

Newsletter

Oregon Estate Planning
and Administration
Section Newsletter
Volume XXVI, No. 1
January 2009

Oregon
State
Bar Estate Planning
& Administration
Section

The Right of an Unsecured Creditor to Recover from a Decedent's Nonprobate Property

This article updates an article published in the Oregon Estate Planning and Administration Section Newsletter, Volume IX, No. 2, April 1992. Its purpose is to examine different types of property that can be transferred at the owner's death, without probate, and the rights of an unsecured creditor of the deceased owner to reach such assets.

When a decedent's estate is probated, the rights of the decedent's creditors to collect the amounts owing to them from the decedent's probate property are established by statute. ORS 115.001-.215. The avoidance of probate, however, is a common estate planning objective, and if a decedent's estate is not probated, the statutory claim provisions under ORS 115.001 through 115.215 do not apply. If there is no probate or if the decedent's probate assets are insufficient to satisfy all creditor claims, an unpaid creditor will have to look to other persons who are responsible for the obligation or to property owned by the decedent that was transferred without probate in order to recover on its claim.

Property Not Subject to Probate

Property Owned with the Right of Survivorship. When property is owned by multiple owners, with the right of survivorship, a deceased owner's interest in that joint property is not subject to probate if another owner survives. An owner is considered to have survived if he or she survives the deceased owner by at least 120 hours, unless an exception provided for in ORS 112.586 applies. *See* ORS 112.570-.590. The right of an unsecured creditor to recover from the deceased owner's interest in the property will generally depend on whether the creditor's claim arose before the joint property interest was created, whether the right of survivorship was terminated before the owner's death, and whether the surviving owner is also liable for the obligation. Both real property and personal property can be owned jointly, with the right of survivorship.

Real Property. Oregon law recognizes two ways of owning real property with the right of survivorship.

Tenancy by the Entirety. A tenancy by the entirety interest is created when real property is owned by a husband and wife or by domestic partners, unless the conveyance document clearly indicates a different intent. *See* ORS 93.180(1)(b). As long as the required marital or partner relationship exists, each owner has a tenants-in-common interest in the property during the joint lifetime of the owners, and each owner also has a remainder interest in the property that is contingent on surviving the other owner. During the term of the marriage or partnership, neither joint owner can defeat the other owner's contingent remainder interest. After the first owner dies, if the other owner survives by the required period of time, the survivor will generally own the entire property free of creditor claims against the deceased. The death of the first owner does not result in a

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transfer of property from the deceased owner to the survivor. Rather, the death results in the extinguishment of the deceased owner's life estate interest in the property. See *Brownley v. Lincoln County*, 218 Or 7 (1959).

Right of Survivorship Under ORS 93.180. ORS 93.180(1)(a) and (2) provide that if a conveyance or devise of real property to two or more persons clearly and expressly declares that the grantees or devisees take with the right of survivorship, those grantees or devisees have a tenancy in common in the life estate with cross-contingent remainders. See also *Halleck v. Halleck*, 216 Or 23 (1959). Since this form of ownership is based on the express provisions of the conveyance or devise that created it and not the relationship of the joint owners, no joint owner can unilaterally defeat the contingent remainder interest of another joint owner. As with tenancy by the entirety property, upon the death of one joint owner and the required survivorship by another joint owner, the creditors of the deceased owner generally will have no claim to the property.

Personal Property. Oregon law recognizes two ways that persons can own personal property with the right of survivorship. One way is authorized by statute, and the other method has been recognized by the Oregon courts. The two methods have similarities, but they also have significant differences that can affect the right of a creditor of a deceased owner to access such property.

Joint Tenancy in Personal Property. ORS 105.920 recognizes joint tenancy as a form of co-ownership of personal property. A joint tenancy created under this statute has the common-law attributes of survivorship and severability. As a result, as long as the joint tenancy exists, the right of survivorship also exists. Each of the joint tenants, however, has the unilateral common-law right to sever the joint tenancy, and the creditors of a joint tenant can also sever a joint tenancy. See the discussion of technical joint tenancies in *Erickson v. Erickson*, 167 Or 1 (1941). In the event of such severance, the joint tenancy ownership is converted into a tenancy in common, which does not have the right of survivorship and is subject to probate in the deceased owner's estate. A statutory joint tenancy can only be created by a written instrument that expressly declares that the created interest is a joint tenancy. That written instrument, however, does not have to be signed. See *Estate of James Wyburn Tressel v. Tressel*, 162 Or App 188, rev den 329 Or 479 (1999). ORS 105.920 states that any transfer or bequest creating a joint tenancy does not derogate from the right of creditors. There are no Oregon cases specifically addressing this provision, but it would appear to give rights to creditors of the person who created the joint tenancy, with respect to claims that existed at the time the transfer was made.

Joint Ownership with the Right of Survivorship. Oregon courts have recognized that ORS 105.920 is not the only way in which personal property can be owned jointly with the right of survivorship. Those decisions have held that the same type of joint ownership with the right of survivorship that exists for real property also exists for personal property. See *Beach v.*

Holland, 172 Or 396 (1943); *Manning v. United States Nat. Bank of Portland*, 174 Or 118 (1944); *Sautter v. Coffey*, 283 Or 303 (1978); *Gilbert v. Brown*, 71 Or App 809, rev den, 300 Or 367 (1985). As with real property, this form of joint ownership must be created by clear and express language establishing the joint ownership and the right of survivorship. Once created, neither joint owner has the unilateral right to divest the other owner of his or her rights in the property, including the right of survivorship. See *State v. Gralewski's Estate*, 176 Or 448 (1945). The *Gralewski* decision, which involved a joint bank account, was based in part on a presumption that the owners had an equal interest in the jointly owned bank account. ORS 708A.465(1) now provides that a joint bank account belongs to the owners in proportion to their contributions to the account, unless there is clear and convincing evidence of a different intent.

Bank Accounts. Oregon law recognizes three types of bank accounts that by the terms of the deposit agreement can be transferred after an owner's death without probate. ORS 708A.480. Those accounts are joint accounts, pay-on-death (P.O.D.) accounts, and trust accounts. ORS 708A.455(4). The right of survivorship arising from the express terms of the account or, under ORS 708A.470, a beneficiary designation under a trust account or a P.O.D. designation cannot be changed by will. ORS 708A.470(5).

A joint bank account is payable on request to one or more of multiple parties. ORS 708A.455(3). At the death of a joint account owner, ORS 708A.470(1) provides that the remaining account funds are rebuttably presumed to belong to the surviving owner or owners as against the deceased owner's estate. This rebuttable presumption may be overcome by establishing that the deceased owner intended a different result or lacked testamentary capacity when the joint account was established. ORS 708A.470(6); see also *Newton v. Bank of the West*, 183 Or App 347 (2002) (holding that bank had right to freeze joint account rather than pay it to surviving owner when joint account was subject to adverse claim).

P.O.D. accounts are payable at the death of the surviving account owner to the P.O.D. payees. ORS 708A.470(2).

Bank trust accounts are held in the name of a trustee for the benefit of beneficiaries where the relationship is established by the form of the account and deposit agreement and the trust does not have any property other than the deposit in the account. ORS 708A.455(12). On the death of all trustees, the remaining amount in the account is paid to the beneficiaries or their survivors, unless there is clear and convincing evidence of a contrary intent. ORS 708A.470(3).

Under ORS 708A.475, the right of survivorship under ORS 708A.470 is determined by the form of the account at the death of an owner. Subject to the satisfaction of the bank's requirements, the form of the account may be altered by a written order signed by the party, delivered to the bank during the party's lifetime, and not countermanded by a later written order from the same party.

The above-noted statutes that create these accounts do not address the ability of a creditor of the deceased account owner to

reach the account proceeds in the hands of the beneficiary. Also, there is no case law directly on point.

Deferred Real Property Sale Proceeds - ORS 93.240. Under ORS 93.240, the general rule is that whenever joint owners of real property sell the real property and a portion of the sales proceeds are deferred and secured by either a mortgage or trust deed on the real property, the joint owners will own the right to receive the deferred payments and the security for those payments with the same incidents that they owned in the real property, including the right of survivorship. This general rule does not apply if a contrary purpose is expressed in the contract, note, mortgage, or trust deed.

Property Owned by a Revocable Trust. Property held in a revocable trust will not be subject to probate when the trust settlor dies if the trust names a beneficiary for the trust property. ORS 130.150(2)(c), which specifically addresses death benefits, provides that death benefits transferred to a trustee are not subject to the debts of the designator to any greater extent than if the death benefits were paid directly to the trust beneficiaries. ORS 130.315(1)(c) provides that property held in a trust that was revocable at the settlor's death is subject to the claims of the deceased settlor's creditors, as provided in ORS 130.350 through 130.450.

Property for Which There Is a Designated Beneficiary. Property for which an owner may designate a beneficiary will be transferred to the beneficiary after the owner's death without probate. Generally, this type of property will not be subject to claims against the decedent's probate estate unless the decedent's estate is the designated beneficiary. The decedent's estate can be the beneficiary of such property either by being designated as such or by default if there is no surviving designated beneficiary at the owner's death. Property for which a beneficiary can be designated includes life insurance policies, retirement plans, annuities, 529 plans, and securities. As discussed above, certain bank accounts can also have designated beneficiaries.

Life Insurance. Life insurance proceeds payable to a designated beneficiary go directly to the beneficiary and are not subject to probate, unless the insured person's estate was the designated beneficiary. ORS 743.046(1) governs the exemption of proceeds from an individual life insurance policy. Under that statute, those proceeds are exempt from the creditors of the person who effected the policy, with two exceptions. The proceeds are not exempt if they are paid to the person who effected the policy, and they are not exempt if they are paid to the legal representative of the person who effected the policy. The designation "legal representative" is not defined in ORS 743.046 and does not appear to include the trustee of a decedent's trust, based on the provisions of ORS 130.150(2)(c). ORS 743.047 creates an exemption for the proceeds of group life insurance, as long as the proceeds are not paid to the insured or to the insured's estate.

Retirement Plans. Retirement plans generally permit the plan participant to designate a beneficiary for any benefits that are unpaid at the participant's death. The plan benefits that are paid to a designated beneficiary are transferred directly to the

beneficiary and are not part of the deceased participant's probate estate, unless the estate is the designated beneficiary. ORS 18.358 provides retirement plan benefits with a general exemption against creditor claims. Under ORS 18.358(2), a beneficiary's interest in a retirement plan is totally exempt from execution, except in the following circumstances: a nonpermitted contribution to the plan is subject to ORS 95.200 through 95.310 concerning fraudulent transfers, and, unless otherwise ordered by a court, only 75 percent of the plan is exempt from support obligations or obligations under ORS chapter 25, 107, 108, 109, 110, 416, 419B, or 419C. For purposes of this exemption statute, the "beneficiary" is the person for whom the plan benefits are provided and that person's spouse or domestic partner. The retirement plans protected by this exemption include pension plans, profit sharing plans, IRAs, and any other pension granted to a person in recognition of the person's employment by a federal or state governmental entity, a person, a partnership, an association, or a corporation.

529 Plans. Under the provisions of the Oregon 529 College Savings Network, ORS 348.841-.873, an account owner can designate a beneficiary who is entitled to distributions from a 529 account. The account owner retains substantial rights over the funds in the 529 account, including the right to change the designated beneficiary, make withdrawals from the account for the designated beneficiary, and make distributions to himself or herself. At the death of the account owner, the 529 account continues for the benefit of the designated beneficiary under the control of a successor account owner who can be named by the prior account owner. The new account owner succeeds to all of the deceased account owner's rights, titles, and interests in the account. This transfer occurs under the terms of the plan and is not subject to probate in the deceased account owner's estate. See www.oregoncollegesavings.com for the Oregon College Savings Plan Description. ORS 348.863(2) provides that the right of an account owner to withdrawals, and payments and withdrawals made in exercise of that right and money, and property in the 529 account are exempt from garnishment and have limited bankruptcy protection.

Securities. The Uniform TOD Security Registration Act, ORS 59.535-.585, authorizes beneficiaries to be designated for a security. For purposes of this act, the definition of a "security" under ORS 59.535(9) appears to be much broader than the definition used for a "security" under the Oregon Securities Law at ORS 59.015(19). ORS 59.565 provides that on the death of the security owner, the security passes to the surviving beneficiaries. If there is no surviving beneficiary, the security passes to the deceased owner's estate. ORS 59.575 establishes that the transfer from the deceased owner to the beneficiary is effective by contract and is not testamentary. That statute also states that the transfer to the beneficiary does not limit the rights of creditors of the deceased security owner against the beneficiary or other transferees under other state laws.

Motor Vehicles. ORS 803.094(2)(b) authorizes the transfer of a motor vehicle pursuant to an affidavit signed by the decedent's

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heirs, if the decedent's estate is not being probated. This statute is silent regarding the rights of the decedent's estate to recover vehicles transferred by this procedure for payment of the deceased owner's creditors.

Bank Accounts Under \$25,000. If a person dies owning bank deposits of \$25,000 or less in Oregon that would be subject to probate, ORS 708A.430 allows the bank to pay the deposits to the person entitled to them under the statute, upon receipt of an affidavit from the person that contains the representations set out in ORS 708A.430. One of the required representations in the affidavit is a promise by the person receiving the funds to use them to pay the decedent's expenses of last sickness, funeral expenses, and just debts. If the decedent's estate is probated, the person receiving the funds must account for them to the estate's personal representative.

Procedures Available to Unsecured Creditors to Collect Amounts Owing

The procedures available to the unpaid creditors of a decedent when the assets of the decedent's estate are insufficient to pay the creditors or the decedent's estate is not probated include those listed below. Whether the procedures or any of them would be successful depends on the nature of the creditor's claim and whether the decedent owned other assets that were not included in the probate estate.

The Right of a Creditor to Proceed Directly Against the Decedent's Surviving Spouse or Domestic Partner Under ORS 108.040. ORS 108.040(1) provides that expenses of the family are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately. The statute provides that "expenses of the family" only includes expenses incurred for the benefit of a family member, and that "family" means the husband, wife, and their minor children. Section 9(2) of the Oregon Family Fairness Act extends this statutory obligation to domestic partners. This joint liability for family expenses ends once the spouses or partners separate, except for such expenses incurred for their minor children. See ORS 108.040(2)-(3).

Oregon courts have found that family expenses mean expenses for the immediate sustenance and comfort of the family, *Chamberlain v. Townsend*, 72 Or 207 (1914), and include not only merchandise but services, such as medical and burial expenses, *Hansen v. Hayes*, 175 Or 358 (1944). *Chamberlain* also held that family expenses do not include business expenses. In the case of a decedent who died with unpaid family expense obligations, the creditor may sue the decedent's spouse or domestic partner directly to recover those expenses.

The Right of a Creditor to Require a Personal Representative to Recover Property. Under ORS 114.435, any property transferred by a decedent is liable correct word for the payment of the probate estate's administration expenses, claims, taxes, and decedent's funeral expenses if the transfer was made either with the intent to defraud the decedent's creditors or by any

other means that is void or voidable against those creditors. If the probate estate is insolvent, the personal representative would have a fiduciary duty to look for transferred property that could be recovered to pay those expenses and, if such transfers were found, to take necessary steps to recover the transferred property. The personal representative is a fiduciary for both the creditors and the beneficiaries of the estate. See *In re Larabee's Estate*, 193 Or 543 (1952); see also *Estate of Hendrickson v. Warburton*, 276 Or 989 (1976), which holds that the personal representative's right to recover transferred assets only exists if the assets are required to pay estate expenses or claims. Otherwise, the right of recovery belongs to the decedent's beneficiaries.

Creditors with allowed but unpaid claims against an insolvent estate have the right to petition the court under ORS 114.275 to instruct the personal representative to conduct a reasonable search for assets recoverable under ORS 114.275 and, if such assets exist, to initiate recovery action. ORS 111.005(19) includes a creditor of the estate as an interested person. Additionally, a creditor with an allowed but unpaid claim against the estate may file an objection to the personal representative's final account if the creditor believes that the personal representative did not adequately search for or initiate action to recover transferred assets. See ORS 116.093(1)(c), 116.103. When an objection is filed against the personal representative's final account, the personal representative has the burden of proving it has complied with its obligations. See *In re Miller's Estate*, 189 Or 246 (1952). Examples of assets that would be subject to identification and potential recovery by the personal representative under ORS 114.435 include (1) securities transferred by TOD registration, see ORS 59.575; (2) joint bank accounts to determine if the presumption of survivorship can be rebutted under ORS 708A.470(6), including jointly owned P.O.D. and trust accounts when an account owner dies, survived by another account owner; (3) motor vehicles that are transferred administratively under ORS 803.094(2)(b); (4) personal property alleged to have been owned as joint tenants under ORS 105.920 to determine if the transfer creating that joint tenancy was in derogation of the rights of creditors or if the right of survivorship in that property had been severed prior to the decedent's death; and (5) fraudulent transfers subject to ORS 95.200 through 95.310.

The Right of a Creditor to Initiate a Probate Proceeding. There is no requirement that a decedent's estate be probated if the decedent dies owning property that would be subject to the jurisdiction of the probate court. Failure to initiate a probate may prevent or limit the decedent's beneficiary from exercising ownership rights over the decedent's property. Those rights can be important if the beneficiary wants to dispose of property with a documented title and the title can only be transferred through probate. However, probate may not be important for the decedent's beneficiary for assets without a title document; for assets that can be transferred administratively, such as motor vehicles or bank accounts under \$25,000; and for assets that the beneficiary will keep and not transfer or sell.

In such cases, if the creditor of a decedent believes that the decedent had assets that were subject to probate, including

assets recoverable under ORS 114.435, the creditor may initiate a probate under ORS 113.035. As long as the creditor or personal representative timely files its claim as provided in ORS 115.105, within the limitation period, the personal representative would be able to take possession of estate assets and, if necessary to pay all estate expenses and claims, recover transferred assets under ORS 114.435. If the statute of limitations on a claim against a decedent has not run on the date of the decedent's death, ORS 12.190(2) provides that if the limitation period runs in less than one year after the date of death, an action may still be commenced against the personal representative of the decedent's estate within one year of the decedent's death. *See also* ORS 115.305 (stating that claims against decedent survive against decedent's personal representative).

While a creditor has the right to initiate a probate, there are many reasons why a creditor may not want to do so. Those reasons include the fact that the personal representative has a fiduciary duty to all creditors and to the estate beneficiaries, *see* ORS 114.265, and that the creditor may have limited knowledge of the decedent's assets and of the decedent's other creditors, including creditors with claims entitled to a higher priority under ORS 115.125.

The Right of a Creditor to Proceed Against the Trustee of the Deceased Settlor's Trust. Under ORS 130.315(1)(c), the trust property is subject to the deceased settlor's creditors as provided in ORS 130.350 through 130.450. The comments to subsection (1)(c) indicate that under traditional doctrine the assets of a probate estate must first be exhausted before assets of a revocable trust can be reached and that this statutory provision does not address that issue.

ORS 130.350 through 130.450 establish rules similar to those under Oregon's probate law. ORS 130.350 provides that a claim against the trust must be filed before the earlier of (1) the applicable statute of limitations, which is extended by ORS 130.420 to one year after the settlor's death if it had not run before the settlor's death, or (2) the time period set out in ORS 130.360, if the trustee elects to commence a proceeding under ORS 130.355. If a proceeding is commenced, the claim must be filed before the later of four months after the publication of notice or, if the trustee delivers or mails a notice to the creditor, 30 days after the notice is mailed or delivered. *See* ORS 130.360. Unlike the obligation of a personal representative to recover assets if the probate estate is insolvent, no such obligation is imposed on the trustee of a trust.

The Right of a Creditor to Proceed Directly Against a Transferee of the Deceased Person's Property. In some situations, a decedent's creditor may be able to proceed directly against a person who received property from the decedent. In *First Nat. Bank of Portland v. Connolly*, 172 Or 434 (1943), the Oregon Supreme Court recognized the general rule that when a creditor's probate claim is proved but unpaid, or if the claim comes into existence too late to be proved or after the administration has been closed, the creditor has an equitable claim directly against

the person receiving property from the probate estate. The court then went on to expand that general rule by stating, "We are of the opinion, however, that the remedy is not limited to cases of that character, but extends to a case like this in which, as we have held, the circumstances warrant the interposition of a court of equity." *Id.* at 485-86. One of the primary issues in *Connolly* was whether the purchaser of an asset from the estate was a bona fide purchaser.

Conclusion

When a person dies and the assets of that person's probate estate, if an estate was initiated, are insufficient to pay all administrative expenses and claims, unpaid creditors with claims for which the limitation period has not run must look elsewhere to recover the amounts owed to them. If the estate had been probated, the creditor could take action to require the personal representative to search for recoverable assets and, if found, to recover them. The creditor could object to the personal representative's final account and make the personal representative establish that reasonable action was taken to recover assets. If the personal representative had not taken such action and if such assets could have been recovered, the personal representative could have personal liability. If the unpaid obligation is for a family necessity, the creditor can collect from the decedent's spouse or domestic partner. If the decedent had a living trust, the creditor can file a claim against the trust. If the decedent's estate was not probated, the creditor can initiate a probate of the decedent's estate. The creditor may also have a right to proceed directly against a person who received property from the estate based on equitable grounds.

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Appealability of Decisions in Probate and Trust Proceedings

The question of whether a probate court order or judgment can be appealed depends on the nature of the action and the nature of the order or judgment that is entered by the court. In general, a party may appeal from a declaratory judgment, a limited judgment, or a general judgment, while a party may not appeal from an order. If an order is entered in a probate proceeding, a party generally may not appeal until much later, when a general judgment of final distribution is entered.

The time period for appeal is generally 30 days from entry of the judgment. ORS 19.255.

The following discussion will explain the complex rules governing the appealability of probate decisions. Although the discussion is limited to estate and trust matters, most of the information also applies to protective proceedings. See ORS 125.030, 125.090, 125.305, 125.400.

When drafting pleadings, care should be taken to pray for the appropriate form of relief.

Declaratory Judgments

In estate proceedings, the probate court may enter a declaratory judgment in “all matters involved in the administration of an estate.” ORS 111.095(2). A declaratory judgment is appealable, partly because ORS 28.070 expressly so states. *Smith v. Caldwell*, 188 Or App 456 (2003). It is also appealable because a limited judgment may be entered in a declaratory judgment action in an estate (ORS 111.275), and limited judgments are appealable. ORS 19.205. In trust matters, the court has authority to enter a declaratory judgment pursuant to ORS 130.050(3) and 28.040, and declaratory judgments are appealable. ORS 28.070; *Smith* 188 Or App.

A declaratory judgment action requires the filing of a complaint, not a petition, and personal service of process is required, rather than mere notice. *Decker v. Wiman*, 288 Or 687 (1980). However, *Decker* may have been modified by the subsequent adoption of ORS 130.035(5), which provides that a contest of a revocable trust requires a summons and complaint, while all other trust proceedings do not, as other trust proceedings are commenced by a petition and notice in the manner required for a probate final accounting. ORS 130.035(4)–(5).

In most trust matters (unlike probate estates), the trust is not under the continuing supervision of the court, and the decision of the court often concludes the proceeding, and thus the decision may be entered under ORS 18.005(7) as a general judgment, which is also appealable. ORS 19.205.

General Judgments

As noted above, a trust matter typically ends with a general judgment, which is appealable under ORS 18.005(7) and 19.205. A general judgment is defined as a judgment that disposes of

all of the remaining issues (requests for relief) that have not previously been decided by a limited judgment. ORS 18.005(7). However, a lengthy trust proceeding might result in interim rulings on various issues, and those interim rulings will be entered as limited judgments if they dispose of one or more issues (one or more requests for relief), but less than all of the issues. ORS 18.005(13)(d). They will be entered as orders if they do not dispose of a request for relief. ORS 18.005(13). Supplemental judgments are entered after the entry of a general judgment; they usually deal with the award of attorneys’ fees, discharge of the fiduciary, and other matters specifically authorized by statute. ORS 18.005(17). Limited judgments, general judgments, and supplemental judgments are appealable, assuming the appealing party preserved right to appeal by timely objecting to the entry of the judgment and filed notice of appeal within the applicable time period. ORS 19.205.

In estate matters, a general judgment is not entered until the estate is ready for final distribution, in which event the court will enter an order approving the final account and a general judgment of final distribution. ORS 116.113, 18.005(7). The two are usually entered as one document. Such a general judgment is appealable under ORS 18.005(7) and 19.205. If a party desires to obtain an appealable decision prior to that time, the party should seek a declaratory judgment (discussed above) or a limited judgment (discussed below). However, while a declaratory judgment may be entered in connection with almost any matter pertaining to the administration of an estate, ORS 111.095(2), or trust, ORS 130.050(3) (ORS 28.040), a limited judgment may be entered only in certain narrow circumstances, which are discussed below.

In estate proceedings, because the general judgment of final distribution is often the only appealable decision entered by the court, consideration should be given to incorporating into the general judgment all of the terms of the previously entered nonappealable orders, if any.

Limited Judgments

Limited judgments are appealable pursuant to ORS 19.205, but the appeal must be filed within the time limit described in ORS 19.255. If a limited judgment has been entered and an appeal is to be taken, the party should not wait until the entry of the general judgment of final distribution to file the appeal. In that situation, the notice of appeal must be filed within 30 days after the entry of the limited judgment. ORS 19.255. If a delay is desired, an order should be entered, rather than a limited judgment.

In estate proceedings, a court may enter a limited judgment for certain decisions and not for other decisions. The permitted decisions are described in ORS 111.275(1):

- (a) a decision on a petition for appointment or removal of a personal representative.

- (b) a decision in a will contest.
- (c) a decision on an objection to an accounting.
- (d) a decision made on a request for a declaratory judgment under ORS 111.095.
- (e) other decisions as may be specified by the Oregon Supreme Court.

The Supreme Court has not yet specified any other decisions that will permit the entry of a limited judgment. As a result, a limited judgment may be entered in only the four decisions described above and no others. Even then, the entry of a limited judgment is apparently discretionary with the court because ORS 111.275(1) uses the word “may.” That same statute requires that a court must determine that there is no just reason for delay before entering a limited judgment. Although the inclusion of that language in the limited judgment is not required, it is highly desirable. ORS 111.275(2).

In trust proceedings, a general judgment is usually entered at the conclusion of the proceeding. However, a proceeding might result in interim rulings on various issues, and those interim rulings will be entered as limited judgments, as discussed above. ORS 18.005(13).

Petitions for Instructions

Petitions for instructions in estate matters (pursuant to ORS 114.275) or in trust matters (pursuant to ORS 130.050) should carefully specify the exact nature of the decision being requested. For example, the prayer of the petition might request the entry of an order, a limited judgment, or a general judgment. (As noted above, a declaratory judgment action requires the use of a complaint, not a petition.) In most cases, the caption itself should reiterate the nature of the decision being requested. A petition might be captioned as a petition for instructions to the personal representative and for entry of a limited judgment or a general judgment, as the case may be.

Summary Determinations

An order entered in a proceeding for a summary determination of a claim against a probate estate may not be appealed. ORS 115.165(3). If a claimant desires to obtain an appealable determination, the claimant should not request a summary determination pursuant to ORS 115.145(1)(a), but instead should commence a separate action pursuant to ORS 115.145(1)(b).

Prior Case Law

Because of recent changes in the statutes dealing with judgments and appealability, care should be exercised when reviewing case law on those subjects. In many situations, the case law will have been effectively overruled by subsequent statutory developments. For example, according to *Roley v. Sammons*, 197 Or App 349 (2005), an order entered in a probate proceeding cannot be appealed until the entry of a general judgment of final distribution of the estate. According to that case, even

if a limited judgment is entered following the resolution of a petition for instructions, it is not appealable. That case stands for the proposition that to obtain an appealable judgment in a probate proceeding prior to the entry of the general judgment, a declaratory judgment must be entered. However, that opinion is most likely no longer good law in Oregon. The reasoning in *Roley* was based on *Decker*, 288 Or 687, and *Smith*, 188 Or App 456. Legislative changes in 2003 (Or Laws 2003, ch 576, which created limited judgments and postdated *Decker* and *Smith*) and legislative changes in 2005 (including ORS 18.005(13)(d) and 111.275, which postdated *Decker*, *Smith*, and *Roley*) would appear to change the result in *Roley*, if it were decided today. In particular, ORS 111.275 permits the entry of limited judgments in probate courts in certain enumerated circumstances, and ORS 19.205 provides that limited judgments are appealable. As a result, limited judgments entered in estates pursuant to ORS 111.275 are appealable, but only certain actions by the court are eligible to be accomplished by a limited judgment, as described above.

In addition, *Roley* appears to have been wrongly decided. At a minimum, the language of the final several paragraphs of *Roley* seems to broadly (and incorrectly) state that only declaratory judgments and general judgments are appealable from the probate court, based on the reasoning of *Decker* and *Smith*. *Decker* and *Smith* concerned heirship determinations, and their rationale was based on certain 1969 legislative changes pertaining only to heirship determinations. *Roley* appears to have incorrectly expanded that rationale to apply to other determinations of the probate court (*Roley* dealt with a will construction issue). As explained above, current statutes provide that limited judgments of the probate court are appealable, but *Roley* holds to the contrary, and *Roley* is the most recent precedent from the Oregon Court of Appeals.

Roley is also contrary to *Amundson v. Brookshire*, 133 Or App 450, 453 (1995), which held that a contested order removing (or declining to remove) a personal representative is appealable. *Amundson* was decided under the 1995 version of ORS 19.205(2), which was then numbered ORS 19.010(2)(a). Both statutes provide that an order may be appealed if it affects a substantial right and effectively determines the action or suit so as to prevent a judgment or decree therein. *Amundson* concluded that an order resolving a dispute over the removal of a personal representative affected substantial rights of both the personal representative and the person attempting to replace the personal representative. *Roley* did not cite the earlier *Amundson* case, but that omission may be explained by the fact that *Amundson* was decided under 1995 law, prior to the creation of limited judgments. For the same reason, however, *Roley* should not have relied on *Decker*, which also predated the creation of limited judgments. Nor should *Roley* have relied on *Smith*. Although *Smith* was decided after the creation of limited judgments, a limited judgment was not entered in that case. Instead, the court entered an order that was merely labeled as a “judgment” in an heirship determination case. The *Smith* court concluded that the “judgment” was not of the

Continued next page

type appealable under ORS 19.205(1), and the statutes in effect at that time (and now) did not permit the entry of limited judgments in heirship determination cases. As a result, *Roley* improperly applied *Smith* to a nonheirship case that had employed a limited judgment.

In any event, it appears that *Roley* is no longer good law in Oregon.

But the most important message is that probate and trust litigation is full of complexities and odd traps for the unwary.

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Trustee Duties – A Refresher

Before the enactment of the Oregon Uniform Trust Code (“OUTC”), Oregon law provided limited statutory guidance regarding a trustee’s fiduciary duties. Consequently, the principles of the common law of trusts adopted by Oregon courts governed the determination of a trustee’s duties. Because Oregon case law applying these common law principles was limited, the scope and nature of some fiduciary duties were unclear. With the enactment of the OUTC, Oregon now has statutory provisions that provide a fundamental set of guidelines for determining a trustee’s duties. Some of the OUTC provisions follow existing common law, but other provisions of the OUTC alter prior law regarding a trustee’s duties. In light of these changes, this article serves as a refresher on a trustee’s fiduciary duties under current Oregon law.

As a general rule, the trustee’s duties set forth in the terms of the trust instrument prevail over the provisions of the OUTC. ORS 130.020(2). A trustee, however, has no duty to comply with trust provisions that are unlawful, contrary to public policy, or impossible to achieve. ORS 130.020(2)(c), 130.165. In addition, certain duties of the trustee cannot be modified or eliminated by the trust instrument. *See* ORS 130.020(2). Specifically, the trust instrument cannot eliminate the duty of a trustee to act in good faith and in accordance with the purposes of the trust and, except as provided by other provisions of the OUTC, the duty to give notice, information, and reports to qualified beneficiaries. ORS 130.020(3)(b), (2)(h)-(i).

To the extent that the terms of the trust instrument do not address the trustee’s duties, the OUTC governs the duties of a trustee. ORS 130.020(1). Under the OUTC, a trustee has the following statutory duties:

Duty to Administer the Trust. On acceptance of a trusteeship, the trustee’s fundamental duty is to administer the trust in good faith, in accordance with its terms and purposes and the beneficial interests of the beneficiaries, and in accordance with the OUTC. ORS 130.650.

Duty of Loyalty. The trustee must administer the trust solely in the beneficial interests of the beneficiaries. ORS 130.655. Unless one of the exceptions in ORS 130.655 applies, the trustee’s duty of loyalty prohibits a trustee from engaging in any self-dealing or any other transaction benefiting the trustee that places

the trustee’s own interests ahead of those of the beneficiaries.

Duty of Impartiality. If a trust has two or more beneficiaries, the trustee must act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries’ respective interests, as set forth in the trust. ORS 130.660.

Duty of Prudent Administration. A trustee must administer a trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. ORS 130.665. In satisfying this standard, the trustee must exercise reasonable care, skill, and caution. *Id.*

Duty to Use Special Skills. If the trustee has special skills or expertise, or is named trustee in reliance on the trustee’s representation that the trustee has special skills or expertise, the trustee must use those special skills or expertise in administering trust assets. ORS 130.675.

Duty Regarding Delegation. A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. ORS 130.680(1). If a trustee delegates a duty, the trustee must exercise reasonable care, skill, and caution when (a) selecting an agent; (b) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (c) periodically reviewing the agent’s actions in order to monitor the agent’s performance and compliance with the terms of the delegation. *Id.*

Duty to Control and Protect Trust Property. The trustee has the duty to take reasonable steps to take control of and protect trust property. ORS 130.690.

Duty to Keep Records and to Identify Trust Property. The trustee must “keep adequate records of the administration of the trust.” ORS 130.695(1). In addition, the trustee must keep trust property separate from the trustee’s own property and, to the extent feasible, designate property as trust property so that the interest of the trust is reflected in any records maintained by third parties. ORS 130.695(3).

Duty to Collect Trust Property. The trustee must take reasonable steps to collect trust property and to redress any breach of trust known to have been committed by a former trustee. ORS 130.705.

Duty to Inform and Report. A trustee must keep “qualified beneficiaries” of the trust reasonably informed about the trust administration and of the material facts necessary for those beneficiaries to protect their interests. ORS 130.710(1). In addition, if information relating to the trust administration is requested by a beneficiary who is not a qualified beneficiary, the trustee may, but is not required to, respond to such beneficiary’s request if reasonable under the circumstances. *Id*

Obligations to Qualified Beneficiaries

A “qualified beneficiary” is a beneficiary who, on the date the beneficiary’s qualification is determined, either is “currently eligible to receive distributions of trust income or principal, whether the distribution is mandatory or discretionary,” or would be eligible to receive such distributions if (1) the interests of all current permissible beneficiaries terminated or (2) the trust is terminated. ORS 130.010 (10), (14).

Under ORS 130.710(2), a trustee has the following affirmative reporting obligations to qualified beneficiaries:

- On request, the trustee must promptly furnish a complete copy of the trust instrument to a qualified beneficiary.
- Within a reasonable time after accepting a trusteeship, the trustee must notify all qualified beneficiaries of the trustee’s acceptance and of the trustee’s name, address, and telephone number. This provision does not apply to acceptances occurring before January 1, 2006. *See* ORS 130.910.
- Within a reasonable time of acquiring knowledge of the creation of an irrevocable trust, the trustee must notify the qualified beneficiaries of the trust’s existence, the identity of the settlor, and the beneficiaries’ right to request a copy of the trust instrument and a trustee’s report.
- The trustee must notify the qualified beneficiaries in advance of any change in the method or rate of the trustee’s compensation.

Trustee Reports

At least annually, and on termination of the trust, a trustee must send a trustee report to the current permissible distributees of trust income or principal and to other qualified beneficiaries who request the report. ORS 130.710(3). The report must:

- Include a list of trust property and liabilities;
- Show the market values of trust assets, if feasible; and
- Reflect all receipts and disbursements of the trust, including the source and amount of the trustee’s compensation. *Id.*

Exceptions

- A trustee shall give information, notice, and reports only to the settlor’s spouse if (a) the spouse survives settlor, (b) the spouse is financially capable, (c) the spouse is the only permissible distributee of the trust, and (d) all other

qualified beneficiaries of the trust are descendants of the spouse. ORS 130.710(8).

- A settlor may waive or modify a trustee’s duty to inform and report to qualified beneficiaries during the period that (a) the settlor is alive and financially capable, or (b) the settlor’s spouse, if a qualified beneficiary, is alive and financially capable. ORS 130.020(3)(a).
- A settlor may designate a person to act in good faith to protect the interests of the qualified beneficiaries, and to receive required notice, information, and reports on behalf of the qualified beneficiaries. ORS 130.020(3)(b).

Duty to Act in Accordance with the Exercise of Power to Direct. A trustee may have a duty to follow the direction of a third party. ORS 130.685. While the trust is revocable, the trustee may follow the direction of the settlor. If the power to direct the actions of the trustee is conferred on a person other than the settlor, the trustee must act in accordance with the exercise of the power unless the exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty the person holding the power owes to the beneficiaries.

Duty to Comply with Prudent Investor Rule. The Uniform Prudent Investor Act (ORS 130.750-.775) sets forth a trustee’s duty to invest and manage trust assets as a prudent investor. ORS 130.750(1).

Duty to Administer Trust at Appropriate Place. The trustee has a duty to administer the trust at a place appropriate for the trust’s purposes, the trust’s administration, and the interests of the beneficiaries. ORS 130.022(2).

Duty to Enforce Claims. The trustee has a duty to enforce claims of the trust. ORS 130.700.

Duty to Defend Actions. The trustee has a duty to defend actions against the trust. ORS 130.700.

Duty to Avoid Unreasonable or Inappropriate Costs. The costs incurred by a trustee must be reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee. ORS 130.670.

Duty Toward Co-Trustee. The trustee must exercise reasonable care to prevent a co-trustee from committing a serious breach of trust and compel a co-trustee to redress a serious breach of trust. ORS 130.610(7).

In addition to the statutory duties, the common law of trusts and principles of equity supplement the OUTC, except as may otherwise be modified by law. ORS 130.025. The most notable source of the common law of trusts is the Restatement (Second) of Trusts (1959). Common law duties include, but are not limited to, the following:

Duty to Make Trust Property Productive. The trustee must make trust property productive. Restatement (Second) of Trusts § 181.

Continued next page

Duty to Pay Income. The trustee must pay the trust income to the beneficiaries at reasonable intervals if the trust instrument requires the distribution of trust income. Restatement (Second) of Trusts § 182.

The law has always imposed serious fiduciary duties on trustees of trusts. Trustees and the lawyers who advise them can benefit from a careful review of these duties.

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Save the Date – Feb. 29, 2009

Natalie Choate

speaking about

Retirement Plan Benefits

New Forms for Probate Practice

HB 2362, enacted as Oregon Laws 2007, chapter 284, was sponsored by the Estate Planning and Administration Section with the goal of conforming probate filings (including those in protective proceedings) to common civil pleading practice. The new law reduces the need for notaries to take oaths or affirmations in probate.

Before reviewing the changes brought about by this legislation, it is important to emphasize what the legislation does *not* do. ORCP 1 E begins:

A declaration under penalty of perjury may be used in lieu of any affidavit required or allowed by these rules.

UTCR 2.120 takes the same approach.

No such change was made to the Probate Code, and there are still several affidavits required by the Probate Code that must be sworn or affirmed before a notary public. These include an affidavit of destruction of a will under ORS 112.820, an affidavit of an attesting witness under ORS 113.055, a small-estate affidavit under ORS 114.505-.560, an affidavit made by or on behalf of the foreign personal representative under ORS 116.263, and an affidavit of a foreign fiduciary under ORS 125.540.

Also, some documents used regularly in probate still need to be acknowledged before a notary public. Obviously this is true of deeds under ORS 93.010, but it is also true of an assignment of an interest in a judgment of distribution under ORS 18.205. The Probate Code does not include any provisions regarding assignment of an interest in an estate other than the reference in ORS 116.113(1) allowing judgments of distribution to vest title to estate assets in persons entitled to the property “by agreement approved by the court,” but good practice would suggest that any such agreement be acknowledged before a notary public.

Having reminded us what the new legislation does not do, the rest of this article will focus on what it does do.

First, the new legislation eliminates all reference in the Probate Code and ORS chapter 125 to verification of papers filed

in the probate court. Since January 1, 2008, nothing should be verified for filing in an Oregon probate court.

Second, it replaces verification with a new requirement in ORS 111.205 that

[a]ll petitions, reports and accounts in proceedings before a probate court must include a declaration under penalty of perjury in the form required by ORCP 1 E made by at least one of the persons making the petitions, reports and accounts or by the attorney for the person, or in case of a corporation by its agent.

This change is not optional. It is mandatory. Affected forms must be revised for filing in court, although the forms in *Administering Oregon Estates* have not yet been revised.

Implementing the new statute first requires a reading of ORCP 1 E. It provides in relevant part:

A declaration under penalty of perjury * * * must be signed by the declarant and must include the following sentence in prominent letters immediately above the signature of the declarant: “I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.”

First, the rule requires that someone sign the document. Note that ORS 111.205 still allows an attorney to sign for a client. Second, it requires that the sentence quoted in the rule (not substantially the quoted sentence) appear in “prominent letters.” In my forms the declaration is printed in bold letters, although it does not appear that courts are enforcing the prominence requirement. Third, the rule requires that the quoted statement be “immediately above” the signature. In my forms that means the date is no longer immediately above the signature, but to the left of the signature, and the signature cannot be on the page following the declaration. If the page break happens to fall immediately above the signature and below the declaration, the declaration should be moved to the following page. The clear objective of the

language in ORCP 1 E is that the person signing the document see the language of the declaration when signing.

The new statute, like the prior requirement of verification, applies to “petitions, reports and accounts.” Those are not defined terms in the Probate Code, although ORS chapter 116 has clear requirements for accounts (which in ORS chapter 125 are called “accountings”). The Probate Code has many references to petitions, but very few to reports. What these three terms have in common is that each refers to a document that conveys information on which a court may (or may not) act. All such documents should include the declaration.

It is worth noting that many probate attorneys continue to use affidavits sworn or affirmed before a notary to support their attorney fees under UTCR 9.060(1) and (2). That is not proper. The same is true of the requirement in UTCR 9.060(3) for an “affidavit” to support personal representative fees in excess of the statutory amount. As noted above, UTCR 2.120 requires that “affidavit” in the Uniform Trial Court Rules be understood as a declaration under penalty of perjury, not a true affidavit.

Effective August 1, 2008, UTCR Form 5.080—Statement for Attorney Fees, Costs and Disbursements—has been significantly amended. Some circuit courts have supplemental local rules (including Multnomah County SLR 9.095(1)(A)) requiring that UTCR Form 5.080 be used to support fee requests in probate. That is the form to be used in those counties, although it must be modified to meet the requirements of probate. The declaration portion of the form has also been amended so that it no longer conforms to the exact language of ORCP 1 E. Although this seems to conflict with the new statute requiring that declarations in probate conform to ORCP 1 E, the source of the requirement for an “affidavit” to support attorney fees in probate is UTCR 9.060, not the Probate Code. I therefore suggest that an appropriately modified version of the UTCR form be used to support attorney fees in probate.

The new statute also adds new ORS 111.218 to the Probate Code. That provision requires that proof of mailing or other delivery of notice or other documents be in the form required by ORCP 9 C and that proof of publication be in the form required by ORCP 7 F. These provisions replace repealed requirements that proof of mailing, delivery, or publication be by affidavit.

The relevant provision of ORCP 9 C provides:

[P]roof of service of all papers required or permitted to be served may be by written acknowledgment of service, by affidavit or declaration of the person making service, or by certificate of an attorney. Such proof of service may be made upon the papers served or as a separate document attached to the papers.

Note that this provision relates only to the form of proof of service. It does not expand the methods of service permitted by the Probate Code (generally mail or personal delivery) to include some of the methods referred to in ORCP 9 C, such as facsimile or email.

ORCP 7 F(2)(b) allows proof of publication by affidavit or by declaration. It replaces the provision of former ORS 113.155 (2007) requiring that proof be by affidavit. The affidavit is still permissible, however, and in my experience publishers have been slow to change to the new system.

HB 2362 requires that numerous probate forms be revised. The benefit to attorneys doing probate work is that when we mail papers to clients to sign or meet clients outside of office hours or away from locations where notaries are conveniently available, we will no longer have to worry about having a notary along for the ride. In the long run this should eliminate a source of annoyance for us and reduce the cost of probate for our clients.

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