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

Newsletter

Oregon Estate Planning
and Administration
Section Newsletter
Volume XXXI, No. 5
December 2014

Oregon State Bar Estate Planning & Administration Section

The Slayer Statutes

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Long ago, the issue of a slayer inheriting from his or her victim was addressed broadly by the feudal doctrines of attainder, corruption of blood, and forfeiture, which essentially removed all assets from a felon, including any inheritance.[1] These feudal doctrines were eventually abolished and while early on the English courts generally prohibited slayers from inheriting, the young American courts routinely, at least initially, permitted slayers to inherit and left any remedy to the legislature.[2] Most states have adopted statutes barring a slayer from inheriting from their victim. In states without a statutory scheme, the common law that persons cannot benefit from their crimes applies. Oregon's slayer statutes, ORS 112.455 to 112.555, are comprised of generally majority positions as well as a broad definition of "slayer" to include certain convicted abusers. Oregon's slayer statutes operate to disinherit a slayer from the decedent's assets, whether through testacy, intestacy, transfer on death deed, joint tenancy with right of survivorship, or beneficiary designation. Slayer statute cases are inherently intertwined with criminal law and emotionally taxing for all, yet we encounter them in estate administration more often than expected. This paper will address a practical application of Oregon's slayer statutes, intertwined with our nation's perspective on the slayer rules.

A. Who Is a Slayer?

A "slayer" is defined as "a person who, with felonious intent, takes or procures the taking of the life of a decedent." ORS 112.455(3). Although the slayer statutes typically apply to homicide, Oregon is one of the few states that also apply the slayer rules to convicted abusers. As long as an abuser is convicted of a felony for physical abuse consistent with ORS 124.105, or financial abuse pursuant to ORS 124.110 of a vulnerable adult within five years of the victim's death, the slayer statutes apply to disinherit the abuser. *See* ORS 112.457. Oregon approved the broadening of the slayer statutes' application to abusers in 2005, and this appears to be a growing trend among other states such as Arizona, California, Illinois, Kentucky, Maryland, Michigan, and Washington.

B. Final Rulings and Evidentiary Standards.

1. What Is a Felonious and Intentional Killing?

A common statutory scheme is used to prove a slaying is a "felonious and intentional killing." ORS 112.555 clarifies that a final judgment of a criminal conviction of a felonious and intentional killing is conclusive to apply the Oregon slayer rules. Similarly, the Uniform Probate Code ("UPC") § 2-803(b) states:

> An individual who feloniously and intentionally kills the decedent forfeits all benefits under this Article with respect to the decedent's

1 3 AM L Prop § 14.5 (1952) [not verified]; The Forfeiture Act, 187 33 & 34 Vict, ch 23 (Eng).[not verified]
2 18 USC § 3563 (1988) (first enacted in 1796); US Const Art III, § 3, cl 2.

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estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance.

Fundamentally, a killing is "felonious" when the homicide is a felony. There are intricacies, however, regarding whether a felony is not felonious for purposes of applying the slayer statutes. Oregon's only known district case on the slayer statutes, *Hatcher v. Aetna Life Ins. Co.,* 105 F Supp 808 (D Or 1952), involved a wife charged with the felony of manslaughter for unintentionally killing her husband. The *Hatcher* court addressed whether committing a statutory felony deemed the defendant's conduct "felonious" within the meaning of the slayer statutes. Considering that the wife's felony charge ceased being a felony when the punishment imposed on her was less than a penitentiary sentence, and her lack of intent in the killing, the *Hatcher* court ruled that although the homicide was wrongful and was defined as a felony under the Oregon criminal code, it did not constitute a "felonious taking" of the husband's life within the definition of the slayer statutes.

Defining a felony is typically simpler than defining intent. "Intent" is generally defined as willful and designedly. Intent can be a challenge to satisfy, which is the case when a defendant is found guilty of manslaughter or not guilty by reason of insanity, for example.

a. Insanity Defense.

What if the alleged slayer lacks the mental capacity to "feloniously and intentionally" kill another? The affirmative defense of insanity precludes criminal punishment, because due to mental disease or defect he or she lacks the capacity to either appreciate the criminality of his or her conduct or cannot conform his or her actions to the requirements of the law. So an insanity defense could mitigate the intent element required to apply the slayer statute. The question of whether someone found not guilty but insane can inherit from the estate of his or her victim has been decided by case law in some states, but not in Oregon, and these rulings have gone both ways.[3] Although at first blush the "felonious and intentional killing" requirement appears easy to satisfy, there are often complexities with each homicide case that are decided on a case-by-case basis.

b. Legal Standards of Intent.

Further complicating the felonious and intentional killing requirement is whether to apply a civil or criminal standard to the intent requirement. Cases outside of Oregon are again varied between the courts that have determined a civil definition of intent or willfulness should apply, considering the slayer rules are civil statutes (e.g., *In re Estate of Kissinger,* 206 P3d 665 (Wash 2009)), and the courts that have decided a criminal intent standard is required (e.g., *Ford v. Ford,* 512 A2d 389 (Md 1986)). Most commonly the probate courts are making decisions on a case-by-case basis, considering the range of relevant circumstances and the broad discretion allowed in these courts of equity.

2. A Final Ruling Is Required in Either Criminal or Civil Court.

Oregon's slayer statutes require a final ruling in either criminal or civil court before a slayer can be treated as a slayer under the statutes. ORS 112.555. If a felony criminal abuse conviction is consistent with either ORS 124.105 or ORS 124.110, then that conviction is conclusive to apply our slayer rules. If there is a criminal conviction that is a felonious and intentional killing, then this conviction is conclusive to apply Oregon's slayer statutes to the felon. Absent a criminal conviction, a final ruling about a killing from a civil court, logically the probate court, is also permitted to determine whether the evidence supports a "felonious and intentional killing" to classify a slayer as a slayer. It is a civil concept that wrongdoers cannot profit from their wrongdoing, and the probate court is properly equipped to address the succession of a decedent's property. The civil court would use a preponderance of the evidence standard of proof to determine whether the killing was felonious and intentional. ORS 112.555. So the probate court has discretion under Oregon's slayer statutes to disinherit a defendant even if he or she is not convicted of murder, whether the defendant is awaiting trial or never criminally charged.

The lower standard of proof in civil court (by a preponderance of the evidence) is probably the greatest benefit to adjudicating the matter in probate court versus criminal court, where the highest standard of proof is required (beyond a reasonable doubt). For a grieving family who wants to move past the painful event, their desire for an expeditious resolution may be more readily achieved in probate court than in criminal court. The evidence is also critical to analyze, particularly because it is most commonly the state's evidence that we may select for use in our civil case. Any evidence used in civil court should be with the district attorney's consent. To put on evidence of the crime in the civil case that may harm or jeopardize the

3 *See In re Estates of Ladd,* 153 Cal Rptr 888 (Cal App 1979); *New York Life Ins. Co. v. Jones,* 541 P2d 989 (Wash 1975); *In re Duncan's Estates*, 246 P2d 445 (Wash 1952); *Estate of Wirth,* 298 NYS2d 565 (Sup 1969); *Riggs v. Palmer,* 22 NE 188 (NY 1889); *Turner v. Estate of Turner,* 454 NE2d 1247 (Ind App 1983).

criminal prosecution would be unforgiveable. Evidence of a killing or killings is tough to review, analyze, and discuss. After all, estate law is very different from criminal law. There is tremendous motivation to accomplish a positive resolution for a family so harmed. Typically the types of evidence analyzed to produce in probate court include but are not limited to police reports, autopsy reports, coroner's reports, and probable cause affidavits.

The decedent's estate may want to wait for a criminal conclusion, preferring all evidence to be in the complete control of the state, and hoping for a conviction that is deemed conclusive under the slayer statutes. Yet there are times when there is no criminal conviction because the slayer committed suicide. Or some cases may take well over two years before the case is deemed a homicide, if at all. The costs of a civil proceeding versus a "free" criminal proceeding are a reality, and putting an already fragile family through not one but two criminal trials (assuming the civil matter is objected to) may be too much for them to handle. Often these families are driven to conclude the matter, allowing them to move forward, so this is a delicate subject that must be thoroughly analyzed. Also, some state courts will stay a pending civil proceeding until the criminal proceeding is finalized, but this is not the trend in Oregon where the statute expressly allows a final judgment in a civil probate court. ORS 112.555.

C. **Appeals and a Final Judgment.**

While the parties in a decedent's estate may choose to await the criminal trial results, the possibility of an appeal from a criminal judgment may be another obstacle. Oregon's slayer statutes require a "final judgment of conviction" and clarify such a conviction is "conclusive" for purposes of applying the slayer statutes. Oregon's statutory and case law does not analyze the subject of appeals in slayer cases. ORS 112.555. The UPC's slayer rules require that "all right to appeal has been exhausted" before a judgment of conviction can conclusively establish criminal accountability. UPC § 2-803(g). Although this issue of appeals and final judgments is not a common matter heard by the states, Florida affirmed a trial court's ruling of a slayer's guilt of first-degree murder was final to evoke their slayer statutes, irrespective of the slayer's pending criminal appeal. *Barber v. Parrish,* 963 So 2d 892, 893 (Fla Dist App 2007). Currently, there is a Probate Modernization work group working with the Oregon Law Commission to update the probate code, which is discussing and analyzing Oregon's slayer statutes to ensure they are clear, are consistent, and reflect the present legislative intent. The issue of a conclusive final judgment and its relationship with appeals is also being analyzed by the group.

D. **Who Takes the Property in Lieu of the Slayer?**

If the slayer statute applies, the next question is what happens to the property? In Oregon, the property of the decedent is distributed as if the slayer predeceased the decedent. ORS 112.465. The UPC operates in the same way, but also correlates the disinheritance with the law of disclaimer, stating, "[i]f the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his [or her] intestate share." UPC § 2-803(b) (brackets in original). So whether the slayer was to inherit by intestate succession, will, trust, or transfer on death, his property "passes and vests as if the slayer or abuser had predeceased the decedent." ORS 112.465(1). This treatment of the property may become more complex when creditors' claims are relevant or the slayer's heirs or devisees stand to benefit from the slayer's wrongful act. For example, in some jurisdictions, including Maryland, no one related to the slayer may claim the property through the slayer. In *Cook v. Grierson,* 845 A2d 1231 (Md 2004), the court refused to permit the slayer's children to inherit from their grandfather (the son murdered his father) by intestacy because they were not "issue" within the meaning of the statute because their father (the slayer) was still living. The court held that any change to this result would require a legislative cure. Oregon's slayer rules do not impact the slayer's issue, only the slayer.

E. **Jointly Held Property Challenges.**

Oregon's slayer statutes also apply to property held jointly by the slayer and the decedent. ORS 112.475; ORS 112.485. Jointly held property presents some unique issues because a joint tenant, unlike a devisee or beneficiary on an account, has some ownership interest in the specific property before the unlawful event occurs. Although it is natural to want to see the slayer penalized, we must differentiate between the slayer's benefit from the crime and what the slayer owned before the crime. As a Vermont court stated, "the slayer should not be permitted to improve his position by the killing, but should not be compelled to surrender property to which he would have been entitled if there had been no killing." *In re Estate of Mahoney,* 220 A2d 475, 478 (Vt 1966).

Some slayer rules, including Oregon's, appear to reason that the slayer transformed the joint tenancy into a tenancy in common, so the slayer is permitted to keep his or her own undivided one-half interest but the other one-half interest is held for the benefit of the decedent's estate, minus the slayer. ORS 112.475 provides, "upon the death of the decedent an undivided one-half interest remains in the slayer or abuser for the lifetime of the slayer or abuser and subject to that interest the property passes and is vested in the heirs or devisees of the decedent other than the slayer or abuser." The maintenance of such an asset could be a cumbersome and potentially long-term requirement. The severance of an asset held jointly between the slayer and the decedent calls into question how to treat the respective ownership interests. For example, what if the joint account was contributed entirely from the decedent's assets? Are the rules of proportionate contribution reflected in ORS 708A.465 through ORS 708A.470 to be used, allowing each owner's individual contribution toward the property to be proportionately severed? Or, once property is titled in joint tenancy, does any excess consideration provided by one joint tenant constitute an irrevocable gift to the other joint tenant? An equal division in this case would benefit the slayer. What if the joint account was contributed solely by the slayer? Then an equal division would arguably operate to divest the slayer of half of his or her ownership interest, at least based on the proportionate contribution theory. However, we do not want to divest slayers of property they owned before the crime.

A Montana court interpreted similar joint asset language and held that once the interests were severed and transformed into tenancies in common, the shares "depend on the decedent's and the [killer's] individual contributions to the acquisition and maintenance of the property." *Estate of Garland,* 928 P2d 928, 932 (Mont 1996). The UPC drafters responded with a technical amendment in 1997 to clarify that they deemed the Montana court had "misconstrued" their original intent. UPC § 2-803 cmts, 1997 Technical Amendment. The UPC drafters amended their rule to add the word "equal" to clarify that the effect of severing the interests of the decedent and slayer is to transform their interests into equal tenancies in common, meaning a "strict fractioning" of equal shares, without regard to the percentage of consideration furnished by either. *Id.* It is possible that our Probate Modernization work group may clarify jointly held assets under our slayer rules, but whether the legislative change will be in line with the UPC or be some type of hybrid incorporating some of the UPC's general position is not yet known.

F. **Other Complexities.**

Plea Bargains. Plea bargaining in any criminal case is standard and expected. Yet plea bargaining to a lesser offense from feloniously and intentionally killing another could interfere with a ruling in probate court. For example, a guilty-but-insane plea from a first-degree murder charge would open up arguments about whether or not the crime was committed with the requisite intent. The district attorney's office is going to do their job, and this typically includes bargaining with the defendant for a plea. So it is important to confer with the district attorneys to be clear about what a criminal plea bargain may do to impact the decedent's estate. The district attorneys are enwrapped in criminal law and its demands, so they cannot be expected to be well-versed in the decedent's estate matters, much less the slayer statutes. This is an example of how consistent communication with the district attorney's office is critical to ensure that the decedent's estate and the criminal matter are in sync.

Death Under Suspicious Circumstances. These are probably the most difficult cases legally. When a death occurs under suspicious circumstances, it often takes time, even years, for the case to be considered a homicide, if ever. Interpleader actions are commonly seen in these cases, when the decedent owned benefits or life insurance. The evidence in these cases is often tenuous, typically because the only key witnesses are the suspects. However, the lower legal standard of proving a killing by a preponderance of the evidence, as well as the hope for a resolution, should be analyzed to decide whether it is worthwhile to pursue a slayer ruling in probate court.

Mercy Killings. These are some of the most heartbreaking cases. When someone cannot bear to see their loved one suffer any longer so they end this suffering, are they feloniously and intentionally taking the life of another? These cases are never simple and are always fact specific. For example, a baby boy in Illinois choked on a balloon resulting in oxygen deprivation that put him into an irreversible coma and on a respirator long-term. The hospital refused to disconnect the boy's life support due to legalities, and the family wanted nature to take its course. The boy's father, Mr. Linares, was successful in his second attempt when he threatened hospital staff at gunpoint so he could disconnect all life support, allowing his son to die in his arms. Mr. Linares pled guilty to a weapons charge, but the grand jury refused to indict him for the death of his son.[4] In another case, chilling testimony by a Florida husband who shot and killed his elderly wife, who was suffering from Alzheimer's, osteoporosis, and arthritis, read: "Sure, I know I was breaking the law but there seems to be things more important than the law, at least to me in my private tragedy. So it's murder. So what?"[5] The husband, Mr. Gilbert, was sentenced to life in prison for the death of his wife. He was released after only five years as the result of a grant of clemency.[6] Culpability is the issue with mercy killing cases, and imposing a strict penalty for one's "private tragedy" is often not socially acceptable.

*Taxes.*What if the decedent's estate remains undistributed as it awaits the criminal trial, causing year-end tax reporting concerns? A Private Letter Ruling was issued by the IRS clarifying that when a suspected murderer is the designated beneficiary of his victim's IRA, it will not penalize the victim's estate beneficiary for failure to make minimum required distributions from the murder victim's IRA during the criminal and estate proceedings. PLR 201008049 (Dec. 1, 2009).

ERISA. Slayer statutes are commonly the formulation of common law, state legislation, case law, or all of the above. There are no federal slayer rules. When an estate has a relevant employee benefits plan, do

4 Larry Green, *Grand Jury Rejects Murder Count*, NY Times, May 19, 1989.

5 *Gilbert v. State*, 487 So 2d 1185, 1188 (Fla Dist App), *rev den*, 494 So 2d 1150 (Fla 1986).

6 Mike Clary, "*Mercy Killing*" *Inmate Going Free*, LA Times, Aug. 2, 1990.

the federal Employee Retirement Income Security Act of 1974 ("ERISA") rules require the court to apply a state's slayer statutes? ERISA is federal law, so the state's slayer statutes do not apply. However, slayer statutes cases involving ERISA-related employee benefits plans typically apply the federal common law that prohibits someone from benefitting from their wrongdoing, and conclude that the result under federal common law or the state's slayer statutes would be identical.[7]

G. **Conclusion.**

After looking at Oregon's slayer statutes in a couple of cases, following cases in some nearby states, and researching the national perspective on the slayer rules, it seems that Oregon's slayer rules have proven to be reasonably balanced. This is not an easy balance to achieve, and these laws are uniquely complex and fact specific in their application. Maybe future slayer cases will reveal a different result; however, with some possible clarification language regarding jointly held assets and maybe appeals, Oregon's slayer statutes have demonstrated they are overall thoughtful and fair.

7 *See* Katherine A. McAllister, *A Distinction Without a Difference? ERISA Preemption and the Untenable Differential Treatment of Revocation-on-Divorce and Slayer Statutes,* 52 BCL Rev, 1481, 1494-97 (2011).

Updated Federal Tax Numbers Announced

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The IRS has announced updated (adjusted for inflation) tax numbers for 2015. The federal unified credit equivalent will be $5,430,000 (the actual unified credit will be $2,117,800). The GST exemption equivalent will similarly be $5,430,000.

The gift tax annual exclusion will remain at $14,000.

The amount of taxable income at which point trusts and estates reach the highest income tax bracket for ordinary income will be $12,300 in 2015. That will also be the amount of taxable income at which trusts and estates reach the highest bracket for capital gains tax. The 2015 AMT exemption for trusts and estates will be $23,800. The threshold level for the net investment income tax applicable to trusts and estates will be $12,300 of undistributed net investment income.

Naming Trusts as Beneficiaries of Retirement Plan Accounts

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Estate planning often includes advising our clients as to the most appropriate beneficiaries for their IRAs (and qualified retirement plans, but for simplicity I will refer only to IRAs). In this article I'll discuss situations when naming a trust as an IRA beneficiary is desirable and the various tax-oriented requirements and possible pitfalls involved in doing so.

REASONS FOR NAMING A TRUST AS IRA BENEFICIARY

There are a number of reasons why an IRA owner may wish to name a trust, rather than one or more individuals, as beneficiary of his or her IRA. Some reasons are as follows:

- The owner may wish to impose control over access to the IRA in order to avoid having a spendthrift beneficiary squander the IRA funds, or withdraw the funds too quickly rather than having distributions stretched out over a long period.
- The owner may desire to have a trustee with particular investment expertise in place to manage the IRA account.
- The owner may wish to control to whom the IRA passes on the death of the initial beneficiary. This can be attractive in the case of a spouse from a second marriage where the IRA owner wants, after the death of the surviving spouse, to benefit his or her children born outside the second marriage.
- The owner may wish to use the IRA to fund a credit shelter trust for estate tax planning purposes.
- The desired beneficiary may be a minor who is incapable of being a beneficiary of an IRA, and the IRA owner may wish to exert more control over the account than can be achieved by using an UTMA account.
- The owner may want to provide for effective planning for a special needs beneficiary.
- The owner may want to provide asset protection planning for beneficiaries who may have creditor problems. See the discussion below of a recent U.S. Supreme Court case (*Clark v. Rameker*, 134 S Ct 2242 (2014)) in which the Court held that a beneficiary IRA held by a non-spouse individual is vulnerable to claims in bankruptcy under federal law.

Despite the attractiveness of naming a trust as an IRA beneficiary in these and other circumstances, negative tax consequences can ensue from doing so unless proper planning is done. To maximize the deferral or "stretch out" of IRA minimum distributions, and thereby delay payment of income tax, the trust must be structured correctly. Also, trusts must address the fact that the compressed tax brackets applicable to trusts (maxing out at $12,150 of income in 2014) could subject the trust's income to high rates unless adequate distributions are made to pass through the income to lower bracket beneficiaries. For estate tax purposes, if the trust is intended to qualify for the estate tax marital deduction, the requirements of § 2056 must be met.

MINIMUM DISTRIBUTION RULES

All IRAs are subject to the required minimum distribution rules of 26 USC § 401(a)(9) and the corresponding regulations (Roth IRAs are only subject to these rules after the death of the Roth IRA owner). In applying these rules, a common goal is to allow the IRA beneficiary to be able to stretch out the IRA distributions for as long as possible for income tax deferral purposes. Naming an individual as beneficiary allows that person to use their life expectancy for purposes of calculating and taking required minimum distributions. This same result can be achieved by naming a trust as beneficiary, but certain specific rules must be followed in structuring the trust in order to allow the life expectancy of a beneficiary to be used in these calculations. The key is to qualify a trust beneficiary as the "designated beneficiary" of the IRA account. The type of trust that can achieve this result is often referred to as a "see-through trust." Failure to establish designated beneficiary status can make a huge difference in the ability to defer income taxes as long as possible. For example, if the deceased IRA owner is deemed to have no designated beneficiary, the account must be distributed within five years of death (if the decedent died before age 70½), or over the decedent's remaining life expectancy (if the decedent died after age 70½). By contrast, a 40-year-old IRA beneficiary, for example, can stretch minimum distributions over 43 years.

QUALIFYING FOR SEE-THROUGH STATUS

In order to qualify a trust beneficiary for designated beneficiary status (through the use of a "see-through trust"), five rules must be satisfied. Treas Reg § 1.401(a)(9)-4, A-5(b).

1. The trust must be valid under state law.
2. The trust must be irrevocable or will, by its terms, become irrevocable upon the death of the IRA owner.
3. By October 31 of the year following the year of the IRA owner's death, the trustee must provide to the IRA custodian either a list of the trust beneficiaries (including contingent and remainder beneficiaries with a description of the conditions of their entitlement) or a copy of the trust.
4. The trust beneficiaries must be identifiable from the trust instrument.
5. All trust beneficiaries must be individuals. The presence of an estate or a charity as a trust beneficiary will not qualify.

Rules 1, 2, and 3 are easily met. Rules 4 and 5 sound simple, but they require careful consideration to ensure that they are satisfied.

TRUST BENEFICIARIES MUST BE IDENTIFIABLE FROM THE TRUST INSTRUMENT

It is important to be able to identify the trust beneficiaries because only the life expectancy of the oldest trust beneficiary may be used in determining the required minimum distributions. A beneficiary need not be specifically named in the trust agreement, so long as the individual can be identified. A class of beneficiaries can be named. A class that is capable of expansion or contraction will be treated as identifiable as long as it is possible to determine the beneficiary with the shortest life expectancy. Treas Reg § 1.401(a)(9)-4, A-1. Once the apparent oldest beneficiary is identified, it must be clear from the trust instrument that under no set of circumstances can a person older than that beneficiary later become a beneficiary.

ALL TRUST BENEFICIARIES MUST BE INDIVIDUALS

Estates and charities are clearly not individuals, so their presence as a trust beneficiary would disqualify the trust from establishing one of its beneficiaries as a designated beneficiary. However, trust beneficiaries that exist as of the IRA owner's death who cease to be beneficiaries of the trust as of September 30 of the year following the year of death will not count in determining whether a designated beneficiary exists. Treas Reg § 1.401(a)(9)-4, A-4(a). A non-individual beneficiary can be eliminated by distribution or disclaimer prior to this September 30 deadline.

TYPES OF SEE-THROUGH TRUSTS

A see-through trust is one that meets all five of the above-described rules. There are two types of trusts to be considered in determining see-through status. One trust is often called a "conduit trust." Under a conduit trust, the trustee is required to distribute to one or more individual trust beneficiaries any withdrawals the trustee takes from the IRA, not just the minimum distribution amounts. Hence, the trustee of a conduit trust has no power to accumulate IRA withdrawals inside the trust. This conduit requirement must become effective immediately upon the death of the IRA owner. A conduit trust is the only form of trust guaranteed to qualify for designated beneficiary status. The individual beneficiaries receiving the mandatory distributions will determine which life expectancy will be used in calculating the minimum distributions, and all other beneficiaries are ignored, including estates, charities, and other individuals.

It should be noted, however, that the requirement that all IRA withdrawals be immediately distributed makes a conduit trust undesirable for an IRA owner wishing to control distributions to the beneficiaries. Furthermore, a conduit trust will also considerably erode the interests of persons holding the remainder interests.

Any trust that does not qualify as a conduit trust (i.e., one that allows accumulations of IRA withdrawals) may nevertheless qualify as a see-through trust under certain circumstances. With a conduit trust we can stop the inquiry at the level of the beneficiary or beneficiaries who are entitled to take the mandatory distributions. For accumulation trusts, however, it is necessary to go further to determine which potential beneficiaries count in determining whether all of the trust beneficiaries are individuals and which life expectancy to use. Treasury Regulation § 1.401(a)(9)-4, A-5(c) provides that a person will not be considered to be a beneficiary for purposes of determining the beneficiary with the shortest life expectancy or whether a person is a non-individual, merely because the person could become the successor to the interest of one of the beneficiaries after the beneficiary's death. Once a beneficiary is identified who will receive the trust property outright and immediately upon the death of a prior beneficiary, the inquiry ends and that beneficiary and all previous beneficiaries make up the pool to determine whether (a) all beneficiaries are individuals and (b) the shortest life expectancy. If a non-individual is present in that pool and is not somehow removed by September 30 of the year following the death of the IRA owner, the deceased owner is considered to not have a designated beneficiary.

In PLR 2004-38044, the IRS gave an example of a non-conduit trust that would qualify one of its beneficiaries as a designated beneficiary. In that letter ruling, A was survived by his spouse, B, and three children, C, D and E. B is older than C, D, and E. A created a trust (Trust Y). Prior to his death, A participated in a qualified plan (Plan X) maintained by his employer. A named Trust Y as the beneficiary of his interest in Plan X.

Trust Y provides that, upon the death of A, the trustee is to create two sub-trusts, one a formula credit shelter trust and the other a residuary QTIP trust. Trust Y provides that during the lifetime of B, the trustee is to pay her the net income of the sub-trusts and the trustee is to pay her principal amounts from the sub-trusts as the trustee deems proper for Taxpayer B's welfare. Upon the death of B, B may appoint the sub-trusts to or for the benefit of, A's lineal descendants and their spouses. Before her death, B executed a disclaimer of this limited power of attorney. As a result of B's disclaimer, Trust Y was divided among and held in separate trusts for A's lineal descendants then living, per stirpes. Trust Y provides that the trustee is to pay each lineal descendant of A his or her separate trust at age 30 upon the death of B. Each lineal descendant of A had attained age 30 prior to the death of A. Trust Y further provided for limited powers of appointment to A's lineal descendants and provides for the disposition of the trust property of said descendants in the absence of exercise of the power(s) of appointment. Trust Y provides for the disposition of the trust property if such property is not disposed of under any other Article of Trust Y.

The IRS ruled that Trust Y constitutes a qualified "see-through" trust within the meaning of the applicable regulations. They said that because B's interest was not unlimited (being subject to a standard), it was necessary to determine which other beneficiaries of Trust Y must be considered in determining who, if anyone, may be treated as A's designated beneficiary. The IRS noted that the right of A's three children to take their remainder interests was contingent upon each child's attaining age 30, but that each child had attained age 30 prior to A's death. Therefore, upon the death of A, each of A's children had an unrestricted right to a portion of the remainder interest in the Trust Y estate including A's interest in Plan X. The IRS concluded that because the right of each child to his or her remainder interest in the Trust Y estate, including A's interest in Plan X, was unrestricted at the death of Taxpayer A, it is necessary to consider only B through E to determine which of them shall be treated as the designated beneficiary. Because B is the eldest of the four with the shortest remaining life expectancy, B is treated as the designated beneficiary.

MARITAL TRUST AS IRA BENEFICIARY/ QUALIFYING FOR MARITAL DEDUCTION

The use of a marital trust as a beneficiary of a retirement plan is generally not the best choice for income tax planning purposes. Naming a trust prevents the surviving spouse from rolling over plan benefits to an IRA in his or her own name. This will usually accelerate the timing of the required minimum distributions because the distributions must commence by the end of the year following the decedent's death, and distributions are forever locked in to the surviving spouse's life expectancy.

Notwithstanding the negatives of naming a marital trust as beneficiary, there may be overriding non-tax reasons to do so, such as the ability of the IRA owner to identify the successor beneficiary of the IRA assets upon the spouse's death. If the trust is intended to qualify for the estate tax marital deduction, certain specific requirements must be met. A life income/general power of appointment trust would qualify for the marital deduction if the surviving spouse has the right, exercisable in all events, to have the principal distributed to him or her at any time during his or her life. A QTIP trust will qualify for the marital deduction if the following three tests are met:

1. The surviving spouse is entitled to all of the income for life, payable at least annually;
2. No person has the power to appoint trust property to anyone other than the surviving spouse during his or her lifetime; and
3. A proper QTIP election is made.

The IRS considers the "all of the income" requirement to apply not only to the trust itself, but also to the retirement plan. Therefore, if QTIP treatment is desired, the trust should include the requirement that the trustee withdraw and distribute all of the income of both the trust and the retirement plan.

CREDITOR PROTECTION

There may be circumstances where a particular planned IRA beneficiary has or can be anticipated to have creditor problems. In that case, naming a trust for that beneficiary as the IRA beneficiary may be advisable, particularly in light of a recent U.S. Supreme Court case.

In *Clark*, 134 S Ct 2242, the Court held unanimously that IRAs inherited by non-spouses are not protected in bankruptcy under federal law. The Court concluded that, unlike regular IRAs that are protected in bankruptcy under an exemption in the U.S. Bankruptcy Code that protects "retirement funds," inherited IRAs are not "retirement funds" for purposes of the exemption (it is not entirely clear but the decision does not appear to apply to a spouse who rolls over the account into an IRA in his or her own name). The Court cited three aspects that distinguished inherited IRAs from regular IRAs. First, the Court found relevant that beneficiaries of inherited IRAs are prohibited from contributing their own funds to inherited IRA accounts. This is in contrast to regular IRAs that encourage contributions by offering tax benefits for such contributions. The opinion notes that inherited IRAs require the beneficiary to withdraw the minimum required distribution each year, beginning in the year following the date of the owner's death. Regular IRAs, by contrast, allow the owner to postpone distributions until age 70½ and Roth IRAs have no lifetime required distributions. The final distinguishing factor, according to the Court, is that inherited IRAs may be withdrawn in full at any time without penalty, whereas a regular IRA owner must pay a 10% penalty for withdrawals before age 59½.

Certain states, including Oregon, allow debtors to choose between federal and state bankruptcy exemptions. ORS 18.300(1). It is now clear that there is no federal exemption for inherited IRAs, at least for non-spouse beneficiaries. Oregon law, with limited exceptions, protects IRAs from "execution and all other process * * *." ORS 18.358(2). The statute makes reference to retirement plans described in § 408, which would include regular and inherited IRAs, but there is no *specific* reference to protection for inherited IRAs. The statutes of Alaska, Arizona, Florida, Missouri, North Carolina, Ohio, and Texas specifically exempt inherited IRAs. *Clark* involved interpretation of a federal bankruptcy exemption, not a state exemption. It is not clear, then, whether the Oregon statute or statutes of other states that do not specifically exempt inherited IRAs would now be interpreted in a similar manner as the Supreme Court applied in that case. Until the issue is settled, it is prudent to proceed on the assumption that bankruptcy protection, and even non-bankruptcy protection, of inherited IRAs may not be available in Oregon. Even if such protection currently exists, it is possible that Oregon law may change, or an IRA beneficiary could declare bankruptcy in a state that has no exemption for inherited IRAs.

Rather than relying on the vagaries of state laws, IRA owners desiring to benefit persons who may have creditor problems should consider naming a trust as his or her IRA beneficiary.

SUMMARY

There are several circumstances where a trust would be a desirable IRA beneficiary. However, great care must be applied in drafting and administering the trust in order to preserve income and estate tax benefits.

Practice Tip: Incarcerated Beneficiaries

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If you are administering an estate or trust with an incarcerated beneficiary there are a few things you need to keep in mind regarding written communication with the beneficiary and making distributions to them. This practice tip will discuss issues related to beneficiaries who are held in state prisons under the jurisdiction of the Oregon Department of Corrections ("DOC").[1]

Sending Mail to Inmates

The rules on how to send mail to inmates are set out in Oregon Administrative Rules ("OAR") 291-131-0005 through 291-131-0050. All mail sent to inmates must include on the front of the envelope the sender's name and address, the inmate's name, and SID (state offender ID) number, the name of the prison, and the prison address. OAR 291-131-0025(1). An inmate's SID number and prison location can be found at http://docpub.state.or.us/OOS/intro.jsf. Do not include envelopes, uncancelled stamps, blank paper, paper clips, or rubber bands as the DOC considers

1 Unlike prisons, jails are under the jurisdiction of County Sheriff's Offices and inmates are generally in custody for a limited period of time. For information regarding sending mail and money to jail inmates, look at the Sheriff Department's website for the relevant county.

these contraband and the items will either be confiscated or cause the mail to be returned to the sender. OAR 291-131-0025(11), 291-131-0035(5), 291-131-0037(2)(b).

The administrative rules make a distinction between ordinary mail and legal mail. Legal mail is defined as mail to or from an attorney, court, or court official that is clearly identified as "legal mail" on the front of the envelope. OAR 291-131-0010(14), 291-131-0030(1)(a). The administrative rules do not specify that there must be an attorney-client relationship between the attorney and the inmate in order for correspondence to qualify as legal mail. Legal mail is treated differently than ordinary mail in two main ways. First, ordinary mail sent to an inmate can only be one quarter of an inch thick while legal mail envelopes can be three inches thick. OAR 291-131-0025(10). Second, ordinary mail sent to or by an inmate is subject to inspection by prison staff. This can include a prison employee opening, reading, or photocopying the mail outside of the inmate's presence. OAR 291-131-0015(6). Information spreads quickly among prison staff and inmates, and there may be details that the beneficiary would prefer to be kept confidential such as the size of a bequest. Unlike regular mail, legal mail is opened and examined for contraband in the inmate's presence but not generally subject to inspection (i.e., reading) and photocopying. OAR 291-131-0030(2).

Sending Money to Inmates

Cash, or cash equivalents, including personal checks, cashier's checks, and money orders, cannot be sent directly to an inmate by mail. OAR 291-131-0035(5)(b)(E). Instead you can make a deposit into an inmate's trust account either electronically or by mailing or hand delivering a money order or cashier's check to the DOC. *See* http://www.oregon.gov/doc/pages/faqs.aspx#Inmates__trust_acct___money. Also consider whether or not the inmate has an agent under a power of attorney who can receive the funds on his or her behalf.

An inmate can use trust account funds to purchase items from the commissary, including stamps and personal items. He or she can also make child or spousal support payments, satisfy court orders and judgments, or pay for education programs with trust account funds. OAR 291-158-0055. With DOC approval, an inmate can request a disbursement of excess trust account funds to third parties. Any funds remaining in an inmate's trust account upon his or her release will be distributed to the inmate. OAR 291-158-0015(5).

If an inmate is indebted to the DOC, for example because of the imposition of court-ordered costs and fees or the cost of medical services, funds in his or her account can be applied toward the debt. OAR 291-158-0065(1). An inmate can spend half of the first $60 in trust funds deposited to his or her account during the month on commissary items. Excess amounts will be applied toward the debt. Deposits into an inmate's trust account can be designated for optical, medical, or dental services or emergency trips and may be used for those purposes even if the inmate is indebted to the DOC. OAR 291-158-0025(2). Unused designated funds in excess of $10 will be returned to the sender.

In some circumstances an inmate can be required to pay for the cost of his or her care while incarcerated. *See* OAR 291-203-0010, *et seq.* Therefore, if you are involved at the planning stage and a client wants to leave a bequest to an inmate, consider the use of a spendthrift trust if the size of the gift justifies the expense of a trust. If the client wishes to make a smaller gift, for example to cover medical services or to pay the cost for the inmate to attend the client's funeral (assuming they qualify for emergency leave), consider including in the bequest the intention that the gift be designated for that specific purpose.

Probate Modernization

Oregon Law Commission Work Group

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During the fall of 2013, the Oregon Law Commission ("OLC") appointed a Work Group to review the Oregon Probate Code and recommend changes to the statutes. The goals of the project are to clarify and modernize statutory sections as appropriate, while leaving intact the parts of the code that work well.

Lane Shetterly, Chair of the OLC, chairs the Work Group; Wendy Johnson, Deputy Director and General Counsel of the OLC, staffs the Work Group, providing research assistance and other guidance; Susan Gary serves as Reporter; and BeaLisa Sydlik, Deputy Legislative Counsel, will draft any bills developed by the Work Group.

Members of the Work Group come from the Estate Planning and Administration Section, the Elder Law Section, the Oregon Bankers Association, the Oregon Land Title Association, the Department of Justice (the Charitable Activities and Civil Recovery Sections of the Civil Enforcement Division), and the Circuit Courts (Probate Judges).

The goal of the Work Group is to get a wide range of perspectives, and then gather input from beyond the Work Group before making any final decisions about a legislative proposal.

The Work Group has approached the project by using the ORS provisions as the baseline. The group meets monthly to discuss a set of statutory provisions, considering alternative provisions used in other states or adopted in the Uniform Probate Code ("UPC"). Ultimately, the Work

Group will review and consider all Chapters of the Probate Code (111-118) except the elective share and the estate tax provisions, which have been amended relatively recently.

Current Topics

The Work Group is currently discussing a range of issues involved in the execution of a will: holographic wills, electronic wills, permitting a notary rather than two witnesses to validate a will, and permitting a will to be deemed executed if the proponent can establish, by clear and convincing evidence, the testator's intent that the document be treated as his will (called "harmless error" in the UPC).

Information about the Work Group, including all meeting notices, research materials, reports, notes, etc., can be found at http://www.willamette.edu/wucl/centers/olc/groups/2013-2015/Probate%20Modernization/index.html. Practitioners can send comments on any of the proposals or suggestions for other changes to Wendy Johnson at wjohnson@willamette.edu or Lisa Ehlers at lehlers@willamette.edu.

2015 Section Officers and Board

At the annual meeting of the Estate Planning and Administration Section of the Oregon State Bar on November 21, 2014, the 2015 section officers and members at large were elected as follows:

Officers

Chair ....Matthew Whitman
Chair-Elect ....Erik S. Schimmelbusch
Treasurer ....Melanie E. Marmion
Secretary ....Ian T. Richardson
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Terms Ending 12/31/15	*Terms Ending 12/31/16*
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Philip N. Jones	Amelia E. Heath
Jeffrey G. Moore	Hilary A. Newcomb
Timothy O'Rourke	Eric Wieland
Holly N. Mitchell	Margaret Vining

Events Calendar

January 26, 2015 (yes, Monday)

What: **Tax Symposium, Understanding Oregon's Family Forest Tax Landscape**
(A day-long symposium aimed at family forest owners and the professionals who serve them.)

Who: Sponsored by the Committee for Family Forestlands and the Oregon Small Woodlands Association.

Where: Oregon State University Alumni Center, Corvallis

Register: http://taxsymposium.eventbrite.com

January 30, 2015

What: **44th Annual Estate Planning Seminar**

Who: Sponsored by the Estate Planning Council of Portland, Inc.

Where: Oregon Convention Center, Portland

Register: http://www.epcportland.org

The Editors want to include announcements of upcoming events that may be of interest to our readers. If you know of an event, please send basic information to Sheryl S. McConnell at smcconnellor@aol.com for inclusion in the next issue of the Newsletter.

Questions, Comments, Suggestions About This Newsletter?

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