

Newsletter

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One if by Land, Two if by Sea

When Governor Ted Kulongoski recently signed House Bill (HB) 3201 into law, the inheritance tax landscape changed dramatically and favorably for many Oregon families who own certain real property, and even more so for those owning commercial fishing operations. Estates containing such qualifying property interests can now exclude from Oregon inheritance tax up to \$7,500,000 worth of those interests, provided the devolution of the property meets certain requirements.

Qualifying Property

Two categories of property interests can qualify for exclusion from the decedent's gross estate: (1) "[n]atural resource property" and (2) "[p]roperty used in commercial fishing operations and any property used in processing or marketing of the product of those commercial fishing operations." HB 3201 § 68(2), 74th Or Legislative Assembly, Reg Sess (2007) ("Section 68").

"Natural resource property" is limited to real property, which includes:

- the land itself;
- buildings, structures, improvements, machinery, equipment or fixtures erected on, above or affixed to the land;
- mines, minerals, quarries and trees in, under or on the land;
- water rights, water powers, and all other rights and privileges in any way appertaining to the land; and
- any estate, right, title or interest whatever in the land or real property, less than the fee simple. Section 68(1), (2); ORS 307.010(1)(b).

In addition to being limited to real property, natural resource property must be lawfully qualified at the decedent's death for designation as (1) farm use property, or as one or more farm use homesites related to that farm; or (2) forestland, or as one or more forestland homesites related to that forestland, not to exceed 5,000 acres.

"Farm use" means currently employing the land for the primary purpose of obtaining a profit by such things as:

- raising, harvesting and selling crops;
- feeding, breeding, managing or selling livestock, poultry, fur-bearing animals or honeybees or the produce thereof;
- dairying and selling dairy products;
- stabling or training horses, including, but not limited to, providing riding lessons, training clinics and schooling shows;
- propagating, cultivating, maintaining or harvesting aquatic species and bird and animal species;
- preparing, storing or disposing of, by marketing or otherwise, the products or by-products raised for human or animal use on farmland; and

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- using land for any other agricultural or horticultural use or animal husbandry or any combination thereof. Section 68(1)(a); ORS 308A.056.

Oregon law provides two definitions of “forestland” depending on whether the land is located in western or eastern Oregon. See ORS 321.257(2), 321.805(4). Generally, however, “forestland” means land that is being held or used for the predominant purpose of growing and harvesting trees of a marketable species and that has been specially designated as forestland, or is land of which the highest and best use is the growing and harvesting of trees. ORS 321.257(2), 321.805(4). A farm use or forestland homesite generally includes the dwelling and structures customarily associated with the dwelling, and the land under those improvements when such improvements are on or used in conjunction with a farm or forestland. ORS 308A.250, 308A.253. Careful examination of the relevant statutes is necessary to determine whether a particular property interest qualifies as farm use, forestland or a homesite.

The second category of qualified property includes property used in commercial fishing operations and any property used in processing or marketing of the product of those commercial fishing operations. Unlike natural resource property, this category of property interests is not limited to real property. Presumably, the value of boats, nets, fuel, bait, permits, cans, delivery trucks, billboards, etc., used in a commercial fishing, processing and marketing operation would all qualify for exclusion from the decedent’s estate for Oregon inheritance tax purposes.

Under its plain terms, Section 68 applies only to direct interests in property. Because natural resource property includes only real property, a decedent’s interest in an entity that owns natural resource property should not qualify for exclusion from the decedent’s gross estate. Similarly, an interest in an entity owning assets used in commercial fishing is not itself “property used in commercial fishing operations” and therefore should not qualify for exclusion.

Qualified Recipients

The value of a qualifying natural resource or commercial fishing property will be excluded from the decedent’s estate only if such interest is transferred to the decedent’s spouse, child, grandchild, sibling, niece or nephew. Section 68(3). Adopted relatives are considered the same as biologically related relatives. *Id.* Stepchildren are noticeably absent from the group of qualified transferees. However, a same-sex “domestic partner” should be a qualified transferee. See HB 2007 § 9(1), 74th Or Legislative Assembly, Reg Sess (2007) (giving registered domestic partners “[a]ny privilege, immunity, right or benefit granted by statute, administrative or court rule, policy, common law or any other law” enjoyed by spouses).

\$7,500,000 Cap

To the extent that it does not exceed \$7,500,000, the value of the qualified natural resource or commercial fishing property is completely excluded from the decedent’s gross taxable estate for Oregon inheritance tax purposes. Section 68(2). The \$7,500,000

cap is indexed for inflation starting January 1, 2009, with increases to be made in \$500 increments. Section 68(4). Although far from clear, it appears that an estate consisting of both natural resource property and commercial fishing property could exclude from the gross estate up to \$7,500,000 worth of each type of property. Section 68(2).

Recapture

HB 3201 imposes an additional tax if natural resource property is excluded from the value of a gross estate and that property is not used as natural resource property for at least five of eight calendar years following the decedent’s death or is disposed of by the transferee other than by disposition to another qualified family member. Section 68(5)(a). The amount of that additional tax can be no greater than the amount of additional taxes that would have been due had the property been included in the gross estate. Section 68(5)(b). Also, the additional tax must be at least equal to the amount of additional taxes that would have been due had the property been included in the gross estate, multiplied by a fraction, the numerator of which is five minus the number of years the property was used as a natural resource property and the denominator of which is five. *Id.* The additional tax is apportioned between the estate and the transferee of the property based on the amount of time that each possessed the property. *Id.* Query whether the decedent’s estate must remain open or get security from a distributee to ensure payment of the estate’s share of any recaptured tax should the property not be used as natural resource property during the eight years following the decedent’s death.

The not-more-than/not-less-than methodology of the additional tax calculation lacks precision. For example, assume that the decedent’s Oregon inheritance tax liability would have been \$500,000 greater had the natural resource property been included in the decedent’s gross estate. Assume further that the transferee used the property in a qualifying manner for three years after the decedent’s death and then sold the property to a third party who was not a qualified transferee. The additional tax imposed could not exceed \$500,000 and could not be less than \$200,000 ($\$500,000 \times ((5-3)/5)$). Apparently, the statute leaves it to the Department of Revenue to determine exactly how much additional tax within that range is to be imposed.

The “executor or the decedent” must notify the transferee of “the potential for tax consequences to the transferee if the transferee fails to” continue to use the property as natural resource property or sells the property to a third party. Section 68(5)(c). Although there is no requirement that such notification be in writing, the transferee’s written acknowledgement of the notice is required to be attached to the decedent’s inheritance tax return. *Id.*

It is unclear who is to provide notice to a transferee if there is no executor for the decedent’s estate. Such a situation could exist, for example, if the decedent owns a natural resource property with a sibling with rights of survivorship and the balance of the decedent’s property is owned by a revocable trust. Would a probate need to be opened for the sole purpose of designating a

personal representative to give the decedent's sibling notice of the potential consequences of disuse or sale of the natural resource property? Could the successor trustee of the decedent's revocable trust give such notice?

The recapture provisions do not apply to the value of assets excluded as property used in commercial fishing operations or used in the processing or marketing of the product of those commercial fishing operations. Thus, assume that the day before the decedent died, she purchased a commercial fishing boat for use in commercial fishing operations. Presumably, under Section 68, the boat's value would be excluded from her gross estate. If the decedent's will devised the boat to her daughter, the daughter could sell the boat immediately after distribution, and there would be no recapture of the forgone Oregon inheritance tax. Query whether the basis of the boat for Oregon income tax purposes would be the decedent's basis or the fair market value of the boat on the decedent's date of death.

Finally, the new law directs the Department of Revenue to

adopt rules "consistent with those adopted under section 2032A of the Internal Revenue Code * * * to administer [Section 68]." Section 68(6). However, the differences between Section 68 and IRC § 2032A are certain to make this a difficult task. For example, IRC § 2032A limits application of that section to estates in which the qualified real property constitutes at least 25 percent of the estate, and at least 50 percent of the adjusted gross estate comprises qualifying real and personal property. IRC § 2032A also requires that the decedent or a member of his or her family own and materially participate in the enterprise for five of the eight years preceding the decedent's death. Section 68 has no similar requirements and is substantively different in myriad other ways.

Effective Date: Section 68 applies to estates of decedents who die on or after January 1, 2007. HB 3201, § 69.

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Reporting Requirements of the Oregon Uniform Trust Code

Since the enactment of the Oregon Uniform Trust Code (the "Trust Code"), Oregon attorneys have been grappling with how to advise clients regarding compliance with and waiver of the reporting requirements of ORS 130.710. Oregon's approach creates a complex matrix of reporting requirements that are triggered at different times and are waivable under different circumstances. The reporting requirements do not currently apply to existing revocable trusts while the Settlor (or a Co-Settlor) is alive, but they do apply to all existing irrevocable trusts, with some limited exceptions.¹ Because Oregon's version of those requirements is complex, it is important to clarify the application of those requirements in various situations. This article is intended to help Settlers and Trustees better understand the notice rules and describe a Settlor's ability to waive or modify those rules.

Reporting Requirements Generally

The reporting requirements of ORS 130.710 impose a duty on the Trustee to keep the trust's qualified beneficiaries; reasonably informed about the administration of the trust and of the material facts necessary to protect their interests in the trust. The qualified beneficiaries of a trust are: the trust's current mandatory and discretionary beneficiaries; contingent beneficiaries who would be beneficiaries if all the interests of the current beneficiaries terminated; and contingent beneficiaries who would be beneficiaries if the trust terminated on the date in question.² To satisfy the duties of ORS 130.710, the Trustee must comply with the reporting requirements within a reasonable period of time, generally 60 days. The Trustee's duties under ORS 130.710 include:

- The duty to provide trustee reports annually and upon termination of the trust only to the current mandatory and discretionary trust beneficiaries (*i.e.*, the permissible distributees);
- The duty to provide trustee reports and information reasonably related to trust administration to a qualified beneficiary upon request;
- The duty to notify the qualified beneficiaries, once a trust has become irrevocable, of the existence of the trust, the identity of the Settlor(s), the identity and contact information for the Trustee(s), and the qualified beneficiaries' rights to request a copy of the trust instrument and a trustee report;
- The duty to provide a qualified beneficiary with a copy of the trust instrument upon request;
- The duty to provide advance notice to qualified beneficiaries about a change in the method or rate of trustee compensation, and
- The duty, when special circumstances require it, to provide advance notice to the qualified beneficiaries of information regarding a transaction with real estate, closely held business interests, and other trust assets that are difficult to value or replace.

Compliance with the Reporting Requirements

If the Settlor has not waived or modified any of the reporting requirements, the Trustee of an irrevocable trust should be advised

Continued next page

to comply with all of the reporting requirements. The Trustee is not under any obligation to provide notice, information or reports to a non-qualified beneficiary (e.g., a disinherited heir). Further, a Trustee does not have to provide notice, information, or reports to anyone other than a financially capable surviving spouse who is the sole permissible distributee of a trust in which the other qualified beneficiaries are descendants of the spouse. The Trustee has three general options for complying with the reporting requirements: (1) delivery directly to the appropriate qualified beneficiaries, (2) delivery to the appropriate legal representatives of the respective qualified beneficiaries (as determined by ORS 130.100 through 130.115), and (3) having each qualified beneficiary waive, in writing, his or her rights to receive any or all notices, information, and reports to which each is entitled. The waiver by a beneficiary, pursuant to ORS 130.710(4), is revocable by the beneficiary at any time. There are some instances when the Trustee must exercise discretion regarding the person to whom to deliver notice (e.g., if the person is an appropriate legal representative) and the content of the notice (e.g., the level of detail regarding a trust-owned business transaction). Each situation should be considered on a case-by-case basis, taking into consideration the various beneficiaries' relationships and the Trustee's other fiduciary obligations. The extent of the liability that the Trustee may face for failure to comply with the reporting requirements is not entirely clear.

Waiver of the Reporting Requirements by the Settlor

The analysis below assumes that a Settlor desires to restrict the amount or type of information passing to the beneficiaries as much as possible by executing as complete a waiver of the reporting requirements as is allowed by law. A Settlor may waive the vast majority of the reporting requirements for the duration of a trust and its subtrusts (i.e., the "non-mandatory" reporting requirements). However, there are several mandatory reporting requirements that may not be waived, except in limited circumstances. The mandatory reporting requirements, listed in ORS 130.020(2)(h) and (i), include:

- The duty to notify the qualified beneficiaries of an irrevocable trust of (1) the existence of the trust, (2) the identity and contact information for the Trustee(s), and (3) the right to request a trustee report; and
- The duty to provide to a qualified beneficiary upon request a trustee report or other information reasonably related to the trust administration.³

Assuming that the Settlor has waived the non-mandatory reporting requirements entirely, there are two instances when the mandatory reporting requirements described in ORS 130.020(3) may be restricted by the Settlor, but not waived. First, pursuant to ORS 130.020(3)(a), the Settlor may prohibit the Trustee from delivering the mandatory reporting requirements to the qualified beneficiaries, but only while the Settlor is living and financially capable, and, if the Settlor's spouse is a qualified beneficiary,

while the spouse is alive and financially capable. Second, pursuant to ORS 130.020(3)(b), a Settlor who desires more secrecy regarding trust information may avoid eventual disclosure of even the mandatory reporting requirements by appointing a third-party representative to receive notice, information, and reports on behalf of a qualified beneficiary. When appointing a third-party representative, although not specifically permitted by statute, it may be advisable to have the Settlor allow the nominated third-party representative to appoint his or her own successor to avoid conflict of interest or succession problems, and also to provide specific standing to the third-party representative. It is difficult to determine at this time the scope of the fiduciary duty the third-party representative may owe to the qualified beneficiary, but this may be clarified over time in Oregon or other uniform act states that permit notice to a third-party representative.

Drafting the Waiver of Reporting Requirements

A Settlor may waive the reporting requirements of ORS 130.710 by integrating the waivers into the trust provisions or by a separate writing delivered to the Trustee. The best way to waive the reporting requirements is to integrate the waivers into the provisions of the Settlor's revocable living trust or new irrevocable trust. In contrast, the best way to waive the reporting requirements for existing irrevocable trusts is to waive the reporting requirements in a separate writing, because integration of the waivers into the trust is not possible without modification of the trust terms either judicially or by agreement with the beneficiaries.

Revocable Living Trusts. The reporting requirements apply to revocable living trusts at the death of the Settlor. The Settlor can include provisions in the trust document that waive the non-mandatory reporting requirements for the duration of the trust and its subtrusts. Pursuant to ORS 130.020(3)(a), the Settlor may also include provisions, effective at the Settlor's death, that prohibit disclosure of the remaining mandatory reporting requirements for trusts of which the Settlor's spouse (if any) is a qualified beneficiary, for the duration of the spouse's financially capable lifetime. Finally, pursuant to ORS 130.020(3)(b), the Settlor may also include provisions that appoint a third-party representative to accept the remaining mandatory notice, information, and reports on behalf of the qualified beneficiaries once the Settlor is deceased and the Settlor's spouse (if any) is financially incapable or deceased.

New Irrevocable Trusts. The reporting requirements immediately apply to new irrevocable trusts. The Settlor can include provisions in the trust document that waive the non-mandatory reporting requirements for the duration of the trust and its subtrusts. Pursuant to ORS 130.020(3)(a), the Settlor may also include provisions that waive or modify the remaining mandatory reporting requirements for the trust while the Settlor is alive and financially capable, and once the Settlor is deceased, for the financially capable lifetime of the Settlor's spouse (if any) if he or she is a qualified beneficiary. Finally, pursuant

to ORS 130.020(3)(b), the Settlor may also include provisions that appoint a third-party representative to accept the remaining mandatory notice, information, and reports on behalf of the qualified beneficiaries once the Settlor and the Settlor's spouse (if any) are financially incapable or deceased.

Existing Irrevocable Trusts. Unlike a revocable living trust or a new irrevocable trust, the Settlor of an existing irrevocable trust cannot waive any of the non-mandatory reporting requirements for the duration of the trust without amending the trust entirely. However, pursuant to ORS 130.020(3)(a), the Settlor can create a separate writing to waive or modify all the reporting requirements, including the mandatory reporting requirements, for the period during which the Settlor is alive and financially capable, and, if the Settlor's spouse (if any) is a qualified beneficiary of the trust, during the period the spouse is alive and financially capable. Therefore, when the Settlor (or, potentially, the Settlor's spouse) is financially incapable or dies, the Trustee will have to meet all the reporting requirements for all qualified beneficiaries. Thereafter, the Settlor's only recourse for keeping trust information secret is, also in a separate writing, to appoint a third-party representative to accept notice, information, and reports on behalf of the qualified beneficiaries (subject to some issues discussed below).

Conflict Between the Types of Waivers

There is a significant disparity between integrating a waiver of the reporting requirements into the trust document and waiver by a separate writing. The most significant problem is that the waiver by a separate writing does not allow the Settlor to waive the non-mandatory reporting requirements for the duration of the trust. The disparity poses serious issues for the Settlor of an *existing* irrevocable trust who would like to keep administration information secret. In such a case, the Settlor has to rely on the appointment of the third-party representative to receive the information after the financial incapability or death of the Settlor (and, potentially, the Settlor's spouse). Aside from the issues of nebulous fiduciary obligations and standing, it is unclear what kind of information the appointed third-party representative is authorized to receive on behalf of the qualified beneficiaries.

Oddly, ORS 130.020(3)(b) specifically states that the third-party representative can be appointed to receive the reports and information listed in ORS 130.710(1), (2)(b), and (2)(c). The comments to the Trust Code state that ORS 130.710(1) is satisfied by delivering trustee reports and other reasonable trust administration information, and ORS 130.710(2)(b) and (c) specifically list their own requirements for delivery of information. Arguably, a strict interpretation of ORS 130.020(3)(b) may mean that a requested copy of the trust instrument and advance notice of a change in trustee compensation, as are listed in ORS 130.710(2)(a) and (d), may not be delivered to the third-party representative, but instead must be delivered to the qualified beneficiary after the financial incapability or death of the Settlor (and, potentially, the Settlor's spouse). In the case of a newly created trust, those two non-mandatory reporting requirements would be waivable for the duration of the trust, so long as such

waiver is integrated into the trust provisions. However, in the case of an existing irrevocable trust, for which waiver of the non-mandatory reporting requirements for the duration of the trust via a separate writing is not possible, it is unclear whether those two non-mandatory reporting requirements can be delivered to a third-party beneficiary at all.

Further, from a drafting perspective, to avoid conflicts between trusts that have incorporated waivers into the trust provisions and a Settlor's ability to waive the reporting requirements via a separate writing, it might be prudent to provide in revocable living trust forms that the Settlor can only modify the reporting requirements with an amendment to the revocable living trust. This would provide consistency within the trust documents, as well as avoid a situation in which a later separate writing somehow modifies the former trust provisions that had had the advantage of waiving the non-mandatory reporting requirements for the duration of the trust. For new irrevocable trusts, an argument could be made to include a provision in trust forms stating that the reporting requirements can be modified with a separate writing to avoid having to later modify (either judicially or by agreement) the irrevocable trust. However, this convenient waiver option must be balanced with the potential problem of inadvertent modification of the waiver of the non-mandatory reporting requirements for the duration of the trust.

The waiver of the reporting requirements as discussed herein is based on an "all or nothing" approach; of course, the Settlor may pick and choose which, if any, of the reporting requirements to keep or waive. The Settlor may also wish to customize a limited waiver of any or all reporting requirements by conditioning the distribution of information by the Trustee on a beneficiary attaining a certain age. The options available to a Settlor creating a new irrevocable trust or a new or updated revocable living trust are numerous. However, the options available to the Settlor of an existing irrevocable trust are somewhat limited and are far from certain without a modification of the irrevocable trust pursuant to ORS 130.200. The reporting requirements are complicated and require having a conversation with each Settlor regarding his or her personal philosophy for managing trust administration information, arguably a difficult and significant issue for many clients' families. Likewise, the complexity of the reporting requirements requires a careful analysis of a Trustee's obligations under the Trust Code and how to balance these obligations with all of the other fiduciary duties owed by the Trustee.

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Endnotes

- 1 For trusts that were irrevocable before January 1, 2006, and for which the Trustee has not changed, certain reporting requirements were automatically waived. However, practically, such waivers do not significantly change the obligations of a

Endnotes continued on page 8

Oregon Uniform Trust Code Reporting Requirements

10/2/07

Reporting Requirement	Generally Waivable?	Revocable Trusts while Settlor Competent	Revocable Trusts while Settlor Incompetent	Revocable Trusts after Death	Irrevocable Trusts
General duty to keep qualified beneficiaries "reasonably informed." ORS 130.710(1). Duty to other beneficiaries is optional.	Yes, but ORS 130.020(2)(i) requires reports to be furnished to requesting qualified beneficiaries. *	May be waived while either spouse is alive and competent. ORS 130.020(3)(a). # Waived while settlor is alive. ORS 130.510(1). ORS 130.710(9).	Waived while settlor is alive. ORS 130.510(1). ORS 130.710(9).	Cannot be waived. ORS 130.020(2)(i). *†	Cannot be waived, ORS 130.020(2)(i), except while either spouse is alive and competent. ORS 130.020(3)(a). *†#
Provide copy of trust to qualified beneficiaries, if requested. ORS 130.710(2)(a).	Yes.	May be waived while either spouse is alive and competent. ORS 130.020(3)(a). # Waived while settlor is alive. ORS 130.510(1). ORS 130.710(9).	Waived while settlor is alive. ORS 130.510(1). ORS 130.710(9).	May be waived. †	May be waived. †
Notify qualified beneficiaries of installation of a new trustee. ORS 130.710(2)(b).	No. ORS 130.020(2)(h). *	May be waived while either spouse is alive and competent. ORS 130.020(3)(a). # Waived while settlor is alive. ORS 130.510(1). ORS 130.710(9).	Waived while settlor is alive. ORS 130.510(1). ORS 130.710(9).	Cannot be waived. ORS 130.020(2)(h). *†	Cannot be waived, ORS 130.020(2)(h), except may be waived while either spouse is alive and competent. ORS 130.020(3)(a). *†#
Notify qualified beneficiaries when trust becomes irrevocable, or an irrevocable trust is created. ORS 130.710(2)(c).	No. ORS 130.020(2)(h). *	May be waived while either spouse is alive and competent. ORS 130.020(3)(a). # Waived while settlor is alive. ORS 130.510(1). ORS 130.710(9).	Waived while settlor is alive. ORS 130.510(1). ORS 130.710(9).	Cannot be waived. ORS 130.020(2)(h). *†	Cannot be waived, ORS 130.020(2)(h), except may be waived while either spouse is alive and competent. ORS 130.020(3)(a). *†#
Notify qualified beneficiaries of changes in fee structure. ORS 130.710(2)(d).	Yes.	May be waived while either spouse is alive and competent. ORS 130.020(3)(a). # Waived while settlor is alive. ORS 130.510(1). ORS 130.710(9).	Waived while settlor is alive. ORS 130.510(1). ORS 130.710(9).	May be waived. †	May be waived. †
Send annual reports and termination reports to permissible distributees, and qualified beneficiaries who request them. ORS 130.710(3).	Yes, but ORS 130.020(2)(i) requires reports to be furnished to requesting qualified beneficiaries.	May be waived while either spouse is alive and competent. ORS 130.020(3)(a). # Waived while settlor is alive. ORS 130.510(1). ORS 130.710(9).	Waived while settlor is alive. ORS 130.510(1). ORS 130.710(9).	May be waived, but ORS 130.020(2)(i) requires reports to be furnished to requesting qualified beneficiaries. †	May be waived, but ORS 130.020(2)(i) requires reports to be furnished to requesting qualified beneficiaries. †

* The settlor may appoint a representative to receive certain reports, in lieu of providing those reports directly to the beneficiary. In that event, the beneficiary will not be entitled to review the reports. ORS 130.020(3)(b). That appointment may be made in the trust instrument or in another instrument delivered to the trustee. ORS 130.020(3)(b). As a result, it appears that such designation may be made by a separate instrument after the trust has been executed, even if the trust is irrevocable. Presumably, that designated representative would have standing to exercise the rights of the beneficiary to enforce the trust; because the OUTC does not so state, the trust instrument should be drafted to give standing to such a representative. Apparently the reports described in ORS 130.020(3)(b) are the non-waivable bare minimum that the designated representative (or the beneficiary) must receive. See ORS 130.020(2)(h) and (i). Other (waivable) reports could also be sent to the representative, and not to the beneficiary, if the trust instrument so provides. Question: May the trustee serve as that designated representative?

† Reports need not be supplied to persons other than the settlor's spouse if:

- the settlor's spouse survives the settlor;
- the spouse is financially capable;
- the spouse is the only permissible distributee of the trust; and
- all of the other qualified beneficiaries of the trust are descendants of the spouse.

ORS 130.710(8)

The waiver of notice described in ORS 130.020(3) can be made by the settlor in the trust instrument or in another writing delivered to the trustee. ORS 130.020(3)(b). As a result, it appears that such waiver may be made by a separate instrument after the trust has been executed, even if the trust is irrevocable. The ability to waive while the spouse is alive and competent requires that the spouse be a qualified beneficiary.

References are to Oregon Revised Statutes (ORS). References to sections of the Uniform Trust Code can be found in SB 275, 2005 Oregon Laws Ch. 348, and ORS Chapter 130.

Except as noted, these reporting requirements are affirmative duties, as opposed to duties to be exercised only in response to requests from beneficiaries. Some of these reporting requirements are to be performed within "a reasonable time" after the occurrence of certain events. The official comments to ORS 130.710 suggest that 60 days is a reasonable time.

A qualified beneficiary may waive the right to receive reports otherwise required to be provided, and that waiver may subsequently be withdrawn. ORS 130.710(4).

Beneficiaries include contingent beneficiaries. ORS 130.010(3)(a).

Permissible distributees are persons who are eligible to receive distributions, whether mandatory or discretionary. ORS 130.010(10).

Qualified beneficiaries generally include permissible distributees and those beneficiaries next in line. ORS 130.010(14).

Disinherited persons (including disinherited heirs) have no right to receive notices, reports, or copies of the trust document.

A trustee may charge a beneficiary a reasonable fee for providing reports under ORS 130.710. ORS 130.710(5).

This summary was prepared by Philip Jones of Duffy Kekel LLP. It is a summary only; please consult the text of the law for precise wording regarding the application of the law to particular situations.

Life Insurance Payable to a Trust

Life insurance on a debtor's life that is not payable to the purchaser's estate cannot be reached by creditors, even in bankruptcy. ORS 743.046(1), (3). This is also true for a policy of group life insurance payable to a person or persons other than the insured individual's estate. ORS 743.047(1). One rationale is that the deceased debtor's dependents should have preferred status over creditors. *Milwaukie Construction Co. v. Glens Falls Insurance Co.*, 389 F.2d 364 (9th Cir. 1968).

The insured owner of the policy may change the beneficiary when that right is expressly reserved in the policy. ORS 743.046(5). However, when the insurance proceeds are received by the beneficiary, the proceeds may not be exempt from the beneficiary's creditors. *In re McAlister*, 56 BR 164 (Bankr. D. Or. 1985). Further, when the owner of the life insurance policy assigns an interest in the policy during his or her life to creditors, they may have priority over the named beneficiaries. *See, e.g., Duty v. First State Bank of Oregon*, 71 Or. App. 611, 617, 693 P.2d 1308, *rev denied*, 298 Or. 822 (1985).

Under prior law, as noted above, assets of a settlor's revocable trust were available at his or her death to the settlor's creditors. It was therefore unclear whether payment of life insurance proceeds

to the deceased owner's revocable trust exposed the proceeds to the owner's creditors. Creditors could argue that the proceeds, once in the trust, deserved no special treatment. Trust beneficiaries could respond that the proceeds were protected by ORS 743.046 and 743.047.

The Oregon Uniform Trust Code appears to resolve this issue in favor of the beneficiaries. ORS 130.150(2)(c) states that "[d]eath benefits received by the trustee are not subject to the debts of the designator * * * to any greater extent than if the death benefits were payable to the beneficiaries named in the trust and not to the estate of the designator." "Death benefits" include the proceeds of life insurance policies. ORS 130.150(3)(a). The "designator" is the person entitled to designate the beneficiary. ORS 130.150(3)(b). The statute includes trusts created by the owner's declaration, as well as testamentary trusts and trusts created by transfers of property to another person as trustee. ORS 130.150(1).

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September 2007 Oregon Inheritance Tax Advisory From Oregon Department of Revenue

Transfers of Property within Three Years of Death

In our 2006 Oregon Inheritance Tax Return instructions (Rev. 8-06) for gross estate (page 1, left column), we stated the gross estate includes "... all transfers of property made by the decedent within the three-year period ending on the date of death."

We based our position on Oregon Revised Statute (ORS) 118.160(2) and Oregon Administrative Rule (OAR) 150-118.005(2)(f). In summary OAR 150-118.005(2)(f) provides that the gross taxable estate includes... gifts made within the three-year period ending on the date of death.

We revisited our position on the three-year gifts issue and determined that the rule does not reflect the provisions of ORS 118.007, which connects the Oregon determination of the gross estate to the Internal Revenue Code as it existed on December 31, 2000. Instead, the rule reflects a connection to prior federal law, which did require inclusion of gifts within three years of death in an estate for federal tax purposes. We are removing this requirement from our instructions, eliminating inclusion of the three-year gifts in the gross estate. We will revise OAR 150-118.005 and update you on our progress.

If you filed a 2006 Form IT-1, Oregon Inheritance Tax Return, and included gifts made within the three-year period ending on the date of death, you may amend the 2006 inheritance tax return. Attach a statement explaining your reason for amending.

Questions: Peggy Salas, Inheritance Tax Auditor or Joanna Mitchell, Estate Tax Auditor;

Email to: estate.help.dor@state.or.us.

Questions, Comments or Suggestions About This Newsletter?

Contact: Susan N. Gary
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Talking Books

Free Library Service Loans Audio Books to Those with Visual Impairment

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*Marcia Martin
Talking Book and Braille Services
Portland, Oregon*

Estate Planning Section CLE

ADMINISTERING THE BASIC ESTATE

Friday, November 2, 2007

Oregon Convention Center

Portland, Oregon

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

6.5 General or Practical Skills Credits and 1 Ethics Credit

Sponsored by the Oregon State Bar and the Estate Planning and Administration Section.

Annual Meeting for the Estate Planning and Administration Section will be held during the lunch break.

Reporting Requirements

Continued from page 5

- Trustee, and they are not addressed herein.
- The qualified beneficiaries also include the persons named in ORS 130.040: a charitable organization expressly designated to receive distributions, a person appointed to enforce a pet trust or a trust for a non-charitable purpose, and the Oregon Attorney General for certain charitable trusts.
 - Oddly, pursuant to ORS 130.020(2)(h), the Trustee must inform the beneficiary of the right to request a trustee report, but not of the right to request reasonable general trust administration information. However, pursuant to ORS 130.020(2)(i), the Trustee must provide the reasonable general administration information if it is, in fact, requested.

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Oregon Estate Planning and
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