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Newsletter

Planning for the Elective Share

In HB 3077, the 2009 legislature passed a major revision to the elective share law in Oregon, currently at ORS 114.105 to 114.165. Although Section 23 of HB 3077 delays the effective date until deaths occurring after January 1, 2011, planning to avoid surprises created by the new law should begin now.

Under current Oregon law, defeating a surviving spouse's elective share right to a 25% interest in the decedent spouse's net probate estate has been as simple as preventing assets from passing through probate. With the proliferation of retirement plan assets and the trend toward probate avoidance in general, the current elective share statutes have become increasingly obsolete as a way to protect the rights of a surviving spouse.

As a result, HB 3077 uses an augmented estate approach that subjects to the elective share essentially all assets in which the decedent spouse and the surviving spouse have an interest at the death of the decedent spouse. Inclusion of the surviving spouse's estate in the augmented estate will prevent a wealthy surviving spouse from using the election against the estate of a less wealthy decedent spouse.

The augmented estate is defined in Section 8(1) of HB 3077 as the decedent's probate estate, the decedent's nonprobate estate, the surviving spouse's estate, and the decedent's probate and nonprobate transfers to the surviving spouse. The nonprobate estate includes revocable trusts, property held in survivorship tenancy, property subject to a pay-on-death or transfer-on-death registration, and property for which the decedent could designate a beneficiary. The nonprobate estate does not include life insurance or trusts with retained interests, except that proceeds from these assets received by the surviving spouse by reason of the decedent's death are included. The probate and nonprobate transfers to the surviving spouse are excluded from the definition of the decedent's probate and nonprobate estate to prevent double counting of those assets. *See* HB 3077, §§ 10, 11. The augmented estate is calculated net of enforceable claims and encumbrances against the property. HB 3077, § 8(2).

The surviving spouse will be able to make an election if the effect of the decedent spouse's estate plan, including beneficiary designations, trust provisions, and property passing by survivorship, is that the surviving spouse ends up with less than a stated percentage of the augmented estate. The percentage starts at 5% of the augmented estate for a marriage of less than two years and ranges up to 33% for a marriage of 15 years or longer. *See* HB 3077, § 3(2).

As with the current elective share statutes, Section 6 of HB 3077 allows spouses to relinquish their elective share rights by an agreement or waiver, entered into before or after the marriage, and signed by at least the surviving spouse. Practitioners will need to be careful to determine if a waiver of elective share rights requires that the spouses receive independent counsel.

Section 2 of HB 3077 makes clear that the elective share must be claimed while the surviving spouse is still alive, but allows the claim to be continued after the surviving spouse's death by his or her personal representative. Only the surviving spouse or an agent, conservator, or guardian of the surviving spouse may assert the elective share. HB 3077, § 7.

Note that although a conservator may assert a claim on behalf of a surviving spouse, the right to make the claim cannot be asserted by the spouse's heirs if the surviving spouse or his or her representative fails to make the claim during the surviving spouse's life. In no

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event may the claim be asserted more than nine months after the death of the first spouse to die. HB 3077, § 4(1).

For planning purposes, HB 3077 recognizes that QTIP and credit shelter trusts naming the surviving spouse as beneficiary will continue to be necessary elements in many estate plans as long as there is a federal estate tax and Oregon inheritance tax. Section 13(2)(b) of HB 3077 provides that such trusts will be valued, for purposes of determining the interest passing to the surviving spouse, at 100% of the principal value if there is a power to invade principal for the spouse's benefit, even if the power is limited to an ascertainable standard. A trust that provides income to the surviving spouse, but that does not allow invasion of principal, will be valued at 50% of the principal value of the trust. HB 3077, § 13(2)(c). Other assets are generally to be valued for elective share purposes at the same value as applies for federal estate tax purposes, under Section 8(4) of HB 3077.

Particularly for clients in second marriages, planning to avoid elective share surprises is likely to be a significant issue. In general, because of the favorable valuation given QTIP qualifying trusts, obtaining a good result for estate and inheritance tax purposes and a good result for elective share purposes should not be unduly burdensome.

However, for clients with large IRAs there is a trap in HB 3077. If the IRA is not left to the surviving spouse, and if the spouse makes the election, the priority rules for recovery of the surviving spouse's elective share, under Section 16 of HB 3077, will require that the named beneficiary of the IRA relinquish some portion of the IRA to the surviving spouse. There is no offset for the income taxes that the named IRA beneficiary will have to pay on withdrawals from a conventional IRA. Therefore, planners will want to be careful in advising clients on beneficiaries for IRAs.

Bequests to charity are also at risk from an assertion of a spouse's elective share rights. This may lead to problems with testamentary charitable trusts, which must meet the definition of a charitable trust from the inception. Treas Reg § 1.664-1(4). A post-inception payment to a surviving spouse in satisfaction of elective share rights would prevent the trust from qualifying for a charitable deduction.

Both the IRA and charitable issues could presumably be resolved by language in a governing document that overrides the proportional contribution requirement for payment of the elective share contained in Section 16 of HB 3077. However, Section 16 contains no provision allowing the decedent spouse to specify an abatement of bequests to satisfy the elective share. *See also* HB 3077, § 4(2). Formula bequests to nonspouse devisees may solve this problem.

Planners may be tempted to believe that the concurrence of both spouses in a proposed plan will mean that the surviving spouse will not make an election against that plan on the death of the decedent spouse. However, if the surviving spouse is incapacitated at the death of the decedent spouse, then the conservator for the surviving spouse will likely have a duty to assert the surviving spouse's elective share rights.

Planners will need to study the new law and consider whether proposed or existing plans need adjustment to avoid an unexpected assertion of elective share rights. Formula clauses may be of assistance to prevent unexpected problems for bequests outside the marriage. Planners will also need to consider whether spouses need independent counsel if it appears, during planning, that an elective share issue must be addressed.

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Gotcha Legislation – SB 880

SB 880 requires the Department of Revenue ("DOR") to create an amnesty program for Oregon taxpayers. The DOR has done so and has begun advertising the program on television and otherwise, as required by SB 880. If a taxpayer participates in the amnesty program, the DOR will waive 50% of the interest on unpaid taxes and all penalties, including criminal penalties that would otherwise be imposed on the taxpayer.

The amnesty program applies to tax years for which the DOR could issue a notice of deficiency. A taxpayer is eligible for the program if the taxpayer was required to file an Oregon tax return or pay taxes for a tax year that began before January 1, 2008. Section 2 of SB 880 lists the types of taxes covered, and inheritance tax returns are on the list. The taxpayer cannot apply for the amnesty program if the DOR has issued a notice of deficiency to the taxpayer or assessed a tax for a year for which the taxpayer could otherwise apply. Although the statutory language is not clear, FAQs posted on the DOR's website say that "each year stands alone for qualification." www.oregontaxamnesty.com/generalinfo.html.

To take advantage of the amnesty program, the taxpayer must file an amnesty application during the amnesty period -- October 1 through November 19, 2009. Within 60 days after the end of the period, the taxpayer must file completed tax returns for all years beginning prior to January 1, 2008 for which the taxpayer did not file a return and file an amended return for each year for which the taxpayer underreported or underpaid the tax liability. In addition, the taxpayer must pay all the tax due plus 50% of the interest due. SB 880, § 1(b), (c).

The taxpayer may request an installment payment plan and the DOR may enter into an installment payment agreement if the DOR

"concludes that the agreement will facilitate efficient collection of the outstanding tax liability." SB 880, § 2(5)(c). Payments made under an installment payment agreement must be completed before May 31, 2011. If the DOR enters into an installment payment agreement and the taxpayer fails to comply with the terms of the agreement (presumably by failing to make the payments as agreed), the taxpayer will owe all the penalties that had been waived under the amnesty program and will owe interest on any tax remaining unpaid. The reinstatement of the penalties and interest will not apply if the DOR determines that the failure to pay on time was due to "reasonable causes." SB 880, § (3)(2)(b).

So what are the catches? Section 4 of SB 880 says that if a taxpayer could have applied for the amnesty program but did not, then an additional penalty of 25% of the total amount of tax due will apply in addition to other penalties. If after November 19, 2009 the DOR issues a notice of deficiency related to an unreported or underreported tax liability for a year for which an amnesty application was filed, a penalty of 25% of the tax due will be added to other penalties.

Imagine a taxpayer who files an inheritance tax return that falls within the period covered by the amnesty program. The taxpayer has prepared the return carefully and has reported every asset. At the time of the amnesty period the taxpayer is unaware of any problems with the return. Later, the taxpayer and the DOR disagree about the valuation of an asset in the estate. The DOR wins on the change in valuation, and the taxpayer owes more tax. Not only does the taxpayer owe interest and perhaps a penalty, but also, under SB 880, § 4, the taxpayer owes an additional 25% of the additional tax. It seems unfair to charge the taxpayer a penalty for not filing an amnesty application when the taxpayer was not aware that a tax was under reported.

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Calculating Bequests Under Formula Clauses

Assume you are administering an estate of $5,000,000. The will contains standard formula language designed to divide the estate between a marital bequest and a credit shelter bequest. The unified credit (or applicable exclusion amount) is now $3,500,000. So the credit shelter bequest will receive $3,500,000 and the marital bequest will receive $1,500,000.

Of course, it is not that simple. The estate will have some administration expenses, including attorney fees, accounting fees, and fiduciary fees. Assume the expenses add up to $50,000. How much will the credit shelter bequest be? How much will the marital bequest be? The answer is: it depends.

Surprisingly, the answer usually does *not* depend on the type of formula clause employed in the will. The most commonly used formulae call for either (a) the minimum pecuniary amount to the marital bequest necessary to reduce the estate tax to zero, followed by a residuary credit shelter bequest, (b) the maximum pecuniary amount to the credit shelter bequest that can pass free of estate taxes, followed by a residuary marital bequest, or (c) fractional shares to both the marital bequest and the credit shelter bequest, with either the smallest possible fractional share to the marital bequest or the largest possible fractional share to the credit shelter bequest, all with the goal of reducing the estate tax to zero. All three of these formulae will reach the same result for purposes of this story (although the income tax results may vary, and the manner in which appreciation is dealt with may vary, but those are different stories). In each case, the marital share is minimized and the credit shelter share is maximized. The answer lies elsewhere.

Even more surprisingly, the answer usually does *not* depend on which share the will directs should bear the burden of the administration expenses. Instead, the answer usually depends on whether the administration expenses are deducted on the estate tax return or on the fiduciary income tax return, a choice every executor is permitted to make by exercising the election permitted by IRC § 642(g). Here is why the answer depends on the election:

Assume the administration expenses are deducted on the estate tax return, so the estate is entitled to a $50,000 administration expense deduction. If the formula calls for the smallest possible marital deduction required to reduce the estate tax to zero, the marital bequest will receive $1,450,000, and $50,000 in expenses will be deducted, thus utilizing deductions to protect $1,500,000 from estate tax. The remaining $3,500,000 will be protected by the unified credit and will pass tax-free to the credit shelter bequest. The same result will take place if the will calls for a maximum credit shelter bequest. Either way, the minimum (or maximum) aspect of the formula will be honored to the greatest extent possible, as required by the will.

On the other hand, if the administration expenses are deducted on the fiduciary income tax return, then no expense deduction will be allowed on the estate tax return. The first $3,500,000 will be protected by the unified credit, but the other $1,500,000 still needs to be protected by some kind of a deduction, and the only available deduction is the marital deduction because the administration expense deduction is not available. In order to take a $1,500,000 marital deduction, the surviving spouse (or a QTIP trust) must actually receive no less than $1,500,000, because the marital deduction is limited to the net value passing to the spouse. Treas Reg § 20.2056(b)-4(a). Under this scenario, the minimum marital bequest needed to reduce the estate tax to zero will be $1,500,000, and the maximum amount that can pass to the credit shelter bequest free of taxes will be $3,450,000

because the $50,000 spent on administration expenses will need to be sheltered somewhere, and the only place left is the unified credit. To be precise, if the will directs the expenses to be paid from the credit shelter share, the credit shelter share will receive $3,500,000, but the credit shelter share will then pay the $50,000 in administration expenses, for a net credit shelter share of $3,450,000. If the will directs the expenses to be paid from the marital share, the credit shelter share will still receive $3,450,000, and the marital share will receive $1,550,000, from which it will pay $50,000 in expenses, for a net marital deduction of $1,500,000. Either way, the net results are the same.

In both cases, the formula clause will require those results, regardless of whether the will directs that the administration expense must be paid from the credit shelter share or from the marital share, because the formulae automatically adjust for the presence (or absence) of an estate tax deduction for the administration expenses. In both cases, the will requires that the marital share be minimized. If the administration expense estate tax deduction is elected, less marital deduction is needed to reduce the estate tax to zero. If the income tax deduction is elected, more marital deduction is needed to reduce the estate tax to zero.

This result will take place regardless of whether the will requires a minimum marital share or a maximum credit shelter share. With a minimum pecuniary marital formula, if the administration expense income tax deduction is elected, more marital deduction is needed to reduce the estate tax to zero. The formula adjusts automatically. The converse is also true. With a maximum pecuniary credit shelter formula, if the administration expense income tax deduction is elected, less unified credit is available to reduce the estate tax to zero, and more marital deduction will be required.

If the will calls for a maximum pecuniary credit shelter bequest, and the administration expense estate tax deduction is elected, a larger credit shelter bequest is permitted without triggering estate tax and less marital deduction is required. If the will calls for a minimum marital formula, and the estate tax deduction is elected, then the credit shelter share will be increased and the marital share will be reduced. The formula adjusts automatically. The same automatic adjustment takes place with a fractional formula, because fractional formulae also include the minimum/maximum language.

The key is that this adjustment takes place regardless of any direction in the will regarding which share should bear the burden of the administration expenses. This raises the following issue: If the will directs the administration expenses to be paid from the credit shelter share, does the surviving spouse have a right to complain if the expenses are deducted on the estate tax return, thus reducing the marital share? The answer is no. The personal representative has a duty to minimize the estate tax. That duty extends not only to the decedent's estate taxes, but also to the estate taxes that will be paid when the surviving spouse dies. That is also why the marital share is always described as the minimum necessary, because the decedent wished to minimize the marital bequest, which will be taxable when the surviving spouse dies. And that is why the credit shelter share is always described as the maximum permissible, because the decedent wished to maximize the credit shelter funds that will be sheltered from tax both on the first death and on the second death.

More importantly, the formulae require that result. First, most formulae expressly require that the fiduciary take into account *all* available deductions and credits when calculating the bequests required by the formulae. Second, although the formulae may not require the election be made to deduct the expenses on the estate tax return, the result flowing from that election is consistent with the minimum marital and maximum credit shelter formulae. And it is also consistent with the use of a fractional formula, because a fractional formula also includes minimum/maximum language. The testator has expressed a desire to minimize the marital share and to maximize the use of all deductions and credits. His (or her) express desires are being carried out.

Does that result conflict with the express direction in the will that expenses should be paid from the credit shelter share? A common axiom of construction (of a statute or a will) is that the interpretation should be adopted that results in every word being given meaning, and carried out, if at all possible. In the example above, if the expenses are deducted on the estate tax return, the minimum marital bequest is $1,450,000. And the maximum credit shelter bequest is (believe it or not) $3,550,000. From that credit shelter bequest, the administration expenses will be paid. The $50,000 will be protected from estate tax by the administration expense deduction, and the $3,500,000 will be protected from tax by the unified credit. And the credit shelter beneficiaries will receive a net of $3,500,000. The credit shelter share has been maximized, the marital share has been minimized, the credit shelter share has paid the expenses, and all available deductions and credits have been taken into account. Every sentence of the will has been given meaning, and every sentence has been carried out.

Although it may seem odd that the credit shelter bequest will be $3,550,000, thus exceeding the unified credit by $50,000, the credit shelter bequest is not limited to the unified credit amount. For shorthand, we may call it the credit shelter bequest or the credit shelter share, but it is calculated by taking into account *all* available deductions and credits, not just the unified credit, in order to maximize the credit shelter share and minimize the marital share.

It may be possible to draft a formula clause that prevents this automatic adjustment from happening, but this automatic adjustment will take place with most formulae in common usage that call for a minimum marital share or a maximum credit shelter share, taking into account all available deductions and credits. For a further discussion of this impact, see Jeffrey N. Pennell, *Estate Tax Marital Deduction*, 843-2d Estates, Gifts, & Trusts Portfolio (BNA), Part IV.G (2007).

We should also note that IRS regulations divide administration

expenses into two types. These are the infamous *Hubert* regulations that were developed after the Supreme Court decided *Commissioner v. Estate of Hubert*, 520 US 93 (1997). The holding in *Hubert* is now of mere academic interest, because the regulations take an approach that is entirely different from the Supreme Court opinion. The regulations divide administration expenses into management expenses and transmission expenses. Management expenses are incurred to maintain estate assets; they include investment advisory fees. Transmission expenses include the costs of marshaling estate assets, paying debts and taxes, and distributing the assets; they include fiduciary fees and attorney fees. Treas Reg § 20.2056(b)-4(d)(1). Management expenses paid from the marital share will reduce the marital deduction only if those expenses are deducted on the estate tax return. Transmission expenses paid from the marital share will always reduce the marital deduction. Treas Reg § 20.2056(b)-4(d)(2)-(3).

The result described above does not apply in all cases, but it does apply in most. Here's an example of where the formulae do not produce this result. Assume a large probate estate, but the unified credit has been completely consumed by lifetime gifts or nonprobate transfers at death. In that situation, no funds will be passing to the credit shelter share, so the credit shelter share will not be available to pay any of the administration expenses. The expenses will be paid from the estate, and the entire balance of the estate will pass to the marital share. In that situation, the election to deduct the administration expenses on the fiduciary income tax return will trigger an estate tax, because the funds used to pay the expenses will not be protected on the estate tax return by the marital deduction, the expense deduction, or the unified credit. In order to avoid triggering estate tax in that situation, the administration expenses will need to be deducted on the estate tax return, thus reducing the tax to zero.

The impact of the administration expense election has recently become more important due to the Supreme Court decision in *Knight v. Commissioner*, 552 US 181 (2008), and Prop Treas Reg § 1.67-4, which will restrict the ability to deduct some administration expenses on fiduciary income tax returns, particularly management expenses. *See* Philip N. Jones, *Miscellaneous Itemized Deductions of Trusts and Estates on Form 1041*, Or Estate Plan & Admin Sec Newsl, Apr. 2008, at 11. As a result, fiduciaries will be deducting an increased amount of expenses on the estate tax return, thus reducing the marital share.

It gets even better (or worse). The automatic adjustments to the formulae occur not just as a result of administration expenses, but also because of funeral expenses, expenses of a last illness, debts, and creditor claims. Although none of those items are deductible on the fiduciary income tax return, they are deductible on the estate tax return. And they all reduce the marital share. Because of the formula clauses, those items do not reduce the credit shelter share, *even if the will directs payment of those items from the credit shelter share*. Or more precisely, the formulae cause the marital share to be reduced and the credit shelter share to be increased, and then those costs are paid out of the credit shelter share, thus reducing the credit shelter share to the precise maximum amount that can pass tax-free, just as the will requires. (The same result occurs if the estate simply becomes larger or smaller: the marital share will shrink or expand, while the credit shelter share will remain the same.)

But wait, there's more. Effective in 2005, the credit for state death taxes was fully phased out, and state death taxes are now a deduction on the estate tax return, with no election to deduct the state taxes on the fiduciary income tax returns. So the Oregon inheritance tax (but not the federal estate tax) will now reduce the marital share and increase the credit shelter share, regardless of which share the will directs should bear the burden of the state inheritance taxes, and regardless of whether the will directs that the state taxes be apportioned.

The formula requires it.

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Determining Oregon Residency for State Inheritance Tax Purposes

Oregon tax professionals are sometimes asked for advice on what a client must do to change residency to a neighboring state, or are faced with the task of determining the residency of a decedent for inheritance tax purposes. This may occur more frequently as Oregon's exemption remains at $1 million and our neighboring states have either increased their exemptions or have no inheritance tax at all. Washington has a $2 million exemption, and California, Idaho, and Nevada effectively have no inheritance tax. Washington begins to look particularly attractive to retirees in the Portland area because it has a higher estate tax exemption and no income tax.

The determination of an individual's residency for tax purposes is made difficult when the taxpayer has contacts in one or more other states, especially when in the client's mind he or she is (or is not) an Oregon resident, but the objective facts seem to speak otherwise; for example, when the client buys a condo in Vancouver but still owns the family home in Lake Oswego. Compounding this often difficult factual determination is the confusing legal concept of "domicile," which must be applied in determining residency for tax purposes. This article focuses on this key concept of domicile, which must be fully understood by practitioners faced with the residency question.

For Oregon inheritance tax purposes, ORS 118.005(9) defines "resident decedent" as an individual who is domiciled in Oregon

at the time of death. ORS 118.005(6) defines a "nonresident decedent" as an individual who is domiciled outside of Oregon at the time of death. The instructions for the Oregon inheritance tax return provide that "domicile is the place where the decedent had his fixed, permanent, principal home. The decedent had only one domicile, though he may have had multiple residences."

Under Oregon statutes, the question is whether the taxpayer is "domiciled" in Oregon, and while the inheritance tax statutes and rules do not define "domicile," the operative terms are defined for income tax purposes in the Oregon Administrative Rules. OAR 150-316.027(1)(a) provides the following definition of the term "domicile":

> "Domicile" means the place an individual considers to be the individual's true, fixed, permanent home. Domicile is the place a person intends to return to after an absence. A person can only have one domicile at a given time. It continues as the domicile until the person demonstrates an intent to abandon it, to acquire a new domicile, and actually resides in the new domicile. Factors that contribute to determining domicile include family, business activities and social connections.

The element of intent in the determination of domicile makes the determination difficult. Primarily, intent is inferred by examining the overt acts of the individual as true indicators of his or her state of mind. Self-serving statements by the taxpayer are suspect. *Hudspeth v. Dep't of Revenue*, 4 OTR 296, 298 (1971). Similar to the need to look at the income tax OARs to find statutory definitions related to residency, it is necessary to look at Oregon income tax case law to determine how a taxpayer's particular situation would be examined.

Hudspeth is the leading tax case in this area and draws heavily from earlier Oregon Supreme Court non-tax cases. Hudspeth was a Prineville businessman in the cattle and lumber business. He also owned a mill in Pagosa Springs, Colorado. He commuted between Prineville and Colorado by private airplane for about two years, but during this time it became clear that the mill could not be successful unless he managed it full time. In June 1965, Hudspeth and his wife and children moved to Pagosa Springs. The family returned to Prineville in June 1966.

It was the view of the Department of Revenue ("DOR") that a lifelong resident of Oregon had not abandoned his Oregon domicile for a relatively short visit to Colorado to strengthen an ailing business. The evidence in favor of the DOR's position looked good. The family did not sell its home in Prineville and resided in a mobile home in Pagosa Springs. Hudspeth continued his Oregon Elks Lodge and golf club memberships, maintained a bank account in Prineville, and remained an Oregon registered voter. At trial, however, Hudspeth and his wife were credible witnesses and had an explanation for each of these factors, which on their face looked bad. He had tried to sell his Prineville home, but found no buyers prior to his eventual return. He resided in a trailer in Pagosa Springs because acceptable housing was not available, and he had made plans for building a permanent home there. His Elks Lodge and golf club memberships were paid as a matter of routine by the Prineville comptroller of the family operations. The Prineville bank account was used as a matter of convenience by the plaintiffs and the family comptroller for several local transactions, but Hudspeth also had bank accounts in Colorado. His Oregon voting registration had not had time to expire before his return, and he did not vote by absentee ballot during his absence. About the time the Colorado business appeared to be operating smoothly, it became apparent that the business in Prineville needed attention, which required Hudspeth to return to Oregon. The court placed no importance on the move back to Prineville, instead finding that intent must be determined at each step along the way, without the benefit of hindsight. The *Hudspeth* case highlights many of the issues that arise in the determination of domicile. No one fact was controlling. The case is somewhat unusual in that in the end, the court relied primarily on the testimony of the taxpayers.

In another Tax Court case, the taxpayer and her family were Oregon residents. In February 1980, the taxpayer's husband moved to Kennewick, Washington for employment, where he and their teenage son lived in a rented one-bedroom apartment. The taxpayer continued living in the Oregon home and was employed in Oregon. She originally filed as an Oregon resident, claiming a tax refund allowed to Oregon residents, but later amended her returns, claiming Washington residency. She testified that she remained in Oregon solely to prepare the home for sale by completing the landscaping. However, the home was never placed on the market. She often spent weekends during this time in Kennewick, and spent her vacation time there. In this case, the court found that the change of domicile was contingent on selling her Oregon home. The court ruled that although the taxpayer's intention may have been to acquire a domicile in Washington in the future, a present intention to make a new location a permanent home at some future time or upon the happening of some contingent event does not change domicile. *Harlan v. Dep't of Revenue*, 10 OTR 497 (1987).

In *dela Rosa v. Department of Revenue*, 313 Or 284 (1992), the Oregon Supreme Court reviewed a case in which the husband moved between different jobs in different states while his wife and family resided in Oregon. This case was probably a fairly easy case for the court to decide. The family owned a house in Oregon before, during, and after 1982, the tax year in question. In contrast, the husband used rented housing, for himself only, on a month-to-month basis when he was working outside of Oregon. The husband repeatedly looked for work in Oregon, and when he was laid off in March 1993, returned to live in Oregon and collected unemployment benefits here. He had an Oregon driver's license during 1982, had prepared and signed an affidavit in 1982 for federal tax purposes stating that his permanent residence was in Portland, and filed a joint Oregon personal income tax return in Oregon for 1982. The court concluded that the husband was domiciled in Oregon during the tax year.

In another residency case, under facts somewhat similar to those in *dela Rosa*, the Tax Court held against the taxpayer. In

that case, the taxpayer attempted to claim Alaska as her home, even though her husband stayed behind in The Dalles. What made the case a little more difficult was that the taxpayer taught school for three full school years in Barrow. However, she returned to Oregon frequently and maintained no permanent place of abode in Barrow. *Davis v. Dep't of Revenue*, 13 OTR 260 (1995).

The most recent Oregon Supreme Court opinion concerning domicile is *Department of Revenue v. Glass*, 333 Or 1 (2001). The taxpayer was a truck driver who had lived in Oregon but had no residence here after he became a truck driver. He lived in his truck. None of his routes took him to places in Oregon. He visited his parents in Oregon for about two weeks each year. He held an Oregon driver's license and registered two cars in Oregon, using his parents' address. The court ruled that because the taxpayer did not establish and maintain a permanent place of abode elsewhere, he remained an Oregon resident for income tax purposes.

A recent search in the Oregon Tax Court database of opinions turned up numerous cases where residency in income tax cases was an issue (but no cases involving inheritance taxes). They often cite the leading cases summarized above. One such case is *Bleasdell v. Department of Revenue*, 18 OTR 354 (2004). In that case the taxpayer and his wife moved from Nevada to Grants Pass, and within a year the taxpayer became permanently employed in Florida. He bought a condo there, acquired a Florida driver's license, and registered to vote in Florida. His wife continued to reside in Oregon and operated a business here. The court said it was a "close call," but found that the taxpayer first moved his domicile from Nevada to Oregon, and then from Oregon to Florida. Important to the court's decision was the short period of time the taxpayer lived in Oregon. The opinion is worthwhile reading for an analysis of the concept of domicile. A reading of several cases gives a good sense of what it takes to change one's domicile and what factors the courts consider.

The DOR used a "Residency Questionnaire" during a 2007 estate administration handled by one of our colleagues, to extract more information regarding the decedent's domicile. The questions asked of the personal representative included the following: (a) number of and locations of personal homes and dates of residence to the day, per year, (b) number of people and relationships of persons living in each personal home, (c) dates of utility service at each home and records of homeowner's insurance, (d) whether any homes were ever rented or placed on the market for sale, (e) state of voter registration and voting history, (f) state of driver's license and vehicle registration, (g) employment history, (h) hunting, fishing, and recreational licenses, (i) location of social activities and memberships, (j) location of bank accounts and safe deposit box, (k) internet, telephone, and cell phone service providers, (l) location of family, and (m) whether personal income tax returns were filed in any state other than Oregon. The DOR asks the personal representative to provide as much information as possible, asks the personal representative to sign the statement as "true, correct and complete," and will not proceed with review of the return until the statement has been made to the DOR.

In the end, the determination of domicile is based on the facts and circumstances of each case. Where the taxpayer's testimony is credible and supported by the facts, the courts have sided with the taxpayer in residency cases. Obviously, in an inheritance tax case the decedent's testimony will not be available in order to determine the decedent's intent. Establishing objective facts indicating an intent to change domicile will be critical in the planning mode, and reliance on objective facts critical as well for the attorney preparing an inheritance tax return.

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Administering the Taxable Estate

Friday, November 20, 2009, 9:00 a.m. – 5:00 p.m.
The Nines, 525 SW Morrison St., Portland

6 General and 1 Ethics credit

The Estate Planning and Administration Section's Annual Business Meeting will be held at noon, during the break for lunch.

Legal Ethics and Estate Planning
Peter R. Jarvis & Dayna E. Underhill

The Oregon Inheritance Tax
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What's New

Brown v. Hackney, 228 Or App 441 (2009)

In *Brown v. Hackney*, the Oregon Court of Appeals considered whether the legislature intended for the amount of a personal representative's compensation to be based on the proceeds from a settlement of a wrongful death action brought by that personal representative, an issue of first impression for the court.

Mr. Brown, the decedent, died in a car accident. He died intestate, and the probate court appointed a personal representative who initiated the wrongful death suit against the driver and passenger of the other vehicle. The probate court later appointed the decedent's sister as successor personal representative. She continued to administer the estate, settled the wrongful death suit, and petitioned the court for a general judgment of final distribution to close her brother's estate. The probate court approved the final judgment, which included a distribution of $5,200 in personal representative compensation. The personal representative compensation was determined based on an amount that included the proceeds of the wrongful death claim settlement. The decedent's brother appealed the judgment, asserting that the personal representative compensation should not have been based on an amount that included the proceeds from the settlement.

On appeal, the decedent's brother relied on ORS 116.173, the statute governing personal representative compensation, and argued that because the statutory definition of "estate" does not include the value of a wrongful death settlement, the compensation of a personal representative, which is based on the "whole estate," should not include proceeds of a wrongful death action.

The personal representative relied on both ORS 116.173 and ORS 30.020 to 30.050, the wrongful death statute, and asserted that the probate court did not err in approving the personal representative compensation. The court agreed.

The court examined the statutory construction of ORS 116.173, the statute governing personal representative compensation; ORS 111.005(15), the definition of "estate"; and ORS 30.020 to 30.050, the wrongful death statute, and concluded that "the legislature's intent in conditioning a personal representative's compensation on a decedent's 'whole estate' must mean something different than a decedent's probate 'estate.'" 228 Or App at 448. The court explained that while the legislature did not explicitly define "whole estate" in the statute, a close reading of ORS 116.173 reveals the intended meaning. Specifically, it means that a decedent's "whole estate" is to include property both within and outside of the jurisdiction of the probate court, and that a personal representative should be compensated for the value of all property subject to the probate court's jurisdiction. The wrongful death statute provides that the proceeds of a wrongful death settlement are subject to the jurisdiction of the probate court, meaning that the proceeds are part of the decedent's "whole estate."

Earlier in the opinion, the court included excerpts of the probate court's findings, which reasoned that the legislature intended for a personal representative to be compensated for "all of the things that the personal representative is responsible for marshalling and bringing together," 228 Or App at 444, and that when a wrongful death action was brought by a personal representative, there would be increased risk for him or her, and more work to be done on behalf of the estate. The court closed the opinion by highlighting that the wrongful death statute charges the personal representative with additional responsibilities, including the prosecution of the wrongful death action (such an action can only be brought by a personal representative for the benefit of the decedent's survivors/ intestate successors) and the distribution of settlement proceeds.

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Editor's Note: Ms. Buck-Romero should have been identified as the author of the two case summaries that appeared in the July 2009 issue of this newsletter.

Avoid Disaster with Your Single-Member LLC

A business can become paralyzed when the single member of a member-managed LLC becomes incapacitated or dies. In these troubled economic times, even a short paralysis may cause a business to collapse. This problem may be avoidable by (1) organizing single-member LLCs as manager-managed and (2) drafting an operating agreement that both appoints a successor manager in the event of the manager's incapacitation or death and includes a "transfer on death" registration for the membership interest.

Why Manager-Managed?

Essentially, there are only two choices for management of an Oregon LLC: member managed or manager managed. ORS 63.047(d). When an LLC has a single member who is active in the business, it may seem unnecessary to designate that member as the manager. After all, a member of a member-managed LLC has all of the powers of a member and all of the powers of a manager. *See* ORS 63.130. A member of a member-managed

LLC, however, cannot easily delegate management authority to a third party when the member is incapacitated, is disabled, or dies. Further, on the member's death, the management authority may suddenly be split between multiple heirs. In a manager-managed LLC, the operating agreement provides the needed flexibility and continuity of business operations to keep the business running.

To illustrate this problem, assume a 50-year-old married man who has two children is the sole owner and member of a member-managed LLC that owns and operates a profitable manufacturing business. If the owner becomes incapacitated or dies, there may be initial uncertainty as to who has the authority to operate the business. Even if the spouse or children are best suited to run the business, they may not have the authority to do so. If a trusted employee is best suited to run the business, he or she also may not have the authority to do so. Leaving this issue to be sorted out by the member's conservator, trustee, or personal representative will take time and could result in unnecessary business interruption and conflict. But, if the LLC were manager-managed, the member could have appointed a successor manager and eliminated the uncertainty, delay, and, hopefully, conflict regarding who will run the business.

Why Have an LLC?

A sole proprietor can form either an LLC or "S" corporation and receive many of the same benefits discussed in this article—namely business continuity and transfer on death registration.[1] An LLC provides more flexibility, however, for the varying situations that a business owner may encounter. Through a carefully constructed operating agreement, the owner of an LLC can designate or appoint a successor manager to act when the owner becomes disabled or incapacitated or dies. An officer of a corporation, on the other hand, is appointed by the Board of Directors, ORS 60.371(1), and the (likely) sole director is elected by the sole shareholder, ORS 60.307(3). When the sole shareholder is also the sole director and sole officer, the business may be stuck without anyone who has clear authority to run the business or take other necessary actions to keep the business afloat upon that shareholder's disability or incapacity. In addition, the flexibility of the operating agreement presents a preferable opportunity to give a successor manager limited, but specific, powers to deal with the real-life duties of the business owner.

The Operating Agreement

Appointment of the Successor Manager

Oregon's Limited Liability Company Act allows a member to appoint a manager by designation or appointment. ORS 63.130(2)(c). This seems to allow a member to appoint a future successor manager. The operating agreement can designate or appoint the successor manager by including a provision similar to the following:

> MANAGEMENT. The Manager shall manage the business and affairs of the Company. The Member shall serve as the Manager. The Manager shall serve as Manager until the Manager is terminated, resigns, becomes incapacitated, or dies, at which time the successor manager, if any, becomes Manager. The Member may, by vote, remove any Manager without cause and elect a successor manager. The Member may appoint a successor manager and may at any time revoke an appointment and appoint a different successor manager or no successor manager. The Member hereby appoints ______________ as successor Manager.

Transfer on Death Registration

As with any security, a membership interest in an LLC can be registered as transfer on death. *See* ORS 59.535(9). The default rule is that upon a member's death, the holder of the deceased member's interest becomes a member of the LLC. ORS 63.265(2)(b). Transfer on death registration can simplify this succession by eliminating (1) any guesswork about who is the holder of the deceased member's interest and (2) the need to probate the member's interest in the LLC. ORS 59.565. Of course, care should be taken to ensure such registration fits in with the member's overall estate plan. The following provision can be added to the operating agreement:

> REGISTRATION OF MEMBERSHIP. The registration of the membership of the Member, [Name of member], shall be as follows:
>
> [Name of member], transfer on death to _______________.

Practical Guidance for Who Should Be Successor Manager

There are three important points to consider when counseling the owner as to whom to appoint as successor manager.

First, the owner obviously will want to leave the business in the hands of someone who can actually run it. As a practical matter, the successor manager must be someone who knows the business; who knows what must be done, at a minimum, to keep the business running on a day-to-day level; and whom the owner trusts. When the successor manager is in charge, by design, the owner is probably unable to provide any effective oversight or guidance for the successor manager or the business. In addition, many people may be perfectly suited to run the business for a short time in normal circumstances but may not be good successor managers. For instance, a spouse may be too distraught upon the incapacity of the owner to be an effective manager.

Second, it is important that both the owner and the successor manager understand, in a general sense, what an LLC manager does and does not do. The manager, unless otherwise provided in the operating agreement, has the sole right of management and conduct over the LLC business. ORS 63.140(2). Except as provided below or in the operating agreement, the manager exclusively decides all matters relating to the business of the LLC. Some pertinent exceptions to the manager's authority provide that, except as provided in the operating agreement, the members have the right to amend the articles of organization or the operating agreement, to dissolve the LLC, to make interim distributions, to admit a new member, to dispose of all or substantially all of the

LLC assets, to merge or convert the LLC, to incur debt outside the ordinary course of business, to approve conflicts of interest, or to change the nature of the LLC business. If left to the defaults in the LLC statutes, then, the successor manager essentially has the right to run the business on a day-to-day basis in the ordinary way in which it has been run in the past. The operating agreement, however, may (and perhaps should) provide for a very different sort of management structure by both augmenting and limiting the successor manager's authority to better suit the situation (as explained more fully below).

Third, just as the client does not want to set the LLC up for failure, the owner does not want to set up the successor manager for failure (or liability) either. A manager owes the LLC fiduciary duties of loyalty, care, and good faith and fair dealing. ORS 63.155(9)(b). While the incapacitated owner would probably assert a cause of action against a successor manager only for intentionally wrongful conduct, the heirs of the owner may well try to recoup damages for a business venture that loses value while in the hands of the successor manager. To alleviate concerns that the successor manager may have, the operating agreement should fully indemnify the successor manager to the extent allowed, and the successor manager should be carefully selected for the job. The successor manager should also be informed as to who the owner's heirs are and, if applicable, their personality "quirks."

Of course, this arrangement will work only if the person appointed as successor manager knows that he or she has been appointed the successor manager and actually agrees to be the successor manager! Make sure that the owner has talked with this person and communicated both what the job entails and the triggers for when the job "begins."

Ultimately, the owner of the business will know who best fits the qualifications for acting as successor manager. The practitioner's job is to make sure the owner understands what those qualifications are.

Not All Managers Are Created Equal

The operating agreement can specify exactly what powers a successor manager possesses. A single-member operating agreement should take advantage of this flexibility by delineating different powers for a manager who is a member and a successor, non-member manager. As explained above, even though by default the manager manages the day-to-day operations of the business and the members retain control for major decisions, these defaults can be modified by the operating agreement.

In the first instance, the owner as manager will always have complete power over the business, and the operating agreement can (but need not) make this explicit. After all, the owner as manager can always get the required "member consent" for any action. In contrast, the powers of the successor manager should be explicit. Particularly if the operating agreement grants the owner-manager unfettered authority over the business of the LLC, the operating agreement should limit the successor manager's powers, perhaps to the statutory defaults of a manager. Those powers should then be explicitly augmented. Some augmentations that may be warranted include the power to allow (or require) the successor manager to make distributions for particular circumstances, such as to pay the owner's recurring debts; to liquidate or sell the business if the owner has significant expenses for longer term, ongoing care; or to incur debt or engage in other activities that are outside the ordinary course of business but may be needed in dire circumstances.

To illustrate this concept, imagine an 85-year-old woman with four children who is the sole owner and manager of a manager-managed LLC that owns an apartment building. She has appointed her oldest son as successor manager and her youngest daughter as next successor manager (her other two children live outside the area). All four children are her heirs. The operating agreement grants her the full power to conduct the business of the LLC, inside or outside of the ordinary course. The owner has started to show signs of dementia, and she has saved funds to stay in a long-term care facility. Under the default rule in ORS 63.265(1), the owner's membership in the LLC would cease in the event of her incompetency, requiring the entry of a court judgment declaring her incompetent to manage her person or estate. ORS 63.001(15). However, the operating agreement can override this default rule by providing that the successor manager takes over when the owner-manager is incapacitated, disabled, or dies. The definition of incapacity in the operating agreement can include the criteria listed in ORS 125.005(5). The operating agreement can also provide that, if the owner-manager is incapacitated and living in a long-term care facility, the successor manager will make regular distributions of a certain amount and interim distributions to pay for the costs of the facility (and other debts) not covered by insurance or savings. The operating agreement can further provide that, upon sudden incapacity or disability requiring acute care, the successor manager is authorized to sell the property as needed to pay for procedures or acute care facilities for treating the owner or to refinance the property's mortgage. In addition, when the member dies, the successor manager has the clear authority to collect rents, execute leases, terminate leases, pay the mortgage, and the like.

Two Warnings

First, the use of a successor manager may not work or may require specific individualization for businesses with specialized licensure. For instance, not just anyone can become the successor manager and run a construction business, law firm, medical practice, or real estate brokerage. The successor must have the appropriate license.

Second, in most cases, the owner of a single-member LLC will guarantee some of the debts and obligations of the LLC, such as long-term loans or lines of credit. A likely possibility is that those guarantees or original documents will default when the owner dies or becomes incapacitated. In this situation, a successor manager will not only face the difficulty of caring for the owner and trying to run the business, but may also be trying to deal with creditors (most likely secured with the assets of the business) who are legitimately concerned with the continued viability of the business as a going concern.

Conclusion

While a manager-managed LLC may not be a panacea for ensuring that a business owned by a single individual survives the disability, incapacity, or death of that owner, it provides sufficient flexibility to give a business a good chance to continue. The flexibility provided by the LLC statutes can and should be used to provide for the client and the client's business when such disasters strike.

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Endnotes

1 Of course, both entities also give the owner limited liability. In addition, in practical terms, there will be some similarity in taxation because an "S" corporation is a pass-through entity and a single-member LLC is a disregarded entity, but a comparison of the tax treatment between the two is beyond the scope of this article.

Adjusted Taxable Gifts and the Oregon Inheritance Tax

Question: Does the Oregon inheritance tax apply to adjusted taxable gifts?

Answer: Yes, no, and maybe.

That ambiguous answer is based on the fact that the calculation of the Oregon inheritance tax is a four-step process. In order to answer the question, you must first work through the four steps. You can do that by roughing out a draft of Form IT-1, or you could write your own spreadsheet template. Commercial software is also available. Either way, it helps if you understand the four steps and how they interact.

Terms

Gross Estate. Oregon has adopted the federal definition of gross estate, so the gross estate will be the same for federal and Oregon purposes. ORS 118.005(5); IRC § 2031. The gross estate does not include adjusted taxable gifts, which are defined as either gifts that did not qualify for the annual exclusion or the amount by which gifts exceeded the annual exclusion. IRC §§ 2001(b), 2503. (The Oregon Department of Revenue once took the position that gifts within three years of death were included in the gross estate. Instructions to that effect were included in the 2006 version of the Form IT-1. The department has since issued an advisory that it no longer takes that position.)

Taxable Estate. Generally, the taxable estate is the gross estate minus deductions. ORS 118.007; IRS § 2051. However, because federal and Oregon deductions will be different, the actual amount of the taxable estate will be different for Oregon and federal purposes. For example, the Oregon inheritance tax is allowed as a deduction for federal estate tax purposes, but not for Oregon inheritance tax purposes.

Adjusted Taxable Estate. The adjusted taxable estate is equal to the taxable estate minus $60,000. IRC § 2011(b)(3). None of the gross estate, the taxable estate, or the adjusted taxable estate includes adjusted taxable gifts. IRC § 2001(b).

The Calculation

For simplicity of illustration, assume a 2009 death of an unmarried decedent with no deductions of any kind (no marital bequests, charitable bequests, claims, or administration expenses). We will ignore annual exclusions.

Step 1 - Filing Threshold

The first step in calculating the Oregon inheritance tax is to determine whether the estate exceeds the Oregon filing threshold. The filing threshold is determined by the value of the gross estate. If the gross estate equals or exceeds $1,000,000, then an Oregon return is due, and the second, third, and fourth steps must then be analyzed. If the gross estate is less than $1,000,000, the filing threshold is not met, no return is due, and the other steps need not be examined. If no return is due, then no tax is due. ORS 118.160(1)(b)(D).

If a client dies with a gross estate of $1,100,000, an Oregon return is due, and the other steps (described below) will result in a tax. But if that client makes a gift of $150,000 immediately before her death, her gross estate will be $950,000, because the gross estate does not include adjusted taxable gifts. As a result, no return will be due, and no tax will be due. In both cases, her children will receive the entire estate. In the first example, they will pay an Oregon inheritance tax of $38,800, but in the second example the estate will be 100% tax-free. Yet in both examples the client started out with the same assets. By making a $150,000 gift, the client saved her family $38,800.

Step 2 - Calculate the Oregon Inheritance Tax

If a return is due, the second step is to calculate the Oregon inheritance tax. The Oregon inheritance tax is based on the amount of the adjusted taxable estate. The adjusted taxable estate is equal to the taxable estate minus $60,000. IRC § 2011(b)(3). The adjusted taxable estate does not include taxable gifts. The amount of the tax is based on a rate table that is identical to the old

federal table for the state death tax credit. ORS 118.010(2). That table appears as Table B in the instructions to the Form IT-1. *That rate table does not use a unified credit.* Instead, it generates a tax as soon as the adjusted taxable estate exceeds $40,000. In our example, if the gift had not been made, the estate of $1,100,000 would generate an Oregon inheritance tax of $38,800. But that amount is not necessarily the amount to pay. Instead, we must continue on to step 3.

Step 3 - Calculate the Federal Cap

The third step is to calculate what we will call the federal cap. This is the federal estate tax the estate would have paid (in our example) for a 2009 death based on the federal law applicable to a 2009 death as that law existed in 2000. At that time, the federal unified credit equivalent was scheduled to be $1,000,000 for a 2009 death. Unlike the calculation of the Oregon inheritance tax, the calculation of the federal estate tax (and thus the federal cap) requires that any adjusted taxable gifts be added back in before the estate tax is calculated. IRC § 2001(b). In our example of a $1,100,000 estate, the federal cap would be calculated on $1,100,000, regardless of whether the decedent had made the deathbed gift of $150,000.

The federal cap is calculated using the federal estate tax rate table that appears as Table A in the instructions to the Form IT-1. After the tax is calculated, the unified credit of $345,800 (which is the tax equivalent of assets worth $1,000,000) is applied. The result is the federal cap. In our illustration, the resulting federal cap would be $41,000.

Step 4 - Amount of Tax to Pay

The amount of Oregon inheritance tax is the lesser of the results of step 2 and step 3. Here's why: ORS 118.010(2) imposes a tax equal to the maximum allowable state death tax credit available for the year of death based on 2000 federal law. However, an estate can receive a credit only against tax it actually owes. The credit cannot exceed the tax. As a result, if the 2000 federal tax was less than the amount calculated by the state death tax credit table, then that lower amount of the tax limits the availability of the credit. The federal tax "caps" the credit. In our example of the $1,100,000 estate with no gift, the lesser of the two is $38,800. If the $150,000 gift had been made, the tax would have been zero, because no return would have been due.

Answering the Question

Now, at long last, we can answer our question: Does the Oregon inheritance tax apply to adjusted taxable gifts? The answer takes three forms:

1. If the decedent used adjusted taxable gifts to reduce her gross estate below the Oregon filing threshold, then the adjusted taxable gifts (and the rest of her estate) completely avoid the Oregon inheritance tax. ORS 118.160(1)(b)(D).

2. If her gross estate (after the gifts) is above the Oregon filing threshold, then a return will be due. Her adjusted taxable gifts will not be taken into account in calculating the Oregon inheritance tax (step 2), but those gifts will be taken into account in calculating the federal cap (step 3). In most cases, making adjusted taxable gifts will (with one minor exception) reduce the Oregon inheritance tax by the amount of the marginal rate of the state death tax credit applied to the adjusted taxable estate. For example, the tax savings from a $10,000 taxable gift from a $1,100,000 estate would be $560, or 5.6%. If the estate were $3,000,000, the tax savings would be $880, or 8.8%.

3. The one minor exception: If the Oregon inheritance tax is greater than the federal cap, then the federal cap will be the determining factor because it is the lesser of the two. In that situation, making adjusted taxable gifts will not affect the tax due because the federal cap includes a tax on the gifts. This exception occurs only if the gross estate (before the gifts) is less than $1,093,784. Below this amount the Oregon inheritance tax is greater than the federal cap. But even this minor exception has an exception: If the gross estate (before the gifts) is only slightly below $1,093,784, and the gifts are large enough to bring the Oregon inheritance tax below the federal cap, then tax savings can still be obtained.

One final note: If you plan to use the alternate valuation date election to eliminate an Oregon inheritance tax that would otherwise be due, and your client has made adjusted taxable gifts, the reduction in value attributable to the alternate valuation election must be large enough to reduce the federal cap to zero. In other words, the taxable estate plus the adjusted taxable gifts (the federal tax computation base) must be reduced to a point below $1,000,000, in order to reduce the federal cap to zero. Simply reducing the Oregon gross estate to a point below $1,000,000 is not sufficient. This is because the estate will pay the lesser of the federal cap (step 3) or the Oregon inheritance tax, which is based on the state death tax credit table (step 2). The state death tax credit table does not employ a unified credit. Instead, the tax is imposed on all amounts over $40,000. Unless the federal cap is zero, the estate will pay some Oregon tax. Because an Oregon return must be filed in order to make an Oregon alternate valuation date election, using the alternate valuation date to reduce the gross estate below $1,000,000 does not avoid the filing requirement. IRC § 2032(d); OAR 150-118.010(7)(1).

You could calculate some illustrations to determine the amount of tax savings that might be obtained by making various taxable gifts. It all depends on the size of the estate and the size of the gifts. As a general rule, the client will save the most money if the gifts reduce the gross estate to a point below the $1,000,000 Oregon filing threshold, but lesser tax savings are available even if the resulting gross estate is still above the filing threshold. Also, keep in mind that the tax savings described above are understated, because they do not take into account the annual exclusion.

It's all very simple, right? If you understand the process, you will understand the answer.

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