Newsletter

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Legislative Report

The Section has prepared four bills for consideration by the 2003 legislature.

Will/Trust Harmonization Statute

This statute, if enacted, will apply to revocable living trusts many of the same provisions that currently are applicable to wills. These provisions include the following:

- Pretermitted children may receive a share;
- The doctrine of advancement will apply to gifts under trusts;
- The antilapse provision in wills will apply to trusts; and
- A trustee will have the power to make non-pro rata distributions from a trust.

In addition, a marital deduction savings provision will be added so that trusts intended to qualify for the marital deduction but that do not adhere to the requirements in IRC § 2056 will be amended by statute so that they do comply.

Revised Uniform Principal and Income Act (the "UPIA")

The UPIA has been discussed extensively in Oregon since the passage of the Prudent Investor Act in 1995. Designed as a companion piece, the UPIA has as its most important provision the ability of a trustee to allocate receipts between principal and income under certain circumstances. For a more complete discussion of the UPIA, see David R. Allen, "Let's Finish the Job We Started in 1995: Why We Should Adopt the Revised Uniform Principal and Income Act," Or Est Pl & Admin Sec Newsl (Apr. 2002). In general the trustee has the power to adjust receipts between principal and income any time that the trustee is investing and managing assets as a prudent investor, the terms of the trust distribute "income" to a beneficiary, and the trustee determines that using traditional standards for determining net income will violate the trustee's duty of impartiality. The UPIA also contains several restrictions on the types of trustees that can make this allocation. For example, if the trustee is also a beneficiary or if holding the power to allocate will result in adverse tax consequences, the trustee is prohibited from holding the power.

The Oregon version of the UPIA that is currently being discussed and that will be presented to the legislature in 2003 contains not only the power to allocate between principal and income, but also a power alternatively to convert a trust from an "income only" trust to a unitrust. Similar provisions exist in the principal and income acts of several other states, including Washington and Delaware. Having the ability either to allocate between principal and income or to convert to a unitrust gives the trustee additional flexibility in deciding how to manage the trust.

The issue of adopting the UPIA has assumed greater importance since the promulgation of proposed regulations under IRC §§ 642, 643, 651, 661, 664, 2056, 2523, and 2601. 66 Fed Reg 10,396 (Feb. 15, 2001). These proposed regulations redefine the term "income" under IRC § 643 and related provisions to include "certain state statutory changes to the concepts of income and principal." 66 Fed Reg at 10, 397. Under these regulations, amounts allocated between principal and income pursuant to the UPIA will be respected if the state has adopted that law. Further, a state law that provides for a unitrust amount of between 3 and 5 percent also will be respected. The same will be true for marital deduction trusts under IRC § 2056 and "grandfathered"

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generation skipping transfer trusts under IRC § 2601. Note, however, that the benefit of these new regulations is available only in those states that have adopted some form of the UPIA.

Although the major innovation following enactment of the UPIA is the availability of the power to allocate income and principal or to convert to a unitrust, the UPIA also changes other provisions of Oregon principal and income law. The adoption of the UPIA would be beneficial from this perspective, because it would provide clarification about what is income versus principal in several areas not currently defined under existing law.

Revocation of Beneficiary Designations upon Divorce

The Section will also propose legislation that will adopt the Uniform Probate Code provisions with respect to revocation of nonprobate transfers upon divorce. Under this new law, in the event of a divorce, a revocable designation of a spouse as a beneficiary or fiduciary under a revocable trust or as a beneficiary under insurance, retirement plans, or several other types of nonprobate transfers will be revoked. Further, interests held by spouses as joint tenants will be severed upon divorce, becoming instead tenancies in common. The statute also revokes revocable designations of stepchildren and other persons related to the decedent only through the former spouse.

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Durable Power of Attorney Statute

A new durable power of attorney statute establishes a comprehensive framework for the creation, enforcement, interpretation, and revocation of powers of attorney in an attempt to make acceptance of durable powers by third parties more likely. First, the bill provides a statutory form of power of attorney that incorporates statutorily defined powers. The form can be modified to augment or withhold any of the defined powers in order to meet the principal's individual needs. The bill presumes the validity of a properly executed form and requires third parties to accept the power of the attorney-in-fact unless (1) the power of attorney is not properly executed and acknowledged, (2) a specimen signature of the attorney-in-fact is not included, (3) the power of attorney is not accompanied by one or more required affidavits, declarations or other documents, (4) the identity of the attorney-in-fact cannot be reasonably confirmed, (5) clear and convincing evidence exists that one or more of the material representations precedent to the attorney-in-fact's authority is untrue, (6) the specified duration of the power of attorney has expired, (7) the party knows of the death of the principal, or (8) the action proposed by the attorney-in-fact constitutes financial abuse under the elder abuse statute. The bill also includes provisions to protect against abusive use of a power of attorney, including the required acknowledgement of the principal's signature and treble damages against the attorney-in-fact for improper use of the power.

No statute can prevent all fraudulent uses of powers of attorney. The drafters have attempted to balance provisions that increase the beneficial usefulness of these powers with provisions to protect against abuse.

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Proposed Split Dollar Regulations: A Primer

Introduction

In a first comprehensive administrative treatment of the taxation of split dollar financing of life insurance, on July 9, 2002, the Internal Revenue Service (the "Service') issued proposed regulations affecting IRC §§ 61, 83, 301, 7872, and 1271 through 1275. For the last 50 years, the taxation of split dollar plans has been outlined by the Service through revenue rulings both published and private. The seminal treatment was announced in Rev Rul 64-328, 1964-2 CB 11, and Rev Rul 66-110, 1966-1 CB 12. In those two rulings, the Service held that the employee must include in his or her annual income the term cost of the life insurance coverage provided by the employer's premium payment, less any contribution the employee made. This economic benefit test applied regardless of whether the employee or the employer owned the policy. Unless the employee received additional benefits such as additional term coverage from the employer's payment, the economic benefit would be the exclusive measure of imputed income.

Split Dollar Defined

Generally, split dollar financing of life insurance policies describes a joint payment of life insurance premiums in which the party making the premium payments is to receive those premium amounts back at the termination of the arrangement or at the death of the insured. The insured or his or her designated beneficiary typically receives the surplus cash value or policy proceeds. Typically, an employer pays all or part of the premium on employee life. Split dollar financing has also been extended to payment of premiums for corporate shareholders' life insurance. Finally, in recent years the technique has been used in donative situations in which a family member will pay all or part of a premium on another family member's life insurance. This later development has been called private split dollar.

Why the Recent Service Interest?

Since 1996, the Service has sought to correct perceived abuses that stem from two sources: the flagrant use of inappropriate term rates in equity split dollar and the use of inflated low-term costs, which the employer paid, in reverse split dollar situations. The Service first levied attack on equity split dollar in TAM 9604001 (Sept. 8, 1995), which was further expanded in Notices 2001-10 and 2002-8. In all three of these pronouncements, the Service sought to tax, in addition to the historic economic benefit, the cash buildup in the policy that was owned by the employee. The 1996 TAM sought to do this annually; Notice 2002-8 would tax the cash buildup in the policy at the termination of the split dollar agreement during the employee's life.

The Service's argument in support of the taxation of the incremental cash buildup to the employee has encountered criticism because of its tenuous legal foundation. In the collateral split dollar context, the employee owns the policy and it is hard to find the transfer of property by the employer required to impose taxation under IRC § 83. In Rev Rul 64-328, the example seemingly falls within the classification of equity split dollar. This phenomenon went largely ignored until recent examinations. The 1964 Revenue Ruling did not tax incremental build up and taxed only the economic benefit of the term coverage.

The Service was also sensitive to perceived abuses arising out of reverse split dollar financing. In that situation, the employer would pay the term cost on a policy owned by the employee for the receipt of death benefit coverage on the employee. The structure has been described as the annual rental of the death benefit by the employer. If either the outdated PS58 rate or an inflated term cost of the insurer was used, much of employer's annual contribution went to the tax-free accretion in the policy for the benefit of the employee.

Current Taxation of Split Dollar

The administrative and legislative foundation for the current taxation of split dollar finance of life insurance is set forth in Notices 2001-10 and 2002-8, the proposed split dollar regulations issued July 5, 2002, Notice 2002-59, and the Sarbanes-Oxley Act of 2002 recently passed by Congress. Notice 2002-8 will apply to all existing split dollar agreements and for all agreements entered into before the adoption of final regulation. Split dollar agreements in effect before January 28, 2002 have some greater latitude in using the insurer's term rates to determine economic benefit. The proposed regulations will apply only prospectively when they become final.

Owner Is King

Whereas the ownership of the life insurance policy was disregarded by the regime established under Rev Rul 64-328, the proposed regulations impose a method of taxation depending on who is the owner of the policy. The test is very simple and formalistic. The owner for tax purposes is the owner designated on the insurance contract. If two or more people are named as owners but each person does not have all the incidents of ownership with respect to his or her undivided interest, the person who is first named as policy owner is treated as the owner of the entire contract. The ownership test dictates whether Prop Treas Reg § 1.61-22 or Prop Treas Reg § 1.7872-15 applies.

Prop Treas Reg § 1.61-22

This new provision in the regulations addresses what formerly was known as endorsement split dollar. It applies when the employer is the owner of the policy in a compensatory setting. It also applies in a donative situation in which the party renting the death benefit is not the owner of the policy. The employee will report annually the economic benefit reflecting the term cost for one year of life insurance coverage supplied by the employer.

Prop Treas Reg § 1.61-22 will cover both equity and nonequity situations. In the event of an equity split dollar situation in which either the donor in a donative situation or the employer in an employment situation receives only premiums advanced from the death benefit of the policy, the regulations provide that in addition to economic benefit measured by term costs, the employee or the donee may be charged with additional income. Clearly, that will occur when there is a transfer of interest in the cash value to the employee or donee. Additional income would not seem to result absent such a transfer. The examples in the proposed regulations seem to hint at that result.

Effective Date of Prop Treas Reg § 1.61-22

Unlike the treatment of traditional collateral split dollar type arrangements under the proposed regulations for IRC § 7872 (discussed below), taxpayers currently may, with respect to the determination of economic benefit for existing endorsement type policies, rely on the proposed regulations. This is not the case with respect to the proposed regulations under IRC § 7872. However, under Notice 2002-8 taxpayers may convert to interest-free loan characterization, and if done before 2004 they will avoid efforts by the Service to tax the incremental buildup in the policy.

Prop Treas Reg § 1.83-3

This proposed regulation, which is not limited to split dollar policies, adds ominous phraseology to the effect that a transfer of a contract involving death benefit protection includes not only the cash surrender value as transferred property, but also considers all other rights under such contract and supplemental agreements to be property. It is hoped that this will be made clear in the final regulations. Cash value has always been thought to be the exclusive measure of value for a transferred policy. The Service may be concerned about typical insurance contracts that have great increases in cash value (springing cash values) shortly after the scheduled transfer.

Prop Treas Reg § 1.7872-15

IRC § 7872 provides that in the case of a donative loan or an employer loan to an employee, the donee or employee (as the case may be) will report either as a gift or as income the amount of understated interest for the year. IRC § 7872 also treats the employee or donee as repaying the interest immediately back to the employer or donor. Consequently, the employee has compensation income equal to the forgone interest, and the employer or donor has interest income received in the equivalent amount. Usually, neither the employee nor the donee will be able to deduct the interest for the imputed payment back to the employer or donor.

This is a new provision in the regulations and addresses the application of the interest-free loan treatment afforded by IRC § 7872 to split dollar contracts in the form of collateral split dollar agreements. Here the owner (the employee or donee) will receive a part or all of the premium payments either directly or indirectly from the employer or donor. The employer or donor will want the premium repaid either without interest or at less than the applicable federal interest rate for the loan.

The requirements established for a loan are (1) the payment is made directly or indirectly by the nonowner to the owner; (2) the payment is a loan under the general principles of federal tax law or, if not, a reasonable person would expect payment to be repaid in full to the nonowner (whether with or without interest); and (3) the payment is to be made from or secured by either the policy's death benefit proceeds or its cash surrender value.

There are basically three types of loans that will be encountered under this section: a demand loan, term loan, or hybrid loan. It would be unusual and disadvantageous to have a term loan. A term loan by definition is an obligation for a specific period, free of contingencies. In a business setting it would be unusual to have a collateral split dollar agreement that is not conditioned on future employment; thus the term is indefinite or conditional.

If the parties establish a term loan, the imputed interest under IRC § 7872 equals the net present value of all anticipated interest payments over the full term of the loan. Consequently, there is an acceleration of income into the year the contract is executed. If there is an advantage, it arises from the fact that the interest rate remains unchanged through the duration of the agreement.

More typically, a split dollar loan will be either a demand or hybrid loan. Both of these types of loans would impute interest measured by the applicable federal rate for short-term obligations at the end of the year in the case of a demand loan, or a blended rate for the year in the case of a hybrid loan. There does not appear to be significant economic advantages or disadvantages with either type of loan, for they are basically comparable.

The regulations will address administrative issues such as whether you may aggregate monthly premiums for purposes of IRC § 7872 and treat all premiums paid in a single year as a single loan, rather than have 12 separate loans for the year.

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Declaration for Mental Health Treatment: Refresher on a Hidden Treasure

Hidden among the powers-of-attorney provisions of ORS chapter 127 lurks a little-known treasure that is designed to help individuals with mental illness plan for periods of incapacity by executing a "Declaration for Mental Health Treatment." Although executing a declaration will not eliminate the need to establish a guardianship in all cases, it does provide a short-term alternative to the complexities and expense of a guardianship proceeding. Executing a Declaration for Mental Health Treatment may also provide invaluable peace of mind to clients who suffer from mental illness, and to their family members.

A statutory form for the declaration is located at ORS 127.736. The form, which in this manner is similar to the statutory advance directive, allows the principal (1) to give directions to health care providers about particular types of treatment the principal will and will not consent to during the principal's incapacity and (2) to appoint a representative (an "attorney-in-fact") to carry out the principal's directions or to make decisions on behalf of and in the best interests of the principal if no specific directions are given. The principal may specify his or her directions about the following types of treatment: convulsive treatment, psychoactive medication, inpatient treatment of no more than 17 days, and outpatient services. The principal may also supply specific information in the declaration, such as health history details, dietary requirements, religious concerns, details about adverse reactions to certain treatments, or people to be notified during the principal's incapacity. This article provides a brief question-and-answer overview of the statute.

When does a Declaration for Mental Health Treatment become effective? The effectiveness of the declaration is not contingent solely on a court's declaration of incapacity but also allows the declaration to be followed upon the opinion of two physicians that the principal is incapable. Under the statute, "incapable" means that the principal's "ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person currently lacks the capacity to make mental health treatment decisions." ORS 127.700(5).

How long is a declaration for mental health treatment effective? A declaration is effective for three years or until sooner revoked. If during the three-year period following execution of the declaration the principal becomes incapacitated, the declaration will remain in effect until the principal is no longer incapacitated, even if this causes the declaration to be effective beyond the three-year period. ORS 127.702(2). A principal can revoke a declaration, by communicating the revocation to the attending physician or provider, at any time he or she is not incapacitated. ORS 127.722.

Are there formalities of execution that must be observed for the declaration to be effective? Yes. The statute requires that the declaration be signed with formalities that are similar to those required for executing a will. The principal must be of sound mind when the declaration is signed and the signing must be witnessed by two competent adults. The witnesses must attest that the principal is known to them, that the principal signed the declaration in the presence of the witnesses, and that the principal appeared at the time of signing to be of sound mind and not under duress, fraud, or undue influence. ORS 127.707. In addition, certain people are prohibited from acting as witnesses. ORS 127.730. These individuals include:

(1) The attending physician or mental health service provider or a relative of the physician or provider; (2) An owner or operator (or relative of an owner or operator) of a health care facility in which the principal is a patient or resident; or (3) A person related to the principal by blood, marriage or adoption. An attorney-in-fact must accept appointment as the principal's representative before he or she can exercise authority under the declaration. ORS 127.705. The

principal may also appoint an alternate attorney-in-fact to serve if the primary attorney-in-fact is unable or unwilling to act.

Are there certain people who cannot act as an attorney-in-fact under a declaration for mental health treatment? Yes. ORS 127.727 prohibits the attending physician or mental health service provider; an employee of the physician or provider; or an owner, operator, or employee of the health care facility in which the principal is a patient or resident from serving as an attorney-in-fact for mental health unless such individual is related to the principal by blood, marriage or adoption.

What is the scope of authority of the attorney-in-fact? First and foremost, the attorney-in-fact's authority under the declaration is effective only when the principal is incapable. If the principal is declared incapable by a judge or by two physicians, the attorney-in-fact has "the same right as the principal to receive information regarding the proposed mental health treatment and to receive, review and consent to disclosure of medical records relating to that treatment," except to the extent limited by the declaration or federal law. ORS 127.712(3). To the extent that the principal has expressed directions about the type of care he or she is willing to accept during periods of incapacity, the attorney-in-fact must act in accordance with those directions. ORS 127.712(4). If the principal has not given directions and the principal's desires are not otherwise known to the attorney-in-fact, the attorney-in-fact is obligated to act in a manner that he or she believes to be in the best interests of the principal. *Id*.

Is the attorney-in-fact subject to personal liability when making decisions on behalf of the incapacitated person? No. An attorney-in-fact acting under a valid Declaration for Mental Health Treatment when the principal is incapable will not be subject to criminal prosecution, civil liability, or professional disciplinary action for any action that is taken in good faith pursuant to the declaration. ORS 127.712(5). An attorney-in-fact is not personally liable for any costs of treatment provided to the principal during periods of incapacity whether or not provided at the direction of the attorney-in-fact. ORS 127.712(2).

Are there any circumstances in which the declaration does not have to be followed? Yes. Professionals can disregard the declaration. Those circumstances are limited to emergencies that endanger the life or health of the principal and to cases in which the principal is committed to the Oregon Department of Human Services pursuant to ORS 426.005 to 426.390 and treatment is authorized in compliance with ORS 426.385(3) and administrative rule. ORS 127.720. Thus, to the extent a principal is involuntarily committed to mental health treatment by the authority of the state of Oregon, the declaration may be disregarded. However, under ORS 426.385(3), the principal may be given certain "potentially unusual or hazardous treatment procedures, including convulsive therapy," only if (1) the principal has given his or her express and informed consent to such therapy, (2) the principal has authorized such therapy in a Declaration for Mental Health Treatment, or (3) the director of the facility in which the principal is confined has good cause to give such treatment and follows specific steps to do so.

Are health care providers required to honor a declaration under this statute? ORS 127.717 directs a physician or other provider to make a Declaration for Mental Health Treatment a part of the principal's medical record and to comply with the declaration to "the fullest extent possible, consistent with reasonable medical practice, the availability of treatments requested and applicable law." If the provider is unable or unwilling to follow the instructions in the declaration or the decisions of the attorney-in-fact, the physician or provider may withdraw from treating the principal "if withdrawal is consistent with the exercise of independent medical judgment that is in the best interest of the principal." *Id*.

Can an attorney-in-fact withdraw from acting under the declaration? Yes. If an attorney-in-fact becomes unable or unwilling to continue to act on behalf of the principal, he or she may withdraw by giving notice to the principal if the principal is not incapable or to the attending physician or provider if the principal is incapable. ORS 127.732(1). An attorney-in-fact's withdrawal may be subsequently rescinded by communicating in the same method as required for withdrawal and accepting in writing as required on the statutory form of declaration.

Conclusion. In summary, the Declaration for Mental Health Treatment is a valuable tool for clients with mental illness and for their family members, providing an opportunity to plan for and exercise some control over periods that are undoubtedly marked by feelings of helplessness. Although structuring estate plans for individuals with a mental illness may be a rarity for many practitioners, the Declaration for Mental Health Treatment can serve as a critical component of the client's plan and should be a standard topic of discussion in the estate planning process. The Oregon Department of Human Services Mental Health home page at http://omhs.mhd.hr.state.or.us/decinstruct.htm provides more practical information about the Declaration for Mental Health Treatment. The statutory form of the declaration can also be printed from this site.

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What's New

Kidder v. Olsen, 176 Or App 457, 31 P3d 1139 (2001).

In this will construction case, the decedent left the residue of his estate in equal shares to Kidder and Gartin. Additionally, Gartin had the right to purchase "the farm," which included an erroneous legal description in the will, by paying Kidder half the tax-assessed value in cash, but only if Gartin gave Kidder 60 days' notice of intent to purchase and closed the sale within 180 days after the decedent's death. At the time of the decedent's death, he owned two parcels of real property: a 90-acre parcel and an adjacent 40-acre forested parcel. Gartin gave Kidder written notice of her intent to purchase the property, and Kidder objected, noting that the property described in the will was not the property that the decedent owned at his death. Further, Kidder asked the probate court to remove Gartin as personal representative. As a result of these legal maneuverings, Gartin was unable to close the sale within 180 days. Kidder argued before the Oregon Court of Appeals that the will did not grant Gartin the right to purchase the property, because it did not accurately describe the decedent's farm and, even if it did, Gartin did not close the sale within 180 days of the decedent's death.

The court began by enunciating several principles of Oregon construction. First, the testator's intent is the controlling factor in construing a will. A will construction can require resorting to extrinsic evidence. Extraneous oral evidence is admissible, for example, to demonstrate the state and extent of the testator's property, or to identify and resolve latent ambiguities in a will. However, mistakes by the testator as to the effect of otherwise unambiguous wording cannot be considered by a court in a will construction. Extrinsic evidence cannot be used to contravene an otherwise clear expression of intent. In the will, the decedent referred to "my farm" when distributing tangible personal property, but referred to "the farm" only when referring to Gartin's option to purchase the property. Kidder argued that the references to "my farm" and "the farm" do not connote the same piece of property and to do so amounts to a will reformation, which Oregon courts have never embraced. The appellate court rejected this argument and used extrinsic evidence to resolve the conflict. Further, the court went on to hold that Gartin was prevented from closing the sale because of legal objections filed by Kidder. As a result, Kidder was estopped from raising the claim.

The result in this case is not surprising. Its main utility is as a reminder to be careful and consistent in drafting.

Newton v. Bank of the West, 183 Or App 347, 51 P3d 1281 (2002).

This case allows a bank to refuse to distribute property in a joint bank account to the surviving joint tenant and instead interplead the funds. Here, a decedent owned two certificates of deposit ("CDs") in the decedent's name, with his children as beneficiaries. Four days before the CDs matured, the decedent went to the bank with Newton, his caretaker, and put the CDs into an account with both of them as joint owners. As the CDs matured, the assets were transferred into a joint checking account. A month later, the decedent's children went to the bank with a general power of attorney allowing them to withdraw any funds held in a bank by the decedent. Using the power of attorney, the children requested that the funds be transferred to accounts in the joint names of the decedent and the children. As a result of the dispute, the bank simply froze the account. The decedent died that same day.

Newton, within 10 minutes of the decedent's death, telephoned the bank seeking account information and requesting to withdraw the funds. Newton, relying on ORS 708A.470(1), sought the court to rule that the funds in the joint account belonged to her as the surviving party. The bank, on the other hand, argued that the statute did not require the bank to disburse the funds and that it must be read in conjunction with ORS 708A.435(3), which provides that an Oregon "operating institution may, at its option, interplead a deposit that is subject to an adverse claim." The court, agreeing with the bank, held that although the statute cited by Newton establishes that the funds belong to her, it does not stand for the proposition that she had the immediate right to their possession. The court further held that the statute "does not require an institution to attempt to distinguish meritorious from nonmeritorious claims. Rather, in such a situation, the bank can avail itself of interpleader." 183 Or App at 351.

This decision is troubling, even though the correct result seems to have been reached in this particular case, because it would allow parties with nonmeritorious claims to a joint account to create an expensive and time-consuming interpleader action simply to create problems and potentially force a settlement.

Walker v. Roberds, 182 Or App 121, 47 P3d 911 (2002).

This case presents another analysis of the factors to be considered when raising a claim of undue influence. The decedent executed two wills, one in 1996 and one in 1997. The 1996 will left the decedent's entire estate to her son, Sommers. The 1997 will divided the decedent's estate equally between Sommers and another son, Walker. Beginning in 1992, the decedent lived with Walker and his family. However, following an argument between them in 1996, the decedent moved to Sommers' house. During the four months she stayed with Sommers, the decedent executed the 1996 will, disinheriting Walker. However, later in 1996 the decedent moved back to Walker's home so that she could have additional space.

Walker claimed that he and his mother had a generally good relationship; however, Sommers pointed out that his mother was afraid of Walker, as evidenced from statements given to medical personnel in the emergency room of a hospital that she was afraid of Walker and was concerned that he might hurt her or take her property. Walker acknowledged that he had difficulty controlling his temper. Finally, the decedent moved out of Walker's home and into an assisted living facility. In March 1997, she executed the 1997 will that included Walker as a beneficiary. Walker testified that he did not know the contents of the 1997 will until several months after it was executed and did not know about the 1996 will until after the decedent's death. Sommers and the personal representative under the 1996 will argued that the 1997 will was executed as a result of Walker's undue influence.

In analyzing the undue-influence claim, the court applied the factors in *In re Reddaway's Estate*, 214 Or 410, 329 P2d 886 (1958). The personal representative had the burden of proving the undue influence, which could be met by establishing (1) the existence of a confidential relationship between Walker and the decedent, (2) Walker's dominance over the decedent, and (3) the presence of suspicious circumstances surrounding the execution of the will. Although the court found that Walker and the decedent had a confidential relationship and that Walker dominated her, the court found that there were no suspicious circumstances surrounding the execution of the will. Suspicious circumstances are often determined by looking at the factors in *Reddaway*. First, Walker did not participate in the preparation of the 1997 will. Although he drove her to the lawyer's office, he sat in the waiting room and did not know the will's contents until several months later. Second, the decedent sought and obtained independent and disinterested legal advice in preparing the 1997 will (interestingly, the same attorney had represented both the decedent and Walker in the past). Third, there was no secrecy or haste in preparing the will. Fourth, although the will did reflect a change in the donor's attitude toward those for whom she had previously expressed affection, it did not reflect a negative change toward any former intended beneficiaries. Fifth, the change in the testamentary plan did not ignore the natural object of the decedent's bounty; it simply returned a division between two of her three sons. Finally, the decedent did not appear to be susceptible to influence. Although the trial court found that Walker's aggressive and dominating attitude made the decedent susceptible to influence, that finding discounted Walker's credibility and did not "match up" with the undisputed evidence that the decedent was fiercely independent with regard to her personal finances in the last years of her life. In light of all the *Reddaway* factors, there were not suspicious circumstances and therefore there was no undue influence.

Again, the result in this case is not surprising, but serves as a reminder of the importance of the *Reddaway* factors when having clients execute wills.

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***McClain v. Hardy*, 184 Or App 448, 56 P3d 501 (2002)**

The decedent executed a will in 1977 that left several personal items to her daughter but contained a provision that the daughter be "specifically excluded from any other benefits of my estate." The decedent's will left the remainder of her estate to her husband. The decedent's husband died in 1993, and the decedent died in 1999 without having revised her will. The decedent's daughter argued that she was entitled to the estate as the sole intestate heir of the decedent because the decedent's will failed to dispose of the residue of the estate. The decedent's brother argued that because the will clearly expressed the decedent's intent that her daughter receive only the specified items and no other benefits, he should receive the estate as the next in line under the laws of intestate succession.

ORS 112.015 provides that the laws of intestate succession apply if any part of the net estate is not "effectively disposed of by *** will." The court held that a disinheritance clause does not "dispose" of property under ORS 112.015. The court concluded that the residue of the estate passes to the daughter under the intestacy statute. This case follows the standard rule that a disinheritance clause only operates to prevent a claimant from taking property under a will. The clause does not affect an heir's right to inherit under the rules of intestacy.

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Governor Kitzhaber Pulls the Plug on Inheritance Tax Reconnect

On October 25, 2002, Governor Kitzhaber vetoed House Bill 4077. The bill would have reconnected the Oregon inheritance tax laws to the federal estate tax laws and eventually repealed the Oregon inheritance tax. As a result of the Governor's veto, Oregon is still tied to the federal estate tax exemption amount in effect prior to the Taxpayer Relief Act of 1997 ("TRA 1997"). That amount is $600,000. TRA 1997 increased the exemption over a period of years from $600,000 to $1 million. In 2000 and 2001 the exemption was $675,000.

The Oregon Department of Revenue (the "DOR") released an Inheritance Tax Advisory (the "Advisory") on November 4, 2002. The Advisory sets forth the following policies:

- For deaths that occurred between January 1, 1998 and December 31, 2001, filers should comply with existing forms and instructions, which presume the adoption of TRA 1997. The DOR cautions that if the legislature does not adopt the TRA 1997 law changes during its 2003 session, estates may owe additional taxes and should retain sufficient funds for that eventuality.
- For deaths occurring after December 31, 2001, a new form is available on the DOR Web site. The form calculates the tax based on a tie to federal law prior to TRA 1997 (i.e., using a $192,800 unified credit). However, if no federal return is required, no Oregon return is required.

The Advisory is published on the DOR Web site (www.dor.state.or.us/taxInfo/Inhtaxadv.html). For further details, see Jeffrey M. Cheyne, "Oregon Estate Tax Warning," Or Est Plan & Admin Sec Newsl, at 8 (Apr. 2002).

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Portland, Oregon

CALENDAR OF SEMINARS AND EVENTS

- January 24, 2003 (Sponsored by Estate Planning Council of Portland) **Annual Estate Planning Seminar**, Oregon Convention Center, Portland, OR. Telephone: (503) 244-4294.
- January 27-29, 2003 (Sponsored by The Law School University of Southern California Law School) **2003 Institute on Federal Taxation**, The Wilshire Grand Hotel, Los Angeles, CA Telephone: (213) 740-2582.
- February 20-22, 2003 (Sponsored by ALI-ABA) **Advanced Estate Planning Techniques**, Fairmont Kea Lani Hotel, Maui, HI. Telephone: (800) CLE-NEWS.
- April 28-May 2, 2003 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, The Plaza Hotel, New York, NY. Telephone: (800) CLE-NEWS.
- June 15-20, 2003 (Sponsored by ALI-ABA) **Estate Planning in Depth**, Madison, WI. Telephone: (800) CLE-NEWS.
- July 7-11, 2003 (Sponsored by ALI-ABA) **Skills Training for Estate Planners (STEP)— Session One**, Atlanta GA. Telephone: (800) CLE-NEWS.
- July 10-12, 2003 (Sponsored by ALI-ABA) **Estate Planning for the Family Business Owner**, Boston, MA. Telephone: (800) CLE-NEWS.
- July 17-18, 2002 (Sponsored by ALI-ABA) **Representing Estate and Trust Beneficiaries and Fiduciaries**, Chicago, IL. Telephone: (800) CLE-NEWS.

Questions, Comments or Suggestions About This Newsletter?

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