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Confidentiality in Protective Proceedings

To address concerns regarding the increasing number of elder abuse cases and the needs of the elderly, the 2009 legislature enacted ORS 125.012. The new statute permits the Department of Human Services (DHS) to disclose confidential information to the court in order to prevent or lessen a serious and imminent threat to the individual's health or safety. DHS is allowed to petition for a protective proceeding or to provide the confidential information for a pending proceeding or in an existing case. Information can include health, mental health, financial, legal and any substantiated abuse in the DHS records. The statute also permits DHS to disclose any confidential information regarding any person petitioning to be appointed a fiduciary or who is an existing fiduciary.

DHS is required to identify and mark the disclosed information as confidential. Recent (May 2010) Administrative Rules have been established by DHS setting out the procedure and criteria for disclosing the confidential information in protective proceedings. (See Chapter 411, Division 26). DHS also developed a cover sheet intended to provide clarification of the information and to alert any recipients that the information attached is confidential. (See Inset 1.)

Oregon
Theodore R. Kulongoski, Governor

Department of Human Services
Seniors & People with Disabilities
Administration
500 Summer Street NE, E-02
Salem, OR 97301-1073
Voice (503) 945-5811
FAX (503) 373-7823

[*Date*]

RE: [*Guardianship / Conservatorship for {client name}*]

DHS Confidential Information Subject to ORS 125.012

Confidential and protected information disclosed by the Department of Human Services (DHS) to a court for the purposes of adult protective services, as permitted by ORS 125.012, must remain confidential. Pursuant to ORS 125.012(3)(b), before DHS discloses the information, DHS must identify and mark the information as confidential and protected. Pursuant to ORS 125.012(3)(a), "confidential and protected … information disclosed under this section must remain confidential and, when disclosed to the court, must be sealed by the court."

The following information is being disclosed and must be protected pursuant to ORS 125.012:

- This cover sheet
- [*title of document*]
- [*title of document*]
- [*title of document*]
- [*title of document*]

"Assisting People to Become Independent, Healthy and Safe"
An Equal Opportunity Employer HSB 1014 (4/00)

Inset 1: DHS Confidential Information cover sheet

Continued next page

In This Issue

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF _____
PROBATE DEPARTMENT

In the Matter of the Guardianship of , Respondent.	Case No.: ORDER REGARDING CONFIDENTIAL INFORMATION DISCLOSED BY DEPARTMENT OF HUMAN SERVICES

This matter came before the Court on the Petition for Appointment of _____ as Fiduciary for _____. Confidential information from the Department of Human Services, herein after referred to as "the information," has been submitted in accordance with ORS 125.012.

IT IS HEREBY ORDERED

1. The attorney of record for a Respondent, Petitioner, Objector, and any nominated or appointed fiduciary shall upon request be provided a copy of the information from the clerk of the Court.
2. Counsel is prohibited from any re-disclosure of the information, subject to the following exceptions: If the attorney of record reasonably believes there is a necessity to re-disclose the information to an expert in order to address the issues in this proceeding, or upon specific order of the Court prior to any other re-disclosure.
3. At the conclusion of the proceedings, any attorney of record must return all copies of the information received or made by the attorney to the clerk of the Court. The Court will rely on the attorney representation as an Officer of the Court that all copies received or made are returned.
4. Nothing in this order shall be construed to prevent the discussion of the contents of the information by counsel with the Petitioner, Respondent, Objector, and any nominated or appointed fiduciary.
5. The Visitor appointed by the Court is prohibited from re-disclosure of the information. At the conclusion of the proceeding, the Visitor must return all copies of the information received or made by the Visitor to the clerk of the Court. Nothing in this order shall be construed to prevent the Visitor from discussing the contents of the information with the Petitioner, Respondent, Objector, and any nominated or appointed fiduciary.
6. In the event that a Petitioner, Respondent, Objector, and any nominated or appointed fiduciary does not have an attorney, the party may come to the courthouse prior to the date of the hearing to review the confidential information. The information shall not be duplicated in any manner by the party.
7. At the time of hearing, the unrepresented Petitioner, Respondent, Objector, and any nominated or appointed fiduciary may have a copy of the information in the courtroom for purposes of the hearing.
8. The unrepresented party must return the copy of the information to the clerk of the Court at the conclusion of the proceeding.
9. The unrepresented party shall not remove any copy of the information from the courtroom without prior permission of the Court.

Dated this _____ day of _____, 2010.

_____
Circuit Court Judge

ORDER REGARDING CONFIDENTIAL INFORMATION

Inset 2: Example of Order Regarding Confidential Information

When the information is disclosed by DHS, the court is required to seal the information, including any visitor report containing the protected information. The implementation of the statute has been a challenge, requiring courts to determine who shall have the right to review the public records and, at the same time, maintain the confidentiality of the information. The statute allows "inspection" of the confidential information on file with the court only by "the parties" and their attorneys. Specifically prohibited from access to the protected information are members of the public, who only gain access by a showing of good cause and prior court order.

In order to provide some guidance to the court clerks who are responsible for filing, maintaining and overseeing all court files, a number of courts have utilized an Order Regarding Confidential Information Disclosed by the Department of Human Services. The order has been generated by the court sua sponte as well as provided to the court by any of the attorneys appearing in the case. (See Inset 2.)

The language of the order seeks to clarify the term "party" as a Respondent, Petitioner, Objector or any existing or proposed fiduciary. Attorneys appearing in the case are allowed to receive copies of the protected information with limitations imposed regarding re-disclosure to any other individual. In addition, any attorney in possession of the protected information is required to return all copies of the protected information to the court.

The order also supplements the statute by specifically allowing the court visitor access to the protected information. The court visitor is also subject to the strict re-disclosure requirement and must also return the protected information to the court. Although not specified, it is anticipated that the information will be returned to the court upon the appointment of the fiduciary or dismissal of the petition.

The unrepresented party is allowed inspection under the terms of the order, but not permitted a copy of the confidential information. The pro se party is allowed a copy of the confidential information at the time of the hearing; however, the copy must be returned to the court at the conclusion of the hearing. Specifically, the unrepresented party is not allowed to remove the protected information from the courtroom without prior permission of the court.

To address the implementation of the statute, the Elder Law Section convened a committee to address the issues regarding the statute. The committee is chaired by Michael Schmidt with participation by the Attorney General's Office, DHS, Disabilities Rights Oregon, the bar and the court. Proposed legislation, as well as proposed UTCRs, have been drafted to clarify the issues in this statute.

Judge Rita Batz Cobb
Washington County Circuit Court
Hillsboro, Oregon

Revocation Reminders

Oregon statutes provide two ways for a testator to revoke a will: by subsequent document or by physical act. ORS 112.285. Marriage, divorce or the birth of children after the execution of a will may also result in the revocation of part or all of a will. A review of the rules on revocation may be a useful reminder for lawyers, and lawyers should discuss these rules with clients so that a client does not revoke a will inadvertently or attempt a revocation that does not work.

Revocation by Will

When a testator changes his or her mind about bequests under a will, the testator can execute a codicil to change one or a few provisions, or execute a new will if most of the provisions will change. A codicil does not revoke the prior will; it merely replaces any provisions in the prior will that are inconsistent with the codicil. For example, if the will gave a specific painting to Jermaine, and a codicil gives the painting to Carlos, the codicil revokes the gift to Jermaine under the will. If instead, the testator executes a new will that gives the painting to Carlos and the residue to Anita, the will revokes the entire prior will by inconsistency.

Practice Tip: ORS 125.012 Drafting Petitions and Confidentiality

Attorneys may find it challenging to draft a petition that alleges the required factual information of incapacity or financial incapability while at the same time not disclosing the confidential information. Consider including somewhat broad allegations of the incapacity or financial incapability in the petition and referencing the confidential information as an exhibit to the petition. After the court seals the record as to the confidential information, the attorney can then proceed to send the petition as part of the notice to the parties, without sending the attachment. The notice or petition should advise that confidential information is part of the petition, that it has been sealed by the court, and that the court should be contacted regarding access to the confidential information. If the petition includes the information, sending required notices, while complying with the court's order sealing the confidential information, will be difficult. Counsel will also need to be careful to not disclose the confidential information or to give copies to anyone who does not have authorization to access the information.

Michael Schmidt
Schmidt & Yee
Aloha, Oregon

A testator can also use a document to revoke a will, without giving the property to new beneficiaries. The document can simply say, "I hereby revoke my will dated July 23, 2004." This document will be valid as a revocation if the testator executes it with the same formalities required for a will: the testator's signature and signatures of two witnesses. ORS 112.235. This form of revocation is unusual, but it is valid. ORS 112.285 contemplates revocation by another "will," and ORS 111.005(31) defines "will" to include "a testamentary instrument that merely appoints an executor or that merely revokes or revives another will." If a person revokes his or her will without executing a new will before death, the person will die intestate.

Usually a testator working with an estate planning lawyer will use a document that revokes the prior will and also serves as the new will, giving the testator's property to new beneficiaries. Will forms typically begin, "I hereby revoke all prior wills and codicils," and this serves as a statement of revocation. A will typically has a residuary clause, which means that the will disposes of all of the person's property. The new will revokes the old will by inconsistency.

Revocation by Physical Act

ORS 112.285(2) provides that a testator can revoke a will by physical act. Revocation by physical act occurs if the testator performs a revocatory act on the will (the will can be "burned, torn, canceled, obliterated or destroyed") with the intent of revoking the will. Accidental destruction, even at the hand of the testator, does not constitute revocation. Intent to revoke is a key requirement.

Oregon does not permit partial revocation by physical act. *Minsinger v. U.S. Nat'l Bank of Portland (In re Minsinger's Estate)*, 228 Or 218, 364 P2d 615 (1961). If a will is found with one beneficiary's name crossed out, that mark will not revoke the gift to the beneficiary, and the bequest will be made as originally written. If a number of provisions are crossed out, but portions of the will remain untouched, the court may determine that the testator did not intend to revoke the entire will. *See id*. But if most of the provisions are crossed out, the marks may rise to the level of "cancellation." In *Brune v. Board of Higher Education (In re Brune's Estate)*, 44 Or App 449, 606 P2d 647 (1980), the testator had marked through most, but not all, bequests. The court found the level of marks (all but one bequest had been crossed out) sufficient to constitute revocation.

If a will with revocatory marks is found after the testator's death, there is a rebuttable presumption that the testator made the marks with the intent to revoke the document. *Williams v. Presbytery of Portland (In re Bond's Estate)*, 172 Or 509, 143 P2d 244 (1943); *Price v. Wood*, 254 Or 259, 456 P2d 500 (1969).

The testator himself or herself must perform the revocatory act, or, if someone else destroys the will, the destruction must occur in the presence of the testator and at the direction of the testator. If someone other than the testator destroys the will, two witnesses must prove that the destruction occurred in the testator's presence and at the testator's direction.

Example: George calls his lawyer, makes an appointment to meet with the lawyer to discuss a new will, and then says, "I want you to destroy my old will, just in case something happens to me before we finish the new will. Intestacy would be better than the old will." If the lawyer writes "cancelled" or "revoked" on the will before the client meets with the lawyer, the attempted revocation will not meet the statutory requirement. Revocation by physical act requires the presence of the testator and not merely the direction of the testator.

George's lawyer cannot revoke the will by physical act but can send the original will to George with instructions on how to revoke the will by physical act or prepare a document of revocation for George to sign, with witnesses.

Lost Will

If the original will cannot be found when the testator dies, a presumption that the testator destroyed the will with the intent to revoke it arises. *Salter v. Salter*, 209 Or 536, 307 P2d 515 (1957). The presumption is rebuttable, and the strength of the presumption depends on the control the decedent had over the document and the access others, with an interest in the estate, had to the document. *First Interstate Bank of Or. v. Henson-Hammer (In re Estate of Herbert Henson)*, 98 Or App 189, 779 P2d 167 (1989). If sufficient evidence exists against the presumption (e.g., the sole intestate heir had access to the will, the testator was careless, the testator's house burned down and the will had been kept in the house), a copy of the will can be probated.

Marriage

If a testator executes a will and then marries, the law assumes that the testator would want his or her new spouse to share in the estate. The law revokes the old will, but only if the new spouse survives the testator. ORS 112.305. If the testator marries and then the new spouse dies and later the testator dies, the testator's original will remains unrevoked.

In some states, but not Oregon, the statute revokes only the portion of the will necessary to give the surviving spouse an intestate share of that part of the estate that is not going to a child of the decedent who was born before the marriage and is not a child of the spouse. See, e.g., Colo Rev Stat § 15-11-301.

Even if the new spouse survives the testator, the will remains unrevoked if the will shows the intent of the testator that it not be revoked by a subsequent marriage or if circumstances suggest that the testator executed the will in contemplation of marriage. ORS 112.305(1). A will executed the day before a wedding is probably an attempt by the bride or groom to put her or his affairs in order before the marriage begins. The timing of the execution means that the testator knew about the new spouse and chose not to include him or her. Therefore, the statute allows the will to stand. Of course, if the will disinherits the new spouse, the spouse may have the right to take an elective share.

If the testator and spouse enter into a prenuptial agreement before the marriage and the contract states that the spouse will have no rights in the testator's estate or makes other provision for the spouse, then the statute does not apply. ORS 112.305(2).

Divorce

If a testator's will provides for his or her spouse, and then the couple dissolves their marriage, the law assumes that the testator would not want the spouse to continue to share in the estate. Unless the will itself evidences a different intent, ORS 112.315 revokes all bequests for the former spouse and also revokes any provision naming the former spouse as executor. The will is given effect as if the former spouse failed to survive the testator, and the will's other provisions control what happens to the estate.

Some states revoke provisions in favor of step-children and other step-relatives who are not related to the testator except through the marriage, see, e.g., Colo Rev Stat § 15-11-804, but the Oregon statute does not. Thus, if the provision for the former spouse is revoked, the next in line may be the testator's step-children. The testator may want this result, if the testator had a close relationship with the children, but the testator may prefer a different distribution if the relationship ended when the marriage ended. After a divorce both parties should always review all their estate planning documents and execute new wills, revocable trusts, and beneficiary designations for life insurance policies, retirement plans, and other will substitutes as appropriate.

Children

The birth or adoption of children does not revoke a will, but a child born or adopted after the execution of a will may be entitled to a share of the estate. ORS 112.405. If the decedent had other children when he or she executed a will and did not leave a bequest to any of the children, then the after-born child will not take a share of the estate. Usually in that situation the testator left the property to his or her spouse and expects the spouse to care for the children.

If one or more children received a bequest under the will, then the after-born child takes a share of what the other children received. The bequests to the children are divided among the children who received bequests and any after-born children.

Finally, if the testator had no children when he or she executed the will, then the after-born child will take an intestate share of the estate. This may completely disrupt the distribution under the will, for example if the testator is unmarried and the after-born child is the testator's only intestate heir. Alternatively, the after-born child's share may be zero if the testator's spouse survives and the spouse is the parent of the after-born child.

Revival of a Revoked Will

In some states if a testator revokes a second (or subsequent) will by physical act with the intent that the prior will be effective, the prior will is considered revived. See, e.g., Wash Rev Code § 11.12.080(1). In Oregon, a prior will is revived only if it is re-executed or if the testator executes a new will that incorporates the contents of the prior will by reference. ORS 112.295. Sometimes a client thinks that by destroying a will, the prior will, sitting untouched in the drawer, will come back into effect. In Oregon revival without execution of a new will does not work.

What to Do with a Revoked Will

When a lawyer helps a client execute a new will that revokes a prior will, the question often raised by the client is what to do

with the old will. The old will is revoked, so it could be thrown away or shredded, but there are at least three reasons that keeping the revoked document may be helpful. First, if the old document exists, it can be revived using incorporation by reference. Second, if the new document is ineffective for any reason—a defect in the execution formalities, undue influence exerted on the testator, or lack of capacity to execute the will—then the old will was never revoked. The testator may prefer the old will to intestacy, so if the old document exists it can be proved more easily. Finally, the existence of the old will may help to discourage a will contest. If an intestate heir knows that the result of the will contest will be the prior will and not intestacy, the heir's interest in contesting the will may vanish.

If an old will is kept just in case the new will is invalid, then the old will should not be revoked by physical act. If the client writes "revoked" on the old will, then the client has revoked the will, not only by executing a new will but also by physical act. If the client lacked capacity or was unduly influenced to revoke the will, then the revocation will not be valid, but if the problem with the subsequent will has to do with formalities of execution, the client may end up with no will. Under those circumstances, the old will might be given effect using dependent relative revocation (the client would not have revoked the old will had the client known that the new will was not effective), but it may be easier not to mark the old will in a way that revokes it by physical act.

Oregon statutes are relatively straightforward when it comes to revoking wills, but lawyers need to keep the rules in mind. Lawyers should remember to advise clients about revocation, both how to revoke a will and when a new will may become necessary because a statute may revoke all or part of a will. These reminders should help lawyers assist their clients with the various situations that can arise.

Susan N. Gary
University of Oregon School of Law
Eugene, Oregon

Ties to the Land: Preparing Resource Land Owners for Succession Planning

One-half of Oregon's family forest land owners and nearly one-third of the state's farmers and ranchers are over the age of 65. Tom Eiland, Family Forestland Survey (Oregon Forest Resources Institute 2004). Yet, the majority of them have overlooked or put off succession planning. As a result, the future of a majority of the woodland, farm, and ranch land is at stake as a result of a predictable and preventable human disaster. In this context, succession planning not only encompasses planning for the intergenerational transfer of land but also planning for the transfer of the core vision and values associated with the land. For professionals, succession planning for landowners involves assisting them in the creation of the legal and financial structures needed to create and sustain a multi-generational legacy.

Millions of acres of Oregon's resource lands (forest land, ranch land, and farmland) will change hands in the next two decades. While many of the owners of these lands want their properties to continue to be owned by their families, less than half of them will actually achieve that result. Catherine Mater, Family Forests: What Will the Next Generation Do? (presentation to National Association of State Foresters, Oct. 2005; data from survey conducted by Pinchot Institute). The cost of this outcome, to both families and society, can be unexpectedly high.

The re-entry costs for heirs who have interest in maintaining the family's resource lands but did not successfully inherit are prohibitively high, resulting in lost family heritage and sometimes lost individual livelihoods. In other cases, lack of planning or failure to address family dynamics creates legal and/or interpersonal conflicts that can divide families for years if not permanently.

Society also loses when intergenerational transfers are unsuccessful. When resource land is sold under the pressures of inheritance taxes, family discord, or other necessity, the result is often that the land is subdivided for development. Subdivided land is not as efficient at, and in some cases is no longer capable of, providing the ecological, economic, and aesthetic resources society needs.

Fear of facing one's mortality, fear of conflict, a desire to maintain control, and uncertainty about how to be fair are a few of the many reasons people put off planning for the distribution of their property after death. Further, most landowners are unaware of the complexities that can be involved in "just keeping the land in the family." They have usually not considered how their family culture and dynamics can influence the planning process.

In addition to these significant personal barriers to planning, owners may have difficulty finding professional advisors who share their view of land as a multigenerational heirloom. Not all legal and accounting professionals have experience in helping families create and maintain land legacies. However, in many ways, advising clients who own resource lands is similar to advising family business owners. In fact, many Oregon landowners are managing forestry or agricultural businesses. As with family business owners, landowners often have a strong emotional attachment to their property. The family dynamics that can make advising family owned businesses challenging are also present with family landowners. Understandably, many estate planning professionals are uncomfortable dealing with non-technical, "soft" issues. Yet, creating strong, flexible plans that address multigenerational needs requires venturing into these issues. Having clients who have thought about these issues and are prepared to discuss them can considerably facilitate candid conversations between lawyers and their clients.

A series of workshops called "Ties to the Land" was developed to help landowners navigate the many obstacles to successful intergenerational transfer of their land. The project was launched at Oregon State University as an innovative partnership between the OSU Forestry and Natural Resources Extension Program, the Austin Family Business Program (at OSU), the Oregon Forest Resources Institute, key local financial and legal professional advisors, and local landowner volunteers. This collaborative

team developed and produced a practical, hands-on, multimedia introductory curriculum on succession planning for woodland owners. The workshop materials received the Association for Communication Excellence 2008 Gold Award for Distance Education and Instructional Design, and the Association of Natural Resource Extension Professionals Gold Award for Mixed Materials, also in 2008.

The Ties to the Land workshops were specifically designed to increase landowners' awareness of the impact family relations have on succession planning. The workshop, usually presented as two 2½ hour sessions, introduces landowners to the individual, relational, contextual, financial, and legal factors that play a role in the succession process. Five of the six workshop modules focus on non-technical issues such as generational differences and family meetings. The workshop is presented on video with supporting graphics and film.

Workshop materials include a companion workbook that was developed to provide participants with substantial and practical take-home materials, allowing them to continue working on their succession process at home, with their families. Clients who have attended the workshop are more likely to be clear about their goals, understand their heirs' needs and aspirations, and have considered questions regarding governance and management of their land legacy.

The Ties to the Land workshops are an innovative way to get landowners started on their succession planning. Professional advisors are also welcome to attend Ties to the Land workshops. Workshop materials are very clear about why it is essential to have professional help and why spending money on creating a good succession plan will save dollars and heartache in the future. By the end of the workshop, attendees are aware of the emotional and relational challenges they may encounter and have the passion, knowledge, and tools to get started on the process. They are then more motivated to tackle succession planning when they contact a legal advisor.

For more information about Ties to the Land and when workshops are scheduled for your area, visit the website at http://tiestotheland.org or contact the author.

Mary Sisock, Ph.D.
Director, Ties to the Land Initiative
Austin Family Business Program
Oregon State University

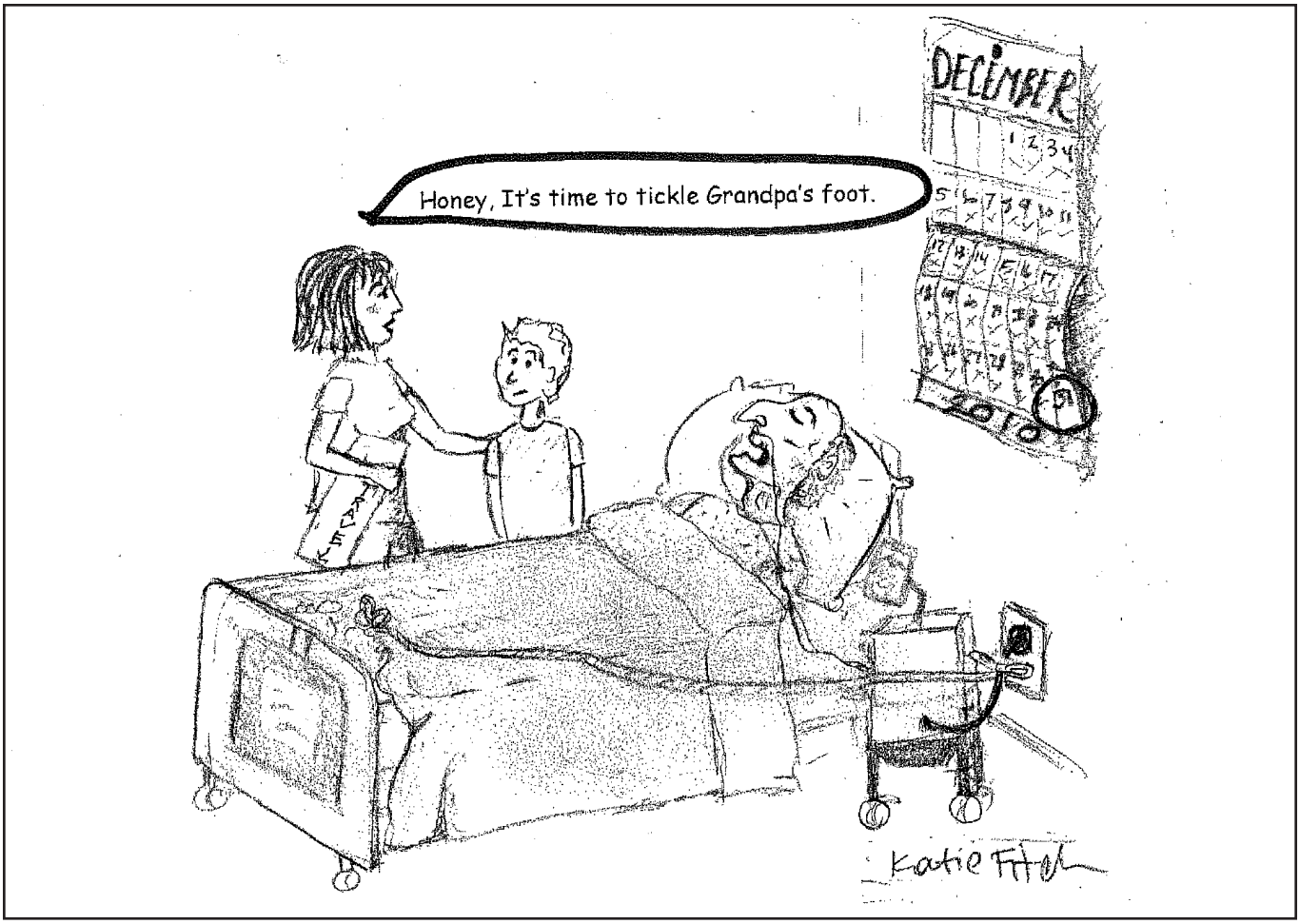

Chart: Oregon Inheritance Tax Penalties and Interest

Oregon Statute	Type	What Statute/Rule Says	Amount of Penalty, Interest or Bond
ORS 118.220 When tax accrues and is payable	T	Taxes imposed by ORS 118.005 to 118.840 take effect and accrue upon death of decedent, and are due and payable on the date the decedent's federal estate tax is due and payable. [Note: LC 245 (Legislative Counsel draft bill) adds that if no federal estate tax return is required, taxes are due no later than 9 months following the date of the death of the decedent.]	
ORS 118.225 Extension of time for payment	EP	Can get extension for payment (14 years) upon application by executor and providing security, may also get extension for deficiency for a reasonable time not to exceed 4 years from date fixed for payment of deficiency.	
OAR 150-118.225 Extension of time to pay tax	EP	Application for extension of time to pay the tax is due within 9 months after the date of decedent's death or within the time of any extension granted for filing the return. Application for extension of time to pay a tax deficiency is due within 30 days from the date of the mailing of the notice of deficiency.	An approved federal extension to pay shall not waive the penalties for late filing and interest shall accrue during the extension period.
ORS 118.260(1) Penalties for delinquency; failure to file and fraud; interest; deposit where tax not determined	FP	Failure to file penalty.	5% of the amount of tax due.
ORS 118.260(2)	FP	Failure to file penalty for a period of time in excess of 3 months after due date.	20% of the amount of tax due [in addition to 5% imposed under sub. (1)].
OAR 150-118.160-(B) Inheritance tax return; extension of time to file	EF	If executor cannot file return within 9 months of date of decedent's death, DOR may allow additional time, usually not to exceed 6 months to file the return. Must show good and sufficient cause for being unable to file a timely return. DOR will not impose delinquency charges if the Oregon return is received within 1 month from the last date that the IRS would accept the federal return without imposing delinquency charges.	Estate still must pay 5% penalty for failure to pay (ORS 118.260(4)). Interest accrues during extension period too (ORS 118.260(5)(a)).
ORS 118.260(3)	PP	Deficiency due to fraud with intent to evade penalty.	100% of the amount of tax due.
OAR 150-118.260(1)-(A) Penalty if no return filed	PP	States exactly what is stated in ORS 118.260(1), (2), (3). The 5% and 20% penalties do not apply to the amount of tax paid within 9 months following the date of death. This rule also says to see OAR 150-305.145(3)(A) for waiver of the penalty, but that rule does not reference a waiver for these inheritance tax penalties.	
ORS 118.260(4)	PP	Untimely payment penalty when no extension granted under ORS 118.225 or timely election made under ORS 118.300.	5% of the amount of tax due.
OAR 150-118.260(1)-(B) Penalty for late payment	PP	If the tax is not paid and no extension of time is granted a penalty is added to the tax. The rule also says to see OAR 150-305.145(3)(A) for waiver of the penalty, but that rule does not reference a waiver for inheritance tax penalties. Waiver of the penalty for late payment will not waive the penalty for late filing. Interest accrues during the late payment period.	5% of the amount of tax due
ORS 118.260(5)(a)	PP/I	When there is a failure to timely pay, interest is charged at a rate established by ORS 305.220 from the time the tax becomes due and payable. [ORS 305.222 provides for the interest determination of ORS 305.220 and states that if the tax is not paid within 60 days after the date of the notice of assessment, the interest rate imposed by ORS 305.220 is increased by one-third of 1% per month (4% annually); this is known as the Tier 2 interest rate.	Tier 1 interest rate is 0.8333% (10% annually) per month, or if that rate is 1 point more or less than the prevailing rate of interest established by the IRS then an adjusted rate may be established by the DOR; OAR 150-305.220(1) provides the 2010 DOR adjusted rate of 0.4167% per month (5% annually). When you combine the Tier 1 and 2, the interest rate presently is 9% annually.

Abbreviations: T=time of payment, EP=extension of time to pay, EF=extension of time to file, FP=filing penalty, PP=payment penalty, I=interest, DOR=Department of Revenue

Oregon Statute	Type	What Statute/Rule Says	Amount of Penalty, Interest or Bond
ORS 118.260(5)(b)	EP/I	When extension to pay is granted under ORS 118.225, interest is charged from the time the tax or deficiency is "otherwise due" and payable to date of payment at rate established by ORS 305.220. [Note: The Tier 2 rate established by ORS 305.222 has been eliminated from this section when an extension was granted in the LC 245 draft, but here the time period begins at the time when the extension is granted.]	Tier 1 interest rate is 0.8333% (10% annually) per month, or if that rate is 1 point more or less than the prevailing rate of interest established by the IRS then an adjusted rate may be established by the DOR; OAR 150-305.220(1) provides the 2010 DOR of 0.4167% per month (5% annually).
ORS 118.260(6)	I	If bond given under ORS 118.300, interest is charged at the rate established by ORS 305.220. [Note: once again, the tier 2 rate established by ORS 305.220 has been eliminated from this section in the LC 245 draft.]	Interest rate is 0.8333% (10% annually) per month, or if that rate is 1 point more or less than the prevailing rate of interest established by the IRS then an adjusted rate may be established by the DOR; OAR 150-305.220(1) provides the 2010 adjusted rate of 0.4167% per month (5% annually).
ORS 118.300 Deferred payment election; bond or letter of credit	I	A person or corporation beneficially interested in property chargeable with tax under ORS 118 may elect not to pay the tax until the person shall come into actual possession or enjoyment of the property.	If personal property, must give bond or irrevocable letter of credit to the state in double the amount of the tax due (must renew bond or letter of credit every 5 years).
OAR 150-118.260(4) Interest	I	Interest shall be charged from 9 months after the date of death until date of payment; interest for fractional months computed on a daily basis.	See ORS 305.220 and the rules for applicable interest rates.

Abbreviations: T=time of payment, EP=extension of time to pay, EF=extension of time to file, FP=filing penalty, PP=payment penalty, I=interest, DOR=Department of Revenue

Chart prepared by Wendy Johnson, Deputy Director and General Counsel, and Dan Miller, Law Clerk, Oregon Law Commission for Inheritance Tax Work Group in July 2010.

The Oregon Law Commission's Inheritance Tax Work Group's materials are public record and available on their website at http://www.willamette.edu/wucl/olc/groups/2009-2011/inheritance_tax/index.php

Planning Ahead: More Adjustments to the O-UTC

The Executive Committee of the Estate Planning and Administration Section expects to develop a bill for the 2013 session to address needed revisions to the Oregon Uniform Trust Code. The Oregon Legislature adopted the O-UTC in 2005 and then enacted technical corrections in 2007. Practitioners have now had several years of experience working with the O-UTC and have identified a few places in which the statutes could be improved.

Chuck Mauritz is heading the effort to collect concerns, ideas, and suggestions for revisions to the O-UTC. He will work with a subcommittee to develop a bill the Section may propose for consideration in the 2013 legislative session. Although 2013 seems a long way off, the best bills are those developed with the thoughts and input of many people, with enough time for analysis, research, and review.

Please send comments to Chuck Mauritz: cmauritz@duffykekel.com

Questions, Comments or Suggestions About This Newsletter?

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Practice Tip: With Qualified Disclaimers, Jointly Owned Doesn't Mean Equally Owned

In this year with no federal estate tax, if the estate you are administering provides for a bypass trust to be funded with the maximum amount that can pass free of federal estate tax, it is important to consider a nuance regarding disclaimers of jointly owned assets under Oregon law and the federal tax code. For some decedents, it may be possible to allow more assets to pass free of federal estate tax. The nuance relates to qualified disclaimers of survivorship interests in joint bank, brokerage, and other investment accounts under ORS 105.634(1)(b) and IRC §§ 2518, 2040(a).

Consider the case of an Oregon decedent "Husband" dying in 2010 with a bank account owned by Husband and "Wife" as joint tenants with a right of survivorship. Husband's will creates a bypass trust for the benefit of Wife during her life, and at her death the bypass trust is distributed free of federal estate tax to the couple's children. The bypass trust funding formula requires the bypass trust to be funded with the maximum amount that can pass free of federal estate tax. Because of the absence of a federal estate tax for 2010, Wife's attorney will advise her to fund the bypass trust to the greatest extent possible, thereby allowing assets to avoid federal estate taxation at both Husband's death and Wife's later death. One option to maximize the amount passing to the bypass trust is for Wife to disclaim her survivorship interest in the jointly owned bank account. The disclaimed portion of the account then becomes part of Husband's probate estate and is available to augment the bypass trust; however, it is important to note that the disclaimed interest may not be limited to just one-half of the jointly owned account.

It is generally assumed that the survivorship interest disclaimed by Wife will be one-half of the account; the other half is already owned by Wife as the joint tenant and therefore does not pass from Husband to Wife. However, neither ORS 105.634(1)(b) nor IRC §§ 2040(a) and 2518 mandates this result. In fact, the statutory default is just the opposite, defining the disclaimed amount as all of the jointly owned property, reduced by that part attributed to the contribution of the surviving joint owner. In the case of joint bank and brokerage accounts, Wife may disclaim more than half of the account if she did not contribute half of the funds to the account and if the terms of the agreement with the bank or brokerage house allow either cotenant to unilaterally withdraw his or her contributions. Treas. Reg. §§ 25.2518-2(c)(4)(iii), (5) Ex. 12; ORS 105.634(1).

The "cost" of the Wife's disclaimer of a greater portion of the account is the disclaimed amount may be taxable in Husband's estate for Oregon inheritance tax purposes in 2010 if the bypass trust exceeds the Oregon $1 million exemption and an Oregon special marital property election for the excess is not made or cannot be made. Nevertheless, it would still be a benefit to avoid the federal estate tax at the second death, particularly if the federal estate tax laws do not change. In summary, a qualified disclaimer of jointly held financial accounts for 2010 deaths can lead to significant federal estate tax savings in cases where the deceased spouse contributed the majority of the funds to the account.

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