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Mediation of Probate and Protective Matters

Over the past 20 years, the adoption of mediation as a preferred method of dispute resolution in family law cases and many other civil matters has become more widespread. However, mediation has not enjoyed the same popularity in probate and protective matters. This article discusses why mediation is appropriate for the resolution of probate and protective matters and urges practitioners to consider applying mediation in these types of cases.

One advantage of adopting mediation early in probate and protective matters is that these cases typically involve families. Family relationships are often at stake in a contested guardianship or conservatorship proceeding for an elderly parent, a will contest among siblings, or a trust administration dispute. Although an ambitious mediator might strive to improve relationships among family members, the goal of most mediators is to preserve existing family relationships and prevent those relationships from deteriorating. Litigation has an unfortunate tendency to increase contentiousness among family members.

A second advantage of mediation is that it is "tough on the problem, but easy on the participants." Like most truisms, this one is not always true. However, when elderly persons are involved, as is frequently the case in protective proceedings, mediation can be a gentler, less wearying method of resolving a dispute than the often lengthy process of litigation.

Third, when mediation works, it is less time consuming and less costly than litigation. When the assets of a protected person are at stake or a family inheritance is depleted in the course of a dispute, mediation can be a way to protect those precious assets from being unduly diminished by litigation.

Fourth, mediation is frequently creative. Clients may achieve resolutions that are better suited to their situations than cookie-cutter solutions that a court might impose. In a protective proceeding, for instance, it might be easier to find a less restrictive alternative for the protected person through mediation than through litigation.

Fifth, family matters are personal. Mediation is a more private process than litigation. Mediation can protect the dignity of the participants by helping to safeguard privacy.

Finally, mediation can deal with emotional as well as financial issues. Mediation is not therapy, but its effects can be therapeutic. When dealing with entrenched family relationships, it can be particularly useful to employ a mediator with a mental health background. Such a mediator can work on emotional issues,

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which may be obstacles to settlement, particularly early in the case. The early stages of mediation are typically devoted to what mediators call “separating the people from the problem.” In these stages, the mediator attempts to bring the participants to a mental state in which they can discuss a problem rationally. As emotional issues are dealt with and the conversation becomes more rational, a lawyer-mediator can step in to interpret legal issues, explain the negotiation process, present options to resolve particular points of disagreement, and draft agreements acceptable to a court.

A wide range of styles exists among lawyer-mediators. Evaluative mediators tend to pay the most attention to the legal standards involved in a case and the application of those standards. Evaluative mediators predict how a particular case may be resolved in court and may lean on the participants when their views do not conform to the mediator’s. Facilitative mediators pay more attention to communication. Their focus is on helping participants effectively communicate with each other. They are much less concerned about what the outcome of a particular case will be and believe that if matters can be adequately analyzed and discussed by the parties, a reasonable solution will emerge. Transformative mediators are perhaps the most ambitious group, believing that mediation can be a tool to improve the parties’ relationships and possibly their general well-being. Most mediators combine these styles and adapt their behavior depending on what the parties want. When working with families, for instance, I ask whether the family is interested solely in practical solutions, or if they would like to work on their relationships or basic communication skills. I try to adjust my behavior according to the family’s response and will bring in a mental health professional as a co-mediator if the family wants to work on relationship issues.

Of course, no one process is suitable for resolving every dispute. There are certainly cases in which mediation is not appropriate, including cases in which one of the participants has diminished capacity. The playing field can be leveled in such cases by the appointment of a guardian ad litem to participate in the mediation sessions. Frequently attorneys are also present at mediation sessions to negotiate on behalf of their clients. Cases in which there has been violence or abuse are usually not suitable for mediation. These cases should be screened to make sure that intimidation is not a factor.

An example from my practice illustrates some of these points. I was recently asked to intervene with a family in a disagreement about the care of their elderly father (details have been changed to protect confidentiality). I was approached by three of the adult siblings who expressed concern about how a fourth sibling was handling the father’s personal and financial affairs. The siblings were concerned about undue influence and possible breach of fiduciary duty. They had previously consulted with an attorney who had suggested trying mediation.

I agreed to serve as a neutral party and to visit with each of the siblings and the father to see if I could assess the situation and find a productive resolution. I met alone with the elderly parent who was living in comfortable and secure surroundings in an assisted living home. I met with each of the four siblings separately, including the ”black sheep” sibling who was at odds with the others.

One of the largest problems was a simple lack of transparency in how the caretaker sibling was handling the elderly parent’s finances. The caretaker sibling had engaged in a number of financial transactions that appeared suspicious to the other siblings, who were predisposed to distrust him based on various family incidents, some of which happened when these 50-something adults were preteenagers. I structured two joint sessions in which we carefully reviewed the financial transactions in question to the satisfaction of the three siblings. We discussed rules for future transactions and developed guidelines that would provide financial disclosure and transparency and require additional family meetings if a transaction exceeded a certain dollar limit. The family also wanted some assistance on how to celebrate certain holidays, and we established guidelines about this as well. The parties consulted with their respective attorneys and received advice about how to document their agreements.

In summary, the controversy was resolved in a manner that did not worsen the family relationships. The process was not hard on the elderly parent because I visited him in his home, and he did not attend the group meetings of his children. The process was not time consuming and resulted in a solution that was acceptable to all parties, protected the elderly parent, and was tailored to their specific situation. Of course, the matter was resolved in a private and confidential manner, and the emotional needs of the parties were taken into account, if not ultimately resolved. Although there will continue to be issues among the siblings, the mediation process allowed them to focus on working together as an effective team, united in caring for their aging parent. For this to occur, it was not necessary that they resolve all of their disagreements. I helped them develop a working relationship, which is a relationship that can deal with differences and resolve those differences in a productive manner.

There is a current effort in Multnomah County to increase the use of mediation in probate and protective proceedings. Practitioners who have an interest in promoting this process can contact me or Michael Levelle for more information.

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Duty to Pay Debts?

In the administration of a revocable living trust, what duty does the successor trustee have to the beneficiaries of the trust to settle the debts of the decedent settlor before making a distribution to the beneficiaries?[1]

This question is significant because assets of the revocable living trust are subject to the debts of the settlor. This is true while the settlor is alive. ORS 130.315(1)(a). It is also true after the settlor has died. *Johnson v. Commercial Bank*, 284 Or. 675, 588 P.2d 1096 (1978). A settlor cannot avoid the payment of debt by having all of his or her assets in a revocable trust at the time of death. Absent some effort to resolve the settlor's debts, the claims of the settlor's creditors follow the assets to the beneficiaries to whom those assets have been distributed.

The probate process and the general administration of a trust are very different processes when it comes to dealing with debt.

Probate is a settlement process. At the end of the probate process, the devisees get their respective shares of the assets free of the debts of the decedent. The personal representative must make an effort to identify claimants and provide notice of the probate proceeding. ORS 115.003. If a claim is not filed in a timely fashion, then the creditor no longer has a claim against the decedent's assets. ORS 115.005. Basically the same is true for a small estate. ORS 114.545, 114.560.

Probate is a statutory process. The personal representative's basic duty is to follow the applicable law and the instructions of the court. In contrast, the general administration of a trust depends, in most cases, on the trust agreement executed by the settlor who created and funded the trust.

Now assume that a revocable living trust has one settlor who was the initial trustee, the settlor has died, the trust is funded with the entire estate of the settlor, the successor trustee is not a professional fiduciary, and the settlor died leaving various unpaid debts. In determining what a successor trustee's duty is with regard to the payment of the settlor's debts, the first step is to read the trust agreement. The successor trustee has a duty to follow the instructions of the settlor. ORS 130.650. There are three possible options: no specific instructions, specific instructions with regard to certain debts but not others, and specific instructions as to all debts. An example of no specific instruction would be a provision that gives the trustee the power to pay debts with no further instruction as to how to go about it. An example of specific instructions with regard to some debts and not others would be a provision that instructs the payment of debts "relating to my last illness" or acknowledging and instructing payment of a specific debt owed to particular person or entity. Finally, the trust agreement could specifically list all of the debts to be paid and instruct that no other debts be paid from the trust or it could instruct the payment of "all just debts." The settlor also has the option of not instructing how debts are to be paid, but specifying the order in which trust assets are to be applied in the payment of the liabilities of the settlor. ORS 130.315(1)(c). Assuming that the payment of debt is left to the discretion of the successor trustee, the successor trustee at his or her sole discretion could invoke the settlement procedure provided for in ORS 130.350 to 130.450 ("OUTC Debt Settlement Procedure"). This procedure mimics probate in that it sets up a settlement procedure. The creditors are given notice and an opportunity to be heard. If the creditors ignore the notice or are unsuccessful in prosecuting their claims, then the trust assets can be passed to beneficiaries free of those claims. What is unusual about the OUTC Debt Settlement Procedure is that in regular probate (ORS

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113.035, 111.005(19)) or in a small estate (ORS 114.545), creditors are specifically named as persons that may initiate the proceeding. In the OUTC Debt Settlement Procedure, that is not the case. The trustee is the only person specifically designated in the statute to initiate the OUTC Debt Settlement Procedure. It seems likely, however, that the statute intends that a creditor can open a probate and then initiate the trust notice procedure.

Does the Oregon Uniform Trust Code create a duty to use the OUTC Debt Settlement Procedure? No. The Oregon Uniform Trust Code is based on the Uniform Trust Code. The Uniform Trust Code does not include a procedure similar to the OUTC Debt Settlement Procedure.

The basic duty of prudent administration arguably applies to all aspects of the administration of a trust. ORS 130.665 provides: "A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution." The comment of the Uniform Law Commission to section 804 provides emphatically, if not helpfully, that "[t]he duty to administer a trust with prudence is a fundamental duty of the trustee." Unif. Trust Code § 804 cmt., 7C U.L.A. 601 (2006).

Under what circumstances might the fundamental duty of prudent administration require a successor trustee to initiate the OUTC Debt Settlement Procedure?

Arguably, if the settlor was engaged in professional or business activities that typically generate claims and, in particular, if those claims have a long statute of limitations period, it would be prudent to invoke the OUTC Debt Settlement Procedure. Creditors whose claims are not reasonably ascertainable are entitled only to publication notice. If a creditor fails to respond to publication notice within the short statutory time period, the creditor's claims are cut off. Prudence might strongly suggest that the trustee of a trust established by a doctor or lawyer who might have unknown creditors should follow the OUTC Debt Settlement Procedure. A Washington case, *Meyer v. Dempcy*, 48 Wash. App. 798, 740 P.2d 383 (1987), makes this point. A doctor had transferred his assets to a revocable living trust, and his estate was not probated. Five years after his death, a malpractice claim was filed. The doctor's estate sued the estate's lawyer for failing to advise the personal representative to probate the estate. The court ruled in favor of the lawyer, in part because the alleged malpractice caused no actual damages, but the court did not rule out the potential basis for malpractice.

An argument against using the OUTC Debt Settlement Procedure would be that giving notice might wake up creditors that have otherwise given up hope on their claims. This, of course, is a risk. In addition, the cost of notice might not be appropriate if the settlor was a long-retired, risk-adverse decedent who left behind no debts and worked in a job in which the risk of malpractice liability was low or nonexistent.

What if certain creditors are actively notifying the successor trustee about their claims? These creditors are already awake. What duty does the successor trustee have to deal with them? ORS 130.700 provides that "[a] trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust." The comment to section 811 of the Uniform Trust Code has one sentence dealing with debts: "It might be reasonable to settle an action or suffer a default rather than defend an action." Unif. Trust Code § 801 cmt., 70 U.L.A. 601 (2006). Reasonable behavior under this section is obviously intended to cover a lot of territory. Even doing nothing and letting a default judgment be taken could be considered reasonable. Again, the successor trustee might wish to wait out the creditors and see if they fail to file an action on their claims in a timely fashion. It is important to note that there are defenses to the statute of limitations. In particular, estoppel may be a defense if the person making the representations encouraging the creditor to hold off filing an action is a person with whom the creditor has a close personal relationship. In *Liebreich v. Cohen*, 49 Or. App. 943, 946, 620 P.2d (1975), the plaintiff and the debtor were brother and sister. The debtor gave plaintiff a promissory note and subsequently made promises to pay. Plaintiff withheld taking action on the note based on those representations and did not finally take action until after the debtor had died, well past the term of the applicable statute of limitations. Based on the representations and the relationship of the plaintiff and debtor, the defendant was estopped from asserting the applicable statute of limitations. Also, under certain circumstances, making a partial payment on a debt could, in effect, reaffirm the debt and restart the statute of limitations period. ORS 12.240 provides: "Whenever any payment of principal or interest is made after it has become due, upon an existing contract, whether it is a bill of exchange, promissory note, bond of other evidence of indebtedness, the limitation shall commence from the time the last payment was made."

It would seem that the duty of prudent administration would not necessarily require the successor trustee to pursue a particular course of action. However, it would seem to require the successor trustee to identify debts and claims, and potential debts and claims, and develop a plan that takes into consideration "the purposes, terms, distributional requirements and other circumstances of the trust" to deal with them or not deal with them as the case may be. ORS 130.665. A successor trustee who has not done at least this much may have difficulty establishing that the successor trustee has met his or her duty of prudent administration. Careful documentation will be helpful to the trustee if a question arises later. Finally, the successor trustee has a duty to inform and report. ORS 130.710. The successor may have the authority under the trust agreement and the Oregon Uniform Trust Code to deal with debts in a variety of different ways depending on the circumstances, but in all cases the successor trustee has a duty to keep qualified beneficiaries, as defined in ORS 130.015, "reasonably informed about the administration of the trust and of the material facts necessary for those beneficiaries to protect their interests." ORS 130.710(1). Arguably, this duty requires the successor trustee to inform the qualified beneficiaries about the existence of any debts and claims, what the successor trustee has ultimately decided to do with them, and what impact that may have on the qualified beneficiaries. In particular, if qualified beneficiaries are receiving assets that may be subject to debts and claims, particularly known debts and claims, the successor trustee has a duty to inform the qualified beneficiaries of that fact. The trustee may also solicit input from the beneficiaries. If the trustee describes the advantages and disadvantages of giving notice and then follows the wishes of the beneficiaries with respect to whether to give notice, the beneficiaries will be unlikely to sue the trustee later.

An additional concern about claims involves federal rather than state law. Federal law may impose an affirmative duty on a trustee to satisfy claims of the federal government or face personal liability for distributing assets without satisfying those claims. The issue often arises in connection with tax liabilities, but it may also apply to liability for claims related to environmental contamination. 31 U.S.C. § 3713.

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Endnotes

1 For an excellent discussion of dealing with debts in the administration of a trust, see Jonathan A. Levy and James C. Cavanaugh, "Creditors Rights and Spendthrift Clauses" *in Administering Trusts in Oregon* §10 (OSB CLE 2007).

What's New

In re Marriage of Brown, 219 Or. App. 475, 183 P.3d 207 (2008)

Husband and wife were married for 24 years and lived the majority of their married life in Montana. Both practiced law and they raised one daughter together. Husband was the beneficiary of two trusts: the Brown Trust, created by husband's father, and the Brown-Moore Trust, created by husband's grandmother. Both trusts granted to husband and his two sisters a monthly mandatory distribution of the trusts' income.

Because of concerns regarding his physical health, husband quit his full-time work at the county prosecutor's office shortly after he began receiving income from the trusts. He began doing part-time work in various law-related positions. Despite the fact that the combined income earned from the part-time jobs was equivalent to approximately half the earnings he received at the prosecutor's office, husband and wife decided to build their "dream home" in Montana.

In 2000, the couple's daughter graduated from high school. Husband began conversations with wife about retiring and leaving Montana. Wife did not wish to leave her job or home and expressed concern over whether they had enough income to retire. Husband assured wife that their finances were secure enough to retire. Wife eventually agreed with husband to retire.

Husband and wife sold their home in 2002, financed the purchase of a fifth-wheel trailer, and traveled for a few months. Eventually, they settled in Gold Beach, Oregon and financed the purchase of a second recreational vehicle. They soon realized that their income was insufficient to cover their monthly bills, so husband began to work as a private investigator, and wife worked in the trailer park office. Husband and wife separated in 2004. Wife moved back to Montana and worked part time in a private legal practice. Husband continued to work part time as a private investigator.

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The Oregon Court of Appeals agreed with the trial court's conclusion that husband's trust interests should be divided, but on different grounds. The trial court awarded the division as spousal support, which the Court of Appeals determined improper. The Court of Appeals noted that ORS 107.105(1) does not authorize the court to award property as spousal support. It does, however, authorize a division of real and personal property. Because a trust interest is a property interest, the court concluded that it should be treated as a divisible asset in a dissolution proceeding.

Husband contended that the trial court erred in awarding wife anything from his trust interests. He argued that the trusts were his separate property, that wife made no contribution to the acquisition of these interests, and that wife was never an intended beneficiary of the trusts. In doing so, husband successfully rebutted the presumption that both spouses have equally contributed to the acquisition of the property, pursuant to ORS 107.105(1)(f). This presumption is intended to promote a "just and proper" division of property.

The just and proper inquiry, however, also takes into account other considerations that weigh into the determination of an equitable division. Citing *Kunze and Kunze*, 337 Or. 122, 132, 92 P.3d 100 (2004), the court stated that the extent to which a party has integrated a separately acquired asset into the common financial affairs of the marital partnership is one of the equitable considerations to include in the analysis. Because husband used his trust interests to finance the couple's "dream home," convinced his wife that they could retire based on income that included his income from the trusts, and persuaded wife to dramatically change her circumstances by leaving a home and a stable job, the court found that husband's interests in the trusts were completely integrated into the financial planning of the parties. Therefore, in an effort to leave the parties on as equal a basis as possible, the court held that it is just and proper to award wife a portion of husband's interests in the trusts.

Harris v. Jourdan, 218 Or. App. 470, 180 P.3d 119 (2008)

The Court of Appeals decided two issues: whether Summer Jourdan was an interested person with standing to contest a will executed by Ruth Comins, and whether that will was the product of undue influence by Jack Harris.

During the later years of her life, the decedent Comins executed a number of wills. Jourdan, a beneficiary of one of those wills, first met Comins in 1975 when both were working in the Multnomah County Courthouse. Comins, who was in her mid-50s at the time, and Jourdan, who was in her early 20s, remained close friends even after they stopped working together. After Comins's husband, Ted, retired, Jourdan began visiting the Cominses frequently. The Cominses also went to Jourdan's home for weekly dinners.

Ted died in 1991. In 1992, Jourdan planned to move to California. Comins prepared a deed that gave title to her property to Jourdan and notified Jourdan of this deed about a week before she left for California. After Jourdan moved to California, Comins and Jourdan continued their friendship and maintained contact through daily phone conversations. As time went on, Comins became increasingly lonely. Neighbors described her as "emotionally needy" and "kind of insecure."

In 2000, Ray Copelin, a prior acquaintance of Comins, and his wife, Laura, visited Comins at her home. Eventually, the Copelins began seeing Comins every Sunday. Comins asked the Copelins to move in with her and mentioned that she wanted to pass the property on to the Copelins. Ray located an attorney, drove Comins to meet with the attorney, and paid the fees for a will, an advance directive, and a power of attorney. Comins did not notify Jourdan that she had executed a will leaving the property to the Copelins.

On June 30, 2003, Jack Harris, who had previously helped Comins with plumbing work, approached Comins about the possibility of parking his trailer on her property in exchange for a $100 payment per month or $100 worth of labor per month. Less than two weeks after moving onto Comins's property, Harris contacted attorney Robert Swift to determine the possibility of Comins executing a will that would leave the property to him. According to Harris, Comins had orally stated her intention to leave the property to him.

Harris eventually moved into Comins's house. His increasingly personal involvement with Comins concerned Jourdan, so she visited Comins to check on her welfare. Comins insisted on executing a new will before Jourdan returned to California. On August 30, 2003, Comins and Jourdan found a notary and executed a will and power of attorney. The August 2003 will left the property to Jourdan and made no mention of the Copelins or Harris.

Harris, feeling that something "was in the works," questioned Comins about what had happened. According to Harris, Comins was unsure of what she had signed and told him, "I think I gave away the property." Harris then directed Comins to state in writing that she did not wish to pass her property on to Jourdan. On October 20, 2003, Harris took Comins to Swift's office to execute a new will making Harris the primary beneficiary of her estate. While Swift was drafting the new will, Comins and Harris refinanced the mortgage on Comins's property and opened a joint checking account. The cash from the refinancing was deposited into the joint checking account. Harris withdrew some of the money from this account for gambling purposes, dinners, leather coats, and trips to the beach. Joint account funds were also used to make payments on a new convertible that Harris and Comins purchased. He moved out of Comins's home in January 2004 with his new wife, Jackie, but continued regular visits with Comins.

In late January 2004, Jourdan visited Comins again and invited Comins to live with her in California. She also asked Comins to sign a power of attorney form and petitioned for a restraining order against the Harrises. Comins executed a deed that transferred the property to Jourdan. Comins moved to California and continued to live with Jourdan until her death in August 2004.

In April 2005, Harris petitioned for the probate of the October 2003 will and for his appointment as the personal representative of Comins's estate. Jourdan argued that because the will was procured through undue influence, it should be considered invalid. Harris also filed a separate civil action against Jourdan, which was consolidated with the current case for trial, alleging that she had procured a deed to Comins's home through undue influence. In affirming the probate court, the court of appeals first concluded that Jourdan was an "interested person" who could contest the probate of the will. Pursuant to ORS 113.075(1), any interested person may contest the probate or validity of the will. ORS 111.005(19) defines an "interested person" as any person who has a property right against the estate of a decedent that may be affected by the proceeding. The main question presented for the court, therefore, was whether the October 2003 will was procured by undue influence.

The burden of proving that a will is the product of undue influence is on the contestant. However, a suspicion of undue influence arises that requires the beneficiary to furnish sufficient proof to overcome the adverse inference if (1) a confidential relationship between the testator and beneficiary existed such that the beneficiary held a position of dominance over the testator and (2) the contestant establishes the existence of "suspicious circumstances" around the procurement of the will.

Because Harris assumed control of Comins's finances, selected her attorney, directed her to write letters, and provided her with physical care, the court found that Harris and Comins were in a confidential relationship and that Harris exercised a considerable amount of control during the relationship. Harris's encouragement to draft the new will with haste and his intimate involvement in the preparation of the will, coupled with Comins's recent display of unexplained changes in her spending habits, led the court to find suspicious circumstances relieving the contestant of the duty to demonstrate that the will in question was procured through undue influence. For these reasons, the Court of Appeals affirmed the probate court's inference of undue influence by Harris, thereby invalidating the October 2003 will.

Helmig v. Farley, Piazza & Associates, 218 Or. App. 622, 180 P.3d 749 (2008)

In 1991, Lea Helmig placed all her assets into a revocable trust, appointing herself as trustee and her son, Lester, as alternate trustee. Lea and her two children were the beneficiaries of the trust.

In 2004, Appellant Lester Helmig maintained control of Lea's finances and was responsible for paying her bills while Lea resided in a care facility. Because of reoccurring late fees that Lester sustained on behalf of Lea, the care facility contacted Clackamas County Adult Protective Services ("Adult Protective Services") to explore the possibility of appointing a conservator. After an investigation, Adult Protective Services concluded that Lea was delusional and unfit to manage her own finances. The county's long-term care ombudsman contacted Respondent Farley, Piazza & Associates ("Farley") to seek Farley's appointment as conservator. Following a petition seeking appointment as conservator for Lea in 2005, Farley was appointed conservator by the probate court. Lester Helmig filed an appeal.

Lea died after the filing of the notice of appeal, so the Clackamas County Circuit Court dismissed the appeal as moot. At the request of Appellant, the court reinstated the appeal and revisited the question of whether Lea's death rendered the appeal moot. Upon reconsideration, the court held that the appeal was not moot. Although ORS 125.230(1) provides that the death of a protected person terminates the authority of the conservator to act as a fiduciary, the conservator still has responsibilities under the statutes to pay claims against the estate, account for the administration of the protected estate, and deliver the assets of the protected person to the personal representative entitled to the estate of the decedent, pursuant to ORS 125.495, *former* 125.475 (2003), and 125.530. The conservator may be discharged by order of the court after approval of a final report. For these reasons, Lea's death did not render the appeal moot.

The court also held that Farley was a "person interested in the affairs or welfare" of Lea, as evidenced by the fact that the Clackamas County long-term care ombudsman requested that Respondent file a petition. Farley, therefore, had standing to seek the appointment of a conservator under ORS 125.010. Additionally, ORS 125.240 expressly authorizes the appointment of a "professional" fiduciary

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as conservator, and ORS 125.240(5) defines “professional fiduciary” as any person nominated as a fiduciary who acts at the same time as a fiduciary for three or more protected persons who are not related to the fiduciary.

ORS 125.400 provides that if a decedent is unable to manage his or her own finances and has money or property in need of management, a conservator may be appointed. Appellant argued that Lea did not own property requiring management outside of the trust. The court, however, found that Lea’s Social Security income and her status as owner and beneficiary of the trust rendered the appellant’s argument unpersuasive. Even though the trust designated Appellant as successor trustee if Lea became incapacitated, the court held that the provisions of the trust cannot preclude a statutory proceeding under ORS chapter 125 for Lea’s protection as an individual. The untimely bill payments and accrual of late fees demonstrated that Lea’s beneficial interest under the trust was improperly managed.

Appellant’s final argument on appeal was that Lea made express provisions in her trust for these particular circumstances and, therefore, that Lea would have objected to strangers making decisions regarding her financial welfare. The court found that the evidence also demonstrated that Lea needed a conservator to manage her property, and because appointment of a conservator did not affect the terms of Lea’s revocable trust, the court affirmed the trial court’s appointment of Respondent as conservator.

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Oregon Natural Resource and Fishing Business Property Credit Update

[The Oregon Department of Revenue recently published the following announcement on its website. Ed.]

As a result of the of the law changes for natural resource property and fishing business property, described below, we revised Oregon Form IT-1 and instructions, and designed Schedule NRC. Please use the revised Form IT-1 and new Schedule NRC when claiming the new Oregon Natural Resource or Fishing Business Property Credit. Do not file Form IT-1 and Schedule NRC, claiming the new credit until the new law is effective on May 23, 2008.

The revised Oregon Form IT (revised 04-08) and new Schedule NRC (Oregon Natural Resource or Fishing Business Property Credit for Form IT-1) are now available on our website at *www.Oregon.gov/DOR*.

The 2007 Oregon Legislature passed House Bill 3201. Section 68 of HB 3201 allows an exclusion from the gross estate of a decedent for natural resource property, not to exceed $7.5 million; or an exclusion from the gross estate of a decedent for property used in commercial fishing operations (processing and marketing), not to exceed $7.5 million. This exclusion was codified into Oregon Revised Statute (ORS) 118.140. The 2008 Oregon State Legislative Assembly Special Session passed House Bill 3618. HB 3618 amends ORS 118.140 to allow a credit against estate tax of the decedent for natural resource property or fishing business property. HB 3618 becomes effective on May 23, 2008 and will be retroactive to deaths occurring on or after January 1, 2007. The current law, ORS 118.140, allowing the $7.5 million exclusion (passed in 2007 via HB 3201) becomes obsolete when HB 3618 becomes effective on May 23, 2008.

If you claim the new credit or are directly affected by the changes detailed in HB 3618, you have additional time to file your 2007 Form IT-1 without penalty or interest being assessed. Inheritance tax returns, on which the new credit is claimed, or where the prior exclusion was taken, are not due, and no tax is owed by those estates, prior to September 1, 2008. This extended due date is provided for in HB 3619 Section 9.

If you already filed a 2007 Form IT-1 and claimed the exclusion, allowed under the current law, ORS 118.140, and have not received a letter from the department, please contact us now at email address: *estate.help.dor@state.or.us*. Please provide the name of the personal representative, or the authorized representative, and a daytime telephone number in your email.

[NOTE: Jeff Cheyne provided the followying update. The 2007 version of ORS 118.140 (natural resource exclusion) found in volume 3 of the Oregon Revised Statues is no longer accurate. On May 23, 2008 it was replaced by the revised ORS 118.140 that is found in HB 3618. There are significant changes in this statute. In order to get the revised copy of this statute, download the following http://www.leg.state.or.us/08ss1/measures/hb3600.dir/hb3618.en.html.

The Department of Revenue has drafted temporary rules regarding various definitions and filing requirements in connection with the natural resource credit legislation that was adopted in February (HB 3618). It is expected that the temporary rules and the proposed permanent rules will be posted in the July 1st bulletin for public comment until July 22nd at which time the DOR will hold a public hearing for all Department rules. Watch the DOR website for these temporary rules and the proposed permanent rules which should be posted soon.]

Looking Ahead: Legislative Proposals for 2009

The Estate Planning Section is preparing for the next legislative session, which begins in January 2009. The Board of Governors of the Oregon State Bar approved legislative proposals submitted by the Section. The Bar then sent the proposals to the Legislative Counsel's office where the proposals will be drafted as bills. The bills should be submitted early in the 2009 session as "Bar bills." In addition to the Section proposals, the Oregon Law Commission is currently working on a proposal to revise the elective share. Other bills of interest to estate planning lawyers may surface after the session begins.

This article provides a quick look at the Section proposals other than the proposal for technical amendments to the Oregon trust code. An article in the April issue of this newsletter described that proposal. This article also summarizes the Oregon Law Commission's elective share proposal. The description of each proposal indicates the name or names of contacts for that proposal. Questions about a proposal can be directed to the contact.

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

The Uniform Law Commission approved this Act in 2007, and the National Association of Elder Law Attorneys, the National College of Probate Judges, and the National Guardianship Association have all endorsed the Act. In nearly all American states a guardian may be appointed by a court in a state in which the individual is domiciled or is physically present, and a conservator may be appointed in a state in which the individual is domiciled or has property. Cases in which more than one state has jurisdiction are becoming more common. An adult may live in one state and be domiciled in another state, the adult's domicile may be uncertain if the adult has multiple residences, or a family may want to move an existing guardianship or conservatorship to a new state when the adult moves to that state. The proposal addresses the growing need for an effective mechanism for resolving multijurisdictional issues. The proposal provides rules to determine which court has primary jurisdiction over an individual, expedites the procedures for transferring a guardianship or conservatorship to another state, and facilitates out-of-state enforcement of guardianship and protective orders. This author and Tim O'Rourke are the legislative contacts.

Technical Revisions to the Disclaimer Statute

The current statute does not clearly indicate who receives property when a person disclaims property he or she would otherwise receive under the law of intestate succession. The proposal amends ORS 105.633 to provide that disclaimed property will pass as if the disclaimant died immediately before the death of the transferor. If the recipient would have been the disclaimant's estate, the property passes not to the estate but to the disclamant's surviving descendants or, if there are no surviving descendants, to the surviving intestate heirs of the transferor. If the transferor's surviving spouse is living but is remarried, the property will bypass the surviving spouse. Chris Cline and Warren Deras are the legislative contacts.

Extension of Conservatorship Until Age 21

Under current law, a conservatorship for a minor child ends at age 18, when the child attains the age of majority. Many children are not prepared to handle assets responsibly at that age. The proposal, based on statutes in effect in Colorado and Idaho, extends all conservatorships for minors to age 21. The proposal does not change the rule, in effect under ORS 125.090(2)(e), that a court can terminate protective proceedings when the "best interests of the protected person would be served by termination of the proceedings." The proposal provides that the conservator will not control assets acquired by the protected person after age 18 and that creditors can reach assets held outside the conservatorship by the protected person after age 18. Warren Deras and Jonathan Levy are the legislative contacts.

Proposed Limits on Fees Allowed in Probate to Heir Search Firms

This proposal regulates the activities of heir search firms. The proposal addresses several concerns with the way these firms operate. The fee is often one-third to one-half of the inheritance the person found by the search firm will receive and may be higher for heirs living outside the United States. Firms try to obtain a contract with the heir quickly, before the personal representative has time to track down all the heirs, and occasionally will try to contact an heir named in a probate petition but not yet notified by the personal representative. Sometimes firms find people with similar names who are not in fact heirs. The proposal provides that

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contracts for payment of fees for finding heirs or devisees entered into within one year of the death of the decedent are against public policy and void if the consideration would be paid by an heir, devisee, or the estate. The proposal creates exceptions for contracts approved by the probate court, for contracts entered into by the Department of State Lands or the personal representative, for fees not exceeding specified percentages, for legal services, for routine genealogical searches not related to inheritance, and for contracts relating to heirs or devisees intentionally omitted from the probate petition. A contract entered into more than a year after the decedent's death is not void if it includes a 10-day right of rescission. Warren Deras and Matt Whitman are the legislative contacts.

Closing Letter and Discharge from Inheritance Tax Liability

Under current law, a fiduciary that would like to complete distributions under a will or trust cannot obtain a closing letter or a discharge from inheritance tax liability. Prudent fiduciaries hold back reserves for taxes and related expenses until the statute of limitations has run and do not close the estate or terminate the trust until the end of that period. This proposal allows a trustee or personal representative to apply to the Oregon Department of Revenue for a determination of tax and a discharge from tax liability. Jeff Cheyne and Bill Brewer are the legislative contacts.

Increase in the Limits for Using a Small Estate Affidavit

This proposal increases the limits on property that can pass under a small estate affidavit. The limitation on the value of personal property is increased from $50,000 to $100,000, and the limitation on real property is increased from $150,000 to $250,000. Penny Serrurier and Bill Brewer are the legislative contacts.

Authorization of Springing Powers of Attorney

Springing powers of attorney come into effect at a specified future time or on the happening of an event, often the financial incapability of the principal. Springing powers are used in Oregon, but some concerns exist that such powers may not be valid absent legislative authorization. English common law did not permit springing powers, so almost all American states have adopted statutes that specifically authorize these powers. This proposal amends ORS 127.005 to authorize springing powers and ORS 127.015 to specify how a principal's financial incapability may be determined if financial incapability is the triggering event. Douglas Holbrook and Jonathan Levy are the legislative contacts.

Revisions to the Elective Share Statute

If a decedent spouse disinherits his or her surviving spouse, the surviving spouse can elect to take a share of the decedent's estate. Under current Oregon law, the elective share amount is 25 percent of the probate estate of the decedent spouse, reduced by amounts the surviving spouse receives in nonprobate transfers. Because the Oregon elective share applies only to probate assets, a spouse who plans ahead can easily disinherit his or her surviving spouse. The proposal will increase the assets to which the elective share applies in order to discourage the easiest forms of spousal disinheritance. The elective share will apply to probate assets, the decedent's fractional interest in assets held in a form of survivorship title, assets owned by the decedent under a payable-on-death or transfer-on-death designation, and any property the decedent could have acquired through revocation, including property held in a revocable trust. To provide for a fair determination of the elective share if both spouses have assets, the elective share calculation will consider the assets of both spouses. The percentage of the elective share will depend on the length of the marriage with percentages increasing over the length of the marriage. The percentages range from 5 percent for less than two years of marriage to a maximum 33 percent after 15 years of marriage. The spouses can avoid the elective share by executing a prenuptial or postnuptial agreement with adequate disclosure to both parties. Bernie Vail chairs the Oregon Law Commission's Elective Share Work Group, the group working on this proposal.

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CLE Resources

The websites listed here provide information about CLE opportunities for lawyers who practice in estate planning, elder law, tax and related areas. Some of the resources listed also provide continuing education to other professionals in these fields. The editors plan to publish a list of CLE resources annually. If you know of sites we have missed or of new sites that may be useful to other readers, please let us know.

Oregon

Oregon State Bar: *www.osbar.org/cle/clelinks.html*

Oregon State Bar Estate Planning Section:
www.osbar.org/sections/estate/index.html

Oregon Law Institute – Lewis & Clark:
http://law.lclark.edu/org/oli

Multnomah Bar Association: *www.mbabar.org*

University of Oregon Law Library CLE Information Available for Credits:
http://lawlibrary.uoregon.edu/faculty/cle.html

Washington

Washington State Bar: *www.wsba.org/cle/default.htm*

University of Washington CLE:
www.uwcle.org/index.htm

King County Bar Association: *www.kcba.org*

Snohomish County Bar Association: *www.snobar.org*

Tacoma Pierce County Bar Association:
www.tpcba.com/page.php?id=10

California

California State Bar Association: *www.calbar.ca.gov*

CEB By and For California Lawyers: *http://ceb.com*
(Continuing Education of the Bar – California, founded by the University of California and the California State Bar)

Southern California Tax & Estate Planning Forum:
www.clenet.com

Other State Bar Associations

State Bar of Arizona: *MyAzbar: www.myazbar.org/cle*

Colorado Bar Association Trust & Estate Section:
http://www.cobar.org/group/index.cfm?EntityID=TRUST

Idaho State Bar: *www2.state.id.us/isb*

American Bar Association

American Bar Association: *www.abanet.org*

American Bar Association Section of Real Property, Probate & Trust Law: *http://www.abanet.org/rppt/*

ALI-ABA: *www.ali-aba.org*

Other Resources

American College of Trust & Estate Counsel:
www.actec.org

Celesq: *www.celesq.com*
(online CLEs, CDs, and tapes)

Foundation for Continuing Education: *www.fce.org*
(seminars and training programs on taxes, accounting, estate planning, financial planning, retirement planning, and other topics)

Heckerling Institute on Estate Planning:
http://www.law.miami.edu/heckerling

Law.com cle center: *www.clecenter.com*
(online CLEs)

Legal Services Corporation Resource Library:
www.lri.lsc.gov
(created by Congress to improve access to justice, provides information about legal services management and delivery approaches)

Lorman Education Services: *www.lorman.com*
(CLE seminars and teleconferences)

National Business Institute:
www.nbi-sems.com/estateplanningprobate.html

Practicing Law Institute: *www.pli.edu*

West LegalEdcenter: *www.westlegaledcenter.com*
(online CLEs)

Wills, Trusts & Estates Professors Blog:
lawprofessors.typepad.com/trusts_estates_prof/

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