Newsletter

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Oregon's Domestic Partner Registry

Summary

Oregon's new domestic partner registry law gives same-sex couples, termed "domestic partners," and their children "[a]ny privilege, immunity, right or benefit granted by statute, administrative or court rule, policy, common law or any other law" to married individuals and children of a marriage. HB 2007 § 9. In general, the law extends benefits, protections, and responsibilities to registered domestic partners and their children that are comparable to those provided to married individuals and their children by the laws of Oregon. The Governor signed the bill on May 9, 2007, and the law will be effective on January 1, 2008.

Who Is Covered

Individuals in same-sex relationships can register as domestic partners, but not if either has a "partner, wife or husband"; if the two of them are first cousins or any nearer of kin; or if either is incapable of consent by want of legal age (18) or sufficient understanding. The act creates parentage for children born or adopted during the registration term.

Procedures

Two persons who want to become domestic partners must file a Declaration of Domestic Partnership with the county clerk, who creates a domestic partner registry and issues a Certificate of Registered Domestic Partnership upon payment of a fee. The registry is public. Termination of the domestic partnership may occur in two ways: by the death of a registered partner or by a judgment of dissolution or annulment of the domestic partnership.

What the Law Does Not Do

As HB 2007 explains, the rules adopted by Oregon cannot change federal law and may not be effective in other states. The bill states that "legal recognition of domestic partnerships under the laws of this state may not be effective beyond the borders of this state and cannot impact restrictions contained in federal laws." HB 2007 § 2(7). "Many of the laws of this state are intertwined with federal law, and the Legislative Assembly recognizes that it does not have the jurisdiction to control federal laws or the privileges, immunities, rights, benefits and responsibilities related to federal laws." HB 2007 § 9(5). The law does "not require or permit the extension of any benefit under ORS 238 or 238A [Oregon Public Employee Retirement System], or under any other retirement, deferred compensation or other employee benefit plan, if the plan administrator reasonably concludes that the extension of benefits would conflict with a condition for tax qualification of the plan, or a condition for other favorable tax treatment of the plan, under the Internal Revenue Code or regulations adopted under the Internal Revenue Code." HB 2007 § 9(6). The law does "not require the extension of any benefit under any employee benefit plan that is subject to federal regulation under the Employee Retirement Income Security Act of 1974." HB 2007 § 9(7).

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In This Issue

Incapacity/Illness Planning

Under the new law, if no advance medical directive has been executed by an ill partner, the healthy partner will have priority to make end-of-life medical decisions and priority for appointment as guardian to determine placement, direct medical care, and receive protected health care information.

Practical Suggestion:

To reduce the risk of a costly guardianship, a medical directive is useful for both same-sex couples (registered or not) and opposite-sex couples (married or not). If the partner falls ill outside of Oregon, the legal status of the registered couple will not necessarily be recognized and therefore the medical directive and nomination of guardian are crucial planning documents, despite the new law.

Disposition of Remains

Registered partners will have priority to determine Oregon disposition of a deceased partner's remains, as spouses do, without the need for the formal written Disposition of Remains instruction under ORS 97.130(1).

Practical Suggestion:

What if death occurs outside Oregon, where the registration status may not be recognized? A written Disposition of Remains instruction should be prepared for all same-sex couples, registered or not.

Inheritance

Registered domestic partners will have the same intestate inheritance rights as surviving spouses under Oregon law, and can claim the elective share, support from the estate, and protection against a premarital will.

The children of registered domestic partners will have the same intestate inheritance rights as surviving children under Oregon law. Parents of these children will also inherit under intestacy from a deceased child.

Practical Suggestions:

Because the status of the registered partner will not be recognized in all states, it is critical to protect the partner with a will.

Because the status of a child born after the registration to one member of the same-sex couple will not be recognized in all states, it is critical to protect the child with a will. If one partner was not a legal parent before the registration, the later registration will create the status of stepparent. Lawyers for same-sex couples recommend a second-parent adoption (permitted in Oregon and in many other states) to cement a parental relationship. The second-parent adoption has legal significance independent of the registration, although whether it will be recognized in all jurisdictions for inheritance purposes is not yet clear.

Because the status of the parents will not be recognized in all states, the adult child of the registered couple should protect both parents with a will.

Parents, grandparents, and other relatives of same-sex couples should be asked whether the term "descendants" in their wills and trusts should be drafted to include the same-sex couple's children. Wills specifically addressing that question, by careful drafting, will avoid litigation challenging which state law applies. Oregon law and California law protect the children of registered same-sex couples as descendants, but other states may not recognize the relationship. Some states specifically prohibit second-parent adoption. It is unclear how courts in those states will treat the question of inheritance by children of same-sex couples, registered or not.

Taxes

Income Tax. Domestic partners will be treated like spouses for Oregon tax purposes. ORS chapter 314, Income Taxation, will clarify this point because the House Bill adds the following provision: "This chapter applies to partners in a domestic partnership * * * and surviving partners as if federal income tax law recognized a domestic partnership in the same manner as Oregon law." HB 2007 § 11. Registered same-sex couples will be able to file Oregon returns, commencing in 2009 for tax year 2008, either jointly or as married filing separately. For income and deduction purposes, taxpayers will (as in Massachusetts and New Jersey) prepare pro forma or "dummy" federal joint returns as married and then prepare the state returns for filing.

New Oregon W-4s and income tax return forms adding the status of registered domestic partner ("RDP") will eventually be issued. The federal return must be prepared as though an RDP were single. Some preparers recommend filing the return with an asterisk and explanatory letter saying that this designation is "single" for federal income tax reasons only, if a marriage valid in another country or Massachusetts exists.

Oregon Inheritance Tax. The estate of a deceased RDP with a surviving partner will be allowed a "marital/registered domestic partner deduction" for Oregon inheritance tax. The personal representative of the deceased RDP's estate will show property passing at death to the surviving RDP (including nonprobate survivorship property) on Schedule M. The personal representative can make the QTIP election for qualified property (such as an all-income-to-RDP trust, similar to the QTIP trust used for the marital deduction in federal spousal planning) passing to the surviving RDP. The Oregon inheritance tax can effectively be zeroed out when the first RDP dies; however, the tax on the QTIP portion is only deferred until the second RDP dies, if the second RDP has sufficient assets, either QTIP or other assets, to create a taxable estate.

The Oregon Department of Revenue will eventually issue new inheritance tax forms reflecting the new category of "registered domestic partner." The Oregon marital deduction may now be referred to as the "state marital/registered domestic partner deduction."

Oregon does not impose a state gift tax. Lifetime nonexempt transfers made before registration will be shown on line 4 of the Oregon IT-1 (2006) as taxable gifts made inter vivos. Whether transfers made after registration should be reflected on line 4 is not clear. The Oregon inheritance tax form requires reporting of all joint tenancy property with nonspouses (page 2, Part 4, #7 of the IT-1, 2006). When the survivorship asset was owned by both RDPs, it will be reported in Oregon as Schedule M property. If joint property or entireties property is included in the deceased RDP's gross estate, it will be washed out with the Schedule M deduction listing bequests to the surviving RDP.

Practical Suggestion:

A same-sex couple with Oregon transfer tax exposure should strongly consider registration to prevent Oregon state inheritance tax being imposed on the estate of the first partner to die. Should the couple move to another state, however, they cannot rely on recognition of the new legal status to eliminate that new state's death tax. Same-sex couples with taxable estates may have arranged their affairs with a relationship agreement and good planning, and they may want their prior arrangement to continue, despite registration. These couples might consider reaffirming their relationship agreement in light of the new RDP status, by preregistration or postregistration agreement directly dealing with the property, inheritance, and support aspects of the new law.

Federal Gift and Estate Tax. The new Oregon law does not change federal gift tax: inter vivos nonexempt transfers to the RDP and others will be subject to federal gift tax, and soak up the donor's $1 million lifetime gift credit. A federal Form 709 should be filed for nonexempt gifts to the RDP, before or after registration. The new law does not change the federal estate tax: transfers effective at death of more than the federal death tax exemption equivalent ($2 million in 2008; $3.5 million in 2009) will be subject to federal estate tax. Federal gift and estate tax planning will continue to be crucial for same-sex couples.

Wrongful-Death and Loss-of-Consortium Claims

When incapacity or illness of the partner results from the wrongful act of another, the RDP will have the common-law claim of loss of consortium.

When the death of an RDP, child, or stepchild results from the wrongful act of another, the surviving RDP, child, stepchild, or stepparent will have rights to an allocation from any wrongful-death award or settlement, in the same manner as a spouse, child, stepchild, or stepparent under ORS 30.010.100. See the definition of stepchild-stepparent relationship in ORS 30.020(3). Damages include pecuniary loss and "loss of the society, companionship and services of the decedent." ORS 30.020(2)(d).

If an auto accident occurred in Idaho, could one file the action in Oregon to obtain the benefit of the expansion of wrongful death to the Oregon RDP and the children, and to avoid the Idaho lawyer's defensive crouch denying Oregon's family protection? These issues will probably have to be litigated. As HB 2007 predicts, the rights of a registered couple are not guaranteed to be portable. But some states with expansive domestic partner or civil union laws, such as California, will recognize the wrongful-death claim of an RDP and children. Washington's new 2007 domestic partner registry law grants wrongful-death statutory rights only to the registered domestic partner.

Practical Suggestion:

When an RDP or child from a domestic partnership dies as a result of a wrongful act outside of Oregon, clue the personal injury lawyer into the choice of venue and possible conflict of laws problem early, so that the lawyer can choose the forum and preempt the likely status challenge.

Wills in Contemplation of Registration; Revocation of Preregistration Will

Marriage automatically revokes a prior will, unless the will expressly states that it was entered into in contemplation of that marriage. Protection from a premarital will is one of the privileges of a spouse. The RDP should also be protected from a preregistration will, which will be revoked by registration. The preregistration will can express the intent to remain in effect despite registration or civil union or other later changes in status. Wills made in contemplation of the change of registration or other changes in status will remain effective after registration. ORS 112.305(1).

Practical Suggestion:

A lawyer should consider whether a will for a same-sex couple should explicitly state that the document will stay in effect after any later marriage to, registry as domestic partners with, or civil union with a named person and that the will is executed in contemplation of that possible event.

Real Property Survivorship

Unregistered domestic partners who want survivorship rights will continue to use Ericksen deeds: mutual life estate with cross-contingent remainders. ORS 93.180. RDPs will be able to take title to real property as "tenants by the entireties," a survivorship form of deed with creditor protection. Both Ericksen and entireties deeds will continue to be used by domestic partners, registered or not, depending on their circumstances. The tenancy-in-common deed will be used in some situations as well, when the partners, registered or not, want to direct their estates to different beneficiaries at death, keep assets separate for estate tax purposes, or avoid 100 percent inclusion in the gross estate of the first to die (with its IRC § 2040 proof of contribution problem).

Practical Suggestion:

Same-sex couples, registered or not, should exercise caution before creating a right of survivorship by deed. Each partner's contribution to the property should be calculated to determine whether a gift is being made. If a sole-owner RDP places the other partner on the deed,

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a Form 709 federal gift tax return should be filed if the value of the interest exceeds the annual exclusion. One hundred percent of survivorship property, whether created by Ericksen deed or entireties deed, is included in the federal gross taxable estate of the deceased RDP. IRC § 2040. Although Oregon will allow the "marital/ registered domestic partner deduction" at death for Oregon inheritance tax purposes, the federal government will force the surviving partner, registered or not, to prove contribution to avoid 100 percent inclusion.

Cynthia L. Barrett
Portland, Oregon

Promoting Conservation Easements Through Tax Incentives in Oregon

A voluntary conservation agreement, also known as a conservation easement, is a legal agreement permitted under state law between a landowner and a nonprofit land trust or government agency that permanently limits uses of the land in order to protect important conservation values. It allows the landowner to continue to own and use his or her land and to sell it or pass it on to his or her heirs.

Oregon state law defines "conservation easement" as a "nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open space values of real property, ensuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property." ORS 271.715(1).

Conservation easements are often used in Oregon to achieve significant conservation goals. They provide permanent protection of natural resources while maintaining the land in private ownership. They also provide real incentives to landowners, through federal income tax deductions and estate tax reduction, without financial cost or hardship to state and local governments. The terms of a conservation easement must, however, be capable of meeting the requirements for being considered exclusively for conservation purposes under section 170(h) of the Internal Revenue Code.[1]

Although landowners grant conservation easements primarily for purposes of conserving land and protecting natural resources, for some landowners state law incentives are important factors. A major factor in a landowner's decision-making process may be the extent to which the landowner can obtain or retain a special assessment for property tax purposes. Current statutes, however, provide disincentives to placing conservation easements on land owned by those who currently enjoy farm or forest use special assessments. Landowners could risk losing their special farm or forest assessment status, thereby causing them to face higher property taxes and potential liability for years of deferred taxes.

In 2001, the Oregon legislature declared that it is the state's policy to encourage sustainable management through tax incentives and that additional property taxes should not be imposed if a landowner voluntarily limits the use of his or her land for conservation purposes.[2] The legislature codified this declaration so landowners would not be penalized by an increase in property taxes if they executed a conservation agreement. ORS 308A.743.

As part of this legislation, the Oregon legislature directed the Oregon Department of Agriculture ("ODA") and the Oregon Department of Forestry ("ODF") to review state statutes, rules, policies and programs that affected landowner decisions to implement conservation strategies. In May 2002, ODA and ODF convened the Conservation Incentives Work Group (the "Work Group"). As directed by HB 3564, ODA and ODF, through the Work Group, developed recommendations for improving incentive programs that would encourage landowners and businesses to voluntarily invest in the improvement of natural resources to maintain the long-term ecological, economic, and social values that certain private lands provide to the state.

The Work Group determined that the language of ORS 308A.743 provides problems for landowners and county assessors:

> First, the language essentially creates two sets of criteria that the assessor has to apply. An assessor must determine (1) whether the farm use special assessment criteria are satisfied and (2) whether the landowner is complying with the terms of the conservation easement.
>
> Second, assessors are given no direction in how to balance the two sets of criteria. For instance, if timber harvest is limited by a conservation easement on forest land, how severe can such a limitation be before the assessor must conclude that the land no longer meets the requirements for forest use special assessment? Must the land be "held or used for the predominant purpose of growing and harvesting trees of marketable species" as arguably required by ORS 321.358(3)(c), or is it enough for the conservation easement to allow some harvesting of trees to maintain or improve wildlife habitat?

Given that a landowner can lose a special assessment if an assessor deems that a conservation easement is incompatible

with the criteria for the special assessment, the statute fails to provide any real assurances to the landowner that he or she will not be penalized for entering into such a conservation agreement. In short, the statute undermines the state's policy not to impose additional taxes on a landowner who voluntarily limits the economic uses of private land for conservation purposes.

In response, in 2005, Senate Bill 593[3] was proposed to the Oregon legislature. The bill would have removed the potential property tax penalty for landowners who wanted to voluntarily engage in conservation through a conservation easement. SB 593 passed the Senate Environment and Land Use Committee[4] and the Senate Revenue Committee[5] but stalled in the House. Some reasons why the bill did not pass include small technical issues such as fiscal impacts not being assessed correctly, the bill referencing incorrect statutes, and confusion over the meaning of the terms "conservation" and "preservation." Also, the political climate in the House was not favorable to the sponsors of this bill.

The Oregon Cattlemen's Association opposed the bill because it believed the bill would undermine the original intent of farm assessment, which was to provide incentives for operators to retain their farmland and contribute to Oregon's character and economy. It argued that given such tight budgetary restrictions, Oregon could not afford to provide tax breaks to land that contributed no financial benefit to the economy.

In the 2007 legislative session, Senate Bill 514 was introduced. Like SB 593, SB 514 seeks to remove a disincentive for landowners with conservation easements by creating a special assessment category for property taxes on their easement lands.[7] SB 514 is essentially the same bill as SB 593 except that the owner must file written certification with the county assessor and pay a $250 application fee. These fees will be credited to the county's general fund in which the specially assessed property is located. This fee will reduce some of the financial impacts on county staff across the state. The revenue impact (loss) of this legislation for the state is estimated to be $91,500 for FY07-09.[6] There are also provisions in this bill for certifying compliance every three years, for disqualification, and for reinstatement of a conservation easement.

SB 514 allows land presently subject to farm use or forest land special assessment to be converted to conservation easement special assessment without the payment of additional taxes. Defenders of Wildlife, which supports the bill, states that this bill will probably affect only 10 to 12 conservation easements statewide per year because of the limited capacities of different land trusts in Oregon. Therefore, the legislation will not cause a large financial impact on counties, and the application fee will mitigate any financial effects. Furthermore, in some areas of Oregon, this bill probably will not affect easement donations because some easements require forest thinning to maximize ecological benefits and would qualify under the forest special assessment tax category.

As there were varying opinions of this bill back in 2005, opposing opinions were also presented during this current legislative session. Jim Welsh, representing the Oregon Cattlemen's Association, emphasized agriculture's importance to Oregon's culture and economy and argued that any land taken out of production as a result of the bill would be detrimental to Oregon's economy. Sharon Livingston, president of the Oregon Cattlemen's Association, also spoke in opposition to the bill. She stated that people should not be paid for conserving land because doing so is part of being a good steward of the land and is the responsibility of all landowners to provide habitat.

Karlene McCabe spoke on behalf of the Greenbelt Land Trust. In support of the bill, she mentioned that she works with private landowners who wish to voluntarily protect their land with permanent easements. Those landowners support the bill because it enhances their property rights by allowing them to retain their tax benefits while continuing to protect the farm, forest, and natural areas they have on their property. Mike Propes, Polk County Commissioner, also speaking in support of the bill, spoke about how his county was a pilot project for this concept in the early 1990s. He stated that the pilot project was very successful. Cheryl Hummon, representing Defenders of Wildlife, provided a brief history of the bill. She stated the bill will correct an inconsistency in state law: the state policy on promoting conservation and the back taxes incurred if property is transferred from a forest or farmland special assessment to conservation purposes. She also stated that the bill does not necessarily target agriculturally productive lands.

The bill passed in the Senate. In the House, a Minority Report would have amended the bill to allow counties of 50,000 or fewer inhabitants to elect not to participate in the conservation easement special assessment program. The Minority Report was not adopted, and the bill was passed by the House without the amendment. The bill now awaits the Governor's signature.

In summary, this new special conservation easement tax will benefit (1) donors of easements who currently have a forest special tax category assessment and want to donate their land without losing tax benefits of the forest special assessment, thereby having to pay back taxes, and (2) donors with no current special tax assessments, by allowing them conservation easement special assessment. This new legislation will apply to tax years beginning on or after July 1, 2008.

An additional bill, Senate Bill 929, was introduced in the Senate but did not move forward this session. SB 929 would have created an income tax credit for donations of interests in real property to public or private conservation agencies for specified conservation purposes. The bill also would have allowed an income tax deduction for costs incurred in undertaking voluntary habitat conservation actions designed to achieve conservation purposes on forest land or farmland exclusively zoned for farm use.

Legislation like Senate Bills 514 and 929 will provide incentives to people to permanently protect important conservation resources. This legislation constitutes a creative and dynamic method for meeting the goals of conservationists and property owners.

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Endnotes

1 For a summary of the income tax requirements, see Stephen J. Klarquist, "The Use of Conservation Easements in Estate Planning: An Overview," Or Est Plan & Admin Sec News at 1 (OSB Jan. 1997).

2 In HB 3564 § 2 (later codified as ORS 308A.740), the 2001 legislature declared: [I]t is in the interests of the people of this state that certain private lands be managed in a sustainable manner for the purpose of maintaining the long-term ecological, economic and social values that these lands provide.

3 Available at http://www.biodiversitypartners.org/Leg/images/sb0593.pdf.

4 *See* Senate Environment and Natural Resources Committee Minutes (Apr. 7, 2005; Apr. 8, 2005).

5 *See* Senate Finance and Revenue Committee Minutes (May 18, 2005; June 16, 2005).

6 In 2007, the Department of Revenue estimated that there were 15.5 million acres of designated land subject to farm use in FY05-06. The estimated FY05-07 revenue loss of the special assessment was $183 million. 2007-09 Tax Expenditure Report. It was assumed that one-tenth of a percent (0.1%) of $183 million associated with 15.5 million acres of land that is subject to farmland special assessment would be designated as conservation easements in FY07-09. In addition, it was assumed that only 50 percent of this $183,000 would pertain to easements that would preclude the land from farm use. Staff Measure Summary, Senate Committee on Revenue (May 2, 2007). Available at http://www.leg.state.or.us/comm/sms/ris07/rsb0514a05-02-2007.pdf.

7 Available at http://www.leg.state.or.us/07reg/measpdf/sb0500.dir/sb0514.intro.pdf.

Legislative Review

In addition to the bills already described in this Newsletter, the legislature passed a number of bills that will touch on estate planning issues. The Governor has signed all the bills listed here, and the new laws will take effect on January 1, 2008. Although a number of inheritance tax bills were introduced, all of those bills died in committee.

SB 133 – Disclaimer

SB 133 amends the Oregon disclaimer statute, ORS 105.643. The statute now bars a disclaimer "if the purpose or effect of the disclaimer is to prevent recovery of money or property to be applied against a judgment of restitution under ORS 137.101 to 137.109." ORS 105.643(6). The Attorney General's office developed this bill so that the convicted perpetrator of a crime could not use a disclaimer to avoid paying restitution to victims of the crime. SB 133 will bar the use of a disclaimer if the purpose or effect is to deny restitution to crime victims.

SB 302 – Foreclosure and Sale

SB 302 amends ORS 18.312, relating to judgments of foreclosure and sale. The existing section says that execution shall not issue against the decedent's estate. The amendment permits the execution on and sale of property pursuant to a judgment of foreclosure and sale of property of the decedent. If the amount collected from the sale of the property does not satisfy the deficiency, then the amount remaining may be collected by making a claim against the estate of the decedent.

SB 305 – Oregon Uniform Trust Code: Representation

SB 305 amends ORS 130.105, part of the Oregon Uniform Trust Code. The new section permits the holder of a testamentary power of appointment to represent and bind the permissible appointees, takers in default, and others subject to the power, so long as a conflict of interest does not exist. The existing section limits the representation to a holder of a general power; the amendment deletes the word "general," making representation possible by the holder of any power.

SB 693 – Oregon Uniform Trust Code: Termination of Trusts by Agreement, Transactions between Bank Trustees and Banks

The Oregon Bankers Association proposed SB 693 to amend ORS 130.205, the section that permits modification or termination because of unanticipated circumstances or the inability to administer a trust effectively. The bill states that if the trustee and all qualified beneficiaries agree, the trustee can terminate a trust without court approval. The termination must be "appropriate by reason of circumstances not anticipated by the settlor," and termination cannot be inconsistent with a material purpose of the trust. The trustee cannot terminate the trust if the trustee is a beneficiary or if the trustee owes a duty of support to any beneficiary. If the trust is a charitable trust, the Attorney General must consent to termination unless the charitable interests are negligible.

ORS 130.200(3) indicates that a spendthrift clause is rebuttably presumed to be a material purpose, but that subsection refers directly to the modification provisions of ORS 130.200(1), (2). The revisions to ORS 130.205 are silent with respect to the effect of a spendthrift clause.

SB 693 also amends ORS 130.655, the duty of loyalty provision, to provide additional protection to trustees for actions taken on behalf of the trust. SB 693 adds two subsections to a provision that permits certain transactions between the trustee and the trust if the transactions are fair to the beneficiaries. The trustee can advance money to the trust to pay expenses, losses, or liabilities, and the trustee can obtain a loan to protect the trust or to pay expenses, losses, or liabilities. The lender may be operated by or affiliated with the trustee.

SB 693 amends ORS 130.725, the section that lists specific powers of trustees, to clarify that a trustee can borrow from a financial institution operated by or affiliated with the trustee.

HB 2361 – Principal and Income Act: Clarification of Partial Liquidation

ORS 129.300 provides that a trustee should allocate money received from an entity to income except for money received under several circumstances listed in the section as exceptions to this rule. One exception is that a trustee should allocate money received as a partial liquidation to principal. HB 2361 amends ORS 129.300(4)(b) to clarify that a partial liquidation occurs if the distribution or series of distributions is greater than 20 percent of the entity's gross assets. HB 2361 clarifies existing law.

HB 2362 – Declaration in Lieu of Verification

HB 2362 permits the use of a declaration in lieu of a verification for petitions, reports, and accounts in probate proceedings, and for proof of mailing and other delivery of notice. The probate code has long required verification of paperwork filed in probate, and verification has been understood to mean a statement on oath or affirmation before a notary public. In the 1970s the Oregon Rules of Civil Procedure eliminated the requirement that pleadings in civil actions be verified, and in 2005 Uniform Trial Court Rule 2.120 provided that affidavits required by the Uniform Trial Court Rules should be declarations rather than made under oath or affirmation. HB 2362 brings the probate rules into line with the rules already applicable in other areas of civil law.

In addition to the elimination of verification, HB 2362 amends ORS 116.083 to make a change in connection with short-form final accounts. A final account can be used to close an estate if "all creditors have been paid in full," but typically certain administrative expenses, including attorney fees, are not paid until the court approves the final account. HB 2362 indicates that a short-form final account is permissible even if administration expenses remain unpaid pending court approval.

HB 2507 – Disposition of Body

Sometimes a person charged with a murder is also the family member with priority to make decisions about the remains of the decedent. A person arrested for or charged with criminal homicide can, until HB 2507 takes effect, direct the disposition of the remains of the victim. HB 2507 prevents a person who may be responsible for causing the death from making decisions contrary to the wishes of other survivors. The bill raises difficult questions, because decisions about a body must be made long before anyone accused of the homicide can be brought to trial. Nonetheless, a person "arrested for or charged with criminal homicide by reason of the death of the decedent" cannot make decisions concerning the disposition of the remains.

HB 2905 – Charities: Uniform Prudent Management of Institutional Funds Act

UPMIFA replaces ORS 128.310-128.355, the Uniform Management of Institutional Funds Act (UMIFA), updating the rules provided in UMIFA. Both acts apply primarily to charities operating as nonprofit corporations and do not apply to funds managed for charities by corporate trustees. UPMIFA updates the rules on managing and investing charitable funds, provides guidance on spending from endowment funds, and sets forth modification rules applicable to restrictions imposed by donors on charitable funds.

UPMIFA incorporates the experience gained under UMIFA by providing even stronger guidance for investment management and enumerating a more exact set of rules for investing in a prudent manner. UPMIFA requires investment "in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances." It requires prudence in incurring investment costs, authorizing "only costs that are appropriate and reasonable." Factors to be considered in investing are expanded to include, for example, the effects of inflation. UPMIFA emphasizes that investment decisions must be made in relation to the overall resources of the institution and its charitable purposes. No investment decision may be made in isolation, but must be made in light of the fund's entire portfolio, and as a part of an investment strategy "having risk and return objectives reasonably suited to the fund and to the institution." A charitable institution must diversify assets as an affirmative obligation unless "special circumstances" dictate otherwise. Assets must be reviewed within a reasonable time after they come into the possession of the institution in order to conform them to the investment strategy and objectives of the fund. Investment experts, whether in-house or hired for the purpose, are held to a standard of care consistent with that expertise.

If the donative documents do not provide otherwise, spending from an endowment fund will be based on a charity's determination of the amount that is prudent, "for the uses, benefits, purposes and duration for which the endowment fund is established." In making its yearly expenditure decisions, the charity must consider the long-term nature of the fund, the need to maintain distributions over time, the purposes of the charity and the fund, general economic conditions, and the investment policy and experience of the charity. A rebuttable presumption of imprudence arises if a charity spends more than seven percent of the value of an endowment fund, computed on a three-year rolling average.

UPMIFA recognizes and protects donor intent more broadly than UMIFA did, in part by providing a more comprehensive treatment of the modification of restrictions on charitable funds. Sometimes a restriction imposed by a donor becomes impracticable or wasteful or may impair the management of a fund. The donor

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may consent to release the restriction, if the donor is still alive and able to do so, but if the donor is not available the charity can ask for court approval of a modification of the restriction. The trust law doctrines of cy pres (modifying a purpose restriction) and deviation (modifying a management restriction) probably already apply to charitable funds held by nonprofit corporations. UPMIFA makes this clear. Under UMIFA, the only option with respect to a restriction was release of the restriction. UPMIFA instead authorizes a modification that a court determines to be in accordance with the donor's probable intention. If the charity asks for court approval of a modification, the charity must notify the Attorney General who may participate in the proceeding.

UPMIFA adds a new provision that allows a charity to modify a restriction on a small (less than $25,000) and old (over 20 years old) fund without going to court. If a restriction has become impracticable or wasteful, the charity may notify the Attorney General, wait 60 days, and then, unless the Attorney General objects, modify the restriction in a manner consistent with the charitable purposes expressed in any documents that were part of the original gift.

Susan N. Gary
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Save the Date

Estate Planning Section CLE

ADMINISTERING THE BASIC ESTATE

November 2, 2007

Topics Covered:

- Alternatives to Probate
- Initiating Probate and Marshalling the Assets
- Special Administrative Problems
- Claims Against the Estate
- Tax Considerations
- Accounting and Distribution Issues
- Ethical Considerations

Questions, Comments or Suggestions About This Newsletter?

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