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The 2010 Tax Relief Act: New Rules, New Opportunities for Lifetime Planning

On December 17, 2010, President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("Tax Relief Act"). This legislation presents estate planning opportunities far above and beyond any previously available, including some unique to Oregon. Though 2010's estate tax offered a "once in a lifetime" estate planning opportunity, you had to die to take advantage of the one-year repeal of the estate tax. The changes effected by the Tax Relief Act now shift the focus to lifetime planning. The following summary is designed not only to give you an overview of the changes, but also to put them in the context of planning options and opportunities.

The 2010 Tax Relief Act

The most notable change under the Tax Relief Act is the re-unification of the lifetime exemption for gift, estate, and generation skipping transfer taxes at $5,000,000 per individual or $10,000,000 for a married couple. This change, when combined with the extension of the 35% federal gift tax rate from 2010, gives rise to extraordinary estate planning opportunities in 2011 and 2012. The favorable tax provisions included in the Tax Relief Act do not apply after December 31, 2012 unless Congress acts again. For example, in 2013, the lifetime gift tax exemption will revert to $1,000,000, and the marginal tax rates will be as high as 55%. As a result, there are less than 24 months to take advantage of gifting opportunities afforded by the new law.

Some anticipated changes to the gift tax rules are noticeably absent from the Tax Relief Act. Despite discussions of new limits on gifting over the past several years, no such limits are included in the Tax Relief Act. Grantor retained annuity trusts, with a term as short as two years and involving a de minimis or no taxable gift, continue to be permitted. Moreover, there are no restrictions on discounting or other provisions aimed at curtailing the use of family limited partnerships or limited liability companies.

Other gift tax rules remain the same. Up to $13,000 ($26,000 if a husband and wife act in concert) can be gifted annually to each child, to each grandchild, and to any other person, and none of such annual exclusion gifts will count against the lifetime federal gift tax exemption amount of $5,000,000 ($10,000,000 for a married couple) in 2011 or 2012. Healthcare and tuition expenses for children, grandchildren, and others can continue to be paid directly without reducing the otherwise available $13,000 (or $26,000 for a married couple) annual exclusion gifts or lifetime federal gift tax exemption of $5,000,000 (or $10,000,000 for a married couple) for 2011 or 2012.

Estate Tax

The estate tax provisions of the Tax Relief Act provide certain beneficial options for the estates of decedents who died in 2010 in addition to an increase in the exemption amount and a decrease in the tax rate. Under the Tax Relief Act, the estate of an individual who died in 2010 is subject to the estate tax, with the $5,000,000 exemption level and maximum rate of 35% (and receives a corresponding step-up in the basis of the decedent's assets to fair market value on the date of death); however, the estate may affirmatively elect out of the estate tax to receive only the limited basis step-up that

Continued next page

In This Issue

applied to decedents' estates in 2010 prior to the Tax Relief Act. Under this option, the decedent's estate will be entitled to a basis step-up of up to $1,300,000 relating to the appreciation inherent in any assets passing through the estate, and an additional $3,000,000 of basis step-up for assets left to the surviving spouse.

The decision regarding which regime an estate should utilize depends on the size and asset make-up of the estate and anticipated time of sale of the estate's assets. The option to avoid the estate tax and take only the limited increase in basis will generally be elected by large estates that would pay a substantial estate tax. The overall tax cost for those large estates will be minimized by avoiding the imposition of estate tax at the time of death and only recognizing income (often capital gain) as assets are disposed of in the indefinite future.

For a death in 2011 or 2012, up to $5,000,000 (plus a possible cost of living increase for a 2012 death) will be tax-free for federal estate tax purposes. The federal estate tax rate for a taxable estate in excess of $5,000,000 will be 35%. For income tax purposes, all assets includible in the taxable estate will have a tax basis equal to their respective date of death values (or possibly their values six months after the date of death). These 2011 and 2012 provisions thus parallel the provisions of the 2010 default rule.

If subsequent legislation is not enacted and the Tax Relief Act sunsets at the end of 2012, the amount that can pass tax-free for federal estate tax purposes will revert to $1,000,000 in 2013, and the highest marginal estate tax rate will be 60%, although the 60% rate only applies until the overall estate tax rate is 55% on the entire estate.

The Tax Relief Act also introduces "portability," which allows the survivor's estate to use the unused exempt amount from a predeceasing spouse's estate. Couples' estates can enjoy the full $10,000,000 exempt amount regardless of the size of the predeceased spouse's estate. Before abandoning the use of a by-pass trust or having spouses equalize the property they own, be aware that this opportunity expires in 2013. Even then, if the surviving spouse lives at least until 2013, there is some uncertainty as to how the portable amount of the exemption received from the deceased spouse will be treated in subsequent years. It also does not apply to the GST tax. A decedent's unused GST exemption is not carried over to the surviving spouse.

Generation-Skipping Transfer Tax

Changes to the generation-skipping transfer ("GST") tax provisions affect 2010 transfers as well as future transfers. No GST tax is imposed on a 2010 GST to or for the benefit of grandchildren or more remote descendants of the transferor or other beneficiaries who are two or more generations below the grantor ("skip people"). The zero generation-skipping tax rate applies even to 2010 GSTs completed after the passage of the Tax Relief Act. In addition, many of the questions that have persisted about 2010 gifts or other transfers to generation-skipping trusts have now been resolved in a manner that favors such transfers:

(1) The potential drawbacks for 2010 gifts to annual exclusion gift trusts for grandchildren or other skip people have been removed.

(2) Gifts made in 2010 to "dynasty" life insurance trusts that are intended to remain in existence for two or more generations will not threaten the exempt status of such trusts for generation-skipping tax purposes, as long as the trust is a skip person or the GST exemption is allocated to the transfers.

(3) A so-called direct skip trust for grandchildren or more remote descendants created and funded in 2010 will not incur any generation-skipping tax liability as of the time of the transfer. Moreover, if the donor elects out of the automatic allocation rules under IRC § 2632(b)(3), this gift could have been made without having to use any of the donor's otherwise available generation-skipping exemption, but only if the gift or other transfer was completed *on or before December 31, 2010*. Similarly, outright direct skip gifts could have been made without having to pay generation-skipping taxes and without having to use any of the donor's otherwise available generation-skipping exemption if the transfer was completed by *December 31, 2010*, and the Section 2632(b)(3) election is made.

For 2011 and 2012, the generation-skipping tax rate is reduced from 55% to 35%. In addition, the generation-skipping tax exemption is increased to $5,000,000 (or $10,000,000 if a husband and wife act in concert). This increase applies retroactively to January 1, 2010, and will remain in effect through December 31, 2012.

Planning Opportunities

The Tax Relief Act greatly facilitates transfers to "dynasty" trusts exempt for generations, or even indefinitely, from generation-skipping tax. Both the generation-skipping tax changes and the gift tax changes favor "dynasty" trusts. From a generation-skipping tax perspective, the generation-skipping tax exemption is increased to $5,000,000 ($10,000,000 for a married couple). In contrast, the generation-skipping tax exemption was $3,500,000 ($7,000,000 for a married couple) in 2009 and was not clear, but was probably zero, for 2010 before the passage of the Tax Relief Act. From a gift tax perspective, the amount that can be transferred without incurring a federal gift tax jumped to $5,000,000 ($10,000,000 for a married couple) for 2011 and 2012. It is worth noting that even donors who made $1,000,000 or more of prior taxable gifts now have $4,000,000 of additional exemption available to them in 2011 and 2012. Although the lifetime federal gift tax exemption may not exactly dovetail with the GST tax exemption during the 2011 and 2012 period, especially because certain annual exclusion gifts made to trusts will count against the GST tax exemption but not the lifetime federal gift tax exemption, they will generally be at least approximately the same during the 2011 and 2012 periods, and both, in tandem, will be materially higher than they have ever been.

Opportunities for Oregonians

What does the Tax Relief Act have to offer to Oregonians in particular? For Oregonians with estates between $1,000,000 and $5,000,000, the Tax Relief Act offers a two-year opportunity to avoid paying the Oregon inheritance tax if they make enough gifts to reduce their estates to less than $1 million as of the date of death and they die before 2013.

This opportunity exists even though the exemption from Oregon's inheritance tax is only $1,000,000 because of two aspects of Oregon's inheritance tax laws. First, Oregon does not pull back into the estate deathbed gifts, or gifts made within the three years prior to death. Second, the $1,000,000 filing threshold for Oregon's inheritance tax return is based solely on the taxpayer's gross estate at death. Therefore, if an Oregon resident worth more than $1,000,000 makes enough deathbed gifts to bring his or her estate below $1,000,000 as of the date of death, his or her estate will not be subject to Oregon's inheritance tax.

This is not a new opportunity, just an expanded one. The deathbed gift strategy has previously been a smart one for Oregonians with $1,000,000 to $2,000,000 estates. Prior federal gift tax law allowed a person to give away $1,000,000 free of gift tax. Thus, an Oregonian with a $1,999,999 estate willing to give away $1,000,000 right before death, could do so free of gift tax and save his or her estate from the Oregon inheritance tax. Oregonians with larger estates were able to reduce their Oregon inheritance tax liability through gifting, but their ability to completely avoid the inheritance tax was hampered by the old $1,000,000 lifetime limit on tax-free gifts. Now that the Tax Relief Act has increased the gift tax exemption to $5,000,000, Oregonians with assets of between $1,000,000 and $5,000,000 can benefit from deathbed giving.

In her excellent article, "Adjusted Taxable Gifts and the Oregon Inheritance Tax,"[1] Holly Mitchell explains in detail the process of calculating the Oregon inheritance tax. The key to avoiding the Oregon inheritance tax is ensuring that an Oregon inheritance tax return is not required to be filed. Under ORS 118.160(1)(b)(D), the filing threshold is determined by the value of the gross estate. If the gross estate is less than $1,000,000, then no return is due. Gross estate is defined by ORS 118.005(5) as the federal definition of gross estate, which does not include adjusted taxable gifts. This is why an Oregonian with an estate between $1,000,000 and $5,000,000 can avoid paying the inheritance tax in 2011 and 2012 if he or she reduces his or her gross estate to under $1,000,000 through deathbed gifts. Note that the gross estate does, however, include any gift tax paid within three years of death. When determining how much to give, a donor should take into account any gift tax paid within three years of death in order to avoid inadvertently tripping over the $1,000,000 filing threshold.

The deathbed gifting strategy is not without pitfalls. First, donors have to be fairly certain that they are on their deathbeds. Second, care should be taken when determining what assets to gift. Very low basis assets should generally not be transferred prior to death so they may enjoy the basis step-up. On the other hand, it may be worth it to heirs to pay Oregon's relatively low inheritance tax sooner in order to avoid paying a capital gains tax later. Most importantly, donors have to be sure that they will not need the gifted assets at a later time if they live longer than anticipated.

In spite of these risks, Oregonians with taxable estates ought to consider taking advantage of the increased gift tax exemption to reduce their estates for both Oregon inheritance tax and federal estate tax purposes. Depending on the size and nature of the estate, giving can be accomplished with outright gifts of cash or through more complex planning techniques involving dynasty trusts or life insurance trusts. The Tax Relief Act is scheduled to expire at the end of 2012; the riskiest estate planning strategy is to do nothing at all while unprecedented gift tax laws are in effect.

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1 October 2009 Estate Planning and Administration Section Newsletter

New 2011 Section Officers

Please contact any of the officers or board members with questions or suggestions for Section activities. Get involved by volunteering to help with legislative projects, CLEs, or by authoring an article for the newsletter.

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Surviving Spouses Get Their Share

The new Spousal Elective Share laws, located in ORS 114.105 through .165, greatly expand the right of a surviving spouse to challenge the estate plan of the deceased spouse. Under the new law, the surviving spouse can demand as much as 33% of all assets, including assets held in trusts, retirement accounts, life insurance benefits, and annuities.[1] The law became effective for all deaths occurring on or after January 1, 2011, which means that it is important to review your clients' estate plans. Is your client married with children from a prior marriage? Did your client bring substantial assets into a new marriage? Does your client intend to leave his or her estate to charity or to his or her children? If you answered yes to any of those questions, then your client's estate plan may be vulnerable to unintended consequences as a result of the elective share.

For example, consider a situation where John Pauper marries Marcy Richwoman, who has children from a previous marriage. Marcy prepares an estate plan that places her real estate and investment accounts in a revocable living trust. Her trust provides at her death for the creation of a QTIP Trust for John, giving him only an income interest for his life, and giving the remainder of the QTIP Trust (including her vast real estate and investment accounts) and all of her retirement assets to charities and her children. Fifteen years into the marriage and after the estate plan is signed, Marcy dies. Under the old law, Marcy's plan would be honored because all of her assets were held in trust and in retirement accounts. John could not successfully demand more than his income interest.

However, under the new law, John can demand a larger share than otherwise provided by Marcy's estate plan. He is able to elect to receive 33% of their combined assets plus his lifetime income interest. The percentage by which an estate can be divided to permit a spousal share changes under the new law. Under the old law, the percentage was set at a maximum of 25%. Under the new law, the size of the spousal elective share is determined by the length of time the spouse and decedent were married to each other. The longer the marriage, the larger the share to which a surviving spouse is entitled. Surviving spouses married under 2 years may receive 5% of all assets; surviving spouses married for 15 years or longer may receive 33% of all assets. If John had signed a pre- or post-marital agreement releasing his right to a spousal elective share, then Marcy's plan would be honored.

If a client's spouse is unwilling to waive the elective share right, or if the client will not raise the issue with his or her new spouse, the attorney could control the amount of assets from which the elective share can be calculated in the estate plan. For example, if John's QTIP Trust contained the power to invade principal for his benefit, then the QTIP Trust would be valued at 100% of the principal value of the trust for determining the assets not subject to the additional elective share. If John's QTIP Trust only provided for an income interest, with no invasion of principal, then the QTIP Trust would be valued at 50% of the principal value of the trust for determining the assets not subject to the additional elective share. To restrict the amount that John could elect from Marcy's estate, absent a waiver of elective share rights, John should be given discretionary distributions of principal.

For administration purposes, the new law allows the surviving spouse up to nine months to contest the deceased spouse's estate plan and apply for the increased elective spousal share. What happens if a surviving spouse demands his or her larger share after an estate is distributed? The court can order those assets returned or obtain a judgment against the beneficiaries. In the case of retirement assets, those assets can be ordered returned without offset for the tax liability on the original distributee. The Oregon Legislature will hopefully resolve this unintended tax liability in the upcoming session.

As with the previous statute, the new law allows spouses to relinquish their elective share rights by an agreement or waiver entered into before or after the marriage, and signed by at least the surviving spouse. Your married clients should pay particular attention to this new law if they have children from prior marriages or plan to give a substantial portion of their estate to charity. Also, the law is likely to undergo additional modification to correct some difficult issues left unresolved by the current law, so practitioners should watch for updates.

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1 For an in-depth review of the new law, see William D. Brewer's article, "Planning for the Elective Share" in the October 2009 Oregon Estate Planning and Administration Newsletter.

Words from the Top
New Estate Planning Section Chair Shares His Vision

For 2011, the Executive Committee of the Estate Planning and Administration Section will continue to focus on its three primary tasks: legislative projects, CLE programs, and the Section Newsletter.

Three bills sponsored by the Section were recently introduced in the Oregon legislature. The Section will work on getting those bills passed and will also monitor other bills affecting our area of practice. The Section is also working on legislative projects for future sessions of the legislature.

The Section will sponsor at least two CLE programs this year and will be organizing the topics and arranging speakers for those programs. The Section Officers are always interested in suggestions for CLE topics and potential speakers. Contact me or any of the Section Officers with those suggestions.

Last, but not least, the Section Newsletter will continue in the capable hands of its new editor, Sheryl McConnell, with four issues planned for the year. Of course, article suggestions and article writers are encouraged. Please contact Sheryl directly.

I look forward to another productive year for the Section.

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Chair, OSB Estate Planning Section

What Estate Planning Lawyers Need to Know about Divorce

In this article, we will address the effects of a divorce (dissolution) on an estate plan. We will also discuss how, in a broader sense, we can help the client "pull together" his or her financial concerns and estate planning needs and address them in a more comprehensive manner.

Though divorce is an equitable proceeding, the divorce court's jurisdiction is derived from statute, specifically ORS Chapter 107. The legal effect of divorce and annulment is the same; both terminate a marriage. For the purposes of this article, both terms will be used under the common heading of "divorce." Legal separation, on the other hand, does not terminate the marriage. A court can grant a judgment of unlimited separation and award virtually all of the relief that a divorce court can, including custody, parenting time, child support, spousal support, and division of property and debt, without terminating the marriage. This is an important initial distinction, in that certain estate planning and probate statutes are not triggered by separation, only by divorce, and the ability to divide retirement plans may differ. Separation is not as common. Accordingly, this article will focus on termination of marriage through divorce and annulment.

When the client is scheduling an appointment for estate planning, the client needs to be reminded to bring in his or her general judgment of dissolution of marriage. Your consultation with the client cannot proceed without a thorough review of the divorce judgment (we no longer refer to divorce judgments as "decrees") and also of all existing assets and debts.

Timing can be an issue. ORS 107.115 provides that the parties are divorced or the marriage is annulled when the court signs the judgment. However, an appeal period runs 30 days from the date of entry of the judgment. If a party dies while the appeal is pending, then the appeal may be continued by the personal representative of the decedent's estate. If a party dies prior to the signing of a judgment, the dissolution process may cease.

Effects of Divorce on the Client's Estate Plan

A divorce revokes provisions favoring the beneficiary spouse in an existing will. *See* ORS 112.315. The rest of the will remains in effect. However, if the client then remarries, the entire will may be revoked. *See* ORS 112.305.

Divorce will also revoke all provisions in a trust in favor of the former spouse. *See generally* ORS 130.535.

Divorce will not necessarily revoke a general power of attorney nominating the other spouse and executed during prior estate planning. A power of attorney should be specifically revoked by the principal.

Part B of the Advance Directive (Health Care Power of Attorney) is suspended pursuant to ORS 127.545 if a petition for dissolution or annulment is filed and the appointment is not reaffirmed.

Divorce, annulment, and separation will revoke designations of the spouse and "relatives of spouse" (stepchildren) as beneficiaries of insurance and retirement plans. However, the revocation will only become effective as to the retirement plan administrator or the insurance company if notice is provided to them, under ORS 107.127. Read ORS 107.118 through 107.131 carefully for more on this topic.

A divorced person may no longer have health insurance available at reasonable cost, because divorce is generally a qualifying event for loss of spousal health insurance coverage on employer plans. COBRA can be utilized if proper notice is given, generally within 60 days after the effective date of the divorce. There are additional statutory protections if the spouse who is losing the health insurance coverage is over the age of 55. For more information, see *Family Law* § 11 (OSB CLE 2008).

Look for the amount, duration, and type of spousal support awarded in the divorce judgment. Some people still refer to spousal support as "alimony." This term is not recognized in Oregon statutes. "Alimony" is an IRS term for qualifying spousal support. Spousal support that qualifies as alimony will terminate upon the death of either party. Qualifying spousal support will be deductible from the obligor's income and includible in the obligee's income. Spousal support is generally not dischargeable in bankruptcy. Spousal support that is labeled in the judgment as "transitional" or "maintenance" can be modified upon showing a substantial change in circumstances of the obligor or the obligee. On the other hand, "compensatory" spousal support is much more difficult to modify as it generally compensates the obligee spouse for an enhanced professional education or training, such as supporting the obligor through medical school. Sometimes spousal support awards are not intended to qualify as alimony. Review the findings in the judgment carefully to see what was intended with any spousal support award.

Since most types of spousal support are intended as alimony and will terminate when the obligor dies, careful practitioners representing the obligee spouse will usually insist that the obligor obtain life insurance as security for anticipated future payments of spousal support. *See* ORS 107.810 – 107.830. This is usually term life insurance, carried by the obligor, with the obligee as beneficiary. Sometimes, family law practitioners do not follow up on this requirement. You can help the obligee by ascertaining whether the obligor has obtained and/or maintained life insurance pursuant to the judgment, and whether the obligor's life insurance company has notice that your client is the beneficiary and that his or her status as beneficiary cannot be changed. These notice requirements are found in ORS 107.820, and they should be recited in the general judgment. If you represent the obligor, determine whether life insurance is in effect and review current beneficiary designations. Because life insurance is included in the calculation of a taxable estate, review the tax apportionment provisions in any will or trust.

Retirement plans are frequently the largest assets of the marriage. Quite often they are divided between the spouses pursuant to a tax-qualified Domestic Relations Order ("QDRO"), which typically takes the form of a supplemental judgment entered a few months after the general judgment of dissolution is finalized. If the general judgment provides for the division of a retirement plan pursuant to a QDRO, ask the client for a copy of the supplemental judgment dividing the plan. If there isn't one, inquire further – for example, ask what specialist attorney has been hired to prepare the supplemental judgment. A follow-up phone call or email to the preparer of the QDRO is an important way to confirm that the retirement plan has been actually divided by the court pursuant to the supplemental judgment. Finally, even if you have a supplemental judgment, it still has to be accepted by the particular retirement plan administrator. Generally, this is an acknowledgement letter from the administrator indicating that the plan will be administered as a QDRO pursuant to the terms of the supplemental judgment. The process of dividing a retirement plan is not complete until acceptance by the plan administrator. For more information, see *Family Law* § 10 (OSB CLE 2008).

While most defined benefit plans (such as pensions) and defined contribution plans (such as 401(k)s) are generally divided through a QDRO, some clients have government plans, such as PERS, FERS, or military retirement plans. These have special rules. For instance, some plans may terminate upon the participant's death. Life insurance should be included as security in these instances. Many government plans, including military pensions, have their own rules for plan division such as a "10/10 rule," which specifies the minimum amount of time that a spouse must be married to a military person in order to qualify for benefits, provided the military spouse has 10 years of creditable service during the marriage. The prudent estate planner will investigate whether all steps have been taken to actually carry out the terms of the judgment as they relate to the military or other government plan. Government plans are tricky. If you have doubts, contact a benefits professional.

Social Security benefits are never considered as property in a divorce judgment; however, they can be factors in determining the amount and duration of spousal support. If the marriage was more than 10 years in length, the nonworking spouse or homemaker may qualify for benefits based upon the employed, divorced spouse. *The Family Law Practitioner's Guide to Social Security*, by Carlton D. Stansbury (ABA, Section of Family Law (1995)), is an excellent basic resource in this area.

Property Issues in a Divorce That Impact the Client's Estate Plan

The property awards and debt allocations in a divorce judgment should be carefully inspected by the estate planning practitioner. Quite often, there are "loose ends" that for one reason or another were not tied up at the time that the divorce judgment was entered. A discussion of some of these loose ends follows.

Have new deeds been recorded to reflect the awards of real property in the judgment? Careful drafters will include legal descriptions of real property in the judgment so that the judgment itself could be recorded in the county where the property is located, if obtaining a deed from the ex-spouse is too difficult.

Is there any personal property still held in joint tenancy? If so, read ORS 105.920.

Are there any bank or investment accounts still held jointly? If so, see ORS 708A.455 through 708A.515 for discussion.

Are there still joint credit cards or other lines of credit? Do not assume that the family expense doctrine, ORS 108.040, will be an effective shield from the claims of certain creditors. Make sure that the joint credit cards and lines of credit are closed.

Has the client changed his or her beneficiary designations for retirement, investment, pension, annuities, and life insurance purposes? The careful practitioner should not assume that this has been taken care of by operation of law under ORS 107.118, *et seq*. Have the client execute new beneficiary designations consistent with the divorce judgment.

Division of retirement plans and annuities are often set forth in a separate paragraph in the divorce judgment. If the benefits are not in payout status, check to see if follow-up was done, including acceptance by the plan administrator. Also ascertain if any pension or annuity has a joint and survivor benefit, especially if the plan is already in payout status.

If a business is awarded to a spouse, inquire further. A great number of small businesses are LLCs, where both spouses are members. If one spouse is awarded the business, did the other spouse assign his or her membership interest, and do the LLC records reflect that? Likewise, if the business is a corporation, did the spouse relinquishing interest sign an assignment of stock back to the corporation? The general judgment may have awarded business interests, but existing buy-sell, shareholder, or operating agreements may require revisions to complete the property division.

If a judgment has been paid, the "debtor" party needs to obtain a satisfaction of judgment promptly from the "creditor" party. A judgment will appear on title reports until satisfied.

Property held for the benefit of minors occasionally comes up as an issue. Does the judgment designate a custodian for this property? It is often assumed that the "custodial" parent is the *de facto* custodian of a minor's property. That authority is not derived from Oregon statutes, but rather from the rules of the entity that administers the property, such as a bank. Exceptions and specific requirements for property held for the benefit of minors are found in ORS Chapter 126. Settlement agreements for minors, payment of judgments for minors, bank accounts for minors, and gifts to minors are also covered in ORS Chapter 126. Finally, if the parties have a 529 Plan for college savings, ascertain the named custodian and what arrangements have been made for continued funding of this plan post-divorce.

Effects of Divorce and Death on Clients with Dependent Children

Divorced clients with minor children will invariably have provisions in the judgment concerning child support. Child support is generally calculated on the Child Support Calculator available from the Oregon Child Support Program, located at **www.oregonchildsupport.gov**. Child support in Oregon is payable until the child is 18 years of age or 21 years of age as long as the child is "attending school" and meets the requirements of ORS 107.108. Child support may be modified every three years as a matter of right, or otherwise at any time if there has been a substantial change in circumstances. Child support is established or modified either administratively or through the circuit court. Clients who prefer to deal with child support administratively usually work through the local district attorney's office that is enforcing the child support award. Like spousal support, child support will terminate upon the obligor's death. The solution to this problem is the same as with spousal support, which is for the obligor to obtain life insurance to secure the obligation, under ORS 107.810 through 107.830. A dependent child may have a right to support during the pendency of a probate pursuant to ORS 114.015, *et seq*., but that requires liquidity. Child support is generally not dischargeable in bankruptcy.

If a party to a divorce is deceased, dependent children of the deceased parent will usually qualify for Social Security survivor benefits. *See Family Law Practitioner's Guide to Social Security, supra*. However, survivor benefits are not an adequate substitute for life insurance as security for the child support obligation. For example, survivor benefits do not extend beyond the age of 18 and graduation from high school.

If there are minor or disabled children, parents need to set up trusts and beneficiary designations that coordinate with the provisions of the general divorce judgment.

Impact of Divorce on the Estate Plan of Clients with Dependent Children

Clients with minor children have additional estate planning concerns after their divorce. First, if the client has engaged in prior estate planning, review the documents. If a basic will with a testamentary trust was prepared, consider nominating new trustees, guardians, conservators, and custodians for minors.

Some fluency in matters concerning the custody of minor children is important for the estate planning practitioner. Does the general judgment of dissolution of marriage provide for a parent to be the sole legal custodian of the children, or does it provide for joint legal custody? There is no statute that defines the rights of the custodial parent. However, case law and accepted practice indicate those rights normally include the rights to be a “tiebreaker” in choosing matters concerning education, religion, and healthcare. Nevertheless, some judgments specify a different arrangement. Note that **noncustodial** parents **do** have statutory rights under ORS 107.154. This provides that a noncustodial parent has, to the same extent as the custodial parent, the right to school records, government records, and medical care records, and the right to authorize emergency treatment for the child provided that the custodial parent is unavailable. Noncustodial parents also have the right to apply to be a child’s conservator, guardian ad litem, or both.

Upon the death or incapacity of the custodial parent, a noncustodial parent will most often be awarded the custody of their children. This is because fit biological parents are presumed to act in the best interests of their children unless strong rebuttal evidence to this presumption is established. *See* ORS 109.119. Note that the guardianship court uses the same legal standards as the rest of the family law court in questions concerning the award of custody of minor children to non-parents over biological parents. *See Burk v. Hall (In re Goodwin)*, 186 Or App 113 (2003). Further, there are no specific “grandparents rights” to custody. Grandparents are simply another species of potential third-party custodians, and they make their claim like everyone else under ORS 109.119.

In addition, minor children do not get to decide where they will live and with whom. That is the responsibility of the court. Many clients mistakenly believe that once children reach the age of 14, they can make their own choice in this area. There is no statute that authorizes this. The court will consider the matter under the “best interests of the child” standard. The courts are also quite aware that the older the teenage minor child is, the more likely the teenager will “vote with his feet” no matter what the court says. Mediation is an increasingly important tool in resolving matters concerning teenagers and custody.

Finally, juvenile court dependency jurisdiction trumps everything above. If a child becomes a ward of the juvenile court, and the Department of Human Services is awarded legal custody of the child, then all matters concerning the child are pursuant to ORS Chapter 419, which constitutes the juvenile code.

Conclusion

Finally, remember that recently divorced estate planning clients have often undergone tremendous emotional and financial stress before the estate planning lawyer sees them. By simply reviewing the divorce judgment and any supplemental judgment, the estate planning lawyer will be able to prepare or modify an estate plan that takes into account not just the client’s stated goals, but all of the client’s needs. Careful review of the plan can save the client much grief and give both the estate planning practitioner and the client the satisfaction of knowing that the plan is more complete and that more contingencies have been properly addressed.

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Practice Tip: Preparer Tax Identification Number

Starting on January 1, 2011, all persons who are compensated for preparing, or assisting in the preparation of, all or substantially all of a U.S. federal tax return or claim for refund must obtain a Preparer Tax Identification Number (“PTIN”). If you already have a PTIN, you must still register on the new IRS system. After December 31, 2010, you can prepare and file returns only after you sign up through the new online registration system, pay the $64.25 fee, and obtain (or renew) a PTIN.

The link to the IRS website on PTIN registration: **http://www.irs.gov/taxpros**.

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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:
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2011 Oregon Legislative Update
Inheritance Tax Law Reform Proposals

The Inheritance Tax Workgroup of the Oregon Law Commission ("OLC") introduced a number of changes to Oregon's Inheritance Tax Law (ORS Chapter 118) in the 2011 legislative session. The proposed changes include:

1. Increased Exemption and New Tax Rate Table. The Oregon exemption would increase from $1 million to $1.5 million, and the current Table A/Table B tax calculations would be eliminated. Instead, a single stand-alone tax rate schedule would replace the State Death Tax Credit table (IRC § 2011). The new tax table would have higher bracket tax rates in order to achieve revenue neutrality, but those tax rates would apply only to taxable estates in excess of $1.5 million. The revised rates range from 8.6% to 19.6%.

2. Tax Changes for Intangible Personal Property. The taxation of intangible personal property of non-resident decedents would be discontinued, and the confusing reciprocal exemption provisions would be eliminated. Also, intangible personal property of an Oregon resident's estate would not be taxed in Oregon if taxed in another state.

3. Natural Resource Credit Changes. The proposal would revise how the Natural Resource Credit is calculated. The "working capital" allowance would be replaced with a more expansive "operating capital" allowance. The ability to convert from one form of natural resource property to another, such as from personal property to real property, without constituting a taxable disposition would be specifically authorized. Also, if natural resource property is disposed of prematurely, the proposal would require the tax to be paid within six months after the disposition event.

4. Miscellaneous Changes. The tax terminology would change from "inheritance tax" to "estate tax." A more current date would replace the existing federal estate tax tie-in reference date of December 31, 2000. The interest rate for approved installment tax payment plans would be reduced by approximately 4% per year. The proposal would request more resources for the Oregon Department of Revenue to assist in tax compliance and auditing since many Oregon estates will not be subject to federal review. There would be other changes to remove outdated provisions such as the provision that does not require an Oregon tax to be paid unless a federal tax is due.

If enacted, these changes will be effective for decedents who die after January 1, 2011.

One of the operating restrictions governing the workgroup is that the reform changes must be approximately revenue neutral when compared to current law. Thus, the exemption increase to $5 million recently enacted by Congress will not be followed in Oregon because the revenue loss would be too great.

The OLC has introduced this legislation, and it has been assigned as HB 2541 (**http://www.leg.state.or.us/11reg/measpdf/hb2500.dir/hb2541.intro.pdf**).

Materials from the workgroup can be downloaded from the website at **http://www.willamette.edu/wucl/olc/groups/2009-2011/inheritance_tax/index.php**.

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