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The Early Vesting Rule and the Rule Avoiding Intestacy

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What happens when a trustor or a testator creates a trust with income beneficiaries and remaindermen, and assumes that the beneficiaries will die in a particular order, but the beneficiaries die in a different order, and the trust is silent regarding how the assets should be distributed in that event? For example, if A's will creates a trust for the lifetime benefit of B, with the remainder to C at the death of B, it is apparent that A expects to die first, followed by B, and then C. But what happens if the parties die in a different order, and the will is silent regarding that possibility?

The Early Vesting Rule. In Oregon, this question is usually answered by a judicial doctrine known as the early vesting rule. Oregon courts have long held that the interests of beneficiaries under a will vest upon the death of the testator, and not later, unless the will clearly indicates a contrary intent. In the example above, if A dies first, followed by C, and then by B, the rights of C vest when A dies and the testamentary trust becomes irrevocable on that date. C need not survive B in order for the rights of C to vest. If C fails to survive B, the assets of the trust will pass to the estate of C upon the death of B, not to the estate of A, nor to the estate of B, nor will they pass to the intestate heirs of either A or B.

The early vesting rule is one of common law, and it can be found in other states. For example, in California see *Estate of Woodworth*, 22 Cal Rptr 2d 676 (App 1993).

The early vesting rule has been applied consistently and uniformly by the Oregon Supreme Court. In *Dean v. First National Bank*, 217 Or 340, 360-61 (1959), the Oregon Supreme Court stated:

> It is well settled in this jurisdiction that an interest should be construed as vested rather than contingent if it is possible to do so consistent with other rules of law. ***
>
> *****
>
> This preferential rule is so favorably regarded by some courts that only a clearly expressed intention to the contrary in positive terms will warrant a finding that the interest is contingent.

This same rule was expressed by the Oregon Supreme Court in *Daniel v. Donohue*, 215 Or 373, 390 (1959). Although that opinion made the following statement with respect to a class gift within a testamentary trust, the court referred to the beneficiaries as if they were heirs to a probate estate:

> [T]he heirs or next of kin of the testator are to be determined at his death in the absence of evidence that a different time was intended.

Id.

In *Williamson v. Denison*, 185 Or 249, 254-55 (1949), the testator left a will creating a trust for the lifetime benefit of A and B, and following the deaths of A and B the trust was to be distributed to remaindermen C and D. When C died prior to the time that the trust became distributable to C and D, D attempted to claim the entire trust. The Oregon Supreme Court held that the interest of remainderman C had vested upon the death of the testator, and thus the estate of C was entitled to receive C's interest in the trust, even though C had not survived the deaths of A and B.

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The early vesting rule has been consistently applied by the Oregon Supreme Court for more than a century, in eleven separate instances. In addition to the cases cited above, the early vesting rule has been applied in *Roberts v. Ellis*, 229 Or 609, 614-15 (1962); *Quick v. Hayter*, 188 Or 218, 228 (1950); *McCleery v. Woodmen of the World*, 136 Or 407, 419 (1931); *Adkison v. Blomquist*, 128 Or 211 (1929); *Kaser v. Kaser*, 68 Or 153, 158 (1913); *Stevens v. Carroll*, 64 Or 417, 419 (1913); *Love v. Walker*, 59 Or 95, 109 (1911); and *Winslow v. Rutherford*, 59 Or 124, 128 (1911). *Accord Estate of McGee v. Dep't of Revenue*, 7 OTR 288, 292-95 (1977); John C. Paulus, *Future Interests in Oregon*, 15 Willamette L Rev 151, 165-66 (1979).

Until recently, the Oregon version of the Uniform Trust Code was silent on the question of trust vesting. In mid-2013, however, the legislature enacted Senate Bill 592, which (among other things) amended ORS 130.730 to provide a statutory trust vesting rule. In many cases, the judicially-adopted early vesting rule will reach the same result as amended ORS 130.730. However, under some circumstances the vesting rule of ORS 130.730 might reach a different result than the early vesting rule. Under the newly-amended statute, a beneficiary's interest in a trust indefeasibly vests upon the occurrence of an event that terminates a trust, partially terminates a trust, or creates an obligation for the trustee to pay or distribute all or any portion of the trust to a beneficiary. But under the common law early vesting rule, the interest of the beneficiary vests upon the death of the trustor. Which is it? Was ORS 130.730 intended to alter the early vesting rule? The statute does not tell us. The drafters of that amendment have indicated that they did not discuss the early vesting rule, and thus they did not intend to alter it. Instead, the amendment was intended to merely provide that the "winding up" period of a trust following a terminating event should not cause any change in the vesting. However, the express language of the statute goes beyond not causing any change; it adopts a different vesting date than the date adopted by the early vesting rule.

Consider the following example. A signs a revocable trust that, upon the death of A, creates a trust for the lifetime benefit of B, with the remainder to C (e.g., "upon the death of B, distribute the assets to C"). Assume the parties are unrelated, and thus the anti-lapse statutes do not apply. Assume that the trust provides that any beneficiaries who do not survive the trustor will have their shares distributed to their surviving issue by right of representation, but the trust is silent as to the vesting date and the date on which survivorship will be determined. A dies first, and B begins receiving lifetime benefits from the trust. While B is receiving benefits, C dies. B continues receiving benefits for several more years, and then B dies. Under the early vesting rule, the interest of C vested on the death of A, and thus C's estate receives C's interest after the death of B. But under ORS 130.730, vesting takes place upon the event that terminates the trust (B's death) or upon the event that triggers the obligation to distribute (again, B's death). Under ORS 130.730, the trust vests in the beneficiary to whom the trustee is obligated to pay. Would that be C's estate (under the early vesting rule) or C's lineal survivors (under a combined reading of ORS 130.730 and the terms of the trust)? Was ORS 130.730 intended to replace the early vesting rule and change the identity of the vested beneficiary? Or just ensure that the period of administration of a trust following a terminating event does not alter the vesting? If the latter is correct, then ORS 130.730 operates in tandem with the early vesting rule, and does not alter it, but the statute is silent on this issue. Since the drafters did not intend to replace the early vesting rule, the two were apparently intended to operate together and not conflict. (Under the Oregon version of the UTC, prior case law does continue to apply, except as modified by the OUTC. ORS 130.025.)

ORS 130.730 took effect on June 26, 2013, and can be overridden by the terms of the trust itself. ORS 130.020. It applies to all trusts, including older trusts, unless the trust instrument indicates a clear intent to the contrary. ORS 130.910.

The Oregon case law discussing the early vesting rule pertains entirely to testamentary trusts, but it seems likely that the same rule would apply to revocable trusts and irrevocable inter vivos trusts. Just like the early vesting rule for testamentary trusts, interests created by revocable trusts would most likely be deemed to have vested on the date of death of the trustor, and it seems likely that irrevocable trusts would vest on the date of their creation, but these outcomes are not certain due to the lack of Oregon case law. In contrast, ORS 130.730 applies to all trusts. (But see below regarding the application of anti-lapse statutes dealing with related parties named as beneficiaries.)

The Oregon Supreme Court has declined to apply early vesting only when the intent of the testator was clearly stated to the contrary on the face of the will. In *Browning v. Sacrison*, 267 Or 645 (1974), the court did not apply early vesting for two reasons. First, the testator had included early vesting language in Article II of her will, while omitting that language from Article III (the article in dispute), thus indicating an intent that early vesting should occur in the former article but not in the latter. Second, the person who could have received the assets if early vesting were applied to Article III was a person whom "'all provision of the will specifically excluded *** from sharing in any interest in the estate.'" *Id.* at 651 (quoting trial court). Thus the Oregon Supreme Court in *Browning* did not reject the early vesting rule. Instead, the court specifically adopted "'a more discriminating evaluation rather than outright rejection of the rule.'" *Id.* at 649 (citation omitted).

The holding of *Browning* is actually not a departure from the early vesting rule. As the Oregon Supreme Court indicated in *Dean* and *Daniel* (discussed above), the early vesting rule provides that the interests of the beneficiaries vest upon the death of the testator, and not later, unless a contrary intent is expressed. In *Browning*, the testator expressed a clear contrary intent on the face of the will. Thus the holding in that case is consistent with the rule, and is actually a careful application of the rule.

A similar result was reached in *Temple Beth Israel v. Feiss*, 167 Or App 113 (2000). In that case, upon the death of a beneficiary the assets of a testamentary trust were to be paid to a second testamentary trust. At the time of the beneficiary's death, the second trust had previously been disbursed and the trust terminated. The court held that the first testamentary trust failed for lack of a beneficiary for three reasons: (1) that result fit more closely with the provisions of the will, (2) that result was consistent with certain inferences found in the will, and (3) that result was supported by extrinsic evidence. *Id.* at 120. Thus the intent of the testator was determined (partly through language found in the will) to be contrary to early vesting. As a result, the holding in *Temple Beth Israel* is not contrary to the early vesting rule.

The Rule Avoiding Intestacy. Closely related to the early vesting rule is the rule avoiding intestacy. The Oregon Supreme Court has consistently held that if a will or trust might be subject to two interpretations, the interpretation that should be favored is the one that avoids intestacy. *Erickson v. Palmer*, 211 Or 342, 353 (1957)*; Nichols v. First Nat'l Bank of Baker*, 199 Or 659, 667 (1953); *Jorgensen v. Pioneer Trust Co.*, 198 Or 579, 595 (1953); *Quick v. Hayter*, 188 Or 218, 225 (1950); *Dobbin v. Vandermeulen*, 163 Or 170, 173 (1939). The preference to avoid intestacy is so strong that the Oregon Supreme Court has held that an interpretation resulting in intestacy "will not be adopted if by any reasonable construction it can be avoided." *Erickson*, 211 Or at 353. The court went on to state, "This presumption gains strength when the subject of the gift is the residuary estate." *Id.* That same language regarding the strength of the preference also appears in *Jorgensen*. 198 Or at 595-96.

In *Dobbin*, the Oregon Supreme Court held that the presumption to avoid intestacy may be overcome only by the terms of the will itself. 163 Or at 173.

This rule comes into play in many settings, but particularly when a will provides for a residuary bequest to a trust, but the trust fails by lapse (for lack of beneficiaries), and thus the will does not provide for an alternate disposition of the residue. In that event, the residue passes by intestacy to the heirs of the testator. *Murphy v. Powers*, 87 Or App 659 (1987). In order to avoid that result whenever possible, the Oregon courts have adopted the rule that intestacy should be avoided if by some reasonable construction a different result can be reached.

However, in two cases the Oregon Court of Appeals has issued opinions that appear at first glance to violate the rule avoiding intestacy. If A leaves a will that creates a post-mortem residuary trust for the lifetime benefit of B, and then after the death of B the remainder is distributable to C, but B dies before A, the Oregon Court of Appeals has twice held that the trust fails, the assets pass by intestacy to the intestate heirs of A, and C receives nothing. *Id.*; *First Interstate Bank of Or. v. Young*, 121 Or App 1 (1993). (If the bequest to the failed trust had not been to a residuary trust, then the bequest would have fallen into the residue, rather than fallen into intestacy.) The result reached by those cases seems to be contrary to the intent of the testator, who most likely intended the assets to eventually pass to C, even if B predeceased A.

In both *Murphy* and *Young*, B predeceased A, who was survived by C. In the example discussed above in connection with the early vesting rule, B survived A but predeceased C. The result reached by the courts in *Murphy* and *Young* (to give the assets to the intestate heirs of A) does not violate the early vesting rule as to B (because B predeceased A, and thus B's interests could not possibly have vested upon the death of A), but that result appears to be contrary to the rule that intestacy should be avoided if any reasonable construction might be adopted to avoid intestacy.

In both *Murphy* and *Young*, C filed briefs with the Court of Appeals urging the court to follow the rule avoiding intestacy. In addition, an amicus brief in *Young* urged the court to follow that rule. In the two resulting opinions, however, the rule avoiding intestacy was not discussed by the Court of Appeals, even though the rule had been adopted by the Oregon Supreme Court in five cases that preceded both *Murphy* and *Young*. Instead, the court in both *Murphy* and *Young* found specific language on the face of the wills that led the court to rule in favor of intestacy.

In *Murphy*, the court relied on the fact that the will stated that the trust would terminate on the death of B, and then would be distributable to C. The court ruled that the trust never came into existence, because B predeceased A, thus the trust terminated on the death of B (according to the express terms of the trust), and thus the gift in trust lapsed. In addition, the will contained a typical "wipe-out" contingency clause which stated that if the trust could not be distributed in accordance with the trust provisions, then the remainder should be distributed in accordance with the laws of intestate succession.

Query: What if the contingency clause in the will in *Murphy*, rather than referring to the possibility that the trust might not be capable of being distributed according to its terms, had instead stated, "If no named or described beneficiary exists for any portion of my estate, then distribute that portion to my heirs following the laws of intestacy"? Might that language have been sufficient to permit the court to avoid intestacy? Probably, because C was named or described as a beneficiary. (Of course, the best approach would have been to draft a will that precisely described who would receive the assets under every possible order of death.)

In the *Murphy* case, the Court of Appeals cited a 1921 case, *In re Johnson's Estate*, 100 Or 142, 160 (1921), which cited a hornbook to the effect that, "The rule is that if a trust fails by lapse, or be condemned as illegal, a devise or a bequest to a person merely by way of trust is not to be construed into an absolute gift." Of course, that rule begs the question: it assumes that the trust has failed by lapse, which precludes interpreting the document in a manner that avoids intestacy by distributing the remainder to a beneficiary named in the trust (the remainderman).

Apparently the court in *Murphy* felt that its holding was not contrary to the rule avoiding intestacy, partly because the *Murphy* trust specifically called for intestate distribution if the trust could not be carried out according to its terms. The problem with that analysis is that a distribution to C would have more closely carried out the terms of the trust, and that distribution would have followed the probable intent of the testator. The court in *Murphy* answered that argument by observing that the language calling for the termination of the trust upon the death of B was unambiguous, and not susceptible to interpretation in order to carry out the testator's supposed intent. Thus lacking an ambiguity, the court simply followed the clear language of the will.

In the *Young* case, the will did not include a contingency clause directing the assets be distributed according to the laws of intestate succession. It did, however, include other language that led the court to disregard the rule avoiding intestacy. The trust in question, which included an income interest to B with the remainder to C, was created by a sentence in the will which stated, "If I am survived by [B], my Trustee shall set aside in a separate trust *** ." 121 Or App at 4. Of course, A was not survived by B, and the court concluded that the language unambiguously conditioned the creation of the trust on the survival of B, a condition that was not satisfied. As in *Murphy*, no ambiguity was present.

As a result of those facts, the court in both *Murphy* and *Young* avoided applying (or even discussing) the rule avoiding intestacy. Had the court in those two cases discussed the rule, the court probably would have held that the rule, by its very terms, requires two alternative, yet plausible, interpretations, one of which avoided intestacy and one of which did not, and in both cases the court clearly felt that only one interpretation was permitted by the unambiguous language of the wills.

In the future, litigants hoping to apply the rule avoiding intestacy will need to circumvent *Murphy* and *Young* by arguing that the holdings in those cases should be limited to their unique facts and to the unique language of those two wills. In short, litigants will need to argue that the rule avoiding intestacy is still very much alive.

If an asset does fall into intestacy, the intestacy statutes operate without regard to the terms of a will or trust. In *McClain v. Hardy*, 184 Or App 448 (2002), a disinheritance clause (e.g., "I specifically direct that none of my estate pass to my daughter") applied only to prevent the disinherited heir from taking under the will, and that clause did not prevent the disinherited heir from taking by intestacy.

The Anti-Lapse Statutes. The operation of these rules can be influenced by the anti-lapse statutes that apply when the beneficiaries and the trustor are related by blood or adoption. The anti-lapse statute that applies to trusts (ORS 130.550) provides that if a beneficiary of a once-revocable trust is related to the trustor by blood or adoption, and the beneficiary dies before the trustor dies or before the time that the trust calls for distribution to that beneficiary, then the distribution passes to the lineal descendants of the beneficiary. That statute applies only to trusts that were created as revocable trusts, and it does not apply to trusts that were irrevocable upon creation, nor does it apply to testamentary trusts. ORS 130.525.

Careful note should be made of the interplay between the anti-lapse statute that applies to revocable trusts (ORS 130.550) and the newly-enacted vesting statute that applies to all trusts (ORS 130.730). Under the anti-lapse statute, the share of a beneficiary who dies before the trustor (or before the time that the trust calls for distribution to the beneficiary) will be distributed to the *lineal descendants* of the beneficiary. But if the beneficiary dies after the event triggering the obligation to distribute, then the share passes to the *estate* of the beneficiary under the statutory vesting rule of ORS 130.730 (the statute does not mention the beneficiary's estate, but it does provide that the interest vests in the beneficiary). In some cases, this distinction might make a significant difference: the beneficiary's spouse or a charity might be the beneficiary of the estate, rather than the lineal descendants, or the estate might disinherit some of the lineal descendants.

But consider the following scenario. A signs a revocable trust that, upon the death of A, creates a trust for the lifetime benefit of B, with the remainder to C (e.g., "upon the death of B, distribute the assets to C"). All of the parties are related by blood or adoption, so the anti-lapse statute is applicable. A dies first, and B begins receiving lifetime benefits from the trust. While B is receiving benefits, C dies. B continues receiving benefits for several more years, and then B dies. The early vesting rule and ORS 130.730 both appear to apply. Under the early vesting rule, the vesting of C's interests took place on A's death. Under ORS 130.730(1), the date of vesting is the date of death of B ("the occurrence of an event *** that terminates *** a trust or creates an obligation for the trustee to pay"). As noted above, the amendment to ORS 130.730 was apparently not intended to alter the early vesting rule. Thus it seems probable that C's estate would receive the remainder interest upon the death of B, under the common law early vesting rule and under the new vesting statute. But the anti-lapse statute applicable to revocable trusts (ORS 130.550) provides that if C dies "before the time set in the trust instrument for distribution" (which would be B's death) then C's lineal descendants would receive C's interest. Under those facts, it is difficult to determine which statute applies, and thus it is difficult to determine whether the assets pass to C's estate or to C's lineal descendants.

The anti-lapse statute applicable to wills is ORS 112.395. Similar to ORS 130.550, that statute addresses related testamentary beneficiaries who died before the testator died. That statute leaves such devises to the lineal descendants of the beneficiary. Unlike the trust statute, it does not apply to beneficiaries who died after the testator but before they received their inheritance; the early vesting rule would apply to those beneficiaries.

ORS 112.395 might possibly be interpreted to apply to devises to testamentary trusts. That statute refers to property "devised" to a related person, and the terms "devise" and "devisee" are broadly defined by ORS 111.005(11) and (12) to include bequests to "legatee[s]" and "beneficiar[ies]." In Oregon, the appellate courts have not yet been called upon to decide whether a bequest to a trust would be governed by that statute, and the 1969 legislative history is silent on the question. The legislative history does, however, refer to the Washington statute (RCW 11.12.110) as a "comparative" statute, and the Washington Supreme Court has interpreted that statute broadly to be applicable to wills, testamentary trusts, and inter vivos trusts. *Estate of Button*, 79 Wn2d 849 (1971). (The Washington statute was subsequently amended in 1994 to specifically apply to trusts.)

Both of the Oregon anti-lapse statutes are based on the assumption that a decedent would want to benefit the children (or grandchildren) of a deceased related beneficiary, rather than having that particular distribution pass to other beneficiaries. Note that both of the anti-lapse statutes, if applicable, leave the assets to the lineal descendants of the deceased beneficiary, not to the intestate heirs of that beneficiary, and not to the devisees of the beneficiary's will.

Both of the anti-lapse statutes (ORS 130.550 and ORS 112.395) and the new trust vesting statute (ORS 130.730) apply unless the governing document provides otherwise. ORS 130.020. Of course, all of these problems can (and should) be overcome by a well-drafted trust or will. Every trust or will should address all reasonably foreseeable contingencies, including the possibility that the beneficiaries might not die in the order normally contemplated. Even though some of those contingencies might be unlikely, they should be addressed in the will or trust. Anytime a will or a trust must be interpreted using the rules of construction or the statutory presumptions, the will or trust is misdrafted or poorly drafted, or very unusual and unforeseeable circumstances have occurred. Few, if any, statutory presumptions or rules of construction cannot be specifically addressed in a will, thus eliminating any question about the actual intent of the testator, without any need to follow a presumed intent determined by the legislature or by the courts.

The rules discussed in this article can be summarized by the following table. Assume that A died, leaving a trust that provided for a lifetime income interest to B, with the remainder to pass to C upon the death of B. In the table below, the order of death is shown in the first column, and the result under Oregon law is indicated in the second and third columns based on two alternate assumptions, that (second column) A, B, and C were all related to each other, or (third column) none of the parties were related to each other. In all cases, this table assumes that the trust is (unfortunately) silent as to who takes the remainder if the parties die other than in the expected order of A, then B, and then C. This table also assumes that ORS 112.395 (the anti-lapse statute applicable to wills) would be interpreted to be equally applicable to irrevocable trusts.

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Order of Death	Parties Are Related	Parties Are Unrelated
ABC	C takes the remainder, under the express terms of the trust.	C takes the remainder, under the express terms of the trust.
ACB	If the trust was never revocable, C's estate takes the remainder, under the early vesting rule. *But see* ORS 130.730. If the trust was once revocable, the answer is unclear. *See* ORS 130.550 (C's lineal descendants take) and 130.730 (C's estate takes).	C's estate takes the remainder, under the early vesting rule. *But see* ORS 130.730.
CBA	C's lineal descendants take the remainder. ORS 130.550, 112.395.	The intestate heirs of A take the remainder, because the entire trust has failed by lapse (for lack of beneficiaries). Neither beneficiary was living at the death of A, so the early vesting rule could not apply.
CAB	C's lineal descendants take the remainder. ORS 130.550, 112.395.	The intestate heirs of A take the remainder, because C was not living when A died, and thus the early vesting rule could not apply.
BAC	C takes the remainder, according to the rule avoiding intestacy. (Note: According to the *Murphy* and *Young* cases, the intestate heirs of A would take the remainder, but the result in *Murphy* and *Young* was brought about by specific language in those wills.)	C takes the remainder, according to the rule avoiding intestacy. (Note: According to the *Murphy* and *Young* cases, the intestate heirs of A would take the remainder, but the result in *Murphy* and *Young* was brought about by specific language in those wills.)
BCA	C's lineal descendants take the remainder. ORS 130.550, 112.395.	The intestate heirs of A take the remainder, because the entire trust has failed by lapse (for lack of beneficiaries). Neither beneficiary was living at the death of A, so the early vesting rule could not apply.

Notice of Proposed Action by Trustee

By Hilary A. Newcomb

On June 26, 2013, changes to the Oregon Trust Code contained in Senate Bill 592 became law. (The statute has not yet been codified.) The new law allows a trustee to serve a notice of proposed action ("NOPA") to beneficiaries to obtain clearance for a future action or inaction. This is an important provision for trustees when a proposed action might be controversial. If a trustee is concerned about liability exposure or the beneficiary's reactions to a proposed action, the trustee may rely on the new NOPA statute to provide proper notice to the beneficiaries, and with the passage of 45 days, the trustee may be released from liability for the specific action proposed. Some proposed actions may include the trustee's intent to:

- Sell or exchange real estate
- Sell or incorporate the decedent's business
- Retain high-risk assets (e.g., stock or real estate)
- Borrow against real estate
- Grant an option to purchase real estate
- Convert the trust to a unitrust
- Complete or disallow contracts signed by the decedent during his or her lifetime
- Distribute income or principal in a different manner
- Distribute decedent's personal property
- Abandon property

NOPA is a structured method to provide notice to beneficiaries and limit the trustee's liability by gaining all beneficiaries' consent, either actively or passively, thereby avoiding court involvement. If a beneficiary objects, however, the trustee always has the option to seek advance court approval of the proposed action. The legislative intent was to broaden the scope of the NOPA beyond only partial and final distributions, as previously provided in ORS 130.730, to include all administrative actions. The new NOPA statute, however, does not apply to specifically enumerated self-interested actions by a trustee, such as approval of trustee compensation, trustee accountings, or sales of trust property to a trustee. Due to the restrictive parameters of a trustee's fiduciary duties to beneficiaries, the old version of ORS 130.730 would not have applied to a trustee's fees or trust accountings either. The NOPA is primarily a method of obtaining consent to release the trustee from liability, yet the process of providing a fully disclosed notice to the beneficiaries may also satisfy the beneficiary's desires to be informed and involved, which may avoid future court action or disputes.

Origins

Oregon's new NOPA is generally based on California's NOPA for a trustee, appearing in California Probate Code §§ 16,500-16,504. California also has a mandatory proposed action statute for probate proceedings, appearing in Probate Code §§ 10,580-10,592, with a corresponding form that must be used. Access to the California probate form can be found online at http://www.courts.ca.gov/documents/de165.pdf, and this form may be carefully modified for use here in Oregon. Numerous other states also have similar notice of proposed action statutes for trustees, including but not limited to Arizona, Nevada, Montana, and Idaho. Although a majority of states provide for a 30-day notice period for NOPA, the legislative compromise in Oregon was to agree to a 45-day notice period to provide ample time to the beneficiaries.

Notice to Beneficiaries

The new NOPA statute requires notice to "the beneficiaries." ORS 130.010(2) defines "beneficiary" as a person who "(a) [h]as a present or future beneficial interest in a trust, whether vested or contingent; or (b) [h]olds a power of appointment over trust property in a capacity other than that of trustee." Therefore, the NOPA statute requires all present and future beneficiaries to be sent notice. If there are beneficiaries that are a minor, unborn, or financially incapable or if their whereabouts are unknown, the doctrine of virtual representation may be an option as long as there are no conflicts of interest. ORS 130.115 addresses this type of "virtual" representation by another with a substantially identical interest. If a portion of the trust is a charitable interest or the trust is a charitable trust, the trustee must analyze whether the attorney general needs to receive notice pursuant to ORS 130.040.

A trustee provides written notice of the NOPA by mailing notice to each beneficiary. Summarizing the new statute, the written NOPA must provide the following:

1. Clear information on the beneficiaries' right to object;
2. How the beneficiary may object and the trustee's (or attorney for trustee) address where an objection may be sent;
3. The date the objection must be received by, which cannot be less than 45 days after the NOPA is mailed;
4. Clear information that the beneficiary's right to object may be barred if the objection is not received by the deadline (45 days or longer); and
5. Sufficient information detailing the proposed action, such as the material terms, relevant dates, and legal effects.

The new NOPA statute also specifies that the proposed action must be taken by the trustee "within a reasonable time" after the trustee notifies the beneficiaries. It is helpful to provide the beneficiaries with the name and telephone number of a person they may contact for additional information regarding the proposed action, such as inviting them to contact the trustee's counsel. It is also helpful to include the date the proposed action is to be taken or is to be effective, which cannot be before the 45-day notice period has elapsed.

A. Sufficiency of Notice

Whether a trustee has provided full disclosure of the proposed action may not always be entirely clear. All details known to the trustee or details the trustee should know must be provided to the beneficiary in a NOPA. The perspective of the trustee should be to provide all relevant detail that involves the proposed action and all detail that may impact the beneficiary's rights. This disclosure would also arguably include notifying each beneficiary of his or her right to seek independent counsel of his or her choice to advise him or her regarding the proposed action.

B. Waiver of Notice

A beneficiary may waive notice to a NOPA, as long as the beneficiary is fully aware of what he or she is waiving. A beneficiary also appears to have the right to revoke or cancel his or her waiver at any time.

Consent

At the core of the NOPA procedure is the consent doctrine. The application of the consent doctrine to minimize trustee liability is common, and can be very effective and advantageous for a trustee. The law of trusts, established by the trust instrument, statute, and courts, is primarily designed to protect beneficiaries. After all, fiduciary duties flow from the trustee to the beneficiary, not vice versa. If a beneficiary voluntarily and knowingly withdraws from the protection of these fiduciary laws, then he or she should be permitted to do so. Like other matters involving beneficiary consent, however, the trustee has no power to demand or coerce the beneficiary to consent to a proposed act. *See* George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 941 (2d rev ed 1995).

There are conditions that must be met in order to give legal effect to a beneficiary's consent. Only a legally effective consent will release a trustee from future liability. Although all conditions for a valid consent are not expressly included in the new NOPA statute, they are helpful to know and apply since these conditions could be relevant, especially in a problematic NOPA. The conditions necessary for a valid consent are:

1) the beneficiary must be of legal age;

2) the beneficiary must be of sound mind;

3) the beneficiary must receive full disclosure of all material facts involved;

4) there cannot be any wrongful conduct by the trustee or another regarding the proposed action; and

5) the beneficiary must be advised of the legal effects of the proposed action and the legal effects of his or her consent.

If a beneficiary is not mentally capable, due to infancy or mental illness for example, then his or her consent will not be binding. A beneficiary must be informed of the facts surrounding the action, the potential legal effect of the action, and the legal effect of the consent. In seeking consent, neither the trustee nor the trustee's agent can commit any wrongdoing, whether by concealment, coercion, or undue influence, among other things. Where consent is obtained by duress, undue influence, concealment, misrepresentation, mistake, or fraud, the act will be voidable by the beneficiary, whether it was performed by the trustee or the trustee's agent. *See* Bogert & Bogert, *supra*, § 941. In meeting these requirements, it is helpful to consider that a fundamental rule of trusts is for the trustee to fully inform the beneficiary to facilitate the beneficiary's ability to protect his or her legal interest.

A beneficiary's consent to a proposed action should be distinguished from consent to an actual breach of trust, to which ORS 130.840 and ORS 130.730 are more applicable. The NOPA statute would likely not extend to permit any type of consent to a trustee's breach of trust.

C. Active Consent

If a beneficiary provides the trustee with written consent to a proposed action, he or she has actively consented. Sometimes the term "acquiescence" is used to indicate an advance approval of an act. Affirmative conduct by a beneficiary, for example by written consent to the trustee's proposed action, may affect the trustee's rights and actions. After a valid consent, equity will not allow the beneficiary to allege a breach of trust by the trustee due to the trustee likely relying and acting upon that consent.

D. Silence as Consent

If all necessary requirements for a valid consent are met, then this may be sufficient to constitute consent to the proposed action. The NOPA statute requires the passage of 45 days without any objection for a valid consent and, therefore, a bar against future claims of liability against the trustee. Subsection (3) of the new NOPA statute states, "If a beneficiary receiving notice does not object as provided in this section, the beneficiary will be deemed to have consented to the proposed action and the beneficiary may not thereafter file an action or other civil proceeding based in tort, contract or otherwise …." This passive consent is a compelling reason for the strict requirements for proper notice, full disclosure, and the exclusion of self-interested acts by a trustee in the NOPA statute.

E. Withdrawal of Consent

It appears that consent given to the trustee can be withdrawn by that beneficiary before it is acted upon, but not after the action has been taken by, the trustee. Yet if the consent involves a trustee's self-interested act (though prohibited by the NOPA statute), and/or amounts to a breach of trust, the action is likely voidable. *See Waterbury v. Nicol*, 207 Or 595, 296 P2d 487, *modified*, 207 Or 595, 298 P2d 211 (1956); *U.S. National Bank v. Guiss*, 214 Or 563, 331 P2d 865 (1958). Once a beneficiary actively consents to the trustee's proposed action, the trustee is affected by that consent. It would be unfair for the trustee to rely on the beneficiary's consent to act and later allow the beneficiary to claim the act he said was rightful was in fact wrongful, or that the act harmed the beneficiary. This could amount to entrapment of the trustee. Bogert & Bogert, *supra*, § 941.

F. Transactions Involving Trustee Directly

Self-interested acts involving the trustee are expressly prohibited in the NOPA, and subsection (3) of the new statute expressly states it does not apply to:

(a) Allowance of the trustee's compensation;

(b) Settlement of trust accounts or the trustee's report;

(c) Sale of trust property to the trustee or sale of the trustee's property to the trust;

(d) Exchange of trust property for property of the trustee;

(e) Grant of an option to the trustee to purchase trust property;

(f) Allowance, payment or settlement of a trustee's claim against the trust;

(g) Compromise or settlement of a claim, action or proceeding by the trust against the trustee; or

(h) Extension, removal or modification of the terms of a debt or other obligation of the trustee owing to or in favor of the trust.

Acts involving the trustee directly are not allowed due to the rigid fiduciary duties a trustee owes to all beneficiaries. When a trustee deals with a beneficiary directly, these are not arm's-length transactions. Due to the fiduciary relationship, there is opportunity for the trustee to exercise an unfair advantage or fraud against the beneficiary, so there is a presumption of invalidity. *See* ORS 130.655; ORS 130.800.

Trustees are not prohibited from having direct dealings with a beneficiary, but these transactions are highly scrutinized by the courts. The *Waterbury* court, on rehearing, clarified:

> The general rule is that a trustee should not engage in self-dealing; i.e., he should not deal as trustee with himself as an individual. It may be that self-dealing with the trust estate under circumstances would be justified, but ordinarily it should never be done without the express and understanding consent of the beneficiary or the approval of the court. 54 Am Jur 250, § 315.
>
> *Waterbury*, 207 Or at 616.

A trustee may overcome this presumption of invalidity if the trustee conducts itself impeccably by being forthcoming, being honest, and helping secure independent legal counsel, among other things. So a trustee may request a beneficiary's consent regarding the trustee's compensation, trust accounting, or other prohibited acts in the NOPA statute if the trustee relies on other laws. To effectively protect a trustee involved in self-interested matters, it is helpful to review ORS 130.840; ORS 130.820; *Waterbury*, 207 Or 595; and *U.S. National Bank*, 214 Or 563.

Not all self-interested acts are breaches of trust, but a breach of trust by a trustee is likely a self-interested act, at least in respect to the trustee seeking a release of liability from the beneficiary. If a breach of trust by the trustee has likely occurred, an analysis of ORS 130.840, ORS 130.820, and ORS 130.730 is a good start to properly protect the trustee against liability.

Options After Objections

Once the trustee receives an objection to a NOPA, the trustee has several options. First and foremost, the trustee has the opportunity to contact the objecting party to determine the details and rationale surrounding the objection. This communication may provide clarification, possibly undo the objection, or facilitate some changes in the trustee's proposal. The trustee can subsequently notice a modified proposed action in an attempt to remedy a prior objection. The trustee can also decide not to take the proposed action. The trustee may also proceed and take the proposed action, while assuming the risk of liability. A trustee that moves forward with the action proposed after it has received and is aware of specific objection by a beneficiary may expose the trustee to a high risk of liability or at least dispute later. Basically, the trustee will only be released from liability related to a proposed action if either all necessary beneficiaries consent (whether actively or passively) or the court approves the proposed action. If the beneficiaries refuse to consent, the trustee may file a petition for instructions or other equitable filing with the court requesting the court's advance approval. Once there is court approval of the proposed action, the trustee is free from liability to proceed with that proposed action. Consider that even after an objection to a NOPA, a noticed petition to the court for approval of the proposed action may not produce an objection by the party who previously objected to the NOPA. Although unexpected and inconsistent, this does happen.

Minimizing Disputes

A trustee has a duty to keep the beneficiaries informed of the trust administration, yet common complaints by trust beneficiaries are that (1) they are unaware of the administration, (2) the trustee ignores them, or (3) they disagree with the trustee's decision after the decision has been made. When a beneficiary is not advised or aware of major trust actions, he or she may harbor dissatisfaction and disappointment with his or her lack of information and lack of involvement. Granted, the trustee may have broad discretion to act in various trust matters, yet the objective is to proactively avoid disputes by a beneficiary while protecting the trustee against liability. A NOPA keeps the beneficiaries informed and involved, may flush out or resolve disputes, and may gauge the level of potential dispute so the trustee can respond accordingly. So the NOPA statute is another option the trustee can consider in managing potential beneficiary disputes.

Conclusion

When problematic issues arise in a trust administration, we often analyze the various options available in an effort to resolve the problem. The NOPA statute is a new procedure that permits a more proactive approach in administering trusts. The proposed actions or inactions to which this statute may apply are countless, and the statute can be used broadly during the entire trust administration, including at a partial or final termination of a trust. Although the NOPA is primarily a method of obtaining consent to release the trustee from liability, obtaining a valid consent from beneficiaries is also a way to keep the beneficiaries informed and involved, which may help to avoid the expense and delay of court approval or litigation.

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Outline of OUTC Changes

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Senate Bill 592, which modified numerous provisions of Oregon's Uniform Trust Code (the "Code"), became law effective June 26, 2013. The April 2013 edition of this newsletter highlighted the most significant changes made by the then-proposed bill. That article accurately reflects many of the changes made by the bill as finally enacted. Below is a short summary of many of the other modifications that were made to the Code by Senate Bill 592.

ORS 130.010 – Beneficiary Definitions

The addition of remote interest beneficiaries was covered in the April 2013 edition of the newsletter.

ORS 130.045 – Nonjudicial Settlement Agreements

ORS 130.045(1)(b)

The definition of "interested persons" for purposes of specifying who may enter into a nonjudicial settlement agreement has been made more specific. It now includes "qualified beneficiaries" as opposed to the less precise concept of beneficiaries interested in the subject of the agreement.

ORS 130.045(1)(d)

The Attorney General is now an interested person as to a charitable trust regardless of whether the charitable trust's situs is in Oregon. This allows the Attorney General to protect the interests of an Oregon charity named as a beneficiary of a trust created and operating outside of Oregon.

ORS 103.045(2), (3), and (6)(e)

Changes made to the statute regarding the Attorney General's representation of charities, the reduction of the time period for objections to a filed nonjudicial settlement agreement, and who is bound by a nonjudicial settlement agreement were covered in the April 2013 edition of the newsletter.

ORS 130.170 – Charitable Trust

Changes to the definition of a charitable trust were covered in the April 2013 edition of the newsletter.

ORS 130.200 – Modification and Termination of Irrevocable Trusts

ORS 130.200(1), (2) and (5)

Prior to Senate Bill 592, all beneficiaries had to be involved in the modification or termination of an irrevocable trust. Now, only the participation of non-remote interest beneficiaries is needed.

ORS 130.200(1)

A settlor's power to consent to the modification or termination of an irrevocable trust can be exercised by an agent under a power of attorney if the trust agreement <u>or</u> the power of attorney so authorizes. Prior law required express authority in the trust agreement.

ORS 130.215 – Termination of an Uneconomical Trust

ORS 130.215(1)

Prior law allowed a trustee to terminate an uneconomical trust only if the trustee was not a beneficiary. Now, a trustee who is also a secondary or remote interest beneficiary can terminate an uneconomical trust.

ORS 130.305 – Spendthrift Provisions

ORS 130.305(4)

Entering into a nonjudicial settlement agreement is not, by itself, a transfer in violation of a spendthrift provision.

ORS 130.315(1)(d) – Creditor Claims

ORS 130.315(1)(d)

A trustee's discretionary power to pay taxes on income generated by the trust or to reimburse a settlor for such taxes does not, on its own, subject the assets of the trust to the settlor's creditors.

ORS 130.315(3)(c)

Property contributed to a trust by a donor that is married, over which a beneficiary has a power of withdrawal, will be subject to the claims of the beneficiary's creditors upon the lapse, release or waiver of the withdrawal power, but only to the extent the value of the property subject to the withdrawal power exceeds twice the annual exclusion amount.

ORS 130.315(4)

Assets contributed to an irrevocable inter vivos marital deduction trust after the death of the spouse-beneficiary will be deemed contributed by the spouse-beneficiary and not by the settlor.

ORS 130.315(5)

If someone other than the settlor of an irrevocable trust holds a general power of appointment over property in the trust, such property is not subject to the claims of the settlor's creditors.

ORS 130.555 – Pretermitted Children

ORS 130.555(1)

The definition of a pretermitted child is modified to include children born or adopted during the settlor's life and those in gestation at the time of a settlor's death. Children are not considered pretermitted if they are identified by name or by class in the trust instrument or in the settlor's will.

ORS 130.555(4)

Rather than making a cross-reference to the probate statute, the statute states directly what a pretermitted child is entitled to when a settlor - who had no living children when the trust instrument was executed - dies.

ORS 130.610 – Cotrustees

ORS 130.610(5)

Delegation of duties between cotrustees, acceptance of a delegated task, and revocation of a delegation must be in writing.

ORS 130.615 – Vacancy in Trusteeship

ORS 130.615(4)(b)

A vacancy in a charitable trust can be filled by the agreement of all qualified beneficiaries and the Attorney General. The agreement of charitable beneficiaries who are secondary or remote interest beneficiaries is no longer required.

ORS 130.625 – Trustee Removal
ORS 130.630 – Former Trustee Accounting
ORS 130.635 – Trustee Compensation

These changes were covered in the April 2013 edition of the newsletter.

ORS 130.650 – Duty to Administer
ORS 130.655 – Duty of Loyalty

ORS 130.650(2) and 130.655(9)

A trustee's general duty to administer a trust and duty of loyalty does not require him or her to object to a modification, reformation or termination of a trust.

ORS 130.710 – Reporting

ORS 130.710(3)(b)

Under prior law, a trustee who leaves office was required to send a trustee report to all qualified beneficiaries. Now, a trustee report is only necessary if required by the court or the successor trustee.

ORS 130.725 – Trustee Powers

ORS 130.725(22)

A distribution of trust property may include payments in cash or in kind.

ORS 130.730 – Distribution upon Termination

This section has been rewritten. The provisions regarding proposals for distributions have been incorporated into the new concept of Notice of Proposed Action, which was adopted into the Code and was thoroughly discussed in the April 2013 edition of the Newsletter. The list of situations that would require a distribution to a beneficiary has been expanded to include the satisfaction of a condition or exercise of a power that has the effect of terminating or partially terminating a trust. The statute now specifies that a beneficiary's interest indefeasibly vests upon the occurrence of the event that terminates or partially terminates the trust subject, however, to elective share rights, the rights of creditors and the administration and sale of property by the trustee. The statute now expressly allows a trustee to request a release from a beneficiary prior to a distribution.

ORS 130.735 – Appointment of Advisor

Changes regarding removal of advisors and succession of advisors were covered in the April 2013 edition of the newsletter.

New Section – Trust Division

A new section was added to the Code to clarify that the division of a trust creates separate trusts and terminates the originating trust. For example, imagine a trust stating that, upon the trustor's death, the trust assets are distributed one-half to a trust for the benefit of the spouse and one-half to a trust for the benefit of the children. The new Code provision clarifies that the division creates two new separate trusts and that the originating trust terminates.

Estate Planning for Same-Sex Couples: An Overview

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Same-sex couples face unique challenges when it comes to estate planning. In addition to being denied the same legal rights as heterosexual married couples, the laws regarding same-sex couples are constantly changing and are inconsistent from state to state. A heterosexual married couple traveling on a cross-country road trip are married regardless of where they travel. A same-sex couple married in Minnesota, however, do not have a valid marriage when they are in Oregon. As Joan Burda puts it in her book, *Estate Planning for Same-Sex Couples*, in most states, lesbian and gay couples are "legal strangers." There are several issues you should know as an estate planner working with same-sex couples.

1. Know the Status of Both Oregon and Federal Law and Keep Current on Changes

A. Oregon law

While Oregon does not currently recognize marriages between same-sex couples, Oregon has allowed registered domestic partnerships for same-sex couples since 2008. The Oregon Family Fairness Act ("OFFA")[1] went into effect February 4, 2008 and provides that same-sex couples may enter into a Registered Domestic Partnership in Oregon. Each member of the couple must be at least 18 years old and at least one of them must be an Oregon resident. Oregon Registered Domestic Partners are afforded the same rights and responsibilities under state law as if they were a heterosexual married couple. Any place in Oregon law giving a right or responsibility to heterosexual spouses gives the same right or responsibility to same-sex Oregon Registered Domestic Partners.

Same-sex couples may register at their county clerk's office by filling out a Declaration of Domestic Partnership form and having it signed by the county clerk. A dissolution of an Oregon Registered Domestic Partnership follows the same procedure as a dissolution of marriage for heterosexual couples.

Even if a same-sex couple was married in one of the 13 jurisdictions allowing same-sex marriage,[2] their marriage will not be recognized in Oregon due to a 2004 Oregon constitutional amendment. To receive the benefits of the OFFA, they must register as domestic partners in Oregon.

Some state rights relevant to estate planning and probate include hospital visitation rights and decision-making authority, automatic parentage of nonbiological parents for children born after the domestic partnership is registered, control over burial and funeral arrangements, ability to file a wrongful death suit, treatment in Oregon as spouses

1 ORS 106.300-.340.

2 Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington, and the District of Columbia.

for tax purposes, rights under intestate succession, and the spousal elective share, to name a few.

An estate planner working with same-sex couples should keep on top of changes to the law. As the law changes and develops, you may need to revise your clients' estate plans. For example, marriage equality will likely be a ballot measure in Oregon in November 2014. You should advise your Lesbian, Gay, Bisexual, Transgender and Questioning ("LGBTQ") clients to come back for review planning when their legal status changes.

B. Federal law

Federal law as it relates to rights granted to same-sex couples recently changed drastically. On June 26, 2013, a key provision of the Defense of Marriage Act ("DOMA") was struck down by the Supreme Court's decision in *United States v. Windsor.* 570 U.S. __, 133 S. Ct. 2675 (2013). DOMA was signed into law in 1996 and prevented the federal government from recognizing same-sex marriages for purposes of federal law. 1 U.S.C. § 7. And even though a same-sex marriage was recognized in a given state, DOMA prevented that marriage from being recognized by the federal government. It also provided that individual states need not recognize same-sex marriages from other individual states. 28 U.S.C. § 1738C.

The Court in *Windsor* struck down the part of DOMA preventing the federal government from recognizing same-sex marriages. However, the Court did not strike down the provision allowing individual states to not recognize same-sex marriages from other jurisdictions.

There are over 1,049 federal laws in which marital status is a factor. The U.S. General Accounting Office provided a report[3] in 1997 enumerating the laws, which they divided into 13 categories:

- Social Security and Related Programs, Housing, and Food Stamps
- Veterans' Benefits
- Taxation
- Federal Civilian and Military Service Benefits
- Employment Benefits and Related Laws
- Immigration, Naturalization, and Aliens
- Indians
- Trade, Commerce, and Intellectual Property
- Financial Disclosure and Conflict of Interest
- Crimes and Family Violence
- Loans, Guarantees, and Payments in Agriculture
- Federal Natural Resources and Related Laws
- Miscellaneous Laws

Some of the federal benefits denied to same-sex couples that are relevant to estate planning include federal taxation, social security benefits, veteran's benefits, private and public pensions, and military benefits.

3 The full report is available at http://www.gao.gov/archive/1997/og97016.pdf.

Couples who were married in states allowing same-sex marriage and currently living in states allowing same-sex marriage should now be entitled to recognition under all federal laws in which marital status is a factor.

The law is not as clear for couples who were married in states allowing same-sex marriage but who currently live in states that do not recognize same-sex marriage, such as a same-sex couple married in Washington who reside in Oregon. Until there is an act of Congress clarifying this issue or until same-sex couples can marry in every state in the country, whether your client receives certain federal rights will depend on the federal agency responsible for those rights. (The Respect for Marriage Act (H.R. 2523, 113th Cong. (1st Sess. 2013)), introduced in the House on June 26, 2013 and currently in committee, would repeal DOMA in its entirety and ensure that married same-sex couples receive federal rights, regardless of where they live.) Some federal agencies will look to the place where the couple was married ("place of celebration") and some will look to the state where the couple currently resides ("place of domicile/residence"), while yet other agencies will look at the state with the "most significant interest" in the marriage.

Federal agencies are working on post-DOMA guidelines and procedures. The IRS, Department of Defense, Department of Labor, and U.S. Citizenship and Immigration Services ("USCIS") have weighed in on the issue. They will all look to the place of celebration to determine whether a valid marriage exists. As of the date of writing this article, the Social Security Administration has not issued a decision.

On August 29, 2013, the IRS announced that for all federal tax purposes (including income, gift, and estate taxes) it would recognize all same-sex marriages entered into in jurisdictions allowing same-sex marriage, regardless of where the same-sex couple currently lives. Rev. Rul. 2013-17, 2013-38 I.R.B. 201. This means, for example, that same-sex couples who marry in Washington, but reside in Oregon, will receive the same federal tax treatment as heterosexual couples who marry in Oregon, even though Oregon's 2004 constitutional amendment bans recognition of their marriages. Additionally, individuals who were in same-sex marriages are also allowed to file original or amended returns for any tax years still open under the statute of limitations.

The Department of Defense is extending spousal and family benefits to same-sex spouses of uniformed service members and Department of Defense civilian employees. The benefits are extended as long as the service member-sponsors can provide a valid marriage certificate. The Department of Defense is also allowing military personnel leave so they can travel to a jurisdiction allowing same-sex marriage.

On September 18, 2013, the Department of Labor released Technical Release 2013-04, which gives post-DOMA guidance to "employee benefit plans, plan sponsors, plan fiduciaries, and plan participants and beneficiaries" as to the meanings of "spouse" and "marriage" as they appear in the Employee Retirement Income Security Act of

1974 ("ERISA"). Same-sex couples married in states that allow same-sex marriage will be recognized as married, regardless of which state they currently reside in.

On July 1, 2013, Secretary of Homeland Security Janet Napolitano released a statement that USCIS will now be reviewing immigration visa petitions filed on behalf of same-sex spouses. USCIS looks to the law of the place where the marriage took place when determining whether the marriage is valid for immigration purposes.

The Social Security Administration ("SSA") is now processing some retirement spousal claims for same-sex couples. The SSA has not made a decision on whether married same-sex couples living in states that do not recognize same-sex marriage will be eligible for benefits. However, the SSA is encouraging everyone who believes they may be eligible to apply for benefits. The sooner you have same-sex couples apply the better, as clients can receive benefits according to their date of application.

As with state law, it is important for you to keep abreast of changes to federal law when creating estate plans for same-sex couples. This area of law is rapidly changing as federal agencies interpret DOMA and will undoubtedly continue to change over the next weeks, months, and years. A key question for your clients will be whether a federal agency will look to determine if your clients have a valid marriage based on where they were married, where they live, or which state has the most significant interest. Same-sex couples expect, and are entitled to, lawyers who keep abreast of their changing federal rights. Your attention to the post-DOMA developments will be crucial to your same-sex couple estate planning clients.

2. Drafting Estate Plans for Same-Sex Couples

There are several things you'll want to consider when you have a same-sex couple in your office.

A. Make your same-sex clients feel comfortable

Many of us assume that every client coming through our door is heterosexual. Although unintentional, we may make gay, lesbian, bisexual, and transgender individuals feel uncomfortable and like they are invisible to us by assuming they are heterosexual. Don't assume when speaking with a client that they are heterosexual.

It is a good idea to make forms gender-neutral and inclusive. Our office's Confidential Estate Planning Questionnaire, for example, includes checkboxes for both married and Registered Domestic Partner. Consider using "spouse" or "partner" instead of "husband" or "wife."

B. The importance of knowing your client's legal status

As discussed above, same-sex couples deal with a myriad of conflicting laws from state to state. A couple's legal status is crucial to determining their current legal rights and therefore what direction your estate planning might take.

i. Oregon Registered Domestic Partners? Marriages or registration in other jurisdictions?

It is important to know your client's status under both Oregon and federal law when that client executes documents in your office. Ask your clients if they are Oregon Registered Domestic Partners. Believe it or not, they may be confused about their legal status. Multnomah County offered a domestic partner registration prior to 2008, but this carries no legal weight in Oregon. Couples may have registered in Multnomah County before 2008, but these clients are not entitled to the protection of the OFFA. Some same-sex couples may have filled out an "affidavit of domestic partnership" or similar form with an employer in order to receive health care benefits for a partner and thus believe they have registered. In order to receive the benefits of OFFA, same-sex couples must be registered in Oregon after the OFFA went into effect.

Find out if your clients are married or registered elsewhere or in multiple jurisdictions (including foreign countries). Some couples have had to register in more than one state as they have moved from state to state. Other couples have chosen to register or marry in multiple jurisdictions. Again, Oregon will not recognize marriages from other states.

Your estate planning documents should reference your client's status – Oregon registration, if any, and marriage or marriages in other jurisdictions – and should include a "savings clause" if your client intends the document be effective despite later registration, marriage, or change in status, so that your client's estate plan is not revoked by a client's change in status. Include an estate planning transmittal letter that encourages your client to come back to update their estate plan when their status changes.

ii. Legal status of children?

Do your clients have children? If so, it's important to determine the legal status of the children. Has there been a second parent adoption? If the children were born after 2008 and the parents were Oregon Registered Domestic Partners, they should have automatic Oregon parentage for the nonbiological parent. But will that parentage be recognized in other jurisdictions? A court decree of adoption or parentage is more secure as your clients travel or move to a less friendly jurisdiction. You can alert the parents to these parentage-by-jurisdiction issues.

C. Using multiple layers of legal protection

You may need to be more aggressive in your estate planning for same-sex couples than you would for heterosexual married couples. In addition to a lack of legal rights, same-sex couples may be facing hostility from family and ignorance from others about the law. While same-sex couples should have the same documents as heterosexual married couples (Wills, Durable Powers of Attorney, Advance Directives), there are unique reasons they need an estate plan and additional measures you may want to take.

A same-sex couple may decide, for a variety of reasons, not to become Registered Domestic Partners in Oregon. One or both partners might not want to lose public assistance or they may be waiting for marriage equality to formalize their relationship. In this case, they have no legal protections in Oregon unless they create them by planning.

Even if a couple is in an Oregon Registered Domestic Partnership, the OFFA is relatively new. Financial institutions, hospitals, and funeral homes may not know about the OFFA or may not follow the law. Consider drafting a Disposition of Remains Designation,[4] which allows each partner to control funeral and burial decisions at the other partner's death. A couple who are Oregon Registered Domestic Partners will automatically have the right to be in charge of funeral and burial arrangements if their partner passes away. However, in the face of a funeral home that does not know the law or family members who do not accept the surviving partner, a properly executed legal document can help.

An Affidavit of Joint Tenancy with Right of Survivorship in Personal Property[5] is another document you should consider for same-sex couples. The Affidavit allows a couple to make sure an interest in personal property is joint and will pass to the surviving partner at the first partner's death. This can be not only a useful probate avoidance tool, but also a way to discourage family members hostile to the surviving partner from taking items from the family home.

Another consideration when drafting estate planning documents for same-sex couples is that the OFFA may not be recognized in other states. Even if a same-sex couple is registered in Oregon, they may run into problems if they travel out of state. If one partner becomes ill and needs to be hospitalized, another state may not recognize the other partner's right to visit the sick partner or to make medical decisions on their behalf. Although the Center for Medicare and Medicaid Services has required hospitals receiving federal funds to recognize same-sex couples' medical directives, this does not help couples who travel to unfriendly jurisdictions – and do not happen to have the medical directive available.

In Oregon, Oregon Registered Domestic Partners can make health care decisions for a partner when they are unable to make them for themselves, even without a medical directive. This may not be the case in another state. Having an Advance Directive in place, naming a partner as a health care representative, is important for all couples, but it is good practice to make sure your same-sex clients can access their Advance Directives wherever they go. Advise them to travel with copies and also to make sure they can access copies electronically. Our office emails clients PDFs of all of their documents immediately following the signing ceremony, so they are always accessible simply by logging into email. Another option is to have your clients use a cloud-based service, like Google Drive, to hold a copy of the signed medical directive.

Conclusion

The laws that govern same-sex couples' legal rights are complex and are constantly changing. While not exhaustive, the above estate planning measures are useful to help protect the rights of same-sex couples. Good resources for current laws affecting same-sex couples are:

- *Ask. Tell. LGBTQ Elder Law Development*s, Cynthia Barrett, Esq., CAP, published in NAELA News, Volume 24, Issue 5 (Oct./Nov. 2012)
- Lambda Legal: lambdalegal.org
- National Center for Lesbian Rights: nclrights.org
- Gay & Lesbian Advocates & Defenders: glad.org
- *Estate Planning for Same-Sex Couples,* Joan M. Burda (2d ed.). This book was published in 2012 and although some laws have changed since its publication, (e.g., more states now have marriage equality and DOMA has been partially struck down) it is an excellent resource.

4 ORS 97.130.
5 ORS 105.920.

SAVE THE DATE

Your Estate Planning Section CLE Committee is working hard on the fall CLE. Mark your calendars now with the date. More information will be available soon.

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.

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