Newsletter

Advising a Creditor of an Estate if No Personal Representative Has Been Appointed

Oregon probate statutes provide a well-defined process for the resolution of outstanding claims of a decedent if a personal representative has been appointed. ORS 115.003 sets forth the personal representative's statutory obligations to take reasonably necessary actions to locate claimants during the first three months of the personal representative's appointment and to notify potential claimants. Under this claim procedure, a creditor will have a forum to present, and resolve, any outstanding claims against a decedent's estate. Similarly, if a proceeding is commenced by a trustee under ORS 128.258, relating to claims against nontestamentary trusts, a creditor would also have a forum in which to present and resolve claims.

If no personal representative has been appointed, a creditor faces a more difficult task in pursuing an outstanding claim against the decedent's estate. Generally, a creditor must either wait to file a claim until a personal representative is appointed or, if it appears that no probate proceeding will be commenced, take the initiative to petition for the appointment of personal representative as an interested person in the estate.

If a creditor decides to "wait and see" if a probate is opened, the longer the creditor waits, the greater the risk that estate assets may diminish in value or become unavailable for recovery. The creditor must also be keenly aware of the statutory time limitations for presenting a claim against the estate. These limitations changed effective January 1, 2004.

New Statutory Time Limitations

Before 2004, ORS 115.005(4) barred the payment of claims not presented within two years after the death of the decedent or within the applicable statute of limitation, whichever was earlier. Under ORS 115.215, upon the death of a decedent, a claim is not barred by the statute of limitations until at least one year after the date of death. This bar on claims did not apply (1) to proceedings to enforce a mortgage, pledge or other lien upon property of the estate, or to take certain other actions with respect to the title to property; (2) to the limits of insurance protection, any proceedings to establish liability of the decedent for which the decedent is protected by liability insurance at the time the proceeding is commenced; and (3) to certain claims by the state for the recovery of public assistance.

Because the time limitation runs from the date of death, and not from the date of the appointment of the personal representative, a creditor could be barred from filing a claim against the estate if an estate was not commenced within two years after death.

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In This Issue

Or Laws 2003, chapter 523 removed the ultimate two-year time limitation for the presentation of a claim.

Under the new time limitations, a claim must be presented against the estate before the expiration of the statute of limitations applicable to the claim. Consequently, each claim must be reviewed based on its own applicable time limitation set forth in ORS 12.010 to 12.282. More common types of claims would be actions on certain contracts or liabilities, which would have a six-year time limitation, ORS 12.080, and torts, which would have a two-year time limitation, ORS 12.110. The time limitation for some claims may be as long as 10 years.

This new law applies to claims against the estate of all decedents, without regard to whether death occurs before, on, or after the effective date of Or Laws 2003, chapter 523. The law revives any claim that would have been barred by the former two-year bar unless a decree of final distribution or general judgment has been entered.

Notably, although the two-year limitation is removed for presenting claims, the new law did not include provisions to amend ORS 115.004(5), which continues to require an action against a personal representative for failure to search for creditors or give notice be commenced within two years or the statute of limitations applicable to claims, whichever is earlier.

Creditor as Personal Representative

If the creditor petitions for appointment as personal representative and an estate proceeding is commenced before the expiration of the statute of limitations, the creditor may then present the claim in timely fashion. Once appointed, the personal representative must be prepared to discharge all duties and responsibilities of a personal representative. Many times, the risks and responsibilities involved in serving as personal representative outweigh the potential benefits. The creditor will need to consider carefully the potential benefits of the appointment and likelihood of any recovery, before petitioning for appointment.

If appointed, a personal representative would have powers normally unavailable to a creditor, which would assist the personal representative in locating and recovering estate assets. Under ORS 114.425, if a probate is opened, the court may order any person to appear and give testimony by deposition if it appears probable that a person has concealed, secreted, or disposed of estate property or any writing or document pertaining to the estate, has knowledge regarding the estate that is necessary for its administration, or has been entrusted with property of the estate and refuses to account for the property to the personal representative.

Under ORS 114.435, if the decedent transferred property with the intent to defraud creditors or transferred property by any means that is in law void or voidable as against the creditors of the decedent, the personal representative has the right to recover that property so far as necessary for the payment of claims. *See, e.g., Burgoyne v McMillan*, 259 Or 625, 488 P2d 405 (1971) (personal representative set aside conveyance to daughter to extent necessary to pay outstanding medical bills).

Further, if the decedent left insufficient probate assets but significant assets in a self-settled revocable trust, the personal representative should be able to compel the trustee to turn over assets necessary to satisfy the decedent's debts. *See Johnson v. Commercial Bank*, 284 Or 675, 588 P2d 1096 (1978); Jonathan A. Levy & James C. Cavanaugh, "Creditors' Rights and Spendthrift Clauses," in *Administering Trusts in Oregon* § 8.43 (OSB CLE 2000).

Of course, powers of a personal representative are beneficial to a creditor only if assets are available to pay the creditor's claims. Accordingly, before commencing the estate proceeding, a creditor will need to investigate whether assets subject to probate administration exist. This investigation may include discussions with family members (if cooperative), review of financial information previously provided to the creditor by the decedent, examination of public records, and consideration of any other information that may be available to give a creditor some reasonable assurance that the proceeding would allow for payment of the claim.

A creditor must take into consideration other potential claimants that may take priority to their claim pursuant to ORS 115.125. In addition to estimating priority administrative expenses, a creditor may consider obtaining a credit report to assist the creditor in evaluating whether there may be other potential creditors with outstanding claims.

Finally, in evaluating whether to petition for appointment as personal representative, if a creditor is a corporation or other entity, the creditor must consider the availability of a nominee that is willing to serve as a personal representative, with the potential fiduciary liability it would entail.

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FDIC Insurance for Revocable Trust Accounts

The Federal Deposit Insurance Corporation (the "FDIC') has promulgated a new regulation intended to simplify the insurance coverage rules for revocable trust accounts. The general rule is that such accounts are insured up to $100,000 per "qualifying beneficiary." 12 CFR § 330.10(a) (2003). "[Q]ualifying beneficiaries" include the owner's spouse, children, grandchildren, parents, brothers, and sisters. *Id*. The terms "children," "grandchildren," "parents," "brothers," and "sisters" include biological, adopted, and step relations. 12 CFR § 330.10(e) (2003). The per-beneficiary insurance coverage available for revocable trust accounts is separate from the coverage afforded to any single-ownership accounts held by the owner or the beneficiary at the same institution. 12 CFR § 330.10(a). If a revocable trust account has multiple owners, coverage is available separately for each owner. *Id*.

As illustration, assume that John Smith has at State Bank an account in his individual name and a second account, which is titled "John Smith, Trustee of the Smith Family Trust." John is the grantor of the Smith Family Trust, which provides that, on John's death, the trust corpus will be divided and distributed equally among his three children. John's individual account would be insured to a maximum of $100,000 and the trust account would be insured to a maximum of $300,000 ($100,000 for each child). If John's wife was a co-settlor of the Smith Family Trust and co-owner of its bank account, the maximum coverage for that account would be increased to $600,000.

Under the old regulation, the per-beneficiary insurance coverage was available for a revocable trust account only if the beneficiary's interest in the trust was not subject to a defeating contingency. 12 CFR § 330.10(f) (2003), *superceded*. A "defeating contingency" is a condition that "prevent[s] the beneficiary from acquiring a vested and non-contingent interest in the funds in the deposit account upon the owner's death." *Id*. Defeating contingencies include things such as a requirement to use trust assets to satisfy legacies under the grantor's will before making distributions under the trust and requiring beneficiaries to graduate from college to be eligible to receive trust distributions. Despite the FDIC's best efforts to clarify trust insurance coverage, significant public and industry confusion surrounding the application of the defeating contingency exception persisted.

Rather than try to modify or more fully describe the defeating contingency exception to per-beneficiary coverage, the new rule abandons the defeating contingency analysis altogether. Under the new rule, a revocable trust is eligible for insurance coverage of up to $100,000 per qualifying beneficiary who, as of the date of an institution failure, would become entitled to the revocable trust assets on the owner's death. The only limitation is that a beneficiary whose trust interest is dependent on the death of another trust beneficiary will not qualify.

For example, a revocable trust provides that on the owner's death the principal of the trust passes in equal shares to the owner's three children. The trust is eligible for $300,000 of deposit insurance. Because defeating contingencies are no longer relevant, the coverage would still be $300,000 if the trust required the children to graduate from college before they could receive distributions. As further illustration, assume that a trust provides that the owner's spouse receives the principal on the owner's death but, if the spouse predeceases the owner, the three children take equally. If the spouse is alive when the institution fails, the account will be insured up to a maximum of $100,000, because only the spouse is entitled to the assets on the owner's death. However, if the spouse is not then living, the account is eligible for up to $300,000 coverage, because there are three qualifying beneficiaries entitled to the trust assets upon the owner's death.

Many revocable trusts provide a life estate interest to one or more beneficiaries and a remainder interest to other beneficiaries. The new rule addresses these split-interest trusts by deeming each life-estate holder and each remainder holder to have an equal interest in the trust assets. Insurance is then provided up to $100,000 per qualifying beneficiary. The regulation provides the following example illustrating the rule:

> "D creates a living trust providing for his wife to have a life-estate interest in the trust assets with the remaining assets going to their two children upon the wife's death. The assets in the trust are $300,000 and a living trust deposit account is opened for that full amount. Unless otherwise indicated in the trust, each beneficiary (all of whom here are qualifying beneficiaries) would be deemed to own an equal share of the $300,000; hence, the full amount would be insured. This result would be the same even if the wife has the power to invade the principal of the trust, inasmuch as defeating contingencies are not relevant for insurance purposes." 12 CFR § 330.10(f)(3), Ex 1 (2004).

A special rule applies to revocable trusts that benefit nonqualifying beneficiaries. Interests of nonqualifying beneficiaries are insured as the owner's single-ownership funds. 12 CFR § 330.10(c) (2003). Those interests are added to any other single-ownership funds that the owner has at the same institution and insured to a maximum of $100,000. For example, assume a revocable trust provides that the grantor's assets will belong equally to her husband and her nephew on her death. If the trust's account held $200,000, at least $100,000 would be insured because, at the institution's failure, the spouse (a qualifying beneficiary) would be entitled to that amount on the grantor's death. The $100,000 attributable to the nephew (a nonqualifying beneficiary) would be insured as the grantor's single-ownership funds. If the grantor also had at the same institution a single-ownership account with a balance of $20,000, the $100,000 attributable to the nephew would be added to that amount and be insured to a limit of $100,000, leaving $20,000 uninsured.

The same nonqualifying beneficiary rule applies in the context of a split-interest trust. For example, assume that a revocable trust gives the grantor's spouse a life estate in the trust assets and gives the remainder to her two nephews. Unless the trust provides otherwise, each beneficiary would be deemed to have an equal ownership interest in the trust assets. If the revocable trust account balance is $300,000, it would be insured for $100,000 because the life-estate owner (the grantor's spouse) is a qualifying beneficiary. However, because the remaindermen are not qualifying beneficiaries, the $200,000 attributable to them would be insured as the grantor's single-ownership funds. If the grantor had no other single-ownership funds at the same institution, then $100,000 would be insured as the grantor's single-ownership funds. Thus the $300,000 in the revocable trust account would be insured to a maximum of $200,000, leaving $100,000 uninsured. 12 CFR § 330.10(f)(3), Ex 2 (2004).

The new regulation also eliminates the requirement that, for a trust to be eligible for per-beneficiary coverage, the records of the financial institution maintaining the account must include the names of the beneficiaries and the ownership interests in the trust. The new regulation becomes effective April 1, 2004, and will apply to all revocable trusts unless, upon the failure of a depository institution before that date, a depositor who establishes a living trust before April 1, 2004 chooses coverage under the old rule. For depository institutions that fail between January 13, 2004 and April 1, 2004, the FDIC will apply the new rule if doing so benefits the account holder.

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Till Death Do Us Part – Revocation on Divorce Statutes

When Mary and Sam dissolved their marriage, they divided their property. A settlement agreement, approved by the court, sorted out legal title to the assets they owned at the time of their divorce. Mary and Sam divided the bank account equally; Mary kept the house, Sam took a brokerage account of comparable value; Mary received the assets held in a retirement plan through her employer, Sam kept the retirement plan held for him by his employer; and Sam retained the life insurance policy held on his life.

After the divorce, Sam probably assumed that Mary had no further rights in his property, because she had already received an equitable share of the marital property. Although that conclusion is certainly true while Sam is alive, at Sam's death Mary's rights in his property will depend upon whether Sam revised his estate planning documents and upon state laws that may revoke some of the provisions in those documents if he failed to revise them.

Oregon Law

Current Oregon law effectively revokes any provision in Sam's will making a bequest to Mary. ORS 112.315. The statute treats Mary as predeceasing Sam; the remaining provisions of the will then apply. Thus, if Sam's will gives the residue of his estate to Mary and, if she predeceases him, divides the estate equally between Sam's son from a prior marriage and Mary's daughter from a prior marriage, then Sam's son and Mary's daughter will divide Sam's estate. The Oregon statute also revokes a provision naming the former spouse as personal representative.

Oregon law now also revokes a gift to a former spouse in a revocable trust and the naming of the former spouse as a trustee under a revocable trust. This new rule, enacted in HB 2269A, became effective May 24, 2003. That legislation extended a number of rules applicable to wills to revocable trusts. *See* Christopher P. Cline, "Bringing Wills and Trusts Together: New Legislation Changes the Law of Trusts," Or Est Plan & Admin Sec Newsl (July 2003).

Legislative Proposal

Another bill involving provisions for a former spouse, sponsored by the Estate Planning and Administration Section in the 2003 legislative session, failed to pass. HB 2270, modeled on Uniform Probate Code § 2-804, would have revoked all provisions for a former spouse in any revocable documents, extending revocation to beneficiary designations in pensions and insurance policies. The bill also would have included relatives of the former spouse in the revocation provisions, revoking all dispositions for someone related to the former spouse and not to the decedent. As amended, the law would have treated a bequest to a former stepchild or in-law of the decedent as if the person did not survive the decedent. In addition, the law would have revoked the naming of a former spouse or a relative of the former spouse to a fiduciary or representative position.

The Estate Planning and Administration Section will reintroduce a similar revocation-on-divorce bill in the 2005 session.

Need for Planning

Following a divorce, the former spouses must attend to their estate planning documents. Each former spouse should review all documents that govern the distribution of assets, including beneficiary designations on retirement plans and insurance policies. Each former spouse should make the necessary changes promptly, to avoid a situation in which an untimely death or simple procrastination results in an unintended distribution.

Under current Oregon law, a beneficiary designation naming a former spouse as the beneficiary of a life insurance policy or a pension plan will likely be given effect, regardless of the intent of the decedent spouse. Two strategies described below may enable alternative beneficiaries to obtain the proceeds. However, the far better approach is for the owner of the policy or pension plan to execute a new beneficiary designation following divorce to make his or her dispositive wishes clear.

Even if the legislature adopts a more expansive revocation-on-divorce statute, the statute will not carry out the wishes of every decedent. The statute revokes provisions based on assumptions about what most decedents would want but will not reach the result every decedent will prefer. For example, Sam may want to name his mother-in-law as personal representative of his estate and may want to give half his estate to Mary's daughter. Under the proposed statute, Sam must execute a new will or make clear in his current will his intent that these provisions continue in force in spite of the divorce. Further, because revocation-on-divorce statutes typically apply retroactively, Sam should not rely on current law to preserve a gift to his former stepdaughter.

ERISA Preemption

Although proposed legislation may attempt to revoke beneficiary designations on retirement plans, the U.S. Supreme Court has held that ERISA preempts state revocation statutes to the extent the statutes apply to plans subject to ERISA. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 US 141, 121 S Ct 1322, 149 L Ed 2d 264 (2001). If a divorced participant in an ERISA plan wants someone other than the named former spouse to take the proceeds, the participant must execute a new beneficiary designation. Two strategies may be of help if the participant fails to change the beneficiary, but both strategies require costly litigation and neither will necessarily reach the desired result.

Alternative Strategies

The current Oregon revocation-on-divorce statute does not address all of the problems that arise when a decedent fails to change dispositive documents after a dissolution of marriage. Even if Oregon adopts the proposed legislation, the statute will not cover ERISA plans. Under either circumstance, a lawyer may be able to assist the beneficiaries who would have received the assets of the decedent, had the decedent remembered to remove the former spouse as beneficiary.

Constructive Trust. A court can apply the doctrine of constructive trust as an equitable remedy to prevent unjust enrichment. Assume that Mary had received her share of the marital assets during the divorce and that Sam's alternative beneficiaries were his children from a prior marriage. The beneficiary designation on Sam's pension directed the distribution of his benefits to Mary. Sam's children could ask the court to impose a constructive trust on the proceeds. The pension provider would distribute the proceeds to Mary, as required by the designation and by law, but Mary would take the proceeds as constructive trustee for the benefit of Sam's children. Mary would take legal title, but her only duty as trustee would be to convey the proceeds to Sam's children. Success for the children would depend on the court's willingness to use the constructive trust doctrine to reach an equitable result on the facts of the case.

Federal Common Law of Waiver. The lawyer representing the alternative beneficiaries can also argue that the former spouse effectively waived his or her interests in the pension or other asset in the settlement agreement executed in connection with the divorce. Courts across the country have developed a federal common law of waiver that treats a spouse's waiver of pension benefits in a divorce decree or settlement agreement as waiving rights as a beneficiary as long as the waiver is sufficiently specific. The result in such a case depends upon the facts and circumstances and upon the language in the decree or agreement.

Conclusion

Both current law and the proposed legislation point to the need for careful review of estate planning documents immediately following a divorce. In many situations a divorced spouse will prefer to leave property to persons other than the former spouse and the former spouse's relatives. In other situations, bequests to former stepchildren may be desirable and even a gift to a former spouse may be the decedent's choice. Either way, careful attention to estate planning matters will avoid unintended consequences.

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Caregiving For Elderly Parents

Many of our clients are part of what is often called the "Sandwich Generation." Those clients care for or support minor or adult children and come to us seeking estate planning advice regarding the children. In addition, those clients may also be caring for elderly parents in the parents' home or in their own home. Often our client undertakes the care of a parent without prior planning as a result of a medical crisis or unexpected medical diagnosis. In addition, most care is provided without a written agreement between the child caregiver and the parent and without any expectation of compensation on the part of the caregiver.

Importance of a Written Care Agreement

Having a written care agreement in place is important for three reasons. First, payment for care provided to a parent, if paid pursuant to a written care agreement, is a legitimate spend-down of a person's resources in terms of Medicaid qualification. Second, Medicaid law, pursuant to OAR 461-140-0242(2)(c), allows a person to transfer his or her home without penalty to a child caregiver if the child has been living in the parent's home for at least two years before the parent applies for Medicaid and has been providing care to the parent, forestalling the parent's placement in a care facility. Medicaid caseworkers, however, require that the care be proven and documented at the time of application for Medicaid. Third, if the child caregiver will be compensated for services to the parent by an adjustment in the parent's estate plan, the care provided will be documented through the care agreement. Such evidence may prevent a will contest by other, noncaregiver children who receive less of the estate.

In connection with a written care agreement, the parent should be represented by his or her own counsel, and an assessment of the parent's competency may be warranted. The caregiver child as well as the parent should execute the written care agreement. In addition to memorializing in a written agreement the care services to be provided, the child caregiver should keep track of hours spent providing or coordinating care and of out-of-pocket expenses incurred in relation to such care.

Terms of the Agreement

The care agreement should include the following components: Services to Be Performed by the Caregiver, Meals, Lodging, Obligations of the Parent, and Compensation.

Services to Be Performed by the Caregiver. The agreement should specifically describe the duties the child caregiver will undertake and where such duties will be performed—at the child's home, at the parent's home, or at a care facility. Caregiver duties can include night-time supervision, preparation of meals, housekeeping, monitoring of medications, arranging medical care and transportation to appointments, shopping, laundry services, and personal assistance with bathing, dressing, and grooming. These services may be performed daily or weekly depending on the parent's need.

Lodging. The agreement should set forth whether the parent will remain in his or her home or will reside with the child caregiver. If the parent will reside with the child caregiver, the agreement should describe the parent's accommodations and establish whether the parent will be provided with furnishings or will bring his or her own furnishings. If the parent will reside with the child caregiver, the "Compensation" section of the agreement should specify the cost for such room and board and state whether the payment amount covers the parent's utility costs, cable TV, and telephone service.

Obligations of the Parent. The parent's obligations will depend on the nature and location of the care being provided. This section should at a minimum describe payment obligations of the parent, the items covered by such payment, and what items remain the responsibility of the parent. If the parent is being cared for in the child caregiver's home, the agreement should contain a provision mandating continued payment if the parent is absent from the home for reasons other than receiving medical treatment.

Compensation. The agreement should set compensation at an amount consistent for similar services in the child caregiver's community. To establish the amount, the lawyer or the caregiver can call in-home care providers and adult foster homes in the area to determine an acceptable rate in the community. By documenting this information, the child caregiver will be able to justify the payment amount if called on to do so by a Medicaid caseworker, court, or noncaregiver sibling.

Retroactive Coverage. A client may have been providing care to a parent for months before seeking advice on the subject. The lawyer can draft the care agreement to cover retroactively the time period actual care is provided. The child caregiver should, however, document the care already given. The child caregiver may have to look at calendars, appointment schedules, and receipts to re-create an invoice for the services provided.

Tax Issues. The child caregiver should also be mindful that receipt of payment for care services is taxable income and must be reported on his or her income tax return. The child caregiver should seek the advice of his or her accountant regarding income and payroll tax issues.

Conclusion

While most clients enter into an arrangement to care for an elderly parent with no expectation of compensation, having a written care agreement in place with services and compensation specifically addressed may be beneficial to all parties.

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Same-Sex Marriage Alert

Validity of Same-Sex Marriages

Validity of Same-Sex Marriage. Same-sex marriages have been performed in Canada since 2003, and those marriages are valid in that jurisdiction. In the United States, the Supreme Judicial Court of Massachusetts has ordered that the state issue marriage licenses to same-sex couples commencing on May 16, 2004. No same-sex marriage licenses have yet been issued in Massachusetts, but after May 16, 2004 legal marriages in Massachusetts will begin. Oregon residents have been married in Canada and may travel to Massachusetts to be married.

Same-sex marriages performed in San Francisco in February and March 2004, and in Multnomah County in March 2004, are valid now, but lawsuits challenging the validity of the licenses, and thus the validity of the marriages performed based on the licenses, have been filed. As those lawsuits wind through the courts, a California or Oregon court might issue an injunction declaring the spousal status "on hold" during the time the court considers the dispute. In California, the supreme court issued an injunction against further issuance of licenses. However, the marriages performed based on San Francisco-issued licenses have not been invalidated. Eventually, the supreme court of each state will have the final word.

The supreme courts of Hawaii, Vermont and Massachusetts have all concluded that failure to grant same-sex couples the rights of spouses is discrimination. Other states are struggling with this issue as well. Oregon same-sex couples who choose to marry will preserve the possibility of marital benefits, and will protect their possible marital rights, during the period of challenge.

The California and Oregon supreme courts are likely to rule as the other courts have, protecting same-sex couples from discrimination and granting them the rights, privileges and immunities of other married couples. Oregon lawyers will contend with not only the validity of the same-sex marriage licenses issued in this state, but with the larger question of the validity of marriage licenses validly issued elsewhere (Canada, Massachusetts and San Francisco at this time). The Oregon Supreme Court has stated the general rule: '"a marriage valid where solemnized is valid everywhere.'" *Kelly v. Kelley*, 210 Or 226, 230-31, 310 P2d 328 (1957) (quoting *Huard v. McTeigh*, 113 Or 279, 287, 232 P 658 (1925)).

Federal Reaction. The Defense of Marriage Act (the "DOMA"), 1 USCA § 7 (1997), provides that "[i]n determining the meaning of any Act of Congress, * * * the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." Because of the DOMA no marital privilege or immunity or statutory preference will be applied to the same-sex married couples without challenge. A same-sex married spouse with a valid state marriage license might challenge the federal statute on constitutional grounds in the near future, and the case will wend its way to the unpredictable U.S. Supreme Court. While that DOMA challenge case is pending, the opponents of gay marriage might try to obtain approval of an amendment to state constitutions, and to the U.S. Constitution, to prohibit the states from granting a marriage license, and the status of spouses, to same-sex couples. State and federal officials might try to create a civil union compromise, as now exists in Vermont, to remove the contentious marriage issue, with its religious connotations, from their plates. The end result is not predictable at this time. Optimists predict an improvement in the legal status of same-sex couples, and pessimists fear some overwhelming backlash of oppression.

Decisions and the Lawyer's Role

A decision to marry is based on more than legal concerns, but marriage is a "civil contract," ORS 106.010, and carries with it many legal benefits and burdens. Any pending legal matter—personal injury, workers' compensation, pension, domestic relations or probate—might be affected by the marriage of a party. An estate planning lawyer can provide advice on the effect of same-sex marriage on estate planning documents.

Many state laws giving a spouse an automatic preference or benefit do not depend on federal law and will not be delayed by a DOMA statutory challenge. The state laws will have immediate application to validly married same-sex spouses. The state agencies and courts have not had to think this through before now, so these issues will be worked out step by step by brave spouses stepping forward to claim rights or preferences.

For lawyers, a quick review of the benefits and burdens of marriage and the impact of marriage on estate planning documents can help clients plan for the legal consequences of marriage.

Benefits of Marriage

Personal Injury. Under personal injury law, a spouse may have rights in a wrongful-death suit and rights for loss of consortium.

Probate Law. Inheritance law provides rights for a surviving spouse, and as an heir a surviving spouse has protection if a court declares a will invalid. A spouse may also be able to claim a support allowance and the right to remain in the family home—rights that have priority over rights of creditors. Further, if one spouse disinherits the other, the surviving spouse can claim an elective share of the estate.

Workers' Compensation. A spouse has rights under workers' compensation, including rights to monthly benefits as a survivor of a deceased worker.

Children. Children born in wedlock are presumed to be the children of both spouses, but "legitimacy" is not equated with the terms "issue" and "lineal descendants" commonly used in estate planning and beneficiary designation documents. Advocates will argue that the non-biologically related same-sex spouse will have legal standing as a parent in eventual dissolution of the marriage, and that the children born during the marriage will be heirs of both parents for inheritance purposes.

Testimony Privilege. An evidentiary privilege bars spouses from testifying about communications between the spouses during a marriage, without the consent of the other spouse, regardless of whether the testimony is sought during or after the marriage. Entertainer Rosie O'Donnell, who just married in San Francisco, cited this important privilege, which was woefully absent during her recent magazine litigation, causing e-mail and other communications between Rosie and her then domestic partner to be admitted into evidence over her objection.

Tenancy by the Entireties. Spouses are permitted to use this form of real property ownership, which is accorded special protections from creditors of either spouse in some states.

Burdens

Support Obligations. Family law imposes support obligations on spouses.

Public Benefit Entitlement Programs. A spouse’s income may affect entitlement for a spouse or children under public benefit entitlement programs such as Supplemental Security Income and housing programs. These federal law burdens may not be imposed because of the DOMA, but these issues have not yet been resolved.

Medicaid. The availability of resources for public benefit entitlement for spouses in the Medicaid program may be affected. This deeming of resources may not be applied because of DOMA, but if it is, then same-sex married couples will also be provided protections against spousal impoverishment.

Existing Domestic Partner Registrations, Affidavits or Agreements

If a client has already registered as a domestic partner with Multnomah County or has signed an Affidavit of Domestic Partner Status with an employer, the client should not terminate the registration or affidavit. At this point of development of the law of same-sex marriage, the employer’s health and other benefits may be based solely on the registration or affidavit. Federal ERISA law governs many private employer job benefit programs, and DOMA currently prevents the employer from treating the same-sex spouse as a “spouse” for ERISA-governed job benefit plans. See Priv Ltr Rul 200339001 (June 13, 2003) for an example of IRS treatment of domestic partners and DOMA application. Although public employers (such as San Jose and Seattle, as their mayors have announced) can recognize the married status of same-sex spouses, some public employers will refuse to take that step and indeed in some states will be prevented by law from recognizing same-sex marriage.

Advocates will argue that the commonly used domestic-partner registration and affidavit systems remain in effect for same-sex-spouse employee benefit purposes, until the spousal status is recognized. Although DOMA now prohibits ERISA-governed private employers from recognizing same-sex marriages, DOMA does not prevent those employers from granting domestic-partner benefits. Thousands of employers do grant employee benefits to same-sex partners, using a domestic-partner affidavit or registration procedure. DOMA will be challenged soon, but advocates will seek confirmation from regulators and employers that domestic-partner benefits continue during any period that the marriage status of the partners is unrecognized.

Some same-sex couples have signed a domestic-partner agreement, defining the nature and obligations of their relationship by agreement. An existing domestic-partner written agreement should be reviewed if the partners marry. The lawyer may recommend amending the agreement, so that it serves as a marital agreement as well as a domestic-partner agreement.

Advice to Estate Planning Clients

Clients who have married in Canada, San Francisco or Oregon, or who intend to marry in Massachusetts after May 16, 2004, should execute codicils to confirm, ratify and revive their existing wills. Under Oregon law, marriage revokes a will executed before the marriage, unless the will indicates the testator's intent that the will not be revoked by a subsequent marriage. ORS 112.305. A will revoked by marriage may be revived by a codicil incorporating the prior will by reference. ORS 112.295. The children of a second-parent adoption should qualify as both issue and lineal descendants, but the status of children born during the marriage is not clear to this commentator. I am consulting with family law experts for pregnant same-sex spouse clients now.

Estate planners for clients choosing same-sex marriage should recommend dual planning, as domestic partners and as spouses. That is, the estate planning documents should recite the dual status and the intention of the parties to take advantage of both spousal and domestic partner status. The federal estate tax benefits of marriage (unlimited inter vivos gifts to spouses, unlimited marital deduction for testamentary transfers) will not be available until a DOMA challenge is successful or other law changes occur. Whether the marriage status will permit the same-sex spouses to claim a marital deduction for Oregon death transfer-tax purposes is not clear to this commentator, although vigorous advocacy on that issue will undoubtedly ensue.

Same-sex marriage clients should be encouraged to review their estate planning documents often.

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Order of Priority of Claims Against Estate and Possible Federal Preemption

Order of Priority of Claims Under Oregon Statute

When the estate assets are not sufficient to pay in full all estate expenses and claims against the estate, the personal representative must pay them in accordance with statutory priorities. ORS 115.125. The statute lists 10 classes of expenses and claims in the order in which the personal representative must make payment. ORS 115.125(1). The expenses or claims of a class of higher priority must be paid before the personal representative can pay those of a lower class. If all applicable assets of the estate are insufficient to pay in full all expenses or claims of any one class, ORS 115.125(2) dictates that the personal representative is to pay each expense or claim of that class on a pro rata basis.

Under the statute, the claim of highest priority is for support of the decedent's spouse and children. ORS 115.125(1)(a). For some estates, however, ORS 114.065 restricts the payout for this claim. If paying spousal and child support under ORS 114.015 would make the estate insolvent, the provision of support ordered by the court is limited so that it will not exceed one-half of the estimated value of the estate property. This is the only class listed in ORS 115.125(1) that is subject to additional statutory limitations.

After satisfying the payment of support for spouse and children, the personal representative shall then make payments for expenses incurred after the decedent's death. First, the personal representative must pay expenses of estate administration. ORS 115.125(1)(b). Next, the personal representative shall pay expenses of a plain and decent funeral and disposition of the decedent's remains. ORS 115.125(1)(c).

The final seven classes are for expenses and debts incurred by the decedent during his or her lifetime, rather than by the estate. The fourth class of payment is "[d]ebts and taxes with preference under federal law." ORS 115.125(1)(d). The superpriority of federal government claims has been the subject of litigation, discussed below. The fifth through tenth classes are listed in ORS 115.125(1)(e) through 115.125(1)(j), respectively, and include medical expenses of the decedent's last illness, state taxes, and child support arrearages.

Federal Statute

Priority of Federal Claims. A federal statute creates a superpriority in favor of claims of the United States, providing that "[a] claim of the United States Government shall be paid first when * * * (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor." 31 USCA § 3713(a)(1)(B) (2003). This federal priority statute generally preempts state priority law when the two conflict. *See Estate of Hitch v. United States Dep't of the Treasury, IRS*, Civ A No 11712, 1992 WL 94372 (Del Ch Apr 30, 1992) (unpublished).

The Utah Supreme Court held that the federal priority governs debts of the decedent, and not debts incurred by the estate. *Martin v. Dennett*, 626 P2d 473 (Utah 1981). This distinction between debts of the deceased and those incurred by the estate allowed the Utah statute's ranking of priorities to stand despite the federal superpriority statute. The Utah statute governing priority of estate debts closely resembled that of Oregon, with funeral and administration expenses ranked ahead of federal debts and taxes. Other courts have held that funeral, burial, and estate administrative expenses have priority over federal tax claims. In re Henke's Estate, 39 Misc 2d 705, 241 NYS2d 788 (NY Sur 1963); *In re Stiles' Estate*, 126 Misc 715, 215 NYS 134 (NY Sur 1926); *In re Holmes' Estate*, 16 NJ Misc 402, 1 A2d 42 (NJ Orphans' 1938). This is most likely due to the obligatory nature of such things—burying the decedent and administering his or her estate. Attorneys might be skittish about taking on a probate if their fees, along with other administrative expenses, could be trumped by the need to pay taxes.

Liability of Personal Representative. The federal priority statute also creates personal liability for the personal representative. "A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government." 31 USCA § 3713(b) (2003). A personal representative with actual knowledge, or on inquiry notice, of the debt due the government is personally liable for the tax debt, to the extent that the estate had sufficient funds to satisfy the debt before the distributions to nonpriority creditors. *U.S. v. Volta*, 86-2 USTC (CCH) 9802 (D Or 1986).

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Oregon DOR Allows Oregon QTIP Election

No newsletter would be complete without an Oregon Inheritance Tax Update. Observant bar members have noticed that the most recent instructions for Form IT-1 (the Oregon Inheritance Tax return) now allow a state QTIP election and alternate valuation. The instructions provide:

"A separate election under IRC 2032 or 2056 (such as alternate valuation or the marital deduction) may be claimed for Oregon purposes. If a separate Oregon election is made, you must attach a schedule to explain the figures you used and mark the appropriate box on Form IT-1."

A representative from the Oregon Department of Revenue (the "DOR") states that the DOR will allow a separate Oregon election, even if a federal election is not made. The DOR will generally follow federal methods and guidelines with respect to the elections.

No administrative rule has been written yet. Representatives from the DOR recently met with several interested parties (an assistant attorney general, the DOR legislative liaison, several estate attorneys, and others) about ideas for a proposed rule. The group also discussed the possibility of the need for further legislation. The DOR intends to draft a temporary rule at this time. The rule must be approved by the agency rules committee, which next meets in April.

The ability to make an Oregon QTIP election is welcome but adds drafting complexities. Practitioners should rethink their forms, perhaps adding a formula Oregon QTIP trust (e.g., "the minimum amount necessary to reduce my state inheritance taxes to zero"). The trust should comply with the federal requirements, such as the requirement to pay all income annually. Whether a lead pecuniary marital bequest or lead credit shelter trust is used, the funding formula should take into account the existence of the Oregon QTIP trust (which is a federal credit shelter trust). For example, some marital bequest or credit shelter funding formulas direct that the marital deduction be deemed to have been made for a QTIP trust whether or not a federal QTIP election is made. If this provision is not overridden, the credit shelter trust would be overfunded because it would not take into account the Oregon QTIP trust.

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Practice Alert

New Requirements for Orders in Probate

Oregon Laws 2003, chapter 576 defines and requires the use of a "judgment," "limited judgment," or "supplemental judgment" title on certain court pleadings, effective January 1, 2004. The new law provides as follows:

> "(9) 'Judgment' means the concluding decision of a court on one or more claims in one or more actions, as reflected in a judgment document.
>
> "(13) 'Limited judgment' means a judgment rendered before entry of a general judgment in an action that disposes of at least one but fewer than all claims in the action and that is rendered pursuant to a statute or other source of law that specifically authorizes disposition of fewer than all claims in the action.
>
> "(15) 'Supplemental judgment' means a judgment that by law may be rendered after a general judgment has been entered in the action and that affects a substantial right of a party." Oregon Laws 2003, chapter 576 §§ 1(9), (13), (15).

The new statute has changed the terminology used for orders in probate. Guardianships, conservatorships, and most trust proceedings, are not affected by the new rules. The changes are meant to clarify when a court ruling is a decision that may be appealed. Any judgment has to be the concluding decision on a claim.

The new state law expressly modified various sections of ORS chapter 116, including ORS 116.113 and 116.213, to reflect the change from "decree" to "judgment." Specifically, this changed the term "decree of final distribution" to "judgment of final distribution" and "order of discharge" to "supplemental judgment of discharge."

There may be some variation in how this is implemented among the counties. The change to judgment of final distribution and supplemental judgment of discharge appears to be universally required, but courts appear to differ about whether they accept or require judgment terminology on other pleadings, such as an order of partial distribution. The order appointing the personal representative should not be affected. The best practice may be to call the court in which you are filing or to limit the changes to those statutes specifically amended.

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Claims Against Estate for Services Rendered to Decedent

This article summarizes the issues raised when a person makes a claim against a probate estate for services he or she rendered to the decedent.

Claims by Near Relations

Often, services were performed by a family member who provided care, ran errands, or managed finances for the decedent before he or she died. There is a presumption that services rendered by a close relative are gratuitous. *Kohler v. Armstrong*, 92 Or App 326, 758 P2d 407 (1988). The presumption may be overcome only by showing that payment was intended and expected, although an express contract or agreement need not be shown. *Wilkes v. Cornelius*, 21 Or 341, 23 P 473 (1890). After referring to cases involving a parent and child, the Oregon Supreme Court stated "We think that the doctrine of that case should not be extended to more remote relationships and that as between brother and sister no presumption unfavorable to the claim will be entertained unless it appears that at the time that the services were rendered the claimant was living as a member of the family of the other party." *In re Herdman's Estate*, 167 Or 527, 531, 119 P2d 277 (1941). An earlier Oregon Supreme Court case also found no presumption in a case involving a niece and aunt wherein the agreement to provide services was reached before the aunt moved in with the niece for whom she provided services. The court quoted Page 3 on Contracts § 1454 as follows: "'If persons who are related are not members of the same family when they enter into an arrangement under which one of them is to render services to the other and if as a result of such arrangement they live together as members of the same family and render services one to the other, there is no presumption that such services are intended to be gratuitous.'" *Estate of McLain*, 126 Or 456, 462, 270 P 534 (1928). Presumably, family members who do not live together and are not as closely related as the relatives in the situations described above would not be covered by the presumption.

Evidence Required

One issue that arises is the type of evidence required to support the claim. If a claim is disallowed by the personal representative, sufficient evidence must be presented to establish a prima facie case independent of the service provider's testimony. ORS 115.195; *Kohler*, 92 Or App 326; *Johnson v. Ranes*, 67 Or App 667, 680 P2d 688 (1984). A prima facie case for payment of the reasonable value of services rendered requires proof that:

- The claimant provided the decedent with valuable services;
- The decedent requested or acquiesced in receipt of services, knowing that they were not gratuitous;
- There was no express contract to pay for the services; and
- Establishes the reasonable value of the services.

The first three items must be established by sufficient evidence other than the claimant's testimony. *Johnson*, 67 Or App at 672.

Conclusion

Often, the relationship is not sufficient to automatically create a presumption of gratuitous services. The main issue, therefore, is whether the agreement to provide services was reached before the claimant moved in with or started assisting the decedent.

Other

The *McLain* case also refers to a presumption that wages for domestic services are paid at stated intervals, and when a claim for such services is made against a decedent's estate, the burden is on the claimant to rebut the presumption that payment was made. *Estate of McLain*, 126 Or at 460.

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PLF Practice Aids

The Professional Liability Fund has developed a number of forms and practice aids. The January issue of this Newsletter provided links to the practice aids, but an easier way to find the forms is to go to *www.osbplf.org*, click on "loss prevention material" on the home page, then click on "practice aids," then click on "Probate and Estate Planning." At that point the reader can select from a number of practice aids, including a sample letter listed under December 2003, Letter notifying client of Oregon inheritance tax law changes.

CALENDAR OF SEMINARS AND EVENTS

- April 22, 2004 (Sponsored by Washington State Bar) **Annual Ethics in Litigation** (***Estate Planning***), Seattle, WA. Telephone: (206) 727-8200.
- April 26-30, 2004 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, New York, NY (Plaza Hotel). Telephone: (800) CLE-NEWS.
- April 29-May 1, 2004 (Sponsored by ALI-ABA) **Partnerships, LLCs, and LLPs: Uniform Acts, Taxation, Drafting, Securities, and Bankruptcy**, New Orleans, LA. Telephone: (800) CLE-NEWS.
- June 21-25, 2004 (Sponsored by ALI-ABA) **Estate Planning in Depth, With Emphasis on Drafting and Administration of Trusts**, University of Wisconsin Law School, Madison. Telephone: (800) CLE-NEWS.
- June 28-July 2, 2004 and continuing July 26-29, 2004 (Sponsored by ALI-ABA & cosponsored by the ABA Section of Real Property, Probate and Trust Law) **Skills Training for Estate Planners** (**STEP**), Atlanta, GA. Telephone (800) CLE-NEWS.
- July 1-2, 2004 (Sponsored by ALI-ABA) **Representing Estate and Trust Beneficiaries and Fiduciaries**, Boston, MA. Telephone: (800) CLE-NEWS.
- July 21-23, 2004 (Sponsored by ALI-ABA, Cosponsored by ABA Section of Real Property, Probate and Trust Law & ABA Section of Taxation) **Estate Planning for the Family Business Owner**, Santa Fe, NM. Telephone: (800) CLE-NEWS.
- July 26-29, 2004 (Sponsored by ALI-ABA) **Skills Training for Estate Planners (STEP)-Session Two**, Atlanta, GA. Telephone: (800) CLE-NEWS.
- July 28-31, 2004 (Sponsored by ALI-ABA) **Modern Real Estate Transactions**, San Francisco, CA (Renaissance Stanford Court): Telephone: (800) CLE-NEWS.
- July 29, 2004 (Sponsored by the Estate Planning and Administration Section of the Oregon State Bar) **Estate Planning for Non-Traditional Couples**, Oregon Convention Center, Portland, OR. Telephone (800)452-8260.
- August 18-20, 2004 (Sponsored by ALI-ABA) **Basic Estate and Gift Taxation and Planning**, Chicago, IL. Telephone: (800) CLE-NEWS.
- August 26-27, 2004 (Sponsored by ALI-ABA) **International Trust and Estate Planning**, Toronto, Ontario, Canada. Telephone: (800) CLE-NEWS.
- September 17, 2004 (Sponsored by Oregon Law Institute) **Basics of Probate; Probate Problems and Solutions**, Oregon Convention Center, Portland, OR. Telephone: (800) 222-8213.
- September 20-21, 2004 (Sponsored by PLI) **35th Annual Estate Planning Institute**, PLI New York Center, New York, NY. Telephone: (800) 260-4PLI.

Questions, Comments or Suggestions About This Newsletter?

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