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Dealing with Contraband in Oregon Estates and Trusts

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Previous editions of this newsletter have discussed the unique issues that arise when an estate contains unusual assets, particularly assets the possession and transfer of which is heavily regulated, such as drugs[1] or guns.[2] Inspired by these previous articles and one author's experience with finding African elephant ivory among the personal effects of a former World War II general, this article will consider the legal issues related to the disposition of various types of contraband, and will provide practical tips for the estate planner or probate lawyer who discovers that a client owns such items.

For purposes of this article, contraband includes such items as controlled substances, regulated taxidermy, other items made from endangered species, stolen items, and the like.

Initial Considerations

At the outset, the Personal Representative of an estate or the Trustee of a trust, as well as his or her legal counsel, must consider the legal and ethical rules applicable to the administration of contraband items, particularly whether mere possession or transfer of a contraband item would give rise to civil or criminal liability. A brief discussion of the relevant rules follows.

Fiduciary Duty to Collect and Protect Property

Both Personal Representatives and Trustees have a duty to collect estate or trust assets, and adequately protect those assets from loss or damage.[3] Nevertheless, the relevant statutes also include certain work-arounds in the case

1 *See* Wendy Goffe, "Clients and Cannabis: Don't Let an Estate Plan Go Up in Smoke," Oregon Estate Planning and Administration Newsletter, October 2017; *see also* Wendy Goffe, "Planning for Unique, Illiquid, Illegal, and Unusual Assets: Good Grief, Grandma's Got a Gun Collection! Part 2," ALI ABA Estate Planning Course Materials Journal, October 2016.[not verified]

2 *See* Brian Thompson, "Firearms in Estate Administration," Oregon Estate Planning and Administration Newsletter, September 2016; Brian Thompson, "Firearms in Estate Administration Part II – NFA Firearms," Oregon Estate Planning and Administration Newsletter, December 2016; Brian Thompson, "Firearms in Estate Administration: Gun Trusts," Oregon Estate Planning and Administration Newsletter, March 2017; *see also* Wendy Goffe, "Planning for Unique, Illiquid, Illegal, and Unusual Assets: Good Grief, Grandma's Got a Gun Collection! Part 1," ALI ABA Estate Planning Course Materials Journal, August 2016.[not verified]

3 *See* ORS 114.225, 114.265, 130.690.

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of estate- or trust-owned contraband. For example, while ORS 114.225 states that a Personal Representative "shall take possession and control of the estate of the decedent" (emphasis added), ORS 114.305(7) authorizes a Personal Representative to "[a]bandon burdensome property when it is valueless, or is so encumbered or is in a condition that it is of no benefit to the estate." Further, ORS 114.265 adds an element of reasonableness to the duty to preserve estate assets: "A personal representative *** shall *** preserve *** the estate *** as expeditiously and with as little sacrifice of value as is reasonable under the circumstances" (emphasis added).

In the case of a trust, the Oregon Uniform Trust Code similarly modifies the duty to collect and protect trust assets in certain circumstances. ORS 130.690 explicitly includes a reasonableness element to the duty, stating that "[a] trustee shall take reasonable steps to take control of and protect the trust property" (emphasis added). Further, ORS 130.725 authorizes a trustee to:

> reject additions to the trust property from the settlor or any other person *** [a]bandon or decline to administer property of no value or of a value that is not adequate to justify its collection or continued administration *** [and] [a]void possible liability for a violation of environmental law by *** [d]eclining to accept property into trust or disclaiming any power with respect to property that is or may be burdened with liability for violation of environmental law ***.

Therefore, in the case where simple possession of an item could expose the fiduciary or the estate or trust to civil or criminal liability, it would seem fairly clear that Oregon probate and trust law permit the fiduciary to abandon or decline to accept the item. Such abandonment or disclaimer appears to be best practice.

Legal Ethics

For the lawyer representing the fiduciary, it is also important to keep in mind the Oregon Rules of Professional Conduct ("ORPC").

ORPC 1.2(c) provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Further, ORPC 8.4(a) states that it is professional misconduct for a lawyer to:

> (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (3) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice law; [or]
>
> (4) engage in conduct that is prejudicial to the administration of justice ***.

Under the ORPC, then, it is clear that a lawyer may not assist a client in taking possession of contraband in an estate or trust, or in transferring that contraband, when such possession or transfer would constitute illegal conduct.

What is the lawyer to do when a client tells the lawyer that he or she is planning to take (or already has taken) possession of or transfer illegal contraband as part of the administration of an estate or trust? Again, the ORPC provide guidance.

While ORPC 1.6 generally provides that a lawyer may not reveal information relating to the representation of a client, ORPC 1.6(b)(1) allows (but does not require) a lawyer "to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime." Notably, this provision of the ORPC gives broader license for lawyer disclosure than does the corresponding rule in the ABA Model Rules of Professional Conduct, which only permits the disclosure of criminal intention if the crime is one "that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."[4] As applied to the case of contraband discovered in an estate or trust, it would seem that the ORPC would permit disclosure to prevent a crime, where the ABA Model Rules would not.

If, however, the client informs the lawyer that he or she has already taken possession of or transferred contraband (and such possession or transfer is a crime), the lawyer is not authorized to reveal such information under ORPC 1.6.

Privacy

The discovery of contraband, in some circumstances, may be embarrassing to the decedent, his or her family, or other estate or trust beneficiaries. Interestingly, unless the lawyer previously represented the decedent,[5] it is unclear whether the lawyer has a duty of confidentiality with respect to information embarrassing to the decedent or the beneficiaries. As noted above, a lawyer may not reveal information relating to the representation of a client, which includes "both information protected by the attorney-client

4 *See* ABA Model Rule 1.6(b).

5 *See Swidler & Berlin v. U.S.*, 524 US 399 (1998) (finding that lawyer's duty of confidentiality survives client's death).

privilege under applicable law, and other information *** the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[6] Importantly, Formal Ethics Opinion 2005-62, issued by the Oregon State Bar, provides that in the case of an estate administration, the client is the Personal Representative, and not the decedent or the beneficiaries of the estate. In such a case, it is unclear whether ORPC 1.6 would prevent the disclosure of information that is embarrassing to someone other than the Personal Representative.

Nevertheless, a lawyer or a fiduciary that discloses embarrassing private information may be liable in tort for such disclosure. A detailed discussion of Oregon privacy law is beyond the scope of this article; however, it is clear that Oregon recognizes a right to privacy, and that the right to privacy protects an individual from public disclosure of embarrassing private facts.[7] Whether this right to privacy extends beyond death, however, has yet to be determined by the Oregon Courts.[8]

Disposal of Contraband

When fiduciaries (and their lawyers) encounter unusual assets in the course of administering an estate or trust, their first question should be "is this item legal or illegal?" Even if it is legal to possess and transfer a given item, the possession or transfer may be highly regulated. If the fiduciary determines that it is not legal to possess or transfer the item, it must be surrendered to the appropriate authorities (bearing in mind the ethical duties discussed above). If the fiduciary determines that it is legal to possess or transfer the item, he or she should take great care to comply with all relevant laws and regulations.

Guns and related legal (and illegal) weapons are not discussed here because they have been covered in detail in previous articles.[9] A brief, non-exhaustive, discussion of several other types of contraband follows. Please note that there are multiple state and federal laws and regulations that apply to the categories mentioned below. A complete discussion of the complex legal and regulatory systems is beyond the scope of this article. The summaries below are intended to serve as a starting point for a lawyer's independent research.

Controlled Substances[10]

The Federal Controlled Substances Act establishes five categories (or "schedules") of controlled substances.[11] Schedules II-V list many prescription drugs, including various types of narcotics and other controlled substances with a medical use. Substances listed on Schedule I are deemed to have a great potential for abuse and "no currently accepted medical use" in the U.S.

Generally, it is illegal to possess a Schedule II-V controlled substance without a prescription.[12] A fiduciary may dispose of prescription drugs, including Schedule II-V controlled substances, pursuant to the Secure and Responsible Drug Disposal Act of 2010. Under rules established by the U.S. Drug Enforcement Administration ("DEA"), a person who legally obtained a controlled substance for his or her own use or the use of a member of his or her household (called the "ultimate user") may dispose of such items at a "drop box" maintained by law enforcement, or, in some cases, via a "take-back" or "mail-back" program for collecting prescription medications.[13] A "person lawfully entitled to dispose of a decedent's property" may dispose of any pharmaceutical controlled substance (i.e. a legally prescribed Schedule II-V substance) if the decedent "was an ultimate user who died while in lawful possession of a controlled substance."[14]

In contrast, Schedule I controlled substances (including cocaine, heroin, LSD, and marijuana) are illegal under federal law in nearly all contexts. There is no DEA-approved, official "drop box" or similar program for disposal of Schedule I drugs. It is a crime in Oregon to manufacture, possess, or deliver most federal Schedule I controlled substances (with certain exceptions for marijuana).[15] It also is illegal under federal law to manufacture, possess, or distribute a controlled substance.[16] This puts the fiduciary in a difficult position – he or she is unable to legally take possession of Schedule I controlled substances (which may be found inside a residence or other property that the fiduciary must sell or transfer). The fiduciary also should not transport the illegal drugs to a collection facility or law enforcement agency, or transfer them to another party. Rather than attempting to dispose of Schedule I controlled substances, best practice is for the fiduciary to contact local law enforcement and follow their instructions. A lawyer

6 *See* ORPC 1.0(f) (emphasis added).

7 *See Simpson v. Burrows*, 90 F Supp 2d 1108 (D Or 2000).

8 As mentioned above, best practice dictates that a fiduciary decline to administer contraband when the possession or the transfer of such contraband is illegal. Such a practice should prevent the fiduciary and the lawyer from being required to report the contraband's existence in a public probate proceeding. Disclosure of the item on an estate tax return generally would not be a matter of public record.

9 *See supra* n.2.

10 For additional discussion of controlled substances, *see supra* n.1.

11 The controlled substance schedules can be found on the Drug Enforcement Administration's website at https://www.deadiversion.usdoj.gov/schedules/#list (Dec. 2017).

12 21 USC § 844.

13 For a list of prescription collection box locations in Oregon, *see* the Oregon Health Authority's website at http://www.oregon.gov/oha/ph/HealthyEnvironments/DrinkingWater/SourceWater/Pages/takeback.aspx (last visited Jan. 9, 2018).

14 21 CFR § 1317.30(b).

15 *See generally* ORS ch 475.

16 *See generally* 21 USC § 841, *et seq.*

counseling a fiduciary in this situation should be mindful of his or her ethical duties to the client, and may want to consult with criminal defense counsel before contacting law enforcement.

Stolen Property

Possession of stolen property can be classified as theft under Oregon law. "A person who comes into control of property of another that the person knows or has good reason to know to have been lost, mislaid or delivered under a mistake as to the nature or amount of the property or the identity of the recipient, commits theft if, with intent to deprive the owner thereof, the person fails to take reasonable measures to restore the property to the owner."[17] Theft by receiving occurs when a person "receives, retains, conceals or disposes of property of another knowing or having good reason to know that the property was the subject of theft."[18] In this context, "receiving" includes "acquiring possession, control or title, or lending on the security of the property."[19]

The sale, interstate transportation, and trafficking of certain stolen property also is a violation of federal law.[20] Thus, if a fiduciary has knowledge (or ought to know) that property in an estate or trust was lost by or stolen from another person, the fiduciary should decline to take possession of the property. If appropriate under the ethical and legal principles discussed above, the fiduciary may report the stolen property to local law enforcement.

Antiquities

Beginning with the Antiquities Act of 1906,[21] Congress has sought to protect archaeological sites and artifacts, as well as other cultural and natural resources on public lands. There are several federal laws covering antiquities from abandoned shipwrecks to archaeological finds to Native American graves.[22] The Archaeological Resources Protection Act of 1979 ("ARPA")[23] requires a permit for any excavation on public or American Indian lands, and governs the removal, possession and curation of any "archaeological resource" discovered there.[24] Purchasing, selling, transporting, and trafficking in items excavated or removed in violation of any law is a crime under ARPA.

If a fiduciary suspects that an item in an estate or trust was stolen or otherwise acquired in violation of ARPA or any other federal or state law, it is important to refrain from selling or transporting the item unless and until the fiduciary can confirm that doing so would not violate any applicable law. The decedent's documentation of the purchase, insurance schedules, appraisals, or other documents related to the item may be useful in this regard. Options for disposing of problematic antiquities may include forfeiture to an appropriate government agency or donation to a museum or school. Disposal of such items should be undertaken in consultation with the relevant federal and/or state agencies, being mindful of the ethical obligations described above and the potential need to negotiate a waiver of any civil penalties and/or immunity from potential criminal prosecution.

Endangered Species

Under Section 9 of the federal Endangered Species Act,[25] it is illegal to import, export or "take" an endangered species without appropriate permits.[26] "Taking" includes hunting, harming, killing, trapping, and collecting. It also is illegal to "possess, sell, deliver, carry, transport, or ship, by any means whatsoever" an endangered species "taken" within the United States or from the ocean, and to sell or offer for interstate or foreign sale any endangered species, regardless of its source.[27]

A discussion of the many other federal conservation laws is outside the scope of this article, but please see the discussion of the application of the 1940 Bald and Golden Eagle Protection Act and the 1918 Migratory Bird Treaty Act in the Sonnabend case discussed in the Taxation section below. Items including certain orchids, corals, shells, sea turtle products, ivory, tiger fur (and most large cat fur), certain sea mammal furs, certain live animals, and taxidermy or feathers, as well as medicinal preparations made from certain species, are all restricted or prohibited from importation and may be illegal to possess or sell.

A separate set of laws applies to possession and intrastate commerce involving endangered species within Oregon. Under Oregon wildlife laws, certain species of plants and animals are protected and regulated within Oregon.[28] A list of endangered species under Oregon law may be found on the Oregon Department of Fish and Wildlife website.[29]

17 ORS 164.065.
18 ORS 164.095(1).
19 ORS 164.095(3).
20 *See*, *e.g.,* 18 USC ch 113.
21 16 USC §§ 431-433 (1906).
22 *See generally* the National Historic Preservation Act, 16 USC § 470, *et seq.*; the Archaeological and Historic Preservation Act, 16 USC §§ 469-469c; the Abandoned Shipwreck Act, 43 USC §§ 2101-2106; the Native American Graves Protection and Repatriation Act, 25 USC §§ 3001-3013.
23 16 USC §§ 470aa-470mm.
24 Archaeological resources are "any material remains of human life or activities which are at least 100 years of age, and which are of archaeological interest." 43 CFR § 7.3.
25 16 USC ch 35.
26 A list of endangered animals and plants can be found on the U.S. Fish and Wildlife Service's website at https://www.fws.gov/endangered/species/us-species.html (June 19, 2017).
27 16 USC § 1538(D).
28 ORS 496.171, *et seq.*
29 Oregon Dep't of Fish & Wildlife, Threatened and Endangered Species (June 27, 2017), http://www.dfw.state.or.us/wildlife/diversity/species/threatened_endangered_species.asp.

Taxation

Even if the fiduciary is able (or legally required) to donate or abandon the decedent's contraband, under Section 2033 of the Internal Revenue Code, the contraband may be included in the decedent's taxable estate. Section 2033 provides, "The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death" (emphasis added). Therefore, any contraband in the decedent's possession is likely includable on an estate tax return, even if a fiduciary later donates or abandons it.

Further, Treas. Reg. § 20.2031-1(b) provides, in relevant part:

> The value of every item of property includible in a decedent's gross estate *** is its fair market value at the time of the decedent's death ***. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

Accordingly, the value of any item of contraband must be reported as its fair market value at the time of the decedent's death on any required estate tax returns.

A 1991 Technical Advice Memorandum[30] extensively analyzes estate tax valuation of illegal items. That TAM involved the estate of Joseph Meador, a veteran who had stolen a number of art objects from Quedlinburg, a medieval German town, while serving in World War II. After Meador's death, his family members, aware of their relative's questionable ownership of the art objects, attempted to sell some of the medieval manuscripts from the stolen collection. Given that the objects were clearly illegal, Meador's family was unable to access a legitimate market for sales of items. Nevertheless, after altering one manuscript's chain of title, Meador's siblings successfully sold it to a German rare book dealer for an initial value of $3 million, subject to a further bonus if the dealer resold the manuscript for profit.

The IRS determined that all of the items should be included in Meador's estate, and considered how to value the items. After examining cases related to narcotics,[31] the IRS concluded that relying on an illicit market to determine the value of illegal items was accepted practice.

30 IRS TAM 9152005.[not verified]

31 The TAM references several cases, including: *Publicker v. Comm'r*, 206 F2d 250 (3d Cir 1953) (valuing large diamonds); *Browning v. Comm'r*, 61 TCM (CCH) 2053 (1991) (valuing marijuana based on the wholesale street market value); *Jones v. Comm'r*, 61 TCM (CCH) 1721 (1991) (determining the fair market value of cocaine using the "retail street value" of "uncut" cocaine); and *Caffery v. Comm'r*, 60 TCM (CCH) 807 (1990) (valuing marijuana using the retail street market for low-quality marijuana).

Nevertheless, the IRS took quite a different approach in valuing a Robert Rauschenberg sculpture owned by Ileana Sonnabend, an art collector who died in 2007. The sculpture, entitled "Canyon," includes a stuffed bald eagle. The 1940 Bald and Golden Eagle Protection Act and the 1918 Migratory Bird Treaty Act make it a crime to possess, sell, purchase, barter, transport, import or export any bald eagle, whether alive or dead. If the estate had sold the sculpture, it would have committed a federal felony. As a result, Sonnabend's estate reported "Canyon" at zero value on the estate tax return.

The IRS took a different view, and valued "Canyon" at $65 million, imposing a $29.2 million tax liability for the estate, as well as an $11.7 million undervaluation penalty. To arrive at the $65 million value, the IRS considered the value of comparable works on legitimate art markets. But this approach was flawed, precisely because the comparable works cited in the IRS appraisal were not subject to the same legal restrictions as "Canyon." According to a New York Times interview with a member of the IRS Art Advisory Panel (the body tasked with determining "Canyon's" fair market value), the Panel ignored relevant facts that would unquestionably affect hypothetical market transactions for "Canyon." As reported in the interview, "the group evaluated 'Canyon' solely on its artistic value, without reference to any accompanying restrictions or laws *** [and] did not consider any hypothetical black-market buyer."[32]

The comparable sales approach is a decided departure from the Meador TAM – a departure that is perhaps warranted with little concrete data about the value of "Canyon" on an illicit art market. Nevertheless, valuing the painting at $65 million solely with respect to the piece's artistic significance inappropriately disregards how legal regulation affects market value, and flies in the face of the "willing buyer, willing seller" standard's assumption that both parties have "reasonable knowledge of relevant facts."

Ultimately, the IRS and the estate settled the dispute in 2013, agreeing to a zero-value for "Canyon." The estate paid no estate tax and no undervaluation penalty, and donated the piece to the Museum of Modern Art in New York. Consistent with the zero valuation, the estate did not take a charitable deduction.

Tips for the Estate Planner

As discussed above, when a decedent owns items of contraband, complicated issues arise as to the proper disposition, as well as the estate taxation, of such items. These fiduciary headaches could likely be avoided by the decedent disposing of the contraband items prior to death. Of course, a pre-death donation would not obviate the necessity of a fair market valuation should the donor wish to take a charitable deduction.

In any event, fiduciaries and their lawyers should take care to abide by all state and federal laws that govern contraband or other highly regulated assets. Where possession, transport, or sale of an item is illegal, a lawyer should advise the fiduciary client accordingly and should guide the client to a lawful disposition of the item and accurate reporting of all assets on any required estate tax returns.

32 Patricia Cohen, Art Sale Value? Zero. The Tax Bill? $29 Million., The New York Times, July 22, 2012.[need page cite for quote]

Basis Reporting and Consistency

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Historically, there was some debate whether the beneficiary of an estate was required to use, for income tax basis purposes, the values shown on the estate tax return, or whether the beneficiary could produce evidence to overcome those values. *See, e.g.,* Rev Rul 54-97, 1954-1 CB 113. Effective for estate tax returns filed after July 31, 2015, beneficiaries of estates and trusts are now required to use a basis that does not exceed the value as finally determined for federal estate tax purposes. IRC § 1014(f) (Pub L No. 114-41, tit II, § 2004(a), 129 Stat 443, 454-55). Penalties apply to violations of this consistency provision by a beneficiary, including the 20% accuracy-related penalty. IRC § 6662. This new consistency requirement applies only to those assets whose inclusion in the estate actually increased the estate tax liability. IRC § 1014(f)(2).

In order to encourage beneficiaries to comply with new IRC § 1014(f), fiduciaries who file estate tax returns after July 31, 2015, are now required to report valuation (basis) information to the beneficiaries and to the IRS within 30 days after filing an estate tax return. IRC § 6035 (Pub L No. 114-41, tit II, § 2004(b), 129 Stat 443, 455). The IRS has issued a new Form 8971 to be used for reporting basis information, along with instructions for the form. The form requires a separate Schedule A for each beneficiary to be attached to the Form 8971 and to be supplied to each beneficiary, showing exactly what assets were acquired from the estate by each beneficiary. Each beneficiary will receive his or her own Schedule A, but the beneficiaries will not receive a copy of Form 8971, nor will they receive the Schedules A that pertain to any of the other beneficiaries. The Form 8971 is to be filed with the IRS, along with copies of all of the Schedules A.

This basis information reporting requirement does not apply to estate tax returns filed solely for the purpose of electing portability under IRC § 2010(c)(4). Treas Reg § 1.6035-1(a)(2).

If the values shown on the estate tax return are later adjusted, or assets are discovered that were omitted from the estate tax return, supplemental reports must be provided to the beneficiaries and to the IRS. Treas Reg § 1.6035-1(e).

This basis reporting requirement applies to both estates and trusts. Values reported should not be reduced by mortgages. Treas Reg § 1.6035-1(a)(2). Penalties apply for failure to provide these reports; the penalties are particularly steep if the failure to file is willful. IRC §§ 6721(e), 6722(e), 6724; Treas Reg § 1.6035-1(h). If willful, the penalty could be as high as 10% of the value of the assets required to be reported. IRC § 6721(e)(2). The penalties apply even if no estate tax was payable, and even if the beneficiary was not subject to the consistency requirement. An inconsequential error or omission on the Form 8971 will not generate a penalty, but an incorrect value, an incorrect name of a beneficiary, or an incorrect EIN of a beneficiary is considered to be consequential, according to the Form 8971 instructions. The instructions discuss the penalties in some detail.

The basis reporting rules under IRC § 6035 and the basis consistency rules under IRC § 1014(f) vary somewhat. They are two different statutes, they are supported by two different sets of regulations, and their requirements are not entirely consistent. For example: Although a beneficiary is not required to use the estate tax value of an asset as his income tax basis unless the inclusion of the asset actually increased the estate tax liability, the fiduciary is nevertheless required to report the estate tax value to the beneficiary and to the IRS regardless of whether the inclusion of the asset increased the estate tax liability. IRC §§ 1014(f)(2), 6035. For a summary of the differences between the IRC § 6035 basis reporting rules and the IRC § 1014(f) basis consistency rules, see the attached Appendix A.

Although the estate tax value of an asset (usually its fair market value on the date of death under IRC § 2031) usually establishes the beneficiary's basis (usually its fair market value on the date of death under IRC § 1014), there are some exceptions to that general rule. For example, an appreciated asset gifted to the decedent within one year prior to death will be denied a stepped-up basis if the asset is bequeathed back to the donor of the gift. IRC § 1014(e). In that case, the estate tax value reported on both the Form 706 and the Form 8971 will be higher than the beneficiary's basis. For that reason, it would not be technically correct to state that the Form 8971 notifies the beneficiary of his basis (although it almost always does). Instead, it would be technically correct to state that the Form 8971 merely provides to the beneficiary the estate tax value, which is not always the basis. This is consistent with IRC § 1014(f)(1), which states that the basis reported by the beneficiary "shall not exceed" the estate tax value.

Temporary and Proposed Regulations

In early March 2016, temporary and proposed regulations were issued to provide guidance regarding many unanswered questions concerning this new basis information reporting and the basis consistency requirement. FR Doc 2016-04718 (Mar. 2, 2016). The temporary regulations and the proposed regulations are identical. This discussion of basis reporting and basis consistency is based on those temporary and proposed regulations, which were in effect as of this writing. In the future, check to see if final regulations have been published. The new regulations will appear in Treas Reg §§ 1.1014-10, 1.6035-1, and 1.6035-2. The IRS once indicated that the final regulations would likely be published by January 2017, but when that date arrived the IRS stated that the final regulations would be delayed. A new due date has not been announced, and the issuance of final regulations is now in question in light of the new administration's policy against issuing new regulations.

The Form 8971, the instructions, and the temporary regulations now provide the following answers, although these answers are subject to change when the temporary regulations are revised and made final. (This is a brief summary of the answers; review the regulations for details. See FR Doc 2016-04718.) The basis reporting must be performed by any person who is an executor or is deemed to be an executor, and the reporting must be supplied to the IRS and to the beneficiaries, including those beneficiaries who are also serving as executors. Treas Reg § 1.6035-1(c)(1). The definition of an executor is very broad. IRC §§ 2203, 7701(a)(6); Treas Reg § 1.6012-3(b)(1); CCA 201334040 (Aug. 23, 2013). If a trust is a beneficiary of an estate, the basis information from the estate needs to be supplied to the trustee, and not to the trust beneficiaries. Treas Reg § 1.6035-1(c)(2).

The Form 8971 is to be accompanied with separate schedules (Schedule A), one for each beneficiary, and the Form 8971 and all of the Schedules A must be filed with the IRS. Each Schedule A is required to describe the assets (and the basis of each asset) to be received by each beneficiary. Each beneficiary is to receive his or her own Schedule A, and is not to receive copies of the Schedules A for the other beneficiaries, nor are any of the beneficiaries to receive a copy of the Form 8971. If the fiduciary does not yet know which assets will be distributed to which beneficiaries, then each beneficiary will receive a Schedule A listing all of the assets that *could* be used to distribute to each beneficiary his or her share of the estate or trust. The instructions to Form 8971 and Treas Reg § 1.6035-1(e)(3)(B) state that in such circumstances, a supplemental Form 8971 may later be filed, but isn't required. Thus finalization of the funding does not require the filing of a supplemental Form 8971. However, if the original basis reporting was incorrect or incomplete, or values are later adjusted for other reasons (such as an estate tax audit), or assets are discovered that were not previously reported, then supplemental reporting is required within 30 days after the event causing the change. Treas Reg § 1.6035-1(e)(4).

According to a controversial provision of the temporary and proposed regulations, if an asset is omitted from the estate tax return, and the inclusion of that asset would have increased the estate tax, and the statute of limitations on assessment of the tax has expired, then the recipient beneficiary will have a zero basis in that asset. Treas Reg

§ 1.1014-10(c)(3)(i)(B). If no estate tax return was filed under circumstances such that the return should have been filed and tax paid, the basis of all of the inherited property will be zero until the property is reported and its basis established. Treas Reg § 1.1014-10(c)(3)(ii). Some commentators have questioned the validity of this zero basis rule, since the statute itself makes no mention of a zero basis. In response, the IRS argues that the zero basis rule is based on the statute, which provides that the basis employed by the beneficiary cannot exceed the basis established for federal estate tax purposes, and since the asset was not reported for estate tax purposes, no basis was established. IRC § 1014(f).

The zero basis rule, the possible penalties, and the required filing of a supplemental Form 8971 for newly discovered assets represents a substantial change in the law. Previously, there was little or no authority that required the filing of a supplemental estate tax return if assets were discovered after the return was filed. In the income tax arena, amended returns are generally not required, although they might be advisable. *Broadhead v. Comm'r*, TC Memo 1955-328 (Dec. 20, 1955); *Goldring v. Comm'r*, 20 TC 79, 83 (1953). In the past, many practitioners have followed that same rule with respect to estate tax returns, although other practitioners have felt that the filing of a supplemental estate tax return is often advisable, depending on the circumstances. But now, under some circumstances (described above) the IRC § 6035 regulations require the filing of a supplemental Form 8971 and impose penalties and a zero basis on taxpayers who fail to do so, and presumably anyone who files a supplemental Form 8971 will also want to file a supplemental Form 706.

These new reporting rules do not apply to cash distributions (other than coins or bills with numismatic value), or to bequests of tangible personal property for which no appraisal is required under Treas Reg § 20.2031-6(b). Life insurance proceeds that were paid to a beneficiary in the form of a check will most likely be treated as cash for purposes of the reporting rules. These new rules also do not apply to IRD assets (although they probably apply to assets that are part IRD). Marital deduction distributions and charitable deduction distributions are not subject to the mandatory consistency rules, but they nevertheless must be reported to the beneficiaries who receive them. The Schedule A is required to inform the beneficiaries regarding which assets did (or did not) increase the estate tax, and thus the beneficiaries who receive assets that did not increase the tax will not be obligated to use the estate tax values as their basis. Treas Reg § 1.1014-10(b)(1).

The question of which assets increased the estate tax liability, and which assets did not, is answered by the temporary/proposed regulations. If an estate tax is due, even after the application of the unified credit, then all of the assets are deemed to have increased the estate tax, except for marital and charitable bequests. Treas Reg § 1.1014-10(b)(3). All of the assets will be reported on the Form 8971, but the marital and charitable bequests will be marked with an "N" to indicate that those bequests did not increase the estate tax. On the other hand, if no estate tax is due (because of the application of the unified credit, other credits, and various deductions), then all of the bequests will be marked with an "N," and basis consistency will not be required. In both cases, however, a Form 8971 will still need to be filed to report the basis to the IRS and to the beneficiaries. Treas Reg § 1.6035-1(b)(1).

The first draft of the instructions to the Form 8971 was published in late 2015. Draft revised instructions were published in late January 2016, and then were revised again in early June 2016, effective September 2016. The draft revised instructions surprisingly indicated that the required information must be supplied on one or more Schedules A without the use of attachments to the Schedules A, but the final instructions issued in June 2016 permit the use of attachments. Appraisals should not be attached to the Schedules A, according to the instructions.

The instructions indicate that if co-fiduciaries are serving, only one need sign the Form 8971, but all co-fiduciaries will be responsible for the content of the submitted form.

Supplemental Reports

In some circumstances, an executor will be required to supplement the Form 8971 if certain facts change after the initial filing of the Form 8971. Those circumstances include the discovery of property that should have been reported on the original Form 8971, a change in value (basis) as a result of an estate tax audit or estate tax litigation, a change in the identity of a beneficiary, or the disposition of property in a transaction in which the basis was carried over to a new asset (such as a like-kind exchange). Treas Reg § 1.6035-1(e). If such a supplemental filing is required, it is due within 30 days after the event that caused the change. Treas Reg § 1.6035-1(e)(4).

Subsequent Transfers

If a beneficiary subsequently transfers any of the estate assets to a related party transferee in a transaction in which the transferee's basis is determined in whole or in part with reference to the beneficiary's basis, then the beneficiary must file a Form 8971 and supply a Schedule A basis report to the transferee and to the IRS, and apparently that obligation continues for decades, regardless of when the second transfer takes place. Treas Reg § 1.6035-1(f). And if the estate has not yet reached a final value of the assets, then that reporting of a subsequent transfer must also be submitted to the executor, and the executor must give the transferee (and not the original beneficiary) notice of any subsequent changes in basis. Treas Reg § 1.6035-1(f). For purposes of this reporting of subsequent transfers to related parties, the regulations provide a definition of related parties. Treas Reg § 1.6035-1(f). Those related parties include family members, controlled entities, and grantor trusts. But they apparently do not include nongrantor trusts. Treas Reg § 1.6035-1(f) (refers to IRC § 2704(c)(2)). Thus if an estate transfers assets to a trust (and reports the basis to the IRS), and then later the trustee transfers the assets to a beneficiary who is an individual, the trustee need not file a basis report, because the trust and the individual are apparently not related under the definition of related parties. This conclusion is not entirely clear, but does seem to flow from the language of the regulation. The fact that the regulation requires reporting of a transfer to a grantor trust seems odd, since the grantor trust will be reporting its income on the grantor's income tax return. Perhaps this uncertainty will be cleared up in the final regulations.

Procedure

When filing a Form 8971, the instructions suggest that a Form 2848 power of attorney should be attached if the executor would like the return preparer to be able to discuss the Form 8971 with the IRS. In that instance, the September 2016 version of the Form 8971 instructions states that the taxpayer listed on the Form 2848 should be the executor, not the estate, and the executor's EIN should be listed, not the estate's EIN or the decedent's social security number. The instructions also state that the Form 8971 should be listed on the Form 2848 as one of the matters that the preparer is authorized to discuss. It seems odd that the Form 8971 instructions call for the use of the executor's EIN on the Form 2848 associated with the Form 8971, since the Form 8971 is closely related to the Form 706 estate tax return, which is filed under the decedent's SSN, not the executor's EIN.

Forms 8971 are filed by mailing them to a designated mail stop at the IRS Cincinnati Service Center. See the instructions for the Form 8971. This is a different address than that used for a Form 706. When the Form 8971 is received by the IRS, it is normally forwarded to whichever IRS office has the estate tax return. As a result, if the estate tax return is being audited, the Form 8971 will be sent to the office auditing the estate tax return.

The IRS delayed the earliest due date of the Form 8971 basis reports to June 30, 2016. As a result, reports relating to Forms 706 filed between July 31, 2015, and May 31, 2016, were due on June 30, 2016, and reports relating to Forms 706 filed after May 31, 2016, will be due 30 days after the Form 706 is filed. Notice 2015-57, 2015-36 IRB 294; Notice 2016-19, 2016-09 IRB 362; Notice 2016-27, 2016-15 IRB 576; TD 9797.

Appendix A: Basis Reporting and Consistency

Type of Asset	IRC § 6035 Basis Reporting Required	IRC § 1014(f) Basis Consistency Required
Asset Does Not Increase Estate Taxes	Yes. IRC § 6035(a)(1); Treas Reg § 1.6035-1(a)(1); Treas Reg § 1.6035-1(b).	No. IRC § 1014(f)(2); Treas Reg § 1.1014-10(b)(2).
Marital Deduction Assets	Yes. IRC § 6035(a)(1); Treas Reg § 1.6035-1(a)(1); Treas Reg § 1.6035-1(b).	No. IRC § 1014(f)(2); Treas Reg § 1.1014-10(b)(2).
Charitable Deduction Assets	Yes. IRC § 6035(a)(1); Treas Reg § 1.6035-1(a)(1); Treas Reg § 1.6035-1(b).	No. IRC § 1014(f)(2); Treas Reg § 1.1014-10(b)(2).
Cash (including coins & bills with no numismatic value)	No. Treas Reg § 1.6035-1(b)(1)(i).	Not applicable (cash basis equals face value)
Tangible Personal Property - Small Amounts	No. Treas Reg § 1.6035-1(b)(1)(iii).	No. Treas Reg § 1.1014-1(b)(2).
Estate Tax Returns Filed for Portability Purposes Only	No. Treas Reg § 1.6035-1(a)(2).	No. IRC § 1014(f)(2); Treas Reg § 1.1014-10(b)(3).
Estate Tax Returns Filed for GST Allocation Only	No. Treas Reg § 1.6035-1(a)(2).	No. IRC § 1014(f)(2); Treas Reg § 1.1014-10(b)(3).
Income in Respect of a Decedent	No. Treas Reg § 1.6035-1(b)(1)(ii).	No. IRD receives no basis step-up at death.
Assets Sold by the Estate and Gain or Loss Is Recognized	No. Treas Reg § 1.6035-1(b)(1)(iv).	No. Asset not distributed to a beneficiary.
Gross Estate Less Than Filing Threshold	No. Treas Reg § 1.6035-1(a)(2).	No. IRC § 1014(f)(2); Treas Reg § 1.1014-10(b)(3).
Other Assets, in General	Yes. IRC § 6035(a)(1); Treas Reg § 1.6035-1(a)(1); Treas Reg § 1.6035-1(b).	Yes. IRC § 1014(f)(1); Treas Reg § 1.1014-10(b).

Compiled by Philip N. Jones of Duffy Kekel LLP. Based on the temporary and proposed regulations published March 4, 2016. FR Doc 2016-04718 (TD 9757). Some exceptions apply; review the relevant statutes and regulations for applications to particular situations.

Summary of 2017 Oregon Legislation Tracked by the Estate Planning and Administration Section

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This article provides a summary of 2017 Oregon legislation tracked by the Estate Planning and Administration Section. The 2017 legislative session was relatively light for our Section, and what meaningful legislation occurred has largely been briefed by other authors. Therefore, this article provides summaries of important legislation, and provides references to other materials with additional detail on certain bills. The end of this article discusses how and why the Section tracks legislation, and how to use the Bar's and Section's websites to track legislation during the session.

Bills That Passed in 2017

- HB 2986 (probate modernization bill): an ongoing project of the Oregon Law Commission, intended to update but not make major substantive changes to the code.
- HB 2608 (UTC clean-up bill): clarifies that certain provisions of the UTC apply to all trusts, whether established before or after passage of the UTC (this bill was sponsored by the Section).
- HB 2622 (financial transactions): gives financial institutions greater leeway to refuse transactions where they may reasonably suspect financial exploitation of a vulnerable person.
- HB 2623 (trustee compensation): allows allocation of trustee fees to principal or income depending on broad range of circumstances.
- SB 32 (penalties for failure to pay estate tax or file estate tax return): clarifies application of penalties for failure to file form OR-706.

Bills That Did Not Pass in 2017

- HB 2069, 2546, 2832, 3354; SB 137, 379, 870 (estate tax bills): all seven of these bills would have reduced the Oregon Estate Tax in some way, and therefore decreased state revenues, and as a result all seven "died in committee" (all in the Revenue Committee).
- SB 494 (advance directive update): would have created a panel responsible for crafting updated forms, if any, of Oregon's Advance Directive. Although this bill did not pass, it is significant and controversial, and is likely to return in some form or other in the next legislative session (perhaps in the next few legislative sessions). For an extensive discussion of the bill and the current state of the law of Advance Directives see Hilary Newcomb & Ella Vining, OSB CLE Seminar Handbook, Advanced Estate Planning ch 1 (2017).

Additional Discussion of Key Passed Bills

HB 2986. From the Oregon Legislature staff measure summary: "Updates chapters of Oregon Revised Statutes relating to probate. Adds definition of 'estate.' Addresses jurisdiction of Oregon courts as relates to estate distributions. Allows electronic notice of hearings. Updates bonding requirements for special administrator and personal representative. Allows personal representative to petition for alternative compensation structure. Modifies preferences for appointment of personal representative and notice requirements. Makes updates to process for administration of estates. Adds provisions specifying when a claim has been referred to a personal representative. Updates process for claims against estate. Defines 'property subject to jurisdiction of court.' Modifies language relating to method of compensation for personal representative. Makes conforming amendments."

The probate modernization project has been well briefed and documented, in particular the 2017, 2016, and 2015 changes have recently been summarized by Lane Shetterly in materials cited below (which materials include both legislative text and Reports of the Probate Modernization Task Force), and by Susan Gary in the article cited below. Related changes in the 2015 legislative session were also previously summarized in materials by Hilary Newcomb, also cited below.

- Lane Shetterly, OSB CLE Seminar Handbook, Advanced Estate Planning ch 4 (2017).
- Susan Gary, "Probate Modernization Bill – Update," OSB Estate Planning and Administration Newsletter at 7 (Mar. 2017).
- Hilary Newcomb, OSB CLE Seminar Handbook, Basic Estate Planning and Administration ch 1 (2015).

Practitioners may want to pay particular attention to the following changes, which, although minor, may be substantive, and which have not all been cited in prior materials (citations are to statutes as amended by the 2017 legislation):

- ORS 113.005(3). A special administrator's power is more limited under the new language: rather than a proscribed set of powers effective as to any special representative once appointed, a special representative's power is now limited to powers expressly granted by the court.
- ORS 113.085(2). The court may now require a personal representative not named in the will to search for statutory personal representatives of "higher priority." The change does not create a new notice requirement, just a new, or perhaps clarified, judicial power.

- ORS 113.105(3). Language in former ORS 113.105(4) that permitted a court to waive bond with consent of all heirs and devisees has been removed. Although no longer specified, the court would still have this power within the broader scope of revised ORS 113.105(3).
- ORS 113.165. The inventory filing period is extended from 60 to 90 days.
- ORS 115.005(1)(a). Note highly detailed clarifications regarding presentation of creditors' claims (in particular that claims must be presented to PR rather than filed with court).
- ORS 115.005(2)(b). The creditor claims presentation period is extended from 30 to 45 days (see corresponding change to creditor notice requirement under ORS 115.003(3)(d)).
- ORS 115.135(2). To disallow a claim, the PR must now expressly "state the reason for the disallowance," rather than simply disallow the claim.
- ORS 116.083(4)(a)(A). A verified statement in lieu of an accounting now requires only the consent of distributees other than specific devisees (and specific distributees need not be "paid" at the time of the verified statement).
- ORS 116.173(5)(b). If the court grants PR compensation greater than would be paid under statute, the PR's fee may be reduced to the statutory amount if the estate would otherwise not be able to pay claims.

HB 2608. From the Oregon Legislature staff measure summary: "In the 2015 Legislative Session, House Bill 2331 updated the Oregon Uniform Trust Code. The Oregon Uniform Trust Code was originally adopted in 2005 after development of the Code by the National Conference of Commissioners on Uniform State Laws. HB 2331 made several updates and changes to Oregon's trust law. First, the measure codified the 'early vesting rule,' allowing the interest of the beneficiary to vest upon the death of the settlor. Second, the measure clarified the rules for dividing trusts into shares or portions and brought such rules in alignment with the federal tax code. Finally, the measure addressed the allocation of qualifying capital gains into the distributable net income of the trust. The changes to these statutes were effective on all trusts executed on or after January 1, 2016, but were not applied to new trust proceedings started after that date. HB 2608 corrects the application error in HB 2331 and makes the Uniform Trust Code modifications applicable to trust proceedings commenced on or after the effective date of HB 2608."

The changes under HB 2608 became effective May 15, 2017.

HB 2622. From the Oregon Legislature staff measure summary: "Allows financial institutions, including banks, credit unions and trust companies, to refuse transactions when they reasonably suspect financial exploitation or have received information from the Department or law enforcement that financial exploitation is suspected or has occurred. Financial institutions are not required to freeze transactions but, if they do so in good faith, they are given civil, administrative, and criminal immunity. Freezes may last up to 10 days for a transaction that involves the sale of securities, such as bonds, annuities, or real estate papers. For non-security related transactions, the freeze may last up to 15 days. Freezes may be terminated by a court order or upon satisfaction to the financial institution that financial exploitation is not occurring."

HB 2623. From the Oregon Legislature staff measure summary: "Within the UPIA, one half of trustee or other custodial service provider fees come from the principal of the trust and the other half from the interest earned from the trust assets. Within the UTC, Rule 802, codified in Oregon statutes as ORS 130.655, requires that trustees administer trusts solely in the interest of the beneficiaries of the trust, then goes on to identify areas in which transactions between trustees and beneficiaries are voidable. Oregon law currently allows a beneficiary to void a transaction between a trustee and a beneficiary that does not involve trust property but from which a trustee gains an advantage if the transaction occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary unless the trustee can establish that the transaction was fair to the beneficiary. HB 2623 does two main things. First, it allows a trustee to charge all of the compensation for the trustee's services, or the regular compensation for investment advice or custodial services, to the principal or the income of the trust in whole, based on the reasonable judgment of the trustee. Second, it modifies the rule for voiding non-trust property transactions to add an additional element so that the rule applies to transactions that occur outside the ordinary course of the trustee's business or on terms and conditions substantially less favorable than those offered by the trustee to similarly situated clients."

SB 32. Notably, this bill does not appear to change the penalty rule applicable to failure to file form OR-706: no penalty applies if no tax was due, even if a return was required to be filed.

How the Section Tracks Legislation During Each Session

Each legislative session the Section executive committee works with our legislative liaison at the Bar to come up with a list of bills that the committee believes may be of interest to Section members. For practical purposes we try to limit the list to matters directly relevant to our Section's practice area. We will always overlap somewhat with other sections, particularly the Elder Law Section, but we try to minimize duplication. The Section executive committee notifies members of the tracking list when updated each legislative session, via the newsletter and list serve.

Tracked bills are listed on the Bar's legislative tracking page, accessible via the Section's website, which provides some basic information about each bill and its status and links to relevant portions the Oregon State Legislature's website.

For more information on how to use the Section and Bar website to track legislation, and the Bar's and Section's roles in legislation, see Ian Richardson, OSB CLE Seminar Handbook, Basic Estate Planning and Administration ch 5 (2017).

Case Law Update

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Hoffman and Hoffman, 285 Or App 675 (2017)

Attorney Fees

FACTS: Husband filed dissolution petition asserting wife should pay his attorney fees if the matter was contested. It was contested. Husband sought attorney fees pursuant to ORCP 68 in his hearing memorandum due to wife's purported non-compliance with discovery. At trial the court allowed testimony related to fees incurred by husband regarding discovery. Wife objected. In issuing its opinion, the trial court found that husband incurred unnecessary fees due to wife's conduct in the discovery process and ordered wife to pay husband $23,000 in attorney fees, which was offset by an equalizing judgment owed by husband to wife.

ISSUE: Can a party short-circuit the procedures for requesting attorney fees outlined in Section C (4) of ORCP 68?

RULING: No. The Court of Appeals vacated the award, holding a court cannot award fees without going through the procedures outlined in ORCP 68 and ORS 20.075 (i.e., filing an affidavit detailing the amount of fees and costs and the applicability of ORS 20.075 factors, providing an opportunity for objection, and hearing on the objection).

Price v. Lotlikar, 285 Or App 692 (2017)

Definition of Interested Person

FACTS: Decedent died testate leaving his estate to one sister ("devisee"). Decedent's nephew served as personal representative of the estate. Decedent's heirs all received notice of the appointment of nephew as personal representative prior to his appointment and notice of time to object to the will. No objection to nephew's appointment as personal representative was filed, no petition to contest the will was filed, and no claims were filed by any heirs of the decedent. After four months the estate was closed. Two days after the estate was closed, two of decedent's sisters ("heirs") petitioned to reopen the estate to pursue an elder financial abuse claim against decedent's nephew. Devisee, the only person who would ultimately benefit from said litigation, objected to heirs' actions. Heirs argued that they were interested persons by virtue of the fact that they were heirs of the decedent. Decedent's nephew argued heirs did not have standing to reopen the estate as they were no longer interested persons since they had no financial interest in the estate as the time to contest the will and/or file a claim had passed. The trial court ruled the heirs were interested persons based on their "familial ties to decedent and their desire to vindicate the rights of the decedent's estate."

ISSUE: Does the definition of an interested person under ORS 111.005(19) require an interested person to have "a property right or claim against the estate of a decedent that may be affected by the proceeding"?

RULING: Yes. The Court of Appeals reversed the trial court, ruling that "the 'interest' that makes 'heirs, devisees, children, spouses, creditors and any others' into 'interested persons' is a 'property right or claim against the estate of a decedent that may be affected by the proceeding.'"

Oregon Health Authority v. Cue, 286 Or App 218 (2017)

Claims on Veterans' Benefits

FACTS: A disabled veteran was hospitalized at Oregon State Hospital ("OSH") the last several years of his life. He died testate with no spouse or dependents. The Oregon Health Authority ("OHA") sought reimbursement of decedent's OSH care costs (totaling $666,187.40) from his estate. His estate was entirely comprised of his veterans' disability payments made during his lifetime (totaling $121,000). The personal representative disallowed the claim, citing a federal statute exempting veterans' benefits from creditors' claims (38 USC § 5301(a)(1)), and the OHA initiated litigation. On cross-motions for summary judgment, the trial court concluded section 5301(a)(1) does not preclude the OHA's claim for reimbursement and entered judgment in favor of the OHA.

ISSUE: Does the federal veterans' benefits exemption in 38 USC § 5301(a)(1) apply to a beneficiary's assets after the death of the beneficiary?

RULING: Yes. The Court of Appeals looked to case law in other jurisdictions on this issue and concluded that when a veteran dies and leaves no spouse or dependents, the purpose of the exemption of section 5301(a)(1)—to provide for the veteran and his or her family—does not survive the veteran and no longer applies. The Court was further unpersuaded by the personal representative's argument that the OHA's failure to obtain direct payment of decedent's benefits to OSH during his lifetime precluded OHA from subsequently recovering those benefits after his death.

Schmidt v. Noonkester, 287 Or App 48 (2017)

Elder Financial Abuse

FACTS: Plaintiffs sued defendant for breach of contract, declaratory relief, and fraud. Defendant counterclaimed for elder financial abuse, asserting the financial abuse was the filing of unfounded litigation by plaintiffs against defendant. Plaintiffs moved to dismiss the elder financial abuse counterclaim pursuant to ORCP 21 A and later moved for a directed verdict, asserting defendant failed to establish wrongful conduct or a taking. Defendant argued the taking was the time, emotional distress, and legal fees incurred in defending the litigation. The trial court denied the motion for directed verdict in large part. The jury found for the defendant on the counterclaim of elder financial abuse; plaintiffs appealed.

ISSUE: Does a "taking" exist for purposes of an elder financial abuse case where the claim is based on unfounded litigation?

RULING: No. The Court of Appeals reversed as to the elder financial abuse counterclaim. The Court held that, at best, unfounded litigation may fulfill the "wrongful conduct" element of elder financial abuse. However, the alleged damages, time, emotional distress, and legal fees did not constitute a taking, as there was no transfer of defendant's money or property to plaintiffs.

Hunsinger v. Graham, 288 Or App 169 (2017)

Attorney Bystander Liability in Elder Financial Abuse

FACTS: Plaintiff, in his capacity as personal representative of his mother's estate, sued mother's attorney for elder financial abuse, alleging attorney provided a power of attorney form, promissory note, and deed to transfer mother's real property to a granddaughter. Plaintiff offered testimony from an attorney in the form of an expert affidavit under ORCP 47 E asserting that the defendant was negligent and that this negligence created an issue of material fact as to whether or not the attorney was liable for elder financial abuse on a theory of bystander liability. The trial court disagreed, granted defendant's motion for summary judgment, and dismissed the elder financial abuse claim, stating plaintiff failed to offer evidence from which a fact-finder could find defendant knowingly acted or failed to act under circumstances in which a reasonable person knew or should have known that a third party would financially abuse the client.

ISSUE: Does attorney negligence create bystander liability for elder financial abuse?

RULING: No. The Court of Appeals affirmed the trial court finding that third-party liability requires proof of two mental states under ORS 124.100(5): actual knowledge that abuse occurred (the defendant's act or failure to act) and constructive knowledge of abuse (the circumstances in which the act or failure to act occurs). The Court focused on the constructive knowledge requirement, ultimately finding that legal negligence does not create third-party liability for elder abuse.

Larisa's Home Care, LLC v. Nichols-Shields, 362 Or 115 (2017)

Unjust Enrichment

FACTS: Plaintiff runs an adult foster care home and provided services to decedent at a lower rate since decedent received Medicaid benefits. It was later determined that decedent qualified for Medicaid through fraudulent conduct by her son. Plaintiff filed a claim against decedent's estate seeking restitution for the difference between the amount decedent would have paid as a private pay patient versus the amount plaintiff actually received. The trial court ruled in favor of plaintiff, finding there was unjust enrichment, but the Court of Appeals reversed.

ISSUE: Can an adult foster care provider claim unjust enrichment and recover the value of its services from a defendant who obtained a lower rate for services from the foster care provider through fraud?

RULING: Yes. The Oregon Supreme Court reversed the Court of Appeals and affirmed the trial court finding that a person, and his or her estate, has been unjustly enriched if the person gets benefits by making false representations about his or her financial state. In this case, the Court found that: (1) decedent's son made false representations on the Medicaid form which wrongfully qualified decedent for Medicaid benefits; (2) decedent would have been disqualified but for the misrepresentations, and decedent was legally responsible for the misrepresentations since they were made by her agent; and (3) decedent's estate was unlawfully enriched by the misrepresentations and is, therefore, subject to restitution.

Fenner v. Fenner, 288 Or App 540 (2017)

No-Contest Clause

FACTS: Two sisters, Roberta and Hillary, engaged in protracted disputes regarding their father's trust. Hillary filed a lawsuit contending, in part, that the 6th amendment to the trust should be declared void for lack of capacity and undue influence of father by Roberta. Hillary subsequently filed an amended petition removing her claims regarding the validity of the 6th amendment. In Roberta's response she asserted, among other things, that by challenging the 6th amendment Hillary "commenced an action" thereby triggering the trust's no-contest clause, resulting in a forfeiture of Hillary's beneficial interest in the trust. The no-contest clause read as follows: "If anyone, other than me, shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this agreement, including any amendments thereto, or commences or prosecutes any legal proceedings to set this agreement aside, then in such event such person shall forfeit his or her share, cease to have any right or interest in the trust property, and shall be deemed to have predeceased me." On summary judgment the trial court held Hillary did not trigger the no-contest clause. Roberta appealed.

ISSUE: How should courts construe a trust's no-contest clause?

RULING: Very narrowly. The Court of Appeals held that Hillary did not trigger the no-contest clause by filing a petition that sought to set aside the 6th amendment to the trust because she did not seek to set aside the entire trust agreement. The Court re-asserted that no-contest clauses are to be strictly construed and not extended beyond their express terms. The Court read the no-contest clause as outlining two ways in which a person can trigger a forfeiture of their beneficial interest. The first is, "[i]f anyone, other than me, shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this agreement, including any amendments thereto." The second way to trigger the no contest clause is if someone "commences or prosecutes any legal proceedings to set this agreement aside, then in such event such person shall forfeit his or her share, cease to have any right or interest in the trust property, and shall be deemed to have predeceased me." In this instance, the Court reasoned that Hillary did not trigger the no-contest clause by commencing an action to set aside the 6th amendment, as the second provision of the no-contest clause does not expressly include challenges to trust amendments. The Court reasoned if the settlor intended that the second provision apply to an action that challenged a single amendment to the trust, the no-contest clause would have said so as it did in the first provision.

Sherertz v. Brownstein Rask, 288 Or App 719 (2017)

Legal Malpractice in Estate Planning

FACTS: This case involved third-party legal malpractice claims alleging that defendant law firm was negligent in preparing an estate plan. Following a jury trial, the court entered a general judgment dismissing plaintiffs' claims. Plaintiffs contended defendant proposed and promised to create an ILIT to pay the estate taxes, which would allow decedent's stock to pass in its entirety to his heirs. The ILIT was ultimately insufficient to pay the estate taxes, necessitating the sale of stock. Defendant contended the estate planning documents were consistent with decedent's wishes and that the purpose of the ILIT was to equally divide the proceeds among his children.

ISSUE: Did the trial court err in instructing the jury as follows: "Attorneys are not negligent merely because they do not achieve the result desired by the client. An attorney does not guarantee a good result by undertaking to perform a service."?

RULING: Yes. Reversed and remanded. To sustain a third-party legal malpractice claim, the plaintiffs must show that the lawyers promised decedent their work would accomplish specific results or objectives for the decedent. Here, whether decedent expressed a desired result and, if so, whether defendant disregarded decedent's request, was the primary issue for the fact-finder. The jury instruction, however, confused the issue by instructing the jury that the defendant was not negligent merely for failing to achieve the desired result.

Givan v. Department of Human Services, 289 Or App 125 (2017)

Small Estate and Claim Presentation

FACTS: A small estate was opened. Three claims were made against the estate. Two of the claims were allowed by the court as administrative expenses, thereby receiving priority over the third claim in the distribution of estate proceeds. Approximately 21 months after the small estate was filed, a full probate was initiated to address an issue regarding sale of real property. The personal representative filed a statement in lieu of final account which gave the two claims priority over the third. The third claimant filed an objection; a hearing was held; and the court ultimately granted the objection, reduced the amount of one claim, and disallowed the other claim in its entirety. Claimants for claims 1 and 2 appealed.

ISSUE: Did the probate court have jurisdiction to order distribution of estate property in a manner other than that provided in ORS 114.555?

RULING: No. The Court of Appeals vacated and remanded the general judgment. The Court of Appeals held that the running of the four-month period for appointing a personal representative is jurisdictional and once that time has passed, all claims must be resolved and property distributed as provided in ORS 114.555.

Events Calendar

Central Oregon Estate Planning Council Meeting
February 6, 2018 at 5:30 PM
at the Awbrey Glen Golf Club in Bend.
Reservations can be made through
cpuddy@oregoncf.org or (541) 382-1170

47TH Annual Estate Planning Seminar
February 9, 2018 – Oregon Convention Center

Central Oregon Estate Planning Council Meeting
May 8, 2018 at 5:30 PM
at the Awbrey Glen Golf Club in Bend.
Reservations can be made through
cpuddy@oregoncf.org or (541) 382-1170

18th Annual Oregon Tax Institute
Thursday June 7th, 2018 – OSB CLE Event
Multnomah Athletic Club

The Editors want to include announcements of upcoming events that are open to the public and may be of interest to our readers. If you know of an event, please send basic information, including point of contact information to Chris Cline at *chriscline@riverviewbank.com* for inclusion in the next issue of the Newsletter.