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Virtual Assets: Part I

This article was first published in BNA Tax Management in 2011 and will be republished here in two parts. Part I explains what virtual assets are and how the license agreements governing these assets affect estate planning and administration considerations. Part II of this article will appear in the April 2012 issue of the Estate Planning Newsletter and will discuss 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.

What Are Virtual Assets?

With respect to electronics and the internet, "virtual" is defined as something that is "occurring or existing primarily online" or that is "being simulated on a computer or computer network."[1] Accordingly, one's "virtual assets" are the electronic information stored on a computer or through computer-related technology. This could include digital images from photographs, electronic investment account statements, emails, social internet accounts like Facebook or LinkedIn, bank account statements, etc.

For many, our primary means of communication is email, often through multiple email accounts. We "tweet" about the latest happenings through our Twitter accounts. We keep in touch with friends and colleagues through social networking sites such as Facebook and LinkedIn. We store family photos and other important information on a growing array of online sites. We access our financial assets, such as bank accounts and brokerage accounts, over the internet. We pay our bills electronically. We own internet domain names. In the aggregate, these "virtual assets" have tremendous aesthetic, emotional and financial value.

A large segment of the U.S. population has some type of online account. These accounts are used to communicate, pay bills, conduct business, create online personalities, and even date. Because many individuals protect such accounts by limiting access to themselves only, accounts with protected passwords can create problems when the account holder passes away, as no one has access to the passwords. As a result, digital assets with online accounts or any information, document, or media stored on one's computer are oftentimes left untouched. This includes photos, videos, music, medical records, legal or financial documents, websites, blogs, social media accounts, banking information, business accounts, and any other material or data owned by an individual. Oftentimes, these assets have economic or sentimental value and should be included in the estate for tax purposes.

The proliferation of virtual assets is certain to increase in the future. In a recent study,[2] internet use in the age group over 71 was only 29%. However, internet use jumped to almost 80% among the Baby Boom generation and exceeded 90% for those 30 and younger. As the Baby Boomers grow older, virtual assets are certain to become a more significant factor in the estate planning process.

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1 "Virtual," Merriam-Webster.com., http://www.merriam-webster.com/dictionary/virtual.

2 Leigh Estabrook, Pew Internet & Am. Life Project and Graduate Sch. of Libr. & Info. Science, U. of Ill. at Urbana-Chapman, Information Searches that Solve problems: How people Use the Internet, Libraries and Government Agencies When They Need help (2007).

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Online Accounts

Anything that an individual creates is considered intellectual property and is governed by traditional property law.[3] Thus, an individual usually owns the contents of his or her emails. Many accounts, however, are in the form of licenses rather than actual property, and these licenses generally expire upon death.[4] Moreover, the terms of service of many sites require that the account holder grant the provider ownership of his or her content.[5] Thus, transferability upon death is oftentimes prohibited by the site's terms of service.[6] It is therefore important to read the terms of service of each site and service used. Examples of some of the policies are set forth below.

Yahoo! Mail. Yahoo!® Mail ("Yahoo") considers an account to be private property, and it will not hand over account information to the decedent's family members without legal action.[7] Additionally, it may permanently delete all accounts and their contents, preventing access to anyone, upon receipt of a copy of a death certificate.[8]

In fact, Yahoo's terms of service include a "no right of survivorship and non-transferability clause." The clause states

3 "Intellectual Property," Merriam-Webster.com, http://www.merriam-webster.com/dictionary/ intellectual%20property; Evan Carroll, *A Legal Perspective*, Digital Beyond, June 30, 2009, http://www.thedigitalbeyond.com/2009/06/a-legal-perspective/.

4 *Id.*

5 Robert E. Calem, *What Happens to Your Online Accounts When You Die?*, Techlicious, June 29, 2010, http://www.techlicious.com/how-to/what-happens-to-your-online-accounts-when-you-die/.

6 *Id.*

7 Sarah AuMiller & Peggy Hoyt, *Estate Planning for Your Online Identity*, Wealth Counsel, June 9, 2010, http://estateplanning.wealthcounsel.com/bid/44803/Estate-Planning-for-Your-Online-Identity.

8 Calem, *supra* note 5.

Virtual Assets in Oregon

Query: Should Oregon specifically authorize personal representatives, trustees, and/or conservators to access and manage online or virtual information as part of their fiduciary duties?

"Virtual assets" are the electronic information stored on a computer or through computer-related technology. This could include digital images from photographs, electronic investment account statements, emails, social internet accounts like Facebook or LinkedIn, bank account statements, etc.

How do these virtual assets get accessed or managed when someone dies or becomes incapacitated? Typically a personal representative (or "PR") is instructed to have the mail of the deceased or protected person forwarded to the PR's home to begin the process of determining where the money was held and who the creditors were. However, if that information is all online – and particularly if that information is password-protected – then how does the fiduciary gain access? And when the detailed license agreements with online providers do not allow for the sharing of such information with a fiduciary (at least one large email company retains the ability to delete entire accounts upon notice of a client's death), how can a fiduciary gain access to important online information, be it financial or sentimental?

While it may be tempting to marginalize issues relating to virtual assets as relevant only to individuals who lead highly digital lives or those who maintain intellectual property or creative assets in some type of electronic media, the growing reality is that accessing information about our own assets and debts, communicating for business or personal purposes, and functioning in modern society demand numerous electronic devices. 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 (Virtual Asset Instruction Letter, as discussed in more detail in Part II of "Virtual Assets," which will appear in the April 2012 issue of the Estate Planning Newsletter) will help to reduce or eliminate the risks of losing important information left for those charged with managing the estate or trust. If virtual assets are any part of an individual's legacy or estate, then estate planners should be taking steps to protect those assets.

The Oregon State Bar has authorized a work group to consider how to avoid the expense of litigation over what a fiduciary may or may not be authorized to do with virtual assets. The following Oregon statutes are currently under consideration for proposed legislation to amend their language to clarify that a personal representative, trustee, or conservator has the legal authority to access online information:

For personal representatives: ORS 114.265 (General duties of personal representative) states a PR shall "preserve, settle and distribute the estate" in accordance with other chapters, including ORS chapter 111. Modify ORS 111.005(15) (Definitions for probate law) to include virtual assets as part of the "estate," rather than limiting it to the traditional "real and personal property" definition.

For affiant of small estate: Modify ORS 114.505(3) (Definitions) to expand the definition of "estate" to include virtual assets.

For trustees: ORS 130.725(1) (UTC 816. Specific powers of trustee) allows a trustee to collect trust property. Modify ORS 130.010(13) (UTC 103. Definitions) to expand the definition of "property" to include virtual assets.

For conservators: Add a new subsection (29) to ORS 125.445 (Acts authorized to be performed without prior court approval) to include accessing virtual assets.

The first Oregon work group meeting was in December 2011, and interested persons should contact the authors about assisting with this work group.

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that, "You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted."[9]

In the well-known case of *In Re Justin Ellsworth*, for example, a U.S. Marine was killed in Iraq, and his family was denied access to his Yahoo email account due to the company policy.[10] Yahoo refused to give the email password to the family as a result of its terms of service, which required the company not to disclose the private email communications of its users.[11] The family filed a suit against Yahoo, and in April 2005, a probate judge signed an order directing Yahoo to provide the contents of the email account used by Ellsworth.[12] Although Yahoo complied with the order, it maintained that its compliance was in no way indicative of its stance on who holds legal title to the account information.[13] Yahoo's compliance, it claimed, was a product of the court order, and it promised to defend its commitment to treat user emails as private and confidential.[14]

Hotmail. Hotmail is one of the more accommodating providers when it comes to accessing or closing a deceased family member's account. In submitting a request, the following information needs to be included:

- Your name, phone number and email address.
- A document that states that you are the benefactor or the executor to the decedent's estate and/or that you have power of attorney for an incapacitated customer and/or are next of kin.
- A photocopy of your driver's license or other government-issued identification.
- A photocopy of the death certificate.
- The complete name, address, email address, and date of birth of the account holder.
- Approximate date of account creation and date of last login (if known). If this information is not known, indicate that you do not know.[15]

Within five days of the receipt of all of the aforementioned information, the Custodian of Records will contact you to confirm your identity and will then send you a CD with the decedent's account information, including contacts and emails.[16]

Google Gmail. Gmail also provides a method through which family members of a deceased individual may gain access to account information. However, Gmail automatically deletes any account that has been inactive for more than nine months. In order for a family member to gain access to the contents of the deceased's account, Gmail requires that a family member submit the following information:

- Your complete name, address and email address, and a photocopy of your government issued ID or driver's license.
- The decedent's name (first and last) and email address.
- A copy of an email you received at your email address from the decedent, including complete headers.
- Proof of death (death certificate or equivalent).
- If decedent was over 18, legal proof that you are the next of kin or legal executor of the estate.
- If decedent was under 18, a copy of the decedent's birth certificate.[17]

Gmail will process your request within 30 days and will provide a CD with complete contents of the decedent's email account, including contacts and emails.[18]

MySpace. MySpace provides no means by which heirs can inherit a deceased user's page.[19] Rather, the MySpace terms of agreement imply that, when you die, your profile dies as well.[20]

Although MySpace will not let you edit any of the information yourself, it may assist you in preserving, deleting, or removing information from a profile if you:

- Make note of the decedent's MySpace ID.
- Send an email to accountcare@support.myspace.com with the decedent's MySpace ID, your email address, relation to the deceased and proof of death (i.e. death certificate, obituary).
- Include in your request whether you would like to preserve, delete, or remove information from the profile.[21]

Facebook. When Facebook is notified that a user has passed away, it puts the profile in "memorial state."[22] In this state, certain profile sections are hidden from view to protect the privacy of the deceased.[23] Logging onto the account is prohibited, but confirmed friends are able to leave messages on the wall.[24] Moreover,

9 Yahoo! Terms of Service, Yahoo!, http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html.

10 Justin Atwater, *Who Owns E-Mail?Do You Have a Right to Decide the Disposition of Your Private Digital Life?,* 2006 Utah L. Rev. 397, 399 (2006).

11 *Id.* at 401.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Hotmail Death Policy: How to Access or Delete Hotmail Accounts*, Entrustet, http://blog.entrustet.com/ digital-executor-toolbox/how-to-access-or-delete-hotmail-accounts/.

16 *Id.*

17 *Gmail Help: Accessing a Deceased Person's Mail,* Gmail, http://mail.google.com/support/bin/answer. py?hl=en&answer=14300.

18 *Id.*

19 Andrew Ramadge, *What Happens to Your Email When You Die?,* Technology, Nov. 4, 2009, http://www.news.com.au/technology/what-happens-to-your-email-when-you-die/story-e6frfro0-1225794263778.

20 Kelly Spies, *What Happens to Your Website When You Die?,* Associated Content, Jan. 8, 2009, http://www.associatedcontent.com/article/518313/what_happens_to_your_website_when_you_pg3.html?cat=15; *MySpace Terms of Use Agreement,* MySpace, http://www.myspace.com/Help/Terms.

21 *MySpace Death Policy: How to Access, Memorialize or Delete a Deceased Person's MySpace Account,* Entrustet, http://blog.entrustet.com/digital-executor-toolbox/how-to-access-memorialize-or-delete-a-deceased-persons-myspace-account/

22 John Romano, *So What Does Happen to Your Digital Assets After You Die?,* Digital Beyond, Dec. 21, 2010, http://www.thedigitalbeyond.com/2010/12/so-what-does-happen-to-your-digital-assets-after-you-die/#facebook ; *Report a Deceased Person's Profile,* Facebook, http://www.facebook.com/help/contact. php?show_form=deceased .

23 *Id.*

24 *Id.*

Facebook allows for the creation of "digital memorials," which provide family members and friends with the administrative rights to manage tributes to the deceased on the user's profile.[25]

YouTube. YouTube allows heirs with power of attorney to gain access to a user's account and its content. It has a web page that contains instructions for this process.[26]

Websites

A website domain name (URL) is registered to an individual as a true asset that is transferable and that passes with the residue of an estate.[27] Moreover, one's website blog content firmly belongs to an individual under copyright law.[28]

The law provides that an individual can bequeath his copyright to others.[29] In order for an individual to transfer a website to a beneficiary, therefore, it must be properly owned and copyrighted.[30] Thus, once a copyright is obtained, a website can be transferred to the intended beneficiary through a will or trust with other estate assets.[31]

Many individuals and businesses have actual websites, as opposed to accounts. Thus, the "owner" of a website must determine whether or not he would like the website to continue upon his death. If an individual chooses to shut down his website upon death, or if he decides to continue a website after death, it is important that there be a plan as to how, when, and who carries out this desire. If the website is owned by a business entity such as a corporation or limited liability company, then the website's ownership will not change upon the death of the business owner, and more traditional business succession principles will determine who will control the website after the decedent's death.

Yet, when we die or become incapacitated, what happens to these assets? Who can gain access to this "virtual existence" when we're gone?

The answer is very complex. Most of these virtual assets are controlled by a license agreement with the provider of the online access. Such license agreements vary from provider to provider. Without careful planning, chaos may reign.

Commercial Services ("Electronic Wills" and Other Snake Oil Gimmicks)

A new cottage industry has sprung up to provide a type of "online safe deposit box" to store your virtual assets and provide a means by which designated individuals can gain access to your virtual assets. A few words of caution are in order. First, be careful and make sure you're dealing with a reputable company. Giving someone the keys to your digital existence would be a goldmine for someone bent on stealing your identity. Second, remember that giving someone access to information ***about*** an asset is not the same as ***giving*** that asset to that individual. Your will or trust should ultimately control who should inherit your assets, not an online service provider. There may be complex legal and tax issues that need to be taken into account in designating beneficiaries of virtual assets. For example, one online service provider refers to an "electronic will." In most states, a will requires certain formalities (typically a written instrument signed before two witnesses), and the absence of these formalities can render one's good intentions legally invalid.

There are many online companies which provide what is essentially an "online safety deposit box" for passwords and account information. The following three companies, which among many others, are referred to as "digital afterlife planning sites" – but such representations may lead to future litigation.

Legacy Locker. Legacy Locker offers three membership plans. A free "trial account" limits you to listing three digital assets and two beneficiaries. Both an annual plan and a lifetime membership allow you to list an unlimited number of digital assets and an unlimited number of beneficiaries. Members also receive a card, which can be kept with his or her will, that directs heirs to contact Legacy Locker upon the member's death. After the website confirms the death, the designated beneficiaries receive e-mails containing links to the information that the decedent wanted them to have.

DataInherit. DataInherit provides a very similar service as does Legacy Locker. DataInherit, however, provides notification to beneficiaries by postal mail as well as by email. In addition, all of the accounts can be accessed by DataInherit's free iPhone app, for you to conveniently access your passwords on the go.

Entrustet. Entrustet also provides a service similar to the aforementioned companies. Entrustet, however, provides an "account guardian" feature that allows you to name one digital executor, who will be in charge of deleting or transferring control of your digital assets. In doing so, the account holder leaves instructions as to what he or she would like done with the accounts.

Words of Caution

Some experts, however, caution against the use of these services. First, companies such as Deathswitch.com send out emails with the account information to the named beneficiaries in the event that a user does not respond to one of its "are you still alive" notices.[32] If the customer's failure to respond is a mere mistake, then he or she is left with others' having access to his or her accounts.

Second, David Shulman has identified companies such as Legacy Locker as "a big fat lawsuit waiting to happen."[33] Shulman's concern is that many online accounts contain assets with actual financial worth, such as PayPal or Ebay accounts.[34] Moreover, one cannot use an online company to "give" assets to a beneficiary following his or her death without a properly executed estate planning document.[35] Legacy Locker has responded,

25 *Id.*

26 *I Need Access to the Account of a Deceased You Tube Member*, YouTube, http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=94458

27 Hoyt & AuMiller, *supra* note 7.

28 *Id.*

29 17 U.S.C. § 201(d) (2006) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession").

30 Hoyt & AuMiller, *supra* note 7.

31 *Id.*

32 Michael S. Rosenwald, *Web Sites Let Online Lives Outlast the Nearly Departed*, Wash Post, Jan. 25, 2010, at A1.

33 David Shulman, *Estate Planning for Your Digital Life, or, Why Legacy Locker is a Big Fat Lawsuit Waiting to Happen*, March 1, 2009, http://www.sofloridaestateplanning.com/2009/03/articles/digital-assets/estate-planning-for-your-digital-life-or-why-legacy-locker-is-a-big-fat-lawsuit-waiting-to-happen/.

34 *Id.*

35 *Id.*

however, by affirming that its goal is not to replace an estate plan, but rather to help the decedent's family gain access to the decedent's accounts.[36]

Another upcoming product is that of digital cemeteries. Personal Rosetta Stone, for instance, is a company that sells "wireless headstones." The objective of this product is to provide a memorial for the deceased individual that a traditional headstone cannot provide. A wireless headstone allows family, friends, and heirs to access information about the life of the deceased person. The information shared ranges from the simple (basic information and pictures) to elaborate (genealogical information, profession, achievements, relationships, etc.).

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.[37] 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 (Virtual Asset Instruction Letter, further discussed in Part II of this article) 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.

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

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Part II of this article will be in the April 2012 issue of the Estate Planning Section Newsletter. In Part II the authors discuss integrating virtual assets into your estate planning and administering estates with virtual assets.

36 *Id.*

37 Saabira Chaudhuri, *The 25 Documents You Need Before You Die*, Wall St. J., July 2, 2011, http://online.wsj.com/article/SB10001424052702303627104576410234039258092.html

Legislative Update – January 2012

The following identifies some of the significant changes made by the 2011 Oregon Legislature that affect estate planning attorneys. To view legislation online, visit www.leg.state.or.us.

1. Uniform Real Property Transfer on Death Act. Or Laws 2011, ch 212 (SB 815). Effective January 1, 2012.
2. Health Care Representatives. Or Laws 2011, ch 149 (HB 2375). Amends ORS 127.540, 127.560. Effective January 1, 2012.
3. Patient Advocates. Or Laws 2011, ch 512 (SB 579). Effective June 23, 2011.
4. Safe Deposit Contents. Or Laws 2011, ch 422 (SB 414). Amends ORS 114.535, 708A.655, 723.844. Effective June 17, 2011.
5. Uniform Principal and Income Act. Or Laws 2011, ch 307 (SB 387). Amends ORS 129.355, 129.420. Effective June 9, 2011.
6. Marital Gift Presumption. Or Laws 2011, ch 306 (SB 386). Amends ORS 107.105. Effective January 1, 2012.
7. Elective Share. Or Laws 2011, ch 305 (SB 385).Amends ORS 114.630, 114.635, 114.660, 114.665, 114.675, 114.700. Effective June 9, 2011.
8. Confidential Information in Protective Proceedings. Or Laws 2011, ch 229 (HB 2683). Amends ORS 125.012; affects UTCR 9.410, UTCR Form 9.410.1. Effective June 2, 2011.
9. Offense of Assisting Suicide. Or Laws 2011, ch 552 (SB 376). Amends ORS 131.602; does not apply to ORS 127.505 through 127.660 (Health Care Advance Directives) or ORS 127.800 through 127.897 (Oregon Death with Dignity Act). Effective June 28, 2011.
10. Reconnection to Federal Tax Law. Or Laws 2011, ch 7 (SB 301). Amends various ORS sections. Effective September 29, 2011.
11. Oregon Estate Tax. Or Laws 2011, ch 526 (HB 2541). Amends ORS ch 118. Effective September 29, 2011.

Increase in Federal Estate Tax Exemption Amount

The exemption amount for federal estate taxes for tax years 2010 through 2012 is contained in the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act ("TRA 2010") that was signed into law by President Obama on December 17, 2010. This law is effective for two years and will sunset on December 31, 2012. As a result, on January 1, 2013, the federal estate tax exemption and rate will default to the numbers that were in effect in 2001/2002 ($1,000,000). TRA 2010 provides that the estate tax exemption, lifetime gift tax exemption, and generation-skipping transfer tax exemption will be indexed for inflation in 2012. The 2012 estate tax exemption amount, effective January 1, 2012, is $5,120,000.

New 2012 Oregon Estate Tax Return and Oregon Exemption Portability Answer

New 2012 Oregon Estate Tax Return. The Oregon tax form for reporting 2012 estates will change. According to a spokesperson from the Oregon Department of Revenue ("ODR") the Form IT-1 will not be used for 2012 estates. Instead, the form will be changed and its new name will be the "2012 Oregon Form OR 706." The title of the new form will be "Oregon Estate Transfer Tax Return." These changes reflect the legislative changes to ORS Ch 118 contained in HB 2541 changing the name from Inheritance Tax to Estate Tax. The Oregon forms for 2012 estates are not expected to be available until September 2012.

The Portability Election Under Federal Law. IRC 2010(c) was amended by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("2010 Act") to give the executor of the estate of the first spouse to die the elective right to pass the DSUEA to the surviving spouse to use in addition to the surviving spouse's applicable exclusion amount. In order to make this election the executor of the estate of the first deceased spouse must timely file a Form 706 Estate Tax Return. The 2010 Act became effective on December 17, 2010.

The election to claim the DSUEA is only available if the first spouse dies in 2011 or 2012. In order to use the DSUEA, the surviving spouse must either (a) make lifetime gifts *during* 2011 or 2012 *but after* the first spouse dies, or (b) die *during* 2011 or 2012 *but after* the first spouse dies.

Oregon Portability Election. *Question:* Can the estate of the first spouse to die during 2011 or 2012 make a portability election under Oregon law to pass the unused portion of the deceased spouse's $1 million Oregon exclusion amount to the surviving spouse? ***Conclusion***: No. However, if both spouses die during 2012, there is a possible argument that the estate of the first spouse can make a portability election to include the Deceased Spouse's Unused Exclusion Amount ("DSUEA") to reduce the Oregon Taxable Estate ("OTE") of the surviving spouse. The resolution of such an election will likely have to be litigated in the Oregon courts.

Oregon Portability. The Oregon portability question arises because the Oregon estate tax was recently tied to the Internal Revenue Code in effect on December 31, 2010. The relevant Oregon Revised Statutes, ORS 118.007 and 118.010(3) as amended by HB 2541(Oregon Laws 2011, Chapter 526), provide:

> "Any term . . . has the same meaning as when used in a comparable context in the laws of the federal Internal Revenue Code relating to federal estate taxes, unless a different meaning is clearly required or the term is specifically defined in ORS 118.005 to 118.840. Any reference in ORS 118.005 to 118.840 to the Internal Revenue Code means the federal Internal Revenue Code as amended and in effect on *December 31, 2010*, except where the Legislative Assembly has specifically provided otherwise. ORS 118.007 (Oregon Laws 2011, Chapter 526, Section 2) (emphasis added).

ORS 118.010(3) was amended to add provisions describing the components for determining the OTE which provide for the reduction of the OTE by "any other applicable exclusions." ORS 118.010(3), as redacted provides:

> (3) The Oregon taxable estate to be used for purposes of computing the tax imposed under this section shall be the federal taxable estate:
>
> (a) Increased by: . . . ; and
>
> (b) Reduced by: . . .
>
> (B) *Any other applicable exclusions* or deductions. ORS 118.010(3) (Oregon Laws 2011, Chapter 526, Section 3) (emphasis added).

Since there are no limiting provisions in ORS 118.005 to 118.840, it is arguable that the "any other applicable exclusions" language in ORS 118.010(3) includes the DSUEA under IRC 2010(c). Thus, under ORS 118.010(3)(b)(B) as amended by HB 2541, if the first spouse and the surviving spouse both die in 2012, and a timely Form 706 is filed for the estate of the first deceased spouse, then the DSUEA could be claimed by the second spouse's estate for the full federal DSUEA. This would mean that up to $5,120,000 or the remaining DSUEA, if less, could be claimed on the Oregon estate tax return of the surviving spouse. It should be noted that this outcome was not intended by the Oregon Inheritance Tax workgroup, the ODR, or the Oregon legislature. Also, this argument does not apply if either spouse dies in 2011, because the December 31, 2010 IRC tie-date only applies to estates of decedents who die on or after January 1, 2012.

The ODR has not issued any published determination regarding the applicability of the federal portability election as it applies to Oregon Law. However, in a recent email to this author an ODR representative issued the following response:

> The department understands that "any other applicable exclusions or deductions" as used in ORS 118.010(3)((b)(B) could possibly be challenged by an estate to include the federal portability provision of IRC 2010(c)(2), (3), (4) and (5) based on the plain language of the statute. However program believes the legislature clearly did not intend to tie to the federal portability provision because without a statutory provision that identifies a basis exclusion amount for Oregon purposes, Oregon would tie to the federal basic exclusion amount identified in IRC 2010(c)(3) which is $5 million. A tie to the federal provision would obviously not be revenue neutral which was a goal of the legislature as evidenced by LRO's Revenue Impact Statement dated June 9, 2011 that shows the expected revenue impact for the legislation to be near zero.
>
> Program believes there would need to be a legislative change in order for Oregon to adopt a portability provision. Thanks for bringing the question to the department's attention and thanks in advance for communicating the department's position on this issue to practitioners.

Thus, the portability election is generally not available to increase the Oregon exemption of the surviving spouse's estate. A possible exception could be when both spouses die in 2012, but such an election will probably be challenged by the ODR. The ODR would likely argue that the "unless a different meaning is clearly required" limiting provision of ORS 118.007 applies to limit the applicability of the DSUEA exemption from being added to the $1 million Oregon Estate tax exemption of the surviving spouse's estate.

If the federal estate tax law is amended to extend the federal portability provisions beyond 2012, then it may make sense to consider whether the Oregon estate tax law should be amended to include express portability provisions so that a surviving spouse can use the deceased spouse's unused Oregon exemption. Until then the ODR will likely not recognize any election for a surviving spouse to use the deceased spouse's unused Oregon exemption.

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2012 Section Officers

At the annual meeting of the Estate Planning and Administration Section of the Oregon State Bar on November 18, 2011, the 2012 section officers and members at large were elected as follows:

Officers

Chair	D. Charles Mauritz
Chair-Elect	Marsha Murray-Lusby
Treasurer	Jeffrey M. Cheyne
Secretary	Matthew Whitman
Past Chair	Eric H. Vetterlein

Members at Large

Terms Ending 12/31/13	***Terms Ending 12/31/12***
Eric R. Foster	Amy E. Bilyeu
Melanie E. Marmion	Janice E. Hatton
Holly N. Mitchell	Amelia E. Heath
Jeffrey G. Moore	Ian T. Richardson
Timothy O'Rourke	Margaret Vining

A Trustee Doesn't Have to Be a Jack (or Jill) of All Trades

HELP WANTED: *Investment guru, psychologist, small business CEO, family dispute mediator, accountant, career counselor, and life coach.*

There are many roles that our clients want their trustees to fill. Fortunately, they do not have to find one individual or institution to fulfill all of these roles. Oregon's Uniform Trust Code ("UTC") allows for the coordination of trustee powers and duties among multiple parties. There are different mechanisms by which trustee powers can be coordinated – through the division of duties between co-trustees, delegation by a trustee to a professional, directed trustees described in the trust agreement, and appointed advisors. The varied landscape of duties and liabilities for the trustee, agent, and advisor is explored in this article.

A trustee is a fiduciary and owes the beneficiaries the duty of loyalty and impartiality and must exercise reasonable care, skill, and caution in administering the trust. In many situations the trustee's duties will include the investment of trust assets, reporting to beneficiaries, evaluating requests for discretionary distributions, and preparing income tax returns. When thinking about who can fulfill all of these roles, many trustors will be able to identify one person who is ideal for handling financial investments and accounting issues, but another who understands the family dynamics and beneficiaries' personalities and needs. By dividing the trustee duties, a trustor can ensure that the right person is fulfilling each of these roles.

The nature of the trust assets themselves might necessitate the division of duties. Perhaps the trustor knows that she wants a professional trust company to serve as trustee. However, one of the assets of the trust is the majority interest in a family-owned business. The trust company may be hesitant to be put in a position where it has to make major decisions regarding the business, such as whether or not to sell or relocate the company. Division of trustee powers can alleviate the trust company's concerns and allow it to serve as trustee without having to manage the trust's ownership of the business.

Imagine a hypothetical client who is a 70-year-old widow with three children and six grandchildren. Her assets include a sizable investment account and the majority interest in the family business. The children and grandchildren have varying financial needs, and there is tension between some of the family members. The client would like to leave her estate to a family trust that covers her family's educational and medical expenses and provides the opportunity for the trustee to make discretionary distributions as he or she sees fit. The client is not averse to the idea of a corporate trustee but worries that a corporate trustee might not be the best choice to handle the intra-family conflicts. She also understands that many corporate trustees do not want to manage the ownership of a family business. The client does have a brother who she believes understands the family dynamics well, but he is not financially sophisticated and is uninterested in managing the investments or dealing with accounting issues.

What are the client's options on whom to name as trustee?

Co-Trustee Delegation. One option is for the client to name two or more co-trustees. For example, by naming a corporate trustee and the brother as co-trustees, the client allows for the possibility of a division of trustee duties. Under ORS 130.610, by default, each co-trustee is responsible for performing all of the functions of a trustee. However, co-trustees can delegate between themselves responsibility for specific functions. ORS 130.610(5). For example, the brother can delegate to the corporate trustee responsibility for investment management while the brother is delegated the role of making discretionary distribution decisions regarding the beneficiaries.

This approach allows some level of flexibility regarding how duties will be delegated. While the client can specifically divide tasks among the co-trustees, she is not required to do so in the trust instrument. The co-trustees can determine among themselves which tasks they are best suited to perform and delegate accordingly.

A co-trustee is not liable for the actions taken solely by another co-trustee so long as the non-acting co-trustee has exercised reasonable care to prevent the acting co-trustee from committing a serious breach of trust. ORS 130.610(7)(a). If a serious breach of trust is discovered by a co-trustee, that co-trustee has an obligation to try to rectify the breach. ORS 130.610(7)(b). Therefore, although a duty has been delegated, a co-trustee still has continuing obligations with regard to the co-trustee's delegated actions.

In addition to potential liability if a co-trustee commits a serious breach of trust, there are other potential problems. For example, there is a risk of deadlock when an even number of co-trustees are named. Co-trustees must act unanimously, or by majority decision. ORS 130.610(1). Absent a provision in the trust agreement describing how to handle deadlocks, if the co-trustees cannot agree on a course of action, court intervention may be required.

Also, there is the question of how trustee compensation will be handled. Many corporate trustees will not reduce their standard fees just because a co-trustee is named. Unless the brother is willing to serve without compensation, this approach may lead to higher administrative fees.

Trustee Delegation. Another option would be for the client to name the brother as the sole trustee. He could then delegate specific duties, such as the investment and accounting functions, to a third party. ORS 130.680 allows a trustee to delegate specific duties and powers to an agent. It contemplates a lay trustee delegating functions to a professional and protects the trustee from liability for the agent's acts if the authority is properly delegated.

The trustee must exercise care in selecting the agent and in establishing the scope and terms of the delegation. ORS 130.680(1)(a)-(b). Furthermore, the trustee has an ongoing duty to monitor the agent's actions. ORS 130.680(1)(c). So long as the trustee exercises such reasonable care, he or she is not liable for the actions of the agent. ORS 130.680(3).

Leaving it to the trustee to delegate tasks to agents also preserves flexibility. At the time the assistance of agents may be required, the trustee can evaluate if such assistance is needed and which professional will be best suited for the task. The trustee can also clearly define the scope of the agent's roles and responsibilities. This approach also preserves the trustee's ability to easily change, modify, or eliminate agents if the circumstances change.

With only one trustee, the risk of a deadlock crippling the trust administration is eliminated. However, there is still a possibility of increased costs or a dispute over trustee fees. If a trust agreement does not specify what compensation the trustee is to receive, the trustee is entitled to compensation that is reasonable under the circumstances. ORS 130.635(1). Because the trust will bear the cost of hiring professionals to provide investment management and accounting services, delegation to an agent is one factor that will affect what is "reasonable" compensation for the trustee to receive.

Directed Trustees. When a trust instrument gives a third party the power to instruct the trustee to take, or refrain from taking, certain actions, the trustee is described as a directed trustee. For example, the client can specify in the trust agreement that the manager of the family business can direct the trustee to sell the trust's interest in the company. Or she can appoint a directed corporate trustee who is to make distributions to the beneficiaries in accordance with the instructions of her brother. Oregon law has two provisions that address a directed trustee's liability – the general provisions of ORS 130.685 and the more protective provisions of ORS 130.735.

The person directing the trustee (the "Power Holder") is presumed to act in a fiduciary capacity. ORS 130.685(4). In general, the trustee is required to follow the instruction of the Power Holder unless the action is clearly contrary to the terms of the trust agreement or if it constitutes a violation of the Power Holder's fiduciary duty. ORS 130.685(2). Therefore, although this is a lesser standard of liability than serving with a co-trustee or delegating to an agent, the trustee is required to evaluate the instruction of the Power Holder before acting to avoid possible liability for complying with the instruction.

However, Oregon law now provides an opportunity for a trustor to further limit a directed trustee's liability for following an appointed advisor's instructions. ORS 130.735 enables a trustor to appoint an advisor who can direct or approve decisions made by the trustee (the "Trust Advisor"). The Trust Advisor acts as a fiduciary unless the trust agreement states otherwise. But, unlike a directed trustee under ORS 130.685, a trustee acting pursuant to an instruction from a Trust Advisor is not liable for such action unless the instruction constitutes reckless indifference to the purpose of the trust or the interests of the beneficiaries. ORS 130.735(2). Furthermore, ORS 130.735(4) explicitly states that, unless stated otherwise in the trust agreement, the trustee has no duty to monitor the Trust Advisor's conduct, to provide advice to or consult with the Trust Advisor, or to inform beneficiaries that the trustee disagrees with the instruction of the Trust Advisor. It is important to note that in order for a trustor to appoint a Trust Advisor and provide this added layer of protection for a directed trustee, the trust instrument must specifically refer to ORS 130.735.

The directed trustee approach is less flexible in that the circumstances under which a trustee is to receive instructions must be set out in the trust instrument. The trustee generally has no say regarding who will act as the Power Holder or Trust Advisor and cannot remove or change the role of the Power Holder or Trust Advisor. Of course, the trade-off for the trustee's lack of control is less liability for following an instruction and a significantly reduced responsibility for monitoring the Power Holder or Trust Advisor. Trust instruments should also provide a clear statement of the responsibilities and duties of Power Holders and Trust Advisors. Do they have a duty to affirmatively monitor the trustee, or is their role limited to only taking action when asked to by the trustee or beneficiaries? Absent a clear statement of what role the Power Holder or Trust Advisor is to play, it may be difficult to find someone willing to fill that role.

Since under this approach there is only one trustee who is required to follow the instruction of a Power Holder or Trust Advisor, there is no risk of a deadlock. Many Power Holders and Trust Advisors will charge for their services, but because the scope of their role is limited, their fees should, accordingly, reflect their reduced role.

Oregon law provides many mechanisms to divide trustees' tasks and responsibilities. This flexibility allows clients to fine-tune trust administration and makes it more likely that the right people are placed in the roles they are best suited for. But, each person's role needs to be carefully coordinated and defined. By using the tools available under the UTC, we can assist our clients in finding the proper balance between flexibility, cost, and liability protection for trustees.

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The Duty to Communicate: Mitigating Trust Disputes While Satisfying Fiduciary Duties

Difficult and contentious people are often avoided naturally. Not surprisingly, a trustee may intentionally forgo communications with unhappy beneficiaries to avoid conflict. Yet this is how simple problems can transform into big problems. Trustees are oftentimes criticized, not only for taking action or failing to take action, but for failing to communicate. A beneficiary's concerns mount when his or her continuous requests for information are ignored. As a result, the beneficiary's suspicions and the likelihood of litigation increase. The more difficult a beneficiary is, the more disclosure the beneficiary should receive. Information regularly and clearly communicated to trust beneficiaries not only satisfies the beneficiaries' need to know; it aids in building trust and confidence that is helpful in the trust relationship. In turn, numerous mandatory fiduciary duties are fulfilled, and potential or actual disputes that take time and money from the trust estate are mitigated.

This article will discuss how frequent communications by the trustee, balancing information flow with the needs of the beneficiaries, and transparency in the trust administration can mitigate disputes, while simultaneously fulfilling fiduciary duties and thereby protecting the trustee. Although most issues addressed here apply to all fiduciaries, this article focuses on the relationship between trustees and beneficiaries.

The Duties to Notify, Inform, and Report.

A fundamental concept of trust law is to keep beneficiaries informed concerning their beneficial interests so they will have sufficient knowledge to enable them to protect their rights. *See U.S. Nat'l Bank of Portland v. Guiss*, 214 Or 563 (1958); Restatement (Second) of Trusts § 173 cmt c (1959). After all, the trustee is managing the beneficiaries' assets. Oregon's Uniform Trust Code ("UTC") primarily provides default trust rules, so the terms of a trust and any related trust documents control first and foremost. Pursuant to ORS 130.020, a settlor is free to override a large majority of the UTC's requirements. However, a trustee's duties to notify, inform, and report to the beneficiaries are generally mandatory duties that a settlor cannot completely restrict, as specified in ORS 130.020(2)-(3).

Notify. Various events trigger mandatory notifications to the beneficiaries. Pursuant to ORS 130.710(2), a trustee must notify the qualified beneficiaries within 60 days of the relevant details related to: (a) when a trustee accepts the role as trustee of an irrevocable trust; (b) when an irrevocable trust is created or a revocable trust becomes irrevocable; and (c) before the trustee's compensation is changed. The notice regarding a newly created irrevocable trust also requires the trustee to inform the beneficiaries of their right to request a copy of the trust. ORS 130.710(2)(c). If a qualified beneficiary requests a copy of the trust, the trustee must promptly furnish it to comply with ORS 130.710(2)(a). A trustee can reduce the tolling statute for trust contests from three years to four months (for revocable trusts that become irrevocable) by distributing a copy of the trust and clarifying that a trust contest may only commence within four months, as detailed in ORS 130.515. The simple act of distributing a copy of the trust early on in the administration process will not only facilitate transparency but also limit the opportunity for litigation. Creditors' claims can also be limited by giving notice to known creditors and the beneficiaries (who may also be creditors) at the beginning of the trust administration. *See* ORS 130.360.

Inform. Communications are typically a two-way street. During the administrative process, the trustee often needs information from the beneficiaries. One example is the need for the beneficiaries' Social Security Numbers for reporting income on the trust's tax returns. If discretionary distributions of income are also to be made from the trust, the trustee may want to review the beneficiaries' individual tax returns and other relevant financial information to assess their income and expenses. When a beneficiary is notified of the reasons for the request in advance, these requests for private information are justified, are reasonable, and help to keep communications open.

Report. Annual reports are a fundamental requirement for a trustee to keep the beneficiaries informed. See ORS 130.710. Who is entitled to receive annual reports, as detailed in ORS 130.020(2)-(3), requires a thorough analysis. For example, the mandatory notice and reporting requirements in ORS 130.020(2)(h)-(i) are subject to ORS 130.020(3), allowing a settlor to waive or modify the notice and reporting requirements involving a settlor, a settlor's spouse, and/or a trust protector. So when a settlor, spouse, trust protector, or beneficiary's agent is involved, that person may be the party receiving the notifications and information from the trustee.

The Duty to Respond.

A trustee has a duty to respond to requests for information from qualified beneficiaries. ORS 130.710(1). This duty to respond is limited to requests that are "reasonable under the circumstances," and the statute does not explicitly require the trustee to respond to requests for information from a qualified beneficiary, much less a non-qualified beneficiary. *Id.* Certainly there are times when a beneficiary's requests are for voluminous information or are too frequent, or the time frame to respond is too demanding. Overall, however, there are benefits to giving difficult beneficiaries as much information as they request, and as many times as they request it. Beneficiaries must be kept informed of their beneficial interests, which generally means they should receive all relevant information requested. When the trustee communicates a little bit more and carefully balances the flow of information, conflicts can be mitigated or avoided entirely. Considering that a fundamental concept of trust law is that beneficiaries are entitled to be apprised of their beneficial interests in order to protect themselves, a court is likely to require a trustee to provide any relevant trust information.

Oregon is in the minority of states that expressly allow the trustee to charge a reasonable fee to the beneficiary for providing trust information upon request. *See* ORS 130.710(5). The financial benefit of charging a beneficiary for trust information, particularly an unhappy beneficiary, should be weighed against the much larger expense, demands, and risks inherent with litigation.

The Duty to Permit Inspection.

The trustee has a duty to allow a beneficiary to inspect relevant trust records and trust property, so the beneficiary has the opportunity to be aware of all information that affects his or her beneficial interest. *See* Restatement (Third) of Trusts § 82(2) (2007). This duty to permit inspection applies to the trustee's records as well as the trustee's agent's or attorney's relevant trust records. Accordingly, the applicable discovery rules are not a prerequisite here. *See* Alan Newman, *Bogert Trusts and Trustees § 962* (2010); *In re Estate of Rosenblum*, 328 A2d 158 (Pa 1974).

Duty to Warn.

Even absent a request by a beneficiary, a trustee has a negative duty not to misinform, and also an affirmative duty to warn a beneficiary when the trustee knows that silence could be harmful. *See* Restatement (Second) of Trusts § 173, cmt d; *Griggs v. E.I. DuPont de Nemours & Co.*, 237 F3d 371 (4th Cir 2001). In *Griggs,*[38] an employer was sued by an employee for breach of fiduciary duty in administering its pension plan under the Employee Retirement Income Security Act ("ERISA"). The fiduciary standards of trust law are incorporated into ERISA, so this ERISA case parallels a trustee's fiduciary duties. *See* 29 USC *§* 1104(a). DuPont was a fiduciary for purposes of ERISA and provided general written information on its pension plan that proved to be incorrect. Griggs relied on this information when he decided to retire early and roll over his pension in a lump sum to the DuPont Savings and Installment Plan. *Griggs*, 237 F3d at 376. When DuPont became aware that Griggs' rollover election would disqualify its plan from tax-exempt status as a qualified plan, it simply paid him a lump sum and thereby kept its tax-exempt status. *See* IRC § 415 (2000). Yet this lump-sum payment to Griggs saddled him with tax liability that he intended to avoid. The court addressed whether DuPont had a fiduciary obligation to pass on information it learned would negatively impact Griggs' pension payment before it distributed the money to Griggs, causing him to incur a tax liability that he never expected. The court found DuPont had breached its fiduciary duty, stating that "a fiduciary is at times obligated to affirmatively provide information to the beneficiary" and this duty clearly arose in this case. *Griggs*, 237 F3d at 380. The court quoted the Restatement (Second) of Trusts, Section 173, comment d, regarding a trustee's duty to provide complete and accurate information following a request by a beneficiary: "[H]e is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection." The court also specified that the affirmative duty to inform must be performed within a reasonable time after the relevant knowledge is acquired. *Griggs*, 237 F3d at 381 (citing *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F2d 747, 751 (DC Cir 1990)). As previously stated by Justice Cardozo: "'A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word.'" *Id.* at 382 (internal quotation marks omitted) (quoting *Eddy*, 919 F2d at 751). Parallel to a fiduciary under ERISA, a trustee of a trust has a duty to timely communicate and warn a beneficiary of known information that may cause a beneficiary harm. This affirmative duty comes from the rationale that the fiduciary should have known its failure to give the information would be detrimental. This duty to warn has also applied to cases where trustees failed to communicate the risks associated with the trust portfolio's lack of diversification and the negative tax implications following the liquidation of assets. *See McGinley v. Bank of Am.*, 109 P3d 1146 (Kan 2005); *Margesson v. Bank of N.Y.*, 738 NYS2d 411 (App Div 2002); *Rollins v. Branch Bank & Trust Co. of Va.*, 56 Va Cir 147 (2002).

Notice of Proposed Actions.

Obtaining advance consents by all trust beneficiaries after full disclosure of a trustee's proposed action is another way to keep beneficiaries fully informed and avoid litigation. A proposed action includes any course of action or inaction the trustee may take. When a trustee provides written notification to all beneficiaries of the material terms of a proposed matter and seeks either their consent or objection within a certain period of time (typically 30 to 45 days), then any problems a beneficiary may have with the matter can be addressed to eliminate future problems. This procedure is parallel to California's mandatory Notice of Proposed Action procedure (Judicial Council Form DE-165) used in probate estates under California Probate Code Section 10580, *et seq.*, and discretionarily used in trust administrations pursuant to California Probate Code Sections 16500-16504. This notice form tells the beneficiaries that if they object, the trustee cannot pursue the proposed action unless it is court-supervised. Or if a beneficiary objects, the trustee can modify the proposed action and re-notice the beneficiaries in an effort to obtain everyone's consent and avoid court involvement (e.g., a hearing). If a beneficiary is unrepresented by counsel, the trustee should recommend that the beneficiary seek independent counsel to review the notice of proposed action procedure.

A beneficiary's dissatisfaction with the trustee is often exacerbated when the beneficiary not only disagrees with the action, but is informed only after the action is complete. Notice of a proposed future action can avoid problems by keeping the beneficiary fully informed and allowing his or her perspective to be heard in the decision-making process. If a beneficiary continues to disagree with a proposed action, the trustee has the option to escalate the matter to the court so the court can hear and resolve the matter, which also protects the trustee. *See* ORS 130.050.

While the beneficiary's consent prior to a trustee's action can be helpful with resolving any potential dispute, in highly contentious trust administrations a trustee will be well served by noticing in advance of all significant transactions. When a trustee proactively communicates and mitigates disputes, he or she is also fulfilling the duty to protect and preserve the trust assets. ORS 130.690.

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38 This case was reviewed after remand a second time, *see Griggs v. E.I. DuPont de Nemours & Co.,* 385 F3d 440 (4th Cir 2004), primarily regarding the remedy available to Griggs.

Petition for Instructions.

When a change of circumstance occurs or if a dispute is anticipated in the trust administration, a petition for instruction can provide a definitive ruling from the court to guide the trustee. A trustee or any interested party, such as a beneficiary, may ask the court to instruct the trustee regarding a trust administration matter. ORS 130.050 confirms the probate court's authority to intervene in a trust's administration before, during, or after a dispute, due to a change in circumstance, or for a declaratory judgment action. The court has jurisdiction over the trustee and beneficiaries pursuant to ORS 130.055. A trustee's petition for instruction is also helpful to notify the beneficiaries of the issue presented to the court and the trustee's proposed solution in advance of certain circumstances occurring. A petition for instruction is a safeguard for a trustee in need of either guidance or protection.

Privileged Information.

Under Oregon law, the attorney-client privilege extends to fiduciary relationships. ORS 40.225(3). So a trustee may invoke the attorney-client privilege regarding communications with counsel or counsel's work product. There is no privity in Oregon, so the trustee's counsel owes a duty to the trustee and generally owes no duty to the beneficiaries. *See Roberts v. Fearey*, 162 Or App 546 (1999); *Lord v. Parisi*, 172 Or App 271 (2001). *But see also Reynolds v. Schrock*, 341 Or 338 (2006); *Granewich v. Harding*, 329 Or 47 (1999); *Cruze v. Hudler*, 246 Or App 649 (2011). If the trustee's counsel has a special relationship with a beneficiary or is not operating under the attorney-client relationship, then privity may attach. *Id.* Although a trustee has a duty to disclose all relevant trust information, some information may be confidential and privileged. One misconception is that a trustee's fee agreement and attorney billing statements are privileged, yet they are generally not privileged because they are merely incidental to the attorney-client relationship. *See Ralls v. United States*, 52 F3d 223, 225 (9th Cir 1995); *United States v. Blackman*, 72 F3d 1418, 1424 (9th Cir 1995); *United States v. Sepenuk*, 864 F Supp 1002, 1006 (D Or 1994). When a beneficiary requests relevant trust information that is also privileged, whether the privilege rule or the duty to disclose rule applies comes into question. This conflict remains decidedly unresolved in the UTC, because the national drafters chose not to address the issue and instead left it for resolution by other law, such as the Model Rules of Professional Conduct. *See* UTC § 813 comment.

Exceptions apply to the attorney-client privilege, including the crime/fraud exception, or the privilege may be voluntarily waived. With good cause and after a thorough analysis, a trustee may want to waive the privilege and disclose trust information that may strengthen arguments and/or mitigate disputes. Alternatively, a limited review by the beneficiary or an *in camera* review by the court may provide the restrictive disclosure that could be helpful in the case while securing the privilege. Oregon's broad application of the attorney-client privilege operates to protect the trustee, but there are appropriate times where waiver of the privilege to disclose information operates to benefit the trustee, the beneficiaries, and therefore the trust estate.

Proposed Distributions and Trust Termination.

A trustee may also want to keep communications open with the beneficiaries by asking their preference regarding partial and final distributions (e.g., in cash or in kind). Any negative tax implications regarding trust distributions must also be evaluated and, if possible, avoided. If a beneficiary will be exposed to tax liability, a trustee has a duty to warn the beneficiary in advance. *See Griggs*, 237 F3d 371.

Any proposed distribution by the trustee should be communicated to all beneficiaries so they have the opportunity to object within 30 days, pursuant to ORS 130.730(1). The proposed distribution plan can also be included in a final settlement agreement. A final settlement agreement (sometimes called a trust termination agreement) addresses the details of the administration, and includes a final accounting or waiver of accounting and the proposal for final distribution. *See* ORS 130.710(1), (4). Contentious matters often require a final accounting for disclosure and protection of the trustee, and the parties are typically unwilling to waive this requirement anyway. A settlement agreement fully informs the beneficiaries of the complete administration of the trust, tax implications, the proposed final distribution, and any other relevant information in preparation for final distribution. A settlement agreement provides disclosure to the beneficiary and thereby protects the trustee. A mutual release also helps in accomplishing a complete and final resolution. A trustee is commonly interested in being released of all liability and being held harmless, and these terms can be included in the final settlement agreement. If the beneficiary has confidence and trust in the trustee at this final stage, the beneficiary is more likely to sign off on the settlement agreement. An expedited resolution of the trust administration, particularly with all beneficiaries releasing the trustee from liability and holding the trustee harmless, is more likely obtained from satisfied beneficiaries who grew to trust the trustee during the administration process.

Conclusion.

Spiraling distrust among beneficiaries often begins with miscommunication or lack of communication from the trustee, leading to perceived betrayal, causing further harm to the relationship between the trustee and the beneficiaries, and resulting in chronic dissatisfaction. Frequent and clear communication encourages the same from others and leads to confidence in the relationship. Trust and confidence are particularly effective and helpful in a fiduciary relationship. When a trustee communicates clearly, openly, and frequently with the beneficiaries, trust and confidence builds in the trustee and in the administration of the trust. Everyone wins when the beneficiaries are satisfied, potential litigation is alleviated, and the trustee's fiduciary duties are fulfilled.

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