Newsletter

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What's New

Reynolds v. Schrock, 341 Or. 338, 142 P.3d 1062 (2006)

Caba v. Barker, 341 Or. 534, 145 P.3d 174 (2006)

Two recent Oregon cases discuss the liability of an attorney to third parties. The first case, *Reynolds v. Schrock*, involved a suit by plaintiff Reynolds against defendant Schrock and Schrock's attorney. The claim against the attorney alleged that the attorney aided and abetted Schrock's breach of fiduciary duty to the plaintiff, and therefore the attorney was jointly liable with Schrock. The attorney won a motion for summary judgment at the trial court level. The Oregon Court of Appeals reversed, holding that an attorney could be held liable for harm caused by the attorney's client if the attorney knowingly aided or assisted in the client's actions causing such harm. The Oregon Supreme Court then reversed that decision, holding that an attorney acting on behalf of a client and within the scope of the attorney-client relationship is not liable for harm caused by the client (in this case, harm that resulted from a breach of fiduciary duty to a third party).

In *Reynolds*, the attorney gave legal advice to his client, Schrock, regarding the duties Schrock owed to the plaintiff under a settlement agreement drafted by the attorney. The advice the attorney gave Schrock allegedly resulted in harm to the plaintiff, and the plaintiff sued Schrock and the attorney. The Oregon Supreme Court looked at whether the attorney's actions in advising Schrock were within the scope of the attorney-client relationship. If so, the attorney's actions would be protected from liability to third parties. The court concluded that in order to hold an attorney liable for a client's breach of fiduciary duty to a third party, one must prove the attorney acted outside the scope of the attorney-client relationship.

The court found that the attorney advising Schrock had acted within the scope of the attorney-client relationship and was not liable to the plaintiff for the harm caused by Schrock's breach of fiduciary duty, even if the attorney's advice and interpretation of the settlement agreement were incorrect. This decision leaves an attorney at ease to advise clients within the scope of the attorney-client relationship, without fear of liability to a third party if the attorney is wrong.

The second case, *Caba v. Barker*, involved the claim of residual beneficiaries under a will against the attorney who drafted the will, alleging negligence and breach of contract, which resulted in a will contest that diminished the residual estate. The trial court dismissed the plaintiffs' claims, the Oregon Court of Appeals reversed, and the Oregon Supreme Court ultimately held that the complaint did not state a cause of action for negligence or breach of contract.

In *Caba*, the attorney drafted a will on behalf of Laura Carnese. The will named a friend and relative of Carnese as personal representative. The will also recited a cash gift to the personal representative and named him as a residual legatee along

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with several others. Shortly after the court admitted the will to probate, a will contest was filed. The estate settled the will contest, resulting in a substantial loss to each residual legatee's share of the estate.

The residual legatees then filed a breach of contract claim and professional negligence action against the attorney, alleging that the attorney breached an implied promise to prepare a will impervious to a will contest so as to achieve the testator's plan to maximize gifts to the residual beneficiaries. The plaintiffs alleged that they were intended third party beneficiaries of such a promise. The trial court dismissed the plaintiffs' claims, concluding that an implied promise to make a will impervious to attack concerns only the professional duty an attorney owes to a client and not a duty that runs to nonclients. The Oregon Court of Appeals reversed, stating that the plaintiffs were classic intended third-party beneficiaries of the attorney's implied promise to act in a professionally competent manner.

The Oregon Supreme Court reversed, stating that because the attorney's promise was only implied, there must be some basis in fact or law for the implication. The court, finding none, held that an implied promise to make a will invulnerable to a will contest did not constitute a legally sufficient source of duty and breach to enable the residual beneficiaries of the will to bring a breach of contract or negligence claim. The court distinguished its decision in *Caba* from its holding in *Hale v. Groce*, 304 Or. 281, 744 P.2d 1289 (1987), because the attorney's promise in *Hale* was not an implied promise as in *Caba*, but instead was a direct promise to the testator to include certain provisions for a beneficiary in the testator's will, which the attorney failed to include. In such a case, the omitted beneficiary was deemed a classic intended third-party beneficiary of the attorney's direct promise to the testator.

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Trust Protectors in Oregon: Co-Fiduciary or Sleeping Lion?

On June 29, 2005, Governor Kulongoski signed Senate Bill 275, making the Oregon Uniform Trust Code the law in Oregon, effective January 1, 2006. The Oregon UTC was enacted to remove ambiguities in existing law and practice, and to keep Oregon current with the national trend. By the end of 2006, 18 states and the District of Columbia had enacted the UTC, and of those states that have not, many are considering doing so.

Many in the legal and trust fields have embraced the adoption of the UTC. Before the UTC was enacted, the legal landscape of Oregon trust law resembled the Wild West. Judges, practitioners, and trustees had little statutory guidance to help them resolve trust-related issues. Most often, those involved in a trust law dispute settled the matter outside the courtroom. Such settlements led to a dearth of case law, which in turn resulted in still more settled cases. Although a couple of "bloodbaths" have made the news, they have been few and far between. The Oregon UTC now provides statutory guidance on many relatively common trust issues. However, as comprehensive as the UTC may be, it still fails to address several trust law areas. One such area is that of the role, rights, and responsibilities of the trust protector, which is the focus of this article.

Trust Protector: What the Heck Is It?

Oregon's version of the UTC does not address the trust protector, and no universal, common law definition of the role exists. An amalgam of the various descriptions of the role of the trust protector provides that a trust protector is an individual or entity with specific powers to direct the trustee in administering a trust. A trustee's powers are either specifically provided in the trust instrument or, in default, are statutorily imposed. *See*, *e.g.*, ORS 130.650-.730. However, because there are no similar default statutory provisions granting powers to the trust protector, powers must be set forth in the trust instrument if they are to exist at all. Common trust protector powers include the powers to:

- remove, add, and replace the trustee;
- veto or direct trust distributions;
- add or delete beneficiaries;
- change the trust's situs or governing law;
- veto or direct investment decisions;
- consent to the exercise of a power of appointment;
- determine whether an event of duress has occurred;
- amend the trust's administrative provisions;
- amend the trust's dispositive provisions;
- approve trustee accounts; and
- terminate the trust.

These powers are often described as negative (*e.g.*, a veto right), positive (*e.g.*, trustee removal), springing (*e.g.*, commencing on the incapacity of the settlor), and/or durable (*e.g.*, withstanding the incapacity of the settlor). From a theoretical perspective, state courts also can be considered de facto trust protectors. Under ORS 130.050, courts have the same equitable authority to exercise any power that a trust protector or a trustee can exercise.

A settlor often nominates a co-trustee when the settlor is uncomfortable having a single trustee manage the trust estate. In other cases, a settlor may opt to nominate a trust protector to oversee and potentially restrain the trustee's control of the trust estate. To the extent that the trust fails to set forth how nominated *co-trustees* are to manage the trust, ORS 130.610 provides default guidelines for such management. However, there are no similar statutory default provisions governing the interaction between a trustee and a trust protector. Obviously, this lack of statutory guidance would cause problems if a trust instrument were to nominate a trust protector and fail to set forth the rights and responsibilities of that position. Moreover, problems may arise if a trust instrument nominates more than one party as trustee but fails to make clear that the parties are to serve as co-trustees. In that event, it could be argued that one of the trustees is not a trustee or co-trustee but, rather, a trust protector. If such a conclusion is reached, the question would then become whether the co-trustee provisions of ORS 130.610 apply to the relationship between the trustee and the trust protector.

Trust Protector Acceptance

Trustee status does not arise simply by virtue of the trustee being designated as such in the trust document. Conceptually similar to offer and acceptance in contract law, under trust law the trustee has to accept the appointment. Acceptance criteria vary widely among corporate trustees. When a corporate trustee is asked to serve as trustee, it must comply with regulations, policies, and procedures before formal acceptance will be effective. Similarly, trustees who are individuals must manifest their acceptance of the appointment either in writing or by their actions. *See* ORS 130.600. Because there are no similar statutory provisions controlling a trust protector's acceptance of the position of trust protector, it is unclear how such acceptance is effected or if acceptance is even necessary. In other words, can a party become a trust protector merely by being designated as such in a trust instrument and failing to refuse to serve? Does mailing a trust instrument to the nominated protector create liability for the protector, the named protector does nothing when a reasonable protector would have acted?

To Be or Not to Be – A Fiduciary, That Is

Black's Law Dictionary defines a "fiduciary relation" as a relationship "founded on trust or confidence reposed by one person in the integrity and fidelity of another." *Black's Law Dictionary* 626 (6th ed. 1990). When considering this definition as it relates to a trust protector, two questions arise. First, is a trust protector a fiduciary? Second, if the trust protector is a fiduciary, to whom is the trust protector's fiduciary duty owed? Is the duty owed to the trust, the settlor, the beneficiaries, or someone or something else?

Some instruments expressly provide that the trust protector is or is not a fiduciary. However, such a declaration is like saying, "[r]egardless of the type of animal that passes through these gates, it will be deemed to be a horse." *Alexander A. Bove, Jr., Trust Protectors*, Trusts & Estates, Nov. 2005, at 29. ORS 130.685(4) imposes a fiduciary duty on anyone who has a power to direct. It is not advisable to attempt to avoid the imposition of fiduciary duties on the trust protector by calling the position by another name. Implicit in all conduct undertaken by a trust protector is an understanding that all duties will be carried out with reasonableness and good faith, which serve as the foundation of fiduciary relationships. Regardless of the name used to identify a person holding traditional trust protector authority and responsibilities, practitioners should presume that such person will be deemed to be operating under fiduciary duties.

To whom the trust protector owes fiduciary duties is unclear. The existence and object of the duty most certainly depends on the particular authority and responsibility at issue, and the surrounding circumstances.

Valuable Tool or Double-Edged Sword?

The most common power exercised by a trust protector is the power to remove and replace a trustee. With individuals and companies constantly relocating and with corporate trustees changing hands with increasing frequency, this power can be very valuable. When creating a trust, settlors often select as trustee an individual or institution with whom they have an existing relationship. Later, through moving, acquisition, merger, or otherwise, the trust may be administered in another jurisdiction or by another trust officer or individual. This is a prime example of when the trust protector should act.

But what happens if the trust protector does not act in good faith or does nothing when it should act? For example, can the trust protector remove a trustee for no apparent reason at the expense of the trust? In *Von Knieriem v. Bermuda Trust Co., Ltd.*, the court considered whether the trust protector was a fiduciary when the protector decided to replace the current trustee. 1 BOCM 116 (Berm. High Ct. 1994). The court held that the test for determining whether the protector is a fiduciary is whether the protector is acting in the best interests of the trust and its beneficiaries. An additional factor is whether the trust instrument provides for a succession of protectors, or provides that a protector

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appointment is personal to one individual and that the office lapses when that individual no longer serves. Other courts have failed to release a protector of its fiduciary responsibility even though the trust expressly so provided. *See In re Rogers*, 63 O.L.R 180 (Ont. 1928). When an attorney attempts to draft certain limits on a protector's liability, he or she is wise to remember that courts are loath to release protectors from their fiduciary duties regardless of the wording of the trust.

Conclusion

Trustees are selected for a number of reasons, not the least of which is confidence in the capability of the trustee to carry out the settlor's desires. Trust protectors are often used to provide an additional level of assurance that those wishes will be carried out. However, before creating the position of trust protector in any trust instrument, the settlor must understand not only the potential benefits of having a trust protector, but also the potential risks that accompany that role.

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Measure 37 – A Practioner's Update

Measure 37 has been a classic example of how the state of the law can change over time. The measure, passed by Oregon voters in 2004,[1] provides a remedy for owners of property, the value of which was reduced by zoning and land use restrictions. It provides a method for a property owner to file a claim of diminished value and gives the government the option of either waiving the restrictions or compensating the owner for the reduced value. Under the microscope of economic and political pressure, state and local officials have been forced to come to grips with what the measure means and how to implement it. Practitioners have been in a similar situation, unable to definitively answer clients' questions about the application of the measure to their property. The measure has gone through several court challenges to date, being declared unconstitutional by the circuit court in Marion County, and then being declared constitutional by the Oregon Supreme Court in *Macpherson v. Dep't of Admin. Servs.*, 340 Or. 117, 130 P.3d 308 (2006). A number of cases have been filed in other circuit courts, with several appeals in process.

Practitioners cannot know exactly how the unanswered questions of Measure 37 will be resolved, but waiver applications already processed at the state level provide at least some guidance. This article highlights some of the issues estate planners should consider, with the recognition that the state of the law with respect to Measure 37 is likely to change, potentially substantially, over the course of the coming months and years.

Clients frequently ask estate planners to perform legal work that includes transferring client property, often as a part of planning work involving trusts or other ownership vehicles (such as family-owned limited liability partnerships or limited liability companies). Estate planners should now have "Measure 37 analysis" on their standard checklist of items to perform in the course of planning.

Two dates must be considered for the purpose of a complete Measure 37 analysis. The first date is when the property was first acquired by a family member of the current owner. "Family member" is defined at ORS 197.352(11)(A) as going as far back as the current owner's grandparent, including family-owned legal entities (see the text of ORS 197.352 for complete definitions). This first date is used to calculate how much compensation a potential claimant would be entitled to, based on the diminution in the land's value caused by land use regulations enacted or enforced after that family acquisition date. For families with long historical ownership chains, the claim for compensation obviously can be a large number. The total compensation requested for Measure 37 claims filed statewide exceeds $6 billion to date.

The second date to keep in mind is the date that the current owner acquired the property. This is the date that the governing authority must consider when deciding whether to pay compensation or to waive regulations (specifically, to "modify, remove, or not to apply the land use regulation"). ORS 197.352(8). Regulations must only be waived back to the acquisition date of the *present owner*, which can be substantially later than the family acquisition date, particularly in the case of families with long historical ownership.

The distinction between the two dates is important, as is the fact that it is the governing authority that makes the choice whether to waive the subject regulations or to compensate. At present, most governmental bodies, including the state of Oregon, have not provided a method for funding Measure 37 claims. As such, nearly all claims determined to be valid have resulted in a waiver, with the only exception to date being a claim filed by Grover and Edith Palin, for which the city of Prineville has offered the Palins $47,750 to avoid waiving a restriction on building homes along visible rimrock around the town. Therefore, until governing jurisdictions appropriate funds for payment of compensation, most practitioners only need to focus their review on the acquisition date of the present owner in the Measure 37 analysis. With that date in mind, the practitioner must then consider whether any land use regulations or local ordinances enacted since that date may affect the uses of the property and the property's value.

Important dates to keep in mind are the effective date of original Senate Bill 100, which marked the birth of statewide land use planning (1973), the date the general Statewide Planning Goals were adopted (January 25, 1975), as well as the date property was classified at the county or local level as part of a certain zoning under local comprehensive planning processes. The state of Oregon has taken the position in several Measure 37 final orders that properties that were acquired after the effective date of the Statewide Planning Goals, but before individual parcels were classified as restrictively zoned under the comprehensive Statewide Planning Goals, are still bound by the restrictions under those general goals. This has resulted in findings of no reduction in value (a "you couldn't use it before, and you still can't use it now" approach), and the denial of claims, even when the same claim may have already been approved at the county level (because of the passage of time between the effective date of Statewide Planning Goals and the approval date of local comprehensive plans). Of course, some land use planning was in effect before 1973 in several jurisdictions, so the specific zoning and restrictions relating to each individual parcel should be carefully reviewed, at both the state and local levels.

A sampling of state Measure 37 filings may illustrate some of the issues an estate planner should consider in the planning process:

Rencher & Rencher Trust, Claim No. M120240 (Or. Dep't. of Land Conservation & Dev. Sept. 13, 2005) (final staff report & recommendation). This claim was granted by the state for property situated in Deschutes County. Mr. Rencher acquired his property on June 22, 1964, and subsequently transferred the property to the Frank L. Rencher Trust on July 9, 1997. The state determined that the original acquisition date (1964) was the proper date for purposes of waiver because the trust was revocable, stating that "[t]ransfer of the subject property to a revocable trust does not result in a change in ownership for purposes of reviewing this Measure 37 claim." *Rencher*, slip op. at 3 n.2. Of note, the state required the claimant to provide information to substantiate that the trust was a revocable trust, and that Mr. Rencher retained an ownership interest in the property "through his role as trustor." *Id*. It is possible that a claim could be denied if the practitioner could not support the claim with trust documentation.

Marilyn Knott & Omer Keith Cyrus, as Successor Trs. of Cyrus Loving Trust, Claim No. M120088 (Or. Dep't of Land Conservation & Dev. Sept 6, 2005) (final staff report & recommendation). This claim was granted by the state for property situated in Deschutes County. The property had been acquired by the Cyrus family in 1944 and was later transferred to the revocable family trust, which provided for successor trustees on the death of each of the parents. Marilyn Knott and Omer Keith Cyrus were the successor trustees, but each was appointed on a different date (on the death of each of the different parents). The state approved a waiver, but with two different applicable waiver dates—one for each date each successor trustee was appointed under the terms of the trust.

B. E. Weiler Exemption Trust, Janice W. Kennedy, Tr., Claim No. M120085 (Or. Dep't of Land Conservation & Dev. Aug. 26, 2005) (final staff report & recommendation). The claimant family acquired the subject property in Clackamas County in May 1960. The property was subsequently conveyed to a trust, and then into an exemption trust in August 2004. The state determined that, because the transfer to the exemption trust was irrevocable, it created a new ownership date for waiver purposes.

Barbara Morgan Charitable Remainder Unitrust, Claim No. M120001 (Or. Dep't of Land Conservation & Dev. Aug. 23, 2005) (final staff report & recommendation). The claimant acquired her property in Grant County in 1958. In 2003, she contributed the property to her charitable remainder unitrust ("CRUT"), designating herself as trustee. This claim illustrates that a CRUT is considered a new owner for purposes of Measure 37, and Measure 37 claims for regulations enacted or enforced before the contribution date to the trust will terminate as of the transfer to the trust, presumably because the grantor is no longer considered to have retained any interest in the property.

Toynette Butolph, Adm'r of Gail E. Woldahl Foote Estate, Claim No. M120463 (Or. Dep't of Land Conservation & Dev. Sept. 26, 2005) (final staff report & recommendation). This was the first claim to clearly answer the question of whether an estate had rights to file or pursue Measure 37 claims that the decedent may have had when alive. The answer was a limited yes. The state found that an estate administrator could pursue a Measure 37 claim with respect to the property of the estate, but the date of death triggered a new owner (the estate, by and through its administrator), meaning offending regulations would only need to be waived to the date of death.

The claims summarized above offer guidance only with respect to the state of Oregon's position on Measure 37 issues.[2] Counties and local jurisdictions may apply different rules, particularly when local politics lean toward or away from supporting development (for example, it may not surprise readers to learn that Lane County has taken a somewhat different approach to implementing and interpreting Measure 37 than Jackson County or Curry County).

How should a practitioner approach potential Measure 37 claims in the estate planning context? First and foremost, a practitioner should advise clients (in writing) that advice is based only on the current state of the law, that this has been and promises to continue to be a potentially volatile area of the law, and that planning decisions made today may be undone, despite best intentions, based on the outcome of court cases or future legislative tinkering.

Second, the practitioner should identify whether current planning needs and client desires contemplate a transfer of real property. If not, there may only be a single Measure 37 issue to review (discussed below). If so, potential claims should be evaluated to determine whether the potential claims merit a modified approach to planning.

If the client wishes to preserve all potential Measure 37 claims, it appears that a revocable living trust, designating the current owners as trustees, meets the state's scrutiny and preserves potential Measure 37 claims, either by virtue of continuous ownership (the grantor and trustee are the same) or by virtue of the grantor's retention of some residual interest in the real property. All irrevocable trusts, charitable trusts, and planning vehicles using company ownerships (limited partnerships ("LPs"), limited liability companies ("LLC's"), other company forms, or generally anything requiring a separate tax ID number) have been interpreted as creating a new "owner" for purposes of the relevant waiver date, effectively destroying the value of potential Measure 37 claims, *looking back*. I emphasize "looking back" because it highlights one of the potential planning benefits of using ownership vehicles in estate planning. Assuming the use of such a planning vehicle would not substantially impair potential Measure 37 claims looking back, it could effectively freeze the current zoning and other regulations related to a subject property, preserving potential value, moving forward.

There were likely a number of potentially lucrative and valid Measure 37 claims that were destroyed or rendered valueless by virtue of perfectly appropriate wealth transition planning done for clients in the 1990s and early 2000s, through the use of family-owned LPs and LLCs. However, there is always a chance that the Oregon legislature will modify the current law to eliminate the ownership distinction between and entity and its principals, at least for Measure 37 purposes, so there may be some hope for those clients.

The use of LPs and LLCs may not necessarily impair Measure 37 claims. One option to continue using those vehicles as a wealth transfer tool might be for the current owner (with a potentially valuable Measure 37 claim he or she wishes to preserve) to transfer less than a 100 percent fee interest in the subject property to the planning vehicle. Retention of some interest in the property should act to preserve the potential Measure 37 claim with respect to the owner, and should allow the owner to use the wealth transfer vehicle to achieve discount values on planning gifts and on date of death. Of course, a number of issues would need to be looked at carefully, including the percentage interest to retain, whether there might be a tenancy in common agreement between the owner and planning entity, and what impact split ownership could have for tax purposes, if any. Also, environmental issues could make individual ownership undesirable.

Other issues to consider are the provisions in a revocable trust regarding changes in trustees and provision for successor trustees. Many revocable trusts provide for an automatic successor trustee in the case of the incompetence or disability of the current trustee. This provision could create a transfer for purposes of the applicable Measure 37 waiver date, destroying Measure 37 claims originally intended to have been preserved through the use of a revocable trust. Practitioners should consider whether successor trustee language should be modified to provide for co-trustees, or to provide for a co-trustee to spring into effect upon the occurrence of some event, ensuring the current trustee retains an interest in the property and preserving potential Measure 37 claims. Depending on an analysis of other factors, the trust might also provide that co-trustees can exercise all powers independently, and that the co-trustees have the authority to pursue any Measure 37 claims on behalf of any other co-trustee, grantor, or the trust itself. Similar language might also be inserted to allow trustees to pursue Measure 37 claims on behalf of or for the benefit

Questions, Comments or Suggestions About This Newsletter?

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of beneficiaries, particularly when long-term trusts are contemplated or possible. Language might also be included to provide that distributions of real property not be made before exploration or exhaustion of Measure 37 rights, to maximize the potential benefits to beneficiaries.

Practitioners may also wish to consider modifying power of attorney forms to specifically address the authority to pursue any Measure 37 claim on behalf of the appointer, either outright or when it is determined the appointer lacks capacity or is disabled. Although most broad-form power of attorney documents probably contain language sufficiently general to allow the attorney in fact to pursue such a claim, specific language is often better, in particular when it can be important to avoid a potential hang up with a local jurisdiction that may not treat Measure 37 claims favorably and is looking for a reason to deny a claim.

One other consideration may be whether advance directives or supplemental instructions need to be reviewed to specifically address the desire to preserve all potential Measure 37 claims. For example, a client with a potentially valuable claim may wish to receive complete life support until such time as a claim is granted or underlying development reaches a certain stage. As the ownership population continues to age, it would not surprise me if certain clients adopt a "stay alive at any cost" mind set (or perhaps more likely, children may keep ventilators running a little longer than they otherwise would have for their ailing parents) until Measure 37 claims are processed and development proceeds.

This article has not discussed a number of the controversial questions that remain with respect to Measure 37. Will waivers be transferable outright, or will some level of development have to take place before a property right "vests"? Will local governments implement additional taxes to provide for compensation funds? What will the courts and legislature do to address and fine tune Measure 37? For now, more questions than answers remain, but practitioners do have some limited guidance as to how best to proceed in a planning environment that will doubtless change in the near future.

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[1] *See Measure 37: An Important Consideration for All Owners of Real Property*, Oregon Estate Planning and Administration Section Newsletter (Or. State Bar), Jan. 2006, at 1.

[2] Practitioners may view these and all other proposed and final orders at the state's web site: *www.oregon.gov/LCD/MEASURE37/index.shtml*.

Bill to Eliminate Verification of Probate Pleadings

Verification of paperwork filed in probate dates back to at least the 1862 Code of Civil Procedure of Oregon § 1046. It has been understood that "verified" means a statement on oath or affirmation before a notary public. *See State ex rel Adult & Family Servs. Div. v. Evans*, 126 Or. App. 592, 869 P.2d 891 (1994) (so holding); *Gibson & Son v. Gibson* (*In re H. Gibson & Son*), 124 Or. 193, 264 P. 371 (1928). "Verification" was formally so defined in relation to civil pleadings in former ORS 16.070, but the probate code has never contained a statutory definition of "verification."

Verification of pleadings in civil actions was eliminated (and ORS 16.070 was repealed) with the adoption of the Oregon Rules of Civil Procedure in the 1970s. At that time it was recognized that legislative action was required to switch to the declaration under penalty of perjury. Last year Uniform Trial Court Rule ("UTCR") 2.120 was added to provide that all affidavits required by the UTCRs should be declarations in the form of Oregon Rule of Civil Procedure 1 E rather than made under oath or affirmation, "[u]nless otherwise mandated by statute."

As part of the UTCR changes last year, the appendix of forms was revised to delete the notarized verification on the account form in favor of a declaration under penalty of perjury. This change appears to be contrary to the express statutory requirement that accounts in probate and conservatorship proceedings be verified. It certainly creates questions as to the meaning of the requirement of ORS 111.205 that all petitions in probate be verified. Elimination of the statutory requirement for verification will eliminate that issue.

In practical terms, the use of notaries for verification presents a couple of significant problems. First, in small law firms or in a client's home, a notary may be unavailable. A notary cannot perform a notarial act in relation to a document in which the notary is "named." ORS 194.158(1). Violation of that statute is a class B misdemeanor. ORS 194.990(1)(a). Many probate pleadings must name the attorney representing the personal representative. The petition normally identifies the attorney, to comply with ORS 113.135. The account awards fees to the attorney. The name of an attorney preparing a pleading must be included in the pleading, to comply with UTCR 2.010(7). Thus the attorney will not be able to serve as the notary.

Second, notarization under oath or affirmation has become a farce. In reality, notaries merely witness the signature of the affiant. How often have you seen a notary in a bank or law office require the affiant to raise his or her right hand, select between an oath and an affirmation, and answer “I do” to the appropriate question? How many notaries (including attorneys) know the difference between an oath and an affirmation? It is not in the interest of anyone supporting the idea of governance based on laws to have a system in place that ignores clear legal requirements. It is therefore time for the probate system to catch up with the rest of the civil law by eliminating verification of probate documents.

The Oregon legislature will consider a bill eliminating verification of probate documents this session. Amends ORS 116.083 to eliminate the requirement that accounts be verified. Incidental to that change, the draft bill makes one other change to ORS 116.083 unrelated to the verification issue to conform to common practice. Subsection (4) of that section permits the use of what is commonly called a “short-form” final account to conclude a probate, provided certain requirements are satisfied. One of the requirements is that “all creditors have been paid in full.” ORS 116.083(4)(b). In reality, two creditors of the estate—the personal representative and his or her attorney—are often not yet paid paid, because they cannot be paid until the court approves their fees upon approval of the final account. The draft bill adds language clarifying that a short-form final account is permissible despite administration expenses requiring approval of the court that remain unpaid.

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2007 Section Officers

The Estate Planning and Administration Section elected the following officers and members of the Executive Committee at the Section’s annual meeting in November. Please contact any of the officers or board members with questions or suggestions for Section activities.

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