Newsletter

# New Administrative Rule Clarifies Laws Relative to Individuals Serving as Professional Fiduciaries

There has long been a cottage industry of individuals in the business of serving as professional fiduciaries. The laws have evolved in the last several years to clarify the instances in which an unlicensed individual may serve as a professional fiduciary. In 1997 the Oregon legislature amended existing banking statutes to define who is authorized to serve as a fiduciary. ORS 709.005(1) provides that no company shall transact any "trust business" until the company has obtained a certificate of authority from the Department of Consumer and Business Services. ORS 709.030(1) provides that no "person" other than a trust company shall transact a trust business. Trust business is defined as (a) acting as trustee as defined in ORS 128.005(2), (b) acting as a fiduciary as defined in ORS 125.005(2), and (c) acting as a personal representative as defined in ORS 111.005(26). "Trust company" means a company authorized to transact trust business. ORS 706.008(37). The term "person" includes individuals and entities. ORS 706.005(27).

ORS 709.030(4) exempts certain classes of persons from the licensing requirement. These include a person who (a) does not and will not regularly transact trust business in the ordinary course of the person's business, (b) acts in a manner authorized by law and in the scope of authority as an agent of a trust company, or (c) is an attorney rendering a service customarily performed by an attorney. Other limited classes are also exempt, including those exempt by rule of the director.

In 1999, the legislature enacted ORS 125.240 and 125.221, setting forth disclosure requirements for professional fiduciaries. The law defines "professional fiduciary" as a fiduciary "who is acting at the same time as a fiduciary for three or more protected persons who are not related to the fiduciary." ORS 125.240(5). With few exceptions, unlicensed individuals were still prohibited by the banking statutes from serving as a fiduciary without complying with the licensing requirements of a trust company. In an effort to remedy this, the Division of Finance and Corporate Securities sought input from interested groups such as the Oregon Bankers Association, the Guardian/Conservators Association and the Elder Law and Estate Planning & Administration Sections of the Oregon State Bar. After a notice and comment period, the Division of Finance and Corporate Securities adopted the following administrative rule on October 25, 2002:

> "OAR 441-505-4030
>
> "Trust Company Exemption; Court Appointed Fiduciaries
>
> "(1) As authorized by ORS 709.030(4) (g), an exemption from trust company licensing as required by ORS 709.005(1) is hereby created for any person appointed as a Fiduciary by a court of competent jurisdiction.
>
> "(2) As authorized by ORS 709.030(4) (g), an exemption from trust company licensing as required by ORS 709.005(1) is hereby created by any individual appointed as

**Oregon Estate Planning and Administration Section Newsletter**
Volume XXI, No. 1
January 2004

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

## *In This Issue*

a Personal Representative, as defined in ORS 111.005, or as a Special Administrator as described in ORS 113.005, by a court of competent jurisdiction."

The adoption of this rule specifically authorizes individual professional fiduciaries to conduct business, under certain circumstances, *without* the licensing requirement. This is the first time authority to act as a professional fiduciary has been granted to individuals. Section (1) of OAR 441-505-4030 addresses service as a "fiduciary." It does not, however, specifically define the word "fiduciary." The definition applicable in the relevant statutes is a "guardian or conservator appointed*** with respect to a protected person." ORS 125.005(2). It should be mentioned here that even trust companies must have court appointment to serve as a conservator, personal representative, or special administrator. The administrative rules have not specifically addressed who may serve as a trustee. One interpretation is that except as provided in ORS 709.030, licensed trust companies are still the only entities allowed to serve as trustees.

The legislative intent behind the current rules is presumably to protect the public. Banks and trust companies under court appointment are subject to court oversight of their actions and must submit to state or federal ongoing audits and reviews. In contrast, the court is able to monitor and supervise private professional fiduciaries under court appointments, but is not able automatically to gain jurisdiction over fiduciary appointments through a trusteeship or power of attorney. Furthermore, unless specifically required by the trust document, private professional trustees may also lack the protection provided to beneficiaries by the requirements for state and national charters. These rules and procedures have been developed over many years and thus were not codified simultaneously.

## Differences Between Private Individual Fiduciaries and Corporate Trust Companies

There are significant differences between private professional fiduciaries and trust companies that may explain the difference in treatment in the statutes. Trust companies are strictly regulated in their respective states under a state charter or by the Office of the Comptroller of the Currency (OCC) under a national charter. Trust companies are continually subject to the oversight of internal, federal, and state auditors. Other differences include:

- **Bonding –** Under most circumstances, courts cannot require trust companies to post a bond for any fiduciary appointment. ORS 709.240. To obtain and maintain their charters, trust companies are already bonded, insured, capitalized, etc. Although private fiduciaries are bonded for each appointment they still have not been able to obtain insurance for their general practice. There simply is not a market for insurance companies to underwrite insurance for this narrow class.
- **Court Accountings –** For those counties that by their SLRs have adopted it, UTCR 9.160(2)(f) and 3(h) exempts trust companies from certain requirements of court accountings. Trust companies must submit an account receipt and disbursement report along with an account holdings list. The attorney then adds a narrative portion explaining the report. There is no need to reenter the data to another report explaining all exhibits. The court may request further information as it requires.
- **Fee Approval –** In most circumstances trust companies do not need prior court approval of fees. ORS 125.095(3). Trust companies are strictly regulated by the federal government and have a stated fee schedule that the court can review and approve before appointment. Fee schedules are generally based upon the market value of the protected person's assets and, therefore, the fees are usually predictable. In contrast, private fiduciaries must obtain prior court approval for their fees. Most private fiduciaries charge by the hour, so their fees are generally unpredictable.
- **Disclosure –** Trust companies are exempt from the disclosure requirements of ORS 125.221 and 125.240. Trust officers must demonstrate as part of the ongoing internal and external audit that they have addressed any conflict of interest issues.
- **Investment Management –** Trust companies are authorized to perform investment management and can conduct both trust administration and investment management internally. In contrast, private fiduciaries may need to use an outside bank or broker to write checks and to invest the assets.
- **Corporate Succession –** Corporate officers have successive and ongoing authority to complete account administrative tasks, pursuant to a ratified corporate resolution. Except as provided in the trust agreement, an individual trustee may not transfer the office of the trustee to another or delegate the entire administration to a cotrustee or to another. ORS 128.015. Unlike specifically named individuals, any authorized trust officer may conduct business on behalf of the company.
- **Vouchers –** Conservators pursuant to ORS 125.475(3) and personal representatives pursuant to ORS 116.083(2)(d) are required to submit vouchers (cancelled checks) for all disbursements made during the period covered by the accounting, unless otherwise provided by order or rule of the court or unless the personal representative is a trust company that has complied with ORS 709.030. Trust companies, however, shall "(A) Maintain the vouchers for a period of not less than one year following the date on which the order approving the final account is entered; (B) Permit interested persons to inspect the vouchers and receive copies thereof at their own expense at the place of business of the personal representative during the personal representative's normal business hours at any time prior to the end of the one-year period following the date on which the order approving the final account is entered; and (C) Include in each annual account and in the final account a statement that the vouchers are not filed with the account but are maintained by the personal representative and may be inspected and copied***." ORS 116.083(2)(d).

## Conclusion

Until the legislature plays catch-up and reconciles ambiguities within the ORS and the OAR, the rules are what they are. With few exceptions, private professional fiduciaries must satisfy the licensing requirements of a trust company in order to serve in Oregon as trustee. Individuals serving as professional fiduciaries, personal representatives, or special administrators appointed by the court are exempt from the licensing requirement.

Finally, attorneys and other professionals should take note of the statutes and rules as they interrelate when choosing or recommending fiduciaries. Attorneys drafting trusts in which unauthorized fiduciaries are named may expose themselves to claims of malpractice, as well as to liability for fiduciary malfeasance.

*Stuart B. Allen*
*Tara M. Hendison*
*Allen Trust Company*
*Portland, Oregon*

### New Estate Planning Section Officers

The Section elected members of the 2004 Executive Committee at the Section meeting on November 20, 2003. The Section also approved officers for the coming year.

**Officers:**

*Chair*
Richard A. Pagnano

*Chair Elect*
Christopher P. Cline

*Past Chair*
Bernard F. Vail

*Treasurer*
James R. Cartwright

*Secretary*
Timothy J. Wachter

**Continuing Members-at-Large (re-elected for a two-year term):**

William D. Brewer
Susan N. Gary
Michael R. Sandoval
Theresa M. Wade

**Continuing Members-at-Large (terms ending 12/31/04):**

Karen C. Allan
Davide E. Paulson
Anne M. Thompson
Jonathan A. Levy
Shannon M. Connelly

**Two-Year Members-at-Large (terms ending 12/31/05):**

Kenneth Sherman, Jr.
Donna R. Meyer
Eric H. Vetterlein

# "New Old" Provisions of the Revised Uniform Principal and Income Act

Chapter 279 of the 2003 Oregon Laws updates ORS chapter 129, Oregon's principal and income statute.

The prior version of ORS chapter 129 was taken from the 1962 revision of the Uniform Principal and Income Act. In broad terms, it covered the (1) allocation of income during estate administration, (2) apportionment of principal and income when an income interest in a trust begins and ends, and (3) allocation of receipts and disbursements between principal and income during trust administration.

The new version of ORS chapter 129 enacts in largely intact fashion the 1997 Revised Uniform Principal and Income Act (the "RUPIA"). It adds dramatic new provisions that permit the trustee to adjust trust receipts between principal and income or to convert conventional principal-and-income trusts into total-return unitrusts. Or Laws 2003, 279, §§ 3, 4, 4a, 4b; see Jonathan Levy, "Selected Changes in Oregon Trust and Estate Law," *Elder Law Essentials* ch 7B, at 7B-1 to 7B-6 (OSB CLE 2003). However, RUPIA also updates existing features of the 1962 uniform act that are less dramatic but that have more use in everyday practice. This article sketches the highlights of the "new old" provisions.

As with most other trust statutes, RUPIA sets forth default provisions that can be modified by the governing instrument. Or Laws 2003 , ch 279, § 3. The new law applies to all trusts, new and old alike, unless the trust document opts out of the act's scope. *Id.* § 34.

## Apportionment of Income and Principal During Estate Administration (or at the Termination of a Trust Income Interest)

Under existing Oregon probate law, unless the will provides otherwise, the following rules apply: (1) probate debts and expenses are charged against principal; (2) net probate income, after expenses, is determined under the rules of ORS chapter 129; (3) recipients of specific gifts in probate receive the net income, after expenses, earned on the property left to them; (4) recipients of pecuniary bequests that are not in trust and do not qualify for the marital deduction earn annual interest at 5 percent, starting one year after the first appointment of the personal representative; and (5) other recipients are entitled to the remaining net income in proportion to their respective interests, measured at the time of distribution, based on inventory value. ORS 116.007, 116.143.

The new law preserves this general scheme, but with some changes:

**Discretion to pay probate expenses from estate income or principal**. The personal representative has discretion to pay fees of attorneys, accountants, and fiduciaries; court costs; and other expenses and interest on death taxes, either from income or principal. This should eliminate the need to make traditional equitable adjustments between principal and income when expenses and their associated tax benefits are mismatched. Or Laws 2003, ch 279, §5(2)(b). However, this statutory adjustment cannot be used if it would jeopardize a marital or charitable deduction. *See C.I.R. v. Estate of Hubert*, 520 US 93 (1997); Treas Reg § 20.2056(b)-4.

**Interest on outright pecuniary gifts from a terminating trust**. The new law extends the same right to receive interest to outright pecuniary gifts from *terminating trusts* that now applies to pecuniary gifts under *wills*. Or Laws 2003, ch. 279, § 5(3). Thus it appears that unless the trust provides otherwise, pecuniary gifts from a terminating trust will bear interest at 5 percent, under ORS 116.143, if the winding up of trust administration extends past the first anniversary of the event that triggered termination.

**Rules for interest on specific gifts now apply to terminating trusts**. In addition to the rule for interest on outright pecuniary gifts, *specific* gifts from terminating trusts now generally carry out interest in the same manner as *specific* gifts under wills. Or Laws 2003, ch. 279, § 5(1). This linkage makes sense, because revocable trusts are often used as will substitutes.

**Allocation of net income using values at time of distribution**. Net income to residuary and remainder beneficiaries may now be allocated using values “reasonably near’ the distribution date, rather than the inventory date. *Id*. §§ 6(1), (2)(d). This flexibility should simplify administration.

Fiduciaries may also apply the new rules to allocate gains and losses during administration. *Id*. § 6(4).

## When Does a Trust Income Interest Begin or End?

When an income interest in a trust begins—that is, when the person who creates the trust dies or when he or she transfers property to the trust during life—the trustee must determine what property remains as principal to pass to the remainder beneficiaries, and what part is currently distributable as income. Similarly, when an income interest ends, the trustee must determine who is entitled to the income that has been received but not yet distributed, that is due but not yet collected, or that has accrued but is not yet due. As before, these are default rules that can be varied by the trust instrument.

**When does a trust income interest begin?** An income interest begins when a decedent dies, in case of a testamentary trust; when an asset is transferred to a revocable trust; or, in the case of a successive income interest of a trust, on the day the prior income interest ends (even if there is a winding up period for that prior interest). *Id*. §§ 7(1)-(3).

If there is a period during which there is no trust beneficiary, that period is treated as one during which there is a prior income interest. *Id*. § 7(4). An example is a trust for grandchildren, before any grandchildren are born.

How are receipts and disbursements apportioned when a trust income interest begins? In general, receipts or disbursements that arise before an income interest begins are allocated to principal. *Id*. § 8(1). Specific gifts are an exception. *See id*. §§ 5(1), (5); ORS 116.007(2)(a).

What about receipts or disbursements that arise *after* an interest income begins? If the payments are *periodic*, they are simply allocated to income. If the payments are not *periodic*, or have no due date, they must be treated as accruing from day to day and apportioned between income and principal. Or Laws 2003, ch. 279, § 8(2). This simplifies prior law, which required accrual and apportionment even of periodic items. *See* former ORS 129.055(2)(b), 129.115(4) (2001).

The due date to owners for distributions from corporations or other entities is the date fixed by the entity for determining entitlement to the distribution, or, if no date is fixed, on the declaration date for the distribution. Or Laws 2003, ch. 279, § 8(3).

**When does a trust income interest end**? Under prior law, a deceased income beneficiary's estate is entitled to, or charged with, undistributed income or expenses that are received or that accrue before the termination of the income interest. *See former* ORS 129.055(4) (2001). The RUPIA changes this somewhat. Net income that is received before the prior income interest is still owed to the prior beneficiary or his or her estate. However, items that have accrued, but are not yet received by the trustee, are added to principal for the new beneficial interest. Or Laws 2003, ch 279, §§ 9(1), (2).

For example, assume the income beneficiary dies on July 30. Rent due to the trust on July 20 has not yet been paid. Under the new rules, the July 20 payment is added to principal when received and the rent payment due on August 20 is income when received. Neither the deceased income beneficiary nor his or her estate is entitled to part of either rent payment. *See* RUPIA § 303, cmt.

Two exceptions apply to the new rules. First, when a deceased beneficiary had an unqualified power to revoke more than 5 percent of the trust immediately before the income interest ended, income received but undistributed by the trustee before the interest ended is added to principal and does not go to the outgoing beneficiary or his or her estate. Or Laws 2003, ch 279, § 9(2). Without this exception, income received before the death of the grantor of a revocable trust, who is the mandatory income beneficiary, would be owed to his or her estate, even if the pourover will directs all assets to the trust. *See* RUPIA § 303(b), cmt.

Second, if the terminating income interest involves an annuity or unitrust payment, the trustee must prorate the final payment between income and principal if necessary to accomplish a tax purpose of the trust. Or Laws 2003, ch 279, § 9(3).

## Particular Receipts as Income or Principal During Trust Administration

The following sections change their focus from the *beginning and end* of income interests to the treatment of items *during* administration of a trust with an ongoing income interest.

When the 1962 uniform act was promulgated, many of the investment securities we now know had not yet been created. The RUPIA provides for the allocation of receipts from traditional entities, such as partnerships and corporations, as well as limited liability companies, real estate investment trusts, pass-through entities such as mortgage-backed securities, and the like. The paragraphs that follow briefly outline some highlights of the allocation rules. These rules are explained in more detail in the prefatory notes and comments of the National Conference of Commissioners on Uniform State Laws. *See* www.law.upenn.edu/bll/ulc/upaia/upaia97.htm.

**Receipts from entities**. Except as provided otherwise, a trustee shall allocate receipts from an "entity" to income. Or Laws 2003, ch. 279, § 10(2). Entities include corporations, partnerships, limited liability companies, regulated investment companies (mutual funds), real estate investment trusts, and common trust funds. *Id*. § 10(1).

The general rule of allocation to income has important exceptions, including:

- distributions other than money;
- money received in exchange for part or all of the trust's interest in the entity;
- money received in total or partial liquidation of the entity; and
- money received from a regulated investment company or real estate investment trust that is a capital gain dividend for federal income tax purposes. *Id*. § 10(3).

A distribution is treated as a partial liquidation if it is described as such by the entity or if it exceeds 20 percent of the entities gross assets. In applying the 20 percent test, one ignores the portion of the distribution that the trustee or beneficiary must pay as income tax on the entity's taxable income. *Id*. §§ 10(4), (5).

A trust may generally rely on a statement from the entity about the nature of a distribution. *Id*. § 10(6).

**Distributions from a trust or estate**. Distributions from a trust or estate to a second trust normally retain their character received as income or principal. However, if the distribution is from an investment trust, such as a mutual fund, a common trust fund, or trust holding asset-backed securities, then the rules of section 10 or 24 of chapter 279 instead apply. *Id*. § 11.

**Business and other activities conducted by the trustee**. Trustees may elect to account separately for businesses and other activities conducted by the trustees, including farming, livestock operations, investment in derivatives, mining, and timber operations. Trustees who elect to account separately may also decide to what extent the business's cash may be retained as part of the business and the extent to which the remaining business cash receipts are accounted for as principal or income on the trust's records. *Id*. § 12.

**Catch-all rule for principal receipts**. Section 13 is a catch-all rule for receipts that are allocated to principal. It covers:

- assets received from other trusts or estates that are not allocated to income by the various sections of the RUPIA;
- proceeds from the sale or exchange of a principal asset;
- amounts recovered from third parties for environmental clean-up costs under § 26(1)(g) or that otherwise are not based on loss of income;
- proceeds of property taken by eminent domain (except for a separate award for loss of income); and
- income received in an accounting period while there is no income beneficiary.

**Rental property**. Rents are normally allocated to income. Security deposits are allocated to principal. *Id*. § 14.

A portion of the lease payment may be a reimbursement of the lessor's capital expenditures for improvements. If the trustee accounts for the rental under § 14, a transfer from income to reimburse principal may be appropriate under § 28. Or the trustee might consider an adjustment between income and principal under § 4. *See* RUPIA § 405, cmt.

The rules of § 14, do not apply to the extent the trustee accounts separately under § 12 for the rental property. *See* RUPIA § 405, cmt.

**Obligation to pay money**. Interest on bonds and notes, including a prepayment penalty, is normally allocated to income. Or Laws 2003, ch. 279, § 15(1). However, all of the amount received on sale of an obligation is principal, unless the obligation, when purchased, had a maturity of less than one year. This exception applies to U.S. Savings Bonds and zero-coupon bonds. *Id*. § 15(2).

Section 15 does not apply to obligations covered by §§ 18 (deferred compensation and annuities), 19 (liquidating assets), 20 (minerals, water and other natural resources), 21 (timber), 23 (derivatives and options), or 24 (asset-backed securities).

**Insurance policies and similar contracts**. In general, insurance proceeds are allocated to principal. However, proceeds for the loss of income, occupancy, or use are income. Note that this section does not cover annuities and other retirement benefits, which instead are covered by § 18. *Id*. § 16.

Insubstantial allocations not required. A trustee need not make "insubstantial allocations" of receipts; instead, he or she may apply the entire receipt to principal. An allocation is presumed to be insubstantial if it would change net income by less than 10 percent or if the value of the asset producing the receipt is less than 10 percent of the total value of trust assets. This section does not apply if its use would have any of the adverse tax consequences described in § 4(3) of the 2003 act. *Id*. § 17.

**Deferred compensation, annuities, and similar payments**. Section 18 covers distributions of various types of deferred compensation, including IRAs, 401(k) plans, and pensions. Notably, required distributions from IRAs and similar accounts are allocated 10 percent to income and 90 percent to principal. *Id*. § 18(3).

For income-only trusts that hold retirement accounts as assets, this 10 percent-90 percent rule could force accumulation of distributions within the trust at compressed trust tax brackets. In addition, this accumulation could cause older or nonindividual contingent remainder beneficiaries to be counted in the determination of required distributions, forcing an acceleration of those distributions. With some of these trusts, it may pay to amend the trust to opt out of the 10 percent-90 percent rule.

**Liquidating assets**. Liquidating assets diminish or terminate with time. They include leaseholds, copyrights, patents, royalties, and lottery payments. A trustee must allocate receipts from these assets 10 percent to income and 90 percent to principal. *Id*. § 19. Section 19 changes the former ORS 129.100 (2001), which allocates either (1) all receipts to income or (2) if the trustee is under a duty to change the form of the investment, up to 6 percent to income and the rest to principal.

**Minerals, water, and other natural resources**. Receipts from interests in minerals, water, oil, gas, and other natural resources are covered by § 20. In general, 10 percent of distributions will be allocated to income. If an Oregon trust holds mineral interests in other state, treatment of the receipts as income or principal may be governed by the other state's laws. *See* William F. Fratcher, *5A Scott on Trusts* § 648 (4th ed 1989).

**Timber**. Under § 21, the amount of net receipts allocated to income depends on whether the amount of timber removed is more than, or less than, the rate of growth. Receipts from cutting that exceeds the growth rate are principal; otherwise, receipts are generally income.

**Property not productive of income**. Section 22 of chapter 279 is substantially different from ORS 129.105, the former rule for unproductive property. Section 22(1) makes clear that the spouse who is beneficiary of a marital-deduction trust has the right to compel the trustee to make the property produce income, sell the property, adjust receipts between income and principal, or take a combination of those actions. Section 22(2) applies to trusts other than marital-deduction trusts. It treats the proceeds from the sale or disposition of assets as principal without regard to the income previously generated by those assets.

Chapter 297 eliminates the right of income beneficiaries, under current ORS 129.105 (2001), to part of the sale proceeds of unproductive property, at an imputed annual rate of 4 percent. However, the beneficiary's new rights under chapter 279 to ask a court to compel adjustment of income and principal, or conversion to a unitrust, should adequately protect against income-phobic trustees.

**Derivatives and options.** Under § 23, receipts and disbursements relating to derivatives and options are generally allocated to principal. A different result may apply if the trustee separately accounts for the trust's derivative and option activities under § 12. This would typically make sense only when the trustee invests substantially and regularly in derivatives and options.

**Asset-backed securities.** Section 24 deals with asset-backed securities, which are financial assets whose value is based on the right to receive distributions from underlying assets that provide collateral for the investment. An example is an interest in a pool of real estate mortgages, credit-card receivables, or auto loans.

## Disbursements During Trust Administration

Trustees must determine whether particular trust expenses are to be charged against income or principal.

**Disbursements from income**. Expenses that must be paid from income include one-half of trustee and investment advisor fees, income taxes, and one-half of expenses for accountings, judicial proceedings, and other matters involving both the income and remainder interests. All other ordinary expenses for the administration, management or preservation of trust property, including interest, ordinary repairs, casualty insurance premiums, and property taxes, shall also be paid from income. *Id*. §§ 25, 29.

**Disbursements from principal**. Expenses to be paid from principal include the other half of trustee and investment advisor fees, accounting expenses, and expenses of judicial proceedings. Other expenses to be paid from principal include trustee fees calculated on principal as acceptance, distribution, or termination fees; disbursements to prepare property for sale; insurance premiums other than casualty insurance, so long as the trust owns and is beneficiary of the policy; transfer and death taxes, including penalties; and environmental clean-up costs. *Id*. § 26(1).

Principal also bears a share of the trust’s income taxes on receipts from an entity to the extent that (1) the receipts are allocated to principal and (2) the trust’s share of the entity’s taxable income exceeds the portion allocated to trust income. *Id*. § 29(3).

If a principal asset is encumbered by a debt that requires direct payment of income to the creditor, the trustee shall reimburse the income account, from principal, in amounts equal to the reductions in the principal balance of the debt. *Id*. § 26(2).

**Transfers between income and principal**. The new law gives trustees authority to allocate expenses between income and principal.

**Transfers to principal for depreciation**. It was unclear under existing Oregon law whether a trustee was required to establish reserves out of current income for depreciation. *See* former ORS 129.035(1)(f) (“income” includes business and farm receipts as provided in ORS 129.085), 129.085 (net business or farm income shall be computed according to generally accepted accounting principles), 129.115(3)(c) (trustee may establish depreciation allowance out of income to the extent permitted by ORS 129.085).

Section 27 makes clear that a trustee “may” transfer a depreciation reserve to principal. However, the authority to create a reserve does not apply to (1) property used by a beneficiary as his or her residence, (2) during the administration of a decedent’s estate, or (3) if the trustee is separately accounting for the business under § 12.

**Other transfers from income to reimburse principal**. More generally, § 28 authorizes trustees to transfer funds from income to principal as reimbursement or a reserve for extraordinary repairs, capital improvements, expenses to prepare property for rental, periodic payments of a debt secured by principal (to the extent the amount transferred is less than the periodic payments), and environmental clean-up costs under § 26(1)(g).

### Adjustments Due to Taxes

Section 30(1) gives the trustee authority to make adjustments between principal and income because of tax law provisions. *See* RUPIA § 506(a), cmt.

Section 30(1)(c) permits the trustee to protect beneficiaries who are taxed on income from qualified Subchapter S trusts whether or not it is distributed from the trust. *See* RUPIA § 506(a)(3), cmt.

Section 30(2) provides for a mandatory adjustment from income to principal to the extent needed to preserve an estate tax marital or charitable deduction. *See* RUPIA § 506(b), cmt; *Estate of Britenstool*, 46 TC 711 (1966).

The adjustment provisions of § 30 do not apply to reimbursement of income taxes paid on constructively received trust income by grantors of intentionally (or unintentionally) defective grantor trusts. Grantors who want such reimbursement should include a reimbursement provision in the trust document. *See* RUPIA § 506, cmt.

### Conclusion

The RUPIA's dramatic new provisions – the power to adjust and the power to convert a trusts to a untitrust – have captured the headlines. However, the new old provisions are equally important for smooth, everyday trust administration.

*Jonathan A. Levy*
*Cavanaugh Levy Twist LLP*
*Portland, Oregon*

## Pro Bono Challenge

Pro bono hours for 2003 should be reported on the 2004 OSB attorney membership fee statement to be mailed in December. The hours reported will be tracked for the Oregon New Lawyers Division Pro Bono Challenge.

The Pro Bono Challenge is a friendly competition to motivate attorneys and law students to provide the highest level of pro bono service. The challenge recognizes pro bono services by firms of all sizes, individual attorneys, and law students.

More information on the voluntary pro bono reporting program is available on the Oregon State Bar Web site, *www.osbar.org*.

## Study of the Uniform Trust Code is Progressing

In September 2002, a 12-person committee was formed to study the new Uniform Trust Code (the "UTC") for possible adoption in Oregon. The UTC is the most comprehensive trust and estate legislation developed by the National Conference of Commissioners on Uniform State Laws since 1969, when the Uniform Probate Code was approved. Five states already have adopted the UTC, and at least 35 states have study projects or legislative proposals pending. The text of the UTC is available on-line at *www.nccusl.org*.

The UTC Study Committee includes representatives of those groups that would be most affected by a new trust code: the Elder Law, Estate Planning and Administrative, and Taxation Sections of the Oregon State Bar; the Oregon Bankers Association; Oregon probate judges; and the Oregon State Bar Public Affairs staff. After studying the UTC for four months, the Study Committee formed five subcommittees charged with reviewing the various UTC articles and making written recommendations. The subcommittees, which included about 40 members, invited other Oregon State Bar Sections to participate in the review process.

The subcommittees submitted their written reports to the Study Committee in September 2003. During the coming months, various Oregon State Bar Sections will be asked for input regarding UTC provisions affecting their areas of interest. The Study Committee's goal is to prepare a final legislative proposal by May 2004, for consideration by the 2005 legislature.

If you have any questions about the study process or would like to share your views about the UTC with the Study Committee, please contact one of the co-chairs:

*Prof. Valerie J. Vollmar*
*(503) 370-6079*
*vvollmar@willamette.edu*

*Prof. Susan N. Gary*
*(541) 346-3856*
*sgary@law.uoregon.edu*

## PLF Practice Aids and Forms

A sample letter that may be of use to notify clients of changes in Oregon's inheritance tax laws has been posted at *http://www.osbplf.org/docs/aids/10ltrnotcltreoretaxlawchg.pdf*. The letter is one of a number of forms and practice aids developed by the Oregon State Bar's Professional Liability Fund. The list of forms is located at *http://www.osbplf.org/main2.asp?page=newaids2&id=13&catname=Probate+and+Estate+Planning*.

# CALENDAR OF SEMINARS AND EVENTS

- January 23, 2004 (Sponsored by the Estate Planning Council of Portland) **33rd Annual Estate Planning Seminar**, Oregon Convention Center, Portland, OR. Telephone: (503) 205-2653.
- January 26-28, 2004 (Sponsored by The Law School University of Southern California Law School) **2004 Tax Institute**, Wilshire Grand Hotel, Los Angeles, CA. Telephone: (213) 740-2582.
- January 30, 2004 (Sponsored by Washington State Bar Association) **The New Essentials for Practicing Elder Law**, Seattle, WA. Telephone: (800) 945-WSBA.
- February 19-21, 2004 (Sponsored by ALI-ABA) **Advanced Estate Planning Techniques**, Maui, HI. Telephone: (800) CLE-NEWS.
- March 12, 2004 (Sponsored by Oregon Law Institute) **Estate Planning**, Oregon Convention Center, Portland, OR. Telephone: (800) 222-8213.
- March 23, 2004 (Sponsored by National Business Institute) **Asset Protection Techniques in Oregon**, Portland, OR. Telephone (800) 930-6182.
- April 20, 2004 (Sponsored by Washington State Bar Association) **Trust and Estate Litigation**, Seattle, WA. Telephone: (800) 945-WSBA.
- April 26-30, 2004 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, New York, NY. Telephone: (800) CLE-NEWS.
- June 8, 2004 (Sponsored by Washington State Bar Association) **Nuts and Bolts: Estate Planning & Probate Practice**, Seattle, WA. Telephone: (800) 945-WSBA.
- June 20-25, 2004 (Sponsored by ALI-ABA) **Estate Planning in Depth**, Madison, WI. Telephone: (800) CLE-NEWS.
- June 28-July 2, 2004 (Sponsored by ALI-ABA) **Skills Training for Estate Planners (STEP)--Session One**, Atlanta, GA. (800) CLE-NEWS.
- July 1-2, 2004 (Sponsored by ALI-ABA) **Representing Estate and Trust Beneficiaries and Fiduciaries**, Boston, MA. Telephone (800) CLE-NEWS.
- July 21-23, 2004 (Sponsored by ALI-ABA) **Estate Planning for the Family Business Owner**, Santa Fe, NM. Telephone: (800) CLE-NEWS.

## Questions, Comments or Suggestions About This Newsletter?

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

PRESORTED STANDARD
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