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What Time Is It? Some Important Statutes of Limitations in Estates and Trusts

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A statute of limitations is defined as a statute that sets out "maximum time periods during which certain actions can be brought or rights enforced. After the time period set out in the applicable statute of limitations has run, no legal action can be brought regardless of whether any cause of action ever existed." *Black's Law Dictionary* 639 (6th ed. 1991). In short, a statute of limitations is your limited window of opportunity to file a cause of action, or lawsuit. Most lawsuits must be filed within a certain period of time. In general, once the statute of limitations on a case "runs out," the legal claim is no longer valid. The period of time during which you can file a lawsuit varies depending on the type of legal claim.

There are reasons limitation periods are considered preferable for the public and court system. For example, a dispute brought to trial sooner enables the parties to present the best evidence and ensure judgments occur only with evidence that has not deteriorated with time. Delays in adjudication are inherently challenging as memories fade, witnesses die, and evidence is lost. The finality of disputed matters also brings certainty which is desirable for the public and the court system.

One question that surfaces within this subject matter is whether notice periods, or notice requirements, are different from statutes of limitations. While a statute of limitations defines the limited period of time within which a legal action can be filed, in contrast, a notice period gives us the time frame in which we must respond to an action that has in fact been filed. This article only addresses statutes of limitations; notice requirements (or objection periods) that arise once an action is filed are not discussed, and would require additional legal analysis.

This article briefly summarizes various statutes of limitations for probate estate and trust matters in Oregon, with a focus on fiduciary litigation. Statutes that are related to notice periods or are too far removed from fiduciary litigation are omitted. Additionally, all of ORS Chapter 125 relating to protective proceedings has been intentionally excluded in order to limit the focus on probate estates and trust administrations.

What starts the clock? When calculating a statute of limitations, one must have a starting point. Many statutes of limitations contain a "discovery rule," meaning the claim accrues when its elements are discovered, even if the statute does not mention a discovery rule. Check case law to determine if your claim accrues upon discovery. Determining what starts the clock naturally leads to the ending point and what ultimately stops the clock.

In This Issue

Calculating the Time. When calculating a statute of limitations, exclude the first day or day of the occurrence, and include the last day. If the last day of an applicable statute of limitations falls on a weekend or legal holiday, it will be pushed forward to the next day that is a judicial working day. ORCP 10. Civil procedural statutes providing that something must be done within one or more years are to be computed by calendar years. *See* ORS 174.120(5), 187.010(3).

What starts the action? Basically, an action or claim is commenced when the moving paper is filed and the action is served. If there are multiple parties to serve, such as co-defendants, this issue of filing and service can become more involved. *See* ORS 12.020.

Estate and Trust Actions

Will Contest. A will contest is a lawsuit against the personal representative/administrator that claims the will should be deemed invalid for reasons such as incapacity, undue influence, duress, or fraud. A will contest must be brought before the later of: 1) four months after the date of delivery or mailing of the notice detail required in ORS 113.145, if the contestant is entitled to receive that notice; or 2) four months after the first publication of notice to interested persons, if the contestant was not required to be named in the probate petition as an interested person. ORS 113.075(3).

Trust Contest. A trust contest is a lawsuit against the trustee that claims the trust should be deemed invalid for reasons such as incapacity, undue influence, duress, or fraud. A lawsuit contesting the validity of a revocable living trust must be brought within the earlier of: 1) three years after the settlor's death; or 2) four months after the trustee sends the person a copy of the trust instrument and notice informing the person of the trust's existence, the trustee's name and address, and the time allowed for commencing a proceeding. ORS 130.515.

Abuse of a Vulnerable Person/Elder Financial Abuse. A civil action for the abuse of a vulnerable person and financial elder abuse must be brought within seven years from the date of discovery of the abuse. ORS 124.130.

Creditor's Claims Against an Estate. Claims against a decedent's probate estate are barred if not presented upon the earlier of: 1) four months after the date of the first publication of notice to interested persons; or 2) 45 days after the date the personal representative gave specific written notice to a known or likely claimant. *See* ORS 115.005(2).

Creditor's Claims Against a Trust. Unlike the automatic statutory creditor's claim period in a probate estate, a trustee must opt into a more structured statutory claim procedure for trusts by first filing a petition to start that procedure. See ORS 130.350-130.450. Claims against a trust described in ORS 130.350, *et seq.* that are not presented within the four-month time limitation established under ORS 130.360, or within the relevant statute of limitations applicable to the claim, whichever is earlier, are barred from payment from the trust estate. ORS 130.350(1).

Support Claim in an Estate. A surviving spouse or dependent child of the decedent may have a claim for spousal support or child support against the decedent's estate, and there is no time limit to pursue such a claim. ORS 114.015, 114.025. However, the sooner a petition for support is filed the better as the administration moves towards final distribution.

Spousal Elective Share in Estates. A surviving spouse may claim his or her spousal elective share of the decedent's augmented estate by filing a motion to exercise the spousal elective share in the decedent spouse's probate proceeding within nine months after the spouse dies. If a probate has not been opened for the decedent, the surviving spouse can file a petition for the appointment of a personal representative. ORS 114.610.

Wrongful Death. Generally, an action for wrongful death must be filed by the acting personal representative within three years after the injury causing the death of the decedent is discovered, or reasonably should have been discovered. ORS 30.020(1). Yet, there are times when a wrongful death action must be brought within two years from the date of discovery, or when the injury should have been discovered, which is relevant to suits against public bodies. *See* ORS 12.110, 30.275(9). If the wrongful death claim is against a public body, then there are special notice requirements, and *notice* of such a claim must be given to that public body within one year after the injury or loss, consistent with ORS 30.275(2)(a). Personal injury actions specifically are governed by ORS 30.075(1), and that statute of limitations is three years.

One-Year Death Toll. In cases where the decedent died before an action was filed (except for personal injury actions), the decedent's personal representative may pursue that decedent's allowable action as long as it is commenced within one year from the death of the decedent. Similarly, if the decedent died before the expiration of the time allowed for an action against him or her, an action may be brought against that decedent's personal representative within one year after the date of death. ORS 12.190

Intentional Interference with Economic Advantage (Prospective Inheritance). The tort of interference with an economic advantage is recognized in Oregon in the form of a prospective inheritance. As a tort, this claim is subject to a two-year statute of limitations. This claim accrues when the interference actually causes the injury, not when the wrongful act occurs. For example, the plaintiff's claim would not accrue when the will or trust was executed, but when the decedent settlor died and the plaintiff thereby lost his or her expected inheritance. *See Butcher v. McClain*, 244 Or App 316 (2011); *Allen v. Hall*, 328 Or 276 (1999); Restatement (Second) of Torts § 774B (1979).

Reopening a Probate Estate. An estate can be reopened to admit a will to probate within one year after the estate has been closed after it was administered in Oregon. However, if there is newly discovered probate property, the court can reopen the estate at any time to administer the new property. ORS 113.027.

Estate and Trust Taxes

Estate Tax Returns. The Internal Revenue Code requires the filing of Form 706 to report estate and/or GST tax within nine months after the decedent's date of death with the ability for an estate to file for an automatic six month extension. Oregon's requirement mirrors the federal timelines.

Payment of any tax due to the IRS is also due at that nine-month mark. If an estate tax return is filed and omits items from the return that are in excess of 25% of the gross estate, the IRS may assess the tax, or begin a court proceeding to collect the tax without an assessment, for a period of six years after the date of filing the return.

Portability Election. If a federal estate tax return is required, the fiduciary must elect to transfer the deceased spousal unused exclusion (DSUE) amount to the surviving spouse on a timely filed Form 706 (within nine months of the decedent's date of death or, if a six-month extension was timely filed, before the expiration of the extension period). However, if a return is not otherwise required (because the decedent's gross estate was below his or her remaining applicable exclusion amount) the fiduciary can file a late return to make the portability election within two years of the decedent's death. Rev Proc 2017-34.

All Tax Returns. The IRS has a general statute of limitations to assess additional tax of three years for all tax returns, including estate tax returns, fiduciary income tax returns, and gift tax returns, which begins on the date the return is filed. This statute can be increased to six years in situations where there are substantial omissions of income or assets. The IRS and the taxpayer may agree to voluntarily extend the statute of limitations in income tax cases and gift tax cases, but not in estate tax cases.

Fraud and Tax Evasion. If there is a willful attempt to evade taxes due, or to defraud the IRS, there is no statute of limitations and the IRS can pursue those claims indefinitely. If a filed estate tax return was fraudulent, or if the return was not filed due to an attempt to avoid taxation, the IRS can assess the tax or start a court proceeding for tax collection at any time.

Proof of Receipt. Except in cases of fraud and tax evasion, the statute of limitations begins upon receipt of the return by the government. It is best practice for the fiduciary to submit returns via United States certified mail with a return receipt requested. A certified mail receipt is the best defense regarding the beginning date of the statute of limitations in case the government makes a mistake with your return, or attempts any action after expiration of the limits under the IRC.

Defenses and Nuances

Discovery Rule. Most statutes of limitations contain a "discovery rule," meaning the claim accrues when its elements are discovered, even if the statute does not mention a discovery rule. The discovery rule can affect when the statute of limitations begins to run. For example, with a statute of limitations that is three years long, normally the clock would start ticking as soon as the injury occurred. However, if the injury was not reasonably discoverable until one year after the injury, the three-year period begins on the date of discovery. Checking related statutes and case law can also help you determine whether or not your specific claim accrues upon discovery.

Tolling Due to Minority or Incapacity. Children under the age of 18 years, and persons that have disabling mental conditions which prohibit that person from understanding rights that the person is otherwise bound to know, are allowed some flexibility and suspension of a relevant statute of limitations, to a certain degree. Claims of minors, and individuals with a disabling mental condition, are tolled for up to five years, or one year past the age of 18 for minors and one year after the person no longer has the disabling mental condition, whichever occurs first. ORS 12.160.

Statutes of Repose. A statute of repose focuses on immunizing the alleged injuring party from long-term liability, and thus may even be based on elapsed time from an event, even if the potential cause of action cannot reasonably be discovered until a later date. Statutes of repose are distinct from statutes of limitations, though their effects are often similar. In contrast to a statute of limitations, a statute of repose is designed to bar actions after a specified period of time has run from the occurrence of some event, other than the injury, that gave rise to the claim. A statute of repose may cut off liability even if the applicable statute of limitations has not run. For example, a defect in an airplane might cause a crash 12 years after the date of initial sale, with the statute of limitations for a personal injury claim starting to run on the date of the crash, whereas a 10-year statute of repose on product liability claims will have already expired. The earlier expiration of the statute of repose will prevent the personal injury claim even before the statute of limitations starts to run. Deadlines imposed by statutes of repose are enforced much more strictly than those of statutes of limitations.

Tolling of the Statute of Limitations. Sometimes the statute of limitations is suspended or extended for a period of time, and then begins to run again. When the reason for the tolling ends (such as when a child becomes an adult) the statute of limitations begins to run again. A tolling agreement may also be possible between the parties to a potential suit, but beware of jurisdictional statutes of limitations that cannot be tolled by agreement because the cause of action is extinguished if brought outside the applicable period spelled out in the statute, regardless of the parties' agreement outside the statute.

The Savings Statute and Equitable Tolling. Under certain narrow circumstances, there is statutory permission for more time granted to the plaintiff to bring a second action, often called a "savings" statute. Oregon's savings statute allows an action that is first timely filed within the statute of limitations, but then is "involuntarily dismissed without prejudice on any ground not adjudicating the merits of the action" due to a defective notice, for example. ORS 12.220(1). The plaintiff can file a new lawsuit within 180 days "after the judgment dismissing the original action is entered in the register of the court," even though the statute of limitations time period is over. ORS 12.220(2). Courts have generally only allowed this equitable tolling if the plaintiff filed a defective pleading during the statutory period, or was induced by the defendant's misconduct into missing the filing deadline, but not when the claimant fails to act diligently and reasonably. *See Irwin v. Dep't of Veterans Affairs*, 498 US 89, 96 (1990); *Baldwin Cty. Welcome Ctr. v. Brown*, 466 US 147, 151-52 (1984); *Zimmerman v. Or. Dep't of Justice*, 983 F Supp 1327, 1329 (D Or 1997).

Conclusion

When disputes arise, or we are aware of problems in an estate or trust matter, a review of the relevant statutes of limitations is a necessary first step. Hopefully this article's summarized material is a helpful reference for practitioners, although the issues are summarily discussed and this is not an all-encompassing analysis of all applicable statutes of limitations in estate and trust matters. Of course, all attorneys should analyze the specific facts in their case and conduct their own independent legal research. It is important to conduct a critical analysis early with any actual or potential estate or trust dispute to determine whether there is enough time to bring an action, and if so, how much time remains to file suit. The conclusion to this analysis helps guide our client's next step in any estate and trust dispute.

The Oregon Estate Tax and Its Fractional Formula for Residents and Nonresidents

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The Oregon estate tax applies to both residents and nonresidents, but in different ways. In both cases, however, the Oregon estate tax statutes employ a fractional formula that can produce surprising results. Particularly surprising is the fact that a nonresident with only a small amount of Oregon assets might still be subject to the Oregon tax. Equally surprising is the fact that a nonresident could leave all of his or her Oregon assets to a surviving spouse or to a charity, and Oregon tax might still be due. All of this is caused by the fractional formula.

For an article that discusses the factors that will be taken into account to determine whether or not a decedent was an Oregon resident, see Stephen J. Klarquist, Determining Oregon Residency for State Estate Tax Purposes, *Oregon State Bar Estate Planning & Administration Section Newsletter*, October 2009.

For an article that discusses the Oregon fractional formula prior to 2012, see Philip N. Jones, The Oregon Inheritance Tax and Its Fractional Formula, *Oregon State Bar Estate Planning and Administration Section Newsletter*, April 2010. Due to 2012 changes in the formula, that article is now out of date.

Attorneys with clients who move to other states (such as clients who retire to Washington, Nevada, Arizona, or California) will want to familiarize themselves with the Oregon fractional formula and the odd results it creates. The tax is calculated on the *entire* taxable estate (wherever located), and then the tax is multiplied by a fraction, but a different fraction is applied to residents than to nonresidents. That's the key.

Oregon Residents

For an Oregon resident, the numerator of the fraction is the sum of real estate located in Oregon, tangible personal property located in Oregon, and intangible personal property worldwide. The denominator is the entire gross estate. ORS 118.010(5). The tax is calculated on the *entire* taxable estate (wherever located), and then the tax is multiplied by the fraction. It is important to note that for Oregon residents, the numerator does not include real property located in other states and tangible personal property located in other states. Thus for an Oregon resident, the estate is not taxed on out-of-state tangible property. *Id.* One other exception: The numerator does not tax intangible assets if those assets are taxed by another state. *Id*. (This last exception is discussed below in the section on limited liability companies.)

Oregon Nonresidents

Nonresident decedents are taxed on property located in Oregon consisting of real property and tangible personal property. But nonresidents are not taxed on intangibles, such as bank accounts and securities, even if those intangibles are somehow deemed to be located in Oregon. For nonresidents, the tax is calculated on the *entire* taxable estate (wherever located), and then the tax is multiplied by a fraction, the numerator of which is the value of the tangible assets subject to tax in Oregon, and the denominator is the entire gross estate. ORS 118.010(6). Thus nonresidents are not taxed on intangibles, nor are they taxed on out-of-state tangible assets.

Gross Estate vs. Taxable Estate

It is important to distinguish between the gross estate and the taxable estate. The gross estate consists of the total value of all of the assets includable in the estate, but then various deductions are taken to reach the taxable estate. The Oregon $1,000,000 filing threshold is measured against the gross estate, but the tax is calculated on the taxable estate, and a $1,000,000 exemption is allowed. ORS 118.010(4).

Odd Results

In short, under the Oregon statutory scheme tangible property (both real and personal) will be taxed only by the state in which it is located, in both resident and nonresident estates. Intangible personal property held by estates of residents will be taxed regardless of location, and intangible personal property held by estates of nonresidents will not be taxed. ORS 118.010. The definition of intangible personal property is very broad. OAR 150-118-0010.

These statutes can produce some unexpected results, partly because the filing threshold of $1,000,000 is based on the gross estate, regardless of where the assets of the gross estate are located. ORS 118.160(1)(c). As a result, a nonresident with a gross estate of $1,000,000 or more, but with a small amount of Oregon tangible assets, will be required to file an Oregon estate tax return, and will be required to pay Oregon estate tax if the taxable estate exceeds $1,000,000, even if the state of residence imposes no estate or inheritance tax, and even if the value of the Oregon tangible property is very low.

For example, if an Oregon resident moves to California (which has no estate or inheritance tax), but leaves behind Oregon real property or tangible Oregon personal property, that person's estate will be subject to Oregon estate tax if the taxable estate (wherever located) exceeds $1,000,000. And even if the taxable estate is less than $1,000,000 and no tax is due, that estate will still be required to file an Oregon no-tax-due estate tax return if the gross estate exceeds $1,000,000 (for example, if the gross estate exceeds $1,000,000 but deductions reduce the taxable estate to less than $1,000,000). The same result will take place if the person never lived in Oregon, but happens to own real property or tangible personal property in Oregon. Because of the fractional method of calculating the tax, even a small amount of Oregon tangible property will trigger a tax if the gross estate and the taxable estate exceed $1,000,000.

For example, an Oregon nonresident might have a gross estate of $1,500,000, with no Oregon assets except for a piano located in Oregon with a value of $5,000. If the taxable estate is $1,450,000, the fractional formula will result in an Oregon estate tax of $155. It hardly seems worth the expense of preparing an Oregon estate tax return when the tax is so low, but Oregon law requires the filing of the return and the payment of the tax.

Similar results will take place if the person lived in Washington, because Washington has adopted an estate

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tax with a fractional formula similar to Oregon's. RCW 83.100.040(2)(b); WAC 458-57-125.

If all of the Oregon property of a nonresident passes to a surviving spouse or to a charity, the Oregon estate tax on nonresidents is not necessarily eliminated. Marital deductions and charitable deductions, like all other deductions, reduce the taxable estate, not the gross estate, and the fractional formula employs the gross estate as its denominator and the gross estate located in Oregon as its numerator. The fact that some or all of the numerator passes to a spouse or to a charity does not affect the fraction or the resulting percentage. Marital deductions and charitable deductions will reduce the overall Oregon tax, and might in some circumstances reduce it to zero, but they will not reduce the percentage of the tax payable to Oregon, nor will they reduce the assets (the gross estate) to be measured against the filing threshold. As a result, the amount of tax payable to Oregon will remain the same regardless of whether the assets passing to the spouse or to a charity consist of Oregon assets or foreign assets.

For example, assume that a Washington resident dies with a $5,000,000 portfolio of real estate equally divided between Oregon and Washington. He leaves all of his Washington real estate to his children, and all of his Oregon real estate to a charity. Even though all of the Oregon assets passed to charity, an Oregon estate tax of $76,250 is owed.

The regulations define "intangible personal property" as including "stocks, bonds, notes, currency, bank deposits, accounts receivable, patents, trademarks, copyrights, royalties, goodwill, partnership interests, limited liability interests, life insurance policies, annuity contracts, brokerage accounts, and other choices [sic] in action." OAR 150-118-0010.

Keep in mind, however, that no Oregon estate tax return will be due (and no tax will be due) if the worldwide gross estate of the decedent is less than the Oregon filing threshold of $1,000,000. ORS 118.160(1)(c). The bottom line: nonresident clients with even a small amount of Oregon assets should review their situation in order to determine whether steps should be taken to minimize or eliminate the Oregon estate tax. Those steps might include disposing of Oregon assets or moving the Oregon assets to another state, such as the state of residence, depending on the estate tax laws of the state of residence.

Even Oregon residents can reduce their Oregon estate tax by holding tangible assets in other states, but the amount of overall tax savings will depend on the estate tax laws of the other states.

Limited Liability Companies

Oregon and Washington treat limited liability companies differently for purposes of their state estate tax. Oregon views an interest in an LLC as an intangible asset, just like stock in a corporation. OAR 150-118-0010. Even though a single-member LLC might be disregarded for income tax purposes under IRC § 7701 and the regulations adopted thereunder, an LLC is respected for estate and gift tax purposes, *Pierre v. Comm'r*, 133 TC 24 (2009; reviewed by the court), and is even respected for purposes of the charitable income tax deduction, *RERI Holdings I, LLC v. Comm'r*, 143 TC 41 (2014).

Thus a nonresident of Oregon can place her Oregon vacation home in an LLC (single member or otherwise), and her interest in the LLC will not be subject to Oregon estate tax, because it is an intangible asset. Had the Oregon vacation home been left in the name of the nonresident decedent, it would be taxed by the Oregon estate tax as the Oregon tangible real property of a nonresident. This is clearly a planning opportunity for an Oregon nonresident. It is not a planning opportunity for an Oregon resident, because the Oregon vacation home will be taxable for Oregon estate tax purposes in any event, either as an intangible LLC investment (if it is held in an LLC by the resident decedent) or as a tangible Oregon real property asset (if held in the individual name of the resident decedent).

But Washington takes a different approach. It disregards the existence of an LLC unless the LLC has a true business purpose. If the LLC holds a vacation home and lacks a true business purpose, the Washington Department of Revenue will view the asset as real property. If the vacation home is located in Washington, the WDOR will view it as Washington real estate, even though it is held in an LLC. If the vacation home is located out-of-state, the WDOR will view it as out-of-state real estate. The LLC will not be viewed as an intangible unless it has a true business purpose.

The true-business-purpose rule is not codified as part of the Washington estate tax statutes, nor is it included in the Washington Administrative Code. Instead, it is found on the WDOR website and in the instructions to the Washington estate tax return (see Addendum #4 to the Washington estate tax return). Some Washington practitioners believe that the WDOR lacks statutory authority for those instructions. They believe that all LLC interests should be honored as intangible investments (as is the case in Oregon, and is the case under the federal estate tax), but no one has yet gone to court to challenge the ability of the WDOR to disregard LLCs that lack a business purpose.

This difference between Oregon and Washington and their treatment of LLCs can create some weird results. If a

Washington resident places an Oregon vacation home into an LLC that lacks a business purpose, the home will escape Washington estate tax because the WDOR will disregard the LLC and treat the asset as out-of-state real estate. But Oregon will treat it as an intangible asset (an LLC interest) owned by a nonresident, and the interest will escape Oregon estate tax. Thus the asset will be taxed in neither state.

But the opposite situation works differently, because of an exception to the Oregon estate tax. If an Oregon resident places a Washington vacation home into an LLC that lacks a business purpose, the WDOR will treat the asset as a tangible Washington asset, which would be subject to the Washington estate tax, even though the owner lives in Oregon. But the state of Oregon will *not* tax that LLC interest as an intangible, because ORS 118.010(5) prevents the Oregon estate tax from taxing an intangible asset that is also taxable in another state. Thus the LLC interest will be taxed in only one state.

Events Calendar

Central Oregon Estate Planning Council
Tuesday, May 14, 2019 at 5:30 PM
Awbrey Glen Golf Club
2500 NW Awbrey Glen Drive, Bend, OR 97703
For attendance and dinner reservations
Please RSVP to Anna: AEsperanza@oregoncf.org
or (541) 382-1170 ext.1602

Advanced Estate Planning 2019
Friday, June 14, 2019, 8:30 AM-4:45 PM
OSB CLE Live Seminar/Webcast
Multnomah Athletic Club
1849 SW Salmon Street, Portland, OR
brochure | registration: live event or live webcast

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.