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Newsletter

Capacity Issues in Representing Clients

Introduction

Pornography and legal capacity have two things in common: (1) they are difficult terms to define, and (2) we tend to rely on the standard of "we know it when we see it" in making case-by-case determinations, as Justice Potter Stewart famously framed the issue of defining pornography in *Jacobellis v. Ohio*, 378 US 184, 197 (1964).

To establish an attorney-client relationship with an adult, a client's legal competency to make and articulate decisions is a threshold question. The attorney should understand the standards for the capacity required to perform legal acts and what steps can be taken to maximize a client's decision-making ability. An understanding of the legal requirements for capacity is crucial for an attorney to effectively represent clients who may have diminished capacity. Finally, the ethical obligations of the attorney vary widely with the ability of the client to evaluate the attorney's advice and give the attorney direction.

Estate planning lawyers are routinely called upon to determine the capacity of clients. Do they have the ability to articulate their wishes? Are they able to enter into a contract of employment? Do they need a surrogate decision-maker? What fiduciary standard will be applied in making decisions for the client? What standard applies to the particular legal question at hand? How is legal capacity determined?

Few of us have formal training in capacity assessment, but we have some excellent guides available to us. The Oregon State Bar has published *The Ethical Oregon Lawyer* with an entire chapter (18) entitled "Representing Clients with Diminished Capacity and Disability" by Michael Levelle. It provides a summary of a "sliding scale" of capacity appropriate to different situations. The American Bar Association in conjunction with the American Psychological Association (ABA/APA) has also published *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers.* Both of these publications are available online at no charge to Oregon attorneys.

The ABA/APA publication includes a helpful chapter, "Capacity Worksheet for Lawyers," which includes observational signs from cognitive functioning (memory, language, calculation skills, disorientation) and emotional functioning (distress, liability) to behavioral functioning (delusions, hallucinations, hygiene). Then we are asked to record mitigating factors and consider the varying standard of legal capacity. The form is a useful tool in assisting a lawyer with marshalling the information that supports a conclusion regarding capacity. It is not a mental status exam, which is the province of highly trained professionals, and it is not a substitute for the diagnosis or opinion of medical or psycho-social professionals.

Consider three different, but typical, scenarios from my practice: (1) estate planning for a client with bickering devisees; (2) filing a guardianship/conservatorship petition against an alleged incapacitated person; and (3) filing a guardianship/conservatorship petition against a client whose capacity has deteriorated since my initial representation and legal services.

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Estate Planning & Administration Section

Estate Planning for a Client with Bickering Devisees

Early in my career I had a terminally ill woman referred to me for estate planning by her son. It turned out that the son was alcoholic and dependent fiscally and psychologically on his mother. It also turned out that he had a sister who was fiercely independent and highly suspicious of anything her mother did to benefit her brother. Mother wanted me to prepare a will for her. We established at the outset that mother was my only client, but her son brought her to the initial appointment and it was apparent that her estate plan was to be skewed to his substantial benefit. Mother's terminal illness had her on hospice care, and there were significant issues about her mental health. Did mother have the capacity to enter into a retainer agreement with me? Was she being unduly influenced by her son to articulate the choices she made in defining her estate plan? Did she have testamentary capacity to sign the documents I prepared for her? All of these questions require answers.

After meeting with her, I felt confident that she had the capacity to engage me and direct me, but what was that confidence based upon? I met with her several times, and she had a lively personality, she was oriented to time and place, she understood the gravity of her health conditions, she knew that her time on this Earth was limited, she was able to articulate reasons for her decisions about who should be in charge of her affairs and how her assets should be divided, and she was consistent in her analysis and determinations. Over the course of the relationship I came to be acquainted with her personality and her biases. I also got to meet both the son and the daughter and had various interactions with them, which were consonant with her descriptions of them. She certainly knew the natural objects of her bounty and was familiar with the nature and extent of her assets, so I determined that I was willing to sign her will as a witness to her testamentary capacity.

But I am a lawyer, and I also had concerns about the impending will contest that seemed likely to follow, so I wanted to have some back-up. I called in a gero-psychiatric specialist to administer a formal mental status exam and had my client release those test results to me for future use in defending her capacity. I also had the specialist sign as the second witness to attest to her capacity. No will contest was ever filed.

Was this necessary, prudent, or even advisable under the circumstances? Soon after going through this process, I heard noted will contest attorney Jim Cartwright speak at a CLE program and ask the rhetorical question: If you sought a professional evaluation for this client, but did not do it for every client, isn't that evidence that you doubted your client's capacity? It was a statement that struck me dumb. Since most clients would not begin to consider the added cost and inconvenience of a mental status test, requiring every client to get one is infeasible. I have relied on my own determination of testamentary capacity ever since, relying on my ever-increasing years of experience to buttress my ability to make that determination. I consider a number of factors from my observation of the client's cognitive, emotional, and behavioral functioning, but in the final analysis, it comes back to the pornography standard: I know it when I see it.

Filing a Petition for Guardianship/ Conservatorship Against an Incapacitated Person

I think of guardianship and conservatorship as solutions to assist someone with medical and financial decision-making. Of course, there are limits. ORS Chapter 125 provides that the court may only impose this solution if is it the least restrictive alternative available to accomplish the purpose of keeping a person or his or her money safe from his or her own inability to make appropriate decisions. How do lawyers get sufficient information to make this determination and get a court to sign a limited judgment appointing another person to serve as a decision-maker?

Remember that reasonable investigation is required. When a client suggests a need for a guardianship for another person, the attorney for the petitioner must establish that (1) the need exists (and the court will likely recognize that need), and (2) the proposed guardian is appropriate for the role. This is usually done based on information provided by the petitioner and without contact with the proposed protected person. The attorney is required to make a reasonable investigation before filing a petition and must believe the petition is well founded in law and fact. ORCP 17; *Whitaker v. Bank of Newport*, 101 Or App 327, 333, 795 P2d 1170 (1990), *aff'd*, 313 Or 450 (1992).

The need exists when the proposed protected person is "incapacitated," that is, suffering from an impairment that affects the person's ability to receive and evaluate information or to communicate decisions to such an extent that the person presently lacks the capacity to meet the essential requirement for physical health or safety. "Meeting the essential requirements for physical health or safety means those actions necessary to provide the health care, food , shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur." ORS 125.005(5).

ORS 125.400 provides that "upon the filing of a petition seeking the appointment of a conservator, the court may appoint a conservator and make other appropriate protective orders if the court finds by clear and convincing evidence that the respondent is a minor or financially incapable, and that the respondent has money or property that requires management or protection." "Financially incapable" means a condition in which a person is unable to manage his or her financial resources effectively for reasons including, but not limited to, mental illness, mental deficiency, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power, or disappearance. ORS 125.005(3). These requirements bootstrap from one to the other to the logical and legal conclusion of the need for appointment of a conservator.

To get an order from the court, it is simplest if medical evidence is offered. A letter from the treating or primary care physician of the proposed protected person stating that there is a medical condition warranting the imposition of the guardianship or conservatorship may be obtained under some circumstances but not in others. A particular diagnosis, for example, that the person has Alzheimer's disease, is *not* sufficient. *See Shaefer v. Schaefer*, 183 Or App 513 (2002). The *impairment* must be shown. *See In the Matter of Baxter*, 128 Or App 91 (1994) (holding that double amputee status did not equal financial incapacity). Important information may be provided by social workers, caregivers, and other persons with the ability to observe the functioning of the proposed protected person. Depending on the credentials of these individuals (RN, LCSW, MSW, PhD), their evidence may be sufficient to support a petition. Sometimes the lawyer may need to rely solely on the observations of friends and neighbors. In such a case, an opportunity to observe and the length and nature of the relationship are important factors to describe in the petition.

The lawyer must always consider lesser measures than a full-blown guardianship/conservatorship to achieve the purpose of protection. *See* ORS 125.150(7)(c). Intervention and support from a local area agency on aging may be adequate to meet the needs of the proposed protected person. A power of attorney, an advance directive for health care, and a living trust may exist or be creatable. The lawyer should make certain these avenues have been explored. If they have, they may provide additional evidence to support the petition.

Filing a Petition for Guardianship/ Conservatorship Against an Incapacitated Client

What happens when a person who apparently needs a guardian or conservator is your own client whose capacity has deteriorated over time since your last contact? Oregon Rule of Professional Conduct 1.14 provides some guidance, exhorting the maintenance of a "normal client-lawyer relationship" "as far as reasonably possible" when the client is incapacitated and the taking of reasonable action to protect the client as deemed necessary by the attorney.

There is no Oregon case law interpreting the current ethical rule. The Oregon State Bar has given us Formal Ethics Opinion 2005-41, which does little more than recite the above rule when asked what duties a lawyer has when a current/former client begins to demonstrate a lack of capacity that is damaging. The American Bar Association has given us ABA Formal Ethics Opinion 96-404. The ABA analysis is this: Attorneys should not bring an action against a client to seek the initial appointment of a fiduciary in a protective proceeding, but may do so if the determination that it is necessary and reasonable has been made by the attorney. And once a court has made a determination that the client is incapacitated, the lawyer may represent the fiduciary appointed by the court to protect the client.

A lawyer may refer the matter to another appropriate party and continue to represent the client in the ensuing protective proceeding. The altruistic view of this posture is that it allows the attorney to ensure that the proceeding is fair and the client has every opportunity to avoid the imposition of authority against him or her, but it allows the attorney with a long-term relationship with the client to remain in the role of advisor and protector of the client, while advocating for the long-time judgments of the client. Continuing to represent a client deemed by the attorney to be incapacitated raises its own issues. How does the attorney take direction from the incapacitated client? What position does the attorney take if the client changes long-held views regarding estate disposition, fiduciary preferences, or other matters expressed when the client's capacity was not in question?

Conclusion

Incapacity can be devastating to a client. Recognizing incapacity may be as simple as knowing it when you see it, but making the appropriate determination of how to proceed as an attorney once the incapacity is recognized requires a sophisticated analysis of the psycho-social, legal, and ethical components of appropriate representation of a client.

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The Oregon Inheritance Tax and Its Fractional Formula

The Oregon inheritance tax applies to both residents and nonresidents, but in different ways. In both cases, however, the Oregon inheritance tax statutes employ a fractional formula that can produce surprising results. Particularly surprising is the fact that a nonresident with only a small amount of Oregon assets will still be subject to Oregon tax. Equally surprising is the fact that a nonresident could leave all of his or her Oregon assets to a surviving spouse or to a charity, and Oregon tax might still be due. All of this is caused by the fractional formula. Attorneys with clients who move to other states (such as clients who retire to southern California) will want to familiarize themselves with the Oregon fractional formula and the odd results it creates.

Oregon taxes resident decedents on (1) tangible personal property located in Oregon, (2) real property located in Oregon, and (3) all intangible property regardless of situs. But the tax is calculated on the entire taxable estate (wherever located), and then the tax is multiplied by a fraction, the numerator of which is the sum of the three classifications described above, and the denominator is the entire gross estate. ORS 118.010(3).

Nonresident decedents are taxed on property located in Oregon, including tangible personal property and real property. Nonresidents are also taxed on intangibles located in Oregon, unless the state of domicile grants reciprocity (an exemption for intangibles owned by nonresident decedents). But the tax is calculated on the entire taxable estate (wherever located), and then the tax is multiplied by a fraction, the numerator of which is the value of the assets subject to tax in Oregon, and the denominator is the entire gross estate. ORS 118.010(4).

A recent article discussed the factors that will be taken into account to determine whether or not the decedent was an Oregon resident. Stephen J. Klarquist, *Determining Oregon Residency for State Inheritance Tax Purposes*, Or Estate Plan & Admin Sec Newsl, Oct. 2009, at 5.

In short, under the Oregon statutory scheme tangible property (both real and personal) will be taxed only by the state in which it is located, in both resident and nonresident estates. Intangible personal property held by resident estates will be taxed regardless of location, and intangible personal property held by nonresident estates will be taxed only if it is located in Oregon and the resident state does not grant a reciprocal exemption. ORS 118.010; OAR 150.118-010(3), (4)(b). As discussed below, the definition of intangible personal property is extremely broad, at least according to the regulations. OAR 150-118.010(1)(2), (3).

These statutes can produce some unexpected results, partly because the filing threshold of $1,000,000 is based on the gross estate, regardless of where the assets of the gross estate are located. ORS 118.160(1)(b)(D). As a result, a nonresident with a gross estate of $1,000,000 or more, but with a small amount of Oregon assets, will be required to file an Oregon inheritance tax return, and will be required to pay Oregon inheritance tax if the taxable estate exceeds $1,000,000, even if the state of residence imposes no estate or inheritance tax.

For example, if an Oregon resident moves to California (which has no estate or inheritance tax), but leaves behind in Oregon real property, tangible personal property, or (more likely) intangible personal property (such as an Oregon bank account), that person's estate will be subject to Oregon inheritance tax if the taxable estate (wherever located) exceeds $1,000,000. The same result will take place if the person never lived in Oregon, but happens to own real or personal (tangible or intangible) property in Oregon. Because of the fractional method of calculating the tax, even a small amount of Oregon property will trigger a tax.

The same result will take place if the person lived in Washington, except Washington has its own estate tax, and Oregon exempts the intangible personal property of Washington residents because Washington grants a reciprocal exemption for intangible personal property of Oregon residents. RCW 83.100.040; WAC 458-57-125. As a result, an Oregon tax will be due from a Washington resident estate if the estate holds Oregon real property or tangible personal property located in Oregon, even if the value of the Oregon property is small.

A reciprocal exemption for intangible property does not exist between Oregon and California. California has no estate or inheritance tax, and the Oregon regulations provide that the exemption exists in Oregon only if the foreign state imposes an estate or inheritance tax *and* exempts the intangible personal property of Oregon residents. OAR 150-118.010(4)(b); Cal Rev & Tax Code § 13,302.

If all of the Oregon property of a nonresident passes to a surviving spouse or to a charity, the Oregon inheritance tax on nonresidents is not necessarily eliminated. Marital deductions and charitable deductions, like all other deductions, reduce the taxable estate, not the gross estate, and the fractional formula employs the gross estate as its denominator and the gross estate located in Oregon as its numerator. The fact that some or all of the numerator passes to a spouse or to a charity does not affect the fraction or the resulting percentage. Marital deductions and charitable deductions will reduce the overall Oregon tax, but they will not reduce the percentage of the tax payable to Oregon, nor will they reduce the assets (the gross estate) to be measured against the filing threshold. As a result, the amount of tax payable to Oregon will remain the same regardless of whether the assets passing to the spouse or to a charity consist of Oregon assets or foreign assets.

As mentioned above, the Oregon Department of Revenue has adopted a very broad definition of intangible personal property located in Oregon. The statute variously refers to such property as "within the jurisdiction of the state" or "located in Oregon." ORS 118.010(1), (4). The regulations adopt the position that property within the jurisdiction of the state includes (for example) stock in an Oregon corporation, accounts in Oregon banks, and promissory notes given by an Oregon resident. OAR 150-118.010(1)(2). The regulations also define "intangible personal property" as including "stocks, bonds, notes, currency, bank deposits, accounts receivable, patents, trademarks, copyrights, royalties, goodwill, partnership interests, life insurance policies, and other choices [sic] in action." OAR 150-118.010(1)(3).

The ambiguous drafting of the statute and the regulations raises many questions. Why do ORS 118.010(1) and ORS 118.010(4)(a) both refer to "property within the jurisdiction of the state," while the fractional formula in ORS 118.010(4)(a) includes only property "located in Oregon," particularly when the regulations at OAR 150-

1 18.010(1)(2) specifically state that "within the jurisdiction of the state" is broader than "'within the state' which denotes locality"? And it seems hard to believe that a court would allow Oregon to tax stock in an Oregon publicly traded corporation held by the estate of a nonresident, as suggested by OAR 150-118.010(1)(2)(a).

Keep in mind, however, that no Oregon inheritance tax return will be due (and no tax will be due) if the worldwide gross estate of the decedent is less than the Oregon filing threshold of $1,000,000. ORS 118.160(1)(b)(D).

The bottom line: nonresident clients with even a small amount of Oregon assets should review their situation in order to determine whether steps should be taken to minimize or eliminate the Oregon inheritance tax. Those steps might include disposing of Oregon assets or moving the Oregon assets to another state, such as the state of residence, depending on the inheritance tax laws of the state of residence. Even Oregon residents can reduce their Oregon inheritance tax by holding tangible assets in other states, but the amount of overall tax savings will depend on the inheritance tax laws of the other states.

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Mission-Related Investing by Charities – Is It Legal?

"Mission-related investing," as this article uses the term, means that a charity uses some of its investment assets, as distinguished from its program-related assets, in ways that accomplish its investment objectives while also supporting its charitable mission. The charity considers its mission as a factor in making investment decisions, but does not ignore the other factors a prudent investor should consider. The investment may yield a return similar to returns on investments made without consideration of the mission, or the mission-related benefits may balance any reduced financial benefits.

Investors and fund managers also use the term "socially responsible investing." That term encompasses investing based on broad social interests that sometimes go beyond the specific mission-related concerns of the charity. This article uses the term "mission-related investing" to signify a relationship between a charity's mission and the investment.

Legal Rules Applicable to Investing by Charities

Duty of Loyalty. The fiduciary duty of loyalty applies to the trustees and directors who manage a charity. Developed under trust law, the duty of loyalty is the trustee's duty to act "solely in the interests of the beneficiaries." ORS 130.655(1); Restatement (Third) of Trusts § 78(1) (2007). The trustee must put the trustee's duties to the trust first and cannot act for personal benefit. If a trustee interacts with the trust for the trustee's personal interests, that self-dealing can constitute a breach of the duty of loyalty.

Oregon's nonprofit corporation statute applies the duty of loyalty to charities organized as nonprofit corporations. A nonprofit director must act "[i]n a manner the director reasonably believes to be in the best interests of the corporation." ORS 65.357(1)(c). In both trust law and nonprofit corporation law, the duty of loyalty is structured to prevent a fiduciary from taking advantage of the trust for personal gain, and the focus has been on self-dealing by the trustee. A comment to the Restatement (Third) of Trusts explains that the duty of loyalty also treats as improper a trustee's decision to invest in a manner that benefits a third party or a non-trust objective, even if the trustee does not benefit. Restatement (Third) of Trusts § 78 cmt f.

A fiduciary cannot make an investment decision for the charity based on private benefit to the fiduciary, and a fiduciary cannot benefit a third party or a non-charity objective. The charitable purpose must come first, but the question becomes how one views "solely in the interests" or in the "best interests" of a charity. Traditionally, the view has been that the duty relates only to financial interests. Yet nothing in the duty of loyalty prevents consideration of non-financial interests. A charity wants to maximize income, within its risk tolerance, and use the income for its charitable purposes. The charity may also want to use its investments to support its charitable purposes. How does the duty of loyalty apply to mission-related investing by charities?

If a fiduciary decides to invest in a particular asset because doing so will "be best for the world" in some general way or because the investment will support a cause the fiduciary favors, then making the investment decision on those grounds could be a breach of the duty of loyalty. If the investment does well financially, no one is likely to complain, but the fiduciary has not acted solely in the interests of the charity.

If, instead, the fiduciary considers the charity's mission in making investment decisions, doing so may be within the scope of the duty of loyalty. The fiduciary must act for the sole interests or best interests of the charity, and those interests may include nonmonetary interests. Although no court has adopted this analysis, revisions to comments to the Restatement (Third) of Trusts suggest that the law, or at least legal thinking, is headed toward this understanding of how the duty of loyalty applies to investing by charities.

The Restatement's section on prudent investment includes the requirement that the trustee must conform to the duty of loyalty. *Id.* § 90(c)(1). The comment to that section explains that the trustee cannot invest trust assets to promote the trustee's personal views on social or political causes. The comment notes that the terms of the trust may permit investing based on social or political issues, and beneficiaries may consent to such investing. And then the comment turns to investing by charities:

> "[S]ocial considerations may be taken into account in investing the funds of charitable trusts to the extent the charitable purposes would justify an expenditure of trust funds for the social issue or cause in question or to the extent the investment decision can be justified on grounds of advancing, financially or operationally, a charitable activity conducted by the trust."

Id. § 90 cmt c. This comment may be the clearest legal articulation of the application of the duty of loyalty to mission investing. The comment suggests that a trustee can consider the charitable purpose of a trust as a factor in making investment decisions.

Duty of Prudence and the Prudent Investor Rule. Another fiduciary duty, the duty of prudence or the duty of care, applies more directly to investment decision-making by trustees. In general, a trustee must manage a trust as a prudent person would, exercising reasonable care, skill, and caution. ORS 130.755(1). The Uniform Prudent Investor Act ("UPIA"), codified in Oregon at ORS 130.750-130.775, provides rules on investing by trustees.

In 2007 Oregon adopted the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"). UPMIFA uses language from the Revised Model Nonprofit Corporation Act to state the overall duty of care for prudent investing: a charitable manager must act "in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances." ORS 128.318(2). UPMIFA then uses language from UPIA to provide more specific guidance for those managing and investing charitable funds. *See* ORS 128.318(3). Whether the charity is a trust subject to UPIA or a nonprofit corporation subject to UPMIFA, the same prudent investor rules apply.

The prudent investor standard directs trustee and directors ("managers") to invest and manage assets as a prudent investor would, exercising reasonable care, skill, and caution in doing so, considering the entire portfolio in making investments, allocating risk across the portfolio, and diversifying trust assets unless the purposes of the trust are better served by not diversifying. ORS 130.755, 130.760, 128.318. The statutes encourage managers to delegate some investment responsibilities and provide a safe harbor for a manager who exercises "reasonable care, skill, and caution" in selecting an agent, setting the terms of the delegation, and monitoring the agent. ORS 130.680, 128.326.

Managers must consider a number of factors, some relating to economic conditions and some relating to the charity. Trustees consider the "purposes, terms, distribution requirements and other circumstances of the trust," ORS 130.755(1), and directors consider "the charitable purposes of the institution and the purposes of the institutional fund," ORS 128.318(1). In addition, the manager shall consider, if relevant, "[a]n asset's special relationship or special value, if any, to the purposes of the trust," ORS 130.755(3)(h), or "the charitable purposes of the institution," ORS 128.318(5)(a)(H). For a charity, an asset may be related to the charitable purpose.

Whether UPIA or UPMIFA applies, the prudent investor rule directs a charity to consider its charitable purposes in making investment decisions. This direction permits consideration of a charity's mission.

A prudent investor will balance risk and return, trying to maximize overall return within the charity's level of risk tolerance. If an investment has a below-market return or carries a high level of risk, the investment may not be appropriate. As the number of funds that engage in different types of socially responsible investing increases, the ability to diversify becomes less of a problem, costs go down, and performance may be comparable to other funds. *See* Social Investment Forum, 2005 Report on Socially Responsible Investing Trends in the United States ("Trends") at 1-2 (Jan. 24, 2006), http://www.socialinvest.org/pdf/research/Trends/2005%20Trends%20Report.pdf.

Mission-Related Investment Strategies

Charities use three types of mission-related investment strategies: screens, shareholder advocacy, and community investment. The use of any of these strategies by a charity will depend on the charity's purposes and its abilities to monitor the strategies.

Screens. Screens evaluate investments based on social or environmental criteria as well as financial performance. Screens may be inclusionary—for example, a fund might prefer companies that engage in sustainable environmental practices and do not pollute, or companies that support employees through fair wages and benefits and nondiscriminatory policies. Screens may also be exclusionary, excluding, for example, companies that produce tobacco or alcohol, pollute, or practice discriminatory employment practices. If the screen relates to the mission of the charity, then investing in a fund that uses a screen may be appropriate, although the managers must still consider the financial returns for the fund and the other factors involved in prudent decision-making. Reports suggest that socially responsible portfolios using screens have been both competitive and not abnormally risky in recent years. *See* Lewis D. Solomon & Karen C. Coe, *Social Investments by Nonprofit Corporations and Charitable Trusts: A Legal and Business Primer for Foundation Managers and Other Nonprofit Fiduciaries*, 66 UMKC L Rev 213, 233-50 (1997).

The difficult question for the charity may be the efficacy of investing in a fund that screens in a way that relates to the charity's mission. The charity may not be able to measure whether its decision not to invest in tobacco stocks, for example, has a positive effect on its health care mission. If the fund performs well in terms of financial returns, then the mission-related benefit does not have a financial cost to the charity. However, if the charity sacrifices some amount of financial return for the mission-related aspect of the investment, then the charity must consider whether investing in the fund furthers its mission.

Shareholder Advocacy. Some charities use their position as shareholders to try to influence corporate behavior. Shareholder resolutions on social and environmental issues and on corporate governance issues have increased in number over the past few years. *See* Trends, *supra*, at 16-27. Shareholders may also engage in ongoing dialog with management, sometimes as a lead-up to filing a shareholder resolution and sometimes as an alternative to filing shareholder resolutions.

Shareholder advocacy requires more active involvement by charities owning stock in the companies than does investing with screens, but a charity with the resources to devote to shareholder advocacy may find it an effective way to support the organization's mission. If the charity addresses issues related to its mission through shareholder advocacy, then investments in the companies targeted for the advocacy will constitute mission investing. Socially responsible funds may use the weight of many investors, both charities and private investors, to influence corporate behavior through shareholder advocacy.

Community Investing. Community investing typically uses capital from investors and lends it to people or businesses in underserved communities. Through community investing, funds can be made available to low-income individuals, small businesses, and organizations providing services such as affordable housing. A charity may engage in community investment directly or may invest through a local organization that provides the financial services. For many of the charities that engage in this type of investing, the investing may be such a significant part of the charities' mission that the investments may properly be considered program-related assets. The rules of prudence apply, but the concerns about financial return will differ from the analysis applied to other types of mission-related investing.

Conclusion

Little case law addressing investments by managers of charities exists, and the statutes and the Restatements remain the best sources of legal guidance of what it means to invest assets held by a charity prudently. Neither UPIA nor UPMIFA discusses mission-related investing directly, but an analysis of those statutes suggests that the law permits mission-related investing by charities. A charity should not invest for vague social benefits unrelated to the charity's mission, but an examination of investment options can include consideration of ways in which the investments can support the charity's mission.

Susan N. Gary

Wanted: New Editor-in-Chief

Susan Gary has decided to step down as editor-in-chief of the Newsletter, and the Editorial Board has begun the search for a new editor-in-chief. The editor-in-chief coordinates all aspects of preparation of the Newsletter. The work includes identifying topics for newsletter articles, working with authors, editing all articles, and working with the Board and the Bar throughout the process. The editor-in-chief receives a small stipend for each issue of the newsletter.

An applicant should send a cover letter explaining his or her interest and qualifications and a current resume to Susan Gary. Applications can be sent as email attachments. Susan will be happy to provide additional information about the job and the time commitment.

Oregon Legislative Preview – Bills for 2011

The Estate Planning Section will sponsor the following three bills for the 2011 legislative session. Jeff Moore will be the Section's legislative contact for the 2011 session, and in addition each bill has a primary contact for that bill. Questions or comments about any of these three bills should go to the person listed as the contact for the bill.

Revisions to the Uniform Principal and Income Act (UPIA)

The Oregon Society of CPAs worked with the Estate Planning Section on this bill. Jeff Cheyne is the legislative contact for the Estate Planning Section.

The proposed bill adds UPIA section references to the Oregon version of UPIA. The section references will facilitate the coordination of the uniform comments for UPIA with the appropriate Oregon sections. The proposal also updates Oregon's version of UPIA by making two changes approved by the Uniform Law Commission in 2008.

UPIA authorizes fiduciaries to make adjustments between principal and income to correct inequities caused by tax elections or by peculiarities in the way the fiduciary income tax rules apply. The amendments to UPIA improve the way these allocation adjustments are made.

The proposal amends ORS 129.355 (UPIA 409) so that a trustee can satisfy the IRS safe harbor requirements published in Rev Rul 2006-26, 2006-1 CB 939, for an IRA or other retirement plan payable to a marital deduction trust. In general, for a trust to qualify as a marital deduction trust, the surviving spouse who is the beneficiary of the trust must have the right to demand distribution of all of the income of the trust. Even though ORS 129.355(4) requires the trustee to allocate IRA or retirement plan distributions as necessary to "obtain the marital deduction," Rev Rul 2006-26 states that this statute does not satisfy the safe harbor requirements. The proposed revision to ORS 129.355 is designed to satisfy the safe harbor requirements and to address concerns that might be raised for similar assets.

The "income" requirement for a trust differs from the more familiar "required minimum distribution" requirement that applies to distributions from retirement plans. Sometimes due to the lack of information provided by a retirement plan's administrator, a trustee may be unable to determine the actual income for the period. When the necessary information is not available, the proposal permits the trustee to use a four percent unitrust method to determine the portion of the IRA or pension distribution that is allocable to income. The trustee would request the value of the fund assets as of the most recent statement of value immediately preceding the beginning of the accounting year and then apply the unitrust percentage to determine the amount of income available for distribution purposes. If a trustee cannot determine either the internal income of the retirement account or the fund's value, the trustee may rely on IRC § 7520 valuation methods to determine the present value of expected future payments. Four percent was chosen for the unitrust computation because it is the same as the percentage specified in ORS 129.225(4)(b) for unitrust conversions.

The proposed bill also amends ORS 129.420 (UPIA 505). Trustees are sometimes placed in a difficult position when a cash distribution received from an entity is not sufficient to pay both the tax liabilities generated by that distribution and the income distribution amount owed to the income beneficiary. The problem often arises when a trust holds an interest in a partnership, limited liability company, subchapter S corporation or other pass-through entity. These entities may choose to distribute to the trust only enough cash to pay the trust's tax liability attributable to its distributive share of the entity's Schedule K-1 income. The tax liability may be higher than the actual cash distribution received by the trust. If a beneficiary requests his or her income distribution, the trustee may be unable to satisfy the duties owed to both the income beneficiary and the remainder beneficiary. The fact that a trust receives an income distribution tax deduction for net income distributions to the income beneficiary further complicates the trustee's position.

The revisions clarify that a trustee of a mandatory income trust may in fact pay some or all of the tax liability on the trust's share of an entity's taxable income from income or principal receipts from the pass-through entity. The revisions further clarify that the trustee is required to increase current year income distributions to the income beneficiary to the extent that the trust's income tax liability is reduced by distributing the corresponding income receipts to the beneficiary.

Dissolution: Changing the Presumption on Property Received by Gift

ORS 107.105(1) provides guidance with respect to the division of marital property on divorce. This section includes a rebuttable presumption that both spouses contributed equally to the acquisition of property during the marriage. The proposed bill amends ORS 107.105(1)(f) and creates an exception for property received by either spouse during the marriage as a gift or an inheritance if the recipient spouse holds the property separately on a continuing basis. In those circumstances the proposal creates a rebuttable presumption that the other spouse did not contribute to the acquisition of the property and that the other spouse was not the object of the transferor's donative intent.

Eric Vetterlein is the legislative contact for the Estate Planning Section.

Technical Corrections to Recent Elective Share Revisions

The legislature enacted revisions to Oregon's elective share statute in 2009, with a delayed effective date of January 1, 2011. A proposed bill clarifies several provisions in the new statutes. Bill Brewer is the legislative contact for the Estate Planning Section.

The proposal adds language to ORS 114.630 that explicitly excludes from the augmented estate gifts made prior to death and property held solely in a fiduciary capacity. ORS 114.660 is amended to clarify that claims and administration expenses will reduce the value in the augmented estate, regardless of whether the decedent held probate or nonprobate property. The proposal amends ORS 114.665 to state that the augmented estate does not include property over which the decedent had the power to designate a beneficiary if the spouse is not a permissible beneficiary. The proposal also clarifies, in ORS 114.675, that the augmented estate includes the decedent spouse's nonprobate transfers to the surviving spouse. ORS 114.675(2) contains special valuation provisions for certain trusts, and the proposal amends that section to clarify that these special valuation rules apply only to trusts created by the decedent spouse. The proposal adds a new subsection (e) to ORS 114.675(2) clarifying that the spouse's interest in any other trust is valued based on the present value of any present or future interest in the trust. Finally, the proposal amends ORS 114.700 to permit the decedent spouse to alter the order of contribution to the elective share provided by the statute so that the pro rata contribution rule will not be a mandatory rule.

The bill provides that the corrections will be effective when the elective share statutes themselves become effective: for decedents who die on or after January 1, 2011.

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What's New

In re Marriage of Keller, 232 Or App 341, 222 P3d 1111 (Dec. 9, 2009)

When Norma Keller and Roy Keller divorced in 2001, their marital settlement agreement addressed their life insurance policies. During the divorce settlement, a written "Statement of Estimated Assets" was given to Norma, which listed Roy's four life insurance policies and clarified that the children, not Norma, were the named beneficiaries. The executed marital settlement agreement included Roy's four life insurance policies and stated, "[Roy] shall be awarded property free and clear of any interest of [Norma], subject to any encumbrances thereon . . . . " About two weeks following the entry of the divorce judgment, Roy updated his estate plan by executing a new will, advance directive and power of attorney. He did not complete any updated beneficiary designation forms for his life insurance policies.

On Roy's death in 2006, it was discovered that the "Statement of Estimated Assets" was incorrect and that Norma was listed with the children as a beneficiary. Roy's personal representative ("PR"), William Holdner, asked Norma to disclaim her life insurance proceeds. Norma would not disclaim her interest, so the PR argued at the trial and appellate levels that she should be held in contempt for disobeying the dissolution judgment. At trial, Norma argued she understood she was giving up any "ownership" interest in the policies, but that was separate and apart from Roy's ability to designate the beneficiaries of his policies. The PR contended that Norma had relinquished her claim to the proceeds, which should be distributed "free and clear" of any expectancy interest she had as a beneficiary. The PR testified that it was a mistake that Roy's beneficiary designation was never updated. Norma claimed the evidence supported her position that Roy intended to keep her as a beneficiary because he had the opportunity to update his entire estate plan, yet he did not do so.

At trial and on appeal, both parties heavily relied on *Prudential v. Weatherford,* 49 Or App 835, 841, 621 P2d 83, 87 (1980). *Prudential* held that a former spouse's interest in the life insurance policy was a mere expectancy interest, not a property interest, which was "not specifically dealt with by the terms of the property settlement agreement." The trial court found that the *Prudential* case supported Norma's position and found no persuasive evidence regarding Roy's intent to distribute his life insurance differently from the manner indicated by his beneficiary designations.

The facts in *Prudential* are similar to those here, with a dispute between an ex-wife and decedent's estate representative. The decedent named his then wife as beneficiary on a term life insurance policy, and they later divorced and entered into a property settlement. Six days after the dissolution judgment, the decedent died, and his ex-wife remained as a beneficiary on the policy. Unlike the situation in *Keller*, the disputed policy in *Prudential* was not included in the parties' property agreement. So in *Prudential*, the court stated, "the policy here was not expressly dealt with in the written settlement agreement and thus could have been awarded to the named beneficiary on that basis."

The core issue on appeal in *Keller* is whether the dissolution judgment had the legal effect of terminating Norma's beneficiary or expectancy interest – relying on *Prudential*. The appellate court did not heavily rely on *Prudential* and instead focused on a contractual analysis of the settlement agreement. The court distinguished *Prudential* based on the facts and said that the specific language of the contract must control and be analyzed on a case-by-case basis.

The property agreement in *Prudential* provided, "This agreement constitutes the full, complete and final property settlement agreement between the parties hereto and each party does hereby release and discharge the other from any and [all] claims and property deman[ds], each against the other, except as expressly provided in this agreement …." In *Keller*, the settlement agreement includes the life insurance policies and states that Roy is awarded the policies "free and clear of any interest of [Norma]." The court found that the trial court erred in the relying on *Prudential* rather than analyzing the specific contractual language to determine whether Norma and Roy intended to terminate Norma's beneficiary interest in Roy's life insurance policies or otherwise bar her future claim to those insurance proceeds. Therefore, the court remanded the case to allow the parties' intent in the first instance to be considered.

Kerr v. Bauer, 232 Or App 374, 222 P3d 1117 (Dec. 9, 2009)

In *Kerr*, a family dispute emerged after numerous deeds were executed transferring a parcel of real property. In the first warranty deed (Deed #1), executed in 1956, Sylva Leona Kerr is identified as the widow of her late husband, Henry Allen Kerr. In that deed she transferred her land to her two sons, Senior and J.M., as trustees in trust. Deed #1 provided, in relevant part:

> "This grant is made for the purpose of creating a place of rest, recreation and recuperation for each and all of the children, grandchildren and descendants of Sylva Leona Kerr and Henry Allen Kerr."

It was later discovered that Deed #1 violated the rule against perpetuities because the property did not vest in any specific person within any specific time. Subsequent deeds were executed by various family members to remedy the original gift in perpetuity. In 1968, the trustees executed Deed #2 conveying the property back to Sylva. Two days later Sylva executed Deed #3 conveying the property to three of her eight children: Senior, J.M. and Marjorie. In 1989, Senior executed Deed #3.5 conveying his interest in the property to Marjorie and J.M. Later that year, Marjorie and J.M. executed Deed #4 conveying the property to the Kerr Homestead Trust, a trust agreement executed by Marjorie and J.M.

In 2003, two of Sylva's grandchildren, plaintiffs Bryan and Junior, sued the trustees of the Kerr Homestead Trust, alleging the trustees lacked authority to transfer the property following Deed #1. Plaintiffs sought an order cancelling Deed #2 through Deed #4 and quieting title in the trustees of Deed #1, plaintiffs' fathers. Another grandchild, Donald, requested by counterclaim that, pursuant to ORS 105.960, the court should reform Deed #1 to create interests that would vest within 90 years of the creation of the trust, which he believed would closely approximate Sylva's manifested plans of distribution.

At the trial level, plaintiffs moved for a partial summary judgment "quieting title in the trustees pursuant to Deed #1 and ordering all subsequent deeds of the real property cancelled." Defendant's response was that Deed #1 was void in its entirety because it violated the rule against perpetuities, and therefore only the interests of the children were valid. Trustees J.M. and Senior contended that the class of "descendants" could be stricken from Deed #1, leaving a trust that would not violate the rule against perpetuities and was consistent with Sylva's intent. Plaintiffs joined in this argument and relied on ORS 105.970(2) to reform Deed #1 to omit the class of "descendants."

The motion for summary judgment was granted. The court concluded that the interests of the grandchildren and descendants under Deed #1 violated the rule against perpetuities, but those interests could be severed from the interests of the children, which the court found to be the only interests that did not violate the rule. So Deed #1 was modified in part, and all subsequent deeds were found to be void as a matter of law.

The appellate court agreed that Deed #1 violated the rule against perpetuities. The resulting question was whether the invalid portions of the trust could be severed from any valid portions, as the trial court allowed.

Severance is only proper if it is consistent with the settlor's purpose in creating the trust. Restatement (Second) of Trusts § 65 (1959). The court cited Helene S. Shapo, George Gleason Bogert, and George Taylor Bogert, 4 *The Law of Trusts and Trustees* § 213, at 189-93 (3d ed 2007), which concludes that if the valid and the void portions of the trust are "inextricably interwoven" and separating them would be inconsistent with the settlor's disposition plan, the court "may hold that the entire disposition is void."

Deed #1 was created for the benefit of "each and all of the children, grandchildren and descendants of Sylva Leona Kerr and Henry Allen Kerr." The court found that this wording indicates Sylva intended to transfer to all beneficiaries equally, with no specified order of preference for any beneficiary over another. As a result, Deed #1 was found to be one entire scheme of distribution, where interests could not be severed without defeating Sylva's manifest intent to benefit "each and all" of the beneficiaries.

The court found that, because the trust created in Deed #1 violated the rule against perpetuities and invalid interests could not be severed from valid interests under the above-mentioned common-law principles, the trial court erred in granting plaintiffs' motion for summary judgment. The respondents offered no alternative grounds for affirmance, so the court reversed and remanded the decision.

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Probate Court Notice Periods

12/22/09

Compiled by Philip N. Jones, Duffy Kekel LLP

Action	Estates	Conservatorships	Guardianships
Initial Petition (for appointment of a fiduciary)	No advance notice required, in most cases. If nominee does not have ORS 113.085 priority, provide consent, nomination, or 14 days notice to those with priority. ORS 111.215. After appointment, give notice per ORS 113.145.	15 days. ORS 125.065(3).	15 days, in most cases. ORS 125.065(3). If subject to the Uniform Child Custody Jurisdiction and Enforcement Act (ORS 109.701 et seq.), provide 21 days notice. ORS 125.065(3).
Petitions and Orders (in general)	14 days. ORS 111.215.	15 days. ORS 125.075.	15 days. ORS 125.075(2).
Partial Distributions	No statutory period. ORS 116.013. Most courts require 20 days.		
Interim Accountings (with or without a request for fiduciary fees or attorney fees)	20 days. ORS 116.093; UTCR 9.060(4).	15 days. ORS 125.075(2).	
Petitions for Fiduciary Fees or Attorney Fees	20 days. ORS 116.093; UTCR 9.060(4).	15 days. ORS 125.075(2). ORS 125.475. UTCR 9.060(4).	15 days. ORS 125.075(2). ORS 125.475. UTCR 9.060(4).
Final Accounting (long form, with or without a request for fiduciary fees or attorney fees)	20 days, to all heirs <u>or</u> all devisees, including specific devisees. ORS 116.093; UTCR 9.060(4).*	15 days. ORS 125.075(2).	
Final Accounting (short form)	Consent required of all distributees, including specific distributees. ORS 116.083(4).*		

In trust matters, the rules pertaining to notice appear in ORS 130.035, which provides that notice of a judicial proceeding must be given in the manner required for the approval of a final accounting in a decedent's estate, which is 20 days under ORS 116.093 and UTCR 9.060(4).
* No notice is required to (or consent from) a recipient of a partial distribution who has signed a receipt for his/her full distributive share.
This is a summary only; please consult the text of the law for precise wording regarding the application of the law to particular situations. Other statutes may also be applicable.

Basic Estate Planning and Administration (w/forms on CD)

Friday, June 25, 2010
Oregon Convention Center
9:00 – 4:30 (6.5 MCLE credits, including 0.5 ethics credit)

Selected Real Property Issues in Basic Estate Administration

Robert Lowe, *Ticor Title Insurance Company, Salem*

- Forms of vesting deed and legal effect
- Sales by trustees
- The benefit of title insurance – what it does and doesn't do

Petitions for Instructions and Settlement Agreements

Philip N. Jones, *Duffy Kekel LLP, Portland*

- Petitioning for instructions, declaratory judgments, or trust modifications in the probate court
- Attorney fees and settlement agreements in estate and trust disputes
- Avoiding unintended tax consequences in judgments and settlement agreements

Fiduciary Duties and Risks

Holly N. Mitchell, *Duffy Kekel LLP, Portland*

- Complying with Uniform Trust Code reporting requirements
- Removal or resignation of a trustee or personal representative
- Partial and final distributions from trusts and estates

Key Issues in Washington Estate Administration

T. Randall Grove, *Landerholm Memovich Lansverk & Whitesides PS, Vancouver*

Philip Baird Janney, *Landerholm Memovich Lansverk & Whitesides PS, Vancouver*

- Nonintervention probate procedures
- Income and estate tax considerations
- Applying community property law to the administration of estates

Representing Your Client Through Diminishing Mental Capacity

Linda Ganzini, *MD, MPH, Oregon Health & Science University, Portland*

Stephen Owen, *Fitzwater Meyer LLP, Portland*

Allison D. Rhodes, *Hinshaw & Culbertson LLP, Portland*

- Cognitive impairment – memory and executive function
- Delirium, dementia, and psychotic disorders
- Clues to cognitive impairment and undue influence
- Attorney ethics when a client experiences diminished capacity
- Practical issues and pitfalls

Gifting in Today's Tax World: Loophole or Noose?"

Jeffrey G. Moore, *Saalfeld Griggs PC, Salem*

- The current state of the gift tax
- Gifting and IT-1 filing: what's the rub?
- Deathbed gifting tips and traps
- Discounted gifting and opportunity shifting
- Gifting issues – pros, cons, and formulas

Basic Estate Planning

Eric R. Foster, *Foster Denman LLP, Medford*

- Basic drafting
- Wills versus revocable living trusts
- Potential pitfalls in drafting estate planning documents

CLE Resources

The websites listed here provide information about CLE opportunities for lawyers who practice in estate planning, elder law, tax and related areas. Some of the resources listed also provide continuing education to other professionals in these fields. If you know of sites we have missed or of new sites that may be useful to other readers, please let us know.

Oregon

Oregon State Bar: www.osbar.org/cle/clelinks.html

Oregon State Bar Estate Planning Section: www.osbar.org/sections/estate/index.html

Oregon Law Institute – Lewis & Clark: http://law.lclark.edu/org/oli

Multnomah Bar Association: www.mbabar.org

University of Oregon Law Library CLE Information Available for Credits: http://lawlibrary.uoregon.edu/faculty/cle.html

Washington

Washington State Bar: www.wsba.org/cle/default.htm

University of Washington CLE: www.law.washington.edu/cle/

King County Bar Association: www.kcba.org

Snohomish County Bar Association: www.snobar.org

Tacoma Pierce County Bar Association: www.tpcba.com//page.php?id+10

California

California State Bar Association: www.calbar.ca.gov

CEB By and For California Lawyers: http://ceb.com *(Continuing Education of the Bar – California, founded by the University of California and the California State Bar)*

Southern California Tax & Estate Planning Forum: www.clenet.com

Other State Bar Associations

State Bar of Arizona: MyAzbar: www.myazbar.org/cle

Colorado Bar Association Trust & Estate Section: http://www.cobar.org/group/index.cfm?EntityID=TRUST

Idaho State Bar: www2.state.id.us/isb

American Bar Association

American Bar Association: www.abanet.org

American Bar Association Section of Real Property, Probate & Trust Law: http://www.abanet.org/rppt/

ALI-ABA: www.ali-aba.org

Other Resources

American College of Trust & Estate Counsel: www.actec.org

Celesq: www.celesq.com (online CLEs, CDs, and tapes)

Foundation for Continuing Education: www.fce.org *(seminars and training programs on taxes, accounting, estate planning, financial planning, retirement planning, and other topics)*

Heckerling Institute on Estate Planning: http://www.law.miami.edu/heckerling

Law.com cle center: www.clecenter.com *(online CLEs)*

Legal Services Corporation Resource Library: www.lri.lsc.gov *(created by Congress to improve access to justice, provides information about legal services management and delivery approaches)*

Lorman Education Services: www.lorman.com *(CLE seminars and teleconferences)*

National Business Institute: www.nbi-sems.com/estateplanningprobate.html

Practicing Law Institute: www.pli.edu

West LegalEdcenter: www.westlegaledcenter.com *(online CLEs)*

Wills, Trusts & Estates Professors Blog: http://lawprofessors.typepad.com/trusts_estates_prof/

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