newsletter

**Oregon Estate Planning and Administration Section Newsletter**
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# Litigation Issues Relating to the Choice Between a Will and Revocable Living Trust

An estate planner looks to the future. A probate litigator looks to the past. Matters of indifference in the choice of an estate planning instrument may loom large when the plan is subjected to the force field of claims. This article reviews the current state of Oregon law, from a litigator's perspective, as it bears on key issues raised by the frequent choice between a will and revocable living trust.

## Capacity To Execute the Instrument

***Will.*** Although the requirements of a will are statutory, ORS 112.235, the test of capacity to execute a will is not. In fact, the decisional standard for determining testamentary capacity has changed over time. *Compare In re Bond's Estate*, 172 Or 509, 143 P2d 244 (1943), *with Ingraham v. Meindl*, 216 Or 373, 339 P2d 447 (1959). The present test requires that at the time of execution the testator comprehend the nature of the testator's act, know the nature and extent of the testator's property, have in mind the natural objects of the testator's bounty, and know the scope and reach of the will provisions.

***Revocable living trust.*** No comparable reported Oregon case lists the elements necessary to establish capacity to execute a revocable living trust. This fact, and case law from other jurisdictions suggesting that trust agreements should be analyzed as contracts, has created an element of uncertainty.

It appears that the capacity test for wills will apply at least to the testamentary provisions of a revocable living trust. Without discussion, the Oregon Supreme Court took this approach in *Detsch v. Detsch*, 186 Or 1, 205 P2d 180 (1949). The Oregon Court of Appeals implied the same result more recently, in an opinion contrasting the capacity to execute an irrevocable conveyance with the capacity to execute a will. *See Ryan v. Colombo*, 77 Or App 71, 712 P2d 139 (1985) (deed by third party to revocable living trust).

No reported Oregon case discusses what capacity is necessary to

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execute the testamentary provisions of an irrevocable trust or the lifetime provisions of a revocable trust. These mixed situations raise the possibility of different standards.

## Undue Influence

***Will and revocable living trust.*** In *Ryan*, the Oregon Court of Appeals indicated that the test for undue influence of a deed is the same as that for a will, although some factors, such as the absence of independent counsel, may weigh more heavily in the case of a deed than a will. 77 Or App at 77. A funded revocable living trust, which has both will and deed features, would appear to be an included case.

## Creation of Premortem Fiduciary Duties

***Will.*** Provided the use is not otherwise wrongful, a testator is free to do what the testator wishes with the testator's property while alive. A will is ambulatory and creates no rights in its beneficiaries until it speaks at the testator's death. *Murphy v. Powers*, 87 Or App 659, 743 P2d 777 (1987); *Pedro v. January*, 261 Or 582, 494 P2d 868 (1972).

***Revocable living trust.*** A revocable living trust, on the other hand, imposes fiduciary duties on the trustee as soon as the trust is established. These include the duty to preserve and prudently manage trust assets. ORS 128.192-.218.

When the trustor and trustee are different persons, a remainder beneficiary has a post-mortem cause of action against a revocable living trustee for breach of duty to preserve trust property that occurred while the settlor was alive. *Cloud v. U.S. National Bank*, 280 Or 83, 570 P2d 350 (1977). The question arises whether a remainder beneficiary has a similar cause of action when the lifetime trustee was the trustor, as frequently occurs. Asserting the claim before the trustor/trustee dies invites retaliation by amendment. After the trust becomes irrevocable, however, a claim for breach of fiduciary duty may lie if the beneficiary has a right to specific trust property or if nontrust assets exist with which to satisfy the claim.

A cause of action against a trustee continues against the personal representative of the trustee. ORS 115.305. If the action was not time barred when the trustee died, it may be brought against the personal representative within one year after the trustee's death. ORS 12.190(2).

## Rights of Unsecured Creditors

***Will.*** If a person dies owning property that becomes subject to a probate proceeding, unsecured creditors of the person have the right to recover amounts owing them from the probate property. In such a case, the procedures for giving notice to creditors, and for the filing and allowance or disallowance of claims against the estate, are clearly set out by statute. *See* ORS 115.001-.215. To prove a claim that is disallowed by a personal representative, a creditor must introduce "competent, satisfactory" evidence other than the creditor's own testimony. ORS 115.195, *see also* Stephen L. Griffith, "The Claimant Testimony Rule," course materials for the Oregon Law Institute's program on Estate Claims (Oct. 15, 1999).

***Revocable living trust.*** Revocable living trust property is not subject to a probate proceeding when the trustor dies if the trust instrument names a succeeding beneficiary. Such property is still subject to the claims of the deceased trustor's creditors, however, under the rule in *Johnson v. Commercial Bank*, 284 Or 675, 588 P2d 1096 (1978) (transfer to revocable trust void as against existing and subsequent creditors; power of revocation held equivalent to general power of appointment, when property is reachable by creditors).

The procedure for reaching property held in a revocable trust to satisfy a debt is more complicated than the procedure involving probate property. The key premise is that a personal representative is a fiduciary for creditors of the estate. *In re Workman's Estate*, 156 Or 333, 65 P2d 1395, 68 P2d 479 (1937). As such, the personal representative is required to recover property transferred by the decedent in such a way that the transfer was void or voidable as against the decedent's creditors if the property is necessary to pay claims of the estate. ORS 114.435. If the requirements of ORS 114.435 are met, a creditor may ask the court to instruct the personal representative to recover assets not included in the probate estate. ORS 114.275.

When a personal representative has not been appointed, as often occurs with a revocable living trust, a creditor may initiate probate and be appointed personal representative of the debtor's estate as an "interested person." ORS 111.005(19); ORS 113.035; ORS 113.085(1)(f). The creditor then must be aware of specific procedures for handling a

personal representative's claims. ORS 115.105. As personal representative, a creditor is unlikely to disallow the creditor's own claim. *See* ORS 115.195. This raises the question whether the creditor/personal representative is relieved of the corroborating evidence requirement in ORS 115.195.

**Elective Share of the Surviving Spouse**

Under ORS 114.105 to .165, the surviving spouse of an Oregon domiciliary has a right to receive an amount equal to one-fourth the value of the decedent's "net estate" as defined in ORS 111.005(23), reduced by the value of interests received under the decedent's will as set forth in ORS 114.105(1)(a)-(c), and limited to one-half the value of property interests described in ORS 114.125.

***Will.*** When the probate estate includes all property for which the decedent made a testamentary directive, there is no impediment in principle to the surviving spouse's recovering the full amount of the elective share. The share is satisfied first from any intestate property and then by ratable contribution from each devisee "out of the portion of the estate passing to the devisee under the will," preserving to the extent possible the decedent's testamentary plan. ORS 114.165.

***Revocable living trust.*** To the extent the decedent's property was held in a revocable living or other trust, the elective share of the surviving spouse may not be satisfied. The wording of ORS 114.165, indicating the order of payment of the elective share, suggests that while nonprobate assets are taken into consideration in computing the amount of the election, the net estate subject to election consists only of intestate and probate property. *See O'Connor v. Zeldin*, 118 Or App 620, 625, 848 P2d 647, *rev den* 317 Or 163 (1993). Legislation proposals to change or clarify the law to include assets in a revocable trust have been made, but not enacted, in Oregon.

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This article is based on remarks of the author at the Multnomah Bar Association's August 10, 1998 program on revocable living trusts.

# Pooled Trust for Persons with Special Needs

A critical concern shared by families with a disabled son or daughter is the question of what will happen to the child when the parents are gone. In some cases, other family members can provide oversight, care, and financial assistance. But in many instances, no other family members are available to help. The parents are left with feelings of worry and guilt that they have not done enough to protect the future of their disabled child.

Many people with disabilities receive some form of public assistance, including support such as Medicaid and Supplementary Security Income ("SSI"). Eligibility for these assistance programs is based primarily on a person's income and assets. If a person's income and/or assets rise above the maximum, eligibility may be denied or benefits reduced. Thus extra support provided by a parent or other family member may jeopardize the person's eligibility.

Federal and state regulations allow certain trusts to provide extra benefits for an individual without affecting the beneficiary's eligibility for public assistance. These supplemental needs trusts require careful drafting and planning to comply with complicated regulations. One cost-effective solution for families seeking to preserve governmental assistance for a child while providing some additional benefits is to participate in a pooled trust. A pooled trust can help a family provide supplemental funds for a disabled person without the expense of setting up a separate trust for the child. The ARC of Oregon recently established the Oregon Pooled Trust to provide this option for Oregon families. For a description of The ARC of Oregon's Pooled Trust, see Mitchell K. Teal, "The ARC of Oregon Pooled Trust," Elder L Newsl at 2 (OSB winter 2000).

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# Basics of Medicaid Law

Medicaid is a joint federal and state program that pays for long-term health care services for aged and disabled persons with low income and a lack of resources. Such services may include nursing home care, foster care, assisted living, in-home care, physician services, and prescription drugs. The Senior and Disabled Services Division ("SDSD") administers the Medicaid program in Oregon. The SDSD Administration Rules are on-line at www.sdsd.hr.state.or.us/resources. Unless receiving Supplemental Security Income ("SSI") or Aid to Dependent Children ("ADC"), an applicant must meet both an income test and a resource test before qualifying for long-term health care services under Medicaid. This article reviews the basic requirements for Medicaid qualification.

**Income Test**

If the applicant's income is over the current income cap limit of $1,536 per month (for year 2000), the applicant is not eligible for Medicaid unless he or she can transfer or eliminate enough income to get under the income cap. The income cap amount is adjusted annually and is always three times the SSI amount for an individual.

Only the gross income of the applicant is counted for Medicaid-qualifying purposes; the income of the applicant's spouse is not counted. Income is presumed to belong to the person in whose name it is paid, and if the income is paid to more than one person, then SDSD presumes that the income is shared equally between the payees. Examples of available income include social security, pension benefits, annuity payments, income from a contract or note receivable, and alimony.

If the applicant's income is greater than the $1,536 per month limit, then the following options may be available: (1) if possible, shift income from the applicant to the spouse (*e.g.*, transfer a contract receivable to the spouse) or (2) if possible, convert the income to a resource (*e.g.*, take a discounted payoff on a note or contract). If such options are not available, then the applicant may establish an Income Cap Trust for purposes of meeting the income test. The Income Cap Trust is a specialized form that was developed and agreed upon by SDSD and a group of elder-law attorneys. Pursuant to OAR 461-145-0540(5), the applicant, the applicant's attorney-in-fact if authorized, the applicant's spouse, or a person authorized by a court may establish an Income Cap Trust for the applicant.

Once established, all of the Medicaid recipient's monthly income goes into the Income Cap Trust bank account. The income is then spent each month according to distribution schedules set forth in the Income Cap Trust. Allowable monthly distributions and payments from the Income Cap Trust include a personal needs allowance for the Medicaid recipient, attorney fees to set up the trust, tax preparer fees, income tax attributable to the income placed into the trust, a monthly fee to the trustee, the Medicaid recipient's health insurance premiums, medical care costs, contributions for the purchase of an irrevocable burial plan, and payments to the spouse if the spouse is entitled to allowances under the SDSD rules. After the payment of all other allowable deductions, the balance of the recipient's monthly income must be paid to the long-term care facility.

**Resource Test**

SDSD also looks at all of the resources of the applicant. Resources are either available (countable) or excluded (exempt). To meet the resource test, a person applying for Medicaid can have only $2,000 in countable resources, plus his or her exempt resources. Examples of countable resources are bank accounts, certificates of deposit, stocks and bonds, cash value of life insurance, deferred annuities, IRAs, and real property.

***Exempt Resources***. Examples of exempt resources are the following:

(1) The *home* if the applicant is residing therein or is reasonably expected to return to it, or if a spouse, minor or disabled child, or other dependent relative is living in the home. OAR 461-145-0220.

(2) One *automobile* if used by the applicant or the applicant's spouse to get back and

forth to work or medical appointments or to visit the applicant in a care facility. If none of the above apply, the value of the automobile is limited to $4,500. OAR 461-145-0360.

(3) All *personal and household belongings*, subject to a $2,000 limit set forth in OAR 461-145-0390. Note: The $2,000 limit is rarely invoked by SDSD.

(4) *Income-producing sales contract or note receivable.* OAR 461-145-0240.

(5) *Irrevocable immediate annuities* that are payable to either the applicant or applicant's spouse as long as the annuity pays out all principal and interest within the life expectancy of the Medicaid applicant or the applicant's spouse (whoever is the owner of the annuity). OAR 461-140-0296(4).

(6) A *burial fund* of up to $1,500 for the applicant and the applicant's spouse or, if preferred, prepaid burial arrangements for the applicant and the applicant's spouse (no dollar limit if plan is irrevocable; $1,500 limit if revocable). OAR 461-145-0040.

(7) *Burial space and merchandise*, which includes plot, crypt, urn, headstone, casket, liner, burial vault, marker, and opening and closing of grave. As long as owned by the applicant, this may be purchased for the applicant and his or her spouse; children, siblings, parents; and any of their spouses. OAR 461-145-0050.

(8) *Term life insurance*. OAR 461-145-0320(2)(e).

(9) *Medical equipment.*

***Community Spouse Resource Allowance.*** Under Medicaid law, the Medicaid applicant's spouse (the community spouse) is allowed to retain a specific portion of the couple's countable assets. The amount of resources that the community spouse is allowed to retain is called the Community Spouse Resource Allowance ("CSRA"). The community spouse is allowed a CSRA equal to the largest of the following amounts:

(1) $16,824 worth of countable resources if the total countable resources are less than $33,648,

(2) One-half of the countable resources up to a maximum of $84,120, or

(3) A court-ordered CSRA.

To calculate the CSRA, the countable resources of either or both spouses are combined and valued as of the date the applicant began a continuous period of care (this can include in-home care). OAR 461-160-0580. The CSRA is computed by SDSD through a process called a Resource Assessment. The Resource Assessment, which is based upon information provided to SDSD by the applicant and community spouse, generally should be scheduled as soon as the applicant begins a continuous period of care.

***Community Spouse Income Allowance.*** Under the Medicaid laws, all or a portion of the Medicaid recipient's monthly income may be diverted to the community spouse so that the community spouse has sufficient monthly income to provide for his or her support. Current Medicaid rules provide that the minimum monthly income to which the community spouse is entitled is $1,383 per month plus an excess shelter allowance equal to the amount by which the community spouse's monthly shelter costs exceed $415. Shelter expenses are defined as rent or mortgage, taxes, insurance, required maintenance charge for a condominium or cooperative, and the standard utility allowance for the spouse and eligible dependents. OAR 461-160-0620(5)(a)(B). The minimum amount can also be increased by court order. The amount diverted from the applicant's income to get the community spouse's income up to this amount is called the Community Spouse Income Allowance.

## Conclusion

As discussed above, the resource test for a married Medicaid applicant is met when the only resources the couple has are the amount allowed for the CSRA of the community spouse, the Medicaid applicant's $2,000 resource allowance, and the exempt resources. The balance of the resources must be spent down or protected before the resource test is met. The July issue of the Newsletter will include an article describing Medicaid planning techniques for individuals and married couples who are over the resource limits.

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***Sheldon v. Sheldon,* 136 Or App 256, 987 P2d 1229 (1999)**

In this case a wife's right to an elective share of the decedent's estate conflicts with the interests of the decedent's children as beneficiaries of a will contract between the decedent and his first wife.

The decedent, James Sheldon, entered into a "joint mutual and reciprocal will contract" with his wife, Billy Sheldon, in 1991. In that agreement James and Billy promised to leave their respective estates to the survivor, who would then distribute the estate equally to their six children. Billy died in 1992 and James received the proceeds of her estate. In 1995 James married Diana Sheldon. In 1996 he was diagnosed with cancer, and James and Diana met with an attorney regarding estate planning. James executed a will to honor the agreement with Billy, whereby property he had acquired after Billy's death was bequeathed to Diana but the remainder of the estate was bequeathed to his six children.

After James died and probate was commenced, Diana filed an election against the will seeking her statutory share of James's estate under ORS 114.105. The lower court held that Diana was not entitled to receive an elective share. Diana appealed the trial court's determination, which had found that she had waived her elective share. Diana argued on appeal that the evidence did not support the finding that she waived her election right and that denying her the election right was against public policy.

The personal representative of James's estate made three arguments in response:

- equitable principles precluded the elective share under the facts of this case,
- Diana waived her right to elect under the statute, and
- even if the elective share statute applies, there is nothing for her to claim because the estate will be depleted as a result of the performance of the agreement with Billy.

The appeals court found that there was no written agreement executed by Diana barring her from making an election under the statute and stated that the personal representative was incorrectly relying on *Patecky v. Friend*, 220 Or 612, 350 P2d 170 (1960); the court found that having notice of contractual obligations (such as a contractual will) before the marriage does not mean that a wife loses her statutory right, as the personal representative argued was the holding in *Patecky*.

The court found that the right to an elective share is an important public policy promulgated by the legislature that cannot be lightly disregarded. The court further found that there was never any waiver, written or oral, and that Diana's failure to object to her husband's new will at the time it was signed was not sufficient to conclude that she had waived her rights to elect. A waiver of statutory right is an intentional relinquishment or abandonment of a known right or privilege and must be clear, unequivocal, and the decisive act of the party; in this case, agreeing that the decedent should perform his obligations under the previous agreement with his wife, Billy, was not a clear waiver but potentially a reservation of rights by silence.

The court further held that the assets of the decedent were not held in a constructive trust for the children; a constructive trust is imposed by a court against one who by wrongful conduct obtained or holds legal right to property that he or she ought not to enjoy in good conscience in equity. This presupposes that someone is holding another's interest wrongfully. In this case, the decedent's obligations under the reciprocal wills were limited to not revoking, amending, or otherwise changing the provisions of his will that affected the provisions for the children of a deceased spouse; the decedent fulfilled his obligations. There was no action that could result in a constructive trust on the estate property with the exception of Diana's election. Because her election is permitted by the legislature under ORS 114.105, it does not provide any wrongful conduct that would be the basis for the imposition of a constructive trust. Therefore, the court found that Diana was entitled to an elective share of the estate and the case was reversed and remanded on that issue.

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**Disciplinary Cases**

Two recent disciplinary actions involving estate planners both involved client conflict of interest. These situations reflect the need for caution and care in this area.

***Matter of Richard P. Schulze,* Or St B Bull 51 (Nov. 1999)**

The conflicts involved in this disciplinary proceeding were DR 5-101(A) (self-interest conflict of interest) and DR 5-105(E) (multiple-client conflict of interest). During the period in question, Richard Schulze worked as in-house counsel for related corporate entities that marketed revocable living trusts to the public. At the same time, Schulze represented individual estate planning clients. In his work for the individual clients he used materials purchased from the corporate client. Although Schulze made some disclosures to the individual clients, the Disciplinary Board found conflicts of interest in his simultaneous representation of the corporate client and the individual estate planning clients. The disclosures he had made were not sufficient to cure the conflicts, and the Disciplinary Board reprimanded Schulze for the violations.

***Matter of Thomas C. Howser,* Or St B Bull 43 (Feb./Mar. 2000)**

The conflict in this matter involved a former client conflict. Violations of DR 5-105(C) (former client conflict) and DR 2-110(B)(2) (failing to promptly withdraw from employment) occurred. In 1994 Thomas Howser undertook representation of a defendant in a lawsuit relating to a loan. During the course of the litigation Howser learned that several years earlier, in 1989 and 1993, Howser's partner had prepared wills for the person who was the plaintiff in the litigation. Howser reviewed the wills, which he found in the firm's storage area, and learned that the 1989 will had included a bequest to the plaintiff and the 1993 will had deleted the bequest but had made a gift to the plaintiff's son. Howser believed that some of the information in the wills supported the defenses he was making on behalf of his client against his partner's former client. Although counsel for the plaintiff objected to Howser's continued representation of the defendant, Howser continued to represent the defendant for another year and a half. The supreme court determined that a reprimand was the appropriate sanction for Howser's violation of the two disciplinary rules.

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## Seminar Series- Estate Planning and Elder Law

The Multnomah Bar Association Young Lawyers Section is sponsoring a series of weekly, one-hour seminars for new lawyers or lawyers who are new to estate planning and elder law.

Call 222-3275 for information.

April 24, Guardianship and Civil Committment, Timothy Nay

May 1, Elder Abuse: Civil and Criminal Liability, Dady Blake

May 8, Planning and Obtaining Medicaid, Medicare and Social Security Benefits, Geoffrey J. Bernhardt

The Editorial Board believes that timely feedback from our readers will further the educational purposes of the *Newsletter.* Therefore, the board welcomes letters to the editor presenting further thoughts and ideas, practice tips, or other substantive comments on estate planning topics presented in the *Newsletter.* As with any other material presented for possible publication, the board reserves the right to withhold publication of any letter in whole or in part. Letters should be sent to the editor, Susan N. Gary, at the address shown below.

**Questions, Comments or Suggestions About This Newsletter?**

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# CALENDAR OF SEMINARS AND EVENTS

- April 3-May 8, 2000 (Mondays) (Sponsored by Multnomah Bar Association Young Lawyers Section) **Estate Planning and Elder Law Series**, Standard Insurance Center Auditorium, Portland, OR. Telephone: (503) 222-3275.
- April 24-28, 2000 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, The Plaza, New York, NY. Telephone: (800) CLE-NEWS.
- May 4-5, 2000 (Sponsored by New York University) **Family Wealth Institute**, The Millennium Broadway, New York, NY. Telephone: (212) 790-1321.
- June 1-2, 2000 (Sponsored by ALI-ABA) **Charitable Giving Techniques**, Seaport Hotel & Conference, Boston, MA. Telephone: (800) CLE-NEWS.
- June 1-3, 2000 (Sponsored by American Bar Association) **Fundamentals for Estate Planners: Trusts & Estates**, Emory University School of Law, Atlanta, GA. Telephone: (312) 988-6209.
- June 2-4, 2000 (Sponsored by Washington State Bar Association) **Real Property, Probate & Trust Section Midyear**, Skamania Lodge, Stevenson, WA. Telephone: (206) 727-8256.
- June 5-7, 2000 (Sponsored by American Bar Association) **Fundamentals for Estate Planners: Wealth Transfer Tax**, Emory University School of Law, Atlanta, GA. Telephone: (312) 988-6209.
- June 8, 2000 (Sponsored by ALI-ABA) **VLR: Annual Spring Estate Planning Practice Update**, American Law Network, live satellite TV nationwide. Telephone: (800) CLE-NEWS.
- June 11-16, 2000 (Sponsored by ALI-ABA) **Estate Planning in Depth**, University of Wisconsin Law School (CLEW), Madison, WI. Telephone: (800) CLE-NEWS.
- June 21, 2000 (Sponsored by Washington State Bar Association) **Nuts & Bolts - Estate Planning**, WSBA Offices, Seattle, WA. Telephone: (206) 727-8246.
- June 23, 2000 (Sponsored by Oregon State Bar) **Estate Planning (Intermediate/Advanced)**, Oregon Convention Center, Portland. Telephone: (503) 620-0222.
- June 25-July 1, 2000 (Sponsored by American Bar Association) **Skills Training for Estate Planners**, Emory University School of Law, Atlanta, GA. Telephone: (312) 988-6209.
- June 29-30, 2000 (Sponsored by ALI-ABA) **Representing Estate and Trust Beneficiaries and Fiduciaries**, Sheraton Hotel & Towers, Chicago, IL. Telephone: (800) CLE-NEWS.
- July 9-July 15, 2000 (Sponsored by American Bar Association) **Skills Training for Estate Planners**, Emory University School of Law, Atlanta, GA. Telephone: (312) 988-6209.
- July 10-12, 2000 (Sponsored by New York University) **Introduction to Trusts & Estates**, New York, NY. Telephone: (212) 790-1321.
- August 3-4, 2000 (Sponsored by ALI-ABA) **International Trust and Estate Planning**, San Francisco, CA. Telephone: (800) CLE-NEWS.
- August 10-12, 2000 (Sponsored by ALI-ABA) **Estate Planning for the Family Business**, Renaissance Stanford Court, San Francisco, CA. Telephone: (800) CLE-NEWS.
- September 7-8, 2000 (Sponsored by ALI-ABA) **Sophisticated Estate Planning**, Westin Copley Place, Boston, MA. Telephone: (800) CLE-NEWS.



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