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Overview of Estate Tax Apportionment

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Too often, we review estate planning documents to find that they do not take into consideration which beneficiaries will pay the estate tax. This becomes problematic in the drafting process; it is a disaster if done incorrectly and an estate goes to probate or trust administration. The question in apportionment is quite simple: "Who bears the burden of paying the tax?" The answer, however, can be quite complex.

The problem is exacerbated by the fact that in most estate planning situations, attorneys do not even discuss apportionment of estate tax with their clients. Often, attorneys have standard language that deals with estate tax apportionment, which in some cases is the antithesis of the client's desired result.

The attorney must discuss estate tax apportionment with each client during the planning process. Often, the attorney will find that the client wishes to protect certain favored gifts from the incidence of estate taxes. For instance, certain specific bequests, intended to be paid in full, could be reduced or extinguished entirely because of tax apportionment. If this is a possibility, the issue should be evaluated in the planning process. In addition, the share of a surviving spouse or charity could end up being subject to estate tax, which reduces the bequest and causes unintended additional taxes.

The controlling Oregon statute is ORS 116.303-116.383, our state's adaptation of the Uniform Estate Tax Apportionment Act, adopted in 1969 by the Oregon Legislature. Expenses of administration are not covered by the Oregon Estate Tax Apportionment Act. Those are dealt with separately in the abatement statutes under ORS 116.113.

There are two basic methods of estate tax apportionment: outside apportionment and inside apportionment. Outside apportionment provides that all taxes will be apportioned not only among the takers of the probate assets, but also among the recipients of all non-probate assets of the estate that are includable in the gross estate for federal and/or Oregon estate tax purposes. ORS 116.303(1). Inside apportionment provides for full apportionment, but only within the confines of the probate estate or trust. Generally, when clients choose an inside apportionment scheme, the personal representative does not have the right to seek taxes from the recipients of property passing outside of the probate estate.

The Oregon apportionment statute, although clear in its definitions, is noticeably lacking in two respects. The statute does not cover the apportionment of generation skipping transfer taxes ("GST"), nor does it provide for apportionment of taxes incurred in connection with IRC § 4974 – the Excess Retirement Accumulation Tax.

Oregon is a full outside apportionment state; it apportions the tax among both probate and non-probate assets. However, the terms of a will or a trust

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can supersede the Oregon statute. In the absence of a superseding provision, apportionment is made "in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate." ORS 116.313. Whether the tax clause in the decedent's will overrides a tax apportionment statute is a question of testator's intent. Estate of Gordon, 510 NYS2d 815 (Sur 1986).

ORS 116.303(3) provides that a "person interested in the estate" is anyone receiving property as a result of the death of the testator. This is the basic rule of outside apportionment. Apportionment is determined based upon the values used in determining the applicable tax. ORS 116.313.

If values for federal and Oregon purposes are different because, say, an Oregon Natural Resource Credit ("NRC") may be applied, the taxes of each taxing entity are apportioned in accordance with the value each interested person's share bears to the total estate. In other words, if a NRC is taken against property for Oregon purposes, the recipient of the NRC property will pay a smaller proportionate share of Oregon tax than he or she would pay on a federal basis.

If a decedent has transferred assets to a revocable living trust and also has signed a pourover will, of utmost importance is coordinating the apportionment provisions between the two documents. If the will provides for payment of taxes out of the residue of the probate estate, and if the trust provides for apportionment of taxes out of the trust estate, then different beneficiaries may be paying different shares of taxes. The provisions must be conformed to each other. One problem is that, until recently, the statute allowed a will to override the statute, but made no mention of a trust. ORS 116.313. In 2015, the statute was amended to permit a revocable trust to override the statute. SB 379 § 32 (2015). If the drafter determines that estate tax apportionment rules should be determined under the trust, the will should provide that estate tax apportionment shall be determined in accordance with the terms of the trust.

A testamentary direction to pay debts, charges, taxes, and expenses of administration is not considered to be a direction against statutory estate tax apportionment. In the absence of a clear provision in the governing instrument identifying how taxes are to be apportioned, taxes will be apportioned under Oregon law. Oregon maintains a strong presumption in favor of true outside apportionment in the absence of clear language to the contrary in the governing instrument. In Matter of Bruun's Estate, 52 Or App 635, *rev den, Giles v. Bruun*, 291 Or 419 (1981), the Oregon court specifically provided that the burden for proving that estate taxes should not be apportioned is on the party challenging the presumption in favor of apportionment.

The Oregon estate tax apportionment rules give a break to gifts that do not generate tax. ORS 116.343(2) provides that exemptions or deductions allowed because of the relationship of certain beneficiaries (or by reason of the purpose of the gift) generally inure to the benefit of those beneficiaries. For instance, a gift to a surviving spouse for which a marital deduction is allowed will not be subject to estate tax apportionment. Nor will taxes be apportioned to property held between spouses as tenants by the entirety. Charities, for which a charitable deduction is available at the decedent's death, do not pay a share of estate taxes. An exception to the rule, however, is when the charitable interest is subject to a non-deductible prior present interest, such as in a charitable remainder trust (CRT). In this case, the tax on the prior income interest is chargeable to the principal of the CRT. ORS 116.343(2). Under ORS 116.343(3), the credit for tax on prior transfers, the credit for gift taxes paid, and the credit for foreign estate taxes are apportioned pro rata among the beneficiaries of the property subject to the respective credit.

It is clear that in writing the Uniform Estate Tax Apportionment Act, the drafters intended to provide the most equitable result possible. As a result, before coming up with a different apportionment scheme, the practitioner should think long and hard before attempting to undermine the estate tax apportionment statute. The effect of the Uniform Act is often referred to as "equitable apportionment." For an excellent discussion of equitable apportionment, see James R. Kanner, Tax Apportionment Clauses That Carry out a Client's Intent, 19 Est Plan 150, 150 (1992).

Often, however, clients supersede the estate tax apportionment law by providing that taxes shall be paid out of the residue of the estate. This may make sense in situations where the instrument provides for specific bequests of personal effects, cash, property, life estates, etc., that the client does not want to be impacted by their proportionate share of estate taxes. Instead, the client will provide that the bulk of the estate goes to certain named beneficiaries, such as children, under a residuary clause. In these cases, taxes should be charged from the residue of the estate. However, this is not a foregone conclusion. Careful evaluation should be made. That evaluation includes an estimate of the estate taxes, both federal and Oregon, and how they will be paid based upon the proposed estate planning scheme. Then the client will have a much better idea of which assets will be subject to tax and how much that tax might be.

A critical issue arises in cases where clients want to limit the gifts to their children to a certain amount and provide for the balance of their estate to be payable to charity. This often results in the incidence of additional unnecessary estate taxes because of poor planning. For example, an unmarried client with a $10 million estate wants to limit the gifts to her two children to $4 million each, with the balance going to charity. A plan that provides for pre-residuary specific bequests of $4 million to each of the children and the remainder going to the charity, with a residuary apportionment clause, could result in substantial unnecessary taxes. In other words, assuming a $5.43 million federal exemption, there will be $2.57 million subject to federal estate tax and $7 million subject to Oregon estate tax. The taxes attributable to these amounts will be charged against the share passing to charity, which reduces the value of the amount the charity will receive. This reduction results in a reduced charitable deduction, thereby causing increased estate tax and further reductions in the charitable share, which turns the tax calculation into a simultaneous equation. A better way of planning might be to provide a specific amount for the charity with the residue going to the children, and having the children's share pay the estate taxes under residuary apportionment. Another alternative would be to compute the estimated taxes on the share each child receives and to increase the share of each child by the amount of estimated taxes. The document could then provide for equitable apportionment under Oregon law.

Under ORS 116.323(1), the court in which a probate administration is proceeding may, upon petition, determine tax apportionment. Therefore, if a personal representative or trustee is confused about how to apportion taxes, he or she can always petition the probate court for a final determination.

If penalties and interest are incurred as a result of a late filed return or underpaid tax, those penalties and interest are normally apportioned in the same proportion as the actual tax. ORS 116.323(1). However, if the court finds that the penalties and interest resulted from the delay or negligence of the personal representative, the personal representative's fee or his or her inheritance may be surcharged in the amount of the penalties and interest. ORS 116.323(3). In addition, ORS 116.323(2) provides that if the court finds inequity in the normal method of apportioning interest and penalties because of special circumstances, the court may direct apportionment in any manner it deems equitable. In the event the court makes a final determination regarding apportionment, that determination is prima facie correct in a later suit to recover interest or penalties from any person who would be liable for his or her share. ORS 116.323(4).

IRC § 2206 provides that absent a direction to the contrary in a will or trust, if any part of a gross estate consists of life insurance proceeds includable in the gross estate and payable to a beneficiary other than a personal representative, the personal representative is entitled to recover from such beneficiary the tax attributable to the inclusion of such life insurance proceeds. This is consistent with Oregon law, in an outside apportionment scheme. If there is more than one life insurance beneficiary, the personal representative is entitled to recover from the beneficiaries pro rata. However, the weight of authority holds that there is no right to reimbursement from the insurance company itself. See Maurice T. Brunner, Annotation, Remedies and Practice Under Estate Tax Apportionment Statutes, 71 ALR 3d 371 (1976). In other words, the personal representative cannot require the insurance company to withhold tax. The difference between ORS 116.313 and § 2206 is that the Oregon law is an estate tax apportionment statute, and § 2206 is a right of recovery.

However, the courts have interpreted § 2206 very literally. In Estate of Tovrea v. Nolan, 875 P2d 144 (Ariz App 1993), even though the life insurance policy caused the entire value of the estate to be set aside for the payment of estate taxes, the claimants were unable to force the court to direct apportionment of tax to the life insurance recipient under § 2206. The court held that a direction requiring taxes to be payable out of the residue of the estate was perfectly clear, and did not allow taxes to be apportioned to other shares.

In addition to § 2206, the Internal Revenue Code provides rights of recovery in a number of other situations. Although a full analysis of these provisions is beyond the scope of this article, it is important to note that under § 2205, if a recipient of property pays tax that is attributable to the estate, the recipient has a right to recover that tax against the estate or recipients of the estate property. Under § 2207, absent a contrary provision in the will, a personal representative has the right to recover tax from a recipient of property over which the decedent held a general power of appointment under § 2041. IRC § 2207A provides that property over which a QTIP election was made at the first death will be subject to a right of recovery of tax by the surviving spouse's estate (and a special tax calculation is provided), unless the governing instrument of the surviving spouse requires that the tax be paid from a different source. Under § 2207B, if property is includable in an estate under § 2036, the personal representative has the right to recover federal tax from the recipient of such property. IRC § 2032A(c) provides that qualified heirs must pay additional estate tax on dispositions of property for which a § 2032A special-use valuation election was made earlier.

Under ORS 116.333(1), the personal representative has the right to withhold taxes from property otherwise distributable to a beneficiary. It appears that the personal representative can actually encumber or sell all or a portion of the specifically devised property to pay the tax. That statutory provision also provides that the personal representative has the legal right to collect tax from recipients of property passing outside of the estate. ORS 116.333(2) actually provides the personal representative with the right to secure a bond in the amount of the apportioned tax from a distributee if the personal representative distributes the property prior to the final payment of tax. However, that creates a dangerous situation. It is always best to ensure that all taxes are paid before assets are distributed to beneficiaries.

The personal representative is liable for the tax unless he or she has been relieved of liability pursuant to statute. IRC § 2204. Until such statutory relief has been granted, the personal representative is personally liable for the tax (even if discharged by the court), particularly if the personal representative has distributed the estate without fully paying the estate tax. See IRC § 6901(a). Under ORS 116.363, the personal representative is under no duty to bring any action against a distributee to recover unpaid tax until three months after a final determination of the tax.

Under § 2204, a personal representative has the right to request discharge from personal liability for the estate tax. If the tax return has been paid prior to or concurrent with the discharge request, the IRS has nine months to notify the fiduciary of the amount of tax due.

A similar rule exists under Oregon law. ORS 118.265. However, even if the personal representative is discharged from personal responsibility, the regular estate tax statute of limitations is not terminated, and tax may still be collected from the estate or the beneficiaries.

The Oregon apportionment statute applies to both federal and Oregon estate taxes. The statutes assume that a tax has been paid or will be paid, and then the statute determines upon whom the ultimate burden lies. In re Estate of McMahon, No. 2014AP2037, 2015 WL 1824109 (Wis App Apr. 23, 2015). The question of estate tax apportionment has been specifically left to each state to determine. Riggs v. Del Drago, 317 US 95 (1942); Estate of Ginn v. Almond, 427 SW3d 291, 294 (Mo App 2014).

A strong public policy favors statutory apportionment. In re Constr. of Last Will & Testament of Sued, 941 NYS2d 537 (Sur 2011). Therefore, courts generally have no equitable power to amend the apportionment formula provided by statute. The only exception is the clear mandate to the contrary by the testator. McCoy v. C.I.R., 97 TCM (CCH) 1312 (2009). A testamentary direction against apportionment has to be clear and unambiguous. A direction merely to pay taxes from the estate has been deemed to be a direction in favor of apportionment. Skaggs v. Yunck, 10 Or App 536 (1972). In Barlow v. Brubaker, 465 NW2d 276 (Iowa 1991), the decedent's will provided that all taxes relating to property passing under his will should be paid from the residue of the probated estate. The court ruled that this meant that all taxes attributable to non-probate property should be fully apportioned to the recipients of the non-probate assets.

Under Oregon law, taxes are to be apportioned among the persons interested in the estate in accordance with the ratio that the property each interested person receives bears to the total amount of property in the gross estate. ORS 116.323, 116.303(1). This applies to beneficiaries only, and not to creditors. Nor is apportionment generally charged to a person who receives an amount in compromise of a will contest. See In re Richheimer's Estate, 102 NYS2d 750 (Sur 1951). Taxes may also be apportioned against the donee of a gift that is later includable in the donor's estate, even if the donee has since died. See 42 Am Jur 2d Inheritance, Estate and Gift Tax § 288, Westlaw (database updated 2015).

It is important to note that the apportionment statute does not discriminate between liquid and illiquid assets. For instance, in In re Estate of Malpas, 9 Cal Rptr 2d 806 (App 1992), the court held that even though the beneficiary received only a life estate in the decedent's residence and no liquid assets whatsoever, that beneficiary was still required to pay tax attributable to his bequest. What is scary is the court's statement in that case that the will was prepared by an attorney who presumably knew the California apportionment rules and, therefore, intended that result.

If a will does not evidence a contrary intent, a direction to pay taxes from the residue of the estate means the residue of the probate estate, and not the remainder of the federal taxable estate. Grimes v. Grimes, 242 Or 158 (1965).

Drafting an apportionment clause should be done only after all the facts are known. The practitioner should also consider questions such as "What if a beneficiary dies and his or her bequest lapses?" and "What happens in the event of a will contest?" A properly drafted tax clause should address which taxes are being apportioned (estate tax, GST tax, state estate tax, and § 4974 additional tax on excess retirement accumulation). The clause should also address whether non-probate property will bear its burden of tax. In other words, should apportionment be "inside" or "outside"? The clause should address whether equitable apportionment should be considered. In other words, will marital gifts or charitable gifts be spared from their share of tax? If the client wants to allocate certain credits or other tax benefits to certain recipients, it should be specifically identified in the instrument. The apportionment language in the governing instrument should also identify whether or not the apportionment scheme applies to penalties and interest. If non-deductible claims, which are similar to or in lieu of bequests, are included, such as required payments to a spouse under a premarital agreement, the drafter should determine whether or not to apportion taxes to those gifts.

The safest alternative is to take one of three approaches:

- Require all taxes to be paid from the residue;
- Require all taxes on probate assets to be paid from the probate residue and all taxes on non-probate assets to be apportioned directly from those assets; or
- Require that taxes be apportioned in accordance with Oregon law.

The governing instrument should include language to the effect that if residuary apportionment is chosen and the residue is insufficient to pay taxes, the remaining taxes should be apportioned in accordance with Oregon law. The practitioner should also take into account the nature of gifts being received by recipients. In other words, if a closely held business is given to one child, and equalizing cash is given to another child, the child receiving the business must secure financing to pay her share of tax. The client should consider these issues.

For example, consider the clause "I direct that all taxes on my estate shall be paid from the residue." Although this seems straightforward, it creates all kinds of problems. The provision does not specifically define which taxes are to be apportioned. It does not specifically identify whether it refers to the probate estate or the federal taxable estate. It also does not define whether it is referring to the residue of the probate estate, the residue of the trust, or any other residue. A number of courts have attempted to construe these words, but there is little consistency among the decisions. In In re Hoffmann's Estate, 160 A2d 237 (Pa 1960), the court held that a direction that "any and all inheritance taxes" be paid from the decedent's estate did not apply to federal estate taxes, because the estate tax is an estate tax, and not an inheritance tax.

If the practitioner takes nothing more from this article, he or she should understand that estate tax apportionment must be thoroughly considered, and the provisions regarding estate tax apportionment should be clear and unambiguous. Anything short of this could create significant problems following a client's death.

Events Calendar

Eugene Estate Planning Council Meeting

When: January 12, 2016

Where: 5:30 – 8:00 pm
at Eugene Hilton

45th Annual Estate Planning Seminar

Sponsored by the
Estate Planning Council of Portland, Inc.

When: February 5, 2016

Where: Oregon Convention Center,
Portland, OR

Register: http://www.epcportland.org/events/register/12310

Eugene Estate Planning Council Meetings

Gwen Griffith, Tonkin Torp
Business Succession Planning and
Gifting of LLC Interests

When: March 8, 2016

Where: 5:30 – 8:00 pm
at Eugene Hilton

The Editors want to include announcements of upcoming events that may be of interest to our readers. If you know of an event, please send basic information, including point of contact information to Sheryl S. McConnell at *smcconnellor@aol.com* for inclusion in the next issue of the Newsletter.

Estate Planning Issues for Mandatory Reporters of Elder Abuse

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As of January 2015, attorneys joined the growing list of mandatory reporters of elder abuse, similar to being a mandatory reporter of child abuse. Lawmakers, attorneys, dentists, optometrists, and chiropractors have been added to ORS 124.050(9), which already included other professionals such as doctors, nurses, police officers, clergy, social workers, adult foster home licensees, and any public official who comes in contact with older adults in the performance of the official's duties.

As lawyers and advisers, we should be honored to assist our elderly clients. We are entrusted with the safety and security of a vulnerable population. With this in mind, one should appreciate that the added responsibility of being a mandatory reporter is not a burden. But this new requirement is a good reminder not to inappropriately prepare a quick will or power of attorney form for an elderly client for an easy buck. Failure to ensure the client is acting on their own can make things so much worse—not only worse for the client, but worse for you when you get dragged into the subsequent litigation.

Under ORS 124.060, if an attorney has reasonable cause to believe that any person 65 years of age or older has suffered abuse, or comes in contact with someone who has abused a person 65 years of age or older, that attorney must report or cause a report to be made in the manner required in ORS 124.065. But it is still important to maintain client confidentiality. An attorney is not required to make a report of elder abuse "by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client." ORS 124.060.

Elder abuse is defined at ORS 124.105 and 124.110 and includes financial exploitation for wrongfully taking the assets, funds, or property belonging to or intended for the use of an elderly person or a person with a disability. In evaluating "wrongful," turn to *Church v. Woods*, 190 Or App 112 (2003).

Some have expressed concern that the requirement to report abuse requires attorneys to step into the quicksand of determining whether a client has capacity. For capacity, review *In re Cook's Estate*, 231 Or 133, 135-36 (1962):

> We have held that no particular degree of acumen will serve as a standard for mental capacity and that each case is to be decided upon its own facts and circumstances.

While "no particular degree of acumen" is not specifically helpful, there are some consistent factors the courts have looked at in evaluating a person's capacity:

- Understanding the nature of the act in which he/she is engaged
- Knowing the nature and extent of his/her property
- Knowing, without prompting, the claims, if any, of those who are, should be, or might be the natural objects of his/her bounty
- Being cognizant of the scope and reach of the provisions of the document

"Evidence of incapacitation prior or subsequent to the time of the will's execution is relevant but it lacks the probative value of evidence revealing his mental condition at the material time. Its value diminishes the more removed it is from the crucial date. Thus, the testimony of attesting witnesses and, next to them, of those present at the execution of the will is to be accorded 'great weight' in cases of this kind." *Spencer v. Hamit,* 24 Or App 897, 905 (1976). Accordingly, in order to properly represent vulnerable clients, delve deeper. Ask more probing questions about:

- Family harmony
- Medical history
- Anyone who may object or cause problems with the estate
- Any will created in the past and how the new will differs
- The client's current living situation and with whom the elder spends most of his/her time

You need to help your client and you need to document, document, document, which may include:

- At time of signing, have the witnesses interact with the client and have them write down their impression of the client, what they were wearing, demeanor, etc.
- Does the Client appreciate the significance of the choices in the document?
- Does the Client have the ability to reason or rationally evaluate the choices in the document?
- Can the Client explain their choices by describing their thinking and sequencing?
- Can the Client problem solve?
- Does the Client demonstrate flexibility of thinking and reasoning?
- Does the Client demonstrate self-awareness and regulation?
- Does the Client demonstrate through words and actions the intent to act?

These are general reminders and guidelines to consider when assisting an elderly client, but the Oregon State

Bar mandatory training will provide additional examples and insights for attorneys to be better prepared to see the warning signs and take steps to protect elderly Oregonians.

Attorneys must complete one hour of MCLE training every three years regarding their duties to report elder and child abuse, but note that if your reporting year is in 2015 or 2016, you will need to acquire this credit in that reporting year; you do not get three full years to wait. And while this article touches on elder abuse through potential financial exploitation, elder abuse is not so limited in its scope. Emotional abuse, physical abuse, abandonment, neglect, verbal abuse, sexual abuse, and seclusion and restraint are more of the unfortunate manifestations of elder abuse that must be considered and evaluated.

The standard you walk past is the standard you accept, so do not allow vulnerable Oregonians to be mistreated. Attend the trainings. Learn more about signs of physical and financial elder abuse, what is "reasonable cause" for reporting, and who to report to and when to report. Speak up when you see signs of elder abuse.

This article by Victoria Blachly on Estate Planning Issues for Mandatory Reporters of Elder Abuse was published in substantially the same form in the January 2015 issue of the Elder Law Section Newsletter. Reprinted here with permission.

Elder Abuse Resources

Administration on Aging:
What Is Elder Abuse?
www.aoa.gov/AoA_programs/Elder_Rights/EA_Prevention/whatIsEA.aspx

Prevention of Elder Abuse, Neglect and Exploitation program
www.aoa.gov/AoA_programs/Elder_Rights/EA_Prevention/index.aspx

Multnomah County Adult and Aging Services:
Understanding and Dealing with Elder Abuse
www.oregoncounseling.org/Handouts/ElderAbuse.htm

Oregon Department of Justice Crime Victims' Services Division:
www.doj.state.or.us/victims/pages/elder_abuse.aspx

Oregon Department of Human Services:
Mandatory Reporting
www.oregon.gov/dhs/abuse/pages/mandatory_report.aspx

Reporting Hotline: 1.855.503.7233

Probate Modernization – Back to Work

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Effective January 1, 2016

Readers may want to review Susan Gary's article in the March 2015 issue of this Newsletter. That article explains the most significant changes in the Probate Modernization Work Group's proposal that became SB 379 and will be effective on January 1, 2016.

To read the entire Work Group report, go to the following link:

http://www.willamette.edu/law/centers/olc/groups/2013-2015/probate-modernization/pdf/ProbateReportSB379_3.pdf

The Oregon Law Commission's Probate Modernization Work Group re-convened in October 2015 and began work on Chapter 111. The Work Group may recommend that the Commission approve a bill for the 2016 legislative session, or may simply hold the work done on Chapter 111 and include it in a more extensive proposal for 2017. Either way, the Work Group's charge remains the same: to review all chapters of the Oregon statutes relating to probate and propose ways to modernize and improve the statutes. This article describes the Work Group's current thinking about proposed changes, but the Work Group has not reached agreement on a proposal. That is, this article refers to "the Work Group's proposal" for ease of explanation, but the project is ongoing. The Work Group met again on December 1, so changes may have been made at that meeting.

The Work Group's first bill, SB 379, made changes to Chapter 112. Enacted by the Oregon Legislature in the 2015 session, the changes take effect January 1, 2016. The Work Group will consider any needed technical corrections to Chapter 112 as part of its next bill.

Modernizing the Language

Chapter 111 includes definitions used throughout the probate statutes, and the Work Group has discussed several changes to modernize or clarify the definitions. For example, in the current proposal, the definitions of "devise" and "devisee" will no longer refer to bequest, bequeath, or legacy. The word "issue" will be replaced with "descendant," and the definition will appear as the definition for "descendant." The statute will continue to include a definition for "issue," which will simply say that "issue" means "descendant." The report will explain that no changes in meaning are intended.

Advancement and Satisfaction

The Work Group spent some time discussing the use of the terms “advancement” and “satisfaction.” In the common law, the doctrine of advancement developed to indicate when a gift received during life would reduce the share the donee would otherwise receive in intestacy. The terms “satisfaction” and “ademption by satisfaction” were used for a similar situation when the decedent died testate. The Work Group heard that most lawyers now use “advancement” for both situations, so the proposal amends the statute to reflect that common usage. Changes will be made in the definition in Chapter 111 and in the substantive provisions concerning advancement and what has been called satisfaction in Chapter 112. In addition, the concept of advancement will be expanded to cover will substitutes like beneficiary designations.

Funeral

The Work Group proposal adds “related expenses” to the definition without specifying the extent to which costs of a memorial service are included. Sections in other chapters refer to “reasonable expenses” and should cover the issue.

Jurisdiction

Chapter 111 contains rules about probate jurisdiction, and the Work Group discussed the fact that the structural situation in Oregon makes the statutes confusing. In most counties, the circuit court has probate jurisdiction, while in six small counties the county court has probate jurisdiction. The Work Group will propose some changes to the language in a few sections to make the language less confusing.

The Work Group discussed whether to specify that trust cases should go through the court sitting in probate, but concluded that given the differences among the counties and the courts, the individual courts should be able to make their own rules. For example, Multnomah County has a supplemental rule saying that the probate judge hears all trust cases, but in another county it might be more appropriate for another judge to hear some types of trust cases.

Probate Commissioner

The proposal amends ORS 111.175 to clarify that the judge can appoint a probate commissioner and one or more deputy probate commissioners, and that the judge will specify the duties and responsibilities of the persons appointed. The probate commissioner may make and enter orders and judgments on behalf of the court. Anyone objecting to an order or judgment entered by the probate commissioner can raise the objection with the judge within 30 days rather than filing a formal appeal. The judge can modify or set aside the order or judgment. Also, the proposal adds to ORS 111.185 the power to appoint court visitors.

The Work Group recognizes that it may need to revisit some of the definitions as it moves through the other probate chapters. In addition, the Work Group has flagged for later discussion questions about priorities for claims and clarification on the meaning of “claims of administration.”

Will Revocation

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A will can be revoked only in certain specified ways. In Oregon, will revocations are governed by ORS 112.285 through ORS 112.315. In fact, ORS 112.275 states that those statutes are the exclusive means to revoke a will. Some of the methods of revocation described in those statutes have resulted in extensive discussion in the Oregon case law.

The same degree of mental capacity is necessary to revoke a will as to execute one. *In re Bond’s Estate*, 172 Or 509 (1943); *In re Dougan’s Estate*, 152 Or 235 (1936).

The subject of will revocation can be divided into the following categories:

Revocation by Marriage

The subsequent marriage of a testator revokes all prior wills if the testator is survived by a spouse, with three exceptions. ORS 112.305; *Stevenson v. U.S. Nat. Bank*, 72 Or App 39 (1985).

The revocation caused by this statute is limited to situations where the testator is survived by a spouse. That condition was added to the statute in 1969. Or Laws 1969 ch 591, § 44. The legislative history states that the condition of survival by a spouse was added because the purpose of the statutory revocation is to protect the spouse, and there is no need to protect the spouse if the spouse predeceased the testator. Query: Does the statutory language (“a spouse”) refer to any spouse? What if a single testator signs a will that makes no mention of any spouse, later marries Spouse A, subsequently becomes single again, then marries Spouse B, and then dies? Was the will revoked? It appears that the statute would operate to revoke the will under those facts, since the purpose of the statute is to protect any spouse who might have survived the testator. The spouse being protected is not just the first spouse married after the execution of the will. The decedent might have married and divorced 10 successive spouses after signing a will. The eleventh spouse will get the benefit of the will revocation, if he or she survives the testator.

This statute is subject to three exceptions. The first exception is when the will evidences an intent that it not be revoked by subsequent marriage, or it was drafted under circumstances that indicate it was prepared and signed in contemplation of marriage. ORS 112.305(1). A will signed the day before the wedding most likely qualifies for this exception, but most practitioners take no chances: they include a sentence to the effect that "I intend to marry Julie Jones in the near future and this will shall not be revoked by that marriage."

The second exception to the revoked by marriage rule is not often encountered. It provides that a will shall not be revoked by a subsequent marriage if the couple enters into a prenuptial agreement that either makes provision for the spouse or states that the spouse is to have no rights in the estate of the testator. ORS 112.305(2). Few practitioners rely on that exception: Most arrange for their clients to sign a new will at the same time that a prenuptial agreement is signed, and the new will includes express language dealing with the impending marriage and the effect of the prenuptial agreement. For example, a typical provision might state: "I intend to marry Julie Jones in the near future, and this will shall not be revoked by such marriage. Julie and I have signed a prenuptial agreement, I intend for this will to comply with that agreement, and I am aware that this will might provide for Julie in ways that are more generous than required by the prenuptial agreement." As always, express language is superior to relying on circumstances and statutory presumptions based on those circumstances.

The third exception provides that marriage will not revoke a will if the couple entered into a registered domestic partnership prior to the execution of the will that preceded the marriage. This exception was added by SB 379, § 16 (2015) as an amendment to ORS 112.305.

Revocation by Divorce or Annulment

A divorce or annulment does not revoke a will in its entirety, but it does revoke those provisions in favor of the spouse and those provisions appointing the spouse as personal representative. ORS 112.315. According to the statute, the effect of a divorce is the same as if the spouse had predeceased the testator.

Revocation by Will

ORS 112.285(1) provides that a will may be revoked by another will. Most professionally prepared wills recite that they revoke all prior wills. But what happens if a will is silent on that subject? Does a will that appears to be a complete will, in that it purports to dispose of all of the testator's assets but is silent on the subject of whether it revokes prior wills, actually revoke all prior wills? The answer is that the prior wills are revoked. *In re Burke's Estate*, 66 Or 252 (1913).

Of course, in order for a later will to revoke earlier wills, the later will must be a valid will. If the later will is invalid for any reason, then it cannot revoke prior wills, under ORS 112.285(1) or any other statute.

In one Oregon case, a will was alleged to have been revoked by a subsequent will, even though the subsequent will could not be found. The court accepted evidence in the form of testimony by attorneys and witnesses that the subsequent will had been signed and that it included the normal recital that all prior wills were revoked. *Melhase v. Melhase*, 87 Or 590 (1918). But in *In re Zimmer*, 191 Or App 26 (2003), the proponents of revocation were unable to produce credible evidence that the decedent had signed a new will that had revoked the prior will.

One new development: The 2015 legislature added a new section to ORS Chapter 112, and that section states that a document that is not in full compliance with ORS 112.235 (which describes the formalities required for a will to be valid) may nevertheless be treated as if it had complied with the formalities if the proponent of the writing establishes by clear and convincing evidence that the decedent intended the document to constitute a will, a partial or complete revocation of a prior will, or an addition to (or alteration of) a prior will. SB 379, § 29. This new statute also includes procedural rules for establishing the decedent's intention regarding the document. Thus the bright-line test previously applied by the courts in accordance with ORS 112.235 is now a fuzzy line, and documents not in compliance with the formalities can now be treated as if they were in compliance. The purpose of this legislation was to overcome harmless error committed in the execution of a will, or to allow a will to be held valid if it is in substantial compliance with the formalities statute. For example, a document that clearly states its intention to constitute a valid will, yet it was witnessed by only one person, might now qualify as a valid will. In such a situation, the intention of the testator will be carried out. That's the good news. But the bad news is that a bright-line test no longer exists, and a degree of uncertainty has been introduced into probate practice. This new amendment applies not only to documents that purport to be a will, but also to documents that purport to be a partial or complete revocation of a will, or an addition to (or alteration of) a will.

Revocation by Destruction

A will maybe revoked by being "burned, torn, canceled, obliterated or destroyed," with the intent of revoking it. In order for the destruction to be effective, it must be done by the testator, or by another person at the direction of the testator in the presence of the testator, and that act by another person must be proven by two witnesses. ORS 112.285(2).

In order for the physical destruction to be effective, the act must be done with the requisite intent to revoke the will, a requirement that has generated considerable litigation over the years. When destroying a will, testators rarely expressly state their intent, so the courts are required to infer intent from the facts and circumstances of each situation. Each case is fact-specific and must be read very carefully before applying the result to any particular situation. In *Bond*, 172 Or 509, the will was held to have been revoked when the testator cut and removed parts of the will and wrote "nul" on the envelope containing the will. But in *In re Wagner*, 208 Or 207 (1956), the markings on the will were not sufficiently extensive to evidence an intent to revoke the will. In *In re Minsinger*, 228 Or 218 (1961), the testator drew lines through part of the will, but the will remained legible, and it was held to not have been revoked. The court noted that a partial revocation is not possible; a will is either entirely revoked or not at all. (But note that ORS 112.295 hints that a partial revocation might be possible, and see the discussions of SB 379 elsewhere in this article. ORS Chapter 129 now provides that a partial revocation can be accomplished by a subsequent document, as opposed to a physical act.)

In *In re McCue*, 254 Or 259 (1969), the testator mutilated the will by cutting from it the name of the beneficiary and the executor. The will was held to have been revoked. The court noted that in a case involving revocation by mutilation, the burden of proof is on the proponent of revocation. In *In re Brune*, 44 Or App 449 (1980), the testator obliterated all but one of the bequests in the will. The entire will was held to have been revoked, because the court held that a partial revocation is not possible. In *In re Langan*, 64 Or App 473 (1983), the will was revoked because the testator wrote "cancelled" in the margin of the will, drew lines through the title of the will, and then signed and dated the margin, all in the presence of a witness.

The moral of this story: If your client wishes to revoke a will by destruction, arrange for the destruction to be performed in the presence of witnesses who can testify that the testator stated an intent to revoke the will.

But here is the rub: The physical destruction of an otherwise-valid will does not revive the prior will. The prior will was revoked by the subsequent will, usually because the subsequent will so stated. And so the revocation was effective, because the subsequent will was valid. But destroying the subsequent will does not revoke the revocation of the prior will; the prior will is not revived. If a new will is not executed later, the testator would then die intestate. The reason: ORS 112.295 provides that a revoked will can be revived in only two ways: (1) re-execution of the revoked will, or (2) execution of a new will that incorporates the revoked will by reference. Destruction of a subsequent will is not listed as one of the two methods allowed to revive a revoked will.

This is an important distinction: If a will is revoked by destruction, the previous will is not revived, and the testator dies intestate. ORS 112.295. But if a will is held to be invalid due to undue influence or lack of capacity, then the invalid will did not validly revoke the prior will, and the prior will comes back to life. Actually, the prior will was never revoked in the first place, because the subsequent will was invalid and could not have validly revoked the prior will.

The fact that a will cannot be partially revoked by a physical act was codified by the legislature in 2015, when ORS 112.285 was amended by adding the following subsection:

> (3) A partial revocation of a provision in a will by one or more physical acts as described in subsection (2) of this section is not a valid revocation. One or more physical acts that affect one or more provisions of a will but not the entirety of the will are not effective to revoke those provisions, but clear and convincing evidence may show that the testator intended by the physical act or acts to revoke the entirety of the will.

SB 379, § 15.

This new subsection largely codifies existing Oregon law, but it raises the bar slightly: the proponent of revocation by destruction must prove an intent to revoke by clear and convincing evidence. Previously, the proponent of revocation merely bore the burden of proof.

Revocation by Loss

If the original will was in the possession of the testator, but at the time of the death the original will cannot be found, the Oregon courts have concluded that the will is rebuttably presumed to have been revoked by the testator through an act of destruction. That presumption can be overcome by evidence to the contrary.

This judicial presumption has generated considerable litigation in Oregon over the years. The first Oregon case on the subject was *In re Miller's Will*, 49 Or 452 (1907), in which the missing will was held to be valid because the presumption was overcome by evidence that the testator made deathbed statements to the effect that he still had a will. A similar result was reached in *In re Lieurance's Estate*, 181 Or 646 (1947), and in *In re Henson*, 98 Or App 189 (1989). In the latter case, the decedent had made statements about his existing will in the year prior to his death. In that case, the daughter who would have benefitted from the destruction of the will had access to the original will, and thus the testator was not the only person who might have destroyed it. But in *In re Penne*, 97 Or App 352 (1989), the will was held to have been destroyed despite a statement by the testator concerning his existing will 15 months before death. One factor in that case was the death of one of the beneficiaries, and the court speculated that the testator might have reacted to the death by deciding that he would prefer to die intestate, rather than under the provisions of his current will. In *In re McCoy's Will*, 49 Or 579 (1907), the court held that the proponent of the will bore the burden of proof to overcome the presumption of destruction, but the proponent was not able to overcome the presumption because the testator had made statements to the effect that he had destroyed his will. A similar result was reached in *Flanders v. White*, 142 Or 375 (1933), and in *In re Edwards*, 5 Or App 471 (1971). The same result was reached in *In re Salter*, 209 Or 536 (1957), because the testator had made statements to the effect that he had wanted to make changes to his will. In *Briscoe* and in *Salter*, the court reiterated that the burden of proof was on the proponent of the will.

In *Wagner*, 208 Or 207, the court noted that the application of the presumption does not require evidence of intent to revoke the will; the simple fact that the will was in the possession of the testator and is now missing is sufficient to raise the presumption. The same result was reached in *In re Peterson*, 202 Or 4 (1954).

The rebuttable presumption is one of the strongest reasons why an attorney should hold original wills in the attorney's office, rather than permitting the clients to hold the originals. If the client misplaces the original will, the presumption will arise, and evidence will need to be produced (if such evidence exists) to overcome the presumption. Such evidence is often hard to come by, since proving a negative (that the decedent did not destroy the will) is often difficult. On the other hand, if the attorney misplaces the original will, the presumption is not present, and a photocopy of the signed will can usually be probated with little or no difficulty by informing the court in the probate petition that the will was misplaced by the attorney, not by the decedent.

Many practitioners do not favor holding original wills in the attorney's office. They simply do not want the long-term responsibility of holding original wills for clients who might not ever return to the attorney's office. The risk, however, is somewhat low: if the attorney misplaces the original, a photocopy of the signed will can usually be probated, and so the damages incurred by the decedent's estate if the attorney misplaces the will are usually very small or nonexistent.

Dependent Relative Revocation

This common law doctrine affects the ability of a testator to revoke a will by destruction. Stated in its simplest form, the doctrine provides that if a testator physically destroys a will based on a mistaken belief, the physical destruction does not revoke the will. This doctrine is most often applied when a testator recently signed a new will and then destroyed the old will, believing that the new will is valid and believing that the new will effectively revoked the prior will. But if the new will turns out to be invalid (due to improper execution, undue influence, or lack of capacity), then the doctrine of dependent relative revocation will be invoked to disregard the physical destruction of the old will. That exact situation occurred in *In re Kirkeby*, 157 Or App 309 (1998), and the doctrine was applied to revive the old destroyed will.

The signing of a new (but invalid) will is the most common situation in which the doctrine is applied, but it is not the only situation. In *Flanders*, 142 Or at 389, the decedent destroyed his will, and then unsuccessfully attempted to distribute his assets based on a mistaken belief that he could do so by giving his niece an account book. The doctrine was applied to revive the destroyed will.

But in *Bond*, 172 Or at 556-57, the decedent destroyed the will based on an intent to prepare a new will at some date in the future. The court declined to apply the doctrine, because the future date was indefinite. Similarly, in *Dougan*, 152 Or 235, the testator obliterated her will because she no longer wanted her assets to pass to certain beneficiaries, and she intended to prepare a new will. The court concluded that the obliteration of the will was unconditional, and not dependent upon the signing of a new will. The court also noted that the application of the doctrine depends largely on the testator's intentions, and those intentions must be surmised by the facts and circumstances. This means that each case is fact-specific, and thus the application of the case law is never certain.

Tseng v. Tseng, 271 Or App 657 (2015)

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In *Tseng v. Tseng*, qualified beneficiaries of an irrevocable trust sued the trustee to obtain information about the administration of the revocable living trust that existed during the settlor's lifetime.

The lower court dismissed the action when it ruled that the qualified beneficiaries have no right to information about the trust's administration before the settlor's death. The Court of Appeals reversed that decision, citing specific language in ORS 130.710(9), which only restricts the right to information while the settlor is alive.

The Court relied on two unique aspects of this case for its opinion: the statutory language limiting restrictions only to a settlor's lifetime and the circumstances of the Tseng revocable living trust, which named individuals other than the settlor as co-trustees.

The Court ruled that when a revocable trust's trustee is not the same person as the settlor, qualified beneficiaries of the irrevocable trust which forms upon the death of the settlor have a right to obtain whatever material facts they need to protect their beneficial interests under the terms of the trust. Those material facts include any information about what occurred during the settlor's lifetime, when the revocable living trust was in existence.

In the opinion of the Court, because the settlor did not serve as trustee of his revocable living trust while he was alive, there exists a lack of assurance that the settlor authorized each and every step taken with trust assets during the settlor's lifetime. Conversely, if a settlor serves as trustee of his revocable living trust during his lifetime, there is no doubt that the settlor authorized the transactions because he acted as trustee of his own trust.

In this case, the settlor did not serve as trustee of his revocable living trust but instead named two co-trustees. There is no assurance that the acts of the co-trustees during the settlor's lifetime were in the control of the settlor or made with the settlor's approval. Therefore, the qualified beneficiaries of the trust are entitled to any material information regarding the actions of the two co-trustees undertaken at any time, including during the lifetime of the settlor, when the revocable living trust was in existence. Because ORS 130.710(9) allows access to information after the settlor's death, the Court's ruling is consistent with the current statutory framework.

Recent Eighth Circuit Court Decision Affects Special Needs Planning

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The Eighth Circuit Court of Appeals recently issued a decision that will require attorneys who prepare a certain type of special needs trust authorized by 42 USC § 1396p(d)(4)(A) ("first-party" or "payback" special needs trusts) to reassess how they create and fund such trusts. The case is *Draper v. Colvin*, 779 F3d 556 (8th Cir 2015).

Stephany Draper was 18 years old when she suffered a traumatic brain injury in a car accident in June 2006. After the accident, she signed a power of attorney for financial decisions authorizing her parents to "'fund, transfer assets to, and to instruct and advise the trustee of any trust wherein Draper is or may be the trustor, or the beneficiary.'" *Id.* at 558 (brackets omitted) (quoting power of attorney). Draper began to receive Supplemental Security Income ("SSI") payments in July 2007. In February 2008, her father entered into a settlement of Draper's claims for personal injuries in exchange for payment of $429,259.41.

Since the SSI resource limit is $2,000, receipt of this settlement would ordinarily have made Draper ineligible for continuing SSI benefits. To avoid this result, on the same day they settled her personal injury claim, Draper's parents created the Stephany Ann Draper Special Needs Trust. This trust was intended to qualify as an exempt special needs trust pursuant to the terms of 42 USC § 1396p(d)(4)(A). That federal statute authorizes the creation of an exempt special needs trust, defined as:

> A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a state plan under this subchapter.

Note that a disabled person cannot establish a trust for him/herself under subsection (d)(4)(A). The trust must be established by a parent, grandparent, legal guardian, or court.

In September 2008, Draper received a notice from the Social Security Administration ("SSA"), indicating that her trust was not exempt from being counted as a resource, and that she was no longer eligible for SSI benefits. SSA took the position that the trust was not exempt because it had been created by her parents acting in their capacity as agents under her power of attorney ("agents"), rather than in their capacity as her parents. This was so even though the parents had signed the trust as individuals and had not made any reference to the power of attorney within the trust document.

Draper appealed to an administrative law judge. The judge upheld the agency's decision, finding that Draper's parents had acted as Draper's agent when they established her trust. Draper appealed to the Social Security Appeals Council, and simultaneously applied for and received a state court order, retroactively modifying the trust to list the court, rather than Draper's parents, as settlor. The Appeals Council denied this request. Draper appealed to the federal district court, which affirmed the judgment of the SSA. Draper appealed that decision to the Eighth Circuit Court of Appeals.

The court began its review by noting that it would only reverse the SSA's decision if it was not supported by substantial evidence, defined as "less than a preponderance, but enough that a reasonable mind would find it adequate to support the [SSA]'s conclusions." *Draper*, 779 F3d at 559 (internal quotation marks and citation omitted). The court recited that "[i]f substantial evidence supports the [SSA]'s conclusions, this court does not reverse even if it would reach a different conclusion * * *." *Id.* (internal quotation marks and citation omitted).

Draper advanced two primary arguments on appeal. First, she argued that her parents had acted "as parents" when they established her trust, and not as agents under her power of attorney. Second, she argued that the subsequent retroactive state court order remedied any initial non-compliance with 42 USC § 1396p(d)(4)(A).

The court began its analysis by examining the text of subsection (d)(4)(A). The court focused on the requirement that the trust be established by a "parent, grandparent, legal guardian of the individual, or a court," and found the terms "parent" and "establish[]" to be ambiguous. The court concluded that the SSA had authority to interpret the statute, and had done so in Program Operations Manual System ("POMS") SI 01120.203B(1)(f) and (g). It further concluded the SSA's interpretation of the federal statute as set forth in the POMS was entitled to *Skidmore* level deference,[1] and that Draper was required to comply with the POMS provisions cited above. Since the federal statute does not permit the disabled individual to create his or her own special needs trust, POMS SI 01120.203B(1)(g) cautions that "a trust established under a POA will result in a trust we consider to be established through the actions of the disabled individual himself or herself." The parent must act *as a parent*, and not as agent for the disabled child.

The court interpreted the POMS section as requiring a two-part process. First, a parent, grandparent, guardian, or court must establish the trust. The POMS states that the parent can "seed" the trust with a nominal amount of the parent's own money, or the parent can create an unfunded or "dry" trust, if allowed by state law. Second, after the "seed" trust or "dry" trust has been established, assets of the disabled person may be transferred to the trust, either by a legally competent disabled person, or by another person with legal authority to transfer the disabled person's assets, such as an agent under a power of attorney.

Draper argued that her trust, at inception, satisfied the POMS criteria. Her parents, acting as parents, established a valid unfunded or "dry" trust. Draper emphasized that her parents had not referenced her power of attorney when they created the trust. They later acted in their capacity as Draper's agent to transfer her personal injury settlement proceeds to the trust.

The court rejected Draper's contention that her parents had established a "dry" trust. The court noted that, on the same day the trust was signed, it was funded with $429,259.41 in personal injury proceeds. The trust itself made this explicit, stating that "this trust is funded with the proceeds of the settlement of a liability claim."

Draper next argued that even if her parents had not created a dry trust, it was still valid because they acted in their individual capacity as parents when creating the trust—and not as her agents under the power of attorney.

Even though Draper's parents had signed only as individuals—they did not sign "John and Krystal Draper, POA for Stephany Draper"—the court concluded that they had acted as agents for Draper when they established the trust. The court first cited "traditional trust-law principles." The court stated that creation of a funded or "non-empty" trust requires more than just execution of trust documents, and that funding plays "a key role," citing the Restatement (Third) of Trusts § 2 cmt i (2003) for this proposition. 779 F3d at 563. In the case of a "funded" trust, the court also interpreted POMS SI 01120.203B(1)(g) and "traditional trust law" to require that someone with a legal interest in the trust assets be involved in the trust's creation. In other words, the court considered the funding of a "funded" trust to be inextricably linked with its creation.

The court went on to find that Draper's parents had no interest in the personal injury settlement proceeds, except as Draper's agent under the power of attorney. Under the

[1] *Skidmore v. Swift & Co.*, 323 US 134 (1944). Under the framework established in Skidmore, agency interpretations like POMS are entitled to deference because they "constitute a body of experience and informed judgment." *Id.* at 140. The amount of deference granted to such an interpretation depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*

court's logic, since the settlement proceeds were the source of the initial funding, the parents could only have created the trust in their capacity as Draper's agent. The court concluded that "substantial evidence" supported the SSA's contention that Draper's parents acted as agents for Draper when they established the trust. *Id.* The court affirmed the district court's holding that the trust was established by the parents as agents for their daughter, that the trust was a countable resource for SSI purposes, and that Draper was not entitled to SSI benefits.

This case is troubling for special needs planners because Draper's attorneys followed accepted practice in establishing Draper's trust. Experienced special needs planners know that 42 USC § 1396p(d)(4)(A) requires that an exempt trust be established by a parent, grandparent, guardian, or court, and that the disabled person may not establish his or her own special needs trust. Special needs planners are also aware that there has to be some mechanism available to fund the trust, such as a competent disabled individual, an existing power of attorney, or a legal conservator. Special needs planning attorneys did not consider that the SSA would effectively merge the establishment and initial funding of the trust into one action, but that is what the Eighth Circuit has done in *Draper.*

While an Eighth Circuit court case is not binding precedent in Oregon, it is still the opinion of a federal circuit court of appeals, upholding a position taken by the SSA. Meanwhile, Oregon special needs planning attorneys should consider taking the following protective measures:

1. In order to avoid having the SSA argue that the establishment of the trust is linked to the ultimate funding source (usually a personal injury settlement or an unplanned inheritance), the attorney should consider having the parent, grandparent, or legal guardian who establishes the trust "seed" the trust by putting a nominal amount (for example, $10) of the settlor's own money into the trust, as the initial trust funding.
2. The special needs planning attorney should consider omitting reference to the ultimate source of funding of the trust. Right now, it is common for attorneys to include a provision in the trust stating that "this trust shall be funded with proceeds of a personal injury settlement." This language caused problems for Draper, and supported the court's holding that the parents acted as agents when creating the trust. A better practice is to reference "seed" funds of $10 as the initial trust asset.
3. Consider adding explicit language to the special needs trust, stating that the settlor is acting in settlor's capacity as an individual parent of the beneficiary, and in no other capacity.
4. It is common to see powers of attorney prepared by experienced lawyers that give the agent authority to "establish and fund a trust with my assets pursuant to 42 USC § 1396p(d)(4)(A)." Consider updating this language to eliminate the agent's authority to "establish" a (d)(4)(A) trust, while retaining authority to fund a special needs trust.
5. Court-created trusts now appear to be a safer option than parent-created trusts.

Attorneys working in the area of special needs trusts should review the *Draper* case, and adjust their forms and procedures accordingly to avoid costly and protracted litigation with the SSA.

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