

# Newsletter

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## Oregon's Death with Dignity Act – What Every Estate Planner Needs to Know

*Elizabeth Jessop  
Law Offices of Geoff Bernhardt  
Portland, Oregon*

*Candice Aiston  
Aiston Law LLC  
Portland, Oregon*

Since 1998, the first full year after the enactment of the Death with Dignity Act, the number of prescriptions for life-ending medication and the number of people who have taken the medication, have increased fourfold. See Oregon Public Health Division, Oregon's Death with Dignity Act – 2012, <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year15.pdf>. As more terminally ill Oregonians choose the time of their death, it seems likely that at some point, an estate planning attorney will encounter a client who seeks information regarding how to obtain lethal medication under the Death with Dignity Act. This article is written to provide the estate planning attorney with concise information about the Death with Dignity Act so that he or she can answer a client's basic questions and make the client aware of common obstacles that can be avoided with advance planning.

**Basic information regarding the Death with Dignity Act.** Oregon's Death with Dignity Act (the "Act"), found at ORS 127.800–.897, was enacted on October 27, 1997. The Act provides a legal procedure for someone who meets certain statutory criteria to "end his or her life in a humane and dignified manner" by requesting a prescription for a drug that will, once ingested, cause the person's death. Using the Act is not the same as refusing medical treatment or declining life support or tube feeding, and it is not the same as euthanasia. The Act is intended to provide a patient with a way to bring on death quickly, rather than let nature take its course. Only people who meet the statutory criteria can avail themselves of the prescription, and it is physicians, not lawyers, who determine whether a patient meets these criteria.

**The qualifications to request medication under the Act.** In order to obtain medication under the Act, a patient must meet certain criteria. The patient must be an adult who is (1) a resident of Oregon, (2) diagnosed with a terminal illness, (3) making a voluntary decision to hasten death, and (4) "capable." ORS 127.805(1).

**Residency.** The physician must make the determination of whether the patient is a resident of Oregon. ORS 127.815(1)(b). The terms of the Act suggest four ways to demonstrate Oregon residency: possessing an Oregon driver's license, being registered to vote in Oregon, owning or leasing Oregon property, and filing an Oregon income tax return for the most recent tax year. ORS 127.860.

**Terminal illness.** Pursuant to the provisions of the Act, a terminal illness is a disease that is neither curable nor reversible and will mostly likely cause

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the patient's death within the next six months. ORS 127.800(12).

**Voluntary.** Although the Act does not specifically define what it means for the patient to act voluntarily, it appears from its terms that it means the patient is not acting under duress, fraud or undue influence, and that the patient is not being coerced to sign the request. See ORS 127.897; ORS 127.810(1).

**Capable.** "Capable" is the legally or medically defined ability to make and communicate health care decisions to health care providers, even if that communication is not direct, but through people familiar with the patient's manner of communicating. A court may determine whether a person is capable for purposes of the Act, but it is usually the physician who determines whether the person is capable. ORS 127.800(3).

In addition to meeting the above requirements, a patient must also be deemed to be making an "informed decision." Generally in a medical situation, a patient (or an agent for the patient) must give "informed consent" before a procedure can be performed or a course of treatment can begin. However, under the Act, rather than giving informed consent, the patient must make an "informed decision." ORS 127.800(7). It is important to note that only the patient, and not an agent, may make an informed decision. In order to make an informed decision, the patient must be informed of his or her medical diagnosis and prognosis, the potential risks of taking the medication that hastens death, the probable result of taking the medication, and alternatives to taking the medication, such as comfort care, hospice care, and pain control. *Id.* The drafters of the Act intentionally used the term "informed decision" rather than "informed consent" because they felt it more accurately described making the decision to hasten death, rather than merely consenting to a procedure or surgery. Tom Bates, *Write to Die*, Oregonian, Dec. 18, 1994, at A1.

It is the patient's "attending physician" who makes these determinations. The "attending physician" is defined under the Act as the doctor with primary responsibility for the patient. ORS 127.800(2). The attending physician must also refer the patient to a "consulting physician" who must independently confirm the attending physician's diagnosis and confirm that the patient is capable and acting voluntarily. ORS 127.815(1)(d). It is only after the consulting physician confirms the attending physician's diagnosis can the patient become a qualified patient. ORS 127.820. Once a patient meets all of the above criteria, he or she is deemed a "qualified" patient. ORS 127.800(11). The attending physician and consulting physician must also determine whether the patient is making an "informed decision" prior to prescribing the medication. ORS 127.830.

**How a qualified patient requests medication to hasten death.** In order to request medication under the Act, a qualified patient must make a request to the physician both orally and in writing. ORS 127.840. The written request must be in substantially the same form as that provided at ORS 127.897. The patient must orally reiterate the request no less than 15 days after making the

initial oral request. ORS 127.840. At the time the patient makes the second oral request, the physician is to offer the patient an opportunity to rescind the request. *Id.* After the second request, the physician may write the prescription for medication to hasten death.

Once the patient receives the prescription, it is up to the patient to decide whether to actually take the medication. From the statistics kept by the Oregon Health Authority, it appears that generally, a little more than half of the patients who request medication take the medicine. Oregon Public Health Division, Oregon's Death with Dignity Act – 2012, *supra*. The physician need not be present when the patient takes the medication, unless the patient requests that the physician be present. Oregon Public Health Division, FAQs About the Death with Dignity Act, <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/faqs.pdf>.

**Medical providers are not required to participate.** When discussing the Act with a client, it is important to point out that medical providers are not required to participate. If the client wants to consider using the Act, he or she should make sure that he or she is part of a medical system in which there are physicians who participate. The Oregon Health Authority does not release the names of doctors who participate, and it is up to the patient to find a participating physician. *Id.* at 2. This is discussed in more detail below.

**Using the Act and insurance coverage.** If a patient hastens his or her death by taking the prescribed medication, this action is not to have any effect on the patient's insurance pursuant to ORS 127.875, which states that "[t]he sale, procurement, or issuance of any life, health, or accident insurance or annuity policy or the rate charged for any policy shall not be conditioned upon or affected by the making or rescinding of a request, by a person, for medication to end his or her life in a humane and dignified manner. Neither shall a qualified patient's act of ingesting medication to end his or her life in a humane and dignified manner have an effect upon a life, health, or accident insurance or annuity policy." Also, pursuant to ORS 127.880, if a patient hastens death, his or her actions shall not be considered "suicide, assisted suicide, mercy killing or homicide, under the law."

The determination of whether the patient's medical insurance provider will cover the costs of the medication and other associated costs is made by the particular health insurance provider. FAQs About the Death with Dignity Act, *supra*, at 4. However, federal funds cannot be used for payment of services under the Act. This means that if the patient receives Medicaid benefits, the state must make sure that any payments made from the Oregon Health Plan (Medicaid in Oregon) will be made only with state funds. *Id.*

**Pitfalls to discuss with your client.** The staff at Compassion & Choices of Oregon, an organization that offers assistance to patients seeking to end their lives under the Act, have encountered several common obstacles that

have prevented patients from using the Act. There are three pitfalls clients should be made aware of: (1) not starting the process soon enough; (2) not understanding until too late that a particular doctor cannot or will not participate; and (3) not knowing that a health care facility will not allow a patient to end his or her life under the Act.

*Not starting the process soon enough.* A patient will not qualify to secure medication under the Act until the attending physician and consulting physician state that the patient has a terminal diagnosis with less than six months to live. ORS 127.800(12). The process to secure medication under the Act takes at least two weeks and three days. There must be at least 15 days between the required oral and written requests, and there must be at least 48 hours between the final request and the administering of the medication. ORS 127.850. The process can take longer than the minimum time required, due to scheduling issues or other factors. It is important for a patient to act quickly if he or she is considering ending his or her life under the Act. If a patient becomes incapacitated, he or she becomes unqualified. Therefore, time is of the essence if a patient has any inclination toward using the Act. Once the patient has the medication, he or she may then choose when, or whether, to take it.

*Not understanding until too late that a doctor cannot or will not participate in the Act.* According to staff at Compassion & Choices of Oregon, a common problem patients face is that when they inquire about securing medication under the Act, the doctor brushes off their concerns and assures them that when the time comes, the doctor will be on their side. When the time does come, however, the patient may find out that the doctor will not participate in the Act, or cannot participate because he or she is bound by a hospital's or other facility's rules. A doctor has no obligation to participate in the Act. ORS 127.885(4). Likewise, hospitals and facilities have no obligation to participate in the Act and can disallow their physicians from participating as well. *Id.* Therefore, it is imperative that a patient who may wish to use the Act in the future ensure that his or her doctor is both willing and able to participate in the Act. This means asking the doctor directly if he or she participates, and asking directly if the network or facility the doctor is involved with allows participation in the Act. Compassion & Choices of Oregon can help patients find a participating physician.

*Not knowing that a health care facility will not allow a patient to participate in the Act.* Another common problem is that even though a patient is able to secure medication from a physician, the facility or hospital where the patient resides will not allow the patient to take the medication while at the facility. As noted previously, no facility is obligated to participate under the Act. *Id.* Patients should find out in advance if their facility has a policy regarding participation in the Act. Ideally, a patient who is considering using the Act should select a facility that supports his or her end-of-life choices. If a patient discovers that the facility will not allow him or her to take the medication, the patient may leave the facility to administer the medication at home, at the home of a family member, or at a hotel.

**Tips for attorneys.** The following are some tips for attorneys with regard to the Act:

1. Be aware of the pitfalls described above. If you encounter a client who wishes to consider using the Act, discuss these pitfalls. With some research and advance planning, the client should be able to avoid these common obstacles. It is especially important that the client realize that he or she should secure the medication sooner, rather than later, if he or she thinks using the Act might be a possibility.
2. Provide unbiased legal advice. For many people, the choice to take medication to hasten death is morally abhorrent. As lawyers, we represent clients even if we do not personally endorse their choices. A client who meets the required criteria has the legal right to choose to use the Act and obtain the lethal medication. All clients that a lawyer chooses to represent should receive unbiased legal advice that will assist them with achieving their goals. Under the Act, there are numerous "safeguards" intended to ensure that the patient understands the ramifications of this decision, and it is therefore unnecessary for the lawyer to interject his or her own opinion on the morality of the client's decision. The attending physician and the consulting physician are required to inform the patient regarding alternatives to taking the medication. ORS 127.830. They must also refer the patient to a counselor if they believe that the patient is suffering from a psychiatric or psychological disorder, or if they believe the patient is suffering from depression such that it is impairing his or her judgment. ORS 127.825. A patient will not be qualified under the Act unless the counselor determines that the patient is not suffering from a disorder or depression that is impairing judgment. *Id.* The attending physician must also offer the patient an opportunity to rescind the request for medication. ORS 127.815(1)(h).
3. Inform clients of additional resources. For more information on Oregon's Death with Dignity Act and how it has affected Oregonians, watch the documentary *How to Die in Oregon*, available for purchase at <http://www.howtodieinoregon.com/>. It shows the experiences of three patients who chose to die using lethal medication under the Act. The documentary shows the level of thought and care that goes into making the decision to take lethal medication. It also shows how choosing to hasten death by taking lethal medication can be one of the final acts of control that a person can retain.

This article is offered to assist estate planning attorneys by providing a basic explanation of the Act. The authors are not providing any opinion on the Act itself.

## New Uniform Trust Code Legislation Highlights: What to Expect

Hilary A. Newcomb  
HAN Legal  
Portland, Oregon

Senate Bill 592, a bill currently pending before the legislature, will modify Oregon's Uniform Trust Code if enacted. Initial work on the bill began in a subcommittee of the Estate Planning Section of the Oregon State Bar. Led by Charles ("Chuck") Mauritz, the subcommittee developed a proposal that then became a project of the Oregon Law Commission (the "Commission"). Professor Susan Gary of the University of Oregon School of Law chaired the work group that finished work on the bill. In addition to significant assistance from Chuck Mauritz and Lane Shetterly, the Commission's chair, the work group drew on the expertise of members of the original subcommittee, other members of the Estate Planning and the Elder Law Sections, and representatives from the Oregon Bankers Association and the Office of the Attorney General.

This new bill was originally intended as a technical amendment, but over time developed to include some substantive changes. The bill is intended to clarify and modernize the law, make the law more relevant and effective, and coordinate trust matters with the probate code. Settlers, trustees, and beneficiaries, as well as their advisors are expected to benefit from the proposed changes. The bill would become effective upon passage, which is estimated to be in May, June, or July of this year.

Although the final results of the bill are not yet known, this article highlights the changes to Oregon's Trust Code currently proposed in the bill. The more significant amendments in the bill are summarized as follows:

- **Beneficiary Definitions. ORS 130.010.** Two new definitions of more remote classes of beneficiaries are added: "remote interest beneficiary" and "secondary beneficiary." A remote interest beneficiary is "a beneficiary of a trust whose beneficial interest in the trust, at the time the determination is made, is contingent upon the successive terminations of both the interest of a qualified beneficiary and the interest of a secondary beneficiary whose interests precede the interest of the beneficiary." A remote interest beneficiary is a beneficiary that is at least third in line and sometimes fourth in line. A secondary beneficiary is "a beneficiary, other than a qualified beneficiary, whose beneficial interest in the trust, at the time the determination of interest is made, is contingent solely upon the termination of all qualified beneficiary interests that precede the interest of the secondary beneficiary." The definition of secondary beneficiary is necessary to create the desired definition of remote interest beneficiary. The goal here is to clarify that in some circumstances notice need not be given to beneficiaries whose

interests are so remote that they will likely never benefit from the trust. Streamlining the notice and consent requirements will help to more reasonably accomplish trust settlements, modifications, and terminations, for example.

- **Nonjudicial Settlement Agreements. ORS 130.045.** The necessary parties to a valid nonjudicial settlement agreement are clarified to specify that the Attorney General will represent all charitable trust beneficiaries who are subject to change by the settlor (and the charities are not necessary parties). The bill also adds clarifying language that a settlement agreement does not need to be filed with the court to be binding on the parties to the agreement. The notice period for an agreement filed with the court is also reduced from 120 days to 60 days.
- **Charitable Trusts. ORS 130.170.** The definition of a charitable trust is expanded to clarify what a charitable trust is and is not. The amendment adds that a charitable trust includes a trust that "expressly designates one or more charitable organizations, or one or more classes of charitable organizations, to receive distributions as beneficiaries of the trust unless the combined interests of all charitable beneficiaries do not constitute more than the interest of a remote interest beneficiary." The modification intends to clarify two things. First, a trust that simply makes distributions to other charities is a "charitable trust." Second, if charitable interests are negligible or if the charitable beneficiaries have very remote interests, the portion of the trust held for charitable beneficiaries will not be considered a charitable trust.
- **Notice of Proposed Action.** A new section is added that releases a trustee from liability, but only after full disclosure by the trustee and no objections by a beneficiary. The specific notice of a pending action by the trustee must be in writing, contain all material terms of the proposed action, and be properly noticed to the appropriate beneficiaries. If 45 days elapse following the notice and there are no objections by a beneficiary, the beneficiaries are deemed to have consented to the proposed action and the trustee is thereafter protected from liability regarding the specifically noticed action that is pending. If a beneficiary objects to the proposed action, the trustee can negotiate a resolution with the objecting party, re-notice the proposed action with modifications, or petition the court for instructions. If a trustee proceeds with a proposed action following an objection, the trustee will not be held harmless regarding the previously noticed proposed action. This new section promotes trustee communications with the beneficiaries and encourages beneficiary participation. This new provision also helps a trustee resolve high-risk actions prior to the annual accounting and limits the statute of limitations against a trustee sooner than the one-year, six-year, or 10-year provisions provided in ORS 130.820.

**The statutes affected by the technical amendments in the bill currently include:**

ORS 130.010	ORS 130.615
ORS 130.045	ORS 130.625
ORS 130.170	ORS 130.630
ORS 130.200	ORS 130.635
ORS 130.215	ORS 130.650
ORS 130.305	ORS 130.655
ORS 130.310	ORS 130.710
ORS 130.315	ORS 130.725
ORS 130.525	ORS 130.730
ORS 130.555	ORS 130.735
ORS 130.610	ORS 130.820

- **Abatement.** A new abatement statute is included that provides rules on the priority of satisfaction of gifts from a revocable trust when the trust assets are unable to pay the gifts in full due to insufficient funds following the payment of creditors' claims and expenses. For example, the new section clarifies that real and personal property distributions that are specific gifts are given priority over general gifts, and general gifts are given priority over gifts from the residual estate. This new provision also provides definitions of a specific gift, general gift, and residual gift. Given the time constraints for finalizing Senate Bill 592 in time for this legislative session, the abatement statute does not address the issue of how payments to creditors are apportioned between the probate estate and trust assets. The priority of payment of creditors' claims between a probate estate and trust estate is a complex issue that will require further analysis and coordination with the probate code, and is intended to be addressed in the next legislative session.
- **Trustee Removal.** ORS 130.625. A decision to remove a trustee cannot be inconsistent with a material purpose of the trust. If a settlor's choice in a trustee is considered a material purpose, removal will be difficult. Under current law, a trustee can argue that the selection of trustee by the settlor is a material purpose of the trust, thereby possibly avoiding removal. The amendment to this section requires the trustee "to establish by clear and convincing evidence that removal is inconsistent with a material purpose of the trust." Thus, the amendment makes more difficult an argument that the settlor's choice of trustee is a reason not to remove the trustee.
- **Former Trustee Accounting.** ORS 130.630. This amendment specifies that the court or a successor trustee may require a trustee that has resigned or been removed to account for the time that the former trustee served. Reasonable trustee's fees and costs for the preparation of the former trustee's accounting may be paid by the new trustee of the trust. The

intent here is to encourage and expedite former trustees to account, when having that accounting will be useful for the trust.

- **Compensation.** ORS 130.635. Two new subsections are added to this section. The first subsection clarifies that trustee compensation must reflect the total services provided to the trust by all co-trustees. The second subsection includes third parties who are also performing trustee tasks and taking a fee from the trust assets. So if a financial advisor is also performing trustee tasks, the fees of the trustee and the financial advisor must be taken into account when cumulatively determining reasonable trustee fees. Trustee compensation is construed broadly here so that the trust is not paying duplicative fees on behalf of the singular position of the trusteeship.
- **Appointment of Advisors.** ORS 130.735. A new section is proposed regarding court removal of an advisor. The bill states a court may remove an advisor if it finds that the advisor has committed a serious breach of trust or that removal best serves the interests of the beneficiaries, because the advisor is unfit or unwilling, or has persistently failed to timely and effectively advise the trustee in trust administration matters. A new sentence is also added to this statute indicating the trust may provide for succession of advisors to the trustee and may provide a process for the removal of advisors.

The more technical revisions in the bill range from clarifications to cross referencing the new sections, and includes the addition of a new section stating a newly created administrative trust or subtrust is an individual trust that follows the terms and likely the termination of the originating trust instrument.

Senate Bill 592 is not yet law and this article only serves as a summary of what is presently included in the bill. The bill may be amended, may be enacted in whole or in part, or may not pass. If this bill is enacted, it will quickly become law. Please see future newsletters for updates on this bill, as well as future CLEs that will help disseminate the new information to the legal community.

## 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 14, 2013

Time: TBA

Location: TBA

### Basic Estate Planning

Date: Friday, November 22, 2013

Time: TBA

Location: TBA

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](mailto:hmitchell@duffykekel.com).

## The Springing Trust Protector<sup>1</sup> — A Possible Solution to the McLean Case

Ted Simpson  
Harrang Long Gary Rudnick PC  
Portland, Oregon

The appointment of a trust protector can be a powerful tool to provide oversight of trustees. A settlor can name a trust protector who has the power to remove and appoint successor trustees. However, questions can arise regarding when a trust protector has a duty to act and whether the trust protector has enough information to determine if intervention is necessary. Courts have held trust protectors liable for breach of fiduciary claims for their failure to remove trustees who are acting against the interests of the trust beneficiaries. However, a trust protector's ability to monitor the actions of the trustee may be limited, creating an untenable position for the trust protector. This article discusses a Missouri case where the duties of a trust protector were extensively litigated and recommends an alternative approach, the springing trust protector, that might allow for the flexibility provided by a trust protector without the untenable liability exposure.

### The Case

In *Robert McLean Irrevocable Trust v. Patrick Davis*,<sup>2</sup> injuries from an automobile accident left Robert McLean ("Beneficiary") a quadriplegic. Beneficiary hired attorney J. Michael Ponder ("Respondent") to represent him in the personal injury lawsuit. After reaching a substantial settlement, Beneficiary's grandmother established a special needs trust. Respondent was named the "Trust Protector."

The trust protector had the power to remove a trustee, appoint a successor trustee, and appoint a successor trust protector. Under the terms of the trust, the trust protector's authority was "conferred in a fiduciary capacity and shall be so exercised, but the Trust Protector shall not be liable for any action taken in good faith." *Id.* at 790. The original trustees resigned and Respondent appointed the law firm of Patrick Davis, P.C., Patrick Davis ("Davis"), and Daniel Rau ("Rau") as successor trustees. Beneficiary and his attorney informed Respondent that Davis and Rau were inappropriately spending trust funds. Then, at the same time, Davis resigned as successor trustee and Respondent resigned as trust protector, appointed Tim Gilmore ("Gilmore") as successor trust protector, and appointed Brian Menz ("Menz") to take Davis's place as a successor trustee. Menz later resigned as successor trustee, and Beneficiary's mother ("Appellant") was appointed as a successor trustee.

Appellant then brought suit against Davis, Rau, Menz, Gilmore, and Respondent. Davis, Rau, Menz, and Gilmore eventually settled their claims. As to Respondent, Appellant alleged that he had "breached his fiduciary duties to [Beneficiary] and acted in bad faith in one or more of the following respects: a. [h]e failed to monitor and report expenditures; b. [h]e failed to stop Trustee [sic] when they were acting against the interests of the Beneficiary; and c.

[b]y placing his loyalty to the Trustees and their interests above those of [Beneficiary] to whom he had a fiduciary obligation." *Id.* at 790-91 (brackets in original).

After a series of motions, memoranda, and an order, the trial court "clarified" its previous order and judgment, which had granted both Respondent's motion to dismiss and motion for summary judgment. The appeals court quoted the trial court's final order, which held that "due to the fact that [Respondent] had no legal duties to supervise the Trustees, the Court found both that [Appellant's] Amended Petition failed to state a claim upon which relief can be granted and that there were no genuine issues of material fact and that [Respondent] was entitled to Summary Judgment as a matter of law." *Id.* at 792.

On appeal, Appellant alleged that Respondent was not entitled to judgment as a matter of law on her claim for breach of fiduciary duty, which consisted of four elements: "1) existence of a fiduciary relationship, 2) a breach of that fiduciary duty, 3) causation and 4) harm." *Id.* at 792-93.

For the question of a fiduciary relationship, Respondent urged that neither Missouri law<sup>3</sup> nor the trust agreement created a duty for Respondent to monitor or supervise the trustees, that Missouri law did not impose specific duties on a trust protector, and that the trust agreement did not include the specific duty to "supervise the trustees or direct them to act in any particular manner." *Id.* at 793.

The appeals court reversed and remanded. First, the court discussed the varying definitions of "duty," but noted one universal axiom: the question of whether a duty exists is a question of law, while the question of whether that duty has been breached is a question of fact. Next, noting that no Missouri case dealt with the function or duties of a trust protector and that Missouri law does not specifically address trust protectors,<sup>4</sup> the court found that the nature of the relationship may only arise from the nature of the relationship between the parties or the language of the trust.

The appeals court also found that "duties and responsibilities the grantor intended the Trust Protector to have are not clearly set forth in the language of the trust, and that intent is a significant and contested issue of material fact." *Id.* at 795. Indeed, the court noted that the trust appointed Respondent to serve "in a fiduciary capacity" and provided limited immunity from liability for "actions taken in bad faith." *Id.* Thus, the court found that there was an issue of fact regarding not only for whom the trust protector was to act in a fiduciary capacity (be it the beneficiary or the trust itself), but also as to the scope of the duties and responsibilities of the trust protector. Importantly, the court seemed to stress the inadequacy of Respondent's pleadings and evidence in the record, noting that "[r]espondent's statement of six uncontroverted facts does not establish, as a matter of law, that Appellant will be unable to prove at least one of these elements." *Id.*

The appeals court stated that it was not deciding that there was a duty of care and loyalty that was breached. Also, in a footnote, the court stated "[i]n pointing out these possibilities as favorable inferences, we are not saying that

any such duty was actually created by the language used in this trust.” *Id.* at 795 n 8.

Two judges concurred in the three-judge panel. Judge Parrish first noted that trusts are “dangerous devices when they undertake to break new ground insofar as designating obligations or rights of a nature not theretofore established by statute or prior judicial determination.” *Id.* at 795 (Parrish, J., concurring). Judge Parrish then concurred on the ground that “[a]rguably, the petition’s allegation that the trust protector acted in bad faith creates a fact issue that could not be determined by what the trial court had before it in the motion for summary judgment.” *Id.* at 796. Judge Rahmeyer, in a “reluctant” concurrence, was “persuaded that, based on the record before the trial court, the trial court did not have sufficient basis to determine that the contract did not impose any fiduciary duty on the Trust Protector.” *Id.* (Rahmeyer, J., concurring). That concurrence noted that “the record is absolutely void of any indication whatsoever what the contract meant by the appointment of a trust protector in this very specific type of trust, a special needs trust.” *Id.*

The case then went back to the trial court. The parties conducted extensive discovery and filed extensive motions. Just prior to trial, in the process of ruling on cross motions *in limine* to limit expert testimony, the trial court issued an opinion as to the law applicable to the case. In the order, the trial court quoted from the prior appellate court opinion that “the question of whether a duty exists is a question of law and, therefore, a question for the court alone.” The court then stated that the role of a trust protector is separate and distinct from the role of a trustee. After reviewing the trust provisions concerning the trust protector and also concerning the trustee for the McLean Trust, the trial court ruled that while the trust protector had the authority to remove a trustee, the trustee was not required to submit any accountings to the trust protector, such that the trustee was independent of “the control or supervision of the Trust Protector,” and that “the Trust Protector has no veto power over conduct of the Trustee.” The court then ruled that the trust protector had no obligation to monitor the activities of the trustee, but that the trust protector could not “ignore conduct of a Trustee which threatened the purposes of the trust. To the extent that any conduct took place, and to the extent that the Trust Protector was made aware of any such conduct, a duty may have arisen by the Trust Protector in his fiduciary capacity to remove a trustee.”

### The Springing Trust Protector

If the trust protector is simply going to “stand by,” waiting to be called into action, his or her very presence invites the question of whether, as a fiduciary, the trust protector has been made aware of any conduct that would require the trust protector to act. Since there is no requirement for the trustee to account to the trust protector, and there is no duty for the trust protector to monitor the trustee, this seems to be an open question, inviting liability.

For those drafters who wish to avoid exposure to this potential complication and who, therefore, do not wish to have a trust protector presently, but who understand that the need for one may arise in the future, there is a possible solution put forth by Boston attorney Alexander Bove.<sup>5</sup> The

trust could be drafted omitting the appointment of a trust protector at the time, but allowing for the appointment of one in the future. He calls this provision a “springing” trust protector.

Such a provision would give a person (like a beneficiary or the settlor) the power to appoint a trust protector for the trust where none existed previously, thus establishing and filling the position only when needed. The provision could allow for the appointment of a trust protector for a specified period of time or permanently. Additionally, the provision can give the beneficiary or the settlor the power to remove and replace trust protectors or revoke the appointment. Such a provision should include all the necessary terms and conditions for trust protector powers, compensation, length of appointment, removal and/or replacement, etc. Attention to all of these issues will enhance the flexibility, integrity, and asset protection qualities of the trust, without the need to fill the position before it is necessary.

- 1 See Stuart Allen’s article “Trust Protectors in Oregon: Co-Fiduciary or Sleeping Lion?” in the January 2007 edition of this newsletter for a general discussion of trust protectors.
- 2 283 SW3d 786 (Mo App 2009).
- 3 Like Oregon, Missouri has adopted the Uniform Trust Code.
- 4 Actually, § 808 of the Uniform Trust Code (and ORS 130.685(4)) provides that any person, other than a beneficiary, who holds a power to direct certain actions of the trust is presumptively a fiduciary. Further, a comment to § 808 (and ORS 130.685(4) itself) goes on to say that the holder of a power (such as a trust protector) who acts on behalf of others is presumptively acting in a fiduciary capacity with respect to these powers and may be held liable for any action or inaction that constitutes a breach of trust, unless the trust provides otherwise.
- 5 Alexander A. Bove, Jr., *The Trust Protector: Mighty Mouse or Just a Cat in a Bag? Everything You Need to Know*, ePublication, Mar. 24, 2011.

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## Representation Under the Oregon Uniform Trust Code

*Philip N. Jones*  
*Duffy Kekel LLP*  
*Portland, Oregon*

The following table summarizes the forms of virtual representation and fiduciary representation authorized by the Oregon version of the Uniform Trust Code (“UTC”). References are to Oregon Revised Statutes. References to sections of the UTC can be found in Senate Bill 275 (Oregon Laws 2005, chapter 348), and in the Oregon Revised Statutes. References to the comments to the Oregon UTC can be found in *Willamette Law Review*, Vol. 42, No. 2 (Spring 2006), although the UTC has been amended subsequent to that publication. This is a summary only; please review the text of the statutes regarding the application of the law to particular situations. Sections not cited here may also be relevant in some cases.

These provisions generally apply to the receipt of notice, the right to object, and the right to consent. ORS 130.100. In general, the agents described may receive notice, may consent to proposed actions, may enter into agreements, and may register objections, all on behalf of the represented person. ORS 130.100(2) provides that the consent (and presumably other actions) of the agent

is binding on the represented person unless the represented person objects to the representation before the consent would otherwise have become effective. However, that statute does not provide a mechanism for notifying the represented person in order to give that person an informed opportunity to object. Although unborn or unascertained beneficiaries are incapable of objecting, the comments to ORS 130.100 point out that some provisions of ORS 130.100 through 130.120 pertain to adult and competent beneficiaries. The safest approach in those situations would be to give notice to those beneficiaries, in addition to the agent. If the represented person is a minor who is 14 years of age or older, notice of a judicial proceeding must be given to the minor, as expressly required by ORS 130.035(4). Although that section applies only to minors between 14 and 18 years of age, and applies only to judicial proceedings, the safest approach would be to give notice in all situations involving a competent beneficiary, and notice should be considered in other situations as well.

In addition, some of these provisions are subject to modification by the terms of the trust. ORS 130.020 describes which sections of the Oregon UTC may, or may not, be overridden by the terms of the trust.

In judicial proceedings:

1. The court may require additional notice. ORS 130.035(4)(d).
2. Notices required to be given to a minor 14 years of age or older must be given to the minor and to the appropriate representative described. ORS 130.035(4)(b).
3. Notices required to be given to a financially incapable person must be given to the incapable person and to the appropriate representative described, if no conservator has been appointed. ORS 130.035(4)(c).

Agent	Principal	Type of Matter	Comments
Special Representative	As determined by the court. ORS 130.120.	Must be court-appointed, but may then act in judicial and nonjudicial matters. ORS 130.120.	Must not have an interest in the trust. Must not be a related party. ORS 130.120(4).
Designated Representative	One or more Qualified Beneficiaries. ORS 130.020(3)(b).	May receive reports and act to protect the interests of Qualified Beneficiaries.	Must be appointed by the Trustor in the trust instrument or other instrument.
Parent	Minor children, if no conservator appointed, and unborn children. ORS 130.110.	Judicial and nonjudicial.	Conflict of interest not permitted. ORS 130.110. Grandchildren are not mentioned.†
Conservator	Protected person. ORS 130.110; ORS 130.505(6).	Judicial and nonjudicial. In trust modifications and terminations, see ORS 130.200(1) and ORS 130.505(6).	Conflict of interest not permitted. ORS 130.110. Court approval required. ORS 130.200(1); ORS 130.505(6).
Guardian	Settlor. ORS 130.200(1); ORS 130.505(6).	Trust revocation, modification, termination, or distribution. ORS 130.200(1); ORS 130.505(6).	A guardian may act only if a conservator has not been appointed. Court approval required. ORS 130.200(1); ORS 130.505(6).
Person with Substantially Identical Interest	Minors, unlocatables, incapacitated, unborns, and unknowns. ORS 130.115.	Judicial and nonjudicial.	Conflict of interest not permitted. ORS 130.115.
Holder of a Testamentary Power of Appointment*	Permissible appointees and takers in default. ORS 130.105.	Judicial and nonjudicial.	Conflict of interest not permitted. ORS 130.105‡
Trustee	Beneficiaries of the trust. ORS 130.110.	Judicial and nonjudicial.	Conflict of interest not permitted. ORS 130.110.
Personal Representative	Beneficiaries of the estate. ORS 130.110.	Judicial and nonjudicial.	Conflict of interest not permitted. ORS 130.110.
Attorney in Fact	Principal. ORS 130.110.	Judicial and nonjudicial. In trust modifications and terminations, see ORS 130.200(1).	Power of attorney must grant appropriate authority. Conflict of interest not permitted. ORS 130.110.

† Parents may represent their minor children, but apparently grandparents may not represent their minor grandchildren. ORS 130.110. If representation for minor grandchildren is needed, use the intermediate generation (the parents of the grandchildren) or ORS 130.115 (representation by persons with substantially identical interests). If the children or grandchildren are not minors, these representation statutes do not apply, and notice must be given directly to those adult beneficiaries.

\* Senate Bill 305, 2007 Legislative Session, was signed into law by the governor on 4/10/07. That bill deleted the word “general” from ORS 130.105, so that statute now allows the holder of a power of appointment (general or limited) to represent and bind permissible appointees and takers in default. Oregon Laws 2007, ch 33, § 1.

‡ The comments to ORS 130.105 indicate that the prohibition on a conflict of interest will often significantly limit the application of that section. As the comments observe, the holder of a testamentary power of appointment

is often the lifetime beneficiary of the trust. As a result, a conflict of interest will be present if a proposed action will enhance the interests of the lifetime beneficiary to the detriment of the appointees or the takers in default. Even though the lifetime beneficiary might hold a general power, and thus may appoint the remainder to anyone he or she might designate, the lifetime beneficiary nevertheless has a conflict of interest and cannot represent the objects of the power, according to the comments. In those situations, representation will not be allowed, and notice will need to be given to the appointees and/or the takers in default. Presumably, notice must be given to the appointees, even if the lifetime beneficiary could later revise the appointment to appoint the remainder to different beneficiaries, but this is not entirely certain. Query: If the lifetime beneficiary has exercised the testamentary power by signing a will, must notice also be given to the takers in default? The conservative approach would be to give notice to both the appointees and the takers in default.

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**Questions, Comments or Suggestions About This  
Newsletter?**

**Contact:** Sheryl S. McConnell, Editor-in-Chief  
Tel: (503) 857-6860

**E-mail:** [smconnellor@aol.com](mailto:smconnellor@aol.com)

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