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How to Minimize the Risk of a Successful Will or Trust Contest

In Oregon, the legal capacity to execute a will or a revocable trust is the same. ORS 130.500. The following techniques can minimize the risk of a successful contest of a will or trust, or might even prevent a contest from being brought. Some of these techniques protect against a contest based on undue influence, while others protect against a contest based on lack of capacity. Most protect against both. Some of these techniques should be employed in every estate plan, but many are not necessary for routine estate plans for clearly competent testators who are leaving their estates to the obvious beneficiaries. For example, a widow who is leaving her estate equally to her three children poses a relatively low risk of a contest.

A cautionary note: Everyone dealing with an elderly client (over the age of 65) should be aware of the Oregon statute on elder financial abuse. ORS 124.100, et seq. The elder financial abuse statute provides that a person who "wrongfully takes or appropriates money or property of a vulnerable person," which includes an elderly person, is liable for treble damages plus attorney fees. The statute includes those who "have caused" the elder financial abuse or who have "permitted another person to engage" in elder financial abuse. Some plaintiffs see that statute as a technique that can be used to sue attorneys who have allegedly engaged or assisted in inappropriate estate planning. For example, an attorney who aids a caregiver in receiving gifts from an elderly person (or assists the elderly person in making such gifts) might become liable for elder financial abuse, with its treble damages and attorney fees. Even if the suit is unsuccessful, the costs of defense can be significant. The statute is extremely broad, and little case law is available for guidance. In a non-elder abuse case, the Oregon Supreme Court has held that an attorney will not be liable for assisting his client in committing a breach of fiduciary duty, because the attorney was acting within his scope of employment as an attorney. *Reynolds v. Schrock*, 341 Or 338 (2006). The court commented that public policy supports allowing attorneys to advise their clients fully, and thus a privilege is present, even if the attorney's advice is incorrect. However, the court commented that the result might change if the attorney aids or abets in the commission of a crime or a fraud. Where alleged wrongful estate planning (elder abuse) falls on that spectrum is not known, but the elder financial abuse statute specifically applies regardless of whether a fiduciary relationship is present. ORS 124.110. One hopes that the preparation of a will for a client who appears to be competent and free of undue influence will not trigger liability for elder financial abuse, even if incompetence or undue influence is later found to have been present, but the courts have not yet so held. Moreover, the aiding or abetting of gifts from an elderly person (or placing property of an elderly person in joint name) might trigger attorney liability, if the gifts are later held to have been wrongful. Proceed with caution.

The following techniques for minimizing the risk of a successful will or trust contest are listed roughly in the order of their importance and effectiveness.

1) Carefully Document Your Interaction with the Testator. Take notes and prepare memos every time you meet with the testator or talk to the testator. Preserve all letters and emails. An estate plan that carefully documents the testator's intentions is very difficult to contest. Ask the testator if anyone has discussed the

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estate plan with him or her, and ask the testator to describe those conversations. Such a question is superior to asking if anyone has tried to influence the testator, because most testators will deny that any influence has taken place.

It helps to explain to the testator that your questions are not designed to question his or her judgment or motivation, or to pry into private affairs, but instead are designed to make the will stronger, in the event that the will is questioned.

2) Ask the Four Questions. At the execution of the document, a competent testator must:

> **Know the natural objects of his/her bounty**. The testator should be able to provide the names and relationships of family members, without prompting.
>
> **Know the nature and extent of his/her property**. A precise statement of net worth is not necessary, but a general idea of the extent of the estate is needed.
>
> **Understand the nature of the act being performed**. The testator must understand that he or she is signing a will or trust, and should understand that the document disposes of the testator's assets at death.
>
> **Know the scope and contents of the will or trust.** The testator need not know the detailed dispositive plan or be able to recite the technical boilerplate of the will or trust, but should be able to generally describe who inherits the estate. *Turney v. Stone (Re Phillips' Will)*, 107 Or 612, 618 (1923); *In re Walther's Estate*, 177 Or 382, 386 (1945); *In re Estate of Hill*, 198 Or 307, 317 (1953); *Kastner v. Husband*, 231 Or 133, 136 (1962).

These topics should all be discussed with the testator at your initial meeting and at the execution of the document. Although capacity is judged at the moment of execution (as discussed below), other evidence of capacity near the date of execution is also very helpful.

3) Recognize the Seven Factors. The Oregon Supreme Court has described seven factors that indicate the possible presence of undue influence. In particular, the court has held that the presence of a close confidential relationship together with one of seven factors gives rise to an inference of undue influence. *Reddaway's Estate*, 214 Or 410, 421-27 (1958); *Troyer v. Plackett*, 48 Or App 497 (1980); *McNeely v. Hiatt*, 138 Or App 434 (1996).

In particular, the Oregon Court of Appeals has held:

> The burden of proving that a will is the product of undue influence is on the contestant * * *. However, under certain circumstances, there may arise a 'suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference.' Specifically, a suspicion of undue influence arises where (1) the contestant first proves that a confidential relationship existed between the testator and the beneficiary, such that the beneficiary held a position of dominance over the testator; and (2) the contestant establishes the existence of "suspicious circumstances" surrounding the procurement or execution of the will.

Harris v. Jourdan, 218 Or App 470, 491-92 (2008) (citations omitted).

The Court of Appeals also noted:

> A finding of dominance does not require evidence that an authoritative, controlling person bullied or directed the actions of a subservient one. Dominance can be expressed more subtly, such as by suggestion or persuasion or by fostering a sense of need and dependence. Dominance is found where the testator is guided by the beneficiary's judgment and advice in the period leading up to execution or destruction of a will.

Id. at 492 (internal quotation marks, alterations, and citations omitted).

Not all of the seven factors can be eliminated in every case, but they should be minimized to the greatest extent possible. The seven factors are:

> **a) Procurement**. If possible, have the testator initiate the estate planning, arrange his or her own transportation to your office, and meet with you without other family members present. This is not always possible, because many elderly clients do not drive, are not ambulatory, etc. And it is impossible to turn back the clock and erase the fact that the favored beneficiary initiated the estate planning process and arranged for an attorney to be hired. In those cases, meet with the testator without other family members present, at an absolute minimum.
>
> **b) Lack of independent advice**. Make sure that your advice is independent; avoid any conflict of interest or appearance of conflict. Meet with the testator alone, not with other family members or beneficiaries present. If you have previously represented one of the beneficiaries, refer the testator to a different law firm, in order to eliminate this factor. *See Caba v. Barker*, 341 Or 534 (2006).
>
> **c) Secrecy and haste.** When a testator is terminally ill, haste is occasionally necessary. But if a beneficiary is trying to keep the estate plan a secret from other family members, the plan will be more difficult to defend. In some cases, the secrecy is requested by the testator for reasons of privacy, but in other situations the secrecy is sought by an influencing beneficiary (or even the testator) for reasons of concealment.
>
> **d) Change in attitude following close association with new beneficiary**. The classic example is a new caregiver (or a new romantic interest) who suddenly appears in the estate plan, to the exclusion of the testator's children, or resulting in a reduction of their shares.
>
> **e) Change in dispositive plan**. A testator with a long history of treating his or her children equally should be questioned carefully if one child is suddenly favored or disfavored. In some cases, legitimate reasons are present. In other cases, one child may have influenced the testator to turn against another child.
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> **f) Unnatural or unjust bequest**. A natural disposition favors the natural objects of the testator's bounty, such as immediate family (spouse, children, etc.). An unnatural disposition favors a caregiver or a distant

Farewell to Editor Stephen Klarquist

This is the first issue of the Estate Planning and Administration Section Newsletter in 18 years without Stephen Klarquist on our Editorial Board. We appreciate Steve's tax genius and willingness to edit many of the complicated tax articles we have published over the years. Steve often provided ideas for articles, and when we could not find an author, he cheerfully wrote articles himself. We on the Board will miss Steve's careful analysis of new legislation, his clear writing, and his input on myriad issues of importance to the Newsletter and, therefore, the Estate Planning and Administration Section. Steve always stepped up to offer his office for our board meetings and diligently attended them wherever they were on a regular basis for all of those 18 years. We recognize and are truly grateful that Steve served above and beyond the scope of his job as an Editorial Board member by mentoring younger members, authoring articles, and always being a willing advisor and friend. Although Steve is leaving our Board, we do hope to see his name on one or two more articles in the years to come. Thanks Steve. We wish you all the best in the future with your law practice, and your travels and adventures.

relative over closer relatives. Query: Is a will or trust unnatural or unjust if it favors one offspring over another offspring? A natural disposition does not necessarily eliminate undue influence, but it greatly reduces the risk. The disinheritance of a spouse is not necessarily unusual if the testator has children from a prior marriage and the second spouse has adequate resources of his or her own.

g) Susceptibility to influence. An ill or elderly testator is more dependent on those who provide care or assistance, and thus is more susceptible to influence. Capacity issues are almost always present to some degree in undue influence cases.

4) Meet Privately with the Client. In every estate plan where undue influence might be a possibility, the attorney should meet privately with the client, without any family members present, particularly family members who might benefit from the proposed estate plan. The presence of other attorneys or staff is acceptable, but at the initial meeting the client might be more forthcoming if no one else is in the room.

5) Use High-Quality Witnesses. In a sensitive situation, use attorneys, rather than clerical staff, as witnesses. Consider using two non-drafting attorneys to witness the execution, with the drafting attorney also present. In effect, three attorneys who are more familiar with, and therefore more observant of, the capacity factors necessary for executing estate planning documents, will have witnessed the execution.

6) Have Your Witnesses Prepare Memos. Have your witnesses discuss the estate plan with the testator and take careful notes about the sensitive aspects of the plan and the motivations for those aspects. Do not allow the witnesses to witness a will without having had any quality interaction with the testator. In most cases, the court will rely heavily on the testimony of witnesses, but in at least one Oregon case the court discounted the testimony of attesting witnesses who had little interaction with the testator. Ask the witnesses to prepare memos based on their notes. Both the memos and notes should be preserved. The memos should describe the facts of what happened at the execution, how the testator behaved, and how the testator responded to questions; the memos should avoid opinions and conclusions unless the memos contain facts to support those conclusions. Consider the following from the Oregon Court of Appeals:

> The testimony of the subscribing witnesses, aided by the presumption of competency which accompanies a will that has been duly executed, carries great weight in the determination of decedent's testamentary capacity. The reason for this is that the determination of testamentary capacity must focus on the moment the will is executed and subscribing witnesses are in a position to observe the decedent at the time of the execution. Nevertheless, this heavy reliance on the subscribing witnesses' testimony is not always appropriate.
>
> Based on the facts and circumstances peculiar to this case, we conclude that other testimony must be given greater weight than that of the subscribing witnesses, whose exchange with testatrix was minimal and who were afforded little opportunity to observe testatrix.

Hurd v. Mosby (In re Estate of Unger), 47 Or App 951, 955 (1980) (citations omitted).

7) Have the Testator Prepare a Letter or a Memorandum. Consider asking your client to prepare a letter or a memorandum explaining his or her wishes and explaining why he or she has decided to craft the estate plan in the manner chosen. The letter or memo should be signed and dated, preferably close in time to the execution of the will or trust. A letter or a memorandum in the testator's own handwriting is most effective, because a letter or memo prepared on a computer or a typewriter might have been prepared by a beneficiary, and thus might be the product of (and evidence of) undue influence. If need be, have your client dictate a letter to a member of your staff, rather than to a family member. A memo prepared by a beneficiary, and then signed by the testator, might backfire and be used as further evidence of undue influence.

Keep in mind that computer-generated documents can be traced via electronic discovery during a will contest.

8) Send an Explanatory Letter with Your Draft Document. The cover letter to your client should carefully explain any unusual provisions that might motivate a contest. For example, if one child is to receive a reduced share, discuss that fact in the cover letter, in order to minimize any argument by the contestant that the testator was unaware of the provision.

Also explain any technical parts of the will that significantly affect the distributive shares that the testator might not understand. For example, if one share bears death taxes and another share does not, explain that provision in the cover letter. If the will contains lapse provisions (who takes if one of the primary beneficiaries predeceases the testator), explain those provisions in the cover letter. If a beneficiary's share is to be held in trust during the lifetime of the beneficiary, explain the terms of the trust in the cover letter, particularly if the terms of the trust are restrictive or extend long into the lifetime of the beneficiary.

Discuss those unusual or technical aspects of the will with the testator again when the document is signed, along with a discussion of the testator's motivations for those provisions, and make notes of that conversation.

The practice of sending detailed cover letters with draft documents also helps avoid malpractice claims.

9) Preserve Copies of Prior Wills and Trusts. Being able to document a long history of a consistent estate plan is very helpful to demonstrate the testator's state of mind over a period of time.

10) Draw a Family Tree. Try to get sufficient information from the testator to prepare a family tree, including nieces and nephews. If in doubt, ask others to supply names of relatives. Obtain names and relationships of not only the testator's own blood relatives, but also the testator's spouse's relatives (relatives by marriage). This serves two goals: It helps to establish capacity if the testator supplies the information correctly, and it helps to ensure that the testator has not forgotten any relatives whom he or she would like to benefit. Although the relatives by marriage are not heirs, the testator might wish to leave them a bequest. In any event, the identification of all family members, followed by a discussion of who your client would like to include in the will or trust, will rule out the possibility that your client simply forgot a family member that he or she intended to benefit.

Even better than drawing a family tree yourself, ask your client to draw the family tree. The ability of the client to draw a family tree goes a long way to establish capacity and answer the second of the four questions.

Drawing a family tree is also immensely helpful after your client dies, when a notice to heirs and devisees must be mailed, as required by the probate statutes.

11) Include a No-Contest Clause. No-contest clauses are somewhat controversial. Some attorneys routinely include them in every will or trust, while others use them more sparingly. Some attorneys use no-contest clauses only when specifically requested by the client. Some attorneys use them only if the estate plan involves an unnatural disposition. There is little point in including a no-contest clause in an estate plan that leaves the estate in equal shares to all of the children of a widow or widower.

No-contest clauses (also known as *in terrorem* clauses) are permitted by Oregon statutes (ORS 112.272 regarding wills and ORS 130.235 regarding trusts). Those statutes generally provide that such clauses are enforceable, with some exceptions. The two statutes are worded slightly differently.

The terms of no-contest clauses vary widely; each no-contest clause should be drafted carefully. For example, some no-contest clauses prohibit the children of the unsuccessful contestant from inheriting (which increases the impact of the clause), while others do not. After all, some beneficiaries will freely violate the no-contest clause if the only downside is that their own children will receive their share. Other forms of no-contest clauses result in the contestant's share passing to the residue, often resulting in the siblings of the contestant receiving the share forfeited by the contestant.

In most cases, a successful contestant need not worry about the consequences of a no-contest clause. After all, if a will or trust is held to be the product of undue influence or lack of capacity, generally the entire document will be held to be invalid, including the no-contest clause. In rare cases only one part of the will was the product of undue influence, and only that part will be held to be void. *Estate of Allen*, 116 Or 467, 499 (1925); *U.S. Nat'l Bank v. First Nat'l Bank*, 172 Or 683, 689-90 (1943).

Rarely, a non-contest clause will attempt to prohibit a beneficiary from challenging any aspect of the administration of the estate or trust. Such a provision appears to raise two issues. First, ORS 112.272 and ORS 130.235 define a no-contest clause as one that penalizes a beneficiary who "contests a will" or "challenges a trust," thus implying that the *validity* of all or part of the will or trust must be in question, and a challenge to the management or administration of the estate or trust is not included. However, the statutes are silent on the question of whether no-contest clauses may address other issues besides the validity of the document. Second, such a provision might violate public policy. In the case of a trust, one could argue that such a provision violates ORS 130.020(2)(m), which provides that the trust document may not restrict the ability of a court to take action necessary in the interests of justice. In the case of an estate, such a provision would appear to improperly circumvent the rights of beneficiaries to object to accountings, file petitions for instructions, etc.

If a no-contest clause is included, it should be specifically discussed with the testator to make sure that it reflects the wishes of the testator, not merely the wishes of the attorney. Because a no-contest clause usually eliminates the contestant's inheritance, a no-contest clause is generally ineffective unless the contestant is actually left something. As a result, a no-contest clause will not deter a family member who has been entirely disinherited by the will or trust. An alternative to a no-contest clause is a provision that states that the attorney fees incurred by both sides in a will contest or a trust contest will be paid out of the contestant's share of the estate (in the form of a reduced bequest) if the contest is unsuccessful. This alternative provides a significant disincentive to contest the estate plan, without entirely disinheriting the contestant. However, like a standard no-contest clause, this clause is ineffective if the contestant has been entirely disinherited. Also, there is no Oregon case law addressing the enforceability of the clause.

A similar attorney-fee clause could be drafted that would apply to beneficiaries who unsuccessfully object to an aspect of the administration of the estate. Such a provision has not been addressed by the Oregon appellate courts. Another less-harsh alternative would be to reduce, but not eliminate, a bequest to an unsuccessful contestant. For example, such a clause might decrease a bequest by half.

A no-contest clause should be contrasted with a conditional bequest. A bequest of "$100,000 to my daughter conditioned on her continuing to live in Portland during the remainder of my lifetime" is most likely enforceable as a conditional bequest. In Oregon, conditional bequests are enforceable. *U.S. Bank of Portland v. Snodgrass*, 202 Or 530, 555-56 (1954); *Larson v.*

Naslund, 73 Or App 699, 706 (1985). According to that case law, the only exceptions to the enforceability of a conditional bequest are if it violates public policy or if it is unenforceably vague. But a bequest conditioned on not contesting the validity of the document will most likely be judged as a no-contest clause rather than as a conditional bequest.

12) Videotape the Execution. Many practitioners immediately think of a videotaped execution as one of the first lines of defense against a will contest. Yet very few practitioners have ever videotaped an execution, for the simple reason that it is very dangerous and generally should not be done. It could easily backfire if the testator does not come across well. If the testator pauses for long periods of time before answering questions, or needs prompting to answer questions, those flaws will all appear on the video. Gaps in the video record (where the camera was stopped and later restarted) will also raise negative inferences. As a result, a video produced as the best evidence of competency might become the best evidence of incompetency.

13) Obtain a Physician's Opinion. A physician can be asked to examine the testator and write an opinion of capacity prior to the execution of the will. This is not commonly done, but it might be effective in some cases. It can also backfire if the doctor has qualms about the testator's capacity.

In summary, the risk of a successful contest of a will or trust can be minimized by following and documenting some or all of these techniques. All situations are different, but routinely following an established practice that includes some of these suggestions might even prevent a contest from being brought.

This article was written with the assistance of Matthew Whitman of Cartwright Whitman Baer PC.

Philip N. Jones
Kuffy Kekel LLP
Portland, Oregon

James Cartwright
Cartwright Whitman Baer PC
Portland, Oregon

Questions, Comments or Suggestions About This Newsletter?

Contact: Sheryl S. McConnell
Attorney at Law
207 E. 19th Street, Suite 100
McMinnville, OR 97128
Tel: (503) 857-6860
E-mail: *smcconnellor@aol.com*

How OCF Can Help with a Difficult Gift

Most estate planning professionals who work with clients that are charitably inclined are familiar with the Oregon Community Foundation (OCF) and the opportunities it affords donors to create legacies to support the causes those clients care about. OCF was established in 1973 and today manages over 1,600 funds created by donors, many of them through planned gifts. With over $1 billion under its management, OCF awards approximately $60 million annually in grants and scholarships. Estate planning professionals are a wonderful source of referrals, and we would not have been as successful at supporting crucial needs in Oregon without their assistance.

This is a story about how OCF can also provide a solution to thorny issues that can arise in the estate administration process when there is a charitable bequest in a will and the most effective means for implementing the donor's intent are subject to dispute among well-intentioned parties.

The main characters in our story are a married couple who lived in Bend, Oregon. During their twilight years, members of the Bend Fire and Police Departments befriended the couple and helped them with tasks that had become challenging, such as buying groceries and mowing their lawn. After the husband passed away, police and firefighters continued to help the widow. As a show of gratitude for their assistance, she made donations throughout her lifetime to support both Departments. However, upon discovering that her donations were added to the city's general fund, she began calling the Departments directly to find out what each needed. She would then write checks directly to the vendors providing goods or services to the Departments. She wanted to ensure that the funds were being used to support the Departments and programs she cared about.

In her will, the widow donated the bulk of her estate to support "the Bend Fire and the Bend Police Department." While the couple lived modestly, their estate exceeded $1 million at the time of the widow's death. The Personal Representatives of her estate were aware of her wish that the funds be used to directly support the Bend Fire and Police Departments, and that she did not want her estate to be turned over to the city's general fund. The relationship between the City of Bend and the Personal Representatives became quite strained and nearly reached the point of litigation. The Personal Representatives considered setting up two separate foundations to administer the funds, but found that private foundations are subject to extensive government regulation. For example, a private foundation must pay an excise tax on net earnings and is required to make annual distributions. In addition, donors receive more favorable tax treatment for their gifts to a fund within a community foundation.

Two city counselors suggested OCF as an organization that could help resolve the dispute and implement the donor's intent. OCF staff convened all interested parties, including the city attorney, counsel for the estate, the Personal Representatives and the Bend Fire Chief and Chief of Police, and suggested a solution. All assets distributable from the estate to the City of

Bend for the two Departments would be distributed to OCF to create two permanent funds, one in the name of the Bend Fire Department and one in the name of Police Department.

The City of Bend initially expressed concern that a city contribution to OCF to establish these funds would be an "investment" subject to ORS 294.035, or an unlawful gift of public funds. However, based on legal research conducted by OCF counsel, the parties determined that the transfer was in the nature of a conveyance, rather than an "investment." The City would retain no ownership interest in the funds and therefore no right to a return of principal, nor would it retain any right to control the investments or the distributions. Also, while the amount of the annual distributions to come from the funds would be influenced by OCF's earnings, there was not necessarily a one-to-one relationship between earnings and distributions. The OCF Board of Directors may decide to grant a lower or higher distribution, depending on prudent management or the needs of the Departments. Similarly, the conveyance would not constitute an unlawful gift of public funds because the funds would be used to promote a public purpose.

As a result of the creation of these two funds, both the Bend Fire and Police Departments will receive permanent income streams to assist in their mission to serve the citizens of Bend. Two separate advisory committees will be appointed to make recommendations to OCF's Board of Directors about how best to expend yearly distributions from the two funds, keeping in mind the donor's stated preference to use her donation to purchase equipment, supplies and historical items, and to fund education and training.

With OCF's record of prudent investing, management and stewardship, both funds should continue to grow over time and provide support for both Departments into perpetuity – a happy ending to the story for all parties.

Julie L. Gregory
Regional Director
Central & Eastern Oregon
Oregon Community Foundation
Bend, OR

Fall CLE Planned

Administering the Basic Estate and Trust: Not So Basic Anymore

Date: Friday, November 18, 2011

Time: 9 a.m. – 4:45 p.m.

Location: DoubleTree Hotel, 1000 NE Multnomah, Portland

The brochure and registration information is available at http://osbarcle.org/seminardetails.

To inquire about participating as a presenter or to suggest a topic, contact committee chair Holly Mitchell at (503) 226-1371 or hmitchell@duffykekel.com.

Selected Tax Issues for Special Needs Trusts

Attorneys who advise clients about special needs trusts must navigate complex and often conflicting legal rules in order to achieve the best income, estate, and gift tax results while preserving the disabled individual's eligibility for public benefits. Many common tax-planning techniques yield unexpected results when analyzed in the context of public benefits. This article will discuss a number of tax issues that should be considered by an attorney practicing in the area of special needs. For this discussion, a special needs trust ("SNT") is a trust that is intended to receive assets from relatives and/or friends of a disabled individual who is receiving or expected to receive means-tested public benefits.[1] The term "means-tested public benefits" refers to those government benefits, such as supplemental security income and Medicaid that are distributed to individuals who are disabled according to Social Security Administration guidelines, and who meet strict financial eligibility criteria.[2]

A. Grantor Trust vs. Non-Grantor Trust. The grantor trust rules are found in Internal Revenue Code ("IRC") sections 671 through 679 and the accompanying Treasury Regulations. These rules set forth the circumstances under which the income realized by a trust is taxable to the grantor of the trust. In the estate planning world, grantor trust status is generally considered advantageous for the following reasons: (1) trusts pay the highest rate of tax on a lower threshold of income, usually resulting in less overall taxes;[3] (2) a trust has a lower exemption amount than an individual and cannot take a standard deduction; and (3) the assets of the trust can grow tax-free and allow more wealth to be shifted to the grantor's intended heirs.

If the terms of a trust do not fit within the grantor trust rules, the trust is deemed to be a non-grantor trust for income tax purposes, and the trust and/or beneficiary(ies) will pay the income tax liability each year. In general terms, distributions from the trust will carry the income out to the beneficiary to be taxed on the beneficiary's individual tax return. If the trust distributes less than the income that is earned during the year, the tax liability will be shared by the trust and the beneficiary.[4] Because of the compressed income tax rates of trusts discussed above, it is generally advantageous for the trust to make enough distributions to carry out all the income

1 If the assets are owned by the disabled individual, those assets must be transferred to a unique type of special needs trust, commonly referred to as a "first-party" or "payback" trust.

2 Generally, Social Security's eligibility rules will require that the person owns less than $2,000 in assets and receives limited monthly income. 42 USC § 1382; 20 CFR § 416.110.

3 Trusts pay the highest rate of tax on income exceeding $10,700 (2011) while an individual will pay that same rate only on income in excess of $357,000 (2011).

4 Details of the calculation of income taxes for a non-grantor trust are beyond the scope of this article. The statutory rules can be found in IRC sections 641-691.

so that it can be taxed at the beneficiary's lower rate.

1. Testamentary SNTs. Because these trusts will be funded only upon the death of the grantor, a testamentary SNT will always be taxed as a non-grantor trust. That is, depending on the amount of the distributions during the year, the trust and/or the beneficiary will recognize the income tax liability each year.

2. Inter Vivos (Lifetime) SNTs. Like many irrevocable trusts, an inter vivos SNT can be drafted to qualify as either a grantor or a non-grantor trust, depending on the goals and intentions of the grantor. If grantor trust status is desirable, the drafter must include provisions that give the grantor one or more of the powers described in IRC sections 673-677. However, in many cases, drafting the special needs trust as a non-grantor trust may provide a better income tax result if the trust meets the standards of a "qualified disability trust" under IRC section 642(b)(2)(C) (discussed below). Further, grantor trust status may not be a practical choice for a trust that is expected to receive transfers from more than one family member.

B. Qualified Disability Trusts. Non-grantor status may provide a unique income tax planning opportunity for SNTs. As mentioned above, a trust has a lower exemption than an individual.

However, IRC section 642(b)(2)(C) allows a "qualified disability trust" to take the same tax exemption as an individual taxpayer. In order to qualify, a trust must be (1) irrevocable; (2) established for the sole benefit of a person under age 65 who is disabled according to the Social Security Administration; and (3) a non-grantor trust. This rule essentially allows income to be sheltered by both the trust exemption and the individual beneficiary's exemption/standard deduction upon distribution from the trust.

Qualified Disability Trust Case Example: Dad establishes a lifetime non-grantor SNT for his adult daughter. Daughter is disabled and under the age of 65. Dad transfers $150,000 into the trust. The trust earns $7,400 in 2011 when the personal exemption amount is $3,700. Under these facts, the trust will qualify as a section 642(b)(2)(C) qualified disability trust. As such, it is not necessary to distribute all of the income to avoid taxation at the compressed trust tax rates. Up to $3,700 of income can remain in the trust and be re-invested into principal without triggering a tax liability. The balance of the income can be distributed for Daughter's benefit under the terms of the special needs trust, and the excess income will carry out and be taxed on Daughter's personal return. Assuming that Daughter has no other taxable income, Daughter's personal exemption and standard deduction will shelter the balance of the income, resulting in $0 income tax liability. If, on the other hand, the trust was established as a grantor trust, all $7,400 would be subject to income tax (assuming Dad had other income).

C. Crummey Powers. When drafting a trust that will receive transfers from a family member/friend (a grantor), estate planning attorneys will often include certain provisions to allow the expected transfers to qualify for the grantor's gift tax annual exclusion.[5] These so-called "Crummey power" provisions (named after the case *Crummey v. Commissioner,*[6] which established this technique) allow the grantor to satisfy the otherwise missing "present interest" requirement of the gift tax annual exclusion rules (section 2503(b)) by allowing the beneficiary of the trust a limited period of time to demand their share of any transfer to the trust.

But while Crummey powers may provide a "favorable" gift tax result, they can have disastrous consequences in the public benefits world. This issue is highlighted when clients want to establish an inter vivos special needs trust for the benefit of a person receiving means-tested public benefits. If a person receiving means-tested public benefits has a right to withdraw their allocable share of any transfer made to the trust, Social Security and the Oregon Department of Human Services could assume that the disabled beneficiary exercised their withdrawal right (whether or not they actually did) and received their share of the transfer, making the person ineligible to continue receiving benefits (assuming their allocable share put them over the $2,000 asset limitation).

> ***Crummey Power Case Example:*** Assume that parents want to fund the special needs trust with a life insurance policy. This is a common practice for parents of a special needs child who want to ensure that their child receives a lump sum of money to pay for his/her needs after the parents pass away. The expected transfer of the life insurance policy to the special needs trust and the subsequent annual payments of premiums will result in taxable gifts to the special needs trust unless Crummey power provisions are employed. While the disabled beneficiary cannot be a Crummey power holder due to the risk of losing benefits as discussed above, his/her sibling(s), or other potential contingent remainder beneficiaries, could hold Crummey power interests to shelter all or a portion of any transfer so it is not treated as a taxable gift.[7] This alternative may not prove practical if the parents wish to make annual exclusion gifts to their other children outside the context of the special needs trust. Given the recent increase in the federal estate/gift tax exemption to $5,000,000, some clients may reasonably choose to simply forgo the inclusion of the Crummey provisions (and their administrative complications) in the special needs trust and assume that all premium payments/transfers will be taxable gifts.

D. 529 Plans. A 529 plan is an education savings plan designed to allow individuals to set aside funds for higher education expenses. Named after the code section (529) that allowed their creation, any contributions made to a 529 plan automatically qualify for the section 2503(b) annual gift tax exclusion.[8] As a further incentive to save for education, section 529 allows a five-year front loading of annual gift

5 The annual gift tax exclusion for 2011 is $13,000. IRC § 2503(b).

6 397 F2d 82, 88 (9th Cir 1968).

7 Whether such power holders would fit within the IRS's perspective of eligible Crummey power interest holders is beyond the scope of this article, and the reader should refer to the landmark cases of Cristofani v. Commissioner, 97 TC 74 (1991), and Kohlsaat Estate v. Commissioner, TC Memo 1997-212 (May 7, 1997); TAMs 9731004, 9628004, 9141008, and 9045002; and PLR 8727003, as well as the plethora of analysis written in the wake of those decisions.

8 IRC § 529(c)(2).

tax exclusions.[9] So, in 2011, a married couple could transfer $130,000 (($13,000 x 2) x 5) to a 529 plan without having to report any taxable gifts. Once in the plan, the funds grow income tax-free and can also be withdrawn tax-free if used for qualified higher education expenses.[10] If the funds are withdrawn for other purposes, the earnings are subject to income tax retroactive to the time of contribution and are also subject to an additional 10% penalty.[11] However, in a little discussed caveat, the 10% penalty may be waived if the beneficiary of the plan is disabled.[12]

E. Charitable Remainder Trusts. Charitable Remainder Trusts ("CRTs") are an estate planning technique in which a taxpayer transfers assets to a trust with charitable aspects. The terms of the trust require that a fixed dollar amount (annuity interest) or a calculated percentage of the trust assets (unitrust interest) will be distributed each year to a non-charitable beneficiary (usually the taxpayer or another family member). At the expiration of the term of the CRT, the remaining trust assets must be paid to one or more charities. If the non-charitable beneficiary is a trust, the duration of the CRT is generally limited to 20 years.[13] However, if the non-charitable beneficiary is a trust for the benefit of a "financially disabled" individual, such as a SNT, the 20-year term limit does not apply, and the CRT distributions to such a trust may be made over the life of the financially disabled individual.[14]

F. Retirement Plans. Often, one of the most valuable assets that a client owns is his/her interest in a retirement plan. Naming a person who is receiving, or expected to receive, means-tested public benefits as a direct beneficiary of a retirement plan will result in a termination of those benefits because the plan assets are available to pay for the disabled person's needs. This is true regardless of whether or not the individual withdraws those funds from the plan. For this reason, it is critical for the attorney to coordinate any assets that will pass by virtue of beneficiary designation with the overall plan to ensure that assets are successfully funneled to a special needs trust for the disabled beneficiary.[15]

When a trust inherits an interest in a retirement plan, the calculation of the minimum required distribution that must be paid out of the plan each year is a complicated analysis.[16] Generally, if the trust qualifies as a "designated beneficiary," the minimum required distribution is calculated based on the oldest trust beneficiary's life expectancy. If the trust does not qualify as a "designated beneficiary," the retirement plan benefits must be paid out either (1) within five years of the death of the plan owner or (2) over the plan owner's remaining life expectancy.[17]

In order for a trust to qualify as a "designated beneficiary" and therefore use the age of the oldest trust beneficiary to calculate the minimum required distributions, four requirements must be satisfied: (1) the trust must be valid under state law; (2) the trust must be irrevocable (or will, by its terms, become irrevocable on the death of the plan owner); (3) all trust beneficiaries must be individuals and identifiable in the trust instrument; and (4) a copy of the trust instrument must be provided to the plan administrator prior to October 31 of the year following the year of death.[18] The third requirement, that all trust beneficiaries be individuals and identifiable in the trust instrument, causes most trusts to fail as a designated beneficiary. This is because all potential beneficiaries of the trust must be considered in this analysis.[19] Consider the following case examples to illustrate this issue:

> ***IRA Case Example 1:*** Mike creates a testamentary special needs trust for the benefit of his disabled son, Thomas, and names this trust as the primary beneficiary of his IRA. The terms of the trust provide that, upon Thomas' death, the remaining trust assets are payable to Thomas' descendants, if any, and otherwise to the United Cerebral Palsy Foundation. If Thomas does not have any descendants when Mike dies, the special needs trust will not qualify as designated beneficiary because a non-individual is a potential beneficiary.
>
> ***IRA Case Example 2:*** Same facts as above, except that the special needs trust provides that any funds payable to a descendant of Thomas are to be held in further trust until such descendant of Thomas reaches age 25. If a descendant dies prior to reaching age 25, the remainder of that descendant's trust is distributed to his/her estate. When Mike dies, if Thomas has a child but the child is under age 25, the special needs trust fails because a non-individual (the child's estate) is a potential beneficiary.

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9 IRC § 529(c)(2)(B).

10 See section 529 and the accompanying regulations for more details on what expenses qualify as higher education expenses.

11 IRC § 529(c)(6).

12 IRC § 529(c)(6) refers to the rules of the Coverdell Education Savings Accounts (IRC § 530(d)(4)) for imposition of the 10% penalty. IRC § 530(d)(4)(B)(ii) provides that the 10% penalty shall not apply to a distribution that is "attributable to the designated beneficiary's being disabled."

13 Treas Reg §§ 1.664-2(a)(5)(i), 1.664-3(a)(5)(i) (n 6).

14 Rev Rul 2002-20, 2002-17 IRB 794.

15 This article is limited to tax issues related to a special needs trust funded by a third party. However, there is an interesting development regarding inherited IRAs that were directed to the disabled individual, rather than to a SNT. In those cases, a first-party funded or payback SNT can be created, and it appears that the IRS will allow a transfer of the inherited IRA to the SNT and will calculate the IRA's annual required minimum distributions using the disabled beneficiary's life expectancy. See PLRs 201116005, 200620025.

16 The vast amount of highly technical rules regarding distributions of retirement plans to individuals and trusts are well beyond the scope of this article. It is the intent of the author to simply highlight certain portions of those rules as they relate in the context of planning with a special needs trust.

17 The determination of which of these terms applies depends on whether the plan owner died prior to his/her "required beginning date" ("RBD"). The RBD is April 1 of the year following the year in which the plan owner turns age 70½. Treas Reg § 1.401(a)(9)-2, Q&A 2 (a). If the plan owner died before the RBD, the five-year rule applies. If the plan owner died after the RBD, the life expectancy rule applies. Treas Reg § 1.401(a)(9)-2, Q&A 2 (a).

18 Treas Reg § 1.401(a)(9)-4, A-5(b).

19 A source for these examples and an excellent article that addresses this topic is Michelle Ward, *Whose Life Expectancy Is It, Anyway? Determining Which Trust Beneficiaries are Countable for Required Minimum Distribution Purposes, Journal of Retirement Planning* (July-Aug. 2008).

IRA Case Example 3: If Thomas' child was over the age of 25, the trust would qualify, and Thomas, as the oldest beneficiary, would be the measuring life to calculate the minimum required distributions.

IRA Case Example 4: Same facts as above, except the terms of the special needs trust provide that, upon Thomas' death, the remaining trust assets will be distributed to Thomas' descendants, if any, and otherwise to Mike's intestate heirs. Assume that Thomas had no descendants at Mike's death, and Mike's oldest intestate heir was his sister, age 65. The measuring age for the trust would be Mike's sister.

In order to get around the complexity of these rules, some estate planning attorneys opt to include "conduit trust" provisions in any trust that will be named as a beneficiary of a retirement plan. Conduit trust provisions require the trustee to distribute any funds received from an IRA distribution to the trust beneficiary. In this way, all IRA amounts will pass through the trust directly to an individual and not accumulate inside the trust for the benefit of a future beneficiary. Thus, conduit-type trusts will always qualify as a "designated beneficiary" and the measuring life will be the individual receiving the IRA distribution from the trust.

However, conduit trust provisions are not appropriate in the special needs trust context. A requirement for the trustee to make distributions to the disabled beneficiary would defeat the purpose of the special needs trust by giving the disabled beneficiary assets that would disqualify him/her from receiving means-tested public benefits. If stretching out the payment of retirement funds over a measuring individual's life is a goal of the client, an attorney will have to navigate through the minefield of rules for trusts to qualify as a designated beneficiary. In fact, for many clients, the importance of naming a charity as the remainder beneficiary of the SNT, or ensuring that assets are held in further trust for the benefit of grandchildren, outweigh the income tax implications of a trust that does not qualify for designated beneficiary status.

While estate planning attorneys are used to prioritizing tax results, the focus shifts in the special needs arena to ensuring the beneficiary's continuing eligibility for means-tested public benefits. For this reason, attorneys should be aware of the impact of the public benefits rules on many common tax planning techniques, and be prepared to understand that maximum tax savings may be less important for clients with a family member who has disabilities.

Melanie Marmion
Fitzwater Meyer, LLP
Portland, OR

When the Estate is "Drowning"

Considerations When Estate-Owned Residential Real Property is Under Water

When an estate's assets include the decedent's residential real property and that property is under water – meaning that the property is worth less than the total amount of debt owing against it – the personal representative (PR) faces a series of decisions about the occupancy, management and ownership of the property. This article addresses a PR's options when handling under water residential real property and identifies potential complications during estate administration. Note that when underwater residential real property is owned by a revocable trust after the trustor dies, a successor trustee will be faced with many of the issues described in this article.

In today's depressed market, many borrowers must decide whether to continue making mortgage payments towards real property that is unlikely to recover its original value. The decision to default on a mortgage, to arrange a short sale, or to pursue other alternatives should be based upon a thorough understanding of the borrower's options and lender's choice of remedies. In the context of estate administration, a PR steps into the shoes of the deceased borrower and must make decisions regarding an estate's real property based on the interests of the estate beneficiaries.

When a property is under water, the PR must consider at least the following:

- Is it in the best interests of the beneficiaries to continue making payments toward the debt secured by the estate's real property?
- Does the estate have sufficient liquid assets to continue making the payments?
- Does the beneficiary want the property and its corresponding debt obligations?
- What are the alternatives to foreclosure?
- What are the potential consequences of each course of action?

Know What You're Dealing with: Obtain a Preliminary Title Report and an Appraisal or Comparative Market Analysis

Shortly after the decedent's death, the PR should consider obtaining a preliminary title report to identify liens against the property. This report will identify voluntary encumbrances including existing mortgages, trust deeds, and security agreements. It may also reveal involuntary encumbrances such as unsatisfied judgments or pending suits against the deceased borrower, unpaid taxes, or other unpaid obligations that act as liens against the property. The PR must also gather information to answer several additional questions:

What is the balance of the debt? While a preliminary title report will show the principal amount secured by the trust deed, it will not necessarily reflect the current balance. The difference between the amount owing and the current market value of the property equals the extent to which the property is under water.

Are the payments current? If the deceased borrower defaulted on the obligation prior to death, did the lender institute foreclosure proceedings?

What is the value of the property? Obtaining an accurate valuation of the property is critical. While a commissioned appraisal will usually provide the most precise statement of value, the PR may also contact an experienced realtor to obtain a comparative market analysis (CMA) of the property. A CMA will indicate the current market value based on recent sales of comparable properties in the area. The information contained in an appraisal or CMA should help the PR determine whether – and to what extent – the property is under water. While a county tax assessor's estimate of real market value may be readily available, such figures can be wildly inaccurate, and a PR should be hesitant to rely on a tax assessor's estimate when gathering information on the current property value.

Identify Potential Conflicts.

Conflicts Among Beneficiaries. If real property is specifically devised in the decedent's will, and the residuary beneficiaries are different from the devisee(s) of real property, the stage is set for conflict. A specific devisee of real property will take subject to a voluntary encumbrance (i.e., a mortgage, trust deed, or other security interest) that exists on the date of death. A PR is not required to discharge a voluntary encumbrance by using other estate assets not specifically devised, except in certain situations described in ORS 115.255(3) and (4). In some cases, a specific devisee of real property will need to obtain his or her own financing to pay off the deceased borrower's loans. The devisee may be well advised to obtain their own counsel to answer specific questions. (e.g. What if the devisee wants the property conveyed according to the terms of the will, and the mortgage is being paid from the residue of the estate? What are such devisees' obligations during estate administration? What if such devisee is not entitled to assume the deceased borrower's loan, and is unable to obtain financing to pay it off when the estate closes? How much input should such devisee have in the PR's decisions?).

Disagreements Between the Beneficiaries and the PR. When deciding on a particular course of action for real property, the PR should consider consulting with the beneficiaries and obtaining their consent. The PR may also make a request for judicial advice or apply for a court order authorizing a certain action in regard to the property.

Foreclosure: Determine a Lender's Rights Upon Default.

When a property is under water, the proceeds from a foreclosure sale will be insufficient to satisfy the loan secured by the foreclosed trust deed.

Residential or Non-Residential Trust Deed? In Oregon, a lender's right to sue the estate for the deficiency – meaning the difference between the loan balance and the sale proceeds – depends on whether the trust deed being foreclosed is residential or non-residential. A "residential trust deed" is defined in ORS 86.705(3) as a trust deed that includes four or fewer residential units, one of which is occupied as the principal residence of the borrower, the borrower's spouse or the borrower's minor or dependent child. A trust deed that does not meet this definition is considered a non-residential trust deed. Accordingly, trust deeds can change back and forth between residential and non-residential, depending on the borrower's use of the property.

Under Oregon law, a trust deed is considered either residential or non-residential based on the use *at the time a foreclosure is commenced*. This presents a problem where the estate defaults on an obligation secured by the deceased grantor's residence, and the property is not occupied by the grantor's spouse or minor/dependent children. For the purposes of a lender's deficiency rights against the estate, it doesn't matter whether the property was the deceased borrower's principal residence up until the date of death.

Foreclosure of a Residential Trust Deed. If a residential trust deed is foreclosed either through judicial process or non-judicial advertisement and sale, the lender cannot bring an action for any deficiency. Additionally, no further action may be taken on any other note, bond, or obligation secured by the residential trust deed (i.e. a second trust deed) if: (1) the other obligation is owed to or originated by the same lender that foreclosed another trust deed covering the property, and (2) the other obligation was created at the same time as part of the same purchase or repurchase transaction. This law often protects borrowers from being sued by a lender in second position, but the protection is not available to an estate unless the trust deed qualifies as a "residential" trust deed when the lender initiates the foreclosure.

Foreclosure of a Non-Residential Trust Deed. If a non-residential trust deed is foreclosed by non-judicial sale, no deficiency action is allowed on an obligation secured by that foreclosed trust deed. However, a lender holding a second trust deed may still bring an action against the estate on the promissory note, seeking a judgment in the amount of the unpaid debt. If the lender chooses to foreclose a non-residential trust deed by judicial sale, the estate is completely vulnerable to an action for the unpaid balance following the sale – whether the action is by the foreclosing lender, or other lenders. The vast majority of foreclosures in Oregon take place through the quicker and less costly non-judicial route, but careful lenders may pursue a judicial foreclosure if the estate has assets available to satisfy a judgment.

Alternatives to Foreclosure: Short Sales and Deeds-in-Lieu

If a foreclosure will not eliminate the estate's liability for any deficiency or the unpaid balance of a promissory note, the PR should consider other alternatives to foreclosure.

Short Sales. In a short sale, the lender agrees to accept less than the total amount due on the promissory note signed by the deceased borrower. Some lenders will only consider a short sale when the loan is in default. Typically, short sale approval is conditioned upon the lender receiving evidence that a seller/borrower has either fallen on hard times, or has limited assets. The same considerations apply to real property owned by an estate. When an estate is the seller, a lender will ask for information regarding other estate assets to determine whether any other estate resources are available to pay the shortfall.

Short sales become significantly more complicated when a second trust deed encumbers the property. If the sale proceeds will be insufficient to pay off the amount owed on the first trust deed, the lender in first position is often willing to share a small portion of the proceeds with the lender holding the second trust deed in exchange for the second lender's release of its lien. The lender in second position may also require an additional cash contribution from the estate in exchange for the release of its lien – generally, a second lender is willing to accept approximately 10% of the balance owing.

However, a lender may require a significantly larger contribution from an estate than it would from a living borrower. When a lender calculates the amount of a borrower's cash contribution it deems acceptable in exchange for releasing its lien, it considers all other resources available to the borrower together with the borrower's living expenses and other liabilities. When the borrower is deceased, the expenses are limited to unpaid claims against the estate and do not include continued living expenses. If the estate contains significant liquid assets, the second lender may require a larger contribution from the estate than it would require from a living borrower in exchange for releasing its lien against the property.

Be Sure the Lender Waives the Remaining Debt. Obtaining the release of a lender's lien against the property will not automatically extinguish the debt owing, and a PR should be careful to condition a short sale upon the lender (1) releasing the lien, AND (2) waiving the remaining debt. If the lender releases its lien but does not simultaneously waive the balance of the debt under the promissory note, the estate could still be sued for the amount owing under the promissory note.

Deeds in Lieu of Foreclosure. If defaulting on a mortgage is the best or only option, a PR may be able to avoid the foreclosure process where the lender is willing to accept a deed in lieu of foreclosure. ORS 115.275 permits a PR to return encumbered assets to a creditor, in whole or in part, in lieu of foreclosure. In this transaction, the PR gives the lender a deed to the property instead of waiting for the lender to take all the steps necessary to foreclose. From the PR's perspective, giving the lender a deed in lieu can speed up estate administration. From the lender's perspective, it is able to acquire the property sooner than in foreclosure and eliminate the costs required to foreclose. However, lenders usually will not accept a deed in lieu unless the PR first obtains court approval for the conveyance. Additionally, unlike a foreclosure sale, if junior liens encumber the property, a deed in lieu will not wipe out those liens. A deed in lieu may be a practical alternative where a property is encumbered by only one trust deed and no other voluntary or involuntary liens.

Tax Consequences of Canceled Debt: Short Sales and Deeds in Lieu. Waiver of debt results in imputed income to the estate and may be taxed as income unless it qualifies under one of the specific exceptions outlined by the IRS. The PR should be aware of the tax consequences of debt cancellation before conveying the property to the lender with a deed in lieu or agreeing to a short sale where the lender agrees to waive the balance of the debt. IRS Publication 4681 provides a useful summary on this topic, and the PR should consult with a CPA to determine the impact of debt cancellation upon the estate's tax liability.

More Pitfalls

Unoccupied Residence and Homeowners Insurance. The PR should immediately contact the decedent's homeowners insurance carrier if the property will remain vacant after the decedent's death. Many homeowners policies will not cover an unoccupied property, or will insure it only at an additional expense. If a family member is available to remain in – or move to – the property, it may help to preserve the assets in the house, as well as the homeowners policy that insures the property and its contents.

Can the Lender Exercise the Due-on-Sale Clause Because of the Borrower's Death? The deceased borrower's loan documents most likely provide that any transfer of an ownership interest in property – including upon death – constitutes an event of default. However, the federal Garn-St. Germain Depository Institutions Act (12 USC § 1701j-3(d)) prohibits a lender from exercising a due-on-sale clause and accelerating the balance of the loan where the transfer is made to the decedent's relative or to a joint tenant in the property. In this case, the beneficiary is entitled to assume the obligation but may not want to – particularly if the property is under water. The PR should be aware that this protection applies only to a loan secured by residential real property containing no more than five dwelling units.

If the devisee of real property is not the decedent's relative or a joint tenant in the property, the lender may accelerate the loan even if payments are current. Unless the lender agrees to allow the devisee to assume the mortgage, the devisee may be required to refinance the loan it its name in order to avoid the lender exercising the due-on-sale clause.

Summary

When an estate or a trust owns real property, the PR or trustee should be well-advised of the options available to the estate or trust and its beneficiaries. The current real estate market presents unique challenges to a fiduciary, and he or she should make decisions based on a careful, informed analysis of the property, applicable laws, and beneficiaries' interests. For more foreclosure information, see "Foreclosing Security Interests," an Oregon State Bar publication, or call any member of the OSB Real Estate/Land Use Section for help.

Kristen Edwards
Edwards Law Offices PC
Bend, OR

Oregon State Bar
Oregon State Bar
Estate Planning and
Administration Section
PO Box 231935
Tigard, OR 97281-1935

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Oregon Uniform Trust Code Seeking Comments for Revisions

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 ("O-UTC"). 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 at cmauritz@duffykekel.com.