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FIREARMS IN ESTATE ADMINISTRATION

Brian Thompson
The Law Office of Brian M. Thompson
Eugene, Oregon

There are several concepts that the fiduciary and his/her attorney need to understand when dealing with firearms during the administration of a decedent's estate. This article will only deal with ordinary hunting and self-defense firearms. Machine guns, silencers, and other firearms regulated under the National Firearms Act will be addressed in a separate article. Gun Trusts will be addressed in a third article.

Source of Law. The right to firearms is specifically set out in the Oregon Constitution, Article 1, Section 27, which provides: "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." This reflects the fundamental human right of self-defense.[1]

There are two overriding issues when dealing with firearms: safety and avoiding criminal prosecution. No one wants to get shot or go to jail.

Safety. The most important concept is safety. Whenever you encounter a firearm, the four firearm safety rules[2] apply:

1 **The Fifth Commandment** says "YOU SHALL NOT KILL." Catechism of the Catholic Church, Second Edition, §§ 2263-2269. **The First Buddhist precept** is "I undertake the training rule to abstain from taking life." *See* About Religion, http://buddhism.about.com/od/theprecepts/a/firstprecept.htm (last visited Sept. 22, 2016). **The United States Constitution, Second Amendment** states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *See also District of Columbia v. Heller*, 554 US 570 (2008). The Illinois Supreme Court in *People v. Aguilar* summed up *Heller*'s findings and reasoning:

> In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court undertook its first-ever "in-depth examination" of the second amendment's meaning *Id*. at 635. After a lengthy historical discussion, the Court ultimately concluded that the second amendment **"guarantee[s] the individual right to possess and carry weapons in case of confrontation" (*id*. at 592); that "central to" this right is "the inherent right of self-defense"(*id*. at 628);** that "the home" is "where the need for defense of self, family, and property is most acute" (*id*. at 628); and that, "above all other interests," the second amendment elevates "the right of law abiding, responsible citizens to use arms in defense of hearth and home" (*id*. at 635). Based on this understanding, the Court held that a District of Columbia law banning handgun possession in the home violated the Second Amendment. *Id*. at 635.

2 NE3d 321, 325 (Ill 2013) (emphasis added; brackets in original; parallel citations omitted).

2 *See, e.g.,* Jeff Cooper's Rules of Gun Safety, https://billstclair.com/safetyrules.html (last visited Sept. 22, 2016) (excerpted from Greg Morrison, *The Modern Technique of the Pistol, ISBN 0-9621342-3-6).*

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Rule 1: All Guns Are Always Loaded. There are no exceptions. This must be your mind-set. Remember, there are no accidents, only negligent acts.

Rule 2: Never Let The Muzzle Cover Anything You Are Not Willing To Destroy. A firearm holstered properly, lying on a table, or placed in a case is of no danger to anyone. Only when handled is there a need for concern. This rule also applies to your own person. Do not allow the muzzle (the end the bullets come out of) to cover (be pointed at) your extremities. The nickname "Stubby" should be a term of endearment, not the result of bad rifle handling.

Rule 3: Keep Your Finger Off The Trigger Until Your Sights Are On The Target And You Are Ready To Shoot. Never stand or walk around with your finger on the trigger. Never put your finger on the trigger unless the sights are on the target and you have made a conscious decision to fire.

Rule 4: Be Sure Of Your Target And Backstop. Never shoot at anything you have not positively identified. Bullets go through things and hit whatever is on the other side. A solid backstop can be a hillside, a concrete wall, an engine block, or the ground.[3]

Criminal Prosecution. Once we have made ourselves safe, the next issue is avoiding criminal prosecution. It is important to recognize that almost every change of possession of a firearm is controlled by criminal law. It is easy to trigger a misdemeanor or a felony when transferring firearms. To avoid doing so requires a base of knowledge. For most shooters, this knowledge is acquired through "on-the-job training" with parents and friends, at the range or gun shop, and/or through military training. For the rest of you, this article will provide a short primer.

Firearms regulation involves many aspects, including the status of the owner, the status of the possessor, the physical dimensions of the firearm, the mechanical nature of the firearm, and the state of residence of the parties. These issues can be broken down into a few questions: (1) What is a firearm?; (2) What is a transfer under state and federal law?; and (3) Who is prohibited from owning or possessing a firearm? All of these issues influence how to handle a firearm in a decedent's estate or whether additional steps are appropriate in an estate plan for a client whose estate includes firearms.

(1) What Is a Firearm? Rifles, shotguns, and handguns are assembled from parts. Due to administrative necessity, parts that are not attached to the firearm may or may not be regulated. The definition of a firearm is found at 18 USC § 921(a)(3):

> (A) any weapon (including a [track and field] starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.[4]

Normally, one comes across a fully assembled firearm. This is a fully assembled AR15. This is a firearm.

The receiver of a firearm is the piece that all of the other parts of a firearm are attached to. Usually, this is the part that houses the trigger and/or firing mechanism—such as this partially assembled AR15 (known as a "lower"). This is a firearm.

3 Additional Training Resources: Thunder Ranch, 96747 Highway 140, Lakeview, OR 97630, www.thunderranchinc.com; Oregon Firearms Academy, PO Box 909, Lebanon, OR 97355, (541) 451-5532, www.oregonfirearmsacademy.com; Massad Ayoob Group, PO Box 1477, Live Oak, FL 32064, massadayoobgroup.com; REACT Training Systems, PO Box 8, Bend, OR 97709, reacttrainingsystems.com.

4 "Antique firearm" is defined in 18 USC § 921(a)(16). *See also* https://www.atf.gov/firearms-guides-importation-verification-firearms-national-firearms-act-definitions-antique.

These are AR15 receivers (known as a "stripped lower"). These are also firearms.

This is an AR15 upper. This is *not* a firearm.

There are hundreds of variations, particular to each firearm design, far too many to show here. Just because something does not "look like a gun" does not mean it is not a gun. When the personal representative of an estate lacks firearms expertise, it is important to get knowledgeable assistance in order to avoid criminal and civil penalties.

(2) What Is a Transfer of a Firearm? The Gun Control Act of 1968 ("GCA") is a federal law enacted in response to the assassinations of John F. Kennedy, Robert F. Kennedy, and Martin Luther King, Jr. With regard to estate planning and administration, the GCA defined what a transfer of a firearm is, restricted the transfer of weapons across state lines, and restricted the types of persons who could own firearms.

Transfer Under Federal Law. The federal transfer provisions only apply to interstate transfers of firearms. A transfer under the GCA is the selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of firearms.[5] This is extremely broad. In order to complete a transfer under federal law, a person must complete a Form 4473 and submit to a background check.[6]

EXAMPLE 1: The transfer of a firearm from a decedent's estate in Portland, Oregon, to an heir in Vancouver, Washington, requires that the heir submit an ATF Form 4473 and go through a background check. This normally happens at a gun shop.

Note: An out-of-state resident cannot complete the transaction in an Oregon gun shop. Normally, the firearms are shipped to a gun shop in the state of residence of the recipient. The recipient then completes a Form 4473 and goes through a background check at that gun shop (expect to pay fees to the gun shop and for the background check). The procedure is set out in more detail after Example 4, below. Additional rules apply to shipping a firearm. It is best to simply employ a local gun shop in Oregon to ship the firearm to a local gun shop in the recipient's home state. Note also that the "prohibited person" rules (set out later in this article) still apply.

Transfer Under Oregon Law. Transfers wholly within the State of Oregon are regulated by Oregon. Transfer under Oregon law is set forth under ORS 166.435(1)(a). A transfer is the delivery of a firearm from a transferor to a transferee, including, but not limited to, the sale, gift, loan, or lease of the firearm. In order to complete a transfer under Oregon law, the transferee must complete a Form 4473. There is no Oregon form—the same procedure is used as under federal law.[7] This form is completed and a background check is undertaken. This normally happens at a gun shop.

The Oregon statute has a series of exemptions from the broad definition of "transfer."[8] These can be generally split into "temporary transfers" (where the firearm will be returned to the owner) and "permanent transfers" that are exempt from regulation because of the relationship between the firearm owner and firearm recipient. It is still important to comprehend that almost every change of possession of a firearm is controlled by criminal law. If a transfer is exempt, a Form 4473 and a background check are not needed. If a transfer is not exempt, a Form 4473 and a background check must be completed. Note also that the "prohibited person" rules (set out later in this article) still apply.

Temporary Transfers. Under ORS 166.435(1)(a), a transfer does not include "the temporary provision of a firearm to a transferee if the transferor has no reason to believe the transferee is prohibited from possessing a firearm or intends to use the firearm in the commission of a crime," and the temporary transfer occurs:

> (A) At a shooting range, shooting gallery or other area designed for the purpose of target shooting, for use during target practice, a firearms safety or training course or class or a similar lawful activity;

5 26 USC § 5845(j); ATF Form 4, definition j (revised May 2016); ATF, *National Firearms Act Handbook* § 9.1 (revised Apr. 2009).

6 This is not the only requirement on the interstate transfer of firearms. Some states, such as California and New Jersey, have additional requirements for firearms transfers. These states require specific procedures in addition to federal law.

7 ORS 166.435(2)-(3).

8 ORS 166.435(1)(a).

(B) For the purpose of hunting, trapping or target shooting, during the time in which the transferee is engaged in activities related to hunting, trapping or target shooting;

(C) Under circumstances in which the transferee and the firearm are in the presence of the transferor;

(D) To a transferee who is in the business of repairing firearms, for the time during which the firearm is being repaired;

(E) To a transferee who is in the business of making or repairing custom accessories for firearms, for the time during which the accessories are being made or repaired; or

(F) For the purpose of preventing imminent death or serious physical injury, and the provision lasts only as long as is necessary to prevent the death or serious physical injury.

Permanent Transfers. These are exemptions from regulation because of the relationship between the firearm owner and firearm recipient. ORS 166.435(4)(c) exempts the transfer of a firearm to:

- A transferor's spouse or domestic partner;
- A transferor's parent or stepparent;
- A transferor's child or stepchild;
- A transferor's sibling;
- A transferor's grandparent;
- A transferor's grandchild;
- A transferor's aunt or uncle;
- A transferor's first cousin;
- A transferor's niece or nephew; or
- The spouse or domestic partner of a person set forth above.

The above exemptions apply generally to estate planning. Therefore, a grandparent can pass down a rifle to a grandchild without going through a background check. The larger point is to show the breadth of the term "transfer."

The Oregon statute has specific exemptions for estate administration. These are as follows:

(d) The transfer of a firearm that occurs because of the death of the firearm owner, provided that:

(A) The transfer is conducted or facilitated by a personal representative, as defined in ORS 111.005, or a trustee of a trust created in a will; and

(B) The transferee is related to the deceased firearm owner in a manner specified in paragraph (c) [listed above under permanent transfers[9]].

9 ORS 166.435(4) (emphasis added).

A violation of the Oregon transfer rules can result in going to jail.[10] Also note that firearms held in a Revocable Trust are *not* exempt; therefore, transfers from a Revocable Trust to anyone must go through a background check through a Federal Firearms Licensee (usually a gun shop), which requires the completion of ATF Form 4473.[11]

EXAMPLE 2: Decedent lived in Medford, Oregon. Decedent's Will lists all of the decedent's firearms by manufacturer and serial number. The Will leaves all of the guns to Child Number One. Child Number One lives in Bend, Oregon. May the Personal Representative of the estate distribute the firearms to Child Number One without having Child Number One complete a Form 4473 and undergo a background check? YES. Assuming that other rules of probate procedure are followed (order approving the distribution, etc.), the Personal Representative may give the firearms to Child Number One directly. Note, however, that restrictions on prohibited persons (discussed later in this article) also apply.

EXAMPLE 3: Decedent lived in Medford, Oregon. Decedent's Will lists all of the decedent's firearms by manufacturer and serial number. The Will leaves all of the guns to Best Friend. Best Friend lives in Medford, Oregon. May the Personal Representative of the estate distribute the firearms to Best Friend without having Best Friend complete a Form 4473 and undergo a background check? NO. Best Friend is not on the approved list of persons set out in ORS 166.435(4).

EXAMPLE 4: Decedent lived in Medford, Oregon. Schedule A to decedent's Revocable Trust lists all of the decedent's firearms by manufacturer and serial number. The Trust leaves all of the guns to Child Number One. Child Number One lives in Bend, Oregon. May the Trustee distribute the firearms to Child Number One without having Child Number One complete a Form 4473 and undergo a background check? NO. The Trustee must require that the heir complete an ATF Form 4473 and go through a background check. This normally happens at a gun shop.

10

(a) A transferor who fails to comply with the requirements of this section commits a **Class A misdemeanor**.

(b) Notwithstanding paragraph (a) of this subsection, a transferor who fails to comply with the requirements of this section commits a **Class B felony** if the transferor has a previous conviction under this section at the time of the offense.

ORS 166.435(5) (emphasis added).

11 Oregon uses the federal background check system and the federal form. There is no separate Oregon form.

PROCEDURE (examples 3 and 4): The fiduciary, the recipient, and the firearms must all go to the gun shop. The fiduciary brings the firearms into the shop, the model and serial numbers are recorded, the recipient completes the Form 4473, the gun shop employee enters the data into the computer, and the National Instant Criminal Background Check System ("NICS") will approve/disapprove the transfer.[12] If approved, the NICS provides the gun shop employee with a unique approval number indicating that the recipient is qualified to complete the transfer. The gun shop employee then writes the approval number and the serial number of the firearm(s) on the Form 4473. If there are multiple firearms, all of the serial numbers are written onto the Form 4473 (one Form 4473 can accommodate multiple firearms). The gun shop must retain the Form 4473 for a period of time. The fiduciary should consider documentation. The cancelled check with a notation in the memo line should suffice, or get a receipt from the recipient signed at the gun shop as part of the transaction.

Note: The transfer is approved only for the firearms listed on the Form 4473. If more firearms are later found, the procedure must be repeated.

The Laws of Other States. Compliance with Oregon and federal law is not necessarily sufficient. Each state has its own set of firearms laws. Most states have laws that are similar to the Oregon and federal laws. For example, New Jersey requires a Firearm Purchaser Permit,[13] and California has an Assault Weapon Ban.[14] Counties and cities have additional rules. Therefore, a potential recipient should select a reputable gun shop in the recipient's town and inquire about whether the items devised to the recipient are permissible to own locally.

(3) Who Is Prohibited from Owning or Possessing a Firearm? Federal law (the GCA) and Oregon law created a class of persons referred to as "prohibited persons." A prohibited person is someone who may not receive a firearm at all.[15] The following list is not exhaustive. Those prohibited include a person who:

- is under indictment for a crime punishable by prison exceeding one year;
- has been convicted of a crime punishable by prison exceeding one year;
- is a fugitive from justice;
- is an unlawful user of or addicted to any controlled substance;
- has been adjudicated as a mental defective or has been committed to any mental institution;
- being an alien, is illegally or unlawfully in the United States;
- has been discharged from the military under dishonorable conditions;
- has renounced his or her United States citizenship;
- is subject to an order restraining the person from harassing, stalking, or threatening an intimate partner or partner's child; or
- has been convicted of a misdemeanor crime of domestic violence.

Transfers to such persons are unlawful.

EXAMPLE: Decedent's Will lists all of the decedent's firearms by manufacturer and serial number. The Will leaves all of the guns to Child Number One. Child Number One is divorced and is subject to a restraining order for harassment.[16] May the Personal Representative of the estate distribute the firearms to Child Number One? NO.

Will getting a background check change the result? NO. What can Child Number One do to receive the firearms? Child Number One will have to retain counsel and get the restraining order lifted.

Estate Planning. For an ordinary estate that owns ordinary firearms (no machine guns, short barreled rifles, short barreled shotguns, or silencers/suppressors), no special estate planning is required. As mentioned above, if the client has a Revocable Trust, and the firearms are transferred into the Trust, a background check will be required when the firearms are transferred to the Beneficiary. If the recipient of the firearms lives out of state, a background check will be required anyway, so this may not be an issue.

12 A buyer who believes that a NICS denial is erroneous may appeal the decision by either challenging the accuracy of the record used in the evaluation of the denial or claiming that the record used as basis for the denial is invalid or does not pertain to the buyer. The provisions for appeals are outlined in the NICS regulations at 28 CFR pt 25.10, and in Sections 103(f)-(g) and 104 of the Brady Handgun Violence Prevention Act of 1993. *See also* NICS, https://www.fbi.gov/services/cjis/nics (last visited Sept. 22, 2016).

13 New Jersey State Police, Firearms Information, http://www.njsp.org/firearms/firearms-faqs.shtml (2016).

14 California Office of the Attorney General, Frequently Asked Questions, https://oag.ca.gov/firearms/faqs (2016).

15 18 USC § 922(g); ORS 166.470. Please review the statutes carefully.

16 The background check will only recognize restraining orders that have been entered into the system by the local sheriff or the courts. However, policies on entering this data vary by jurisdiction.

Gifting. If the donor and the recipient both live in Oregon, lifetime gifts are quite useful. Firearms acquired over a lifetime of hunting may not be used anymore. Many types of hunting are physically strenuous, and the client may no longer be able to participate. A grandchild may be better able to hunt with the firearm.

Small Estates. The statute makes an exemption for personal representatives. There is no similar exemption for claiming successors. If a small estate procedure is used, a background check will be required. The background check is cheaper and easier than a probate, so this may not be an issue.

Conclusion. The right to keep and bear firearms is specifically protected by the Oregon Constitution and the federal Bill of Rights. Both Constitutions support the fundamental human right of self-defense. Nevertheless, it is important to understand that almost every change of possession of a firearm is controlled by criminal law. In most estates, no additional planning is required. However, an attorney should be aware of issues involved and bring in experts as needed.

Advance Directive Legislation Update

Hilary A. Newcomb
HAN Legal
Portland, Oregon

Senator Prozanski's legislative work group charged with updating Oregon's advance directive form and statutes met again. The work group has reviewed and analyzed proposed legislation, which is presently aimed to accomplish the following tasks:

1. Establish an Advance Directive Rules Adoption Committee for purposes of adopting a standardized form. (This form will not take effect unless it passes the Legislative Assembly.)

2. Modify the current statutory form.

3. Increase flexibility to the modified form's execution.

4. The statutory form will sunset on January 1, 2020.

5. The new statutes and modified statutory form are planned to become operative on January 1, 2018.

A bill may be proposed as soon as December of 2016. If you would like more information please look to future Newsletter articles or contact Hilary Newcomb at hnewcomb@hanlegal.com.

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Contact: Sheryl S. McConnell, Editor-in-Chief

(503) 857-6860 Sheryl@mcconnellattorney.com

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Events Calendar

Estate Planning and Administration Section CLE

What: Basic Estate Planning
When: November 18, 2016
Where: Double Tree Hotel, Lloyd Center, Portland

46th Annual Estate Planning Seminar

What: Estate Planning CLE sponsored by the Estate Planning Council of Portland, Inc.
When: January 20, 2017
Where: Oregon Convention Center, Portland

The Editors want to include announcements of upcoming events that are open to the public and may be of interest to our readers. If you know of an event, please send basic information, including point of contact information to Sheryl S. McConnell at *Sheryl@mcconnellattorney.com* for inclusion in the next issue of the Newsletter.

How to Stay Relevant in a DIY World

Taylor Kittell
Gevurtz Menashe
Portland Oregon

We've all heard the question and struggled through an answer: "Why can't I do my estate plan myself?"

Our culture is increasingly expecting unlimited access to free information, unbundled services, and cheap alternatives to traditional methods. Estate planning is caught in this tide and free or low-cost forms are abundant. How do we, as estate planners, demonstrate our value and stay relevant in this do-it-yourself ("DIY") world?

1. **Ask thoughtful questions, and then dig deeper.**

The vast majority of people think their situation is simple. However, important and nuanced information frequently surfaces during our estate planning discussions, the relevance of which clients may not understand. For example, a client came in recently for a consultation because her parents told her she needed an estate plan. She was in her mid-twenties, a single parent with a young child and "nothing much" in assets.

I started with a simple question: Where are you from? I continued with a line of follow up questions. Fifteen minutes later, I had more critical information than my client would have thought to tell me. She was a Canadian citizen with real property in three states and a small business in Canada. She did not initially think that this information was important. No DIY form could have explained the full complexity of her situation or how to make sure her child is taken care of in the event something unexpected happened to her.

Regardless of the size of one's estate, relationships make a significant difference in, and are often a defining characteristic of, one's legacy. A husband may raise his wife's children for their entire lives and consider them his own, even though they have no legal relationship to him. An aunt may be very close to her nieces and nephews and disconnected from her children and may assume that "everyone knows" who she wants to benefit from her estate. An adult child might quit her job to be a full-time caretaker for her ailing step-father, but, upon his death, discover the step-father's estranged children are the sole beneficiaries of his estate.

In these situations and many others, a DIY approach can have hurtful, costly, and even unfair consequences. On the other hand, an estate planning attorney who asks thoughtful questions and digs deeper can craft an estate plan that is customized to the client's situation and needs.

2. **Explain both the emotional and financial value of preventing unintended consequences.**

The consequences of poor planning are rarely seen until it's too late. The price tags on many low-cost "estate plans" can be misleading, as they fail to take into account the time, money, and stress of contentious and protracted probate or trust proceedings.

Parents complete a DIY form naming their child as the sole devisee and then are killed in a car crash. The child turns 18 and gets all of his inheritance at one time, only to immediately spend it on a Ferrari and wrap that fancy car around a telephone pole. Why wasn't that money put in a trust and used for college tuition or health care expenses?

Two individuals are engaged to be married and execute DIY wills to make sure all their "paperwork" is in order. They subsequently get married, which revokes their existing estate plans. This is clearly not what they intended, but even a perfectly-drafted DIY form cannot educate these individuals on the legal consequences of their actions.

A couple has two adult children, one with special needs. They want to be "fair" and decide to leave their estate to their children equally. Upon their deaths, the disabled child receives her inheritance and is disqualified from the public benefits on which she depends. Is that what her parents would have wanted?

Some of these mistakes and misunderstandings cannot be fixed. For those that can, the actual cost far outweighs the expense of a customized and thoughtful estate plan.

3. **Help your clients *understand* their estate plan, not just have one.**

As every estate planning attorney knows, every person has an estate plan: Oregon's laws of intestacy. A DIY form can be worse than Oregon's default plan because often the creator of the form doesn't regularly practice Oregon law. Clients sabotage their own plans without knowledge of what they're doing, and a critical part of our job as estate planners is to educate them on how our probate and trust systems work to prevent this result.

After completing a DIY revocable living trust, a client believes his assets will avoid probate after his death. The client is likely to skim past the pages of instructions in legalese that may (or may not) instruct the client to transfer assets into the trust. Upon his death, it is discovered that the trust was never funded and the estate is subject to a separate probate in every state in which the client owned property.

A client put her son's name on her safe deposit box to ensure he had access to it if she becomes incapacitated. Two years later, she came into my office wondering why the bank would not let her access it, only to discover the contents of her safe deposit were listed as an asset of her son's bankruptcy proceeding. Uneducated clients make their heirs beneficiaries or joint owners of significant assets without understanding these actions cause the assets

to pass outside the terms of their plan. This unintended consequence undermines the client's expectations, unfairly enriches one or more beneficiaries, and leaves painful feelings and family disharmony in its wake.

In these examples, *having* an estate plan is not the same as *understanding* it. Clients assume their situation is normal because it is normal to them. A good estate planning attorney is an investigator and then an educator, viewing the client's life with fresh eyes and then explaining to the client how his or her situation is unique. In this way, the estate planning attorney is the guardian of the client's legacy and assumes the critical role of educating clients so that they do not inadvertently sabotage their own intent.

Staying relevant in the DIY world means offering new levels of customer service, not just a more expensive form. This is true now more than ever before. Our role is not to produce an estate plan; it is to develop a relationship with our clients; to understand their family dynamics, their values, their legacy; to give them the space to process the tough questions of what may happen upon their death or incapacity. Understanding their estate plan and knowing their loved ones will be taken care of brings invaluable peace of mind to our clients.

A DIY form is not a person. A form cannot ask nuanced questions and read between the lines. A form does not have the emotional intelligence to navigate and understand family dynamics and it cannot offer guidance on each person's unique circumstances. A form cannot offer recommendations and explain its reasoning.

To be clear, I'm a huge fan of DIY. I crafted my own wedding invitations and made natural laundry soap. The projects were fun and the results were good enough, maybe even worth the savings. But these tasks carried minimal risks of unintended consequences and harmful impact on my loved ones.

Estate plans are different. Each person spends years – decades – building a legacy of relationships, wealth, and charitable causes that is unique to him or her. The choice to use a low-cost DIY form to preserve or effectuate this unique legacy is short-sighted and reckless. Often the reality is that use of a DIY form not only undermines a person's testamentary intentions and ultimately results in substantial legal expense, but also harms those people most important to them. A lifetime of relationships, family, and wealth is far too valuable to risk on a DIY form.

So how do we, as estate planners, answer the question "Why can't I do my estate plan myself?" I don't enjoy using scare tactics or sounding like a saleswoman, but a few examples like those in this article can highlight how important estate planning is and that a DIY form will ultimately cost one's family more to fix in time, money and stress than it will cost to thoughtfully create an estate plan with an experienced attorney.

State v. Bevil, 280 Or App 92 (2016)

Stephanie M. Palmblad
Ryan W. Collier
Collier Law
Salem, Oregon

The Court of Appeals recently addressed an issue of first impression in Oregon regarding a criminal statute used against perpetrators of financial elder abuse in *State v. Mitchell A. Bevil*, 280 Or App 92 (2016). The court narrowed the meaning of the word "takes" under ORS 163.205(1)(b)(D) for first degree criminal mistreatment and held that a person only "takes" property under the statute if the owner does not give voluntary consent to the recipient's receipt of property. Therefore, a caregiver's receipt of a gift from a person in his or her care does not constitute criminal mistreatment if the donor voluntarily consented to the gift. In other words, a valid gift to one's caregiver is not financial elder abuse.

In 2007, Defendant began his relationship as groundskeeper with Ms. Howser, a wealthy woman living on a large property. Over time, his role grew to include arranging her medical appointments as well as handling her finances. To ease his work, Howser introduced him as her nephew, although the two were not related. Beginning April of 2009 and lasting for one year, Defendant received from Howser seven checks totaling $260,000.00. Howser fell and was injured in May 2010 and died shortly thereafter. A hospital social worker raised concerns with Adult Protective Services which resulted in a criminal investigation. Defendant first denied having received large gifts from the decedent but later admitted to receiving $100,000.00. However, the police searched Defendant's home and located an additional cashier's check for $161,000.00 hidden in Defendant's kitchen.

Defendant was charged with seven counts of aggravated first-degree theft and seven counts of first-degree criminal mistreatment under ORS 163.205(1)(b)(D) for receipt of the seven checks. ORS 163.205(1)(b)(D) provides:

> "A person commits the crime of criminal mistreatment in the first degree if:
>
> ****
>
> (b) The person, in violation of a legal duty to provide care for a dependent person or elderly person, or having assumed the permanent or temporary care, custody or responsibility for the supervision of a dependent person or elderly person, intentionally or knowingly:
>
> ****
>
> (D) Hides the dependent person's or elderly person's money or property or takes the money or property

for, or appropriates the money or property to, any use or purpose not in the due and lawful execution of the person's responsibility[.]"

In a bench trial, Defendant was acquitted of the theft charges and convicted of the criminal mistreatment charges. Prosecution argued that by accepting the role of caregiver, Defendant created a fiduciary relationship and his knowing receipt of gifts from the dependent individual was criminal mistreatment under the terms of the statute. Defense counsel argued that valid gifts to a caretaker were not criminalized by the language of the statute. The trial court was persuaded that any gift made to a caretaker that was "for any use or purpose . . . not in the due and lawful execution of the person's responsibility" violated the statute. 280 Or App at 99. The trial court's broad interpretation of the statute would criminalize the receipt of a gift by a family member acting as a caretaker even though the family member would normally be the object of an individual's donative intent. Defendant was sentenced to 36 months in prison and ordered to pay $260,000.00 in restitution to Howser's trust.

On appeal, the court examined the text and context of the phrase "take" in the statute and concluded that only a transfer made without the consent of the owner is understood to be "taking" in the context of criminal statutes.

The legislative history supports this reading. Much of the legislative testimony centered on protecting the elderly from financial exploitation. Both the House and Senate were concerned with transfers made by an individual with diminished capacity. However, they also focused on protecting the financial independence and freedom of choice of elderly individuals as distinguished from financial exploitation. The court found no indication in the legislative history of intent to criminalize valid gifts made with voluntary consent.

The court concluded that a gift made with the voluntary consent of the giver is not a gift the recipient "takes" and therefore is not criminal mistreatment under ORS 163.205(1)(b)(D). The court reversed and remanded the case for a new trial to determine whether Defendant received property from Howser without her voluntary consent.

In Memoriam: Jeff Cheyne

On July 5, 2016, the Estate Planning community lost a dear colleague and friend in Jeff Cheyne. Jeff passed away after suffering a number of strokes in short succession. He was well known in the Pacific Northwest and the legal community for his intellect and legal skills, his deep understanding of the nuances of the law, his professionalism, and his contributions to the bar and community. He was an amazing mentor to the young and old. He was always just a phone call, email, or coffee break away. He made time for everyone.

Jeff had an amazing legal mind and an accomplished career. He was on, and headed, countless committees, study groups, and legislative work groups. He spent hours meeting with state representatives, giving testimony, and helping to shape our current estate, trust, and tax laws. In just the past few years he contributed eight articles to the Estate Planning and Administration Section Newsletter. When he saw a problem, he didn't simply ignore it, he did something about it. When he volunteered for something, he didn't just delegate tasks, but rolled up his sleeves and worked alongside you. His dedication to his craft, career, and profession was second to none.

Jeff was a cherished member of Samuels Yoelin Kantor, LLP since 2006. He was a very proud fellow of the American College of Trust and Estate Counsel and past president of the Oregon State Bar Estate Planning and Administration Section. But above all, he was a fierce and devoted counselor to his clients. He never lost the desire to learn and was always eager to discuss the finer points of the law. He was a valuable asset and friend to this community. He is missed.

Eric Wieland
Samuels Yoelin Kantor, LLP
Portland, Oregon