Published by the
Estate Planning
and Administration
Section of the
Oregon State Bar

Newsletter

Distribution Provisions in Testamentary Special Needs Trusts

When drafting testamentary trusts for non-disabled children and family members, estate planning attorneys strive to write distribution language that will reflect the wide variety of spending purposes intended by the grantor. Generally speaking, there are no firm drafting "rules," and estate planning attorneys are free to be creative in crafting the dispositive language. If, however, the intended beneficiary is receiving (or is expected to receive) means-tested public benefits, creative writing skills can have unintended consequences for the beneficiary's eligibility to receive those benefits. It is generally advisable for the attorney to draft the distribution provisions using specific language that is recognized by and acceptable to the public benefits agencies.

The primary purpose of a special needs trust is always to protect a beneficiary's eligibility for means-tested public benefits such as supplemental security income ("SSI") and Medicaid. In order to receive these benefits, an individual must be disabled and must meet strict income and asset limits. As a general rule, assets available to pay for the individual's food and shelter (i.e., basic support) must be less than $2,000. If an individual is entitled to receive SSI, he or she will automatically be eligible to receive Medicaid.

When assets are held in trust for the benefit of the disabled individual, the distribution standard of the trust often receives close scrutiny by public benefits agencies, which ultimately determine whether the assets in the trust are "available" to pay for these basic support needs. If the trust assets are determined to be available, the beneficiary of the trust will not be able to pass the financial limits test and will lose his or her eligibility to receive needs-based public benefits. If, however, the special needs trust distribution standard is carefully worded, the assets of the trust will be considered "unavailable" to pay for the beneficiary's basic support and thus will be ignored in determining the individual's financial eligibility.

A distribution standard that allows the trustee to expend funds for the beneficiary in whatever manner the trustee deems appropriate (i.e., the "sole discretion" of the trustee) should arguably result in the trust assets being considered unavailable, provided the beneficiary has no right to compel a distribution from the trust and the trustee exercises his or her discretion by choosing *not* to make distributions for the beneficiary's basic needs. While Social Security may follow this interpretation, many state Medicaid agencies, including the Oregon Department of Human Services, take the position that, because this distribution standard *does not prohibit* the trustee from making distributions for basic needs, the trust assets are an available resource to the beneficiary, regardless of whether the trustee actually disburses the money for such purposes.[1]

On the other end of the spectrum, a distribution standard in a special needs trust might directly forbid the trustee from making distributions

1 See OAR 461-140-0020(2)(e), 461-145-0540.

Oregon Estate Planning and Administration Section Newsletter
Volume XXIX, No. 2
April 2012

Oregon State Bar
Estate Planning & Administration Section

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for the beneficiary's basic needs.[2] While this "strict" distribution standard will certainly protect the trust assets from being considered an available resource of the beneficiary, it does not leave the trustee with any flexibility to adapt to the critical needs of the beneficiary. For many parents, preserving the ability for the trustee to make distributions for their child's food and shelter is a priority. Luckily, a "hybrid" distribution standard, one that provides flexibility for the trustee to make distributions for food and shelter while still protecting the beneficiary's access to needs-based public benefits, is recognized and available to many clients who are establishing a testamentary special needs trust in their estate plans.

If a beneficiary is receiving SSI each month, it may be possible to allow a trustee to make distributions for a beneficiary's food and shelter without eliminating the beneficiary's eligibility for SSI and Medicaid. This is due to a specific Social Security rule regarding "in-kind support and maintenance." According to the rule, if the trustee of a special needs trust pays for the beneficiary's food and/or shelter, the beneficiary's SSI cash benefit will be *reduced*, dollar for distribution dollar, up to a maximum penalty amount.[3] If the penalty reduction does not completely eliminate the SSI benefit, the beneficiary's eligibility for Medicaid will continue. In such a case, the inclusion of the hybrid distribution standard in the special needs trust can provide the proverbial best-of-both-worlds scenario.

The following examples illustrate the interaction of the hybrid distribution standard and the Social Security "in-kind support and maintenance" rule:

Example 1. Jane is disabled and has lived with her parents all of her life. She receives the full SSI benefit ($698 in 2012) each month. Because of her receipt of SSI, Jane is automatically eligible to receive Medicaid. Her parents want to make sure that when they pass away, Jane's eligibility for these benefits is protected, but they are worried about her living situation. They have done some preliminary research and believe that Jane will need $1,000 every month for rent.

If Jane's parents were to leave their assets to Jane in a special needs trust that dictates a strict distribution standard, Jane's eligibility for her SSI and Medicaid would continue, but the trustee would not be able to help Jane pay the monthly cost of the group home. Jane's only resource for her housing and food costs would be the $698 SSI amount, which would not cover her rent. If Jane's special needs trust were to contain a hybrid distribution standard, the trustee could pay the $1,000 rent each month from the trust assets. The $1,000 payment to the group home would mean that Jane's SSI benefit would be reduced, dollar for distribution dollar, up to a maximum penalty. In 2012, that maximum penalty reduction is $252.66. Jane's SSI check would therefore be $445.34 each month ($698 - $252.66), but she would keep her Medicaid. Clearly, in this situation, the reduction of Jane's SSI check by $252.66 per month would be worth the trade-off of allowing the trustee to pay for the cost of the group home.

Example 2. Now suppose that Jane were to receive a blend of benefits: $500 in Social Security Disability ("SSDI")[4] and $198 of SSI. Using the same facts as above, the reduction of Jane's SSI each month by the maximum amount of $252.66 would totally eliminate her SSI benefit. Upon losing her SSI, Jane will lose her automatic eligibility for Medicaid. Unlike the situation in the first example, the trustee's payment of rent in this situation must be weighed against the impact of Jane losing her SSI and Medicaid benefits.

Example 3. Finally, let us assume that Jane was disabled under Social Security criteria prior to age 22 and is collecting SSI. After her parents' death Jane would be entitled to collect $950 of SSDI based on her father's work record. In such a situation, Jane would retain her access to Medicaid because she would be receiving SSI but for the fact that she is entitled to collect a larger amount in SSDI based on her father's Social Security work record. Jane is a "childhood disability beneficiary," or "CDB."[5] For CDBs, the result is even more favorable. Because the in-kind support and maintenance rules are only applicable to reduce an individual's SSI benefit, Jane's $950 of SSDI *would not* be reduced if the trustee pays $1,000 in rent for Jane each month, and Jane would keep her Medicaid.

Of course, the above examples do not tell the whole story. Making distributions for food and shelter under a hybrid distribution standard requires careful analysis of multiple, highly technical public benefits rules that are beyond the scope of this article. Any distribution that impacts the beneficiary's receipt of public benefits should be approached with caution and with the advice of an attorney versed in this area of law. It is also critical to understand that the conclusions of this article are limited to the context of estate planning with a testamentary special needs trust. The distribution standards discussed herein would be analyzed quite differently in the context of a special needs trust funded with assets owned/

2 Despite its name, the strict distribution standard is actually quite broad, allows the trustee to make distributions for the beneficiary's "special needs," and can encompass many types of expenses that can increase the beneficiary's quality of life. For example, under a strict distribution standard, a trustee can make distributions for cable television, internet services, or vacation expenses. In fact, it is more illustrative to focus on what is not considered a special need. In short, under a strict distribution standard, a special need is anything that is not cash, shelter, or food.

3 The technical mechanics of the in-kind support maintenance rules are beyond the scope of this article. See 42 USC § 1382a(a)(2)(A); 20 CFR §§ 416.1102, 416.1130, 416.1131, 416.1140.

4 SSDI benefits are not "means-tested" benefits. That is, the asset and income tests of SSI are not applicable to SSDI.

5 "Childhood Disability Beneficiary" is a relatively new term used to describe individuals in Jane's situation. These individuals are often referred to as "Disabled Adult Child" or "DAC" in written materials.

controlled by the disabled beneficiary (i.e., a "payback" or "first party" special needs trust).[6]

The authors would like to recognize the gracious contribution of their colleague, Donna R. Meyer, to this article.

Michael Edgel and Melanie Marmion
Fitzwater Meyer, LLP
Portland, Oregon

A related article, Selected Tax Issues for Special Needs Trusts by Melanie Marmion, appeared in the October 2011 issue of the Estate Planning Section newsletter.

Oregon's Uniform Real Property Transfer on Death Act: Part I

The passage of Senate Bill 815 in last year's legislative session gives Oregonians a new option for transferring real property upon the owner's death without subjecting the property to probate proceedings. This new law has the potential to simplify estate administrations. However, it also has the potential to create unintended results and complications. This article is written and published in two parts. Part I reviews the requirements for creating a valid transfer on death deed, and the effects a valid transfer on death deed has on the transferor and the transferor's beneficiary, creditors, heirs, and devisees. Part II, to be published in the July issue of the *Estate Planning Section Newsletter*, will discuss the potential benefits and problems of using transfer on death deeds.

Creation of a Transfer on Death Deed

Oregon's Uniform Real Property Transfer on Death Act ("URPTDA") is found in Chapter 93 of the Oregon Revised Statutes. To create a valid transfer on death deed ("TODD"), the deed must satisfy the following requirements:

> *Capacity of Transferor*. The person creating a TODD must have the requisite capacity. Capacity requirements for executing a valid TODD are identical to the capacity requirements for executing a valid will. ORS 93.959.
>
> *Statement of Intent*. The deed must state that the transfer to the designated beneficiary will occur at the transferor's death. ORS 93.961(1)(b).
>
> *Beneficiary Specifically Named*. The deed must specifically name the designated beneficiary(ies). ORS 93.961(1)(c). References to beneficiaries only as members of a class are void. ORS 93.961(2). Although a trust may be named as a beneficiary, it is unclear whether the person acting as trustee must be specifically named in the TODD (e.g., "John Doe, Trustee of the Doe Trust"), or whether specifically naming the trust will be sufficient (e.g., "the then acting Trustee of the Doe Trust"). This issue is under discussion and may be the subject of a technical amendment in the future. *See* Susan Gary, "Oregon Update – 2011," 41st Annual Estate Planning Seminar, Estate Planning Council of Portland.
>
> *Deed Formalities*. A TODD must contain the same elements and formalities of a proper inter vivos deed, with two exceptions: (1) a recitation of consideration is not required, and (2) the land use warnings of ORS 93.040 are not required. ORS 93.961(1)(a), ORS 93.030(6), ORS 93.040(6).
>
> *Recording*. Prior to the death of the transferor, the deed must be recorded in the county in which the property is located. ORS 93.961(1)(d).

A valid TODD does not require notice, delivery, acceptance by the beneficiary during the transferor's life, consideration, probate, or the execution formalities of a will. ORS 93.963, ORS 93.957.

A TODD is void if executed as a result of fraud, duress, or undue influence. Challenges to a TODD on these grounds must be brought within 18 months of the death of the transferor. ORS 93.959(3).

6 See Michael Edgel and Melanie Marmion's materials, "Third Party and First Party ('Payback') Special Needs Trusts," Chapter 3 in the June 10, 2011 OSB CLE titled "Special Needs Trusts."

Transferor

A property owner who executes a TODD is referred to in the statute as a "transferor." During the transferor's life, a TODD does not affect the interest or rights of the transferor and does not affect the transferor's eligibility for public assistance. ORS 93.967(1), (4).

Revocation by the Transferor or Transferor's Representative

While the transferor is alive, a TODD is always revocable, even if the terms of the TODD or another agreement state otherwise. ORS 93.955. However, a transferor's promise not to revoke a TODD may have a remedy under other law if the promise is broken. *See* URPTDA § 6 cmt.

A transferor may revoke a TODD by executing a subsequent deed or instrument that is one of the following: (1) an instrument of revocation, (2) a TODD that expressly or through inconsistency revokes the prior TODD, or (3) an inter vivos deed. To be valid, the deed or instrument of revocation must be recorded prior to the transferor's death in the county in which the property is located. After a TODD has been recorded, it cannot be revoked by a revocatory act on the deed. ORS 93.965.

A transferor's subsequent marriage does not revoke a TODD, and divorce revokes any TODD provisions in favor of the former spouse. ORS 93.981.

An agent acting under a power of attorney may revoke a TODD only if authority is expressly designated in the TODD. ORS 93.965. A transferor's conservator may, with prior court approval, revoke a TODD on behalf of the transferor. ORS 125.440(6).

Designated Beneficiary

During Transferor's Life. Prior to a transferor's death, a beneficiary named in a TODD is referred to as a "designated beneficiary." The TODD does not create a legal or an equitable interest in the designated beneficiary, nor does it affect an interest or a right of a designated beneficiary, including the designated beneficiary's eligibility for public assistance. ORS 93.967(2), (4). The property is not subject to the claims of a designated beneficiary's creditors. ORS 93.967(6).

After Transferor's Death. Title vests in a designated beneficiary upon the transferor's death, provided that the designated beneficiary survives the transferor by 120 hours. ORS 93.969(1)(a)(A), ORS 112.572. A transferor may opt out of the 120-hour survival requirement by providing for a different survival requirement in the TODD. ORS 112.586.

If a TODD designates multiple beneficiaries, the beneficiaries receive equal undivided interests in the property with no survivorship rights. Any lapsed or failed share passes to the surviving beneficiaries in proportion to the interest each remaining designated beneficiary has in the property. ORS 93.969(1)(b)(B).

There is disagreement among practitioners regarding whether ORS 93.969(1)(b)(B) precludes a transferor from directing a deceased primary beneficiary's share to a named alternate beneficiary when the deceased primary beneficiary is survived by other primary beneficiaries. For example, it may not be possible for a transferor to name Jane and Dick as beneficiaries, and also direct that Jane's interest pass to Spot in the event that Jane is deceased and Dick is alive. This issue is currently under review and may be the subject of a technical amendment in the future.

A beneficiary may disclaim all or part of the beneficiary's interest under ORS 105.623 to 105.649, and a beneficiary's conservator may disclaim on behalf of the beneficiary with prior court approval. ORS 93.971, ORS 125.440(4).

Heirs and Beneficiaries Not Named in the Deed

Because a property subject to a TODD is not an estate asset, heirs and beneficiaries of a deceased transferor's estate have no interest in the property, unless they can invalidate the terms of the TODD.

A TODD may be contested on grounds of lack of capacity, fraud, duress, or undue influence. In addition the property will pass as though the beneficiary predeceased the transferor if the beneficiary was a slayer or an abuser of the transferor, or if the beneficiary is a parent of the transferor who failed to support the transferor for 10 years prior to the transferor's becoming an adult. Proceedings to contest a TODD or a beneficiary's right to receive the property under a TODD must be commenced within 18 months of the date of the transferor's death. ORS 93.959, ORS 112.465, ORS 93.983.

Oregon's anti-lapse and pretermitted heir statutes do not apply to TODDs.

Creditors

During the transferor's life, a TODD does not affect the interest or right of a creditor of the transferor, and notice of foreclosure proceedings to the designated beneficiary is not required. ORS 93.967(3). A designated beneficiary receives the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death, including claims or liens for reimbursement for public assistance. ORS 93.969(2).

Upon the transferor's death, the property transfers subject to the rights and interests of the deceased transferor's creditors. Creditors with a security interest in the property retain their security interests, and notice of foreclosure proceedings must be given to the beneficiary. ORS 86.740.

Creditors of a deceased transferor must bring their claims against the transferor's estate as provided under ORS Chapter 115 and ORS 114.505 to 114.560. If the transferor's probate estate is insufficient to satisfy the claims of a creditor, the personal representative may enforce the liability against the property within 18 months of the transferor's death. If multiple properties are passing by TODD, the liability is apportioned according to each property's net date-of-death value. ORS 93.973(2).

Summary

Oregon's URPTDA allows property owners to avoid a court probate of real property upon their death without the tax and creditor complications associated with joint ownership. Part II of this article will examine the practical consequences, good and bad, that practitioners and their clients should be aware of when considering the use of a TODD.

Freeman Green
Saalfeld Griggs, PC
Salem, Oregon

Words from the Chair

The Executive Committee of the EP Section took up a full agenda of projects in January—some were carried over from last year, and several new ones have been added this year. On the legislation front, work continues on revisions to the Oregon Uniform Trust Code with the hope of presenting a bill to the 2013 Legislature. (It's still not too late to send us suggestions if you've encountered statutory issues administering trusts in Oregon.)

The probate code topics are also under consideration. One project seeks to clarify the authority of the personal representative to access a decedent's virtual assets, including financial accounts and social networks. Another project is exploring the adoption of non-intervention probate administration as an efficiency and judiciary cost-cutting opportunity. This project has the potential of initiating a re-examination of the entire probate code, which has remained basically unchanged since its adoption in 1969.

Another project has arisen in the aftermath of the adoption of the new spousal election statute two years ago. The committee is seeking guidance from the Bar on the ethical issues surrounding joint representation of spouses with potentially conflicting interests. We believe a formal ethics opinion will clarify the attorney's role in presenting information and options to the clients.

Sponsoring continuing education programs in our topic area is the ongoing task of the CLE subcommittee. With attendance at these programs rising steadily, the expectation level for interesting and timely topics rises, too. The committee is constantly on the prowl for new topics, so don't hesitate to suggest areas and issues that would help you in your practice.

D. Charles "Chuck" Mauritz
Chair, OSB Estate Planning Section
Duffy Kekel, LLP
Portland, Oregon

Virtual Assets: Part II

This article was first published in BNA Tax Management in 2011 and is being republished here in two parts. Part I appeared in the January 2012 issue and explains what virtual assets are and how the license agreements governing these assets affects estate planning and administration considerations. This is Part II of the article, which discusses how to integrate virtual assets into your estate planning and administration practice.

Virtual assets may be something you see, create, or rely upon every day, yet they may simultaneously be something you never consider as valuable or worth incorporating into your estate plan. This article will explain how to reshape your perceptions and protect your virtual assets to benefit one's estate and your heirs.

Integrate Virtual Assets into Your Estate Plan

The Planning Dilemma

As the internet has developed over the last 20 years, so has the sophistication of the use of passwords to internet-based virtual assets. Online providers of virtual assets require user name and passwords, and the providers' security protocols often require users to change passwords periodically. When registering for online access to virtual assets, we are often required to list "challenge questions," the answers to which would often only be known to the user (e.g. "What was the name of your favorite teacher in high school?"). Providers caution us to not share our passwords with anyone.

These security measures create a serious dilemma when the user dies or becomes incapacitated. If the virtual assets in question are vital to one's overall estate planning, the failure of fiduciaries or family members to access these assets could create serious difficulties and unnecessary expenses. Hence, it is very important that sensible measures be taken to integrate virtual asset planning into one's overall estate plan. Here are some steps to consider in this process:

Identify All Virtual Assets. Whether one is in the planning stages of an estate plan or beginning the process of administering a decedent's estate, one key preliminary step is to identify the relevant assets. When evaluating virtual assets, many such assets will be fairly obvious, and are many of the assets we've already discussed in this article (i.e. online financial accounts, email, social media accounts, access to vendors whose bills are paid electronically, online subscriptions, and online storage accounts). [See Part I of this article in the January 2012 issue.] Often, it may take a careful review of a year's worth of bank and credit card statements to identify most vendors who may be paid by some electronic means.

Not all virtual assets are internet-based. For example, a great deal of electronic information may exist on the hard drive of one's home computer or laptop, or more portal storage devices such as flash memory drives, CDs, or DVDs. If the file structure on such media is difficult to interpret, this could lead to great confusion if clear instructions are not left behind by the decedent. Home security systems are often accessed through keypad codes or passwords. In addition, personal or business smartphones may contain significant amounts of personal information that would be very sensitive.

Not all electronically accessed information relates to an "asset." It is now very common for many regular monthly bills (such as utility bills) to be paid electronically. Most credit card, bank loans, and mortgage accounts allow electronic access and bill paying capabilities. Hence, it is essential that a list of such "virtual liabilities" be maintained as well.

Choose Appropriate Personal Representatives, Trustees and/or Advisors. Wills, trusts, and powers of attorney have been around for centuries. In appointing an executor, trustee, or agent under a power of attorney, you are appointing a representative that you trust to take control of your assets and follow your legal instructions. Whether dealing with virtual assets or an office building, you should appoint individuals in these roles that are both trustworthy and competent to carry out these instructions.

But let's face reality! Not everyone is computer and internet savvy. If a person's estate is complex and has a great many virtual assets, a technophobic fiduciary is likely not the best choice. If family politics or "primogeniture" (i.e. oldest child serves first, then the next oldest, etc.) requires that an individual without technical or computer skills be named as personal representative and/or trustee, then the will or trust could name either a co-fiduciary or informal advisor to help administer the virtual assets. In a trust setting, the Oregon version of the Uniform Trust Code contains a provision relating to trust "advisors" in which an individual is appointed to perform particular tasks on behalf of the trust.[1] Hence, one might consider appointing a "virtual asset trust advisor" if the circumstances require.

Provide Specific Virtual Asset Authority in the Will or Trust. The law relating to virtual assets has been somewhat slow in developing. At this writing, only two state legislatures have promulgated statutes to specifically authorize fiduciaries to access a decedent's virtual assets.[2] Hence, one should consider including specific authority in wills and trusts to give the fiduciary specific authority over virtual assets. Particularly because the contemplation of virtual assets in the estate planning process is a relatively new issue, a trust or will that grants specific authority to a fiduciary could be particularly important if one's estate contains a significant number of virtual assets. For example, one could consider including the following provision in your trust:

> Upon the death of the Settlor, the Trustee may take such actions as are reasonably necessary and prudent to locate, administer, transfer, and distribute any Virtual Asset (as hereinafter defined) which the Trustee or Settlor may own or otherwise possess rights to at the time of the Settlor's death. Without limiting the generality of the foregoing, the Trustee is authorized: (a) to hire and reasonably compensate computer or other technical experts to assist the Trustee with respect to any Virtual Asset; (b) to change passwords or other means to access and/or control any Virtual Asset; (c) to take such actions as the Trustee shall deem necessary to protect the security and continued accessibility of any Virtual Asset; and (d) to communicate with any software licensor, internet service provider, or other third party in connection with the location, administration, transfer, or distribution of any Virtual Asset. For purposes of this Trust, a "Virtual Asset" shall mean any intangible personal property which is stored and/or accessed by any electronic means whatsoever, whether on a personal computer, computer network, portable electronic storage device or media, or through and/or over the internet.

Create a Virtual Asset Instruction Letter. A "Virtual Asset Instruction Letter" or "VAIL" will list all of your online accounts and other virtual assets, and will provide web addresses, user names, and passwords to give your designated representative the ability to identify and access these accounts. The VAIL should also contain the decedent's instructions as to what is to be done with these assets. *However*, it is important to keep in mind that, under the laws of most states, unless the VAIL is incorporated into the terms of one's will or trust, any such instructions may not be legally binding. That's not to say that the VAIL would not be an extremely helpful resource; it's just important to realize that the VAIL is not the place to designate the beneficiary of any asset or issue instructions that *must* be legally binding.

1 *See, e.g.,* ORS 130.735. ORS 130.735(1) specifically states: "A trust instrument may appoint a person to act as an adviser for the purpose of directing or approving decisions made by the trustee, including decisions related to distribution of trust assets and to the purchase, sale or exchange of trust investments. The appointment must be made by a provision of the trust that specifically refers to this section. An adviser shall exercise all authority granted under the trust instrument as a fiduciary unless the trust instrument provides otherwise. A person who agrees to act as an adviser is subject to Oregon law and submits to the jurisdiction of the courts of this state." *See also* 12 Del. Code § 3313 (Delaware's trust advisor statute).

2 *See* Idaho Code Ann. § 15-5-424(3)(z) (authorizes personal representative to "[t]ake control of, conduct, continue or terminate any accounts of the protected person on any social networking website, any microblogging or short message service website or any e-mail service website"); Okla. Stat. Ann. tit. 58, § 269 (stating that "[t]he executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites").

Place the VAIL in a safe location, such as a safe deposit box or a fire-proof safe in one's home, which can only be accessed by your legal representative. In addition to placing the VAIL in written form, one might consider saving the VAIL to a flash memory drive or CD which can make your representative's access to these accounts more efficient. For assets such as email accounts, your VAIL may instruct your representative to delete the account after a period of time. Most such accounts will simply terminate after a certain period of inactivity.

Gaining access to another's online accounts is often more troublesome in cases of incapacitation. One reason for this is the fact that the records may be needed to meet expenses, which continue while a person is disabled, but which generally end at death. Informal measures, such as giving a password to a child so that he or she can pay the bills of an ill parent can be problematic. If, for example, a sibling accuses that child of misusing funds, the child may need the parent's authorization and instructions in order to defend herself.[3]

Some recommend preparing a durable power of attorney, authorizing another individual to act as an agent and handle finances, in order to avoid these problems.[4] However, a power of attorney alone may not be sufficient in the electronic world.[5] Bills paid online, automatically charged to a credit card or debit card account, can nevertheless be hard to identify and audit.[6] A VAIL provides the necessary information to a trusted fiduciary to perform their duties.

In addition to containing instructions as to particular assets, the VAIL could set forth a decedent's wishes as they relate to administering their virtual presence after they are gone. For example, a decedent may wish that email contacts and Facebook friends be notified of their passing.

Consider How Virtual Assets Should Be Disseminated. If a virtual asset is a bank or investment account, your will or trust should (presumably) control who will receive these assets at your death. However, what about access to family photos or genealogical information? One might want to specifically instruct your executor or trustee to replicate and distribute these items so that they pass to *multiple* intended beneficiaries.

Administering Virtual Assets in a Decedent's Estate

In an estate or trust administration, the fiduciary[7] should adhere to the common practices required by law in dealing with virtual assets. However, as this area of the law is still developing, the fiduciary charged with administering a decedent's estate or trust is likely to encounter a relative dearth of clear legal authority as it relates to the administration of an estate or trust containing virtual assets. Nevertheless, a careful application of existing fiduciary standards will likely be helpful. This discussion would also be relevant in a similar context if a person loses mental capacity and a

Behind the VAIL

The seven steps the authors recommend be included in any Virtual Asset Instruction Letter

1. Identify each internet account that you have and determine how each company handles an account when the account holder dies.
2. Determine which accounts you want your representative to maintain and have access to, and prepare a written and electronic file list of those accounts with their passwords.
3. Determine which accounts you wish to have deleted and provide the necessary written instructions to do so.
4. Consider saving the account and access information on a CD or memory stick and store it in a safe place. Give your representative instructions about how to access this information. Don't forget to update it as passwords change.
5. If you have a collection of pictures or other memorabilia that are being stored on the internet, consider making a backup of that information to a disk drive or CD that you control. Store this information in a safe place, and provide your personal representative with instructions on how to obtain that information.
6. Upgrade your power of attorney to include provisions authorizing your agent to access your emails and other electronic data.
7. If someone other than your personal representative is being designated to handle your electronic data, then those individuals should be named in your will or other estate planning documents.

The authors have received the green light to proceed in Oregon with a work group to address modifying statutes to clarify that a personal representative, trustee, or conservator has the legal authority to access online information. The first Oregon work group meeting was in December 2011, and interested persons should contact the authors.

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3 Deborah L. Jacobs, *When Others Need the Keys to Your Online Kingdom,* N.Y. Times, May 20, 2009, *available at* http://www.nytimes.com/2009/05/21/your-money/estate-planning/21ONLINE.html.
4 *Id.*
5 *Id.*
6 *Id.*
7 In this section, we use the term "fiduciary" to generally refer to the individual or entity charged with administering a decedent's estate or trust (i.e. an executor or personal representative of an estate, and a trustee of a trust). Most of the principles discussed in this section apply in the same manner to each type of fiduciary.

conservator or successor trustee is faced with similar dilemmas with respect to the incompetent person's assets.

Virtual Assets and a Trustee's "Prudent Person" Standard

In a general sense, a fiduciary's duty is often expressed as a "prudent person" standard. For example, Section 804 of the Uniform Trust Code states that a trustee "shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust."[8] However, how do these standards apply to a fiduciary's duties in dealing with virtual assets held by an estate or a trust? First, comment "a" to Section 174 of Restatement (Second) of Trusts is helpful in stating that the standard of care and skill required of a trustee is an "external standard." Hence, the proliferation of virtual assets in modern society would necessary lead to the conclusion that a trustee's duties must evolve to meet that changing manner in which individuals own and manage their assets. In 1960, it would have been unlikely for a court to conclude that the "ordinary prudence" of a trustee would include a working knowledge of computer technologies. However, a court in the "information age" would likely reach a much different conclusion. The following discussion may provide the fiduciary with at least a starting point in evaluating the appropriate steps to meeting the "prudent" standard in the context of an estate or trust which owns a substantial number of virtual assets.

Locating a Decedent's Virtual Assets

Consider the possibility of a decedent with substantial assets and a strong tendency to manage those assets in a way that leaves only a limited "paper trail" in the traditional sense. If the decedent managed his or her assets online, received "paperless" account statements via email, maintained information about those assets on a "cloud" server, and generally communicated about those assets by email, unless the decedent undertook careful planning during his or her lifetime, merely *finding* the decedent's virtual assets may present a serious challenge.

If such a decedent had not planned adequately, what constitutes "prudent" action by the fiduciary may be difficult to ascertain. First, the fiduciary should consider whether it may be necessary to hire a forensic expert in information technologies to advise the fiduciary on a prudent process for locating a decedent's virtual assets. The fiduciary should also attempt to gain working access to and analyze all potential "portals" into the decedent's digital existence. This may include the decedent's personal computer(s), smartphone, or other digital storage devices. If the decedent utilized financial software (e.g. Quicken or Microsoft Money), entries found in such programs might lead to virtual assets. Finally, sources such as tax returns and Forms 1099 could reflect assets that might not otherwise be found in traditional "paper records" such as account statements.

Administering an Estate with Virtual Assets

Presuming the decedent's assets can be located, there are a number of steps that the personal representative and/or trustee should consider.[9]

1. The fiduciary should properly "marshal" these assets by making certain that the fiduciary is the only party that has access to the assets. For example, the fiduciary should consider changing the password that is used to access the asset. If the decedent had shared such a password with a family member or other individual who is not the fiduciary, then such a "digital interloper" could interfere with the fiduciary's ability to accomplish the proper administration of the estate or trust. The fiduciary should remove all private and/or personal data from online shopping accounts (or close them as soon as reasonably possible).

2. If the decedent had established any form of "automatic" means to pay bills, make loan payments, or other debts, the fiduciary should determine the exact nature of these arrangements, then evaluate whether they should be continued, or (more likely) converted to a payment method that is consistent with the fiduciary's administrative and accounting procedures.

3. If possible, the fiduciary should endeavor to remove personal or sensitive data (such as credit card information) from online sites. This is yet another means to try to prevent identity theft or other unforeseen consequences.

4. While undertaking such control, the fiduciary should also take steps to archive important electronic data for the full duration of the relevant statutes of limitation. In this way, if data is updated during the course of administration, the fiduciary will have a "baseline" of data if beneficiaries or other parties raise questions or complaints in the future.

5. Along with all other assets under the fiduciary's control, the fiduciary should prepare a written inventory of the decedent's virtual assets. If a virtual asset has its

8 *See also* Restatement (Second) of Trusts § 174 (1959) (the trustee "is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property"); Uniform Probate Code § 7-302 (the trustee "shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another"); ORS 130.665 (statute is identical to Section 804 of the Uniform Trust Code); 12 Del. Code § 3302(a) ("a fiduciary shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account").

9 *See also* Dennis Kennedy, *Estate Planning for Your Digital Assets*, Law Practice Today, March 2010, *available at* http://apps.americanbar.org/lpm/lpt/articles/pdf/ftr03103.pdf.

own extrinsic value (such as a commercial website or online publication), then the value of such asset should be separately listed on the estate or trust's asset inventory. While placing a value on such assets may be difficult, it is certainly not beyond the professional expertise of a qualified valuation professional. This step may also be relevant to the extent that the estate may be subject to federal estate tax or state-level transfer taxes.

6. The fiduciary should consider consolidating virtual assets to as few "platforms" as possible (e.g. have multiple email accounts set to forward to a single email account). This may ease the fiduciary's administrative burden.

7. If appropriate, the fiduciary should consider notifying the individuals in the decedent's email contact list and other social media contacts. As these contacts may be very sensitive and personal in nature, the fiduciary may wish to consult with any appropriate family members before undertaking such communications.

8. The fiduciary should keep all accounts open for at least a period of time to make sure all relevant or valuable information has been saved and all vendors or other business contacts have been appropriately notified so all payables can be paid and accounts receivable collected.

Conclusion

Upon an individual's death or incapacity, virtual assets can be difficult to administer, and sometimes to even locate. According to a recent article in the *Wall Street Journal*, state treasurers around the United States currently hold $32.9 billion of unclaimed assets.[10] As the ownership of virtual assets continues to proliferate, without careful planning, this number could increase significantly.

While it may be tempting to marginalize issues relating to virtual assets as relevant only to individuals that lead highly "digital" lives or those who maintain intellectual property or creative assets in some type of electronic media, the growing reality is that individuals use numerous electronic devices in order to access information about assets and debts, to communicate for business or personal purposes, and to generally function in modern society. This new existence will have a profound effect on estate planning as well as fiduciary administration and litigation. Being aware of the various challenges and planning in advance with a VAIL and similar instruments will help to reduce or eliminate the risks of losing important information left for those charged with managing an estate. If virtual assets are any part of one's legacy or estate, then steps should be taken to protect them.

Victoria Blachly and Michael Walker
Samuels, Yoelin Kantor LLP

Other Resources

Evan Carroll & John Romano, Your Digital Afterlife: When Facebook, Flickr and Twitter Are Your Estate, What's Your Legacy? (2011)

Part I of this article appeared in the January 2012 issue of the Estate Planning Section Newsletter. *In Part I the authors explain what virtual assets are and how the license agreements governing these assets affect estate planning and administration considerations.*

10 Saabira Chaudhuri, *The 25 Documents You Need Before You Die*, Wall St. J., July 1, 2011, *available at* http://online.wsj.com/article/SB10001424052702303627104576410234039258092.html.

Save the Date

Your Estate Planning Section CLE Committee is working hard on CLEs for later this year. Mark your calendars now with these dates. More information will be available soon.

Advanced Estate Administration

Date: Friday, June 22, 2012

Time: TBD

Location: Double Tree Lloyd Center Hotel, Portland

Advising Oregon Estates

Date: Friday, November 9, 2012

Time: TBD

Location: Oregon Convention Center, Portland

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.

What's New from the Courts?

In re Guardianship of Derkatsch, 248 Or App 185 (2012)

In *Derkatsch* the court decided whether attorney fees could be awarded pursuant to ORS 125.095(1) in a protective proceeding to a firm that represented the protected person in another case but did not represent any party in the protective proceeding. The court determined that the attorney fees from another case could be awarded in the protective proceeding but only for services the law firm rendered on behalf of the protected person after she became a protected person.

In 1999, Erna Derkatsch executed a trust. Under the trust, she was both trustee and principal beneficiary. After she was diagnosed with Alzheimer's disease, two of her children, Erick and Natalie (the trustees), began serving as successor trustees in 2006. Later that year, Erna met with an attorney and a banker, and they both determined she had full capacity to handle her affairs. Erna then executed a document to have the bank appointed as a neutral third-party trustee instead of Erick and Natalie. Erick and Natalie did not turn over management of the trust to the bank. In December 2006, Erna filed a financial abuse case against Erick and Natalie. In this suit, Erna was represented by the law firm of Thorp, Purdy, Jewett, Urness & Wilkinson P.C. (the "Firm").

During the financial abuse case, a separate protective proceeding was initiated to appoint professional guardians/conservators (the Raineys) for Erna. The probate court temporarily appointed the Raineys to serve as Erna's guardians/conservators and ordered them to assess and evaluate the financial abuse case and direct the Firm as to its prosecution, dismissal, or other resolution. The Firm did not represent any party in the protective proceeding. The Firm did, however, provide the Raineys with a cost estimate for completing the pending financial abuse case. After being provided with an incomplete accounting from the trustees, the Raineys instructed the Firm to proceed with the financial abuse case.

The financial abuse case eventually settled in 2007. The Firm then filed concurrent motions in the financial abuse case and protective proceeding under ORS 125.095, seeking attorney fees and costs. The trustees objected, contending that ORS 125.095 did not allow for the recovery of fees in a protective proceeding for representation in a separate civil action (the financial abuse case). The probate court, finding that the Firm's services fell within ORS 125.095(1) because they were on behalf of a protected person, entered an attorney fee award in the protective proceeding, ordering that the Firm be paid $58,210.64 using trust assets.

On appeal, the trustees advanced three arguments as to why the award of attorney fees was inappropriate. First, they contended that because ORS 125.095(1) uses permissive language that allows only the person in control of a protected person's assets to pay for services rendered, the court did not have the power to order payment of attorney fees. Second, the trustees contended that the fees incurred in the financial abuse case before Erna became a protected person were not recoverable under ORS 125.095(1). Third, the trustees argued that the Firm was not entitled to fees rendered after Erna became a protected person because the services provided did not benefit Erna.

The court started by looking at the text of the statute. ORS 125.095(1) provides that "[f]unds of the protected person may be used to pay reasonable compensation to any visitor, attorney, physician, fiduciary or temporary fiduciary for services rendered in the protective proceeding or for services rendered on behalf of the fiduciary or protected person." The court held that ORS 125.095(1) generally allows for a court to order payment for services provided by an attorney on behalf of a protected person even if the services were rendered in a different case.

Next, the court addressed whether ORS 125.095(1) allows for the recovery of fees incurred in another case prior to entry of a protective order in a protective proceeding. On this point the court held that such fees are not recoverable under the statute, reasoning that ORS 125.095(1) allows for recovery of attorney fees in two instances. First, attorney fees may be awarded for services provided during the protective proceeding itself. Second, attorney fees may be awarded for services provided on behalf of the protected person. ORS 125.005(7) defines a protected person as someone "for whom a protective order has been entered." In the present case, the Firm did not represent Erna in the protective proceeding, and Erna was not a protected person until after the protective order appointing the Raineys was entered. Therefore, the court held that the Firm could not recover fees for services rendered prior to Erna being legally designated a protected person.

Next, the court determined that the Firm could recover for fees incurred after Erna became a protected person. The trustees contended that the Firm's services were not rendered on behalf of Erna because, in the opinion of the trustees, the Firm's services did not benefit Erna. The court held that ORS 125.095(1) does not make payment of compensation for services rendered contingent on a finding that the services conferred a benefit on the protected person. The court noted that the Firm's services in the financial abuse case were in fact on Erna's behalf because the Raineys directed the Firm to proceed after the trustees provided incomplete financial information. The court also noted that the Firm's representation of Erna resulted in a benefit to her.

In summary, ORS 125.095(1) allows for the recovery of attorney fees in a protective proceeding for services rendered in a separate case on behalf of a protected person after the protective order has been entered. Payment of attorney fees for services rendered outside of the protective proceeding prior to the entry of the protective order are not authorized under ORS 125.095(1).

Janice E. Hatton
Thorp Purdy Jewett Urness & Wilkinson, PC
Springfield, Oregon