The Estate Planner and Divorce Lawyer: A Marriage Made in Heaven

1. Introduction

I am a divorce lawyer. I know little about estate planning. I have found, however, that divorce lawyers and estate planning lawyers often strive to accomplish the same goal for their clients: the future disposition of clients’ assets and liabilities in accordance with well-laid plans. Estate planners and divorce lawyers are often unaware they have common clients. More importantly, each often fails to accomplish the clients’ goals because: (1) the most intricate, complex, well-crafted estate plan can be reduced to worthless paper by a divorce proceeding; (2) the most intricate, complex, well-crafted pre- or post-nuptial agreement can be reduced to worthless paper by a failure to take into consideration a client’s already existing estate plan. Many of my divorce attorney colleagues fail to recognize that a divorce planning device such as a pre-nuptial agreement alone is not good estate planning. The job is only partially done.

This article discusses case law affecting estate plans through divorce and briefly touches on the mechanics of drafting pre- or post-nuptial agreements. If you want to know more about this, I highly recommend Josh Kadish’s excellent chapter on pre-nuptial agreements found in 1 Family Law (Or. St. Bar CLE 1990) or an earlier article of mine entitled Pre- and Post-Nuptial Agreements, A Few Suggestions, Strategies and Opinions, Fam & Juv. L. News. (Or St. Bar), April 1991. I hope that when you finish reading this article, you believe that divorce lawyers and estate planners need to work together in achieving their common clients’ goals.

2. The Power of the Divorce Court, or Equity Knows No Bounds

Next to the Federal Bankruptcy Court, the dissolution court, particularly in so-called equitable distribution states such as Oregon, is the most powerful and intrusive court in our legal system. How? Generally, the principles which apply to an equitable proceeding are more loose, if not amorphous, than those which apply when the court is sitting in law. The following examples should show you just how powerful the divorce court is.

First, we start with the statute ORS 107.105(1) provides in relevant part:
“Whenever the court grants a judgment of marital annulment, dissolution or separation, it has power further to adjudge as follows:
“(f) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances.” * * * Subsequent to the filing of a petition...
for annulment or dissolution of marriage or separation, the rights of the parties in the marital assets shall be considered a species of co-ownership, and a transfer of marital assets pursuant to a judgment of annulment or dissolution of marriage or of separation entered on or after October 4, 1977, shall be considered a partitioning of jointly owned property."

(Emphasis added.)

This statute alone gives Oregon divorce courts tremendous reach in identifying, valuing, and dividing property interests which might otherwise be thought to be separate or excludable. In the absence of pre- or post-nuptial agreements, courts have exercised this broad grant of authority in ways that can drastically affect the estate planning of the parties or their families.

Now the cases. In Benton and Benton, 61 Or App 282 (1982), rev'd en banc, 294 Or 613 (1983), the parties divorced after 20 years of marriage. Midway through the marriage, the husband's father died. The father's will established a trust, the income from which husband was to receive monthly until he reached age 50, at which time he was to receive the corpus of the trust. At the time of the dissolution trial, husband was 42, and the trust principal had a present value of approximately $680,000.61 Or App at 284.

Wife argued that she should be awarded a share of husband's interest in the trust, to be paid when the corpus was received free and clear of any claim by wife. Id. The Court of Appeals had no trouble accepting the wife's argument on appeal: "Whether vested or contingent, husband's interest in the trust is a marital asset to be considered in the division of marital property."

61 Or App at 284-85.

In Walker and Walker, 27 Or App 693 (1976), rev'd den (1977), the parties were married for a much shorter period (nine years), were younger, and had no children. Further, each party had a separate, self-sustaining career. Finally, each party brought into the marriage interests in one or more family trusts. 27 Or App at 695.

The wife had interests in three trusts, one of which vested during the marriage. The husband had an interest in one trust, which was not vested. The trial court held that the trust interests that had not vested should not be considered part of the marital assets. The wife's trust that was subject to being distributed was included in the court's property distribution. Id. The Court of Appeals, in modifying the judgment, disagreed: "Regardless of whether the parties' various trust interests are vested or contingent, they are valuable, alienable property. Thus, they should properly be considered by the court when making an equitable distribution of the parties' assets, and the trial court erred in considering only that trust interest which it found to be presently vested. We therefore consider all of the parties' trust interests on de novo review."

27 Or App at 696 (citations omitted). Based on equitable principles stated in the opinion, the Court of Appeals excluded the value of each party's unvested trust interest in its division of the remainder of the marital assets. Id. Still, Walker's reach is no less shortened by its result.

Taylor and Taylor, 121 Or App 635, modified, 124 Or App 581 (1993), is, at least for divorce attorneys, a startling and remarkable opinion. It is perhaps the best example of how the absence of a pre- or post-nuptial agreement can devastate a person's estate plan, or in this case, the plans of a party's family.

In Taylor, the parties had been married 20 years. Both were well educated and equally employable with modest incomes. They enjoyed an "opulent" lifestyle through gifts from the husband's parents. The parties separated and filed for divorce in 1990. In 1991, the husband's mother died and his remainder interests in several trusts vested. These trusts, none of which were spendthrift trusts, had been created by the husband's parents and grandmother. Husband did not learn of his interest in his grandmother's trust until 18 months after the parties separated. 121 Or App at 637-641. The trial court valued husband's inherited and trust assets at the time of trial at approximately $1,300,000. Id.

The Court of Appeals, reviewing de novo, compared this case to a similar case, Howard and Howard, 92 Or App 347, rev'd den, 507 Or 101 (1988), and made the following critical findings:

"Both were long-term marriages. In both cases, the income potential of the inheriting spouse, in the light of the inheritances, vastly outdistances that of the non-inheriting spouse. In both cases, the non-inheriting spouse expressed concern that the parties should save for retirement, but the inheriting spouse gave assurances that the anticipated inheritances made that unnecessary. In both cases, the non-inheriting spouse relied on those assurances. In this case, wife's reliance was reasonable in the light of the frequent and generous monetary gifts that husband's family bestowed on them during their marriage."

Id. at 640.

The court went on to find that the wife should receive a share of the husband's inheritance and trust interests, but not the grandmother's trust that he was unaware of until after fighting for dissolution. The appeals court upheld the trial court's conclusion that the wife should receive a one-third share of the husband's other inheritance and trust interests. Id.

For a case involving similar facts, but more modest asset values, see Bekooy and Bekooy, 118 Or App 227 (1993) (wife granted one-half interest in an inheritance husband received from his mother's estate after separation, where husband's entitlement to it prior to separation became clear because of his mother's death).

Another case I suggest estate planners read is McGoldrick and McGoldrick, 85 Or App 412 (1986), rev'd den, 304 Or 55 (1987). In McGoldrick, the husband attempted, shortly before he filed for divorce, but long after the parties had separated, to engage in some interesting estate planning. In making what the Court of Appeals found to be an irrevocable transfer of real property to the parties' children while reserving unto himself a life estate, the timing of the transfer in relation to the dissolution proceeding was not a fraudulent transfer. The Court of Appeals further found:

"If we divide the property as suggested by wife and award her an offsetting judgment, there will be no assets from which that judgment can be satisfied.

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Husband, as life tenant, will be unable to sell the property or mortgage it to pay a judgment to wife. If he prevails on the children to reconvey the property to him so that he can mortgage or sell it to pay the judgment, the estate plan will be defeated. Wife would benefit in the amount of the judgment with a corresponding ultimate loss to the children.”

85 Or App at 417. The court found in favor of husband, denying the wife a judgment to reflect the value of the transferred assets.

Chief Judge Joseph dissented:

“There is conclusive evidence that the only real purpose of the transfers was to defeat any claim of wife either in the event of a dissolution or on husband’s death. Although the conveyances are absolute in form, their purpose and the secrecy persuades me that the children were not intended to have any benefit, economic or otherwise, during husband’s life and that he intended to go on treating the property as his own as long as he lived.”

85 Or App at 419-20.


a. Property Settlements

The dissolution court generally can fashion a combination of three remedies for the non-inheriting spouse when it decides to include some or all of the value of gifted or inherited assets, including trust interests, in the property distribution:

(1) It can divide the remaining marital assets and liabilities, presumably, but not necessarily, equally, and award the non-inheriting spouse a non-interest-bearing judgment for one-half of any future trust distribution when and if made; or

(2) It can simply place the value of the gifted or inherited assets on the receiving spouse’s side of the ledger sheet. Depending on what other assets or liabilities are left to distribute, this may result in the non-inheriting spouse receiving a money judgment against the inheriting spouse; or

(3) It can award the non-inheriting spouse some or all of the gifted or inherited assets.

For instance, in Bekooy, supra, the trial court included husband’s recent inheritance as a marital asset, awarded it to him at its full value and awarded wife other marital assets of equal value. Bekooy and Bekooy, 118 Or App at 229.

In Taylor and Taylor, supra, after including one-third the value of the husband’s gifted and inherited assets on his side of the ledger, the trial court awarded wife a money judgment against husband for $435,000, supposedly immediately due and payable. Taylor and Taylor, 121 Or App at 638. As mentioned above, the trust agreement did not contain a spendthrift provision.

Oregon follows the majority rule upholding the validity of spendthrift trusts, i.e., trusts prohibiting a beneficiary from assigning and creditors from attaching, the beneficiary’s right to future payments of income or capital. Kirk v. Kirk, 254 Or 44 (1969). Little case law exists applying spendthrift trust provisions in the context of a divorce. Presumably a spendthrift clause would be enforceable against a former spouse in a suit for payment of a property settlement judgment. However, an exception applies in the case of alimony and child support judgments.

b. Alimony and Child Support

The liability of a spendthrift trust for support of children, and for payment of alimony was discussed at length in Shelley v. Shelley, 223 Or 328 (1960). In Shelley, husband’s father created a testamentary trust which provided that all income be distributed to the husband quarterly, and gave the trustee, a bank, power to make distributions of principal in such amounts as the trustee deemed husband capable of investing. The trust contained a spendthrift clause. Prior to the suit, husband disappeared, and his whereabouts were not known at the time of the trial. Consequently, the trustee retained accumulated income. At issue was the liability of the trust for the support of two former wives and four children.

After a discussion of public policy considerations, the court held that the income of the trust was subject to claims of one of the wives for alimony (the other bad not been awarded alimony) and to the children for support. The court held that the claimants could reach only so much of the income as the trust court deemed reasonable under the circumstances, taking into account various factors specified by the court.

As to the corpus of the trust, the court held that, for the same reason policy reasons stated with respect to distributions of income, the husband’s interest in the corpus was not immune to the claims of the former wives and children. However, because disbursement of the principal of the trust was within the discretion of the trustee, husband’s right to receive any part of the corpus did not arise until the trustee had exercised his discretion to invade the corpus. Therefore, the beneficiaries could not reach the corpus derivatively through husband because husband, as beneficiary, had no realizable interest in it.

A spouse’s interest in a trust, whether vested or contingent, may be subject to the dissolution court’s dispositional authority notwithstanding the existence of a spendthrift provision. However, if the trust contains a spendthrift provision, then should the former spouse become a money judgment creditor of a spouse who has an interest in the trust, assets which are still held in the trust will not be subject to execution or other form of legal process.

4. Divorce Asset Valuation: At Times a Different World

In dividing property, which necessarily includes both assets and liabilities, ORS 107.105(1)(f) exhorts courts to “require full disclosure of all assets by the parties in arriving at a just property division * * *.” However, disclosure is only half the tale. Valuation is the other, and often more adversarial, half. Non-divorce lawyers and other professionals (particularly accountants) are at times surprised to learn the unique rules of valuation that apply in divorce proceedings. Some of the more important and frequently cited valuation rules in divorce cases include:

(1) A business ordinarily has some value above and beyond those of its fixed assets, known as goodwill value, unless success or failure of the business depends almost solely on a party’s personal services. Adams and Adams, 121 Or App 187, 190 (1993); Lankford and Lankford, 79 Or App 742, 745 (1986).
(2) Book value is an appropriate basis to value a business only if the business has just been formed or if the owner is contemplating a sale. Otherwise, its greater value to the parties is as an operating entity. Therefore it should be valued as a going concern. Bors and Bors, 115 Or App 572, 575 (1992).

(3) Consideration of the tax consequences and other costs of sale is not appropriate if a sale is not contemplated by the parties or ordered by the dissolution court. Follansbee and Ackennan, 115 Or App 39, 41 (1992).

(4) Under the asset value method, the value of stock in a closely held corporation may be discounted if it represents a minority interest or if the bylaws contain restrictive provisions, such as a right of first refusal, which inhibit the stock's marketability. However, if there is no evidence that a minority sale is planned or has occurred in the past, the valuation need not contemplate any discount. Barlow and Barlow, 111 Or App 179, 182 (1991), rev den, 313 Or 299 (1992); Wehber and Webber, 99 Or App 703 (1989), modified, 102 Or App 93, rev den, 310 Or 282 (1990).

(5) Assets are valued at the time of the divorce trial, not separation, unless there has been both a long period of separation and financial independence. Crislip and Crislip, 86 Or App 146, 150 (1987).

The above valuation rules are by no means exhaustive, and indicate that in some instances valuation rules employed by taxing authorities may differ. Nothing prevents a divorce lawyer from including in a pre-nuptial agreement provisions regarding valuation methodology which differs from the case law.

5. The Mechanics of Drafting the Pre-nuptial Agreement

To many lawyers practicing in the ‘80s, pre-nuptial agreements frequently seemed nothing more than trendy devices representative of that decade’s “me” mentality. They often resembled a sledgehammer with which a person with substantial assets (the Have) agreed to many a person with insubstantial assets (the Have Not) so long as the Have Not forever forsook an interest or claim in the Have’s assets. The horror stories associated with pre-nuptial agreements were legion: There was the unsophisticated Have Not who was presented with a pre-nuptial agreement for the first time in the Have’s lawyer’s office on the way to the wedding ceremony; or, the Have who grossly misstated either the full value, or nature of his wealth.

These stories were in reality few. In 1987 the Oregon legislature codified existing case law by enacting the Uniform Premarital Agreement Act (UPAA), ORS 108.700 et seq. With its passage, lawyers and their insurance carriers heaved a big sigh of relief.

The law requires very little: (1) a written pre-nuptial agreement; (2) full disclosure as to the value and extent of each party’s assets and liabilities; and (3) adequate time for each party to carefully review, consider, and negotiate the agreement’s terms. It is astounding how frequently one sees a case in which the Have is in a hurry and attaches very little significance to both the ceremony and legal importance of the pre-nuptial agreement. To lawyers, the rule is very clear: do it right or don’t do it at all.

I often find that the process of negotiating and signing a pre-nuptial agreement, if not the very concept itself, has a negative impact on a couple’s relationship. The process stands in stark contrast to what is normally a very joyous occasion usually filled with wedding plans, honeymoon plans, and the thinking about a future life together. The strain can be great and often results in the parties’ exhibiting behaviors previously unseen in the relationship. Therefore, I often recommend to my clients who are undergoing such strain and frustration to seek mental health counseling during the process, both individually and as a couple, to better understand and deal with new and conflicting emotions.

6. Working with Estate Planners

Usually, the need or desire for a pre-nuptial agreement comes from one of the parties. However, not infrequently the force behind the request comes from one of the parties, but rather, a party’s relative, often a parent. When this occurs, there is usually in place an estate plan. Should this be the case, when drafting the agreement, the attorney should consider the client’s (i.e. family’s) overall estate plan. If the client assents, the lawyer should ask the family’s estate planner to review the drafts and offer comments. In these cases, the pre-nuptial agreement is the final step in a party’s overall estate plan. However, there are instances when the drafting of a pre-nuptial agreement is the first step in a party’s devising a comprehensive estate plan. Whatever the case, I do not favor turning my client’s pre-nuptial agreement into a testamentary document. Therefore, my agreements generally contain language such as the following:

“Death of Either Party During Marriage.

“In the event either party dies during the parties’ marriage, the surviving party shall receive, in addition to his or her own ‘separate estate,’ any such interest as may be created for him or her by the other gift; by the other’s will or trust agreement; by beneficiary designations of survivorship and by joint ownership of assets; by tenancy-in-common right of survivorship in securities or other personal property; or by any other method of conveying or transferring property interests.”

Because death is not the same as a domestic proceeding such as divorce or separation, most parties are willing to be more generous in death than in divorce. This generosity should be spelled out in a will or testamentary document and not in the pre-nuptial agreement.

7. Conclusion

Divorce planning is estate planning. To do that effectively for our clients, estate planning lawyers and divorce lawyers should work together. Divorce can but ruin the best laid estate plans. Using either a pre- or post-nuptial agreement will advance a client’s already existing estate plan.

Michael A. Yates

Endnote

1 To their consternation, I remind my colleagues that with the effective date of the ORCP, the procedural distinction between equity actions and law actions was abolished. See ORCP 2. Accordingly, since January 1, 1980, all Oregon courts “adjudge,” not “decree” and the final adjudicatory document in a legal proceeding is a “judgment” and not a “decree.” Old habits die hard.
What's New?

**Woody v. Medical Research Foundation of Oregon, 130 Or App 114 (1994)**

Defendant’s will left her estate to the Medical Research Foundation of Oregon. The will specifically directed that the net income of the estate be used “for the benefit of cardiopulmonary research, development and education under the direction of Dr. Albert Starr and/or Dr. James Wood, or their successors, in the Department of Cardiopulmonary Surgery at the University of Oregon Medical School.” Plaintiffs sought to use the funds to conduct research at St. Vincent’s Hospital, and to show that Defendant specifically intended to benefit Plaintiffs’ research projects, regardless of where such research was conducted. Defendant, on the other hand, took the position that the terms of the will were unambiguous, requiring the money to be used only on research performed at Oregon Health Sciences University (“OHSU”).

The trial court determined that the will contained a latent ambiguity and admitted extrinsic evidence to interpret the will. Part of such extrinsic evidence was testimony from the lawyer who drafted the will for Defendant. Upon examination of such evidence, the court concluded that Defendant intended that the money be used to further Plaintiffs’ research, no matter where conducted.

The Court of Appeals disagreed. The court reviewed the language quoted above and found it to be unambiguous. In the court’s view, the syntax of the will provision in question gave no alternative to OHSU as a site for the research.

The court also rejected Plaintiffs’ argument that, even if the language is unambiguous, extrinsic evidence is admissible to show the circumstances under which the will was made. Citing *Jarrett v. US. National Bank*, 81 Or App 242, 236 (1986), *rev den*, 302 Or 476 (1987), the court concluded that, where language in a will is unambiguous, extrinsic evidence cannot properly be admitted to assist the court in determining its meaning, regardless of the circumstances under which the will was made.


Plaintiff, acting as personal representative for his mother’s estate, brought this action to set aside a transfer of real property from Defendant to Defendant Paulson, who is Plaintiff’s half-brother. Plaintiff asserted that Defendant had unduly influenced Decedent into transferring the property. The trial court found for Plaintiff and set aside the deed. Appellant asserted that the evidence supporting the findings of the trial court was insufficient.

In its de novo review, the Court of Appeals found that Decedent had, from the time she bought the house in 1983, required substantial physical care and that she was dependent on help from others in her daily living. For approximately four years, Decedent’s care was rendered by three of her four children, including Plaintiff. During this period, the fourth child, Defendant, did not participate in Decedent’s care and never even visited her.

Approximately one year before Decedent’s death, Defendant took over Decedent’s care, moved into Decedent’s home for a brief period, then relocated Decedent to Longview with Defendant, Defendant’s girlfriend, and her daughter. Decedent’s home was rented Out and the rental proceeds were used to pay the expenses of the Longview house. Defendant also obtained a power of attorney from Decedent, using it to exhaust Decedent’s savings account and to run up substantial debt on Decedent’s credit card. The court also found that the Defendant, on numerous occasions, told Decedent that the state would take away her home if she kept it in her name, which Defendant knew to be false and which was directly contrary to what Plaintiff had previously told Decedent. Because of what Defendant told her, Decedent was afraid of losing her home. Defendant also urged Decedent frequently to make up her mind “about the deed.” Throughout this period, the court found that Defendant shielded Decedent from contact with her other children and caused Decedent’s relations with her other children to deteriorate.

About four months before Decedent’s death, Defendant suggested to Decedent that they go to a title company in Rainier and get a deed to transfer Decedent’s home to Defendant, which they did. Defendant drove Decedent there, filled out the deed in his handwriting, then had the Decedent sign it before a notary back in Longview.

The court relied upon *In re Reddaway’s Estate*, 214 Or 410 (1958), to determine what is required to support a finding of undue influence. The court pointed out that, although the claiming party bears the burden of proving the existence of undue influence, “an inference of undue influence arises when, in addition to a confidential relationship, there are suspicious circumstances.” *In re Reddaway’s Estate*, 214 Or at 420. Such an inference does not shift the burden of proof, but may, alone, be sufficient for a court to find undue influence if the inference is unexplained.

Here, the court found that a number of the types of suspicious circumstances outlined in the *Reddaway* decision were present in this case, including, among other factors, (1) Defendant’s direct participation in the disputed transaction, (2) Defendant’s false statements to Decedent about the loss of her home, (3) Defendant’s lack of independent advice in the transaction, and (4) Defendant’s efforts to shield Decedent from her other children. As a result, the court concluded that Defendant was in a confidential relationship with Decedent, that suspicious circumstances surrounded the disputed transaction, and that the inference of undue influence was not explained. The court affirmed the lower court and held that there was sufficient evidence to support the lower court’s findings.

**Van Marter v. Van Marter, 130 Or App 500 (1994)**

This is the first Oregon appellate case reviewing a summary judgment in an undue influence case. The trial court had granted Defendant’s motion for summary judgment in an action by Plaintiffs to set aside Decedent’s will on the basis of undue influence. Plaintiffs appealed. The court pointed out that, in a motion for summary judgment, the moving party must show that there are no material issues of fact and that he or she is entitled to judgment as a matter of
law. All inferences must be drawn in favor of the party opposing the motion.

The court stated, “In the abstract, ORCP 47 does not preclude summary judgment in a claim for undue influence. In reality, such cases may, indeed, be virtually nonexistent. Each case of undue influence must be decided on its own peculiar facts which, in turn, may reasonably support varying, often conflicting, inferences. Cline v. Larson, 234 Or 384, 410 (1963); see Knutsen v. Krippendorf, 124 Or App 299 (1993), rev. den, 318 Or 381 (1994).” Van Marter v. Van Marter, 130 Or App at 503.

The opinion discusses at length the nature of the “confidential relationship” element in undue influence cases and enumerates the types of “suspicious circumstances” that must be present before undue influence can be inferred. See In re Reddaway’s Estate, 214 Or 410, 420 (1958). The court pointed out that not all of the suspicious circumstances need be present to infer undue influence, but that the most important factor is the beneficiary’s participation in the preparation and execution of the will. Roblin v. Shantz, Executrix, 210 Or 371, 378 (1957); Knutsen v. Krippendorf, 124 Or App at 309.

In this case, certain elements of fact were missing from the evidence offered by Plaintiffs. Despite these missing elements, the court reversed the lower court, and found that material issues of fact remained with respect to some suspicious circumstances and as to whether Defendant was in a position of domination or superiority over Decedent.

Steven W. Moulton

1995 Legislative Update

The Estate Planning and Administration Section sponsored two bills this legislative session. Senate Bill 72 would repeal ORS 112.017. That statute, which was enacted in 1993, created a new category of “spouse” for purposes of intestate succession. It appears that outright repeal may not be feasible because of opposition to repeal. There seems to be general agreement that, if outright repeal is not feasible, technical problem need to be corrected. Corrective legislation has been drafted.

The other Section-sponsored bill is Senate Bill 73, which allows a trustee to present a certification of trust in lieu of providing a copy of the trust agreement to third parties. The bill specifies the contents and effect of the certification. The purpose of the legislation is to provide uniformity in presenting trust information. The Oregon Bankers Association submitted similar legislation under Senate Bill 268. The Section is working with the OBA, joins with it in seeking enactment of Senate Bill 268, and will not seek enactment of Senate Bill 73. Senate Bill 268 has been passed by the Senate.

Other legislation of interest to the Section includes Senate Bills 61, 89, 90 and 92, all pertaining to guardianships and conservatorships. Senate Bill 61 completely rewrites ORS Chapter 126, the guardianship and conservatorship statutes. The Section supports this bill. Senate Bill 89 requires appointment of an attorney for a respondent in certain protective proceedings if the respondent is indigent and objects to the protective proceeding. Senate Bill 90 is similar, and requires the appointment of an attorney if the person nominated as guardian intends to place the respondent in an in-patient facility for purposes of psychiatric or psychological treatment. Senate Bills 89 and 90 have financial impacts, and it appears there will be no action taken on those bills. The Section took no position on those bills. Senate Bill 92 contains several provisions that were deemed too controversial to include in Senate Bill 61. It is unlikely the bill will pass as drafted. The Executive Committee of the Section voted to oppose Senate Bill 92.

Senate Bill 86 amends ORS 293.490 to increase the amount of money that a state agency may pay directly to survivors of decedents from $1,000 to $10,000. It also allows payment to the trustee of a revocable inter vivos trust under certain circumstances. Senate Bill 86 has been passed by the Senate.

Senate Bill 324 increases the limits allowed under the filing of a small estates affidavit to a total of $115,000, if not more than $25,000 of fair market value is attributable to personal property, and not more than $90,000 of fair market value is attributable to real property. Senate Bill 324 has been passed by the Senate.

House Bill 2197 eliminates the requirement that the Department of Revenue provide income tax releases to probated estates. It was submitted by DOR. DOR advises it is a “workload issue.” DOR apparently does not have the staffing available to timely respond to applications for income tax releases. House Bill 2197 has been passed by the House.

House Bill 2524 allows a decedent to direct the disposition of the decedent’s remains. It also expands the list of persons authorized to direct disposition of a decedent’s remains and authorizes delegation of authority. Current statutes allow survivors to make the decision regarding disposition of the decedent’s remains. The existing statutes are in conflict as to the priority of persons entitled to make those decisions.

House Bill 2650 establishes standards and guidelines for trustees in investing and managing trust assets. It repeals the present “prudent person” rule and directs the trustee to act as a “prudent investor.” The prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. The investment provisions will also apply to custodians under the Uniform Transfers to Minors Act and to short-term investment of funds by personal representatives of decedents’ estates.

Ron D. Bailey

From the Bench

Restricting Assets

The use of restrictions on a fiduciary’s access to assets has become a relatively common way to reduce the amount of bond ordered by the court in probate. UTCR 9.080 requires a written acknowledgment from the depository that the funds are restricted. In addition, the Rule states,
“prompt procurement of the writing is the responsibility of the attorney for the fiduciary.” (Emphasis added.)

Real property can be effectively restricted by language which indicates that “real property cannot be sold or encumbered without prior court order.” Note that when real property is restricted, the court may require proof that the restrictions have been recorded, if the real property is located in some other county or state.

Restricting personal property can present the attorney with problems. Some financial institutions refuse to acknowledge an order restricting an account. In effect, the institution is indicating that they cannot guarantee that funds will be restricted in the account.

Restrictions on an account should generally be utilized when funds are not needed for the ongoing support of the ward or administration of the case. Repeatedly requesting access to funds in a restricted account can be costly and time consuming to the estate.

When deciding whether to restrict a specific asset, it is advisable to consider the role that the asset will play in the overall administration of the estate. In the long run, it may be easier, safer, and more cost effective to bond the fiduciary at the outset.

Portland To Develop Rules Regarding Estates and Trusts

In August 1994, the City of Portland and Multnomah County issued proposed administrative rules affecting trusts and estates. Specifically, the rules proposed that the City and County business license tax be applied to trusts and estates. In some instances, the proposed rules would have provided that all of the income of trusts, including interest and dividends, would be subject to the City and County business license taxes.

Legal, accounting, and trust professionals objected to the rules as overly broad, and the rules were withdrawn prior to hearing. The City of Portland Bureau of Licenses has formed an advisory committee to review the issues raised by the now-withdrawn proposed rules, and to develop new rules.

Revised proposed rules will not be issued until after the current filing season. Until new rules or policies are adopted, the Bureau advises practitioners to prepare returns consistent with past practices. It also advises that any rules adopted may be applied retroactively to the 1993 or 1993 taxable years, or both, which could require amended returns. Questions should be directed to the City of Portland Bureau of Licenses at 823-5157.

New! Administering Trusts in Oregon

This new, one-volume book includes all you’ll need to know on administering a trust in Oregon. Chapters include Succession and Resignation of the Trustee, Tax Aspects, Trust Investments, Creditors’ Rights, Administering Charitable Trusts, Special Needs Trusts, Litigation Issues, and Ethics Issues. The book will be available at the June 30 seminar. Watch your mail for the OSB CLE calendar and for the brochure advertising the book and the June 30 program.

Editor Position Open

The current editor-in-chief of this newsletter, Jennifer Todd, has announced her resignation from the post, effective July 31. The editorial board is accepting applications for the position from lawyers with good writing skills and some experience in the area of estate planning and administration.

The position involves arranging for authors, coordinating publication, and editing for style and form. The time requirement is approximately 25 to 35 hours for each quarterly issue. Salary depends on experience.

Those interested should send a resume to Shannon Connelly, Foster Pepper & Shefelman, 15th Floor, One Main Place, 101 SW Main St., Portland 97204.

Do You Write Living Trusts?

The Professional Liability Fund is sponsoring a free seminar entitled Malpractice Traps for Lawyers Handling Living Trusts for Estates Under $600,000. This seminar will be presented live on April 27, 1995 at the Oregon Convention Center. In addition, video replays will take place in Eugene (May 12, 1995), Ontario (June 23, 1995), Pendleton (June 14, 1995), and Redmond (August 10, 1995).

The morning portion of the seminar will cover malpractice traps in planning and administering the trust including: Suitability of client, tailoring the trust to the client’s needs, selection of a trustee, trust administration and management, duties of a successor trustee, and defining responsibility clearly between lawyer, trustee, accountant and financial planner. The afternoon session will cover segments on hidden tax issues including: Proper valuation and inclusion of assets, gifts from the trust, special problems of non-citizens, tax issues in joint living trusts, joint tax return issues, and special asset issues.

A registration flyer was mailed in mid-March. If you have any questions about registration or about the program, contact Linda D’Agostino at (503) 639-6911 or (800) 452-1639. To request an additional registration form, fax your request to (503) 684-7250.
CALENDAR OF SEMINARS AND EVENTS

- April 27, 1995 (Sponsored by the Oregon State Bar Professional Liability Fund) Malpractice for Lawyers Handling Living Trusts for Estates Under $600,000, Oregon Convention Center, Portland, Oregon. Telephone: (503) 639-6911 or (800) 452-1639.


- May 12, 1995 (Sponsored by the Oregon State Bar Professional Liability Fund) Malpractice for Lawyers Handling Living Trusts for Estates Under $600,000, [site to be announced], Eugene, Oregon. Telephone: (503) 639-6911 or (800) 452-1639.


- June 2, 1995 (Sponsored by the Oregon State Bar Professional Liability Fund) Malpractice for Lawyers Handling Living Trusts for Estates Under $600,000, [site to be announced], Medford, Oregon. Telephone: (503) 639-6911 or (800) 452-1639.

- June 5-6, 1995 (Sponsored by New York University, School of Continuing Education) Trusts and Estates, Nikko Hotel, San Francisco, California. Telephone: (212) 998-7171.

- June 14, 1995 (Sponsored by the Oregon State Bar Professional Liability Fund) Malpractice for Lawyers Handling Living Trusts for Estates Under $600,000, [site to be announced], Pendleton, Oregon. Telephone: (503) 639-6911 or (800) 452-1639.

- June 23, 1995 (Sponsored by the Oregon State Bar Professional Liability Fund) Malpractice for Lawyers Handling Living Trusts for Estates Under $600,000, [site to be announced], Ontario, Oregon. Telephone: (503) 639-6911 or (800) 452-1639.

- June 30, 1995 (Sponsored by the Oregon State Bar Continuing Legal Education) Administering Trusts in Oregon, Oregon Convention Center, Portland, Oregon. Telephone: 620-0222 or (800) 452-8260 ext. 326.

- July 17-21, 1995 (Sponsored by New York University, School of Continuing Education) Partnerships and Other Pass-Through Entities, New York, New York. Telephone: (212) 998-7171.

- July 17-21-1995 (Sponsored by New York University, School of Continuing Education) Introduction to Taxation, New York, New York. Telephone: (212) 998-7171.


- July 24-28, 1995 (Sponsored by New York University, School of Continuing Education) Introduction to Trusts and Estates, New York, New York. Telephone: (212) 998-7171.

- August 10, 1995 (Sponsored by the Oregon State Bar Professional Liability Fund) Malpractice for Lawyers Handling Living Trusts for Estates Under $600,000, [site to be announced], Redmond, Oregon. Telephone: (503) 639-6911 or (800) 452-1639.


Questions, Comments or Suggestions About This Newsletter?
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