

Newsletter

Oregon Estate Planning
and Administration
Section Newsletter
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Oregon's eCourt Program

*David Factor, Staff Counsel
Office of the State Court Administrator
Salem, Oregon*

The Oregon eCourt Program is the Oregon Judicial Department's business transformation process that involves all circuit courts, the Tax Court, Court of Appeals, and Supreme Court. Its purpose is to give courts and judges the tools they need to provide just, prompt, and safe resolution of civil disputes; to improve public safety and quality of life in our communities; and to improve the lives of children and families in crisis. Or more succinctly: Better Access. Better Information. Better Outcomes.

The vision for Oregon eCourt began in 2004, when a group of judges and staff wrote a 10-year technology plan for the Judicial Department. It called for making court information available over the Internet (creating a "virtual" courthouse), developing a "person-based" system to replace Oregon's decades-old "case-based" OJIN system, automating data-sharing with other government entities, and developing more consistent business practices across the courts.

Ten years later – after developing and implementing a new case management system in Oregon's appellate courts – Oregon is halfway through its schedule of implementing the Oregon eCourt Case Information (OECI) system in the circuit courts of all 36 Oregon counties. The OECI system is up and running in 11 counties, with three more scheduled to go live on December 8, 2014, and the remaining circuit courts (and Tax Court) in June 2016.

A list of courts currently using the OECI system and the go-live schedule for future courts is available at <http://courts.oregon.gov/Oregonecourt/pages/Implementation-Schedule.aspx>.

Consistent with the decade-old plan, most court documents can be electronically filed in the 11 circuit courts using the IECI system, payments, payments on court fees and fines can be made online 24/7, automated integrations are in place to receive traffic citations from the Oregon State Police and automate communications with other public entities, and business practices are much more consistent (including a statewide case numbering system). In addition, Oregon lawyers can subscribe to get most current court documents available online.

Note that eCourt and eFiling are not necessarily the same thing. The eCourt system, also known as OECI, includes many features. The two features that will be used most often by practitioners are: (1) the ability to view and print documents on file with the court, including orders that have been signed by a judge, and (2) the ability to electronically submit (eFile) documents to the court.

We understand that members of the Estate Planning and Administration Section have some questions that are unique to its practice area and other questions or concerns that are shared by other Bar members. Some eFiling questions – addressing whether original wills and certified copies of death certificates must be eFiled – were already answered (*see* UTCR 21.070(3)(i)), which requires original wills and "certified document[s]" to be filed

In This Issue

- | | |
|-----------------------------------------------------|----------------------------------------------------|
| 1 Oregon eCourt Program | 4 Ode to IRC Section 2013 |
| 2 New Editors & New Schedule | 5 Practice Tip: How to Search Previous Newsletters |
| 3 What's New from the Courts on Fiduciary Authority | 5 Bonus Issue of the Newsletter |

conventionally). Others, such as the below-mentioned retention schedule for eFiled documents that contain original signatures by a third party, will be addressed by the current UTCR revision process.

eFiling into Oregon Circuit Courts

This brings us to the most recent Oregon eCourt development – mandatory eFiling for attorneys. Starting December 1, 2014, active attorneys will be required to eFile documents into the 11 circuit courts that are using the OECI system. For courts that are not yet using the OECI system, eFiling will become available 30 business days after the court's OECI go-live date, and mandatory eFiling will be implemented after an additional 30 business days. eFiling kiosks will be available in OECI courts to facilitate on-site eFiling.

In addition to the increased convenience of eFiling 24/7, implementing mandatory eFiling will reduce lines at courthouse windows, and automating the filing process will allow court staff to be more available to help people and to perform more significant functions instead of scanning and data entry.

For Bar members, the benefits include enhanced reporting and financial reconciliation, reducing the time it takes to file documents, fewer trips to the courthouse, real-time access to file-stamped copies of court documents, and 24-hour online access to eFiling and many court documents.

eFiling and UTCRs

The Judicial Department, after consultation with the Oregon State Bar and attorneys across the state, has proposed changes to several UTCRs in Chapter 21 to implement mandatory eFiling. To see the proposed rules and submit comments, go to <http://courts.oregon.gov/OJD/programs/utcr/pages/utcrules.aspx>. Comments on the proposed rules changes were accepted through September 22, 2014. We hope to have the new rules adopted in October – well in advance of the December 1, 2014 implementation of mandatory eFiling.

In addition to establishing formatting and other technical requirements, the Judicial Department is proposing to reduce the requirement to retain hard copies of documents containing an original signature of a person other than the filer from 10 years to 30 days, in a proposed change to UTCR 21.120.

Proposed changes to UTCR 21.040 would require documents having attachments (such as exhibits or affidavits) to be consolidated into a single PDF file and eFiled in one “envelope.” The proposed rule would require confidential documents or documents requiring court signatures, such as proposed orders or judgments, to be eFiled as separate documents, but still within the same filing envelope. The proposed rule also establishes formatting standards for documents requiring a court signature.

A proposed new rule – UTCR 21.140 – would implement the mandatory eFiling requirement and authorize limited waivers from that requirement. Petitions for waivers from the eFiling requirement must be submitted conventionally under proposed changes to UTCR 21.070.

Finally, filings made when the eFiling system is unavailable (due to technical problems) may be related back to the date of the attempted filing under proposed changes to UTCR 21.080.

eFiling Training Available

The Judicial Department has a number of resources available to assist attorneys to use the eFiling system. First, attorneys need to register to use the eFiling system. This can be done online, at the general eFiling web link, at <http://courts.oregon.gov/OJD/OnlineServices/OJDeFiling/Pages/index.aspx>. Of course, training is available not only for attorneys, but also for their secretaries and paralegals. You can elect to take the training for CLE credit or not; the training sessions are identical. That web page also has additional information about eFiling – including system requirements for computers, rules, and user guides.

The Judicial Department is ramping up eFiling trainings for attorneys. More than 40 webinars have been scheduled, and some offer CLE credit. For more information, go to <http://www.tylertech.com/news-events/tyler-events/client-training/odyssey-file-serve-online-training>.

We appreciate that this is a significant change for attorneys as well as the courts, and look forward to a smooth transition to eFiling.

New Editors & New Schedule

Please welcome two new Editors to the Estate Planning and Administration Section Newsletter Editorial Board. While we are always disappointed when editors need to move on, we enjoy meeting and working with the volunteers who step up to take their places.

John Sorlie of Bryant, Lovlien & Jarvis, PC in Bend, Oregon joined us as of January, 2014. John has already written a couple of articles for the Newsletter which makes us like him all the more.

Phil Jones of Duffy Kekel LLP in Portland, Oregon joined us this summer. Phil has always been a prolific author for the Newsletter and we look forward to his skills as an editor.

Remember that the Newsletter will now be published on a new schedule, March, June, September, and December. If you have questions about the Newsletter or wish to volunteer to write an article, please contact the Editor Sheryl McConnell or a member of the Editorial Board.

What's New from the Courts on Fiduciary Authority?

Fuentes v. Tillett (Filed 05/21/2014; A143362) and
Flaig v. Emert (Filed 01/23/2014; A14967)

Tim McNeil
Davis Pagnano McNeil & Vigna LLP
Portland, Oregon

A client considering a challenge to fiduciary authority – whether the fiduciary is a conservator or a personal representative – must acknowledge the distinct advantage of the fiduciary. While the client pays hundreds of dollars just to appear in the case, the fiduciary retains counsel and defends against the challenge without using personal funds. In addition, the fiduciary controls access to documents that may be essential to the challenger's case. However, two recent cases clearly limit fiduciary authority and carve a strong foothold for those who would question the actions of a conservator or personal representative.

In *Fuentes v. Tillett* (Filed 05/21/2014; A143362), a successor conservator objected to her predecessor's eight annual accountings, despite the fact that all of the accountings had been approved by the court after proper notice was provided. The multiple objections included allegations that the conservator had taken excessive compensation; that the conservator had improperly delegated authority to the conservator's attorney; and that the conservator had failed to account for or repay loans from the conservatorship.

The successor conservator used three different avenues to present the objections to the trial court. All were unsuccessful. First, the probate court dismissed the objections to the prior accountings after citing ORS 125.480, which states that “an order, made upon notice and hearing, allowing an intermediate accounting of a conservator, is final as to the liabilities of the conservator concerning the matters considered in connection with the intermediate accounting.” Second, when the successor conservator brought a separate civil action against the conservator, the company that issued the conservator's bond, and the attorney for the conservator, the court dismissed the suit after stating that the probate court, in accordance with ORS 124.015(1),¹ had exclusive jurisdiction of the claims and the probate court had already dismissed them. Third, the successor conservator's subsequent petition to the probate court to surcharge the bond, supported by the same claims, met the same fate.

The appellate court reached a different conclusion, scrutinizing whether the prior accountings had adequately presented the facts to which the successor conservator objected. To the appellate court “the question reduces to

whether the annual accountings presented – and the probate court considered – the same matters that plaintiffs later raised in their objections and surcharge petition.” The court concluded that the accountings presented some but not all of these matters, as the accountings had misrepresented some facts and failed to disclose other facts at all. ORS 125.480 “provides finality as to a conservator's liability concerning those matters that the court considered in connection with the intermediate accounting; it does not insulate a conservator from subsequent claims of breach of fiduciary duty that are raised while the conservatorship remains open and the final accounting has not been approved.” For these reasons, the appellate court remanded the case so that the probate court could consider the successor conservator's objections.

While in *Fuentes* the fiduciary found no safe harbor in ORS 125.480 and orders approving prior accountings, in *Flaig v. Emert* (Filed 01/23/2014; A14967) a fiduciary discovered that the statutory protection upon which she relied was more limited than expected. In this case, the decedent's son filed a claim against the estate for expenses that he had paid on the decedent's behalf. The personal representative responded to the claim by filing an answer and counterclaim, alleging that the son had received a life insurance benefit that was the rightful property of the estate. The probate court dismissed the claimant's argument that counterclaims were not allowed in the summary claim resolution process outlined in ORS Chapter 115, and was unsympathetic to the complaint that the summary process did not allow for due process such as a jury trial and discovery. The probate court heard the claim and counterclaim, and rendered a money judgment in favor of the personal representative.

SAVE THE DATE

Your Estate Planning Section CLE Committee is working hard on the fall CLE. Mark your calendars now with the date. Registration will open soon.

Basic Estate Planning and Administration 2014

Date: Friday, November 21, 2014

Time: 8:30 a.m. – 4:45 p.m.

Location: DoubleTree Hotel

1000 NE Multnomah Street, Portland

CLE Credits: 5.75 General CLE credits

1.0 Ethics credit

0.5 Access to Justice credit

To inquire about participating as a presenter or to suggest a topic, contact committee chair Jack Rounsefell at justflyit2@yahoo.com.

The appellate court concluded that the probate court should not have heard the counterclaims. Scrutinizing the plain text as well as the legislative history of ORS 115.145 and 115.165, which establish a detailed process for the resolution of estate claims, the court concluded that the statute makes no room for counterclaims. According to the court, ORS Chapter 115 was designed to resolve claims against the decedent, not claims of the decedent against others. The latter claims warrant additional process (discovery, jury trial) that the summary proceeding outlined in ORS Chapter 115 does not offer.

When the personal representative pointed out that the plain text of ORS 115.165 clearly prohibits the appeal of the summary determination of a claim, the appellate court responded that the probate court did not simply issue an order allowing or disallowing a claim. If it had, ORS 115.165 would prohibit the appeal of such an order. The appeal of the money judgment of the court against the claimant, a decision arising from the counterclaim, was not prohibited. The court vacated the probate court's decision and remanded the case.

In *Fuentes* and in *Flaig*, the appellate court favored equity over administrative efficiency. In *Fuentes*, the court reviewed the disclosures of the conservator in interim accountings and judged them to be insufficient, thereby opening the door to the litigation of issues that the conservator had considered settled for years. In *Flaig*, the appellate court rejected the probate court's attempt to efficiently decide multiple matters in a summary proceeding. Instead, the appellate court insisted upon a more narrow scope for the summary determination of estate claims and required additional process for matters that fell outside this scope. These two cases make clear that while the fiduciary may still hold the cards and control the purse, the challenger is no outlier in the eyes of the court.

¹ **ORS 125.015. Jurisdiction of protective proceedings; proceedings in other states.** (1) The probate courts and commissioners provided for in ORS chapter 111 have exclusive jurisdiction of protective proceedings.

Ode to IRC Section 2013*

*Barbara Jo Smith
Heltzel, Williams, Yandell,
Roth, Smith, Petersen & Lush, P.C.
Salem, Oregon*

Ode to IRC Section 2013

It was so sad
When the kids lost their Dad
But they paid the state estate tax
Without breaking their backs.

A child with a cancer diagnosis
Not a good prognosis
Even sadder the next January
When they lost dear sister Mary.

I do well to remember
Section 2013 before September
But wait . . .
This is the State . . .
What does Oregon mean?
Any help in Chapter 118?

Alas, more tax to pay
On this sad, sad day.

*For some facts a change,
maybe even a name,
for there was still time,
to make this story rhyme.

PRACTICE TIP: How to Search Previous Newsletters

Sheryl S. McConnell
Attorney at Law
McMinnville, Oregon

One of the most frequent questions I am asked as Editor of the Estate Planning and Administration Section Newsletter (EP Newsletter) is “How do I search old newsletters?” Fortunately, I have worked with those mysterious folks who handle the Oregon State Bar (OSB) and the Section websites, and we have gathered all previous issues of the EP Newsletter into one location that users can easily search in two different ways.

1. Searching by Section Newsletter Library. All prior issues of the EP Newsletter are now located in the EP Newsletter search library located within the OSB website. The following steps will get you there:
 - a. Log into the OSB Member Site with your Bar number and password.
 - b. From the member dashboard, find the Sections button on the brown bar across the top of the page. This is a drop-down menu titled “Section Information.”
 - c. Choose “Section Newsletter Library.” This will display a green bar with a Search Library button and a yellow bar with a Browse Library button.
 - d. Beneath the yellow Browse Library bar you will see boxes for the newsletters for each section of which you are a member. For members of the Estate Planning and Administration Section, there are 106 EP Newsletters from 1984 to 2014 available. If you know what issue you are looking for, select the year. The individual issue months for that year will be displayed to the right. You can then select the particular issue you need.
 - e. If you want to search for an article and do not know the issue it was in, you can use the search function. Click on the green Search Library bar, and it will drop down a search box where you can enter search terms. You will see the list of newsletter libraries for those sections of which you are a member. Select the library or libraries you want to search and click the search button. This searches for your term(s) throughout the text of the newsletters, not just the titles. The results display as the number of hits in a certain issue, in a descending list starting with the most hits. It displays the issue as a hotlink so you can go right to the issue you select. No search terms are highlighted in the issue. It goes without saying that using very common terms such as “trust,” “will” or “tax” may not help you very much.

2. Searching the Table of Contents. Nearly all previous EP Newsletters are listed as hotlinks on the Estate Planning and Administration Section website. There is a long list of years and monthly issues that each appear as hotlinks. Below that is a list of issues, shown by month and year, with a hotlink that is followed by that issue’s Table of Contents. Presently this list is only current through July 2012. For some searchers, scanning the Tables of Contents is an easier way to find what they are looking for. To reach this search by Table of Contents location:
 - a. Log into the OSB Member Site with your Bar number and password.
 - b. From the member dashboard, find the Sections button on the brown bar across the top of the page. This is a drop-down menu titled “Section Information.”
 - c. From this menu, choose “Section Web Sites.” This will take you to the Section home page. Scroll down a bit to see the alphabetical list of Sections and their websites. Click on the Estate Planning and Administration Website button.
 - d. Once you are at the Estate Planning and Administration Website, look to the menu bar at the left of the page. Click on the Newsletters button. You will now see the list of issues, shown as month and year, as hotlinks. Below that list, you will see the July 2012 issue with the Table of Contents. A majority of the previous issues dating back to 1986 are here.

If you run into difficulties while using these search tools, please feel free to contact me or another editor of the EP Newsletter. The Bar is currently undergoing some changes to their website design and programming, so some of what I have described may change. We will be in communication with the Bar during this process in an effort to retain the search capabilities we currently have for the EP Newsletter, if not to expand upon them.

Bonus Issue of the Newsletter

We have the opportunity to offer a Bonus Issue of the Estate Planning and Administration Section Newsletter this fall. The Editors feel that it is an extraordinary opportunity to publish a significant article that will be valuable to every section member as a resource document. The Bonus Issue is comprised of one, lengthy article titled “A Fiduciary Income Tax Primer” by Philip N. Jones. The article is too long to be included in a typical issue but is relevant to each of our practices. The Section’s Executive Committee supported our request and the Bonus Issue will be published during October, 2014.

The following excerpt is intended to whet your appetite. “The purpose of this paper is to summarize the

basic elements of the fiduciary income tax for the benefit of professionals (particularly attorneys and trust officers) who administer trusts and estates or who advise fiduciaries. Those professionals and their clients will regularly make administrative decisions that will impact the fiduciary income taxation of trusts and estates, and those decisions will also impact the individual income taxation of beneficiaries (including the taxation of trusts that are beneficiaries of estates, or are beneficiaries of other trusts). Because administrative decisions have a significant impact on income tax consequences, attorneys and trust officers who administer trusts and estates should familiarize themselves with the basics of fiduciary income taxation. Even if an accountant experienced with the fiduciary income tax is part of the professional team advising an estate or trust, attorneys and trust officers should be conversant on the subject of fiduciary income taxation, if only to spot issues that need to be discussed with the accountant.

This paper is devoted primarily to the federal fiduciary income tax, but discussion of Oregon law and the Oregon fiduciary income tax is also included.”

Oregon Estate Planning and Administration Section Newsletter

Editorial Board

Janice Hatton	Timothy R. Strader
John D. Sorlie	Sarah S. Keane
Philip N. Jones	Vanessa Usui

Questions, Comments, Suggestions About This
Newsletter?

Contact: Sheryl S. McConnell, *Editor-in-Chief*
(503) 857-6860 or e-mail: smconnellor@aol.com

Disclaimer

The articles and notes in the Oregon State Bar Estate Planning and Administration Section Newsletter may contain analysis and opinions that do not necessarily reflect the analysis and opinions of the Newsletter Editor-in-Chief, the Editorial Board, the Estate Planning Section Board or the membership of the Estate Planning Section. It is the responsibility of each practitioner to perform their own research and analysis and to reach their own opinions.