newsletter

Oregon Estate Planning and Administration Section Newsletter
Volume XVII, No. 1
January 2000

Published by the Estate Planning and Administration Section of the Oregon State Bar

Tuition Savings Programs

This past July Governor Kitzhaber signed Senate Bill 756 into law, establishing a Qualified Tuition Savings Program ("savings program") for Oregon. The savings program, based directly on IRC § 529, allows grandparents and parents to invest money for their children's higher education in a tax-deferred savings account administered by the state. Qualified tuition savings programs join Education IRAs as the newest tools available for estate planners and investors alike. This article provides an overview of Oregon's new savings program, a brief comparison of the program to an Education IRA, and a brief comparison of the savings programs available in other states. *See Oregon's College Savings Program* (visited Oct. 27, 1999) <http://www.ost.state.or.us/ wrapsav.htm>.

General Requirements

The Oregon bill establishes an Oregon Qualified Tuition Savings Board (the "Board") to operate the savings program, to adopt rules for the program, and to invest contributed funds. *See* SB 756, 70th Or Legislative Assembly, Reg Sess (1999) (hereinafter "SB 756"). Operation of the savings program by the Board complies with the requirement of IRC § 529(b)(1) that the savings program must be maintained by the state. The Board can contract for services of private and public financial institutions and advisors. *See* SB 756 § 5(4). Only the Board or the financial institution in which the funds are invested—and not an account owner—can direct investments. *See* IRC § 529 (b)(5); SB 756 § 7(1). The Board cannot guarantee any rate of return and is not liable for any loss. *See* SB 756 § 7(2), (3).

To establish an account, the account owner contributes cash in the name of a designated beneficiary. *See* IRC § 529(b)(2); SB 756 § 6(1). Either the account owner or the beneficiary must be a resident of Oregon, and then after the account is established, anyone can contribute to the account. *See id.* The Board has the authority to establish maximum contribution limits, because total contributions may not exceed what is reasonably necessary for a beneficiary's higher education expenses. *See* IRC § 529(b)(7); SB 756 §§ 6(4), 8(4).

Withdrawals may be made without penalty (1) for qualified higher education expenses, (2) in the event of the beneficiary's death or disability, or (3) if the beneficiary receives a scholarship, but only up to the amount of the scholarship received. *See* IRC § 529(b)(3). There is a penalty for nonqualified withdrawals (the amount is to be determined by the administrator, but it must be more than de minimis). *See id.* The program must provide a separate accounting for each beneficiary. *See* IRC § 529(b)(4). Because the program is state run, the donor and beneficiary may not direct the investment. *See* IRC § 529(b)(5). Interest earned on the account may not be used as security for a loan. *See* IRC § 529(b)(6).

The Oregon bill ensures that account funds will only be used for higher education expenses by requiring that refunds from higher education institutions for overpayment of education expenses must go back to the savings program for credit to the beneficiary's account. Withdrawals from the account may not be paid directly to the beneficiary, but instead must be either paid jointly to the beneficiary and an

In This Issue

1 **Tuition Savings Program**

4 **Rethinking the Distinction Between Principal and Income: The Unitrust Concept**

6 **Estate of Magnin Opens New Planning Opportunities**

8 **Final Rules on Adequate Disclosure of Gifts Published**

9 **Practice Tips: Planning for a Beneficiary's Divorce**

10 **What's New**

12 **Calendar of Seminars and Events**

institution of higher education or directly to the institution. *See* SB 756 § 8(2), (3).

Withdrawals

Withdrawals for qualified educational or other purposes may be made with 30 days' written notice to the Board (or shorter notice if provided by rule). *See id.* § 10(1). The individual must designate whether the withdrawal is for a qualified educational purpose and must provide information to enable the Board to determine whether the expense is qualified. *See id.* If the withdrawal is for a nonqualified purpose, the Board will assess a penalty, in satisfaction of the IRC § 529(b)(3) requirement of more than a de minimis penalty. *See* SB 756 § 10(3). Penalties are used to defray the costs of the savings programs. *See id.* § 10(4). Amounts withdrawn must be reported to the individual and the Internal Revenue Service. *See id.* § 10(2).

Definitions

Qualified higher education expenses include "tuition, fees, books, supplies, and equipment required for the enrollment or attendance of a designated beneficiary at an eligible educational institution." IRC § 529(e)(3)(A). Qualified higher education expenses also include room and board for students who are enrolled at least half-time. Generally, room and board cannot exceed the school's posted room and board charge, or $2,500 per year for students living off campus and not at home. *See* IRS Notice 97-60, 1997-2 CB 310. An eligible educational institution is any college, university, vocational school, or other postsecondary educational institution described in section 481 of the Higher Education Act of 1965, 20 USCA § 1088 (1990 & Supp 1999). *See* IRC § 529(e)(5). This includes both public and private schools.

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?

Contact:
Susan N. Gary
1221 University of Oregon School of Law
Eugene, OR 97403-1221
(541) 346-3856 E-mail: sgary@law.uoregon.edu

Tax Consequences

The account owner can deduct the amount contributed to a savings program, up to $2,000, from taxable income on his or her Oregon income tax return. The contribution counts toward the IRC § 2503(b) $10,000-per-beneficiary annual gift exclusion. The contribution is a completed gift and does *not* qualify as an education expense exclusion under IRC § 2503(e). *See* IRC § 529(c)(2)(A). The donor can also elect to exceed the annual exclusion amount and apply the exclusion ratably over a five-year period, permitting the donor to make a $50,000 contribution at one time. The gift is considered completed even though the contribution is revocable. If the donor dies within the five-year period, the gross estate will include the portion of the contribution allocable to the periods after death. *See* IRC § 529(c)(2)(B), (4)(C). Distributions from the qualified program are not considered taxable gifts. *See* IRC § 529(c)(5)(A).

For the beneficiary, the most obvious benefit is that interest accumulates tax free until a qualified withdrawal is made. At that time, the distributions are includible in the beneficiary's gross income at the beneficiary's rate. *See* IRC § 529(c)(3)(A), (B). A student, or a student's parent, may claim a Hope Scholarship Credit or Lifetime Learning Credit for qualified tuition and related expenses covered by a qualified state tuition program, if the other eligibility requirements are met. These benefits can be taken even if another individual funded the savings program account. *See* IRS Notice 97-60.

The account owner can transfer funds to another account or change the designated beneficiary to another individual who is a member of the former beneficiary's family. *See* SB 756 § 9(1), (2). The Board may deny the right to transfer funds or change beneficiaries if the change would result in excess contributions to an account or impermissible investment direction by an account owner. *See id.* § 9(3).

Education IRA Under IRC § 530

General requirements. Education individual retirement accounts ("Education IRA") are another tax-advantaged method for college savings. *See* IRC § 530. An Education IRA is a trust created in the United States exclusively for the purpose of paying the beneficiary's qualified higher education expenses and designated as such when created. *See* IRC § 530(b)(1). Contributions must be made in cash before the beneficiary reaches age 18. *See* IRC § 530(b)(1)(A)(i), (ii). The maximum amount that can be contributed to a child's account(s) per year is $500. *See* IRC § 530(b)(1)(A)(iii). Contributors whose adjusted gross income is over $95,000 (or $150,000 for joint returns) may not contribute a full $500 per year. *See* IRC § 530(c) (detailing formula for reducing contribution amount). If the aggregate contribution to a child's account for the year exceeds $500, the excess is subject to a 6 percent excise tax for each year it remains in the account. *See* IRS Notice 97-60. There is no penalty if the excess is a result of a rollover of an amount from a family member's account. *See* IRC § 530(b)(1)(A)(iii).

Comparison of tax consequences of Education IRAs and savings programs. As with savings programs, an Education IRA is considered a completed gift at the time of contribution and is subject to the annual IRC § 2503(b) exclusion. Unlike

savings programs, distributions from an Education IRA for qualified higher education expenses are not includible in the beneficiary's gross income. *See* IRC § 530(d)(2). If a distribution is used for nonqualified expenses, however, that portion of the distribution allocable to tax-free accumulation is taxed. This tax is then increased by 10 percent as a penalty, unless the distribution occurs on account of the beneficiary's death, disability, or scholarship. *See* IRC § 530(d)(4). The definitions of "qualified educational expense" and "eligible educational institution" are the same as those used under IRC § 529 for savings programs. Changing the beneficiary will not be treated as a taxable distribution so long as the new beneficiary is a member of the former beneficiary's family and under 30 years of age. *See* IRC § 530(d)(6).

Unlike savings programs, a taxpayer is not entitled to a Hope Scholarship Credit or Lifetime Learning Credit for educational expenses for a tax year in which there has been an Education IRA distribution. The taxpayer can, however, waive the Education IRA exclusion to take advantage of greater tax savings based on the education credits. *See* IRS Notice 97-60. The taxpayer may also transfer funds from an Education IRA to a state tuition savings program. If an amount has been contributed to an individual's Education IRA account for a given year, any contribution within the same year to that individual through a savings program will be treated as an excess contribution. *See id.*

Which is better for your client? The advantage of an Education IRA is that the interest accumulation is never taxed. Some clients, however, may not be able to use Education IRAs because their income level is too high. In contrast, savings programs impose no income-based contribution restrictions and allow for much larger annual contributions. Savings programs also allow the donor to make an immediate, tax-free $50,000 contribution per child. By contributing $50,000 immediately, instead of giving it over five years, interest accrues tax-free outside the estate. Savings programs also may be set up for adults. In fact, according to some sources, one can set up an account for oneself. *But see* Janet Novak, *"The Tuition Estate Trick,"* Forbes 142-43 (Feb. 22, 1999) (advising that federal income tax restrictions at this time do not allow individuals to set up accounts for his or her own higher education expenses). If the money is not used, it can be transferred to a child or other family member's account.

A potential drawback of a savings programs is that a college student will be taxed on money that he or she has not personally received. Furthermore, the account owner has no control over how the money is invested. And, of course, there is no guarantee that Congress will not change the tax code and impose greater penalties for nonqualified withdrawals. *See id.* at 142.

Prepaid Tuition and College Savings Programs

Prepaid plans. There are two types of state higher education financing programs: (1) prepaid tuition plans and (2) qualified tuition savings programs. Under prepaid plans, families purchase contracts with a state to pay tuition, fees, and in some cases room and board expenses for a set number of academic periods or course units. The plans allow the individual to attend an out-of-state or private institution, but the amount of covered expenses is based on the in-state tuition rate. The contract price depends on the type of contract purchased, the projected enrollment date, and the current and projected cost of tuition. Payment plans may be lump-sum or installment. Some funds allow refunds if the beneficiary dies or chooses not to go to college. Many plans allow a change of beneficiary. Most states have escape provisions that allow the state to issue refunds to recipients under certain circumstances. *See Tax Incentives To Promote Saving for Higher Education Before the House Ways and Means Committee*, Cong. (June 23, 1999) (statement of Marshall Bennett, state treasurer of Mississippi.)

Savings programs. Under qualified tuition savings programs, as discussed above, the state invests the funds in anticipation of future costs of tuition, but the distribution amount is not guaranteed to cover tuition. In an attempt to keep pace with anticipated tuition inflation, the fund investments vary based on the age of the beneficiary. "The funds contributed on behalf of a younger beneficiary may be weighted more toward equities, while funds for a student nearing college enrollment are normally weighted toward fixed income investments." *See id.*

As of September 1, 1999, 17 states had prepaid plans and 24 had tuition savings programs. Seven new savings programs and one additional prepaid plan are expected to begin operation within the next year. *See State of the States: College Savings Plans Overview* (visited Oct. 27, 1999) <http://www.collegesavings.org/state-table.htm>.

Comparison to Other States' Programs

The majority of savings programs are open to both residents and nonresidents. Therefore, Oregon residents are not limited to participating only in Oregon's program. The advantage of using Oregon's program, of course, is that a resident may deduct up to $2,000 of contributions from taxable income on his or her Oregon tax return. However, another state's program may be more desirable because it permits a higher maximum contribution amount, has lower annual fees, or uses a preferable investment strategy. *See College Savings Plans Network* (visited Oct. 18, 1999) <www.collegesavings.org>; Mindy Charski, *"Baby Goes to College: State Savings Plans Make It Easier To Raise the Cash for College,"* US News, Mar. 1, 1999 <www.usnews.com/usnews/issue/990301/nycu/1coll.htm>.

Conclusion

Because many states are currently in the process of creating savings programs, it will be important to maintain updated information to advise clients of their options. For more detailed information on each individual program, see the information on the various programs found on the Internet. The College Savings Plans Network, an affiliate of the National Association of State Treasurers, advocates for the creation of savings programs and maintains information on the various state programs. It maintains a Web site with links to the various state programs. By going to the Web site <http://www.collegesavings.org>, or by calling (877) 277-6496, one can be connected to representatives for the various state savings programs.

Emily V. Karr
Stoel Rives LLP
Portland, Oregon

Rethinking the Distinction Between Principal and Income: The Unitrust Concept

Most trust instruments provide for distributions by reference to income and/or principal, giving the trustee some level of discretion in making distributions. A common example is the marital trust structure that provides for income payments to a spouse for life, permits principal invasions subject to a need-based ascertainable standard, and leaves the balance remaining on the spouse's death to the children as remainder beneficiaries. Such formulations are based on the premise that a trustee can invest to achieve a balance between adequate income production and preservation of principal. As discussed below, however, that premise is becoming obsolete. Trusts that distinguish between income and principal distributions (described in this article as "income trusts") create conflicts between the trustee and the income and remainder beneficiaries and may not achieve the settlor's objectives. The emerging unitrust concept eliminates many of the problems inherent in income trusts.

Background

Increasingly, trustees of income trusts are encountering difficulty in selecting investments that generate sufficient benefits for the current beneficiary, while preserving the trust corpus for the remainder beneficiary. This difficulty is primarily attributable to a shift in investment theories and practices toward diversification and management of investments as a portfolio invested for total return, and the related lack of availability of marketable assets that produce sufficient income.

The recently enacted Oregon Uniform Prudent Investor Act (the "Act") (ORS 128.192-.218), which is based upon the model act of the National Commission on Uniform State Laws, recognizes the shift described above. *See* David A. Diamond, *"Trust Design and Investment Strategy for the Next Millennium: Pulling the Plug on Income Rule Trusts,"* 5 Cal Tr & Est Q No. 3, at 12 (1999) (stating that income trusts are on "life support" due, in part, to adoption of the Act). The Act provides that a trustee's investment decisions are to be evaluated in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. ORS 128.196(3). The Act also contains a list of circumstances to be considered in investing and managing trust assets. That list includes the expected total return from income and the appreciation of capital. See ORS 128.196(3)(e). For a more detailed discussion of the Act, *see* Jonathan A. Levy, "*Uniform Prudent Investor Act in Oregon,"* Or Est Plan & Admin Sec News, at 1 (OSB Jan. 1999).

As under prior law, under the Act a trustee must manage trust assets solely in the best interests of trust beneficiaries. ORS 128.204(1); *Marshall v. Frazier*, 159 Or 491 (1938). In addition, if the trust has two or more beneficiaries, the trustee has a duty to act impartially in investing and managing the trust assets, taking the beneficiaries' differing interests into account. ORS 128.204(2); *Windishar v. Windishar*, 83 Or App 162 (1986), *reconsidered* 84 Or App 580 (1987).

For today's trustee of an income trust, fulfilling the duties to manage trust assets solely in the best interests of the beneficiaries and to deal with them impartially can be an insurmountable challenge. On the one hand, if the trustee invests in assets to produce adequate income for the current beneficiary, he or she does so at the expense of the remainder beneficiary. On the other hand, if the trustee invests primarily in growth assets or pursues an investment strategy based on diversification or total return, the current beneficiary is likely to receive little or no income.

A portfolio that contains a mix between income and growth assets may produce far less income than the income beneficiary may need. Such a portfolio will also disappoint the remainder beneficiary, who will be in a position to criticize the trust portfolio's performance and may later seek to surcharge the trustee for poor investment performance. One author has appropriately described the income trustee's dilemma as the "Duty to Disappoint Equally." *See* Robert B. Wolf, *"Defeating the Duty to Disappoint Equally—The Total Return Trust,"* 23 ACTEC Notes 46 (1997); *see also* Diamond, *supra,* at 12 (asserting that income trusts set up trustees for failure and beneficiaries for disappointment).

Without special guidance, a settlor typically will not appreciate the problems discussed above. Whereas an attorney is likely to have a narrow interpretation of the term "income," the settlor may think of "income" as a concept of cash flow, without considering whether that cash flow is derived from income or principal. Without an explanation of these terms and concepts and the difficulties attendant to them, the settlor may not understand that a trustee of an income trust will be forced to make compromises that may negatively affect the "income" beneficiary because that beneficiary's interest is defined in terms of income rather than cash flow. If the settlor expects an "income" stream to provide adequate support for a beneficiary, the client's objectives are likely to be frustrated by an income trust.

In view of the problems discussed above, a distribution approach that dispenses with the concepts of income and principal to measure distributions has great appeal. The unitrust concept is such an approach.

The Unitrust Concept

The unitrust concept is quite simple in principle and application. The term "unitrust" refers to a distribution formula that requires a trustee to pay a fixed percentage of the fair market value of the trust's assets to the beneficiary annually. Of course the annualized amount can be paid at any desired interval, *e.g.,* monthly or quarterly. The fair market value of the assets is determined on the same date each year. Usually the value is determined at the beginning of the year, and distributions for the remainder of that year are based on that determination.

Lawyers acquainted with charitable remainder trusts are familiar with the unitrust concept, because charitable remainder trusts are required under IRC § 664 to provide for payments to the noncharitable beneficiary of either an annuity or unitrust amount. IRC § 664. However, unlike a charitable remainder unitrust, which cannot deviate from the strict criteria of IRC § 664, the unitrust formula in a noncharitable trust can be modified to accomplish any result the settlor intends.

Because a unitrust formula is based on the value of the trust assets rather than concepts of income and principal, the trustee is free to invest for total return. This approach maximizes the benefit to the current beneficiary and the remainder beneficiary, because it is to the advantage of both to have the trust assets increase in value. As a result, the trustee can adopt an investment strategy that does not risk violating the duty of impartiality or the duty to manage trust assets in the best interests of beneficiaries. Because of their emphasis on total return investment, trusts implementing the unitrust concept are commonly described as "total return trusts," "total return unitrusts," or "prudent return unitrusts." *See, e.g.,* Robert B. Wolf & Stephan R. Leimberg, *"Total Return Unitrust: The (TRU) Shape of Things to Come,"* Est Planner's Alert, at 6 (Dec. 1998); Robert B. Wolf, *"Total Return Trusts—Can Your Clients Afford Anything Less?"* 33 Real Prop, Prob & Tr J 131 (1998); Diamond, *supra.*

Another advantage of the total return unitrust is that it is more likely to accomplish a trustor's objective of providing cash flow for the current beneficiary. The beneficiary is also better situated to predict the amount of distributions over the course of a year, because the fair market value of the trust assets are measured on a specific date each year *(e.g.,* the first business day of the year) and the distributions for the entire year are based on that valuation. It is worth noting, however, that total return unitrusts have also been criticized based on the fact that they require distributions based on market value, which is unpredictable from year to year and will lower a beneficiary's distributions in a bear market. *See* James P. Garland, *"The Problem with Unitrusts,"* 1 J of Portf Mgmt No. 4 (spring 1999). Preserving some discretion for the trustee to make additional distributions based on the current beneficiary's needs or to maintain a standard of living should address this concern to a large extent.

Numerous additional advantages of the total return unitrust have been advanced. These include:

- avoiding dissension between the current and remainder beneficiaries due to investment strategies;
- reducing or eliminating the uncertainty and potential for discord that accompanies discretionary power to make distributions;
- protecting the trustee against having surcharges sought by remainder beneficiaries who may claim that they were harmed by an emphasis on investment in income-producing assets;
- tempering the effects of year-to-year market fluctuations on the current beneficiary; and
- numerous other market-related advantages, relating to such concepts as dollar cost averaging and reduction of transaction costs associated with asset turnover.

For a detailed discussion of these and other advantages, *see* Wolf & Leimberg, *supra,* at 7-8.

As the unitrust concept gains wide acceptance, it appears to be replacing the income-based distribution standard. The concept's increasing number of supporters view the income-based standard as outdated and as a "liability trap" for the practitioner as well as the trustee. *See* Diamond, *supra,* at 13. Some have gone so far as to recommend replacing traditional definitions of income under state trust law with a definition tied to the unitrust concept. For example, earlier this year a legislative committee assisted by Professor Kenneth F. Joyce of the University at Buffalo School of Law proposed legislation in New York to define income as a percentage of the trust corpus valued annually. A discussion of that proposed legislation can be found on Steve Leimberg's Web site at http:\\www.leimberg.com, on the Newsletter Archive page.

Applications of the Unitrust Concept

Unitrust-based distribution formulas can be adapted to a wide range of settings. A few examples are described below:

- Under IRC § 2056 a qualified terminable interest trust ("QTIP") must require all net income to be distributed to the surviving spouse. A settlor who wants to ensure that the surviving spouse receives a mandatory cash flow benefit, however, can require the trustee to distribute the greater of net income or a stated percentage to the spouse.
- In a non-QTIP context, a settlor may want to permit a spouse or child to receive a stated annual percentage of the trust value and benefit from increases in trust value, but also may want to ensure that the beneficiary receives a specific dollar amount as a minimum. In that case, the trust instrument could require the trustee to distribute the greater of that dollar amount or the unitrust amount annually to the beneficiary.
- Conversely, a settlor may want a beneficiary, such as a child or grandchild, to benefit from increases in trust value through a unitrust approach, but not to the extent that the unitrust payment would exceed a certain dollar amount. In such a case, the trustee might be required to distribute the lesser of the unitrust amount or the fixed dollar amount annually to the beneficiary.

Numerous permutations of the unitrust formula have been proposed and implemented. A detailed discussion of them is beyond the scope of this article. For a detailed discussion of various unitrust formulas, see William L. Hoisington, *"Modern Trust Distribution Design and Implementing Investment Strategies,"* Cal Continuing Educ of the Bar at 18-28 (June 1998), (describing various alternative unitrust distribution formulas, based on such considerations as discretion, objective external standards, percent of market value, and references to indexed annuity or market performance); Diamond, *supra,* at 14-15 (describing additional formulas and suggesting a unitrust payout between 3 percent and 5 percent, the lower figure tending to favor the remainder beneficiary and the higher figure tending to favor the income beneficiary).

Conclusion

By replacing traditional trust distribution formulas with unitrust-based formulas, practitioners can avoid many of the conflicts and difficulties encountered by trustees and beneficiaries. Trusts employing unitrust provisions allow trustees to invest for total return, consistent with modern portfolio theory and the Act. When properly implemented, this approach also provides greater certainty for the trustee and beneficiaries and will better accomplish the settlor's objectives.

Erik S. Schimmelbusch
Davis Wright Tremaine
Portland, Oregon

Estate of Magnin Opens New Planning Opportunities

Clients, with help from their advisors, have long looked for ways to remove assets from their taxable estates yet enjoy the use of the assets for their lifetimes. IRC § 2036, which has been a part of the estate tax code almost from the beginning, is Congress's answer to taxpayer attempts to retain the income from or use of retained assets. Section 2036 provides as follows:

> The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer *(except in case of a bona fide sale for an adequate and full consideration in money or money's worth)*, by trust or otherwise, under which he has retained for his life or for any period * * * which does not in fact end before his death—
>
> (1) the possession or enjoyment of, or the right to the income from, the property, or
>
> (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom. (Emphasis added.)

One technique with intriguing possibilities of avoiding § 2036 has been the sale of a remainder interest in property. The sale of a remainder interest seeks to take advantage of the emphasized language in § 2036. The technique is simple: The taxpayer simply sells his or her remainder interest in certain property, while retaining the income from, or use of, the property for his or her lifetime. As long as the sale is for consideration equivalent in value to the actuarial value of the remainder interest, § 2036 does not apply.

Unfortunately, the IRS has long argued that unless the consideration was equivalent to the total value of the subject property (and not just the value of the remainder interest), § 2036 would apply to bring the entire date of death value of the property into the taxpayer's estate. Until recently, courts have generally sided with the IRS. In the last few years, however, the Third and Fifth circuits, and now the Ninth Circuit, have held that the consideration must only match the value of the transferred remainder interest.

Estate of Magnin

In *Estate of Magnin*, 184 F.3d 1074 (9th Cir 1999), the Ninth Circuit thoroughly examined the issue and agreed with the Third and Fifth circuits that for the "adequate and full consideration" exception to apply, the decedent must have received adequate and full consideration only for the interests sold, *i.e.,* the actuarial value of the remainder interest. The court rejected the government's position as illogical and inconsistent with the meaning of the statute. According to the government, to fall within the exception, the purchaser must pay consideration equal to the full value of the property, not just the remainder interest. Having done so, however, the purchaser would have made a gift to the seller, because the purchase price exceeded the value of the purchased property—the actuarial value of the remainder interest.

The court also rejected the government's argument that the "adequate and full consideration" exception should have limited applicability because, according to the IRS, "Congress viewed transactions involving the sale of a remainder interest as 'inherently abusive.'" *See id.* at 1078. However, the Commissioner cited nothing to the court that indicated that Congress viewed sales of remainder interests as inherently abusive.

Although the court found for the taxpayer on the legal principle discussed above, it did not agree with the estate on two other issues. First, it rejected the estate's argument that arm's-length transactions are presumed to be for adequate consideration. Second, it rejected the estate's argument that, when testing the adequacy of the consideration as compared with the remainder interest, the value of the consideration should be measured as of the time of death, or a proportional approach must be taken. The court rejected both approaches.

The problem the estate alluded to in its argument is the case in which the consideration falls short of the value of the remainder interest. Under IRC § 2043, if the consideration falls short, the full date of death value of the property (of which the remainder interest was sold) is included in the estate of the seller under § 2036, less the amount of consideration received by the seller. For example, if the decedent sold $100 of property with a remainder interest valued at $10 for consideration of $9, $91 ($100 - $9) will be included in the decedent's estate, assuming the property is still worth $100. If the property appreciated substantially in value, the estate is forced to include the full appreciated value net of the consideration at date of transfer value, even if the consideration fell $1 short of "adequate."

Under the proportional approach, if the consideration paid was equal to 90 percent of the value of the remainder interest (as in the example above, $9 for a remainder interest worth $10), then 90 percent of the property would be excluded from the decedent's estate. The decedent would include $10 in the example above. The court acknowledged that the proportional approach would be the most fair but could not read it into the statute.

The message from *Estate of Magnin* is clear: Sales of remainder interests are now a valid planning technique in the Ninth Circuit, but the consideration *must* be adequate; there is no room for error.

Planning Opportunities

Estate of Magnin opens some intriguing planning opportunities. It can allow the client to retain the use of, and income from, property during his or her lifetime yet not suffer estate inclusion as a result.

For sales to nonfamily members, the client can simply sell the remainder interest in the property for its actuarial value, while retaining the use of, and income from, the property for his or her lifetime. "Family members" for this purpose means the transferor's spouse, any ancestor or lineal descendant of the transferor or his spouse, any brother or sister of the transferor, and any spouse of the foregoing. IRC §§ 2702(e), 2704(c)(2).

However, most sales will likely be made to family members and will be governed by IRC § 2702. Although it is beyond the

scope of this article to discuss § 2702 in detail, a brief summary is useful to understanding the issues involved with a remainder sale.

Section 2702. One technique commonly used by estate planners as a means to reduce the taxable value of a client's estate is the GRIT–Grantor Retained Income Trust. The original GRIT took the form of a trust for a term of years, usually at least 10. The grantor would keep the income from the trust for the duration of its term, after which the balance would pass to his or her family, free of estate tax. Actuarially, the value of the initial gift to the GRIT (that is, the remainder interest) would be quite small. Because the purpose of the GRIT was to transfer assets tax-free to the grantor's family, the trust investments would be manipulated to minimize the amount of income passing back to the grantor during the 10-year term, so as to maximize the value of the trust assets passing to the family. To end this abuse, Congress enacted § 2702, which sets some ground rules applicable to trusts and other arrangements with retained interests established for the benefit of family members.

Section 2702 provides that solely for the purpose of determining whether a transfer of an interest in trust to or for the benefit of a member of the transferor's family is a gift (and the value of the gift), the value of any interest in such trust *retained* by the transferor shall be determined as provided in the section. A transfer of an interest in property in which there are one or more "term" interests *(i.e.*, life estate or term of years) is treated as a transfer in trust. *Id.* Thus, § 2702 is potentially applicable to all sales of remainder interests to family members, even though a trust is not involved.

Generally, § 2702 requires that the transferor, or "grantor," retain only certain kinds of income interests. The interest must either be in the form of an annuity or unitrust, with techniques called, respectively, the Grantor Retained Annuity Trust ("GRAT") or Grantor Retained Unitrust ("GRUT"), or must be a life estate in a personal residence, using the Qualified Personal Residence Trust ("QPRT"). (The GRUT is not commonly used and will not be discussed here.) Other life or term interests in property or trusts retained by the grantor are ignored for gift valuation purposes, so the full value of the property must be reported for gift tax purposes.

With a GRAT, the grantor funds a trust, retaining the right to an annuity for a term of years. With a QPRT, the grantor funds a trust with a personal residence and retains the right to reside in the residence for a term of years. In either case, if the trusts are structured in a manner that complies with the requirements of § 2702, the income and remainder interests are valued under IRC § 7520. Practically speaking, this is usually done using published IRS tables or commercial computer software.

The problem with both of these techniques is that to avoid § 2036 (assuming consideration is not paid for the remainder interest), the trust term must be set at a fixed term and the grantor must outlive the term. If the grantor dies during the trust term, the assets are included in his or her estate under § 2036. If the grantor survives the term, he or she is faced with a lower income (having outlived the annuity) with having to move from his or her residence, or with the need to rent the residence back from the remainder beneficiaries, none of which are desirable prospects.

Sale of Remainder Interest in GRAT or QPRT. The foregoing problems can be avoided if the grantor can sell the remainder interest to his or her children (or other family members). If so, instead of structuring the trusts with fixed terms, life estates can be used. Under *Estate of Magnin*, if the consideration is adequate, § 2036 will not apply.

Nothing in the code or regulations proscribes the use of a life estate for the retained interest in GRATs or QPRTs. For GRATs, the regulations allow the use of a term of years, life estate, or the shorter of either. Treas Reg § 25.2702-3(d)(3). (With GRATs, special care should be exercised to ensure proper valuation of the remainder interest, taking into account the possibility that the fund will be exhausted during the annuitant's lifetime. *See* Rev Rul 77-454, 1977-2 CB 351.) The "QPRT" exception to § 2702 requires the use of the personal residence by persons holding "term interests," further defined as "a life interest in property" or "an interest in property for a term of years." IRC § 2702(a)(3)(A)(ii), (c)(3).

Where the transfer of the remainder interest is made for consideration, the value of any gift (as determined under § 2702) is reduced by the amount of consideration received in the transfer. *See* Treas Reg § 25.2702-4(d), Example 2.

To prevent application of § 2036, the consideration must come in the form of a bona fide sale and must be adequate and full in money or money's worth. The regulations provide that to satisfy these requirements, the transfer must have been made in good faith and the price must have been adequate and full equivalent reducible to a money value. Treas Reg § 20.2043-1(a). The IRS will respect sales between family members as long as they are legitimate sales. The same standards—which are mainly an application of care and common sense—should apply for sales of remainder interests. The sale must not come with any "strings" attached and should be documented appropriately.

The consideration should come entirely from the purchasers and should not be furnished by the seller by way of a gift. If the seller provides a portion of the consideration, the IRS may assert the step-transaction doctrine unless the prior gift was "old and cold" and the gift and subsequent sale were not structured as part of the same transaction. Although usually arising in the context of corporate reorganizations, the step-transaction doctrine would be easy to apply in this situation, because the seller would be in the same position after the transaction as if he or she had simply made a gift of the remainder interest, a transaction clearly within § 2036. *See Penrod v. Commissioner*, 88 TC 1415, 1429 (1987).

Conceivably, the seller could lend the consideration, for example by taking back a note, but the note should bear adequate interest (which would probably have to be the rate under § 7520 used to value the remainder interest), have commercially reasonable terms, and be adequately secured. The terms of the note (timely payments made, etc.) should then be respected. *See, e.g., Estate of Meyer B.Berkman,* 48 TCM (P-H) ¶ 79-046 (1979). The consideration could also be given in the form of an annuity, which might be especially useful if the client is in need of cash flow.

A danger exists if the property transferred is not easily val-

ued, for example a remainder interest in stock of a closely held corporation. Even if an appraisal is obtained, if the value is subsequently adjusted upward on audit, the consideration given for the remainder interest would then be inadequate. A price adjustment clause, increasing the price to prevent a gift, would probably not work. *See Commissioner v. Procter*, 142 F.2d 824 (4th Cir 1944). A conservative approach to valuation should be taken or property capable of easy valuation, such as publicly traded stock, should be used for the gift.

If the transaction is carefully structured, the property in the GRAT or QPRT remaining at the transferor's death, including all appreciation, will not be included in his or her estate. The consideration received in the sale, at its appreciated value, would be included, if still held by the transferor. In theory, its appreciated value will match the value of the property sold, which is the reasoning behind the court's decision in *Estate of Magnin*. However, the consideration may have been consumed or given away during the decedent's lifetime.

Joint QPRTs. A particularly interesting scenario is the application of the sale to a joint husband-wife QPRT, where each contributes an undivided one-half interest in the residence to a QPRT (or two separate QPRTs). The couple's children or other family members purchase the remainder interest. The value of the remainder, and hence the purchase price, should be relatively small because it follows two lives. Each spouse would acquire from the other a contingent life estate following the first death. Care would have to be taken to adjust the consideration (with a documented transfer of property or money from one spouse to the other) to reflect age differences. But if adequate and full consideration is paid by the surviving spouse for the life estate in the deceased spouse's interest in the property, it will not be included in the estate of either the deceased spouse or the surviving spouse.

Conclusion

Obviously, the economics of the remainder interest sale in any given situation should be examined. The sale usually involves the sale of an interest in highly appreciating property, so that the true projected value of the remainder interest is higher than the actuarially computed value. It might involve a sale by a relatively unhealthy (but not terminally ill) parent who is likely not to outlive his or her actuarial life expectancy (again, the projected remainder interest would be more valuable than the actuarial value). The client may be in need of the funds received in the remainder interest sale for his or her support. For example, a house-rich but cash-poor client, with reasonably well-off children, may be a good candidate for the remainder interest sale.

Estate of Magnin has opened the door to interesting possibilities for the use of remainder interest sales. However, care must be exercised to ensure that the sale is structured properly and will be respected for estate and income tax purposes.

Stephen J. Klarquist, LL.M
Zalutsky & Klarquist, P.C.
Portland, Oregon

Final Rules On Adequate Disclosure Of Gifts Published

Appraisals of property transferred by gift have become even more important under the final regulations on adequate disclosure of gifts, published by the Internal Revenue Service on December 3, 1999. 64 Fed Reg 232 at 67767. The final regulations reflect an evolutionary change from the proposed regulations published almost a year earlier.

As with the proposed regulations, the final regulations describe the elements of disclosure necessary to obtain the benefits of the period of limitations for the assessment of gift tax under IRC § 6501(c)(9). Some of the most significant changes from the proposed regulations are as follows:

Finality of legal issues. Legal issues with respect to gifts get the same protection as valuation issues. This can be particularly important in some cases, such as whether a gift to a trust qualifies for the annual exclusion. Example 1, Treas Reg § 25.2504-2(c).

Appraisal. Attaching an appraisal to a return can satisfy many of the disclosure elements. Treas Reg § 301.6501(c)-1(f)(3). The appraisal must meet specified standards and must include specific information. To some degree, this information is different from the information which must be disclosed in the absence of an appraisal. Gift tax return preparers may wish to meet the disclosure standards under both approaches.

Financial data. The final regulations describe the financial data and other elements required for adequate disclosure in more detail than in the proposed regulations. Treas Reg § 301.6501(c)-1(A)(2)(iv).

Entity value. The value of 100 percent of an entity must be disclosed when a portion of the entity is transferred. The regulations state that if the value of 100 percent of the entity is not disclosed, "the taxpayer bears the burden of demonstrating that the fair market value of the entity is properly determined by a method other than a method based on the net value of the assets held by the entity." Treas Reg § 301.6501(c)-1(f)(2)(iv). Interestingly, the regulations describing the information which must be included in an appraisal do not explicitly require that the value of 100 percent of the entity be disclosed. Treas Reg § 301.6501(c)-1(f)(3). Where it will be difficult for the donor of a partial interest in an entity to determine the value of 100 percent of that entity, attaching an appraisal meeting the standards of Treas Reg § 301.6501(c)-1(f)(3) should provide adequate disclosure.

Tiered entities. Where there is a gift of a partial interest in an entity which owns a partial interest in another entity or entities and any interests are valued with discounts, disclosure information must be provided for each such interest, if the information is "relevant and material." Treas Reg § 301.6501(c)-1(f)(2)(iv). Again, the regulations describing the information which must be included in an appraisal do not explicitly require this information.

Nongift transfers. Transfers in the ordinary course of business, such as payment of a salary to a family member working for the family business, need not be disclosed on a gift tax return if all parties properly report the salary for income tax purposes. Other nongift transactions will be considered adequately disclosed on a gift tax return if certain details about the transfer are disclosed and there is an explanation as to why the transfer should not be treated as a gift. Treas Reg § 301.6501(c)-1(f)(4). Although the final regulations do not explicitly require the same extensive disclosures required for gift transfers, a thorough explanation might include most of that information.

Split gifts. The final regulations clarify that in the case of split gifts, adequate disclosure with respect to the donor's gift tax return is deemed adequate disclosure on the consenting spouse's return. Treas Reg § 301.6501(c)-1(f)(6).

Disclosure of controversies. The proposed regulations required disclosure of any potential gift tax controversy concerning each gift. In the final regulations, this provision has been eliminated. However, the donor must report any positions taken which are contrary to any proposed, temporary or final regulation and any revenue ruling published at the time of the transfer. Treas Reg § 301.6501(c)-1(f)(2)(v).

Substantial compliance. The IRS refused to add a provision to the regulations allowing a return to be considered to have adequate disclosure if it is in "substantial compliance" with the regulations. However, in the supplementary information to the final regulations, the IRS states that "it is not intended that the absence of any particular item or items would necessarily preclude satisfaction of the regulatory requirements." 64 Fed Reg 232 at 67768. No such statement appears in the actual regulations.

Effective date. Because of different effective dates in the Taxpayer Relief Act of 1997 for the amendments to IRC §§ 6501(c)(9) and 2504(c), 1997 gifts are subject to different rules depending on whether or not the gift was made prior to August 6, 1997. The effective date rules are set forth in Treas Reg § 25.2504-2 and illustrated in Example 2 at Treas Reg § 25.2504-2(c).

Gifts to trust. The final regulations now specifically allow attaching a copy of any trust to the return in lieu of a description of the trust's terms. Treas Reg § 301.6501(c)-1(f)(2)(iii).

William D. Brewer
Hershner Hunter Andrews Neill & Smith LLP
Eugene, Oregon

Practice Tips: Planning for a Beneficiary's Divorce

Butler and Butler, 160 Or App 314 (1999), a recent Oregon Court of Appeals case described in the October 1999 issue of the *Newsletter,* prompted two lawyers to contribute the following suggestions for planning for the possible divorce of the beneficiary of a client's estate.

Estate Planning Questionnaires

Butler and Butler dealt with the disposition of inherited property when the recipient is in the process of getting divorced. One of the primary factors in determining whether the noninheriting spouse is entitled to any of the inheriting spouse's inheritance is the intent of the grantor of the inheritance. Estate planners should therefore include in their estate planning questionnaires a question similar to the following: "If your child is in the process of divorcing when you pass away, would you like his or her spouse to be able to participate in that child's share of your estate?" Although one might reasonably predict the answer to be "of course not," in my experience that is the answer only about half the time. Estate planning attorneys should also be careful to document the client's response so that if an issue as to the grantor's intent arises, the estate planning attorney could possibly testify on that issue.

Patricia L. Heatherman
Merrill, O'Sullivan, MacRitchie,
Petersen & Dixon LLP
Bend, Oregon

Detrimental Reliance

Estate planning clients are frequently concerned about protecting gifts and devises to their children from the grasping hands of those children's spouses in the event of divorce. If money is held in a child's separate name, or even in a separate trust for the child, how effectively are those funds insulated from the reach of the divorce court? Practitioners should be aware that *Butler and Butler* did not address one major factor, that of detrimental reliance.

Assuming that a client wants to protect transfers from the reach of a beneficiary's divorcing spouse, what advice can an estate planner provide? If the gift or inheritance vests before the dissolution, it is a marital asset subject to the statutory presumption of equal contribution. The burden of proof shifts to the recipient to show that the gift or inheritance was acquired by the recipient spouse free of contribution of the other spouse and that there was no donative intent to the other spouse. Thus lesson number one is to document gifts so that it is clear that donative intent runs only to the child and not to the child's spouse.

The courts next look at whether the asset was commingled with other family assets and whether the nonrecipient spouse had any access to or control over the asset. Thus lesson number two is to make sure that the recipient child understands the importance of not commingling the asset. This is obviously difficult if the asset is used to purchase a new car for the child's family or goes to the remodeling of the family kitchen.

The major element not addressed in *Butler and Butler* is detrimental reliance. The noninheriting spouse frequently argues that although the inherited asset was not commingled,

the parties acted as if their retirement was provided for by the inherited asset. Accordingly, during the marriage they increased their level of spending and did not save as much for retirement as they might have had the inherited asset not existed. The court relied on this factor in *Becker and Becker*, 122 Or App 567 (1993). There the court stated that the unhappy couple "used husband's salary and did not save for retirement in anticipation that wife's trust receipts and husband's pension would keep them financially secure during retirement. The judgment partially compensates husband for his reliance on wife's assets for retirement." *Id.* at 571. The judgment to which the court refers was against the wife in the sum of $2,024,644. Lesson number three is that there is not a great deal one can do about this factor other than to keep gifts a secret from the in-laws. Presumably if the in-laws do not know about the gifts, they cannot argue that they relied upon them.

A final practical factor, implicit in many long-term marriage cases, is that the courts will not let a property division become too lopsided in favor of either spouse. The court seeks a division of assets that is "just and proper in all the circumstances." ORS 107.105(1)(f). This statute allows judges broad discretion and, as cases such as *Becker and Becker* demonstrate, they do not hesitate to exercise that discretion under certain circumstances.

In summary, although one can furnish a certain amount of reassurance to clients through the use of trusts and carefully defined gifts, complete protection from the long arm of the divorce court is not available. Although courts may not be able to award a portion of a trust because of a spendthrift clause, they can use an offsetting judgment against the beneficiary, as was the case in *Butler and Butler*. Clients should be so advised.

Joshua Kadish
Meyer & Wyse LLP
Portland, Oregon

What's New

Roberts v. Fearey **162 Or App 546 (1999)**

In *Roberts v. Fearey*, the Oregon Court of Appeals decided the issue of whether a trustee's attorney can be liable to the beneficiaries of the trust for legal malpractice. In *Roberts,* the original trustee of two trusts hired the defendant as his attorney to advise him with regard to administration of the trusts. While serving as trustee, the trustee used trust funds for several questionable loans to a corporation of which the trustee was a shareholder. The notes were not repaid, resulting in a substantial depletion of the trust corpus. The plaintiff alleged that the defendant attorney was aware of the trustee's loan transactions and failed to investigate the loans, failed to take action to stop the trustee from breaching his fiduciary obligations, and failed to disclose the trustee's conduct to the beneficiaries. Thus, argued the plaintiff, the trustee should be held liable to the beneficiaries of the trust for malpractice.

The dispute in *Roberts* centered on the applicable test for determining to whom an attorney is liable for malpractice. The court in *Roberts* rejected the plaintiff's theory that an attorney's liability should be determined under general negligence foreseeability principles. Instead, the court held that an attorney can be liable for malpractice only to those with whom he or she is in privity, noting that an attorney ordinarily is not liable to those outside of the attorney-client relationship because there is no obligation to protect anyone outside of the attorney-client relationship from economic losses. The court also stated, however, that it would carve out exceptions to the privity rule on a case-by-case basis.

The court fashioned a two-part test to determine in the *Roberts* case whether the plaintiff beneficiary's action against the defendant attorney could stand as a matter of law. The first prong of the test is to determine whether there was an attorney-client relationship between the attorney and the trusts or the trust beneficiaries. The court in *Roberts* answered this question in the negative, agreeing with OSB Legal Ethics Op No. 1991-119 that in the context of an attorney's ethical obligations, an attorney retained by a fiduciary represents only the fiduciary. The second prong of the test is to determine whether there are other circumstances that indicate the existence of a special or de facto relationship that justifies imposing a duty on the attorney to pursue the economic interests of the trusts or the trust beneficiaries. The court in *Roberts* also answered this question in the negative, stating that it would not extend the trustee's duty to the trusts and its beneficiaries to the trustee's attorney as a per se rule. In addition, the court stated that just because the trustee's attorney would advise the trustee to make decisions that have the effect of benefitting the trust and more indirectly the beneficiary's economic interests, and that the trustee's attorney may be in that sense acting "at least in part" to further the economic interests of the trust and the beneficiaries, those facts did not establish the existence of a special de facto relationship as a matter of law, but are only factors the court considers in making its decision whether the court will recognize a special relationship between the trustee's attorney and the trust beneficiaries.

The court thus concluded in *Roberts* that the plaintiff only alleged passive conduct by the defendant attorney and that such an allegation did not demonstrate sufficient circumstances to carve out an exception to the privity requirement. The court further concluded that the defendant attorney owed no duty to protect the trust or the beneficiaries from economic losses. The court, however, did note that the successor trustee may still sue his breaching predecessor, and if the breaching trustee has received inadequate legal services, he in turn may sue his attorney for malpractice. Further, if the trustee's attorney knowingly aids or assists the trustee in commission of the breach of fiduciary duty, the successor trustee may also bring a claim for vicarious liability against the former trustee's attorney.

Lisa N. Bertalan
Bryant, Lovlien & Jarvis PC
Bend, Oregon

Estate of James Wyburn Tressel v. Tressel
162 Or App 188 (1999)

This case involved an appeal from a summary judgment on the issue of whether a joint tenancy with right of survivorship account was properly established by James and Kathryn Tressel. The issue was raised by the personal representative of Mr. Tressel's estate, who would include in the estate half the proceeds of the account if the property was not held in joint tenancy with right of survivorship but as tenants in common.

When Mr. and Mrs. Tressel established an account with a brokerage company, the representative filled out a written Customer Holding Sheet that indicated among other things that the account was held "JTWROS," to show that the account was held as joint tenants with the right of survivorship. Neither of the Tressels signed the Customer Holding Sheet.

The plaintiff argued that the Customer Holding Sheet did not constitute a "written instrument" required to establish a survivorship account within the meaning of ORS 105.920, because written instruments must be signed to be effective. The court reiterated that a joint tenancy (1) may not be created orally but only by written instrument, (2) such instrument must expressly declare that the interest created is to be a joint tenancy, and (3) the expressed declaration must be contained in a written instrument that creates, or is part of the process in creating, the joint tenancy. The plaintiff did not dispute that the initials "JTWROS" on the Customer Holding Sheet constituted an expressed declaration that the intent was to hold the account with right of survivorship. The argument primarily turned on the allegation that the Customer Holding Sheet was not a written instrument because it was not signed. The court noted that the statute does require a writing but does not require a signed writing. The court stated that it would not add to a statute language that the legislature omitted.

The plaintiff alternately advanced the argument that the Customer Holding Sheet was an internal accounting document created by the brokerage company and may never have been seen by the Tressels. The court disregarded this argument, stating that the uncontradicted evidence established that the Customer Holding Sheet was filled out at the direction of the Tressels and reflected their expressed wishes.

The plaintiff further argued that there were disputes of fact that precluded the lower court from properly issuing summary judgment. The major argument was that Mr. Tressel had agreed as a condition of divorce from his first wife to give their children proceeds from the sale of a home located in Los Gatos. The plaintiff argued that this created a factual question as to whether Mr. Tressel intended to transfer assets to his wife rather than his children. There was no evidence, the court noted, that the assets Mr. and Mrs. Tressel placed into the joint account were proceeds from the sale of the house, and, in fact, there was evidence that Mr. Tressel had also set up a separate account at the brokerage company that he intended to go to the children.

A dissenting judge argued that there were indeed factual disputes as to whether the Customer Holding Sheet satisfied the requirements of ORS 105.920. The dissent raised the issue of whether the Customer Holding Sheet was merely a third-party document that memorialized the Tressels' desires to create a joint tenancy but did not actually create one. Agreeing that the creation of the tenancy document need not be handwritten and signed, the dissenting judge believed that the creation needed to be at the Tressels' direction, and thus the form needed to be completed either by the Tressels or by an agent of theirs. The judge's factual question was whether the individual who filled out the form was an agent for the Tressels or an agent for the brokerage company.

Procedure To Notarize Affidavits and Other Documents

The disciplinary board of the Oregon State Bar recently approved a stipulation for reprimand of a Beaverton attorney for misrepresentation and false statement of fact. The attorney repeatedly took part in an office procedure involving the execution of estate planning documents. Documents including affidavits were apparently signed by witnesses, with the affidavits later being presented to an office notary to complete the notarial subscription. The notarial act was an untrue statement, in that the witnesses had not signed in the presence of a notary, as required by law. The notary would complete the notarial certificate upon the direction of the attorney.

As a result of this case, attorneys should review their office procedures to make sure that any notarial acts are properly completed and specifically that witnesses sign affidavits in the presence of the notary who will notarize their signatures.

Timothy R. Strader
Hanna, Kerns & Strader
Portland, Oregon

CALENDAR OF SEMINARS AND EVENTS

- January 28, 2000 (Sponsored by the Estate Planning Council of Portland and Northwestern School of Law) **29th Annual Estate Planning Seminar**, Portland Convention Center, Portland, Oregon. Telephone: (503) 233-1224.

- February 11, 2000 (Sponsored by National Business Institute) **How to Draft Wills and Trusts in Oregon**, The Red Lion Coliseum, Portland, Oregon. Telephone: (715) 835-7909.

- February 17, 2000 (Sponsored by ALI-ABA) V**LR: Annual Winter Estate Planning Practice Update** (American Law Network, Live Satellite TV Nationwide). Telephone: (800) CLE-NEWS.

- February 17-18, 2000 (Sponsored by Professional Education Systems, Inc.) **Integrated Estate Planning and Asset Protection Conference (Includes a Special Discussion of the Impact of the "Anderson" and "Lawrence" Decisions)**, The Doubletree Orlando Resort, Orlando, Florida. Telephone: 1(800)826-7155 or (715)836-9700.

- February 17-19, 2000 (Sponsored by ALI-ABA) **Representing Professional Service Organizations: Qualified Plans and Other Employee Benefits, Tax, Corporate, Insurance, Health Care, and Estate Planning Issues**, Doubletree, La Posada, Scottsdale, Arizona. Telephone: (800) CLE-NEWS.

- February 24-26, 2000 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates,** The Plaza, New York, New York. Telephone: (800) CLE-NEWS.

- February 24-26, 2000 (Sponsored by ALI-ABA) **Advanced Estate Planning Techniques**, Grand Wailea Resort & Spa, Maui, Hawaii. Telephone: (800) CLE-NEWS.

- March 8-10, 2000 (Sponsored by National Law Foundation) **7th Annual Great Western Tax & Estate Planning Conference**, Caesar's Palace Resort, Las Vegas, Nevada. Telephone: (800) 634-6661 or (702) 731-7222.

- March 16, 2000 (Sponsored by ALI-ABA) **VLR: Retirement Distribution Basics for Estate Planners** (American Law Network, Live Satellite TV Nationwide). Telephone: (800) CLE-NEWS.

- April 24-28, 2000 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, The Plaza, New York, New York. Telephone: (800) CLE-NEWS.

- May 4-5, 2000 (Sponsored by New York University) **Family Wealth Institute**, The Millennium Broadway, New York, New York. Telephone: (212) 790-1321.

- June 1-2, 2000 (Sponsored by ALI-ABA) **Charitable Giving Techniques**, Seaport Hotel & Conference, Boston, Massachusetts. Telephone: (800) CLE-NEWS.

- 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, Madison, University of Wisconsin Law School (CLEW). Telephone: (800) CLE-NEWS.

- June 29-30, 2000 (Sponsored by ALI-ABA) **Representing Estate and Trust Beneficiaries and Fiduciaries**, Sheraton Hotel & Towers, Chicago, Illinois. Telephone: (800) CLE-NEWS.

BULK RATE
U.S. Postage
PAID
Portland, OR
Permit No. 341

Oregon State Bar
Estate Planning and
Administration Section
PO Box 1689
Lake Oswego, OR 97035-0889

Oregon Estate Planning and
Administration Newsletter

Susan N. Gary
Editor-in-Chief

Editorial Board
Lisa N. Bertalan
Susan C. Daigle
Stephen J. Klarquist
Emily V. Karr
Erik S. Schimmelbusch
Timothy R. Strader