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Changes to the Oregon Uniform Trust Code

In 2005, Oregon adopted a version of the Uniform Trust Code, which introduced some significant changes to the Oregon law of trusts. Professor Valerie Vollmar of Willamette University College of Law initiated the process of drafting the Oregon Uniform Trust Code ("Oregon UTC") and, together with Professor Susan Gary of the University Oregon School of Law, co-chaired a committee consisting of practitioners, academics and judges from throughout the State of Oregon. This committee reviewed the original Uniform Trust Code, determined the provisions that should be adopted in Oregon, and harmonized those new provisions with existing provisions that the committee felt should be maintained. The result was a significant improvement to the Oregon law of trusts. For the most comprehensive description of the Oregon UTC and the thoughts behind its adoption, see Valerie J. Vollmar, *The Oregon Uniform Trust Code and Comments*, 42 Willamette L. Rev. 187 (Spring 2006).

But, as with any sweeping change to a body of law, the adoption of the Oregon UTC resulted in some unintended consequences, as well as some unintended errors that needed correction. The Executive Committee of the Oregon State Bar Estate Planning and Administration Section has submitted a legislative proposal to the Oregon Legislature that, if enacted, would make technical corrections and would "fine tune" some of the provisions that the Executive Committee felt would be helpful to most practitioners. What follows is a brief description of the changes included in that legislative proposal. The proposed changes are categorized by statutory section number. The changes are underlined and in bold.

1. **130.010(3). Should be amended as follows:**

   "(3) 'Charitable trust' means a trust, or a portion of a trust, created for a charitable purpose described in ORS 130.170(1) **in which contingencies do not make the charitable interest negligible**."

   Comment: The definition of a charitable trust should be consistent throughout the statute in order to standardize the participation of the Attorney General. This qualification also needs to be added to the end of ORS 128.710(2).

2. **130.010(15). Should be amended as follows:**

   "(15) 'Revocable trust' means a trust that can be revoked by the settlor without the consent of the trustee or a person holding an adverse interest. **A revocable trust does not cease to be a revocable trust for purposes of this chapter if it becomes irrevocable as a result of the settlor becoming incompetent or incapacitated.**"

   Comment: This change makes clear that a "revocable trust" continues to be categorized as such even if it becomes irrevocable as a result of the grantor's

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incapacity, so that the provisions of ORS 130.520 – 575 will continue to apply.

3. 130.020(3)(b). Should be amended as follows:

"(b) Designating a person or persons to act in good faith to protect the interests of qualified beneficiaries and to receive any notice, information or reports required under ORS 130.710(1), (2)(b), (2)(c) **and (2)(d)** in lieu of providing the notice, information or reports to the qualified beneficiaries. **Such designated person may receive reports required under ORS 130.710(3) in lieu of providing such reports to the qualified beneficiaries except to the extent that such reports relate to the termination of the trust.**"

Comment: This proposed change would expand the settlor's ability to designate a person to receive notice in place of a beneficiary.

4. 130.045(4). Should be amended by adding the following new subsection (i):

"**(i) Modifying the terms of the trust, including extending or reducing the period of the trust's operation.**"

Comment: This proposed change, as well as that set forth in Item 5, below, restore the Oregon law of trust modification and termination to its pre-UTC form. Before the Oregon UTC was enacted, after a settlor died, the beneficiaries could, by unanimous written agreement and without judicial oversight, modify or terminate a trust. However, under the Oregon UTC, modification or termination by agreement is allowable only if the settlor is alive and participates.

5. 130.045. Should be amended by deleting current subsections (5) and (6) and adding the following new subsections (5)-(7) (note that these new subsections are not new to the Oregon UTC, but rather are taken from ORS 130.200, as noted below):

"(5)(a) A trustee, or any other person interested in the trust, may file an agreement entered into under subsection (2) of this section, or a memorandum summarizing the provisions of the agreement, with the circuit court for any county where trust assets are located or where the trustee administers the trust.

(b) After collecting the fee provided for in subsection (7)(a) of this section, the clerk shall enter the agreement or memorandum of record in the court's register.

(c) Within five days after the filing of an agreement or memorandum under this subsection, the person making the filing must serve a notice of the filing and a copy of the agreement or memorandum on each person interested in the trust whose address is known at the time of the filing. Service may be made personally, or by registered or certified mail, return receipt requested. The notice of filing shall be substantially in the following form:

CAPTION OF CASE NOTICE OF FILING OF AGREEMENT OR MEMORANDUM OF AGREEMENT

You are hereby notified that the attached document was filed by the undersigned in the above entitled court on the _____ day of _____, _____. Unless you file objections to the agreement within 120 days after that date, the agreement will be approved and will be binding on all persons interested in the trust.

If you file objections within the 120 day period, the court will fix a time and place for a hearing. At least 10 days before the date of that hearing, you must serve a copy of your objections and give notice of the time and place of the hearing to all persons interested in the trust. See ORS 130.045.

_____

Signature

(d) Proof of mailing of the notices required under this subsection must be filed with the court. Proof of service may be made by a certificate of service in the form provided by ORCP 7 F, by a signed acceptance of service or by a return receipt from the postal authorities.

(e) If no objections are filed with the court within 120 days after the filing of the agreement or memorandum, the agreement is effective and binding on all persons interested in the trust.

(6)(a) If objections are filed with the court within 120 days after the filing of an agreement or memorandum under this section, the clerk of the court shall collect the fee provided in subsection (7)(a) of this section. Upon the filing of objections, the court shall fix a time and place for a hearing. The person filing the objections must serve a copy of the objections on all persons interested in the trust and give notice to those persons of the time and place fixed by the court for a hearing. Service must be made at least 10 days before the date set by the court for the hearing. Service of the objections may be made personally or by registered or

certified mail, return receipt requested.

(b) Proof of mailing of objections must be filed with the court. Proof of service may be made by a certificate of service in the form provided by ORCP 7 F, by a signed acceptance of service or by a return receipt from the postal authorities.

(c) The court shall approve an agreement entered into under subsection (2) of this section after a hearing upon objections filed under this subsection unless:

(A) The agreement does not reflect the signatures of all persons required by subsection (2) of this section;

(B) The agreement is not authorized by subsection (2) of this section; or

(C) Approval of the agreement would not be equitable.

(d) An agreement approved by the court after a hearing is binding on all persons interested in the trust.

(e) Persons interested in the trust may waive the notice required under subsection (5) of this section. If all persons interested in the trust waive the notice, the agreement is effective and binding on all persons interested in the trust upon filing of the agreement or memorandum with the court.

(7)(a) The clerk of the circuit court shall collect in advance a fee of $65 for the filing of an agreement or memorandum of agreement under subsection (5) of this section, and a fee of $32.50 for the filing of objections under subsection (6) of this section.

(b) In addition to the filing fees provided for in paragraph (a) of this subsection, the clerk shall charge and collect in proceedings under this section all additional fees authorized by law for civil actions, suits or proceedings in circuit court.

(c) A pleading or other document is not considered filed unless the fees required by this subsection are paid. Filing fees may not be refunded to any party."

Comment: See the comment to Item 4, above.

6. 130.060. Should be amended as follows:

"**Except as provided in ORS 130.355,** the circuit court has jurisdiction of proceedings in this state concerning the administration of a trust."

Comment: This change is designed to take into account those smaller counties in which the probate court does not reside with the circuit court.

7. 130.150(2)(b). Should be amended as follows:

"(b) A trustee named by will may be designated as beneficiary of death benefits if the designation is made in accordance with the provisions of the policy, contract, plan, trust or other governing instrument. Upon probate of the will, **or upon the filing of the affidavit of small estate under ORS 114.515,** the death benefits are payable . . . ."

Comment: A trustee can be a beneficiary of death benefits. This change makes clear that it can be a testamentary trust under a will, whether that trust was established in probate or upon the filing of a small estate affidavit.

8. 130.195. Should be amended as follows:

"(1) In addition to the methods of termination prescribed by ORS **130.045**, 130.200, 130.205, 130.210 and 130.215, ...

(2) A proceeding to approve or disapprove a proposed modification or termination under ORS **130.045**, 130.200, 130.205, 130.210 and 130.215, ..."

Comment: This change is necessary in light of the changes proposed in Items 4 and 5, above.

9. 130.200. Should be amended by deleting subsections (6) – (8) (which will be added to ORS 130.045 under item 5, above), and adding the following new subsection (6):

"**(6) Under the provisions of ORS 130.045, interested persons, as defined in that section, may enter into a binding nonjudicial settlement agreement with respect to modification or termination of a trust.**"

Comment: This change makes ORS 130.200 consistent with the changes to ORS 130.045, described in Items 4 and 5, above.

10. 130.210(2). Should be amended as follows:

"(2) If a provision in the terms of a charitable trust would result in distribution of the trust property to a noncharitable beneficiary, a court may **not** apply cy pres to modify or terminate the trust under subsection (1)(C) of this section **[DELETE: only]** if, when the provision takes effect: . . . ."

Comment: This change corrects a typographical error in the original Oregon UTC. Subsection 2 should prevent a court from applying cy pres under certain circumstances; however, the statute as it currently exists allows the court to do so under those circumstances.

11. 130.240(7). Should be amended as follows:

"(7) Subsections (4) and (6) of this section do

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not apply to a trust that qualifies for the marital deduction under section **20.2056(c)-2(b)(1)** of the code of Federal Regulations, as in effect on January 1, 2006."

Comment: This change corrects another typographical error, so that the statute now refers to the correct section of the marital deduction regulations. The statute as it now stands refers to a regulation section that does not exist.

12. 130.510(1). Should be amended as follows:

"(1) While the settlor of a revocable trust is alive, the rights of the beneficiaries are subject to the control of the settlor, and the duties of the trustee are owed exclusively to the settlor. Beneficiaries other than the settlor have no right to receive notice, information or reports under **[DELETE: ORS 130.710]** **this chapter**."

Comment: This change is really only a clarification: as long as the settlor of a revocable trust is alive, no duties are owed to any other beneficiary, under any part of the Oregon UTC.

13. ORS 130.710. Should be amended by adding the following new subsection (10):

"**(10) Despite any other provision of this section, a qualified beneficiary who has attained that status only because that beneficiary is entitled to a distribution from the trust of a specific item of property or a specific amount of money shall not be entitled to receive a trustee report pursuant to subsection (3) and need not be notified, under subsection (2)(c), of a right to request a trustee's report, for a period of six months after the trust becomes irrevocable. If such qualified beneficiary continues to be a qualified beneficiary at the end of such time, then all provisions of this section apply until the distribution of the specific item or specific amount of property has been completed.**"

Comment: This new subsection makes clear that the beneficiary of a specific gift is entitled only to notice of the right to a copy of the trust agreement, and not the right to a report, for the six months after the date that the gift is payable (typically upon the death of the settlor or the settlor's spouse). If the gift is not satisfied within that six-month period, then the beneficiary becomes entitled to a report and must be given notice. This allows the trustee to satisfy a specific gift in a timely fashion and avoid preparing a report for a beneficiary who does not need one.

14. New Section. The following new section should be added:

ORS 130.776 Advisers

The following specific provisions shall govern the actions of trustees in any case in which the trust instrument appoints an adviser:

(1) Where one or more persons, by specific reference to this section, are authorized by the trust instrument to direct, consent to or disapprove a trustee's actual or proposed investment, distribution or other decisions, such persons shall be considered advisers for purposes of this section and shall exercise such authority in a fiduciary capacity unless the trust instrument provides otherwise. By accepting the role of adviser pursuant to a trust agreement that is subject to this state's law, an adviser submits to the jurisdiction of the courts of this state.

(2) If a trust instrument provides that a trustee is to follow the direction of an adviser, and that trustee acts in accordance with such a direction, then, except in cases of that trustee's reckless indifference to the purposes of the trust or the interests of the beneficiaries, that trustee shall not be liable for any loss resulting directly or indirectly from such act.

(3) If a trust instrument provides that a trustee is to make decisions with the consent of an adviser, then, except in cases of gross negligence or reckless indifference to the purposes of the trust or the interests of the beneficiaries on the part of the trustee, the trustee shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such adviser's failure to provide such consent after having been requested to do so by the trustee.

(4) For purposes of this section, "investment decision" means the retention, purchase, sale, exchange, tender or other transaction involving investments.

(5) Whenever a trust instrument provides that a trustee is to follow the direction of an adviser with respect to investment, distribution or other decisions of the trustee, then, except to the extent that the governing instrument provides otherwise, the trustee shall have no duty to:

(a) monitor the adviser's conduct;

(b) provide advice to the adviser or consult with the adviser; or

(c) communicate with, warn or apprise any beneficiary or third party concerning instances in which the trustee would or might have exercised the trustee's own discretion in a manner different from the manner directed by the adviser.

(6) Absent clear and convincing evidence to the contrary, the actions of the trustee pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the trustee solely to allow the trustee to perform those duties assigned to the trustee under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the trustee to monitor the adviser or otherwise participate in actions within the scope of the adviser's authority.

Comment: This new section allows a settlor to appoint a trustee and a separate "adviser" to handle discrete trust tasks (usually investment). This will probably happen most often when a settlor wants to appoint an individual or a corporate trustee but wants to specify that a particular money manager should invest trust assets. Without this change in the law, the trustee remains subject to potential liability for bad investment decisions by the adviser. This new section relieves the trustee of that liability. Note, however, that to take advantage of this protection, the settlor must designate the adviser by specific reference to this new section. That means that old trusts cannot take advantage of this provision unless the parties modify the terms of the trust (using the provisions as changed in Items 4 and 5 above).

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2008 Special Legislative Session Establishes Farming, Forestry, and Fishing Inheritance Tax Credit

History – HB 3201

Near the end of the 2007 legislative session, the Oregon legislature passed HB 3201 with the belief that it would provide a $7.5 million inheritance tax exemption for forests, farms, and commercial fishing operations. HB 3201 § 68; ORS 118.140. After the bill passed, the Oregon Department of Revenue ("ODR") was informally advised by the attorney general's office that the "natural resources" definition in HB 3201 applied only to land, thus excluding trees and timber. Farmland was included, but it was unclear whether farm buildings, crops, and equipment were included. There was doubt as to whether property that was held in a limited liability company, corporation, partnership, or trust would qualify under HB 3201. In addition to these questions, there were a number of other unresolved issues, including which provisions of section 2032A of the Internal Revenue Code applied to HB 3201.

After the 2007 session, Representative Phil Barnhart, Chair of the House Revenue Committee; Senator Ginny Burdick, Chair of the Senate Revenue and Finance Committee; and Paul Warner, Legislative Revenue Officer, considered the need for corrective legislation. Mr. Warner then requested input from a group of attorneys and accountants who were organized with the help of the Oregon State Bar staff to formulate the policy issues that the legislature needed to resolve. Representative Barnhart undertook the corrective legislation project. The result was HB 3618, which was approved during the 2008 special session.

The policy goal of the legislation was to help preserve natural resource property and commercial fishing property that would otherwise have to be partially liquidated to pay the Oregon inheritance tax. HB 3618 was supported by nursery owners, farmers, commercial fishing operators, and winery owners, and it passed in both the House and the Senate with bipartisan support. However, the new legislation has left a number of issues remaining, such as new requirements that precluded a number of small-woodlot owners, inflation adjustments, and other technical corrections that legislators will likely revisit in 2009.

HB 3618 – Property Definitions Clarified

HB 3618 redefined the farm and forest natural resource property definitions to include all types of farm and forest property, as the authors of HB 3201 had intended. Property used in farming refers to the property definitions in ORS 308A.056 and 308A.250, and also includes tangible and intangible personal property, such as farming equipment, crops (grown and stored), and working capital. HB 3618 §1 (to be codified at

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ORS 118.140(1)(a), (2)(a)(C)). Forestland natural resource property now includes timber, trees, improvements, working capital, forestry equipment, and land not to exceed 5,000 acres. *Id*. (to be codified at ORS 118.140(1)(b), (2)(a)(C)). According to legislative testimony, the bill also includes ranching enterprises. Biofuel crops, land, and production facilities are eligible in tax years beginning on or after July 1, 2008. 2007 Or Laws, ch 739, §§ 37-38; ORS 308A.056.

Definitions are now included for commercial fishing operations. If a decedent had a license under ORS chapter 508, then the decedent's boat(s), gear, equipment, vessel licenses and permits, commercial fishing licenses and permits, and working capital are included as eligible credit property. Property used to process and sell the catch of the fishing business, including a restaurant with fewer than 15 seats, is also included. HB 3618 §1 (to be codified at ORS 118.140(1)(b) & (2)(a)(B)).

First, an Exemption, Then an Exclusion, Now a Credit

The authors of HB 3201 intended to exempt up to $7.5 million of natural resource property, with the exemption quickly disappearing as the value of the taxable estate increased above $7.5 million. However, instead of an exemption, HB 3201 created a $7.5 million natural and fishing resource gross estate exclusion. As a result, HB 3201 had revenue loss implications that had not been fully considered.

HB 3618 replaces the HB 3201 $7.5 million exclusion with a $7.5 million credit for eligible farming, forestry and fishing property. To apply the credit, one first calculates the Oregon inheritance tax on the taxable estate. For example, assume that the value of the taxable estate is $10.5 million. The Oregon inheritance tax would be $1,146,800. Assume further that $6.6 million of the taxable estate is farming property eligible for the credit. The credit table contained in HB 3618 provides that the credit would be $586,800. HB 3618 §1 (to be codified at ORS 118.140(2)(c)). After subtracting the credit, the net Oregon inheritance tax would be $560,000. Because the tax credit is calculated independently from the tax calculation for the taxable estate, it is not a dollar-for-dollar offset. If the value of the credit-eligible property exceeds $7.5 million, the credit gradually decreases, reaching zero when the value of the credit-eligible property reaches $15 million. If the adjusted gross estate exceeds $15 million, no credit is allowed.

Additional Requirements and Clarifications

In addition to the foregoing, HB 3618 added several other provisions to reflect actual taxpayer ownership and to reduce the opportunities for tax manipulation. First, the value of the property eligible for the credit must equal at least 50 percent of the total adjusted gross estate. HB 3618 §1 (to be codified at ORS 118.140(3)(b)). This new 50 - percent requirement excludes a number of woodlot owners, farmers, and commercial fishermen who otherwise would have qualified under HB 3201. This requirement will also cause a number of 2007 estates to no longer qualify.

Second, the property must be transferred to a "member of the family," as defined in IRC § 2032A, or to a registered domestic partner of the decedent. HB 3618 §1 (to be codified at ORS 118.140(3)(c)); IRC 2032A(e)(2). HB 3618 applies to a deceased domestic partner only if he or she was registered as a domestic partner under Oregon law.

Third, during five out of the last eight years before the decedent's death, the decedent, or a member of the decedent's family, must have used the credit-eligible property for farm-related or forest-related purposes. HB 3618 §1 (to be codified at ORS 118.140(3)(d)). This "look-back" requirement was not in the former law. Fishing businesses were inadvertently omitted from this requirement. It is expected that the ODR will adopt regulations exempting fishing operations from the "look-back" restriction.

In addition to the "look-back" restriction, HB 3618 also continues the "look-forward" restriction which limits a transferee's disposition and use of the property. If a transferee disposes of credit-eligible property or ceases to use credit-eligible property for any of three years during the eight years following the decedent's death, an additional tax will be due based on the portion of credit-eligible property which is disqualified. The tax is then prorated based on the number of years remaining in the five-year use period. The additional tax is the responsibility of the transferee who sold or otherwise caused the property to no longer be credit eligible. HB 3618 §1 (to be codified at ORS 118.140(7)(a) - (b)). If a credit-eligible property is disposed of through condemnation and then replaced with credit-eligible property, or if a conservation easement is created, the property will not be disqualified. *Id*. (to be codified at ORS 118.140(6), (7)(a)).

Fourth, eligible property held in entities such as corporations, partnerships, limited liability companies, and trusts will qualify for the credit, provided that at least one of the transferees "materially participates," which is based on an "active management" standard defined in IRC 2032A(e)(12). HB 3618 §1; ORS 118.140(5). Eligible property subject to a net cash lease also qualifies. *Id*. (to be codified at ORS 118.140(4)(a)). It is anticipated that ODR will adopt regulations regarding entities, material participation, and active management.

Fifth, before the transfer, the executor must notify the transferee of the potential tax consequences of the transferee's failure to use the property in a qualifying manner. The transferee must acknowledge the notice in writing, and that acknowledgment must be attached to the return filed with

ODR. *Id*. (to be codified at ORS 118.140(7)(c)). The new bill deleted the previous requirement that the decedent notify the transferee.

The representative of the estate has several options in connection with the use of the credit: full, partial, or no credit elections can be made, and the credit can be applied to specific assets. *Id*. (to be codified at ORS 118.140(2)(b)).

Effective Date and Retroactive Impact

HB 3618 will be effective on May 23, 2008. It will be retroactive to January 1, 2007, except for domestic partners and biofuel property. ODR has informally indicated that temporary regulations will be adopted on or shortly after the effective date, with permanent regulations to be adopted within six months after that. ODR must cancel any interest or penalties due before May 23, 2008. For any deaths before May 23, 2008, no taxes will be due until after June 30, 2008. HB 3618 §2. A number of 2007 estates will no longer qualify for the credit.

Estate Planning Considerations

Estate planning for this new credit will require additional analysis. Care must be taken to ensure that the 50 - percent requirement is maintained for each individual owning credit-eligible property. Transfers to family members will be fairly straightforward provided the transfers are dispositions of credit-eligible property at death, or transfers of cash leases. Gifts of credit-eligible property or sales of credit-eligible property will have to be more closely scrutinized, because such dispositions could drop a taxpayer below the 50 - percent threshold.

For married couples holding credit-eligible property, ODR will have to clarify in its rule making process whether a decedent can make a QTIP or marital deduction election for federal tax purposes and make a credit election, rather than a marital deduction election, for Oregon inheritance tax purposes. Estate planning with entities holding credit-eligible properties will be considerably more complex, especially when the federal estate tax exemption, the generation skipping tax exemption, the Oregon qualified property credit, and the marital deduction (if the decedent was married) need to be coordinated.

HB 3618 answers a number of questions that resulted from HB 3201. But as with most new legislation, more questions will develop as these new provisions are applied to real-life situations. Clients who are farmers, ranchers, forestry lot owners, nursery owners, winery owners, fruit growers, biofuel producers, and commercial fishing operators should have their estate plans reviewed to determine whether any changes are necessary to accommodate this new law.

The workgroup of attorneys and accountants appreciated the opportunity to act as a tax advisory resource to the legislature. Representative Barnhart and Senator Burdick deserve a special thanks for diligently leading this corrective legislation through the special session.

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Washington Imposes Estate Tax on Property of Nonresidents

PRACTICE TIP: If you represent clients with real or tangible personal property located in the state of Washington, you should familiarize yourself with Washington's newly enacted estate tax provisions, found under Washington Administrative Code chapter 458-57. Washington now imposes inheritance tax on real and tangible property of nonresidents. WAC 458-57-125. It does not, however, impose such tax on intangible personal property of nonresidents. *See* WAC 458-57-125(4). Thus, if an Oregon resident client owns real or tangible property in Washington state, you should consider transferring the property to a limited liability company, partnership, or corporation to avoid the inheritance tax. Note that transfer of the property to a trust does not convert the property to intangible property. WAC 458-57-125(4)(a)(iv). For a more comprehensive discussion of how this issue can affect your clients, see Dean V. Butler & Michael D. Carrico, *Planning for Estates of Taxable Size in Washington*, Estate Planning Council of Seattle and Washington State Bar Association, Estate Planning Seminar (Sept. 2007).

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Update on the Oregon Advance Directive

Concerns About the Advance Directive

The Oregon Advance Directive, ORS 127.531, allows a person to prepare for a time when he or she may be unable to make decisions about health care. Part A provides information about the form. Part B provides for the appointment of a health care representative—a person authorized to direct health care for the principal when the principal can no longer do so. Part C provides instructions to health care providers, to be followed when the principal can no longer direct his or her own care.

The statutory language of the Advance Directive continues to generate concern that a properly executed Advance Directive regarding end-of-life medical care and treatment may not be honored in a manner consistent with the principal's wishes. In the wake of the national attention surrounding the Terri Schiavo case in 2005, there was a renewed awareness of the need to execute an Advance Directive as a written expression of end-of-life care decisions. Around this same time, a group of lawyers learned that the Veterans Administration refused to acknowledge the authority of a health care representative appointed under a properly executed Advance Directive. The hospital interpreted the principal's initials on a statement in Part C of the form—indicating that the principal did not have a health care power of attorney—as nullifying the then contemporaneous appointment of a health care representative under Part B of the form. It became clear that the legal and medical practitioners were assigning different meanings to the statutory language. Attorneys began to explore ways to ensure that end-of-life wishes expressed in an Advance Directive would be honored. The ideas ran the gamut from modifying the statutory form to attaching handwritten or computer generated addendums. Many questioned whether their efforts at clarity would be effective.

In response to the ongoing concern, the Estate Planning and Administration Executive Committee of the Oregon State Bar hired this author to communicate with the medical and legal community in the hope that consensus could be reached as to the interpretation of the statutory language that favors protecting the rights of Oregonians who wish to make their end-of-life decisions known. There was no interest in pursuing a clarification of the statutory language because of the difficulty in achieving agreement among competing interest groups. Any legislative attempt to fix the problem could make things worse.

In the author's efforts to contact the community, she discovered the Oregon Health Decisions' *Crucial Conversations* project. Oregon Health Decisions plans to publish educational materials and provide statewide training at a future date. In the interim, the Executive Committee decided to use the *Crucial Conversations* newsletter to provide lawyers with information and analysis about end-of-life decision-making and the current Oregon Advance Directive.

Attachments and Amendments

To achieve some consensus among lawyers and medical professionals the author recommends preparing an attachment or addendum to the Advance Directive that allows the principal to define certain terms and explain his or her intent. Some lawyers have wondered whether one can make changes to the statutory form. The statutory form allows the principal to "cross out words that don't express your wishes or add words that better express your wishes." ORS 127.531. Thus the principal may cross out any item he or she wishes to delete, or add words that clarify his or her wishes (*i.e.,* create an addendum). The framework of the Advance Directive is statutory, but the additional words are unique to the principal, and therefore, whether handwritten or computer generated as an attachment, the additional words should be given the full force and effect as a principal's expressed wishes. We recommend that the principal write "see attachment," or "the attached addendum reflects my expressed wishes, and my representative is to honor it" on the Advance Directive. The principal should date and initial the addendum.

Part B: Appointing a Health Care Representative

Alternate Health Care Representatives. Typically clients want to add more than two health care representatives. Despite the potential risk associated with modifying the statutory form, many attorneys simply add lines to add more people. However, if the lawyer is concerned about violating the integrity of the statutory form, he or she can add this information to the addendum by writing on the form, "See addendum for additional health care representatives."

Honor the Health Care Instruction. After item one in Part B, the principal can initial the following statement: "I have executed a Health Care Instruction or Directive to Physicians. My representative is to honor it." By initialing this statement, the principal is presumably notifying his or her health care representative that the principal has executed Part C (Health Care Instructions) and the principal's health care representative is to follow those instructions. It makes sense to read Parts B and C together and to permit the principal to execute both parts and direct the way the representative should make decisions.

Scope of Authority of Health Care Representative. Most

principals are unaware that many health care decisions, including life-support decisions, go beyond the four health conditions referenced in Part C. Thus, although the principal may initial statement 1, directing the representative to follow the health care instructions by executing Part B, the principal is also giving the representive broad authority to "direct my health care when I can't do so." Ideally, before executing the Advance Directive, the principal should discuss with his or her family and physician the kinds of decisions the health care representative should make and the principal's wishes with respect to his or her care. Part B permits a principal to list any special conditions or instructions with respect to his or her care. By initialing statement 2 (Life Support) and statement 3 (Tube Feeding) in Part B, a principal is authorizing the health care representative to make medical decisions pertaining to life support and tube feeding, consistent with the health care instructions in Part C.

Life Support. Occasionally, a health care provider may want to consult with, or recognize the authority of, the health care representative as the final decision maker when a principal has executed Part C and is diagnosed with one of the four identified medical conditions. Statutorily, the representative has the same authority over the principal's health care as the principal if the principal were not incapable, subject to certain limitations. ORS 127.535. Therefore, even absent specific authority in the Advance Directive, the health care representative is authorized to make medical decisions concerning life support, consistent with the known or expressed wishes of the principal.

Tube Feeding. The authority of the health care representative does not include the withdrawal or withholding of artificially administered nutrition and hydration except as provided under ORS 127.580. The statutory exceptions for tube feeding are not as clearly delineated as those governing life support. Therefore, it becomes even more critical that the principal understand the importance of initialing statement 3 in Part B, which gives the health care representative specific authority to make medical decisions about tube feeding.

One source of confusion has been over who makes the final decision if the principal has completed Part C. One physician in charge of training on end-of-life issues for a major Portland hospital indicated that if Part C is completed, and if the principal is in one of the four conditions listed, the treating physician need not consult with the health care representative.

The concern surrounding who has the final say is not to disregard the principal's known or expressed wishes, but to make sure health care decisions are made consistent with the intent of the principal's expressed wishes. If the principal intends that the health care representative have the final say, the principal should grant specific authority in the Advance Directive by initialing statements 2 and 3 in Part B. By initialing these statements, the principal states that at all times the appointed health care representative stands in the shoes of the principal and is authorized to receive medical information and make appropriate medical decisions consistent with the principal's known or expressed wishes. In an attempt to clarify the principal's intent regarding the final decision maker, the sample addendum that follows this article includes a statement to that effect.

As My Physician Recommends. Some principals may not want to grant the health care representative such broad authority or may wish to leave medical decisions pertaining to life support or tube feeding to doctors as they "recommend." It is helpful to remind clients that, depending on the nature of the medical setting, the "personal physician" may not necessarily be involved in the decision-making process. Either way, conversations about the nature or extent of the authority granted to individual health care professionals should be encouraged.

Part C and the Meaning of "Other Documents"

The various interpretations of statement 7 of Part C have given lawyers the most cause for concern. In Part C the principal indicates his or her instructions regarding health care. At the end of Part C, statement 7 attempts to establish whether the principal has a health care power of attorney and the status of that power (*i.e.,* revoked or still in effect). The fact that many principals execute Parts B and C at the same time has led to confusion. Many principals may initial "I DO NOT have a health care power of attorney," believing this statement to refer to some "other document," different from the Advance Directive that the principal is currently signing. Other principals may initial "I have a health care power of attorney and I REVOKE IT," intending to revoke a power granted at some earlier time and not to revoke the new health care representative appointed under Part B. It seems illogical to disregard the appointment of a health care representative in a contemporaneously signed document. That does not, however, preclude a medical provider from determining, as the Veterans Administration has done, that making such a designation under Part C cancels the appointment under Part B.

In reading through the legislative history, it appears that the legislative intent was to combine the appointment of a health care representative and the giving of health care instructions into one document and yet enable each to stand alone, so that a principal could have a valid and properly executed Advance Directive if he or she filled out only Part B, Part C, or both. Most of the time, however, our clients are executing an Advance Directive for the first time. These clients fill out both Parts B and C and then often initial one line of statement 7, in an attempt to communicate that a health care representative is

Continued next page

being replaced, or that there is no authority granted outside of this contemporaneously executed Advance Directive.

Therefore, if a principal is executing an Advance Directive for the first time, we recommend that the principal leave statement 7 blank. Instead, if the principal intends to revoke a previously appointed health care representative, insert: "I have a health care power of attorney [signed before today] and I REVOKE IT." The principal can also date the execution of the prior documents, such as, "signed on 'x' date." Added to line 2 or 3, this phrase should eliminate needless ambiguity and potential misinterpretation.

Addendum

The following addendum offers sample language that a lawyer might include in preparing an Advance Directive for a client. The goal is to provide a practical guide for lawyers to use in discussions with their clients in the hope that greater clarity will eliminate confusion and increase the likelihood that end-of-life decisions will be respected and honored.

Ruth Simonis
Portland, Oregon

Addendum to the Advance Directive

I instruct my health care representative to follow these attached written instructions as further evidence of my end-of-life health care decisions.

_____**Health Care Representative Decides.** I want any decision(s) about life support or tube feeding to be made by my health care representative, after consultation with my doctors and as guided by my health care instructions.

- OR -

_____**Doctors Decide.** I want any decision(s) about life support or tube feeding to be made by my doctor, after consultation with my health care representative and as guided by my health care instructions.

_____**Religious/Spiritual Beliefs.** It is important that medical decisions made regarding my care are guided by particular religious beliefs or spiritual values as follows: _____.

_____**Pain Control.** If I have a terminal diagnosis and can no longer speak for myself, I want to receive enough medication to relieve my pain even though, as a result, I may become unconscious or have difficulty breathing.

_____**Hospital/Hospice.** I authorize my health care representative to admit me to the hospital for treatment and diagnosis and arrange for hospice care as appropriate.

_____**Long-Term Care Services.** My health care representative is authorized to arrange for me to receive long-term care services as appropriate.

_____**Hiring and Discharge of Doctors.** My health care representative is authorized to hire or discharge doctors and other health care professionals.

_____**Medical Records.** My health care representative may review my medical records and authorize their release to those persons whom my health care representative designates. My health care representative shall be considered my "personal representative" as that term is used in HIPAA. I authorize my physicians and other health care professionals to discuss my medical condition with my health care representative and those designated by my health care representative.

_____**Visitors.** I authorize the following individuals to visit me in the hospital or any other care facility to the same extent that my relatives would be allowed to visit me. _____.

_____**Copies of Advance Directive.** A photographic or facsimile copy of this Advance Directive shall have the same force and effect as the original.

_____**Home Death.** If possible, I would prefer to die at home and not in a hospital or other care facility. When, in the opinion of a licensed physician I am likely to die within six months, I wish to be transferred to my home. I wish to be transferred to my home even if there is a risk that the transfer itself may accelerate my time of death. However, if dying at home becomes too much of a burden to my family or others living with me, my health care representative may arrange for me to receive care elsewhere.

_____**Organ Donor.** I authorize my health care representative to arrange for organ donation upon my death. I have spoken to my family about organ and tissue donation. I wish to donate:

A: Any organ and tissues.

B: Only the following organs or tissues: _____ _____.

C: Entire body for medical education (additional forms needed). _____

_____
Signature of person executing Advance Directive

_____
Date

Miscellaneous Itemized Deductions of Trusts and Estates on Form 1041

under §67(e), *Knight v. Commissioner*, and Prop. Reg. §1.67-4 (REG-128-224-06, 7/27/07)

Type of Deduction	Fully Deductible	Deductible Subject to 2% Floor
Trustee Fees	Fees attributable to estate or trust administration, including balancing of beneficiary interests, allocation of income and principal among beneficiaries, distribution of assets to beneficiaries, pursuit of unusual fiduciary investment objectives, and specialized fees applicable only to trusts and estates.	Fees attributable to investment management. As a result, unitary trustee fees that compensate for both trust administration and investment management must be unbundled or allocated between trust administration and investment management. Unbundling not required for tax years beginning before 1/1/08. IRS Notice 2008-32.
Attorney Fees	Most attorney fees are fully deductible, because most are not commonly incurred by individuals.	Fees not unique to trusts and estates, such as attorney fees expended in defense of claims.
Will and Trust Contests	All.	None.
Court Fees	Most court fees, including most probate court fees.	Fees incurred defending against claims.
Fiduciary Accountings	All.	None.
Fiduciary Bond Premiums	All.	None.
State and Local Taxes	All (not a Miscellaneous Itemized Deduction). §67(b)(2).	None.
Real Estate Management	None, unless the trust or estate is engaged in real estate business. §62.	Real estate management fees, insurance, property repairs and maintenance, condo association fees, utilities.
Estate Tax Return Preparation	All.	None.
Gift Tax Return Preparation	None.	All.
Income Tax Return Preparation	Fiduciary income tax returns.	Decedent's final income tax return.

This summary was prepared by Philip N. Jones of Duffy Kekel LLP. 4/8/08. Review the statutes, court opinion, and regulations for application to particular situations. The regulations are not yet final.

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Oregon State Bar

Oregon Estate Planning and
Administration Newsletter

Susan N. Gary
Editor-in-Chief

Estate Planning CLE Seminar

June 20, 2008

Advanced Estate Planning Issues

9:00 – 5:00

Estate Planning Ethics

Peter Jarvis, *Hinshaw & Culbertson LLP, Portland*

Oregon Inheritance Tax Update

Jeffrey M. Cheyne, *Samuels Yoelin Kantor Seymour & Spinrad LLP, Portland*

Charitable Planning with Real Estate and Closely-Held Business Interests

Jeffrey C. Thede, *Thede Culpepper Moore Munro & Silliman LLP, Portland*

Advanced Estate Planning: A Few Random Thoughts

- Tax apportionment and tax clauses in documents
- The proper use of marital deduction formulas
- Fresh look at dynasty trusts
- Grantor-retained interests vs. intentionally defective grantor trust sales

Christopher P. Cline, *Wells Fargo Bank, Portland and*

John H. Draneas, *Draneas & Huglin PC, Lake Oswego*

Maximizing Client Satisfaction and Minimizing Tax Risks: Practical Issues in Designing, Implementing, and Operating Family Entities

Randall T. Grove, *Landerholm Memovich Lansverk & Whitesides PS, Vancouver*

Building Your Family Business Clients for Continuity

Mark Green, Ph.D., *The Family Business Consulting Group Inc., Salem*