them. ORS 115.125.

B. Scope of Recovery

Oregon estate recovery law defines "estate" very broadly, so as to facilitate recovery of Medicaid assistance paid regardless of how it passes upon a recipient's death. OAR 461-135-0832. Federal Medicaid law allows (and Oregon has opted for) an "expanded" definition of "estate" that includes not only the assets in a person's probate estate (as determined by state law) but also those assets that pass outside of probate, including through:

1. Joint tenancy/tenancy by the entirety;
2. Life estates;
3. Living trusts;
4. Certain annuities.

Any property in which an individual has an interest on the date of death may, to the extent of that interest, be reached by Oregon's estate recovery program.

In addition, current Oregon Administrative Rules allow DHS to recover assets not owned by the Medicaid recipient at the time of death, if said assets were transferred from the Medicaid spouse to the community spouse within 60 months of the first "date of request" for Medicaid. OAR 461-135-0835(1)(e)(B)(iii). Thus, in a case where a Medicaid spouse transfers his or her interest to the community spouse within 60 months of applying for Medicaid, DHS considers the house part of the Medicaid spouse's estate.

The current Oregon Administrative Rules are, in the opinion of most experienced elder law attorneys, not supported by federal law. Currently, a lawsuit is pending in the Oregon Court of Appeals challenging these rules. (The case is captioned *Tim Nay v. Oregon Dept. of Human Services*, Case No. A150722, and is a direct Court of Appeals action challenging an agency rule under ORS 183.400, so there is no administrative decision or lower court decision being appealed. A similar challenge in Minnesota resulted in that state's supreme court striking down the agency's expanded definition of estate. The case was appealed to the United States Supreme Court, which denied certiorari and let the Minnesota Supreme Court ruling stand. A copy of the Minnesota Supreme Court decision, *In re the Estate of Francis E. Barg*, is available online at http://mn.gov/lawlib/archive/supct/0805/OPA052346-0530.pdf.

Until a decision is issued here in Oregon, practitioners should advise their clients that any interspousal transfer of assets made within five years of applying for Medicaid may bring the transferred assets back into the "estate" of the Medicaid recipient, thus enabling recovery against those assets.

C. Limits of Recovery

Not all Medicaid assistance provided by DHS is recoverable under the estate recovery laws. For example, DHS cannot recover the costs of basic medical care (i.e., Oregon Health Plan) provided to recipients who were under the age of 55 when the care was provided. (However, if the recipient was permanently institutionalized, DHS can recover benefits paid at any age.). In addition, if a Medicaid recipient is survived by a spouse, DHS must defer enforcement of its recovery claim until the surviving spouse's death. Finally, if a recipient is survived by a child under age 21, a permanently disabled child, or a blind child, the estate recovery claim cannot be enforced. ORS 416.350, OAR 461-135-0835.

D. Hardship Waivers

DHS is empowered to waive enforcement of any estate recovery claim if it finds that enforcing the claim would result in undue hardship to the family members, heirs, or beneficiaries of the deceased Medicaid recipient. ORS 416.340. OAR 461-135-0841. For example, if enforcement of a recovery claim would cause the waiver applicant to become homeless or would result in the applicant becoming eligible for Medicaid him or herself, DHS may opt to waive recovery. In some cases, the claim is forgiven in its entirety. In other instances (such as where a deceased recipient's family has compelling reasons to continue residing in the recipient's home but lacks the liquid resources to pay the claim), the department will negotiate with the interested parties, sometimes accepting a note and trust deed on the property in lieu of a lump-sum payment.

E. Notice to DHS

Although estate recovery in Oregon is not limited to assets that pass through probate estates, Oregon law does require that notice of all probates initiated in the state (including copies of small estate affidavits) be provided to the DHS Estate Administration Unit. ORS 113.145(6); ORS 114.525(11); OAR 461-135-0834. DHS takes the position that this requirement applies even to probates opened for the sole purpose of pursuing a wrongful death claim.

In general, proceeds of wrongful death claims are not available to creditors of the decedent, as the claim is not property of the decedent. However, DHS contends that it may nonetheless have valid claims for reimbursement of Medicaid costs from wrongful death proceeds and thus should be notified of wrongful death probates. Specifically, DHS points to the reporting requirement contained in ORS 416.530, which requires recipients and/or their attorneys to notify DHS whenever an action for personal injuries is initiated. In these cases, DHS takes the position that notice of the probate should be given to the Estate Administration Unit (as required by ORS 113.145(6)), and notice of the wrongful death action for which the probate is opened should be given to the Personal Injury Liens Unit (as required by ORS 416.530).

F. Funeral Expenses

As mentioned above, Oregon probate law prioritizes certain creditor claims over others in insolvent estates. One claim with a higher priority than DHS's estate recovery claim is a "plain and decent funeral" for the decedent. ORS 115.125 (1)(c). In its administrative rules, DHS has determined that such a funeral can and must be arranged for no more than $3,500. OAR 461-135-0833.

APPENDIX A—SAMPLE IRREVOCABLE LIVING TRUST AGREEMENT INCOME CAP TRUST

IRREVOCABLE LIVING TRUST AGREEMENT
INCOME CAP TRUST

[Beneficiary Name], Beneficiary Living Trust Agreement, dated _____, 20___.

[Trustee Name], Trustee

Address: _____

_____

_____

For the Benefit of

[Beneficiary Name], Beneficiary

Tax Identification Number of Trust _____ (if applicable)

Prepared by: _____

Address: _____

_____

_____

[Beneficiary Name] Income Cap Trust
Irrevocable Living Trust Agreement
Dated _____, 20___

RECITALS:

This declaration of Trust is made this _____ day of 20___, by [Grantor Name], Grantor.

[Beneficiary Name], as Grantor, establishes a trust that is effective [date effective], for the benefit of [Beneficiary Name], the lifetime beneficiary ("Beneficiary").

The initial Trustee is [Trustee Name].

Article 1—Name of Trust

This irrevocable trust shall be known as "The [Beneficiary Name] Income Cap Trust."

Article 2—Purpose of the Trust

The purpose of this Trust is to provide for the administration and disposition of the trust estate during and after the lifetime of the beneficiary, in accordance with the terms and conditions of the Trust. This Trust is created pursuant to Section 1917(d)(4)(B) of the Social Security Act (42 USC 1396p). This trust document is created in order to enable the beneficiary to qualify for Medicaid, and any provisions of this trust that are deemed to be inconsistent or contrary to the intent of the above-referenced federal law shall be deemed to be void and of no further force or effect. All interpretations and actions taken by the trustee pursuant to this Trust shall be done for and with the purpose of creating, establishing, and maintaining the beneficiary's eligibility for Medicaid benefits.

Article 3—Trust Funding

3.1 Initial Funding. Grantor will cause to be transferred to trustee the monthly income of the beneficiary beginning in the month of _____, 20___. Grantor intends that the income funding this trust, together with all accretions and additions thereto, shall be used, handled, and disposed of by the trustee and by any successor or substitute trustee as described in this instrument.

3.2 No Other Assets in Trust. No property other than the beneficiary's shall be placed in this trust. The trustee shall place no other money in the trust bank account.

Article 4—Distribution During Beneficiary's Life

4.1 General Distribution Plan. During the lifetime of the beneficiary, the trustee shall use the beneficiary's income placed in the trust to pay:

a. Personal Needs Allowance. The beneficiary's personal needs allowance or applicable OSIP standard;

b. Room and Board. The cost of room and board at facility if applicable in accordance with the OSIPM standard;

c. Administrative Costs. Reasonable administrative costs associated with the maintenance of this trust of up to $50 per month to cover trustee fees, bank service charges, copy charges, postage, accounting and tax preparation fees, income taxes attributable to trust income, and guardianship or conservatorship fees and costs.

d. Spouse and Family. Monthly maintenance needs allowance for spouse and family.

e. Health Insurance Premium. The health insurance premiums of the beneficiary, the beneficiary's spouse, and the beneficiary's dependents.

f. Other Reserves. Other incurred medical care costs that are not reimbursed by a third party. Contributions to reserves limited to child support, alimony, and income taxes. Contributions to reserves for the purchase of an irrevocable burial plan with a maximum value of $5,000. Contributions to reserves for a home maintenance allowance may be made on a monthly basis if the client meets the criteria of OAR 461-155-0660 or OAR 461-160-0630.

g. Patient Liability. Patient liability not to exceed the cost of waivered services or nursing home care.

h. Excess. Any excess income may be distributed to or on behalf of the beneficiary only to the extent allowed under the Oregon Administrative Rules governing Medicaid assistance. Excess income may be distributed to the state to repay it for any Medicaid assistance that it provided to the beneficiary, even if recovery for the past assistance is not required by federal or state law.

4.2 Changes Are Anticipated. The cost of care will vary with changes in the beneficiary's income, the income cap amount, tax withholding, and allowable expenses. The representative of the state Medicaid program may from time to time notify the trustee of changes in the rules that affect the contribution to the cost of care. If the trustee determines that a change in the distribution plan is warranted, the trustee shall notify the worker assigned to the beneficiary's case.

Article 5—Distribution at Termination

5.1 Remainder Beneficiaries Named. This trust shall cease and terminate at the death of the beneficiary, or earlier if the trustee determines that the existence of the trust is no longer necessary to establish or maintain Medicaid eligibility for the beneficiary. Upon the termination of this trust, the remaining trust property shall be distributed as follows:

a. To any state that may have provided the life beneficiary with medical assistance up to an amount equal to the total medical assistance paid on behalf of the life beneficiary by a state plan for Medicaid assistance or through an approved waiver program; this provision is intended to meet the requirements of 42 USC 1396p as amended by OBRA '93; and

b. Any remainder after the state's claim has been paid shall pass outside of probate to those residuary beneficiaries named in the beneficiary's will or trust; however, if the beneficiary leaves no

will or trust, then the remainder shall be distributed outside of probate to those heirs as determined by the Oregon law of intestate succession.

5.2 Winding Up Affairs of Trust. At the termination of this trust, trustee shall wind up the affairs of the trust before distribution, paying for all administrative costs and for preparation of the final tax return. The trustee shall have the sole discretion to claim any tax deductions useful to reduce the taxation of the living trust. After winding up the trust, the trustee shall distribute the remainder, if any, as provided above.

Article 6—Tax Nature of Trust

It is the intent of the parties hereto that this Income Cap Trust be construed as a "grantor trust" under Internal Revenue Code Section 677(a). All income received, distributed, held, or accumulated by this trust shall be taxable to the grantor. The trustee may distribute directly to the taxing authority such amounts of income or principal of the trust as are necessary to satisfy the beneficiary's tax obligations.

Article 7—Authority of Trustee

The trustee's discretion in choosing which nonsupport disbursements to make is final as to all interested parties. The trustee's sole and independent judgment, rather than any other person's determination, is intended to be final.

Article 8—Spendthrift/Nonassignment

No interest in the principal or income of this trust shall be anticipated, assigned or encumbered, or be subject to any creditor's claim or to legal process prior to its actual receipt by the beneficiary. No beneficiary shall have the power to sell, assign, transfer, encumber, or in any other manner anticipate or dispose of the beneficiary's interest in the trust or the income produced thereby, prior to its actual distribution by the trustee for the benefit of the beneficiary in the manner authorized by this agreement. No beneficiary shall have any assignable interest in any trust created under this agreement or in the income therefrom. Neither the trust principal nor income shall be liable for any debts of the beneficiary. The limitations herein shall not restrict the exercise of any power of appointment or disclaimer.

Article 9—Irrevocable Nature of Trust

Grantor retains no right to modify, change, alter, or revoke this trust, as it is intended to be an irrevocable trust. The beneficiary has no power to modify, change, alter, or revoke the trust.

Article 10—Governing Law

The validity and construction of this agreement shall be determined under Oregon law in effect on the date this agreement is signed.

Article 11—Powers of Trustee

The trustee shall have all powers granted to trustees by Oregon law as now existing or later amended, except to the extent limited by the other provisions of this trust. In addition, the trustee shall have the power:

11.1 Manage Assets. To manage and distribute assets.

11.2 Retain Assets. To retain assets;.

11.3 Manner of Making Distribution. To make any distribution on behalf of the beneficiary, directly to the person or organization.

11.4 Principal and Income. The trustee may allocate items of income or expenditure to either income or principal and create reserves out of income all as provided by law, and to the extent not so provided, to allocate to income or principal or create reserves, on a reasonable basis, and the fiduciary's decision made in good faith with respect thereto shall be binding and conclusive upon all persons.

11.5 Undistributed Income. Income accrued or undistributed at the termination of a beneficiary's interest in a trust shall be added to and become part of the principal of that trust, and the rights of the beneficiary to that income shall terminate.

11.6 Employment Of Agents. The trustee may engage persons, including attorneys, auditors, investment advisors, tax advisors, or agents to advise or assist the fiduciary at the cost of the trust estate.

11.7 Do Other Acts. Except as otherwise provided in this instrument, to do all acts that might legally be done by an individual in absolute ownership and control of property and that in the trustee's judgment are necessary or desirable for the proper and advantageous management of the trust.

11.8 Trustee Liability; Use of Funds to Research Programs. It is recognized that the trustee is not licensed nor skilled in the field of social services. The trustee may seek the counsel and assistance of the beneficiary's guardian or conservator, if any, and any state and local agencies that have been established to assist the elderly or disabled in similar circumstances. The trustee may use these resources to aid the beneficiary, or the beneficiary's guardian or conservator, as appropriate, in identifying programs that may be of social, financial, and/or developmental assistance to the beneficiary. However, the trustee shall not in any event be liable to beneficiary, the remainder beneficiaries of the trust, or any other party for the trustee's acts as trustee hereunder so long as the trustee acts reasonably and in good faith. For example, the trustee, the beneficiary, and the beneficiary's guardian or conservator, if any, shall not be liable for the failure to identify each program or resource that might be available to the beneficiary.

11.9 Power to Amend. The trustee may amend the trust to conform with future changes in federal or state law, to better effect the purposes of this trust.

Article 12—Trust Administration and Courts

This trust shall be administered according to its terms expeditiously and without order, approval, or other action by any court. However, the trustee or any interested person may petition the court as allowed in this trust agreement or by Oregon law. A court, however, shall have the continuing jurisdiction to modify any provision of this trust to the extent necessary to maintain the eligibility of the beneficiary for medical assistance or other public benefits under applicable law.

Article 13—Trustee Succession and General Administrative Provisions

13.1 Resignation of Trustee. The trustee may resign the trusteeship at any time. Any resignation shall be in writing, and shall become effective only after 30 days from the date of mailing of the written notice to the beneficiary and to the first remainder beneficiary, and to the successor trustee named herein, mailed to the most current addresses known to the trustee; now the addresses are:

Beneficiary's Address:
[Beneficiary Name]
[Address]
[City, State, Zip]
[Beneficiary Telephone Number]

First Remainder Beneficiary:
State of Oregon
Department of Human Services
Estate Administration Unit
PO Box 14021
Salem, OR 97309-5024

Trustee Address:
[Trustee Name]
[Address]
[City, State, Zip]

or the most current addresses then known to the trustee.

13.2 Designation of Successor Trustee. The successor trustee shall be [Successor Trustee Name]. Any named trustee may nominate and appoint additional successor trustees to serve if the persons initially nominated as successors are unavailable or unwilling to serve.

13.3 No Trustee. If the trust at any time has no trustee, and no successor has been nominated as described above, then a court having jurisdiction may appoint, after notice to the beneficiary and an opportunity to be heard, a successor trustee at the request of any person interested in the trust, including the trust beneficiary.

13.4 Transfer to Successor Trustee. Every successor trustee shall have all of the rights, title, powers, privileges, and duties conferred on or imposed upon the original trustee, without any conveyance or transfer. All right, title, and interest to the trust property shall immediately vest in the successor trustee, upon the successor trustee executing a document accepting the office. The prior trustee shall, without warranty, transfer the existing trust property to the possession and control of the successor trustee. The successor trustee shall not have any duty to examine the records or actions of any former trustee and shall not be liable for the consequences of any act or failure to act of any former trustee.

13.5 Removal of Trustee. Any interested person herein may petition any Oregon circuit court for removal of any trustee. While any interested person may petition for removal of any trustee, the decision on whether to remove any trustee shall be in the exclusive discretion and control of an Oregon circuit court.

13.6 Replacement of Trustee. Any trustee may be replaced by a successor trustee upon the death, resignation, removal, or incapacity of the prior trustee. Also, should no successor trustee have been nominated, any Oregon circuit court shall have the power to fill any vacancy in the trusteeship resulting from the death, resignation, removal, or incapacity of a trustee.

13.7 Trustee's Reporting Responsibility. The trustee shall report, at least every twelve months, to the beneficiary and his/her legal representative, if any, and to the next successor trustee, at the most recent address then known to the trustee. The trustee's report shall advise of any change in the beneficiary's eligibility for public benefit programs and shall list all of the receipts, disbursements, and distributions occurring during the reporting period, along with a complete list of the assets held by the trust. A copy of the most recent bank account statement and a copy of the most recently filed trust tax return shall be attached to the accounting. The account shall be deemed to have been delivered when it has been placed in the United States Mail addressed to that person at the person's last known address.

13.8 Availability of Records. The records of the trustee, such as all trust documentation and annual accountings, shall be made available to the trust beneficiary, and/or the beneficiary's legal representative, and the trust remaindermen, including but not limited to the State of Oregon, Department of Human Services, within 10 days of notice to the trustee.

13.9 Trustee Compensation. The trustee may receive reasonable compensation and reimbursement for expenses such as travel costs (if automobile, at the then-current IRS mileage expense allowance), postage, copy and fax charges, and long distance telephone charges required to administer the trust estate.

13.10 Trustee Indemnification. Trustee is entitled to be indemnified, to his or her reasonable satisfaction, against liabilities lawfully incurred in the administration of this trust, at the cost of the trust.

13.11 Bond. No bond shall be required of any trustee.

DATED this _____ day of _____, 20___.

_____
Grantor

_____
Trustee

Acceptance of Office by Trustee

I, [Trustee Name], the named trustee in this instrument, accept the office and responsibilities of trustee.

DATED this _____ day of _____, 20___.

_____
[Trustee Name], Trustee

Schedule A of the [Beneficiary Name] Income Cap Trust

Assets Transferred to Trust at Time of Creation

The principal of this trust will be composed of bank deposits from the net monthly income, including pensions and social security benefits, of Beneficiary.

These funds will be kept in a bank account opened in the name of "[Trustee Name], Trustee of the [Beneficiary Name] Income Cap Trust" under the tax identification number of the trust (if applicable).

Commitment to Transfer

I promise to cause the income of Beneficiary to be transferred to the trustee of the [Beneficiary Name] Income Cap Trust.

DATED [Date Executed].

_____

Trustee

APPENDIX B—ORS 114.600–114.725, ELECTIVE SHARE FOR DECEDENTS WHO DIE ON OR AFTER JANUARY 1, 2011

(Generally)

114.600 Elective share generally. (1) If a decedent is domiciled in this state on the decedent's date of death, and the decedent is survived by a spouse, the surviving spouse of the decedent may elect to receive the elective share provided by ORS 114.600 to 114.725. An election under ORS 114.600 to 114.725 must be made before the death of the surviving spouse by the filing of a motion or petition in the manner described in ORS 114.610. If a motion or petition is filed within the time specified in ORS 114.610, and the surviving spouse dies before payment of the elective share, the personal representative for the estate of the surviving spouse may take all steps necessary to secure payment of the elective share under ORS 114.600 to 114.725.

(2) Any amounts received under ORS 114.015 are in addition to the elective share provided for in ORS 114.600 to 114.725.

(3) If a decedent dies while domiciled outside this state, any right of a surviving spouse of the decedent to take an elective share in property in this state is governed by the law of the decedent's domicile at death. [2009 c.574 §2]

Note: Section 23, chapter 574, Oregon Laws 2009, provides:

Sec. 23. Sections 2 to 20 of this 2009 Act [114.600 to 114.725] and the amendments to ORS 114.555 by section 21 of this 2009 Act apply only to the surviving spouses of decedents who die on or after the effective date of this 2009 Act [January 1, 2011]. Notwithstanding the repeal of ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165 by section 25 of this 2009 Act, the rights of a surviving spouse of a decedent who dies before the effective date of this 2009 Act shall continue to be governed by the law in effect immediately before the effective date of this 2009 Act. [2009 c.574 §23]

114.605 Amount of elective share. (1) Except as otherwise provided in ORS 114.600 to 114.725, the amount of the elective share is a dollar amount determined by multiplying the augmented estate by the percentage provided in this section. All properties included in the augmented estate shall be determined as provided in ORS 114.600 to 114.725. A court of this state has authority to order distribution under ORS 114.600 to 114.725 of all properties included in the augmented estate under ORS 114.600 to 114.725.

(2) The elective share of a surviving spouse is determined by the length of time the spouse and decedent were married to each other, in accordance with the following schedule:

If the decedent and the spouse were married to each other:	The elective-share percentage is:
Less than 2 years	5% of the augmented estate
2 years but less than 3 years	7% of the augmented estate
3 years but less than 4 years	9% of the augmented estate
4 years but less than 5 years	11% of the augmented estate
5 years but less than 6 years	13% of the augmented estate
6 years but less than 7 years	15% of the augmented estate
7 years but less than 8 years	17% of the augmented estate
8 years but less than 9 years	19% of the augmented estate
9 years but less than 10 years	21% of the augmented estate

10 years but less than 11 years	23% of the augmented estate
11 years but less than 12 years	25% of the augmented estate
12 years but less than 13 years	27% of the augmented estate
13 years but less than 14 years	29% of the augmented estate
14 years but less than 15 years	31% of the augmented estate
15 years or more	33% of the augmented estate

[2009 c.574 §3]

114.610 Manner of making election. (1) A surviving spouse may claim the elective share only by:

(a) Filing a petition for the appointment of a personal representative for the estate of the deceased spouse, and a motion for the exercise of the election as described in paragraph (b) of this subsection, within nine months after the spouse dies.

(b) Filing a motion for the exercise of the election in a probate proceeding commenced for the estate of the deceased spouse under ORS 113.035. The motion must be filed not later than nine months after the death of the decedent. A copy of the motion must be served on the personal representative, on all persons who would be entitled to receive information under ORS 113.145 and on all distributees and recipients of portions of the augmented estate known to the surviving spouse who can be located with reasonable efforts. A surviving spouse may withdraw a motion for an election filed under this subsection at any time before the court enters an order granting the motion.

(c) Filing a petition for the exercise of the election under ORS 114.720 (1) within nine months after the death of the decedent.

(2) If a court determines that the elective share is payable, the court shall determine the amount of the elective share and shall order its payment pursuant to the priorities established under ORS 114.700. If it appears that property has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the property or who has possession thereof, whether as trustee or otherwise. [2009 c.574 §4]

114.615 Payment of elective share. In determining whether any payment is required to a surviving spouse in satisfaction of the elective share provided for in ORS 114.605, the court shall consider the values of the decedent's probate estate, the decedent's nonprobate estate, the surviving spouse's estate, the decedent's probate transfers to the surviving spouse and the decedent's nonprobate transfers to the surviving spouse. If the court determines that the aggregate value of the surviving spouse's estate, the decedent's probate transfers to the surviving spouse and the decedent's nonprobate transfers to the surviving spouse do not satisfy the amount of the elective share, any additional amount required to satisfy the elective share shall be paid out of the decedent's probate estate and the decedent's nonprobate estate in the manner provided by ORS 114.700. [2009 c.574 §5]

114.620 Waiver of right to elect and other rights. (1) The right of election under ORS 114.600 to 114.725 may be waived, wholly or partially, before or after marriage by a written contract, agreement or waiver signed by the surviving spouse.

(2) Unless specifically provided otherwise, a written agreement that waives all rights in the property or estate of a present or prospective spouse, using the phrase "all rights" or other equivalent language, or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to an elective share under ORS 114.600 to 114.725 by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to each spouse from

the other by intestate succession or by virtue of any will executed before the written agreement or property settlement. [2009 c.574 §6]

Note: Section 24, chapter 574, Oregon Laws 2009, provides:

Sec. 24. A written contract, agreement or waiver entered into before the effective date of this 2009 Act [January 1, 2011], whether prenuptial or post-nuptial, that waives in whole or in part the elective share of a surviving spouse is effective as a waiver under section 6 of this 2009 Act [114.620] unless a court determines that the contract, agreement or waiver is not enforceable under the standards of section 6 of this 2009 Act. Section 6 (2) of this 2009 Act applies to contracts, agreements or waivers entered into before, on or after the effective date of this 2009 Act. [2009 c.574 §24]

114.625 Who may exercise right of election. The elective share may be personally claimed by a surviving spouse, or may be claimed on the surviving spouse's behalf by a conservator, guardian or agent under the authority of a power of attorney. [2009 c.574 §7]

(Augmented Estate)

114.630 Augmented estate. (1) Except as otherwise provided in ORS 114.600 to 114.725, the augmented estate consists of all of the following property, whether real or personal, movable or immovable, or tangible or intangible, wherever situated:

(a) The decedent's probate estate as described in ORS 114.650.

(b) The decedent's nonprobate estate as described in ORS 114.660 and 114.665.

(c) The surviving spouse's estate, as described in ORS 114.675.

(2) The value attributable to any property included in the augmented estate under ORS 114.600 to 114.725 must be reduced by the amount of all enforceable claims against the property and all encumbrances on the property. Any exemption or deduction that is allowed for the purpose of determining estate or inheritance taxes on the augmented estate and that is attributable to the marriage of the decedent and the surviving spouse inures to the benefit of the surviving spouse as provided in ORS 116.343 (2).

(3) The value attributable to any property included in the augmented estate includes the present value of any present or future interest and the present value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security Act.

(4) The value attributable to property included in the augmented estate is equal to the value that would be used for purposes of federal estate and gift tax laws if the property had passed without consideration to an unrelated person on the date that the value of the property is determined for the purposes of ORS 114.600 to 114.725.

(5) In no event may the value of property be included in the augmented estate more than once. [2009 c.574 §8; 2011 c.305 §4]

Note: Section 7, chapter 305, Oregon Laws 2011, provides:

Sec. 7. The amendments to ORS 114.630, 114.635, 114.660, 114.665, 114.675 and 114.700 by sections 1 to 6 of this 2011 Act apply to the surviving spouses of all decedents who die on or after the effective date of this 2011 Act [June 9, 2011]. [2011 c.305 §7]

114.635 Exclusions from augmented estate. The augmented estate does not include:

(1) Any value attributable to future enhanced earning capacity of either spouse;

(2) Any property that is irrevocably transferred before the death of the decedent spouse;

(3) Any property that is transferred on or after the date of the death of the decedent spouse with the written joinder or written consent of the surviving spouse;

(4) Any property that is community property under ORS 112.705 to 112.775 or under the laws of the jurisdiction where the property is located; or

(5) Any property that is held by either spouse solely in a fiduciary capacity. [2009 c.574 §9; 2011 c.305 §1]

Note: See note under 114.630.

(Decedent's Probate Estate)

114.650 Decedent's probate estate. For purposes of ORS 114.600 to 114.725, a decedent's probate estate is the value of all estate property that is subject to probate and that is available for distribution after payment of claims and expenses of administration. A decedent's probate estate includes all property that could be administered under a small estate affidavit pursuant to ORS 114.505 to 114.560. A decedent's probate estate does not include any property that constitutes a probate transfer to the decedent's surviving spouse under ORS 114.685. [2009 c.574 §10]

(Decedent's Nonprobate Estate)

114.660 Decedent's nonprobate estate. For purposes of ORS 114.600 to 114.725, a decedent's nonprobate estate consists of the property described in ORS 114.665 that is not included in the decedent's probate estate and that does not constitute a transfer to the decedent's surviving spouse. The value of the decedent's nonprobate estate is reduced by all debts and liabilities of the decedent that are not paid in probate, and by all costs of administering the decedent's nonprobate estate that are incurred for the purpose of settling claims against the nonprobate estate and distributing the nonprobate estate property to the persons entitled to that property. [2009 c.574 §11; 2011 c.305 §2]

Note: See note under 114.630.

114.665 Decedent's nonprobate estate; property owned immediately before death. (1) A decedent's nonprobate estate includes the decedent's fractional interest in property held by the decedent in any form of survivorship tenancy immediately before the death of the decedent. The amount included in the decedent's nonprobate estate under the provisions of this subsection is the value of the decedent's fractional interest, to the extent the fractional interest passes by right of survivorship at the decedent's death to a surviving tenant other than the decedent's surviving spouse.

(2) A decedent's nonprobate estate includes the decedent's ownership interest in property or accounts held immediately before death under a payable on death designation or deed, under a transfer on death registration or in co-ownership registration with a right of survivorship. The amount included in the decedent's nonprobate estate under the provisions of this subsection is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to any person other than the decedent's estate or surviving spouse or for the benefit of any person other than the decedent's estate or surviving spouse.

(3) A decedent's nonprobate estate includes any property owned by the decedent immediately before death for which the decedent had the power to designate a beneficiary, but only to the extent that the decedent could have designated the decedent, or the spouse of the decedent, as the beneficiary.

(4) A decedent's nonprobate estate includes any property that immediately before death the decedent could have acquired by the exercise of a revocation, without regard to whether the revocation was required to be made by the decedent alone or in conjunction with other persons.

(5) A decedent's nonprobate estate does not include the present value of any life insurance policy payable on the death of the decedent. [2009 c.574 §12; 2011 c.305 §3]

Note: See note under 114.630.

(Surviving Spouse's Estate)

114.675 Surviving spouse's estate. (1) For purposes of ORS 114.600 to 114.725, a surviving spouse's estate is:

(a) The decedent's probate transfers to the spouse, as described in ORS 114.685.

(b) The decedent's nonprobate transfers to the spouse, as described in ORS 114.690.

(c) All other property of the spouse, as determined on the date of the decedent's death.

(d) Any property that would have been included under paragraph (a), (b) or (c) of this subsection except for the exercise of a disclaimer by the spouse after the death of the decedent.

(2) (a) For the purpose of establishing the value of the surviving spouse's estate under this section, the estate includes 100 percent of the corpus of any trust or portion of a trust from which all income must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse, and for which the surviving spouse has a general power of appointment that the surviving spouse, acting alone, may exercise, during the surviving spouse's lifetime or at death of the surviving spouse, to or for the benefit of the surviving spouse or the surviving spouse's estate.

(b) For the purpose of establishing the value of the surviving spouse's estate under this section, the estate includes 100 percent of the corpus of a trust or portion of a trust created by the decedent spouse, if all income from the trust or portion of a trust must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse and the trust principal may be accessed only by the trustee or the spouse and only for the purpose of providing for the health, education, support or maintenance of the spouse.

(c) For the purpose of establishing the value of the surviving spouse's estate under this section, the estate includes 50 percent of the corpus of a trust or portion of a trust created by the decedent spouse if all income from the trust or portion of a trust must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse and neither the trustee nor the spouse has the power to distribute trust principal to or for the benefit of the surviving spouse or any other person during the spouse's lifetime.

(d) For the purposes of this section, all amounts distributed to a surviving spouse from a unitrust that meets the requirements of ORS 129.225 (4) shall be considered income.

(e) The value of the surviving spouse's beneficial interest in a trust other than a trust described in paragraphs (a) to (d) of this subsection shall be determined under the provisions of ORS 114.630 (3) and (4). [2009 c.574 §13; 2011 c.305 §5]

Note: See note under 114.630.

(Decedent's Probate Transfers to Spouse)

114.685 Decedent's probate transfers to surviving spouse. The decedent's probate transfers to the decedent's surviving spouse include all estate property that is subject to probate, that passes to the surviving spouse by testate or intestate succession, and that is available for distribution to the surviving spouse after payment of claims and expenses of administration. [2009 c.574 §14]

(Decedent's Nonprobate Transfers to Spouse)

114.690 Decedent's nonprobate transfers to surviving spouse. (1) Except as provided in subsection (2) of this section, the decedent's nonprobate transfers to the decedent's surviving spouse include all property that passed outside probate at the decedent's death from the decedent to the surviving spouse by reason of the decedent's death, including:

(a) The decedent's fractional interest in property held in any form of survivorship tenancy, as described in ORS 114.665 (1), to the extent that the decedent's fractional interest passed to the surviving spouse as surviving tenant;

(b) The decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, to the extent that the decedent's ownership interest passed to the surviving spouse as surviving co-owner;

(c) Insurance proceeds payable to the surviving spouse by reason of the death of the decedent; and

(d) All other property that would have been included in the decedent's nonprobate estate under ORS 114.660 and 114.665 had it passed to or for the benefit of a person other than the decedent's spouse.

(2) The decedent's nonprobate transfers to the decedent's surviving spouse do not include any property passing to the surviving spouse under the federal Social Security Act. [2009 c.574 §15]

(Payment of Elective Share)

114.700 Priority of sources from which elective share payable. (1) The surviving spouse's estate, as described in ORS 114.675, shall be applied first to satisfy the dollar amount of the elective share and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others.

(2) If after application of the surviving spouse's estate under subsection (1) of this section the elective share amount is not fully satisfied, the following amounts shall be applied to the extent necessary to satisfy the balance of the elective share amount:

(a) Amounts included in the decedent's probate estate.

(b) Amounts included in the decedent's nonprobate estate under ORS 114.600 to 114.725.

(3) Unless otherwise provided by a will, trust or other instrument executed by the decedent spouse:

(a) Amounts applied against the unsatisfied balance of an elective share amount under subsection (2) of this section shall be collected from both the probate and nonprobate estates of the decedent in a manner that ensures that the probate and nonprobate estates bear proportionate liability for the amounts necessary to pay the elective share amount.

(b) Amounts applied against the unsatisfied balance of an elective share amount under subsection (2) of this section out of the probate estate of the decedent must be apportioned among all recipients of the decedent's probate estate in a manner that ensures that each recipient bears liability for a portion of the payment that is proportionate to the recipient's interest in the decedent's probate estate.

(c) Amounts applied against the unsatisfied balance of an elective share amount under subsection (2) of this section out of the nonprobate estate of the decedent must be apportioned among all recipients of the decedent's nonprobate estate in a manner that ensures that each recipient bears liability for a portion of the payment that is proportionate to the recipient's interest in the decedent's nonprobate estate.

(4) All apportionments under this section between the probate and nonprobate estates of the decedent and among the recipients of those estates shall be based on the assets of each estate that are subject to distribution by the court under the provisions of ORS 114.600 to 114.725.

(5) In any proceeding described in ORS 114.610, the court may allocate the cost of storing and maintaining property included in the augmented estate pending distribution of the property. [2009 c.574 §16; 2011 c.305 §6]

Note: See note under 114.630.

114.705 Liability of recipients of decedent's nonprobate estate. (1) The following recipients of the decedent's nonprobate estate are the only persons who may be required to make a proportional contribution toward the satisfaction of the surviving spouse's elective share under the provisions of ORS 114.600 to 114.725:

(a) An original recipient of all or part of the decedent's nonprobate estate.

(b) A person who has received all or part of the decedent's nonprobate estate for less than fair consideration from an original recipient of the property, to the extent the person has the property or proceeds of the property.

(2) A recipient of all or part of the decedent's nonprobate estate who is required to make a proportional contribution toward the satisfaction of the surviving spouse's elective share may elect to make the contribution by returning property determined to be adequate to satisfy the recipient's obligation or by paying money equal to the value of that property. [2009 c.574 §17]

114.710 Protective order. (1) If a surviving spouse has filed a motion or petition described in ORS 114.610, the surviving spouse or any person who has received any part of the decedent's probate or nonprobate estate may request, at any time after the filing, that the court issue a protective order. The protective order shall prohibit or impose conditions on the transfer of property included in the augmented estate. The protective order may be served on any person holding property included in the augmented estate.

(2) Upon the filing of a motion or petition under ORS 114.610, any person who has received any part of the decedent's probate or nonprobate estate and who is required to make a contribution toward the satisfaction of the elective share may file a motion or petition with the court requesting a determination of the amount of the person's proportionate contribution toward the satisfaction of the elective share. Upon that determination being made, the person may deposit with the court the amount so determined in the form of money or a bond or other security. The deposit discharges the person from all claims relating to the satisfaction of the elective share. In lieu of deposit with the court under this subsection the court may require that the money or security be deposited with a person designated by the court.

(3) If a surviving spouse has filed a motion or petition described in ORS 114.610, and a notice of pendency of action under ORS 93.740 is recorded, a temporary restraining order is issued under ORCP 79, or provisional process is issued under ORCP 83, an owner of the property that is subject to the notice, order or process may seek relief from the notice, order or process by providing a bond or other security to the court in such amount as the court may determine adequate to satisfy the person's proportionate contribution toward the satisfaction of the elective share. [2009 c.574 §18]

(Procedure)

114.720 Proceedings to claim elective share. (1) A surviving spouse may claim the elective share by filing a petition for the exercise of the election in a circuit court within the time allowed by ORS 114.610 (1)(c). Venue for the proceeding is as provided in ORS 113.015. A copy of the petition must be served on all persons who would be entitled to receive information under ORS 113.145 and on all distributees and recipients of portions of the augmented estate known to the surviving spouse who can be located with reasonable efforts. The fee for filing a petition under this subsection shall be the amount prescribed in ORS 21.170, based on the value of the nonprobate estate. The Oregon Rules of

Civil Procedure apply to proceedings under this section. Any party to a proceeding under this section may request that the pleadings and records in the proceeding be sealed.

(2) A surviving spouse may withdraw a petition filed under this section at any time before entry of a judgment on the petition.

(3) If a probate proceeding is commenced for the estate of the deceased spouse under ORS 113.035 either before or after a petition is filed under this section, the court shall consolidate the proceedings under this section with the probate proceedings. [2009 c.574 §19; 2011 c.595 §125]

114.725 Effect of separation. If the decedent and the surviving spouse were living apart at the time of the decedent's death, whether or not there was a judgment of legal separation, the court may deny any right to an elective share or may reduce the elective share to such amount as the court determines reasonable and proper. In deciding if all or part of the elective share should be denied, the court shall consider whether the marriage was a first or subsequent marriage for either or both of the spouses, the contribution of the surviving spouse to the property of the decedent in the form of services or transfers of property, the length and cause of the separation and any other relevant circumstances. [2009 c.574 §20]