

Newsletter

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Trust Repair: Modifications, Terminations, and Conversions Part I: *Getting Ready*

This article is adapted from the written materials prepared for the CLE presented on November 18, 2011, entitled “Trust Repair,” as part of the Section’s “Administering the Basic Estate and Trust: Not So Basic Anymore.” The materials have been broken into two parts: this first part focuses on the history and basics of the law relating to the process used to change an irrevocable trust; the second part, to be published in the October issue of the Oregon Estate Planning and Administration Section Newsletter, will focus on the two methodologies one can employ: repair by agreement and repair by judicial proceeding.

History

A court of equity has always had the power to modify an irrevocable trust on the grounds of fraud, duress, mental incompetency, undue influence, or mistake. However, historically, absent those equitable grounds, a court was unable to change the terms of an irrevocable trust. *In re Harrell*, 104 Or App 332 (1990) (the court lacked the power to approve of an agreement among all the beneficiaries of a trust to extend its term as to the interest of one incapacitated remainderman), *rev den*, 311 Or 166 (1991).

In response to the outcome in *Harrell*, in 1993 the Oregon Legislature enacted a new law that, for the first time, created a statutory mechanism to modify an irrevocable trust. *Former ORS 128.177 to 128.185* (1993). D. Charles Mauritz, counsel for the appellant in the *Harrell* case, provided testimony in support of the new law in the form of a letter dated February 1, 1993. Of interest, Mr. Mauritz’s letter testimony contains examples of how the new law could be applied. A thorough treatment of this statute, together with forms, written in part by Mr. Mauritz, can be found in Chapter 13 of the 1995 CLE publication *Administering Trusts in Oregon*.

Oregon lawyers were able to use these statutory tools for over a decade. However, in 2006, this statutory scheme was incorporated into the newly adopted Uniform Trust Code (“UTC”). Because of some inadvertent changes that were made to the statutory scheme when it was incorporated into the UTC, concerns were raised about the ability of the trustee and beneficiaries to modify an irrevocable trust by agreement and without court involvement, when the settlor of the trust was no longer living. Corrections to that portion of the UTC were made in the 2009 session so that nonjudicial agreements could once again be used to make changes to irrevocable trusts, even after the death of the settlor.

Basics

The statutory process sets forth two pathways practitioners may follow to modify an irrevocable trust: one that requires the court to act; and the other that simply involves an agreement among the trustee and beneficiaries (which may, but need not, be filed with the court). While the specifics about these two choices will be addressed in Part II of this article, there are similarities that must be addressed in both instances.

PRACTICE NOTE: Some practitioners, to ensure privacy, choose not to file the agreement with the court because ORS 130.045(5) uses the permissive term “may.” An agreement is a contract and can be binding on the parties. Not filing an agreement with the court does not defeat any contract claim. As a practical matter, filing the agreement with the court, especially when dealing with unrepresented parties, eliminates potential arguments later, because the agreement is effective and binding when the statutory filing procedure is followed. Privacy concerns can be addressed by filing a summary agreement that eliminates any personally sensitive or tax sensitive information. ORS 130.045(6)(e) contains the waiver of notice provisions and makes the agreement effective immediately upon filing. The authors’ preference is to file all agreements with the court.

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Jurisdiction

ORS 130.055 provides that Oregon courts have jurisdiction over a trustee if the trustee accepts the trusteeship of a trust having its principal place of administration in Oregon or moves the principal place of administration to Oregon. Either of these circumstances causes immediate personal jurisdiction over the trustee regarding any matter involving the trust. ORS 130.060 provides for subject matter jurisdiction over trust administration matters in the circuit courts. ORS 130.050(1) provides that the court may intervene in the administration of a trust to the extent the court's jurisdiction is invoked by an interested party or as provided by law. A judicial proceeding may relate to any matter involving a trust's administration, including a request for instructions or a declaratory judgment action.

How does one determine a trust's principal place of administration? ORS 130.022(1) provides that the terms of a trust designating the principal place of administration are valid and controlling if:

- (a) A trustee's principal place of business is located in the designated state, country or other jurisdiction, or the trustee is a resident of the designated state, country or other jurisdiction;
- (b) All or part of the administration occurs in the designated state, country or other jurisdiction; or
- (c) Other means exist for establishing a sufficient connection with the designated state, country or other jurisdiction.

ORS 130.022(2) provides that a trustee is under a continuing duty to administer the trust at a place appropriate to the trust's purposes, the trust's administration, and the interests of the beneficiaries. It also provides that, absent a substantial change of circumstances, the trustee may assume that the original place of administration is also the appropriate place of administration. Finally, it provides that the duty to administer the trust at an appropriate place may prevent a trustee from moving the place of administration.

PRACTICE NOTE: Consider the following practice issues when a trust modification or termination is contemplated:

- Are there jurisdictional issues presented by a brokerage house serving as a trustee? Does the standard language required by the brokerage house change the jurisdiction to an inconvenient location for the trust's purposes or the interests of the beneficiaries?
- Have mergers of corporate trustees changed the location where the trust is primarily administered in such a way as to be inconvenient to the beneficiaries or contrary to the trust's purposes?
- Has an individual trustee's move to another state changed the situs of the trust?

Can you change the principal place of administration of a trust to another state, country, or jurisdiction? ORS 130.022(3) answers the question affirmatively if the transfer of jurisdiction is in the furtherance of the duty imposed by ORS 130.022(2), which requires that the place of administration be a place appropriate to the trust's purposes and the interests of the beneficiaries. In order to change the place of

administration, the trustee is required to notify the qualified beneficiaries identified in ORS 130.010(14) at least 60 days before initiating the transfer. The notice must contain:

- Where the trust's principal place of administration is being transferred to;
- The new address and telephone number where the trustee can be contacted;
- An explanation of the reasons for the proposed transfer; and
- The date on which the proposed transfer is anticipated to occur.

A qualified beneficiary may object to the proposed transfer within 60 days after the notice is given. If a qualified beneficiary timely objects, the authority of a trustee to transfer a trust's principal place of administration terminates. The term "qualified beneficiary" is defined at ORS 130.010(14) as a beneficiary who:

- (a) Is a permissible distributee on the date the beneficiary's qualification is determined;
- (b) Would be a permissible distributee if the interests of all permissible distributees described in paragraph (a) of this subsection terminated on the date the beneficiary's qualification is determined; or
- (c) Would be a permissible distributee if the trust terminated on the date the beneficiary's qualification is determined.

PRACTICE NOTE: The deadline for objection is not based on the date the notice is received, but rather when the notice is sent.

PRACTICE NOTE: While most trust agreements specify which state's law governs, they are often silent on the issue of jurisdiction. If a drafter knows that a client has specific concerns about where the trust is to be administered and how accessible the trustee is to the beneficiaries, the drafter may want to consider including a jurisdiction provision in the trust document.

Venue

Venue for a judicial proceeding involving a trust is in the county where the trust's principal place of administration is, or will be, located. Venue for testamentary trusts can also be where the decedent's estate is being administered if the estate is not yet closed. If a trust has no trustee, venue for a judicial proceeding to appoint a trustee is in a county where a beneficiary resides, trust property is located, or the decedent's estate is or was administered.

PRACTICE NOTE: Within Oregon, there are a significant number of anecdotal cases of venue shopping. Many counties and judges have practices in place or formal guidelines for trust modifications. Other counties have no guidelines and less formal processes. Resources, experience, and knowledge of judges and court staff also vary from county to county. If a fiduciary appears to have improperly selected a venue to the detriment of the beneficiaries, it is possible to request that the proceedings be moved to a different county where venue can be established pursuant to ORS 130.065.

Governing Law

The meaning and effect of the terms of a trust are determined by the law of the state designated in the trust agreement, unless the designation of the governing law is contrary to strong public policy of the state having the most significant relationship to the matter at issue. If the terms of the trust do not identify a governing law, then the law of the state having the most significant relationship to the matter at issue is the governing law. ORS 130.030(1).

Notice

Once you have determined that Oregon law applies and that Oregon has jurisdiction, and you know which county has venue, you need to determine who must participate in the process to change the irrevocable trust and how they should be notified of the change you seek. In other words, who are the parties to the process?

Notice of a judicial proceeding must be given by the petitioner to anyone the court requires, as well as to the trustee and to all persons whose interests are affected by the requested action or relief. Methods of giving notice are set forth in ORS 130.035. The notice must be sent in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document, such as: first class mail, personal delivery, delivery to a person's last known place of residence or place of business, or properly directed electronic mail. If the identity or location of a person is unknown and not reasonably ascertainable, notice is not required, but in that event, an affidavit setting forth the efforts made to find the person must be filed with the court or held as part of the trust records if a court proceeding is not pending. Any person may waive the requirement of notice. However, the requirement of notice of judicial proceedings cannot be waived. ORS 130.035(4). If the person to receive notice is not a capable adult, the statute sets forth a number of rules to follow. If a person who is entitled to notice is a minor, notice must be given to the minor's conservator or, if the minor does not have a conservator, to another appropriate representative such as the minor's parent, as set forth under ORS 130.100 to 130.120.

PRACTICE NOTE: If the minor is 14 years of age or older, notice must also be given to the minor.

While a conservator for a person who is financially incapable has the power to receive notice and give binding consent, ORS 130.100, notice must nonetheless be given both to the financially incapable person and to that person's conservator, or, if the person does not have a conservator, to another appropriate representative. ORS 130.035(4)(c). Note that the person represented may object to the representation. Such an objection must be made before the consent would otherwise become effective. ORS 130.100(2).

Notice to a person who may represent and bind another person under ORS 130.100 to 130.120 has the same effect as if notice were given directly to the person. Likewise, the consent of a person who may represent and bind another person is binding on the person represented unless the person represented timely objects to the representation. For example, a person who is authorized to represent a financially incapable settlor may receive notice and give binding consent on the

settlor's behalf.

There are limitations on when one person may act for another. Even though the settlor may have been the person who created an irrevocable trust, the settlor may not represent and bind a beneficiary with respect to the termination or modification of an irrevocable trust. ORS 130.200(1). Furthermore, a person may not act for another if a conflict of interest exists between the person acting and the person represented with respect to a particular question or dispute. Barring a conflict of interest, however, the holder of a testamentary power of appointment may represent and bind persons whose interests are subject to the power as permissible appointees, as takers in default, or by other reason. ORS 130.105. In addition:

- (1) A conservator may represent and bind the estate that the conservator controls;
- (2) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
- (3) A trustee may represent and bind the beneficiaries of the trust;
- (4) A personal representative of a decedent's estate may represent and bind persons interested in the estate; and
- (5) A parent may represent and bind the parent's minor or unborn child if a conservator for the child has not been appointed. ORS 130.110.
- (6) Unless otherwise represented, a minor, financially incapable individual, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another person having a substantially identical interest with respect to the particular question or dispute. ORS 130.115.

Notice to a representative must comply with ORS 130.035(4), which means that notice is to be given in the manner required by statute for the approval of the final account in a decedent's estate. ORS 116.093 sets forth those rules and requires that a notice be mailed to all interested parties at least 20 days prior to the judicial proceeding. Proof that notice was mailed to those persons entitled to notice should be filed with the court.

PRACTICE NOTE: A judicial proceeding to contest the validity of a revocable trust must be commenced by the service of a summons in the manner required by ORCP 7.

What if the court determines that the interest of a person is not represented under ORS 130.100 to 130.120, that the otherwise available representation is inadequate, or that a conflict of interest exists? The court may appoint a special representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, financially incapable individual, unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable. A special representative may be appointed to represent several persons or interests if the interests of the persons represented do not conflict. ORS 130.120.

A special representative may act with respect to any

matter that the court has authorized, whether or not a judicial proceeding concerning the trust is pending. In making decisions, a special representative may consider the general benefit accruing to the living members of the individual's family. The person appointed must have the appropriate skills and experience necessary to adequately represent the individual, may not have an interest in the trust that is the subject of the appointment of the special representative, and may not be related to a personal representative of an estate with an interest in the trust, or to a trustee, beneficiary, or other person with an interest in the trust.

The appointment of a special representative requires the filing of a petition with the court describing the proposed special representative, the need for a special representative, the qualifications of that person, who will be represented, the actions to be taken, and the approximate date or event when the authority of the special representative will terminate. The person seeking to serve as special representative must file a consent to serve. The special representative is entitled to reasonable compensation for services, payable from the principal of the trust that is attributable to those beneficiaries who are represented; if the beneficiaries who are represented do not have a principal that is attributable to them, compensation is an administrative expense of the trust. Upon completion of the matter, the special representative should be discharged, upon motion and order.

Conclusion

Now that you have determined where to file, who must be involved, and how to provide notice, the next issue to address is whether your contemplated action is allowed by law, and whether it is best to take that action by agreement or by filing a petition with the court, resulting in a final judgment. Part II of this article will address these topics in the October issue of the Oregon Estate Planning and Administration Section Newsletter.

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Oregon's Uniform Real Property Transfer on Death Act: Part II

The passage of Senate Bill 815 in the 2011 legislative session gives Oregonians a new option for transferring real property upon the owner's death without subjecting the property to probate proceedings. Part I of this article, published in the April issue of the *Oregon Estate Planning and Administration Section Newsletter*, reviewed the requirements for creating a valid transfer on death deed ("TODD"), and the effects a valid TODD has on the transferor and the transferor's beneficiary, creditors, heirs, and devisees. This Part II and the accompanying "Methods of Transferring Real Property at Death" reference chart discuss the practical consequences that practitioners and their clients should consider prior to using a TODD.

Advantages of a Transfer on Death Deed

A TODD has a number of attractive features.

Simplicity. In ideal situations, TODDs can transfer title to real property upon death with a minimal amount of pre-death planning and after-death administration. This simplicity can

significantly reduce the time, money, and effort that might otherwise be required to accomplish the same property transfer.

Control. During life, a transferor retains full control of real property subject to a TODD. The transferor can sell the property, encumber the property, and revoke or alter the TODD without the consent of the designated beneficiary. Some other "simple" probate-avoidance techniques (such as joint tenancy with rights of survivorship and transfers retaining a life estate) require the beneficiary's consent if the transferor wishes to alter the arrangement or encumber or sell the property.

Not a Lifetime Gift. Because the transfer does not take place until the death of the transferor, a TODD is not considered to be a transfer for federal gift tax purposes. This feature can make the TODD an attractive option when planning for unmarried couples where the unlimited marital deduction is not available.

Property Receives Adjusted Income Tax Basis. Property transferred via a TODD is acquired from a decedent by reason of death, and is includable in the transferor's gross estate for state and federal tax purposes. As a result, the property generally receives a basis adjustment to the fair market value of the property at the date of the transferor's death under Section 1014 of the Internal Revenue Code. However, an exception to this general rule applies in the case of appreciated property acquired by the decedent by gift within the year preceding the decedent's death, if the property passes from the decedent back to the donor or donor's spouse. See IRC § 1014(e).

This feature of TODDs can be helpful for tax planning opportunities in certain situations, such as when a married couple owns real property jointly and knows which spouse is most likely to die first. The couple could transfer ownership of the property into the sole name of the spouse expected to die, and the spouse expected to die could then execute a TODD in favor of the expected surviving spouse. Upon death, the surviving spouse inherits the property free of probate, and the property receives an adjusted income tax basis to the (hopefully) higher date-of-death value, so long as the transfer occurred over one year prior to death. Alternatively, if the property value has fallen below the property's basis, the couple could transfer ownership to the expected surviving spouse in order to preserve the higher basis. In the later example, the one-year rule of Section 1014(e) would not apply due to the property not being "appreciated" property.

Due-on-Sale Clauses. A property owner can use a TODD to transfer title to property when other probate avoidance techniques could result in a lender exercising a due-on-sale clause in an existing mortgage.

Disadvantages of a Transfer on Death Deed

A TODD has a number of attributes that may lead to negative or unintended results. Practitioners should advise clients regarding these issues prior to executing a TODD, and document their file accordingly.

Statutory Requirements. The statutes governing TODDs contain rigid requirements and prohibitions that must be considered and followed. Provisions that may surprise clients include:

Recording Prior to Death. Unlike other deeds and estate planning documents, a TODD must be recorded prior to the transferor's death. For this reason, TODDs are inadvisable in death-bed planning scenarios, where a transferor may not survive long enough for the TODD to be recorded in the appropriate county.

Beneficiary Specifically Named. The requirement that a beneficiary be specifically named in a TODD prevents class gifts and the use of common distribution schemes, such as "per stirpes" or "by representation." As a result, a transferor must monitor his or her estate plan to be sure that a TODD is kept current with changed circumstances (such as the birth or death of an intended beneficiary).

Revocation Limited to Recorded Instrument. Unlike wills and trusts, which may be revoked by a physical act on the document or by a subsequently executed unrecorded document, a TODD can only be revoked by a recorded instrument (a subsequent TODD or instrument expressing revocation). This restriction limits the speed with which a transferor may revoke or alter an existing recorded TODD.

Potential for Adverse Possession Claim. A beneficiary who has, in good faith, taken possession of real property via an invalid TODD may acquire title by adverse possession, provided that the claim meets the provisions of ORS 105.620.

18-Month Claims Period. The mandatory 18-month claims period may create problems for the designated beneficiary. During this period, the beneficiary may not be able to sell or encumber the property, resulting in a liquidity problem if cash is needed to pay for claims, taxes, or expenses. This can be a particular problem for estates subject to estate tax. It is possible that title companies may be willing to insure a sale prior to the expiration of 18 months. The policy will likely be subject to underwriting and, assuming underwriter approval, the designated beneficiary will likely pay a higher premium to compensate for additional risk to the insurer.

Oregon and federal estate tax returns are due nine months after death (or 15 months with the timely filing of a six-month extension). Because claims against the property can have tax consequences affecting an estate tax return, the 18-month claims period may create uncertainty for a fiduciary attempting to accurately complete and file estate tax returns. For this reason, alternatives to a TODD should be considered in situations involving taxable estates. The designated beneficiary may face similar uncertainty in evaluating whether to utilize a qualified disclaimer, also due nine months after the transferor's death.

Creditor Claims. Property passing by TODD is subject to claims of the deceased transferor's creditors, but only after property subject to probate has been exhausted. If the property is subject to a lien or mortgage, the creditor may execute on the security interest or may submit a claim through the probate proceeding. The creditor's choice could lead to unintended results in situations where the devisees under the will are different from the beneficiaries named in a TODD.

Public Record. As a public record, the terms of a valid TODD can be accessed by third parties, including the designated beneficiary, the designated beneficiary's spouse, the designated beneficiary's creditors, and the creditors (or potential creditors) of the transferor.

Property Subject to Estate Tax. Property passing by

TODD will be considered a part of the transferor's estate for state and federal tax purposes under Section 2033 of the Internal Revenue Code.

Unresolved Issues of Interpretation. As discussed in Part I of this article, there are at least two issues of ambiguity in the TODD statutes. One issue is whether ORS 93.969(1)(b) (B) precludes a transferor from directing a deceased primary beneficiary's share to a named alternate beneficiary when the deceased primary beneficiary is survived by other primary beneficiaries. The second issue is whether a TODD must specifically name the trustee of a beneficiary trust.

Suggestions for Integrating a Transfer on Death Deed into an Estate Plan

A TODD can function as a more effective part of an overall estate plan when coordinated with other estate planning documents. Following is a list of suggested items to consider.

Survivorship Requirements. Under ORS 112.572, a transferor may alter the default 120-hour survival requirement. When a different survival period has been expressed in a will or trust, practitioners can consider whether to include a correlating provision in the TODD.

In Terrorem Clauses. When an *in terrorem* clause is included in a will or trust, practitioners may wish to consider drafting the clause so as to apply to challenges to a TODD.

Apportionment of Estate Tax. Practitioners should consider advising their clients with regard to whether to apportion estate taxes to property passing via a TODD and draft appropriate provisions into the will and trust documents. When estate tax is apportioned to property passing by TODD, clients may also wish to consider providing liquidity to the beneficiary in order to prevent placing the beneficiary in a situation where the property must be liquidated to pay its share of estate taxes but cannot be sold due to the 18-month claims period.

Consider Disclaimer. A degree of flexibility can possibly be added to a TODD by planning for a potential disclaimer of the property by the designated beneficiary. This technique could provide a useful safety valve in the event that the 18-month claims period proves problematic. For example, a specific provision could be included in the client's will that leaves the property to the same beneficiary named in the TODD. After the transferor's death, the beneficiary could then choose whether to inherit via the TODD (subject to the 18-month claims period) or to disclaim and inherit via a probate proceeding (subject to the four-month claims period).

Conclusion

Oregon's Uniform Real Property Transfer on Death Act allows property owners to avoid a court probate of real property upon death without the tax and creditor complications and loss of lifetime control associated with joint ownership. Although TODDs can be a useful tool in simple estate planning scenarios, practitioners and clients must exercise discretion to prevent this seemingly simple technique from resulting in practical problems and unintended results. The accompanying "Methods of Transferring Real Property at Death" reference chart can assist in a preliminary evaluation of common planning techniques for transferring real property at death.

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Methods of Transferring Real Property at Death: Quick Reference				
	Transfer on Death Deed	Probate/Will	Joint Tenancy w/ ROS	Living Trust
Pre-Death Recording Required	X			
Transferor Controls During Life	X	X	(consent of joint owners required)	X
Revocation by Physical Act		X		X
Revocation by Written Instrument	X (recording required)	X (must conform to will formalities)	(consent of joint owners required)	X
Class Gifts Possible		X		X
Contingency Planning	limited	X	limited planning via TODD	X
Transfer for Gift Tax Purposes			Possibly (depends on intent and degree to which asset is used to benefit recipient owners during life)	(possible gift if joint trust, depending on trust terms)
Privacy During Transferor's Life	(public record)	X	(subject to rights of joint owners)	X
Privacy of Proceeding After Transferor's Death (recorded deed transferring title to a beneficiary is a public record)	(public record)	(public record)	X	X (subject to beneficiary information rights)
Avoids Probate	X		X	X
Claims Period	18 months	4 months		4 months (optional)
Includable for Estate Tax	X	X	X (decedent's portion)	X
Receives Adjusted Basis at Death*	X	X	X (decedent's portion)	X

*Subject to IRC § 1041(e)

Legislative Update

Including Virtual Assets in Oregon's Probate and Trust Laws

The Oregon State Bar Estate Planning and Administration Section sponsored proposed legislative changes designed to include virtual assets in Oregon's probate and trust laws. The proposal can be viewed here: http://osblip2013.homestead.com/Estate_Planning_-_Digital_Assets.pdf. The OSB Board of Governors approved filing in the 2013 legislative session, which begins in February, and the proposal is now in the drafting process at the office of Legislative Counsel. We anticipate a final official draft during September.

The proposal sets forth a process to enable a fiduciary (personal representative, conservator, or trustee) to take possession of the estate's, the protected person's, or the trust's digital assets, assets or information that the fiduciary will need to access in order to carry out his or her duties. Current statutes do not clearly authorize this. If the proposal is adopted, fiduciaries will be able to perform the obligation of identifying, marshaling, and protecting the assets of a decedent, protected person, or trust beneficiary with greater efficiency and lower costs.

This express inclusion of digital assets and information will not necessarily override the terms of a licensing agreement between the online service provider and the decedent, protected person, or trust beneficiary. These types of user license agreements are currently in flux, and some may expressly allow fiduciary access to user accounts. However, in the absence of either express permission or a denial of fiduciary access in a licensing agreement, the amendments to the Oregon legislation should give an online service provider greater confidence in allowing a fiduciary prompt access and control.

Additionally, the Uniform Law Commission is moving forward with its study group and is making headway in gaining the attention of stakeholders to enable a more productive conversation about the challenges posed by virtual assets and to find a resolution that works for all of the interested parties.

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Save the Date

Your Estate Planning Section CLE Committee is working hard on CLEs for later this year. Mark your calendars now with these dates. More information will be available soon.

Advising Oregon Estates

Date: Friday, November 9, 2012

Time: TBD

Location: Oregon Convention Center, Portland

To inquire about participating as a presenter or to suggest a topic, contact committee chair Holly Mitchell at (503) 226-1371 or hmittchell@duffykekel.com.

Practice Tip: New Insurance Division Tool Helps Locate Missing Life Insurance Policies

More than 300 companies sell life insurance or annuities in Oregon. To facilitate the location of missing life insurance policies, the Insurance Division of the Oregon Department of Consumer and Business Services has created a new Life Insurance Finder Tool (LIFT). This program provides a communications link between people searching for policies and all of the companies that sell life insurance and annuities in Oregon. Oregon is among only a handful of states to develop a life insurance policy finder tool. Information and forms for LIFT can be found at the following link: <https://www4.cbs.state.or.us/exs/ins/lift/>.

Briefly, here's how LIFT works:

1. Searchers (including attorneys or legal representatives) complete and print an online form found at the above web address.

- a. The person making the request (searcher) provides information as to his or her own identity and the identity of the decedent, including alternate names or addresses for the decedent. The Social Security number of the decedent is required, but the decedent's date of birth is optional.

- b. When the online form is completed, the searcher prints the form and signs it in the presence of a notary.

- c. The searcher then mails the printed, signed, and notarized form, together with a copy of the death certificate, to the Insurance Division at the address provided.

2. The Insurance Division electronically forwards the request to all of the insurers that sell life insurance and annuities in Oregon.

3. Insurance and annuity companies have 60 days to search their databases and report the outcome of their searches as "no policy found," "active policy," or "inactive policy." A "pending" result means the company has not yet searched its database.

4. The searcher receives a link to a page where the company-by-company results for his or her search are posted.

If a company does not respond within 60 days, the searcher may file a complaint with the Consumer Advocacy section of the Insurance Division. When an insurance policy is found, the

insurance company's normal procedures regarding policies are then followed.

The search is for individual policies. For group policies, contact the group entity (often an employer) about the policy. The Insurance Division is not actively involved in the search, and the Insurance Division does not charge a fee for the LIFT program.

For information about how to use LIFT, call the Insurance Division's insurance consumer advocates at 503-947-7984 (Salem area) or 888-877-4894 (toll free).

Margaret E. Dailey
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The Insurance Division's LIFT program is new. If you utilize or a client utilizes this search tool please submit a short email to the Editor. We will compile the experiences and publish them in a future issue.

What's New from the Courts?

Biggsby v. Vogel Life Estate and Real Estate

In *Biggsby v. Vogel*, 248 Or App 423 (2012), the Oregon Court of Appeals affirmed the trial court's holding that certain disputed assets were properly distributed to Maxine Vogel's husband in an appeal from a judgment of final distribution for a probate proceeding. Under the terms of Maxine Vogel's ("Decedent") will, her husband ("Respondent") was entitled to a life estate in any real property she owned at her death, with the remainder interest passing in equal shares to her children ("Appellants"). In addition, Respondent was entitled to the residue of Decedent's estate: "All the rest, residue and remainder of my estate, real, personal or mixed, of which I may die seized or possessed or to which I may be entitled at the time of my death, to my husband* * *, absolutely and without limitation." *Id.* at 426.

Prior to her death on May 24, 2008, Decedent attempted to sell her ranch. One sale fell through, which entitled Decedent to \$30,000 of forfeited earnest money. In January 2008, Decedent signed a contract to sell the ranch for \$1.8 million. At the time of the sale, the ranch was under a farm lease, pursuant to which Decedent would receive a 40% landlord share of the 2008 wheat crop ("2008 crop share"). Also at the time of the sale, Decedent was entitled to Conservation Reserve Payments from the Department of Agriculture in exchange for implementing certain conservation measures ("2008 CRP"). In February 2008, Decedent and the buyer renegotiated the terms of the ranch sale so that Decedent retained the 2008 crop share and the 2008 CRP. Decedent died before the sale closed and before receiving the forfeited earnest money, the 2008 crop share, or the 2008 CRP.

In June 2008, the estate received the \$30,000 forfeited earnest money. In July 2008, Respondent, in his capacity as personal representative of the estate, closed the sale of the ranch and the estate received the sale proceeds, the 2008 crop share, and the 2008 CRP. The ranch sale proceeds were placed in a constructive implied testamentary trust, to which all parties stipulated. The appellate court noted that the stipulated trust expressly defined the principal of the trust as the net cash proceeds and the trust deed and installment note from the

ranch sale. Pursuant to the order creating the trust, all of the trust's income would be distributed to Respondent during his lifetime, and upon his death, the remaining trust assets would be distributed in equal shares to the Appellants.

Appellants objected to the final accounting, claiming that they, rather than Respondent, were entitled to the 2008 crop share, the 2008 CRP, and the forfeited earnest money. Appellants argued that under the Uniform Principal and Income Act ("UPIA"), those assets should have been allocated to the principal of the trust. The trial court rejected Appellants' argument and held that the disputed assets were personal property and properly distributed as part of the residuary estate to Respondent under the terms of Decedent's will.

On appeal, Appellants argued that because Decedent's will did not address the allocation of post-mortem receipts, pursuant to ORS 116.007(2), UPIA applied. Moreover, Appellants argued, the disputed assets were real property interests and as such should have been distributed to the trust.

The appellate court addressed first the question of whether Decedent's will provided for the allocation of the disputed assets. Decedent's will expressly provided for the disposition of property "to which [Decedent] may be entitled at the time of [her] death," *Bigsby*, 248 Or App at 426, which included the 2008 crop share, the 2008 CRP, and the forfeited earnest money. Therefore, the court concluded, under ORS 116.007(2), UPIA did not apply. In a footnote, the appellate court explained that even if the will had not provided for the disposition of post-mortem assets, UPIA would not have applied because under the terms of the stipulated trust, only the sale proceeds were deemed principal.

Next, the appellate court considered whether, as Appellants argued, the disputed assets were real property and as such, improperly distributed to Respondent. Respondent argued that the 2008 crop share was properly distributed to him because, having been severed from the land, it was personal property distributable to him under the residual clause of Decedent's will. Respondent also argued that even if the 2008 crop share were real property, it was still properly distributed to him because a life estate holder is entitled to all income from the land, in this case, the 2008 crop share. The appellate court agreed with Respondent's arguments and held that regardless of whether the 2008 crop share, the 2008 CRP and the forfeited earnest money were real or personal property, they were properly distributed to Respondent.

In affirming the trial court's decision, the appellate court noted that there are no reported Oregon decisions on the issue of whether CRP payments are real or personal property, but it did not resolve the issue because even if CRP payments were considered real property, the 2008 CRP was still properly distributed to Respondent as the holder of the life estate entitled to all profits from the land.

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