Newsletter

**Oregon Estate Planning and Administration Section Newsletter**
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# Want Higher Ed? Better Plan Ahead!

Over the last decade, college costs have increased dramatically, outpacing increases in both the cost of living and wages. The average annual cost of a community college education is approximately $12,000, a four-year public in-state education costs around $16,000, and a private university education runs about $32,000. *See* www.collegeboard.com/trends. When added to the price of graduate or professional school, these costs now rival the cost of buying a home. However, the benefits of higher education are great, including better odds of achieving economic success, job satisfaction, and job flexibility, and the opportunity to discover new ideas and meet new people. Fortunately, parents (and grandparents) have numerous tax and other strategies available to them to help finance these rising college costs.

### Savings Strategies Before College

Section 529 of the tax code describes two different programs designed to make college more affordable. The first program is the "prepaid tuition plan," which allows taxpayers to pay for future college tuition at today's rates. The second program is the "529 college savings plan," which allows taxpayers to put money into individual state-run investment accounts designated for the payment of higher education expenses. Under section 529, contributions to these plans must be in cash and are limited to what would reasonably meet the educational needs of the beneficiary. IRC § 529(b)(2), (6). Contributions are not deductible, but the earnings are tax-exempt if they are used to pay "qualified higher education expenses," which include tuition, related expenses, and room and board. IRC § 529(e)(3). Any taxpayer, no matter how wealthy, can contribute to these plans. Up to $60,000 (five times the gift tax exclusion amount) or $120,000 (if a split gift is elected) can be placed in these plans the first year, with no gift or generation-skipping tax, and the $12,000-per-donee exclusion is prorated over a five-year period. IRC § 529(c)(2). If the donor dies, no estate tax is due, even though the fund can be refunded or the beneficiary changed, unless the donor/owner dies before five years have elapsed. In that situation, only the portion of the nonelapsed contribution for the remaining years will be included in the donor/owner's estate. IRC § 529(c)(4)(C).

State law can also offer significant tax advantages for section 529 plans. Oregon, for example, provides an annual $2,000 income tax deduction for contributions to these plans. ORS 316.680. Withdrawals for qualified expenses are tax exempt under state law, and rollovers to another state are not subject to recapture. ORS 348.870(1).

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There are two types of prepaid plans: state-run plans and the relatively new plan run by private educational institutions. Only 12 states now have prepaid plans. *See* www.savingforcollege.com. A few of these plans, such as Washington's Guaranteed Education Tuition Program, www.get.wa.gov, charge a premium (20 percent more than the current tuition at the priciest public university). Because of shrinking state budgets—and, in the case of Oregon, a referendum passed by citizens unwilling to subsidize the growing deficit in these accounts—many state prepaid plans have been eliminated or have closed their programs to future participants.

The institutional plan, called Independent 529, www.independent529plan.com, began in 2002 and now has over 250 private college participants. Such prestigious educational institutions as Princeton, Stanford, the University of Chicago, Reed College, Pomona College, and MIT are members in this plan. Under this plan, the schools offer varying up-front discounts on tuition. Unlike state-run prepaid plans, individual private institutions assume the investment risk of the plan as well as all administrative fees, making the plan likely to be sustainable for the long term.

The major benefit of prepaid plans is that the tuition is guaranteed, even when investment returns are low and tuition costs remain high. In addition, the recent Deficit Reduction Omnibus Reconciliation Act of 2005 grants prepaid plans the same beneficial financial aid consequences as the section 529 savings plan. Pub. L. No. 109-171, § 8019(d)(5). The value of the account will not be considered an asset of the student under the federal formula. When held by the parent, only 5 percent to 6 percent of the value of the account is considered the parent's asset for financial aid purposes, and when set up and owned by a grandparent, none of the assets are considered.

The drawbacks of the institutional plan are that there is no guarantee of admission; the plan only covers tuition and mandatory fees, not room and board; and it only covers undergraduate education. Furthermore, the plan may not cover the school the student ends up attending (such as nonmember institutions Harvard, Yale, Columbia, and Georgetown). In addition, if the participant desires a refund or to transfer the account to a Section 529 savings plan, the refund is adjusted for fund performance, subject to a maximum return of 2 percent per year.

The 529 college savings plan offers greater flexibility than the prepaid plans. Every state except Washington and Wyoming (which recently terminated their plans) has at least one of these plans. These savings plans can be used at any school—state or private. They can also be used for room and board and for graduate and professional education expenses.

Oregon offers three college savings plan options: the Oregon College Savings Plan (www.oregoncollegesavings.com), the MFS 529 Savings Plan (www.mfs.com), and the Oppenheimer Funds Plan (www.oregon529network.com). These plans are quite similar in terms of minimum investment, maximum contribution, and annual fee waiver for Oregon residents. The big difference is that the MFS and the Oppenheimer plans are broker-sold. When choosing a plan, the advantages of the state tax deduction must be weighed against the fees and performance of an out-of-state plan. *See* www.savingsforcollege.com for ratings of the various plans.

Section 530 offers another saving technique to parents and grandparents: the Coverdell Education Savings Account (Coverdell ESA). As with the 529 plans, contributions to an ESA must be in cash, are not deductible, and are tax-free when used for qualified educational purposes. IRC § 530(b)(1). On the other hand, contributions are limited to $2,000 per year per beneficiary, must end when the beneficiary attains the age of 18, and must be distributed by the time the beneficiary is 30 (unless a change of beneficiary occurs). IRC § 530(b)(1)(A)(ii), (d)(6). The funds can be used for qualified higher education expenses, but unlike 529 plans, can also be used for K-12 educational expenses, such as tutors, computers, tuition, and room and board at private or parochial schools. IRC § 530(b)(4). Unlike 529 plans, but like other IRAs, the donor controls the investment. The Coverdell ESA is limited to taxpayers with modified adjusted gross income (AGI) of less than $220,000 if married filing jointly, and less than $110,000 if single or a head of household. IRS Pub. 970 at 39 (2005). However,

the AGI limitation rule can be circumvented by setting up an account in the low-income beneficiary's name. Under recent legislation, the value of the account is not considered the student's asset for financial aid purposes, even though the student is considered the owner of this account. Deficit Reduction Omnibus Reconciliation Act of 2005, Pub. L. No. 109-171, § 8019(d)(5).

Roth IRAs also offer an effective education savings vehicle when retirement goals are not compromised. IRC § 408A. The allowable contribution to these plans is now $4,000 ($4,500 if the taxpayer is over age 55), although it is not deductible. IRS Pub. 590 at 52 (2005). The 10 percent penalty on early withdrawals does not apply if funds are withdrawn from Roth IRAs for qualified educational purposes (room, board, and tuition) for either children or grandchildren. IRC § 72(t)(7). The earnings on those withdrawals could result in income tax, but distributions are first considered a return of capital, so no tax results on earnings until the principal is exhausted. For grandparents (or others) over 59½ years old, withdrawals are allowed regardless of purpose, and the earnings are excluded. IRC § 408A(d)(2). Contributions to a Roth IRA are limited to taxpayers with modified AGI of less than $160,000 if married filing jointly, less than $110,000 if a head of household or single, and less than $10,000 if married filing separately. IRS Pub. 590 at 53 (2005). Unlike Coverdell ESAs, Roth IRAs cannot be established for those with no earned income. Assets in these plans are not considered in the federal financial aid formula used by most state schools, but may be considered an asset of the parents in the institutional formula used by private schools.

## Pay-As-You-Go Strategies

If the taxpayer has not saved enough for college costs, the tax code provides numerous other benefits. Middle-income taxpayers (married taxpayers with AGI of less than $107,000 and single or head-of-household taxpayers with AGI of less than $53,000) are eligible for the Hope Scholarship or Lifetime Learning credits. IRC § 25A. The Hope Scholarship credit is 100 percent of the first $1,000 of qualified educational expenditures and 50 percent of the next $1,000 of expenditures for a total credit of $1,500. The Hope Scholarship credit is only available for the first two years of college education. The Lifetime Learning credit, as its name implies, can be used anytime for up to 20 percent of $10,000 of expenditures, for a maximum credit of $2,000. IRC § 25A(c)(1). The Hope Scholarship credit is a per-student benefit, whereas the Lifetime Learning credit has a per-return limitation. IRC § 25A(b)(1), (c)(1).

For those in slightly higher income tax brackets (married taxpayers with AGI of less than $160,000 and single or head-of-household taxpayers with AGI of $80,000 or less), section 222 of the tax code offers an alternative to the credits: an above-the-line educational deduction in the amount of $2,000, or in the case of taxpayers with AGI of less than $130,000 if married or $65,000 if single or a head of household, a deduction of $4,000. IRS Pub. 970 at 33 (2005). Taxpayers must choose the appropriate credit or the section 222 deduction. No double benefits are allowed. However, sections 25A and 222 can be coordinated with the other savings techniques that cover room and board, such as 529s, 530s and Roths.

Because the education credits are nonrefundable—and of no benefit to those with no tax liability—grants, scholarships, and loans are also available to help defray college costs. Grants, including Pell Grants, Federal Student Opportunity Grants, and Oregon Opportunity Grants, as well as scholarships, are all excludable from the recipient's income. IRC § 117. Grants and scholarships, however, reduce the qualified expenses used to calculate other tax benefits.

Loans, which now finance a growing percentage (about 60 percent) of college costs, are available to everyone. A Federal Perkins Loan is based solely on need, has a fixed interest rate of 5 percent and does not require repayment to begin until nine months after graduation. A Stafford/Direct Loan can be either subsidized or unsubsidized. The subsidized loan is need-based, has a variable interest rate, and requires repayment to begin six months after graduation. The unsubsidized loan, including PLUS Loans for parents, has a variable interest rate, and interest accrues while the student is in school. There is no deferment. These unsubsidized loans are available regardless of need. Home equity loans may also be available to homeowners, and the home equity interest deduction is allowed on a loan of up to $100,000 when the taxpayer itemizes. IRC § 163(h)(3)(C). The proceeds from this loan can be used for any college expenses, including transportation, health costs, clothing, and entertainment.

## Other Techniques

The tax code provides two tax benefits after college graduation. Section 221 allows an above-the-line student loan interest deduction of up to $2,500 as long as the taxpayer has a modified AGI of less than $65,000 ($135,000 if filing a joint return). Section 108(f) provides for an exclusion when debt is discharged for taxpayers working in certain fields. Other tax benefits include the saving bonds exclusion, IRC § 135, employer-provided educational

fringe benefits, IRC §§ 127, 132(d), and trade or business deductions for education. Treas Reg § 1.162-5. Shifting techniques, such as UTMA accounts and trusts, as well as traditional investments, such as real estate, mutual funds, and cash surrender value of life insurance, can also be used to help finance college expenses. All these strategies are covered in greater detail in my soon-to-be published ABA book entitled Fundamentals of College Planning: Section 529s, Trusts and Other Techniques.

## Conclusion

As the costs and demands for higher education have increased, so have the techniques available to parents and grandparents for financing these costs. Unfortunately, the strategies have different qualifying rules and different effects on financial aid. Choosing the best strategy and coordinating all the rules is complex and makes the attorney's role essential in facilitating the planning process.

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# Less Than the Kitchen Sink: Planning with an Eye to a Possible Dissolution of a Beneficiary's Marriage

There is an old saying about the person who not only wants the cake, but wants to eat it, too. In estate planning, we not only want, but expect to have, dominion over the cake, the cake pans, the stove, the kitchen sink, all the major appliances, and the kitchen itself. And why not? The person who is creating the estate plan owns these things and should have the right to make gifts of his or her property, inter vivos or post mortem, as he or she pleases.

Domestic relations does not operate in such an easy context. For many people the dissolution of a marriage is a personal and financial disaster. The rule is that the division of the parties' assets must be just and proper under all circumstances with the presumption that both parties have contributed equally to the acquisition of the property now subject to division between them. ORS 107.105(1)(f).

The problem is that the property acquired during the marriage can include gifts from friends and family members for which neither party has contributed anything. The gifts are free-will offerings—pennies from heaven. When someone makes such a gift to one partner in a marriage, the last thing the giver would expect is for that gift to end up being commandeered in a dissolution proceeding and involuntarily shared with the recipient's estranged spouse. Even so, in a dissolution proceeding, property that is acquired by gift or inheritance is a "marital asset." *Pierson and Pierson*, 653 P.2d 1258 (Or. 1982). The court can determine that, despite the donor's express intentions, the nonbeneficiary spouse should share in the inheritance because the parties had relied on the expectation of the inheritance or on the inherited assets in planning for their retirement (or perhaps more accurately in the lack of any financial planning for their retirement). *Taylor and Taylor*, 856 P.2d 325 (Or. App. 1993).

The opinion in *Tsukamaki and Tsukamaki*, 112 P.3d 416 (Or. App. 2005), provides a good explanation of the current state of the law. The opinion first cites the relevant statute:

ORS 107.105(1) provides, in part:

> "Whenever the court renders a judgment of marital annulment, dissolution or separation, the court may provide in the judgment: . . . .
>
> "(f) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all circumstances. * * * The court shall consider the contribution of a spouse as a homemaker as a contribution to the acquisition of marital assets. There is a rebuttable presumption that both spouses have contributed equally to the acquisition of property during the marriage, whether such property is jointly or separately held."

> *Id*. at 419 (second ellipsis in original). The court then explains,
>
> To rebut the presumption, a party must prove by a preponderance of the evidence that the disputed marital asset's acquisition did not result from an equal contribution from the other spouse. [*Kunze and Kunze*, 337 Or. 122], 134, 92 P.3d 100 [2004]. If one spouse can establish that the marital asset was acquired by gift and that the other spouse neither contributed to its acquisition nor was the object of the donative intent, then the statutory presumption is rebutted. *Jenks and Jenks*, 294 Or 236, 241, 656 P2d 286 (1982).

*Id*. The court also explained that "[w]hen a party has proved that a marital asset was acquired free of any contributions from the other spouse, * * * absent other considerations, it is 'just and proper' to award that marital asset separately to the party who has overcome the statutory presumption." *Id*. (*quoting Kunze*, 92 P.3d at 108); *see also* Casenotes, Oregon State Bar Family Law Newsletter, Aug. 2005, at 11.

An example of how estate planning and domestic relations can interact, or perhaps collide, is the *Tsukamaki* case cited above. In *Tsukamaki*, Husband and Wife argued over the correct distribution of funds that Wife had received from her parents as gifts over a period of years and had subsequently transferred into two brokerage accounts jointly held by Wife and Husband.

Between 1984 and 1995, Wife's parents, as part of their estate planning, gave Wife shares of stock in a business in which the parents owned a substantial interest. Wife held the shares until 1995, when another shareholder bought the interests of Wife, her parents, and her brothers. Wife deposited the proceeds of the sale of her interests in a brokerage account in joint tenancy with Husband. From 1996 to 2001, Wife's parents made annual exclusion gifts of cash to Wife, who deposited these gifts into the brokerage account. Wife introduced into evidence letters that accompanied seven of the gifts from her parents, from 1992 through 2001. The first three letters were from her parents' lawyer, and the remaining four were from her parents. The substance of all of the letters was similar. Each letter from the parents read as follows:

> "Dear [name of Wife]:
> "Enclosed with this letter please find my gift to you of $9,500 cash. The gift is effective as of the date of this letter. This gift is consistent with my gifts of recent years."

*Tsukamaki*, 112 P.3d at 420. At the time of the dissolution of the marriage, the single brokerage account had become two accounts, through various transactions. The two accounts, both held in joint tenancy, were funded primarily with the gifts from Wife's parents. The court noted,

> At trial, Wife's father testified that Wife's parents and Wife had a "mutual understanding" that Wife would keep the money "available" in case her parents needed it for expenses, such as health care. Wife's father further testified that, although there was no written document expressing the parties' purported agreement, "[i]t was verbally understood, more or less."

*Id*. at 418 (brackets in original).

The trial court found that the "accounts were marital assets and that wife had not rebutted the statutory presumption under ORS 107.105(1)(f) of equal contribution toward the acquisition of the assets." *Id*. In making this determination, the trial court stated,

> I don't believe that the presumption of marital contribution has been rebutted in this case. * * * [B]asically, what we have in this case, and I think if you look at the cases which have kept this out, you end up, really, with two gifts. You end up with a gift from the parents to the respondent in this case, who then gifts her interest in that to the petitioner by putting his name on those accounts.

*Id*. at 420 (internal quotation marks omitted; ellipsis and brackets in original). The accounts were divided equally between the parties.

The carefully documented plan and intention of the donor had been defeated by the actions of the recipient. Although perhaps unfortunate for the donor, isn't it also true that a gift, once given, is the property of the recipient, to be used as the recipient chooses?

The matter was appealed. The court of appeals found no fault with the trial court's analysis, noting that before *Kunze* it might have reached the same conclusion. However,

the *Kunze* decision came down after the trial court made its decision.

The court of appeals found that under *Kunze* the fact that Wife had commingled her gift in a joint account with Husband was no longer the last word on the subject.

> [W]hether assets have been commingled with the marital estate ordinarily is not a consideration in the analysis of whether the statutory presumption of equal contribution has been rebutted. Rather, commingling is a factor in analyzing whether the statutory presumption has been rebutted only when an "act of commingling may preclude the court from identifying that spouse's separate contribution with sufficient reliability to rebut the statutory presumption that both spouses have contributed equally to the disputed asset." Otherwise, commingling is considered at the "just and proper" division stage of the analysis. Here, the preponderance of the evidence shows that wife was the sole object of her parent's donative intent and that husband did not contribute to the acquisition of the gifts. Therefore, we hold that the trial court's legal conclusion that wife had not rebutted the statutory presumption was error.

*Id*. (citations omitted). So far, so good for donative intent.

The next question was whether any equitable considerations could make it just and proper to divide the gifts with Husband. *Id*. at 420-21. On this point

> [t]he Supreme Court explained in *Kunze* . . . "when a spouse has treated a separately acquired asset as a joint asset of the marital partnership, *then the parties' shared financial decisions during the marriage have been made in reliance on that asset without consideration of whether it was separately or jointly acquired."* We conclude that wife's joint titling of the . . . accounts from their inception demonstrates her intent to make them joint assets of the marital estate.

*Id*. at 422. (citations omitted; emphasis added). Ultimately, behavior that could affect a couple's shared financial decisions made in reliance on that behavior trumps donative intent.

However, the story in *Tsukamaki* was not over. Commingling is an equitable consideration, and a court can consider the extent of the commingling. The court in Tsukamaki explained that "commingling is not an all or nothing proposition. Instead, commingling falls along a spectrum. In some cases, a particular asset may be commingled to such an extent that it would be inequitable to divide it in any manner other than equally. In other cases, an asset may be less commingled and therefore subject to a split into unequal shares." *Id*. at 421. The court stated that "[w]ife largely preserved the separate existence of the gift funds in the . . . accounts. The only significant exception to that preservation was that she deposited approximately $2,000 from her paychecks in the . . . accounts in order to save toward the purchase of a car, which she ultimately bought with funds from the . . . accounts and titled jointly in both her and husband's names." *Id*. at 422. Because both parties to some extent had expressed a moral obligation to make the money in the account available to support Wife's parents, the court would award 25 percent of the account to Husband. *Id*.

What could the donors in this case have done differently to preserve their donative intent? Nothing. They did everything they could to make clear what they were doing when they did it. The only other thing they could have done was refuse to make the gift unless Husband and Wife agreed to sign a postmarital agreement.

One might wonder what a postmarital agreement might accomplish given that Oregon statutes authorize premarital agreements, ORS 108.700, et seq., but not postmarital agreements, and given the somewhat unhelpful decision in *Grossman and Grossman*, 82 P.3d 1039 (Or. App. 2003). In fact, *Grossman* did not hold that postmarital agreements are unenforceable. Rather, the case held that the intent of the parties and the circumstances surrounding the creation of the agreement in *Grossman* precluded the court from using that agreement to determine the division of assets in the dissolution of the parties' marriage.

A postmarital agreement could address the equitable considerations relating to "shared financial decisions" and "reliance." If the parties know from the start that particular gifts are separate property and will remain separate if certain rules are followed, then making a "reliance on the gift" equitable argument will be challenging. However, a postmarital agreement must be carefully crafted and executed. Mutuality, full disclosure, and use of counsel by both parties to ensure informed and voluntary consent are all crucial features of the process. A document that is

only a litany of the "the cake, the cake pans, the stove, the kitchen sink, all the major appliances, and the kitchen" conceded by one side to the other may fail for lack of consideration. Another saying—pigs may prosper, but hogs get slaughtered—is worth recalling in undertaking such an effort.

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# Anatomical Gift Changes

HB 3197, enacted by the Oregon Legislature and effective January 1, 2006, revises Oregon's laws on anatomical gifts. Of significance is a change to ORS 97.954, the section that creates a list of priorities for who may make an anatomical gift of all or part of a body. HB 3197 adds to the top of the list, after the decedent, "A person to whom the decedent has granted power of attorney" With this change a person holding a power of attorney will have the highest priority after the decedent, above a spouse or children.

The priority given to the attorney in fact makes ORS 97.954 inconsistent with ORS 97.130, which establishes who can control disposition of human remains, setting up a potential conflict. Also curious is that under law other than this statute a power of attorney does not survive death. ORS 97.954 does not make clear whether an attorney in fact would be making an anatomical gift under the power of attorney or merely under the statute (because the power does not survive death). The revised statute also does not specify that the power of attorney has to address anatomical gifts.

The existing coordination between ORS 97.954 and ORS 97.130 arose from considerable effort by, among others, the Estate Planning and Administration Section. HB 3197 does not preserve that coordination.

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# Should Oregon Permit Beneficiary Deeds?

## General Information

A beneficiary deed, also known as a transfer-on-death or T.O.D. deed, allows the owner of real property to execute a deed that names the beneficiary who will succeed to ownership at the owner's death. Eight states (Arizona, Arkansas, Colorado, Kansas, Missouri, Nevada, New Mexico, and Ohio) have passed beneficiary deed statutes.[1] California passed a bill that requires the California Law Review Commission to study the effect of California's nonprobate transfer provisions and to study statutes in other states that establish beneficiary deeds.

A study group of the Estate Planning and Administration Section has examined the experience with beneficiary deeds in other states and would now like to gather input from practitioners in Oregon concerning whether Oregon should consider adopting beneficiary deed legislation. Comments can be sent to Anne Thompson, athompson@amthompsonlawfirm.com, or to Susan Gary, sgary@law.uoregon.edu.

At death, a person's probate property transfers to his or her beneficiaries by will or through intestacy if the decedent left no will. These days, much property transfers outside the probate process, through trusts or pursuant to contractual arrangements. Insurance proceeds transfer to the person named as beneficiary under the policy, bank accounts and stock accounts may have P.O.D. or T.O.D. designations of beneficiaries, and revocable trusts have become a popular will substitute. Many people prefer to avoid the probate process, either because of concerns about delays and cost or due to a desire for privacy.

If a person owns real property, he or she can avoid probate by using a revocable trust, but a revocable trust may not be appropriate if the person's only significant asset is a house. The only other option for an Oregon

property owner is to transfer the title of the property into a form of joint ownership with a right of survivorship. In Oregon, husbands and wives use tenancy by the entirety to create joint ownership with survivorship. Persons other than a married couple use tenancy in common with cross-contingent remainders. In either case, by adding the other person to the title, the original property owner makes an irrevocable gift of half the property. The irrevocable nature of the gift means that if the original owner later changes his or her mind, undoing the transaction will be difficult if the other owner does not agree. Further, the transfer will be a completed gift for gift tax purposes and may generate a gift tax. And finally, because the person added to the title has rights in the property, the creditors of the added person may be able to reach the asset.

To facilitate the transfer of property on death, many states, including Oregon, have enacted transfer-on-death statutes for bank accounts and stock accounts. The statutes permit a person to designate a beneficiary to take the account at death without giving the named beneficiary any current rights in the property. The eight states identified above now use beneficiary deeds to accomplish the same purpose for real property. Beneficiary deeds allow a property owner to designate a beneficiary without making a current gift of the property. The designation is subject to revocation by the owner, but if the owner records the deed and does not revoke it, on the owner's death the beneficiary will be able to obtain title to the property without going through probate. For persons of modest means, the beneficiary deed will reduce the cost of estate planning and estate administration.

## Specifics of a Beneficiary Deed Statute

***Recording requirement.*** To be effective, a beneficiary deed must be recorded before the death of the owner.

***Multiple deeds.*** If multiple beneficiary deeds are recorded, the most recently executed beneficiary deed controls, regardless of the order of recording.

***Owner's rights.*** During the owner's lifetime, the owner retains full power and control over the property. The owner owes no duties to the beneficiaries and need not provide notice to or obtain consent from the beneficiary for any actions taken with respect to the property.

***Revocation.*** The owner of property can revoke a beneficiary deed at any time by execution of a subsequent beneficiary deed or by an instrument of revocation. The instrument of revocation must be recorded to be effective. A will cannot revoke the designation of a beneficiary on a beneficiary deed. If a creditor of the owner executes on the property and then acquires the property, the beneficiary designation is revoked.

***Capacity for execution.*** The level of capacity required to execute a beneficiary deed is the same as the level of capacity required to execute a will.

***Tax considerations.*** The execution of a beneficiary deed has no tax consequences. The designation of a beneficiary is not a completed gift and remains revocable. The full value of the property remains in the estate of the owner for estate tax purposes.

***Beneficiary's interest.*** The beneficiary has no interest in the property until the death of the owner. The creditors of the beneficiary cannot reach the property while the owner is alive. The owner need not notify the beneficiary when the owner creates or revokes the deed. Delivery and acceptance of the deed by the beneficiary are not required. If foreclosure is initiated against property, the beneficiary is not entitled to notice.

***Interest contingent on survival by beneficiary.*** The beneficiary must survive the owner by 120 hours in order to take the property. The anti-lapse statute (providing a substitute gift to the descendants of a beneficiary who is related to the owner) does not apply to beneficiary deeds.

***Omitted spouse or child.*** A spouse or child unintentionally disinherited by a beneficiary deed is not protected. Marriage or the birth of a child after the execution of a beneficiary deed does not affect the validity of the beneficiary designation.

***Multiple beneficiaries.*** If the deed names multiple beneficiaries, the deed should indicate how the beneficiaries will take title to the property. If the deed does not indicate, then tenancy in common will be presumed unless the beneficiaries are married to each other, in which case tenancy by the entirety will be presumed.

***Contingent beneficiaries.*** The deed may provide for an alternate beneficiary if the first-named beneficiary predeceases the owner.

***Vesting of ownership.*** Title vests in the beneficiary on the death of the owner. The beneficiary takes the interest subject to all interests affecting the title to which the owner was subject, as well as any interest in the property of which the beneficiary has actual or constructive notice.

***Proof of death***. The beneficiary establishes proof of death in the same manner that a surviving tenant by the entirety establishes the death of the decedent tenant.

***Multiple owners.*** Owners who hold property as tenants in common with cross-contingent remainders or as tenants in the entirety can use a beneficiary deed to transfer the property on the death of the last owner to die. If only one of the owners executes the deed, the deed will be effective only if that owner is the last to die. If two owners execute a beneficiary deed and then one owner revokes the deed, the revocation will be effective only if that owner is the last to die. If two owners execute a beneficiary deed and one owner dies, the surviving owner can subsequently revoke the beneficiary deed.

Owners who hold property as tenants in common without survivorship rights can also use beneficiary deeds. Each owner can use a beneficiary deed to convey that owner's individual property interest.

***Encumbrances***. On the owner's death, the beneficiary takes the property subject to all encumbrances, mortgages, and other interests affecting title to the property to which the owner was subject during the owner's lifetime. An interest affecting title to the property will be barred unless the person asserting the interest records evidence or notice of the interest within four months of the death of the owner.

***Creditors of the owner.*** The execution and recording of a beneficiary deed does not affect any rights the creditors of the owner may have during the owner's lifetime. After the owner's death, if other assets of the estate are insufficient to pay all claims and all statutory family allowances, then the beneficiary who receives the property pursuant to the beneficiary deed is liable to account to the personal representative for a proportionate share (based on all nonprobate transfers) of an amount needed to discharge the claims and allowances.

***Creditors of the beneficiary.*** If the beneficiary files for bankruptcy, the automatic stay in the bankruptcy proceeding does not bar the owner from revoking the deed. A lien creditor of the beneficiary cannot execute on the beneficiary's interest in the real property until after the owner's death.

***Limitations on actions against beneficiaries.*** Claims of a creditor of the owner are barred one year after the owner's death. Claims of any other claimant or by an heir or devisee are barred at the earlier of three years after the owner's death or one year after proof of the owner's death is recorded.

***Medicaid recovery.*** If a person who has received medical assistance dies with a beneficiary deed in effect, the beneficiary's interest will be subject to a claim by the state for recovery of any medical assistance payments made on behalf of the owner.

***Bona fide purchasers.*** A bona fide purchaser who purchases property from the beneficiary after the owner's death takes title free of the rights of persons interested in the owner's estate.

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**FOOTNOTE:**

1. *See* Ariz. Rev. Stat. § 33-405; Ark. Code Ann. § 18-12-608; Colo. Rev. Stat. § 15-15-401(1); Kan. Stat. Ann. § 59-3501; Mo. Rev. Stat. § 461.025; Nev. Rev. Stat. § 111.109.1; N.M. Stat. Ann. § 45-6-401; Ohio Rev. Code Ann. § 5302.22.

## New Statutory Warning On Deeds Required

ORS 93.040(1) now requires the following warnings on deeds and land sale contracts.

BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER CHAPTER 1, OREGON LAWS 2005 (BALLOT MEASURE 37 (2004)). THIS INSTRUMENT DOES NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930 AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER CHAPTER 1, OREGON LAWS 2005 (BALLOT MEASURE 37 (2004)).

**Questions, Comments or Suggestions About This Newsletter?**

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# *Busch v. Farmington Centers Beaverton*: It's Not Settled Until the Court Says It's Settled

The Oregon Court of Appeals recently held that court approval under ORS 30.070 is a condition precedent to a personal representative's power to settle a wrongful death claim. *Busch v. Farmington Centers Beaverton*, 203 Or. App. 349, 124 P.3d 1282 (2005). Accordingly, until a court grants such approval, any settlement agreement entered into by the personal representative purporting to resolve a wrongful death claim is not binding.

The personal representative in *Busch* brought a wrongful death claim against two nursing homes where the decedent had lived. In mediation before trial, the parties entered into an agreement to settle the case. The settlement provided that it was subject to the approval of the probate court as required by ORS 30.070. That statute provides, in pertinent part:

> The personal representative of the decedent, with the approval of the court of appointment, shall have full power to compromise and settle any claim of the class described in ORS 30.030, whether the claim is reduced to judgment or not, and to execute such releases and other instruments as may be necessary to satisfy and discharge the claim.

*Id*. The personal representative then petitioned the probate court for approval of the settlement agreement, stating that the agreement was in the best interest of the estate. When the decedent's husband and daughter objected to the petition for approval, the personal representative responded by advising the probate court that he no longer believed that the agreement was in the best interest of the estate. The court refused to approve the agreement.

The wrongful death claim proceeded to trial where the nursing homes claimed as an affirmative defense that the estate had settled its claims against them. The defendants also claimed that the personal representative had breached his duty under the settlement agreement to make good-faith efforts to obtain probate court approval.

The court of appeals made clear that ORS 30.070 "controls when and under what circumstances a personal representative can compromise and settle a wrongful death claim." 203 Or. App. at 355. Further, it held that court approval was not merely a condition precedent to performance under the contract at issue in *Busch*. Rather, it is a condition precedent to the personal representative's power to settle a wrongful death action at all. Absent such power, the personal representative cannot create a legally binding settlement agreement. *Id*. at 357. Accordingly, the court held that the defendant's affirmative defense failed because no enforceable settlement agreement existed. Moeover, the court held that because there was no enforceable settlement agreement, "no implied covenant arose that imposed a duty on [the personal representative] to exercise good faith in pursuing probate court approval of the settlement." *Id.*

*Thomas M. Jones*
*Davis Wright Tremaine LLP*
*Portland, Oregon*

**Hot Topics in Estate Planning**

**June 9, 2006**
**Oregon Convention Center**
**9:00 a.m. – 12:00 noon**

- Drafting under the Oregon Uniform Trust Code
- Keeping Vacation Property in the Family
- Qualified Retirement Plans and IRAS
- Asset Protection – Simple and Advanced

*Presented by the Estate Planning and Administration Section and the Oregon State Bar*

## Oregon Uniform Trust Code

*Your copy is in the mail!*

The Estate Planning and Administration Section is sending to all Section members a complimentary copy of the Willamette Law Review issue devoted to the Oregon Uniform Trust Code. The volume will contain the recently enacted Trust Code and the Official Commentary. The Section is pleased to be able to offer this resource to its members.

# Judgments and Orders in Probate Court

| Court Action | Probate Estates | Conservatorships | Guardianships |
|---|---|---|---|
| Appointment of fiduciary. | Limited judgment. §33; ORS 111.275.*† Usually also admits will to probate. | Limited judgment. §36(1); ORS 125.030.*† See ORS 125.400. | Limited judgment. §36(1); ORS 125.030.*† See ORS 125.305. |
| Admitting will to probate. | Limited judgment, if it also appoints personal representative. §33; ORS 111.275.*† | | |
| Removal of fiduciary. | Limited judgment. §33; ORS 111.275.* | Limited judgment, because it usually appoints a new fiduciary. §36(1); ORS 125.030.*† | Limited judgment, because it usually appoints a new fiduciary. §36(1); ORS 125.030.*† |
| Decisions in will contests. | Limited judgment. §33; ORS 111.275.* | | |
| Placement of a protected person. | | | Limited judgment. §36(2); ORS 125.030.* |
| Sale of residence of protected person. | | Limited judgment. §36(2); ORS 125.030.* | |
| Declaratory judgment decisions. | Limited judgment. §33; ORS 111.275.* | Order. | Order. |
| Approving an interim accounting without objection. | Order. | Order. ORS 125.480. | |
| Decisions on interim accountings after objection. | Limited judgment. §33; ORS 111.275.* | Limited judgment. §36(2); ORS 125.030.* | |
| Decisions awarding attorney fees without objection, or if no accounting involved. | Order.‡ | Order.‡ | Order.‡ |
| Decisions awarding fiduciary fees without objection, or if no accounting involved. | Order.‡ | Order.‡ | Order.‡ |
| Decisions awarding attorney fees after objection to an interim accounting. | Limited judgment. §33; ORS 111.275.* | Limited judgment. §36(2); ORS 125.030.* | |
| Decisions awarding fiduciary fees after objection to an interim accounting. | Limited judgment. §33; ORS 111.275.‡ | Limited judgment. §36(2); ORS 125.030.* | |
| Decisions on petitions for final accounting and distribution. | General judgment. §34(1). ORS 116.113; ORS 18.005(7). | Order approving final account and general judgment closing the proceeding. §37(3); ORS 125.090; ORS 125.480; ORS 18.005(7). | |
| Termination of a protective proceeding. | | General judgment. §37(3); ORS 125.090; ORS 18.005(7). | General judgment. §37(3); ORS 125.090; ORS 18.005(7). |
| Discharging fiduciary after general judgment on final account. | Supplemental judgment. §4(16); ORS 116.213; ORS 18.005(17). | | |
| Additional decisions after entry of general judgment. | Supplemental judgment. §4(16); ORS 18.005(17). | Supplemental judgment. §4(16); ORS 18.005(17). | Supplemental judgment. §4(16); ORS 18.005(17). |

Notes:

1. Sections (§) refer to HB 2359 (2005 Oregon Laws Ch. 568). That act will be codified as part of ORS Chapters 116 (probate estates) and 125 (protective proceedings).

2. ORS 112.205(4) states that the probate court operates through orders and judgments. Sections 33 and 36(2) provide that limited judgments may be used only in certain enumerated situations. ORS 111.275 and 125.030. In estates, section 34 states that a general judgment will be used to approve final accountings and direct the distribution of assets. In protective proceedings, section 37 states that a general judgment will be used to terminate the proceeding. The statutes do not authorize limited or general judgments in other situations. Accordingly, this chart indicates that an order should be used in all situations where the statute is silent as to the type of document to employ. For the same reason, court decisions should be in the form of orders in situations not described in this chart.

3. This is a summary of relevant provisions, prepared by Philip Jones of Duffy Kekel LLP. It is a summary only; please review the text of the statutes regarding the application of the law to particular situations. Statutes not cited here may also be relevant.

**FOOTNOTE:**

* Sections 33 and 36(2) both require that the court must determine "that there is no just reason for delay" before entering a limited judgment under those sections. ORS 111.275(2); ORS 125.030(3). However, the limited judgment document need not reflect that determination. The safest practice would be to include that representation in the petition and then to include that determination in the limited judgment.

† The use of the phrase "limited judgment" may be confusing to financial institutions and others dealing with a fiduciary operating pursuant to an appointment under a limited judgment. To clarify that the fiduciary has full powers to act as fiduciary, it is suggested that both the caption and the body of the limited judgment reflect those full powers. For example, the document appointing a personal representative might be labeled as a "limited judgment admitting will to probate and appointing personal representative with full powers."

‡ Sections 33 and 36(2) provide that limited judgments may be used only in certain enumerated situations, one of which is approval of an accounting after objection. ORS 111.275 and 125.030. If the accounting included a request for attorney fees or fiduciary fees, and an objection was filed, then a limited judgment may be used to award those fees. If no objection was filed, or in fees were requested in a situation not involving an accounting, then the fees should be awarded by an order, not a limited judgment.

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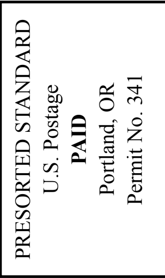

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