Published by the
Estate Planning
and Administration
Section of the
Oregon State Bar

Newsletter

Oregon Estate Planning
and Administration
Section Newsletter
Volume XXXII, No. 1
March 2015

Oregon State Bar
Estate Planning & Administration Section

Probate Modernization Proposal

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The Oregon Law Commission's Probate Modernization Work Group has prepared a bill revising chapter 112, the chapter of the Oregon statutes focused on intestacy and wills rules. The Oregon Law Commission ("OLC") considered the proposal at its February 18, 2015 meeting. The proposal amends chapter 112 to address issues created by technological and societal changes, to make the rules governing intestacy and wills more likely to carry out the intent of decedents, and to clarify provisions where the language in the current statutes is unclear. The Work Group will continue its work reviewing other probate chapters after the 2015 legislative session.

This article explains the most significant changes in the proposal. For more detail and further explanation, the reader can find Senate Bill 379-3 and the report of the Work Group to the OLC posted on the OLC website, http://www.willamette.edu/wucl/centers/olc/groups/2013-2015/Probate%20Modernization/index.html.

Negative Will

A new subsection added to ORS 112.015 will adopt the concept of a negative will. A testator will be able to execute a will stating that a named person should not inherit any of the testator's property, and even if gifts to other people fail, the disinherited person will be unable to take. Under current law the testator must successfully give property to someone other than the disinherited person, or the person may be able to take through intestacy.

Diligent Search

The proposal amends ORS 112.055 to clarify that the level of search required before an estate or a portion of an estate escheats should be appropriate under the circumstances, taking the value of the estate into consideration. The new language helps to explain that excessive amounts need not be spent searching for missing heirs.

Representation

The proposal changes the method for determining shares of issue by representation, found in ORS 112.065. Current Oregon law follows "modern per stirpes," a method in which shares are determined by starting at the first generation below the decedent where someone is alive. The proposal adopts "strict per stirpes," the traditional English model that begins the division into shares at the first generation below the decedent, regardless of whether a child survives at that generation. Shares are then further divided at each generation, with each deceased child's share being distributed to that child's issue. The Work Group made the change based on the belief that most people would prefer shares to be divided in stirpital lines – lines based on a share for each child – so that even if no child survived the decedent, each child's issue (the decedent's grandchildren) would divide the share allocated to the decedent's child.

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The change in representation will affect intestate distributions and will also affect the interpretation of "issue" and "descendants" when those terms are used in wills and trusts. A court interprets a will or trust based on the testator's or settlor's intent, so a court may look to prior law to interpret a document executed before the effective date of a new statute. Alternatively, the court may assume that the testator intended the new meaning rather than the old.

The intestacy statutes are default law, and anyone can write a will or trust distributing property as the person prefers. Lawyers should consult with clients and include a definition in a will or trust that matches the client's preference, rather than rely on the statute.

Adoption

The rules on adoption in connection with inheritance are left unchanged, except that the stepparent exception in ORS 112.175 is extended to include someone adopted by a parent's registered domestic partner ("RDP"). The stepparent exception provides that if one parent dies and a child is adopted by the spouse or RDP of the surviving parent, the child will continue to be a child of the surviving parent and will also continue to be a child of the deceased parent for purposes of inheritance through the deceased former parent.

Emancipated Minor

The proposal amends ORS 112.225 to provide that an emancipated minor may make a will.

Will Formalities

The proposal adopts a concept from Washington that treats the signatures of witnesses on a self-proving affidavit as signatures on the will. Sometimes witnesses mistakenly sign the affidavit and think those signatures are sufficient to validate the will. The new subsection in ORS 112.235 provides that a will executed in this manner will be considered validly executed.

Harmless Error

The Work Group considered the problem of testators who attempt to execute wills but fail because they do not understand the formalities or make a mistake in execution. The Work Group considered relaxing the formalities or authorizing holographic wills (permitted in a majority of states including Washington and California), but concluded that adopting the doctrine of harmless error would better protect testators and their heirs.

The doctrine of harmless error was developed to address the problems that occur when a person's testamentary wishes are thwarted due to mistakes in the execution of a will, a codicil, or a written revocation of a will. Harmless error requires a determination by the court, based on clear and convincing evidence, that the decedent intended a writing to be a will, codicil, or document revoking a will.

The benefit of harmless error over other strategies used to validate documents as wills is that a court will oversee the determination of whether a document should be admitted to probate as a will, with an emphasis on the intent of the decedent. The harmless error rule permits the court to fix a number of the problems that occur with will execution, but because the proponent must produce clear and convincing evidence of the decedent's intent, the change should not lead to a significant number of additional hearings. Most wills, codicils, and documents of revocation will still be admitted to probate based on compliance with the statutory execution requirements. These requirements will remain as a safe harbor, and any lawyer assisting a client with a will should follow those requirements when the client executes the will. The Work Group found no information to suggest that states that have adopted harmless error have seen a significant rise in proceedings to establish wills using the doctrine.

Although the concept of harmless error comes from the UPC, the Work Group added several additional provisions to the new section. The section requires the proponent of the document to give notice to heirs and devisees under prior wills and then provides for a 20-day period for any person receiving notice to object before the court makes its determination. Although the document cannot be admitted to probate before the end of the 20-day period, the court can appoint a special administrator if necessary. Also, if the court determines that the writing was a will, codicil, or revocation, the court must prepare written findings of fact supporting the determination and enter a limited judgment to that effect.

Incorporation by Reference and Acts of Independent Significance

The proposal adds two common law doctrines – incorporation by reference and acts of independent significance – to ORS 112.255. The proposal does not change Oregon law, because these doctrines are already used in Oregon, but codification may make the rules easier to understand.

Incorporation by reference allows a testator to refer to a document outside her will and have it be treated as part of the will as long as the document is in writing and in existence when the will is executed. Subsequent changes to the document cannot be given effect without a codicil to the will.

A testator can also refer to something that has significance apart from the will, and the description can result in identification of property to be given under the will or identification of persons to receive property. For example, a gift of "all the jewelry that I own at my death"

will be given effect even though the will itself does not identify the pieces of jewelry. Similarly, a gift to "the person employed by me as a housekeeper at the time of my death" will be given effect, even though the will does not specify the identity of the person receiving the gift. This doctrine applies when the identification has significance for reasons other than the testator's own testamentary wishes. The testator in the examples will buy jewelry or hire a housekeeper for reasons other than making a testamentary gift.

In Terrorem Clauses

The Work Group decided not to change Oregon's rule in ORS 112.272 that an in terrorem clause will be given effect unless the contestant has probable cause to believe the will was a forgery or revoked. The proposal adds language to clarify that if a will contest is successful, the in terrorem clause cannot be used against the successful contestant. The proposal also clarifies that an action challenging the acts of the personal representative is not a contest for purposes of an in terrorem clause. A court will decide whether other actions should be considered a contest for purposes of an in terrorem clause.

Revocation by Physical Act

Oregon does not permit partial revocation by physical act. The proposal codifies this common law rule in a new subsection in ORS 112.285. If a testator strikes out one clause or one beneficiary's name, the will and the clause remain valid. If it can be shown by clear and convincing evidence that the testator intended to revoke the entire will, then the physical act will revoke the entire will, even if it touches only one clause.

Revocation by Marriage

The proposal adds a subsection to ORS 112.305 that provides that if a person executes a will while in a registered domestic partnership, a subsequent marriage to the partner will not revoke the will.

Pretermitted Children

ORS 112.405 currently provides that if a testator executes a will when he has no children and subsequently has a child and dies without executing a new will, the child is entitled to an intestate share of the estate. The proposal amends this section to provide that if the will leaves all or substantially all of the testator's property to the other parent of the child, the will stands and the child does not receive an intestate share. This change seems likely to follow the wishes of most testators in this situation.

Slayer Statutes

The proposal makes a number of changes to the slayer statutes to clarify the rules. The one substantive change is that if a decedent and slayer or abuser held property as joint tenants with right of survivorship or in tenancy by the entirety, the property will be converted into tenancy in common property so that the decedent's heirs or beneficiaries receive one-half and the slayer or abuser receives one-half. Current law instead creates a life estate in the entire property for the slayer or abuser and gives a remainder in the entire property to the decedent's heirs or beneficiaries.

Posthumously Conceived Children

A new section will address the question of whether a child conceived after a person's death, using the person's gametic material (stored sperm or eggs), will be considered the person's child for purposes of the intestacy statutes. The impact of the change goes beyond intestacy, because terms like "children," "issue," and "descendants" used in a will or a trust are typically construed based on the intestacy statutes if the document does not provide its own definition. Although some documents provide a definition for these terms, many do not, or the definition provided does not cover this situation. In addition, whether a person is a dependent for social security purposes depends on whether the person is a child under the intestacy statutes.

Oregon law has been silent on this issue, and the proposal creates rules for when a posthumously conceived child will be treated as a child of the deceased provider of the gametic material. The Oregon proposal is similar to a statute adopted in Florida. The decedent must have provided for posthumously conceived children in his will, the decedent must have left a writing that provides for the posthumous use of the gametic material, and the child must be in utero within two years of the decedent's death. The person with control of the gametic material must notify the personal representative within four months of the decedent's death. Thus, if the personal representative is not notified within that time period of the possibility of a posthumously conceived child, the personal representative need not worry about a later disruption to the distribution of the estate.

Satisfaction of a Devise

The doctrine of advancements, ORS 112.135, provides rules about whether an heir's intestate share should be reduced by a gift made by the decedent during life. Similarly, ORS 130.570 addresses the issue of whether a gift outside a revocable trust should reduce a gift under the trust. The proposal extends the concept to wills. The doctrine is called satisfaction in connection with wills.

A new section provides that if a testator's will makes a devise to a beneficiary and the testator then makes a gift to the same beneficiary during life, the lifetime gift will reduce the devise under the will only if the testator or the beneficiary declares in writing that the lifetime gift is in satisfaction of the devise under the will. This section

addresses the problem that arises when a will makes a gift of money and then the testator makes a lifetime gift of money to the beneficiary. Under the new section, the lifetime gift will be in addition to the testamentary gift unless the testator or the beneficiary documents the intent that it reduces the testamentary gift.

Separate Writing or "Tangibles Memo"

The proposal adopts the use of a separate writing to distribute property without will formalities. The UPC includes this concept, and the idea has been adopted in other states, including Washington. The Oregon version will be limited to "household items, furniture, furnishings and personal effects," and cannot be used for "[m]oney, property used in trade or business and items evidenced by documents or certificates of title." Thus, use of a separate writing in Oregon will be more limited than use of a separate writing in states where statutes provide for a separate writing that can distribute "tangible personal property," which could include automobiles, planes, and other items. To be valid, the testator must sign the separate writing and the will must refer to the writing. Also, the writing must describe the items and the beneficiaries with "reasonable certainty."

A separate writing, often referred to as a "tangibles memo," can lead to evidentiary challenges as to what constitutes the last version or what the testator meant in describing items of property, but the Work Group noted that similar tools already exist. A testator might give her tangibles to the personal representative to be distributed in accordance with a list that provides precatory guidance. Also, a settlor of a revocable trust can use a tangibles list and amend it without amending the whole trust. Work Group members also noted that not having statutory authorization for a tangibles memo leads to partial or total revocation of wills, because testators attempt to revise gifts of tangibles made in the will and do so unsuccessfully, sometimes revoking the entire will.

Apportionment for Revocable Trusts

The proposal also amends ORS 116.313, a provision in the Oregon Uniform Trust Code that directs the apportionment of estate tax unless the decedent's will provides otherwise. The amendment adds a reference to a revocable trust of the decedent, so that if either the will or revocable trust contains language on apportionment, that instruction can be consulted and applied.

Treasury Finally Amends Circular 230 – The Crazy Disclaimers Are A Thing Of The Past

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As of June 12, 2014, with the exception of what are commonly known as "Marketed Opinions," tax advisors and their firms no longer need separate standards governing Written Advice. As a result of IRS Bulletin 2014-27, Section 10.35 of Circular 230 ("C230") has been eliminated. Consequently, the crazy, overused C230 disclaimers can go in the trash bin. No more emails to mom, dad, children, other family members, and/or friends with a federal tax disclaimer. These email recipients are likely relieved by this development. No longer will they find themselves looking for tax advice as a result of the prominent disclaimer in a message that has absolutely nothing to do with taxes. Representatives of the IRS and the Office of Professional Responsibility ("OPR") have vocalized glee about the elimination of C230 disclaimers. Karen Hawkins, Director of the OPR, told participants at a tax conference in New York in June of last year: "I'm here to tell you to get that jurat, that disclaimer, off your e-mails. It's no longer necessary." IRS Chief Counsel William Wilkins echoed the same sentiments when he said: "The Circular 230 legend is not merely dead, it's really most sincerely dead."

Treasury estimates this amendment to C230 and the removal of the corresponding compliance burden on tax advisors "should save tax practitioners [and/or their clients] a minimum of $5,333,200."

Thus, going forward, among other things specifically set forth in Section 10.37 of C230, tax advisors must:

- Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);
- Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;
- Use reasonable efforts to identify and ascertain the facts relevant to written advice on each federal tax matter;
- Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable;
- Relate applicable law and authorities to facts; and
- Not, in evaluating a federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

C230 still provides that any tax advisor with principal authority and responsibility for overseeing the firm's tax practice take reasonable steps to ensure that it has adequate procedures in place to ensure C230 compliance. Failure to take such "reasonable" steps subjects the tax advisor and his or her firm to discipline. Consequently, law and accounting firms still need to take C230 compliance seriously.

As a result of the June 12, 2014 amendments to C230, tax advisors (with the exception of "Marketed Opinions"):

- Are no longer required to use disclaimers; and
- Are no longer required to describe in Written Advice all of the relevant facts, including assumptions and representations, the application of law to the facts, and any conclusions.

It is hard to dispute that specifically including in Written Advice all relevant facts, assumptions, and representations, application of the law to the facts, and any legal conclusions, is a good and sound practice. Nevertheless, Section 10.37 of C230 now only requires that tax advisors consider the:

- Scope of the engagement;
- Type and specificity of the advice sought; and
- Appropriate facts and circumstances.

Based upon these factors, tax advisors are now required to determine the extent to which the relevant facts, application of the law to those facts, and conclusions should be included in the Written Advice. This amendment to C230, in a lengthy and verbose manner, tells tax advisors that they are no longer subject to specific and rigid information inclusion requirements in all Written Advice. Rather, they are required to look at all of the relevant facts and circumstances, giving due consideration to what they reasonably know or should know, to determine what should be included in Written Advice. No rigid, one-size-fits-all requirement exists any longer. According to Karen Hawkins, the government amended this component of C230, purposely making it a broad principles-based rule. It gives both the government and tax advisors lots of flexibility, allowing them to use common sense and sound practice standards when rendering Written Advice.

Despite this added flexibility, or perhaps because of it, tax advisors and their firms need to have a good understanding of C230, as amended, and implement policies to ensure compliance therewith. In light of the possibility of censorship, suspension, or disbarment from practice before the IRS, the stakes are high.

It should also be noted that written presentations provided to an audience solely for educational purposes are not considered Written Advice for purposes of C230. But beware – if a presentation is made with any level of intent to market or promote transactions, more onerous requirements are required. The IRS has not lost sight of history – it is keeping its eye on Marketed Opinions and will continue to closely scrutinize them.

The Service's new arsenal is strong. The 2014 amendments to C230 redirect the tax world back toward normalcy. Nevertheless, given the sanctions for noncompliance, C230 is still something tax advisors and their firms need to take seriously and strive to comply therewith.

The takeaways are threefold:

1. No longer may tax advisors place disclaimers on Written Advice that say things like "the IRS requires that we tell you" or "we are required under Circular 230 to tell you" that you may not rely upon this advice to avoid federal tax penalties. Those types of statements are no longer accurate and should be removed from Written Advice. No longer does the IRS or C230 require such a statement.
2. A good understanding of C230 is required by all tax advisors. Firms should have a C230 Committee in place to adopt good practice standards and policies, and to educate, monitor, and ensure C230 compliance by all members of the firm.
3. Despite the new amendments, compliance with Section 10.37 of C230 is still required and Marketed Opinions are still being closely scrutinized by the IRS.

Waiver of Personal Representative Fees

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Perhaps a personal representative's ("PR") compensation for estate administration duties is not ordinarily seen as a tax planning issue. There is a statutory right to claim compensation under ORS 116.173. Because entitlement to compensation is a right and not a mandate, the PR fees can be waived. Waiver creates its own set of tax issues.

In many cases, particularly when a decedent's family member serves as PR, and more particularly when that family member is also a devisee, compensation is waived. While that might be seen as a selfless act to preserve the pot for an estate's residual beneficiaries, it has potential unforeseen tax consequences for the PR.

Waiver of PR compensation presents two broad questions: (1) Does waiver result in a gift from the PR to the estate beneficiaries? And, (2) If the waiver is untimely, can the PR nonetheless be charged with income tax liability?

The IRS issued a series of revenue rulings in the 1950s and 1960s to clarify this issue. According to Revenue Ruling 66-167, 1966-1 CB 20, the "crucial test" as to whether waiver of a commission incurs income or gift

tax liability is whether the waiver "constitute[s] evidence of an intent to render a gratuitous service." If the waiver appears to be calculated to provide some benefit other than providing a gratuitous service, there is potential for income tax *and* gift tax liability.

Revenue rulings have been issued using the following three examples:

A. FACTS: PR entered into an agreement to serve for substantially less than the available statutory commission, waiving all the additional statutory amount to which he would be entitled. The agreement was entered into before any services were rendered and before any statutory entitlement to commission arose.

HELD: The difference between the agreed-upon lesser commission and the higher amount PR was statutorily entitled to was not includible as gross income and was not a gift to the beneficiaries. Rev Rul 56-472, 1956-2 CB 21.

B. FACTS: New York trustees waived their right to a class of statutory commission. However, such waivers were not executed until after the end of most years in which entitlement to commission arose. Circumstances and facts indicated the trustees had not intended to render gratuitous services.

HELD: Commissions, although waived, were includible in trustees' income tax for the taxable year when waived *and* execution of waivers effected a taxable gift of the commissions. Rev Rul 64-225, 1964-2 CB 15.

C. FACTS: Surviving spouse served as PR of deceased spouse's estate in which he and son were beneficiaries with equal shares. State laws did not limit use of estate funds for PR compensation, nor did they state whether failure to withdraw compensation was a valid waiver. PR served for three years with accountings filed in each year showing substantial income and dispositions. Within a "reasonable time" after commencing PR duties, PR waived statutory commission and acted consistently with intention to serve gratuitously.

HELD: No income or gift taxes for reasons discussed below. Rev Rul 66-167.

While not a bright-line rule, Revenue Ruling 66-167 permits an inference of intent to serve gratuitously when the fiduciary gives notice of waiver to at least one beneficiary within six months of appointment. There may be an implied intent to serve gratuitously where the fiduciary fails to claim fees or commissions at the times of filing usual accountings. Conversely, if the PR claims his or her statutory commission as a deduction on one or more estate, inheritance, or gift tax returns, that is evidence of intent to accept the commission, not to serve gratuitously.

For federal gift tax purposes, it is worth acknowledging the practical reality that, given the size of most probate estates that generate fairly modest PR fees, the PR can likely exclude the waived compensation under his or her IRC section 2503 annual exclusion (currently $14,000 per donee). Moreover, an IRS tax auditor might not give any notice to this issue. Still, the income tax auditor's roving eye should not be overlooked.

In summary, under the facts of prior cases, an indication soon after appointment of waiver of PR compensation, in addition to actions that demonstrate intent to serve gratuitously, will likely result in neither income tax nor gift tax consequences. But, if no indication of intent to waive is given until after completion of PR duties, there may be a strong assumption that the 11th-hour waiver is for avoidance of income tax to the PR and increased distribution to the estate beneficiaries. In that situation, the relevant taxes may be levied accordingly.

The Chair Speaks

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I am honored to follow Jeff Cheyne as Chair this year. He worked tirelessly for the Section last year, and his continued tireless work as immediate past Chair may save me from embarrassing myself.

This year is an unusually busy legislative year for our Section. We have sponsored two bills that are long in the making (SB369, relating to access to digital assets, and HB 2331, relating to technical changes to the Uniform Trust Code). Both were extensively work shopped and drafted through the Oregon Law Commission. As of this writing HB 2331 has already passed out of the House, 59-0-1, and is headed to the Senate.

The Bar's Public Affairs Program has flagged many other bills that would impact Oregon estate planners, and the Executive Committee is actively tracking and analyzing those bills. We have voted to oppose HB 2221, which would make powers of attorney much more onerous to use, and HB 2647, which is a telecoms-industry-drafted alternative to our sponsored digital assets bill.

Legislative work is one of the primary responsibilities of the Executive Committee. The other is our twice-annual CLEs. I hope to make the legislative work more transparent and accessible to Section members at large through more affirmative communication on the listserv. We will also be sending Section members a link to a short online survey so the Executive Committee can get feedback on what we are doing well, and what we can improve.

TIPS FROM A TRIAL ATTORNEY
You Are Served with a Subpoena for Client Files

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This is the first in a periodic series of columns on litigation issues for estate planning and administration attorneys. Our practice area touches on families, property, expectations, and, frequently, disappointment. This combination can lead to litigation. Portland litigation attorney Karen Thompson has agreed to write short, informational columns about litigation-related topics commonly encountered by estate planning and administration attorneys. The goal is to raise issues and provide initial direction to help in your analysis of these topics. Occasionally, as with this first column on subpoenas, there are times when it is appropriate and even recommended that you consult with a trial attorney or the Professional Liability Fund for assistance.

If you have a particular litigation topic you would like to see covered in a future column, contact Karen Thompson directly at karenruththompson@gmail.com, or if you are interested in writing an article on a litigation topic, please contact the Newsletter Editor, Sheryl McConnell, at smcconnellor@aol.com.

You find out when you open today's mail – your client has been sued: *In re the Rich Dude Trust, Goldie Digger, plaintiff, vs. Sam Son, individually and as Trustee, defendants.* At the same time that he filed the lawsuit, the plaintiff's attorney sent you a *subpoena duces tecum* requesting 20 categories of documents. What should you do? You don't know what's at stake; you don't even have a copy of the complaint. Do you have to give up the trust administration file, or the prior attorney's file? Do you need to provide a chronology of events? How much time do you have to comply?

ORCP 55 is the rule governing subpoenas for nonparties like the attorney for the defendant. You have only 14 days in which to answer the subpoena or to file an objection per ORCP 55 B.[i] Your client, as the defendant, gets 30 days to answer the complaint, and may not have hired a defense attorney yet.

Can anybody help me?

Good news – you're not alone. You don't have to wait until you're named in a lawsuit to call the PLF. "Call us ASAP," advises Bruce Schafer, Claims Manager for the PLF. "Even the weirdest subpoenas are routine for the PLF's attorneys. Plus," warns Schaefer, "you could be the target of the litigation and not even know it." Most of us have not read the fine print in our professional liability coverage documents. However, the coverage is broader than you might imagine, so give them a call if you have questions.

Is your file privileged?

The scope of discovery is broad. A party may inquire as to any nonprivileged matter that is relevant to the claim or defense of any party. ORCP 36 B(1).

Your PLF-appointed lawyer will sort through your files to determine whether the subpoena requests privileged documents requiring an objection. The PLF-appointed lawyer will ask you whether you want him to go out in front, directly contending with the opposing attorneys, or to support you behind the scenes so others are unaware you have help responding to the subpoena. Your decision may depend on how combative the opposing attorneys are, or how comfortable you are with confrontation.

Just don't pretend that you know this stuff – it can get complicated. In *Frakes v. Nay*, 254 Or App 236 (2012), the estate planning attorney, who was also the trustee, objected to producing the estate-planning file as subject to the lawyer-client privilege under Oregon Evidence Code 503.[ii] But OEC 503 protects only "confidential communications," not an estate planning attorney's files in general. Nay had served as the attesting witness for the trusts. The court of appeals pointed out that pursuant to OEC 503(4)(d), the lawyer-client privilege does not apply to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness.

Remember, the privilege belongs to the client. If your client wants to waive the privilege and give the plaintiff everything she asked for, that's your client's choice.[iii] In that case, you won't need the PLF. The best practice in this situation is to document your client's consent to avoid a later claim by that same client for malpractice or a complaint for an ethics violation.

Can I bill my client for my time in responding to the subpoena?

Yes. However, consider if there is a chance that your client blames you for the fact that he got sued. If this might be the case, I recommend that you skip the billing in the interest of maintaining a good client relationship.

What if my client wants to pay me but can't afford to?

ORCP 55 B gives the court discretion to order the requesting party to pay the reasonable costs of production when the subpoena is unreasonable and oppressive or causes undue hardship on the recipient. It works like this:

1. The recipient (you) objects to the subpoena before the 14 days are up. At this point you do not have to provide the documents;

2. The requesting party must then schedule a hearing with the court to move for an order to compel production; and
3. At the hearing, you can move to quash the subpoena or ask the court to deny the motion unless and until the requesting party pays the reasonable costs of producing the documents.

Don't raise red flags.

If the attorney that served you with the subpoena suspects that you're holding back documents, he may get suspicious. For example, your timesheet billed for emails that you didn't produce – red flag. Your client's CPA firm produced shared documents that you somehow overlooked – red flag. You didn't print out documents that are stored on an old hard drive – red flag. The opposing attorney may accuse you of intentionally hiding documents that you did not produce. Burying the other side in paper, although time consuming, is better than getting sued under a theory of conspiring with your client to commit some type of undue influence.

Do I have to produce a chronology of events?

You only have to produce existing documents – you do not have to create anything new in response to the *subpoena*.

Now back to that pesky *subpoena duces tecum* that arrived in today's mail.

It is the responsibility of each practitioner to perform their own research and analysis, and to reach their own opinions.

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[i] ORCP 55 B provides (in summary) A subpoena may command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

[ii] 40.225 Rule 503. Lawyer-client privilege.
(1) . . .
(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: (a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;(b) Between the client's lawyer and the lawyer's representative; (c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest; (d) Between representatives of the client or between the client and a representative of the client; or (e) Between lawyers representing the client.
(3) The privilege created by this section may be claimed by the client, a guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.
(4) There is no privilege under this section: (a) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; (b) As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; (c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer; (d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or (e) As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

[iii] The privilege created by this section may be claimed by the client, a guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

UTCR eCourt Updates Affecting Probate Practice

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The Oregon Judicial Department is squarely in the middle of a four-year plan of implementing eCourt – eventually including mandatory electronic filing of all documents and pleadings – in all state courts. In each county, the new Oregon eCourt Case Information (OECI) system goes live first, with mandatory eFiling for all Bar members implemented a couple of months later. Yamhill County was the first to implement eCourt in June 2012, and it is now in place in Benton, Clatsop, Columbia, Crook, Douglas, Jackson, Jefferson, Josephine, Linn, Marion, Multnomah, Polk, and Tillamook Counties. The other circuit courts, as well as the Tax Court, will go live in 2015 and 2016. When fully implemented in each county, it allows practitioners to file documents and pay filing fees through a simple web-based interface. The rules regarding eFiling are promulgated under UTCR Chapter 21, and those rules, as well as helpful user information, can be found at http://courts.oregon.gov/oregonecourt/Pages/index.aspx.

While eCourt and eFiling have long been familiar to regular practitioners in the Court of Appeals and federal courts, the implementation of this new technology has created interesting issues for the old-fashioned probate courts and their practitioners. Since its initial rollout, the UTCRs have been modified to acknowledge boots-on-the-ground issues raised by the probate court's special practical and statutory procedures. For example, when the original eFile UTCRs were promulgated, they required eFiling of virtually all documents. Of course, probate petitions and small estate affidavits, by statute, must be filed with the decedent's original will, if it is available. So, UTCR 21.070(3)(j) now requires that any eFiled document that includes a document that by statute must include an original – such as a will or a death record – include a .pdf scan of the original document, with the original document to be filed conventionally within seven days.

Another source of concern for probate practitioners has been the document retention requirement at UTCR 21.120. As originally promulgated, it required the eFiling practitioner to retain *for ten years after filing* the original paper form of any eFiled document containing the original signature of another person. Of course, in any probate proceeding, this might include petitions, inventories, affidavits of search for creditors, accountings, and the like. This would have the practical effect of shifting the burden of long-term maintenance of probate files from the archives of the courts to the storage facilities of individual practitioners, many of whom are working to "go paperless." Practitioners suggested that a more reasonable retention period would be thirty or sixty days, and an amendment shortening the retention requirement to "no less than 30 days" passed the UTCR Committee in October 2014.

More recently, practitioners have encountered the practical death of the "confirmation card." The eCourt system presently makes no provision for notice to practitioners of the signature and entry of their proposed and eFiled Orders and Judgments. Whether a given circuit court retains the ability and willingness to fill out a confirmation card submitted by counsel varies from county to county. The net effect is that lawyers and their staff must regularly log on to OECI and check the status of their submitted Orders and Judgments. While an ordinary civil lawsuit might include few if any Orders, and only one Judgment terminating the matter, probate cases as a matter of routine may include many Orders and Judgments after the initial Limited Judgment appointing the fiduciary. The OJD-OSB eCourt Task Force is aware of this issue and its heavy burden on probate practitioners, and we can hope it will be responsive to the concerns raised regarding records retention and original documents.

NOLS Legislative Review Project: Recommended Changes and a Request for Feedback

Susan N. Gary
University of Oregon School of Law
Reporter, Oregon Probate Modernization Work Group

The Legislation Committee of the Nonprofit Organizations Law Section (NOLS) of the Oregon State Bar is reviewing Oregon's nonprofit corporation statutes (ORS chapter 65) with the goal of preparing a bill for the 2017 Oregon legislative session. The Committee will recommend changes to update and clarify language in the statutes.

The Committee began its work by establishing two guiding principles. First, the Committee will recommend changes that clarify or improve the functioning of the statutory framework, but the Committee does not plan to make policy changes to the legal structure for nonprofit corporations in Oregon. Second, the Committee decided that with limited exceptions a nonprofit corporation should be able to draft its own governance rules through its Articles and Bylaws. Certain rules will be mandatory and will be clearly identified as such in the statutes. Most rules will be default rules and will apply if the Articles and Bylaws of a nonprofit corporation are silent on the issue.

The Committee's report of its initial recommendations is posted on the NOLS website, in the Spring 2015 newsletter. These initial recommendations deal primarily with sections on members and directors. The Committee seeks comments, suggestions, and input from anyone who practices in nonprofit law or otherwise works with nonprofit corporations in Oregon. Comments can be sent to Susan Gary at sgary@uoregon.edu.

Retired Attorneys Can Stay in the Section

Retired attorneys who are "inactive" and still paying the annual $125 Bar dues and those who "resigned in good standing" (not Form B) can continue to be members of the Estate Planning and Administration Section. Those retired attorneys simply need to pay the annual $20 section membership dues in order to continue to receive the Estate Planning and Administration Section Newsletter and to continue to participate on the Section ListServ.

What's New

State of Oregon, Long Term Care Ombudsman, Appellant, v. Phyllis M. Symons and Molly K. Smith, Respondents, 264 Or App 769 (2014)

Ryan Flatley
Scarborough McNeese
Lake Oswego, Oregon

The Court of Appeals considered whether Smith, the guardian and conservator of Symons, was required to disclose the residential address of Symons to the Long Term Care Ombudsman (LTCO).

In 2002, Symons suffered a stroke, which left her severely disabled. As a result of the stroke, Symons had difficulty speaking. Smith—who was an attorney, registered nurse, and court-approved fiduciary—replaced the previous guardian and conservator.

Symons initiated a complaint against her residential facility, with the help of another attorney, and the LTCO opened an investigation into Symons' concerns. The LTCO invoked its authority under ORS 441.109(1), which provides that the LTCO shall "[i]nvestigate and resolve complaints made by or for residents of residential facilities about administrative actions that may adversely affect their health, safety, welfare or rights, including subpoenaing any person to appear, give sworn testimony or to produce documentary or other evidence that is reasonably material to any matter under investigation."

Smith moved Symons to another residential facility. The transfer was not a smooth one, and a Department of Human Services representative concluded that the original residential facility interfered with Symons' transfer and caused Symons stress.

After the transfer to the new residential facility, Smith notified the court of the transfer but did not disclose to the court the location of the new residential facility. The LTCO learned of the transfer, and filed with the court a Petition to Disclose Protected Person's Information, asking the court to require Smith to disclose the location of Symons.

The LTCO argued that the LTCO's investigation authority and responsibility under ORS chapter 441 required the court to compel the location of Symons. Smith presented the court with a letter from a psychologist who was also a court-appointed visitor. The psychologist supported Smith's refusal to disclose the location of Symons because the LTCO's involvement with Symons' case in previous instances caused Symons emotional distress and was expensive.

Smith asserted that her obligation as guardian was to promote Symons' best interests, and that obligation superseded the LTCO's statutorily mandated duties. The trial court agreed with Smith.

The Court of Appeals held that, while both Smith and the LTCO had the objective of protecting Symons' welfare, the LTCO's involvement was indirect while the guardian's was immediate and direct. The Court of Appeals reasoned that it would not make sense to require the LTCO to perform its duties if such performance would prevent the guardian from performing its duties.

The Court of Appeals affirmed the ruling of the trial court, agreeing that Smith did not need to disclose the residential address of Symons.

Wyers et al., Appellant, v. American Medical Response Northwest, Inc., Respondent, 268 Or App 232 (2014)

Ryan Flatley
Scarborough McNeese
Lake Oswego, Oregon

Defendant-respondent American Medical Response Northwest, Inc. (AMR) employed Lannie Hazard as a paramedic. Hazard used his position as a paramedic to sexually abuse several female patients while the patients were being transported to the hospital. The victims were joined together as plaintiffs in their suit against AMR, and each plaintiff brought a claim for abuse of a vulnerable person under ORS 124.100. The trial court held there was no genuine issue of material fact and granted AMR's summary judgment motion.

Each of the plaintiffs was abused in separate incidents by Hazard, and most of the plaintiffs reported the incident to AMR. Management of AMR took no substantial action against Hazard as a result of the abuse reports, and eventually made a perfunctory report of the abuse of one plaintiff to the police. AMR's report to the police failed to disclose Hazard's identity or the existence of other similar reports of abuse that AMR had received. Police independently discovered incidents of abuse and arrested Hazard, and Hazard pled guilty to abusing several victims.

Plaintiffs and AMR disputed whether AMR "permitted" Hazard to engage in the abuse of plaintiffs under ORS 124.100(2) and (5). AMR's motion for summary judgment argued that it had not permitted the abuse based upon its interpretation of the text, context, and legislative history of ORS 124.100(2) and (5). The Court of Appeals rejected each of AMR's arguments in detail.

ORS 124.100(2) provides, "A vulnerable person who suffers injury, damage or death by reason of physical abuse or financial abuse may bring an action against any person who has caused the physical or financial abuse or who has permitted another person to engage in physical or financial abuse."

ORS 124.100(5) provides, "An action may be brought under this section against a person for permitting another person to engage in physical or financial abuse if the person knowingly acts or fails to act under circumstances in which

a reasonable person should have known of the physical or financial abuse."

The Court of Appeals stated that the knowledge requirement in the statutes was akin to reckless conduct rather than mere negligence. The defendant, according to the Court of Appeals, must know of the existence of the requisite circumstances at the time of the alleged "permitting," and rejected AMR's argument that ORS 124.100(5) required each plaintiff to establish that AMR subjectively knew Hazard was abusing each plaintiff at the time the abuse was occurring.

The Court of Appeals held that a plaintiff may bring an action under ORS 124.100 against a defendant for permitting another person to engage in physical abuse if the defendant knowingly acted or failed to act when the defendant was aware of the substantial risk that the abuser would abuse the plaintiff.

The Court of Appeals further held that there was sufficient evidence to create a genuine issue of material fact at trial, and reversed and remanded in favor of plaintiffs.

Oregon Health Authority v. Cue, 268 Or App 350 (2014)

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In this case, the Oregon Court of Appeals held that a claim made by the Oregon Health Authority (OHA) against a probate estate could not be disallowed as untimely under ORS 115.005(2) because OHA only received notice of the estate under ORS 113.145, and not as specified under ORS 115.003(3).

A personal representative disallowed a claim presented by the OHA for services rendered to the decedent. There is no argument as to whether the services were provided. Instead, the personal representative asserted that the claim was disallowed because it was presented more than four months after OHA became aware of the probate proceeding.

The personal representative timely provided notice to OHA of the probate proceeding under ORS 113.145. The notice under ORS 113.145 is the information to devisees, heirs, interested persons, Department of Human Services, and OHA. This notice consists of the following information: the case number and title of the court of the proceeding; the name of the decedent, date of death, and place of death; whether a will has been admitted to probate; name and address of the personal representative and attorney; the date of the appointment of the personal representative; and a statement that the rights of those receiving this notice may be affected and that rights may be barred if action is not taken within four months of the mailing of the notice.

OHA filed suit to challenge the disallowance of the claim. The trial court granted summary judgment to the personal representative, finding that OHA's claim was not timely and should be disallowed because OHA did not assert its claim within four months of receiving actual notice under ORS 113.145. The trial court agreed with the personal representative that if notice is sent under ORS 113.145, then notice under ORS 115.003 is not required.

OHA appealed the trial court decision. The Court of Appeals examined whether providing notice to OHA under ORS 113.145 was sufficient to run the four-month creditor claim time period such that OHA's claim was not timely presented. The Court found that providing notice under ORS 113.145 was not the equivalent of the personal representative providing notice of the right to assert a claim under ORS 115.003.

ORS 115.003 provides that the personal representative shall provide notice to each person known by the personal representative to have or assert a claim against the estate (excepting those persons whose claims have already been presented, accepted, or paid in full, or for a claim that is merely conjectural). The information that is to be provided is very similar to that provided under ORS 113.145, but differs in one key respect: the notice under ORS 115.003 must include a statement that claims against the estate not presented to the personal representative within 30 days of the date of the notice may be barred.

Therefore, the Court concluded that OHA should have received a notice under ORS 115.003 that provided the period of time in which to assert a claim against the estate. Since it did not receive the notice under ORS 115.003, and the personal representative was aware that OHA had a potential claim against the estate, its later submitted claim fell into the category of ORS 115.005(3)(b). Under ORS 115.005(3)(b), if a claim is presented by a person who did not receive a notice under ORS 115.003, and who should have received a notice under ORS 115.003, then that person's claim is not necessarily barred at the end of the four-month credit claim period.

The Oregon Court of Appeals reversed and remanded the case.

Tilton v. Lee (In re Estate of Blakee), 255 Or App 244 (2013)

Barbara Smythe
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Tilton v. Lee, 255 Or App 244 (2013), underscores the authority of probate judges to reduce attorney fees in probate cases without a hearing. The bottom line is that Oregon statutes provide courts with ample authority for doing so.

In August 2008 the appellant, Tilton, was appointed to administer an intestate estate consisting of one piece of real property located in Curry County and some cars and other personalty. In October 2009, Tilton's counsel submitted

a first annual accounting and an affidavit of attorney fees requesting $16,051. The court denied the fee request in a letter opinion focusing on concerns that the petition reflected tasks that could have been accomplished by the personal representative or delegated to workers charging a lower rate, and – perhaps as a result – the total amount of fees requested seemed “high for an estate of this size and complexity.” *Id.* at 247.

Tilton did not respond to the letter but filed a second and final petition for attorney fees, which requested $22,729.40, in August 2010. The court responded with a letter reiterating and expanding on its previously stated concerns and also describing fees in excess of $10,000 as “quite rare” in the absence of contested issues. *Id.* at 248. The court concluded that a reasonable amount for fees and costs would not exceed $9500.

Tilton then filed an objection to the court’s finding that fees were limited to $9500 and requested a hearing. The trial court denied the request for hearing, modified the proposed judgment to reflect a fee of $9500, and signed it. Following a motion for reconsideration upon which the court took no action, Tilton appealed.

On appeal, Tilton argued (1) the court abused its discretion by substantially reducing the fee award and by refusing to grant a hearing on the issue of fees, and (2) the court erred in relying on the judge’s “personal knowledge” rather than on-the-record information regarding the typical cost of a probate in the community.

In response to the allegation of abuse of discretion, the Court of Appeals unequivocally endorsed the trial court’s latitude in determining fees based on the factors set forth in ORS 116.183, including customary fees in the community. The court also clarified that a trial judge’s refusal to approve a fee petition does not constitute a *sua sponte* objection and thus does not trigger a right to an evidentiary hearing under ORS 116.103.

As to the trial court’s reliance on its own impressions as to the “average” fee awarded in probate matters in the jurisdiction, the Court of Appeals appeared potentially sympathetic to the personal representative’s concerns but held that the issue had not been preserved for appeal because Tilton had not raised it with the trial court.

Regarding its original concerns about law office billing rates being charged for non-legal work, the trial court suggested that, where this type of work appears in a fee petition, the benefit to the estate, rather than the time spent by legal staff, should govern the amount awarded, and the Court of Appeals found this to be within the framework mandated by ORS 116.183. *Id.* at 252.

This case serves as an endorsement of the authority of probate judges to exercise broad discretion in reviewing fee petitions. It also suggests that practitioners who wish to be paid for tasks that could be done by someone else or otherwise result in an unusually large bill should explain in their fee petition how their actions benefited their client.

Events Calendar

Central Oregon Estate Planning Council Quarterly Meetings

When: May 12, 2015 / August 11, 2015 (Annual Social) / September 29, 2015 / November 10, 2015

Where: 5:30 – 7:30 pm at Awbrey Glen Golf Course, Bend

Register: Contact Cheryl Puddy, Associate Program Officer, The Oregon Community Foundation (541) 382-1170, CPuddy@oregoncf.org

Advanced Estate Planning CLE

Sponsored by the Estate Planning and Administration Section

When: June 12, 2015

Where: Oregon Convention Center, Portland

Register: https://www.osbar.org/cle

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 to Sheryl S. McConnell at smcconnellor@aol.com for inclusion in the next issue of the Newsletter.

Oregon Estate Planning and Administration Section Newsletter

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