

Newsletter

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Forensic Document Examiners

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When a document appears to have been altered, or we question whether a signature is authentic, we want to know more. Often our cases demand that we know more. As laypeople we can guess whether a document is authentic or was altered, but the analysis required to truly determine a document's authenticity is a specialized science. Forensic document examiners are trained to help resolve issues related to questionable documents and questions related to document authenticity.

The discipline of forensic document examination addresses what are sometimes referred to as "questioned documents" and can have a significant impact on a wide array of criminal and civil investigations, from suicide notes and check fraud, to art forgeries and will contests. This article will focus more specifically on forensic document examination in the area of estates and trusts. Questioned documents in the area of fiduciary litigation could range from a suspicious deed, new pages inserted into a trust, a problematic will, or a copied and pasted signature on a contract.

What Does a Forensic Document Examiner Do?

A forensic document examiner is a specially trained professional who is skilled to make scientific examinations, comparisons, and overall analysis of written documents that are in question. Documents can be examined for evidence of alterations, page substitutions, obliterations, indentations, use of different inks, authentic handwriting, and additions or deletions.

Document examiners often conduct their analysis using various types of technology and testing to determine authenticity. The type of questioned document will dictate what type of analysis the examiner should explore. For example, a questionable signature will prompt the examiner to painstakingly compare and contrast many handwriting samples that were written during the same time period as the document in question and dissect the similarities and differences to hopefully reach a conclusion as to whether the signature was forged or authentic. When a signature is forged by tracing, the examiner will do the same detailed comparisons with sample signatures, and sometimes the examiner can identify the document that was the source of the tracing based on the specific details analyzed.

Once the document examiner has conducted their analysis, they often draft a written report of the testing they conducted, include samples and images of the tests, and detail their analysis and findings within the report. The examiner's report is a common and useful piece of evidence that the attorneys can rely on in assessing the questioned document. If a matter goes to trial then the document examiner can give expert testimony during trial and also use their report as part of their testimony.

Handwriting Analysis Procedure

As children we learn to write by copying letters, and as we age that skill is honed, becomes automatic, and is uniquely personal to each individual. A

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document examiner can dissect numerous details of a person's handwriting to help determine if that person wrote a particular word or signature. The examiner will compare the different qualities in the handwriting samples, such as the amount of pressure applied, the size and proportion of the letters, any unusual formation of letters, and other unique attributes. All attributes within the writing will also be analyzed by the examiner, such as grammar, spelling, punctuation, and phraseology. In some situations, it may be relevant to compare the words or phrases used in the sample documents, such as a consistent misspelling. The examiner will consider the connecting strokes to letters, and slant and letter formations. They will also look at where the subject wrote in proportion to the line on the document. The examiner then applies this analysis to compare the similarities and differences between each writing sample. The examiner can also analyze whether the individual may have tried to alter their writing by using the writing utensil wrong or using one's left hand to write when they are truly right-handed.

To begin their analysis, a document examiner will first want to see the original document in question, if it is available. If the original is not available, then the best copy possible is needed. The examiner will need as many authentic samples of the author as possible, in order to thoroughly compare the document in question to the individual's authentic handwriting or signature. It would not be uncommon for the document examiner to request at least 15 authentic writing samples. Those authentic sample documents also need to be from the same time period as the document in question, so the examiner can determine the authentic range of variation. Sample documents can be obtained from a variety of sources, such as the author's driver's license, banking records, checks, tax returns, and medical records.

Handwriting analysis is supported by the fact that the same writing cannot be produced by any two people. A single individual is also simply not capable of duplicating the same signature twice, because that level of exact duplication is not humanly possible. Yet a copy machine or computer printer could duplicate a signature exactly. So a document examiner can skillfully decipher whether a questioned document is authentic, a forgery, or a copy of an original.

What Aids Might a Document Examiner Use?

A document examiner will have access to specialized equipment and possibly a laboratory that will aid in their analysis of a questioned document. An example of specialized laboratory equipment is a Video Spectral Comparator (VSC), which uses infrared radiation to examine the type of ink used in the questioned document. For example, a check may be filled out using all black ink,

and in visible light it may look cohesive and unaltered. Yet in an altered document the pen used to write the check will not be the same pen used to alter the check. Using the VSC, the ink used to prepare the genuine check reacts differently than the ink used to alter the check, making the alteration obvious.

Some ink comparisons require a sample of the specific ink used within the document, so tiny samples of the document must be taken for that test to be conducted. Even with the samples of ink taken for analysis, ink will remain within the document for further testing by the opposing side. A document examiner can analyze whether a document's handwritten alterations used one ink for a majority of the document and a different second ink for certain modifications to the document. Ink testing could be relevant to a will, trust, deed, or other written note or agreement. If the ink testing is more complex and requires a determination of the origination of the ink, the pen used, or a more specific date of when the ink was used, then a document examiner will often send out this more specific testing to an ink chemist.

Similar analysis can be done by a paper chemist to help determining the type of paper used. In estate and trust matters, page inserts and copy and paste edits are often in need of analysis by a document examiner. A document examiner can assist to compare and contrast the type of paper used in the document, analyze the staple holes in the paper to determine whether it was part of the original stapled document, and analyze any inconsistencies in parts of the paper used that may support a copy and paste alteration.

One example case involved a suspicious deed that focused on a handwriting analysis and fingerprint testing. The deed was suspicious because it was signed close to the decedent's date of death and contradicted the decedent's known testamentary wishes. Document examiners collected numerous sample signatures of the decedent from the same time frame as the deed's execution, and all samples were consistent with each other. The questions to analyze were whether the deed was a forgery and, if so, who may have signed the deed. Differences in the signature on the deed demonstrated it was a forgery, so then an examination occurred to determine who forged the signature. The original deed was photographed, magnified, and processed for fingerprints, and some fingerprints were found. The print of a hand palm edge located where a right-handed person would have rested their palm in order to sign the deed was one of the noted prints found. Based on the evidence, a court order was granted for the production of fingerprints and palm edge prints of the person who benefitted from the deed, and those prints were ultimately found to belong to that beneficiary in question.

All findings were made by document examiners, who analyzed both handwriting and fingerprints.

How Reliable Are the Methods Used by Document Examiners?

Document analysis is most reliably conducted by forensic document examiners who are properly trained, whose qualifications are professionally vetted, and who pursue ongoing educational training. Ideally an examiner has completed a two-year, full-time apprenticeship training program under the guidance of an experienced document examiner. A qualified forensic document examiner is preferably a member of a well-established and professionally vetted professional association within the realm of forensic document examiners. There are two professional organizations that heavily scrutinize and vet highly trained and qualified document examiners: the American Board of Forensic Document Examiners (the “Board”) and the American Society of Questioned Document Examiners (the “Society”).

The Board was founded in 1977 to establish, maintain, and enhance standards of qualification for forensic document examiners and to certify applicants who comply with their requirements for a high level of expertise in the field. The Board and the Society have similar strict requirements, so many of their members are members of both organizations. Some of the requirements to be admitted as a member of the Board and the Society include having a bachelor’s degree, completing a two-year apprenticeship under a trained document examiner, and passing written exams and formal interviews. Some differences between the Board and the Society are the Board is a certification organization and the Society is not, and the Society offers more extensive training and educational courses than the Board. Several courts have acknowledged the Board as one appropriate accrediting organization for forensic document examiners. These membership organizations help attorneys identify reliably trained document examiners and ensure integrity, training, and professionalism among the industry.

Handwriting analysis is based on the presumption that no two people worldwide have identical handwriting. Hundreds of thousands of handwriting samples are contained in computer databases maintained by the Federal Bureau of Investigation, the U.S. Secret Service, and the German Federal Police, for example. Comparisons of samples among the different databases have not identified any two individuals who have the same exact combination of handwriting characteristics, which supports the authenticity of handwriting as a reliable form of evidence. While these massive databases are only accessible to the government, they provide a tremendous resource for

document examiners and lend significant credibility to the theory that handwriting is unique to each individual.

Document Examiners as Expert Witnesses

As expert witnesses, document examiners can analyze information, form opinions, and prepare reports in a similar fashion as other expert witnesses. Oregon Evidence Code Rule 702 allows the scientific, technical, and specialized knowledge of a document examiner to assist the trier of fact in understanding any analysis of a questioned document. A qualified document examiner could then testify about their opinion and their analysis.

The federal court system has accepted testimony from document examiners under the *Daubert* standard, based on the U.S. Supreme Court decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993). Some states follow the *Daubert* standard, while others follow the *Frye* standard, based on a D.C. Circuit case, *Frye v. United States*, 293 F 1013 (DC Cir 1923). *Daubert* and *Frye* are seminal cases that establish the legal standards that govern the admissibility of expert witness testimony in federal courts. In *Frye*, the standard is more narrowly related to whether the scientific community generally accepts the technique that the expert bases their opinion on; if so, the testimony is admissible. In *Daubert*, the focus is broadened and specific factors were enumerated that addressed how to assess admissibility of expert testimony. Some of the specific factors addressed in *Daubert* included whether the expert’s technique or theory can be tested for reliability, the existence and maintenance of standards or controls in the industry, and whether the technique or theory has been generally accepted in the scientific community. In Oregon, the case that adopted most of the *Daubert* factors is *State v. O’Key*, 321 Or 285 (1995).

Document examiners as expert witnesses may not be able to say with certainty that a particular handwriting sample came from a particular individual. Instead, document examiners as experts will typically express their opinion as to whether the characteristics of the handwriting on the document in question are consistent or inconsistent with the known sample used for comparison, and then the trier of fact can reach their own conclusion.

The integrity of the document in question is also relevant to the document examiner’s expert testimony. If the questioned document is a copy, burned, obliterated, or hard to read, then the document examiner’s analysis, and therefore the value of their testimony, will be impacted by that fact. If the original is not available to anyone, then certainly that fact will be relevant in the testimony of the document examiner or examiners. Ideally the document examiner is able to analyze an original document to analyze the “wet ink,” authentic document.

Conclusion

When the authenticity of written documents in estate and trust disputes is in question, the attorney must first identify the questioned document to be further analyzed. A trained expert is needed to examine and assess whether a questioned document is authentic or not. Forensic document examiners can assist attorneys and their clients in the analysis and formulation of an expert opinion regarding issues raised in questioned documents. Whether the questioned document is a deed, will, or trust, the analysis, technology, and skills of a document examiner is an extremely valuable resource that attorneys can turn to.

Oregon Appellate Case Addresses the Application of the “HEMS” Standard

By Christopher P. Cline, Riverview Trust Company

A recent Oregon Court of Appeals decision (*Cumming v. Nipping*, 310 Or App 780 (2021)) provides a rare judicial examination of the propriety of trust distributions. Many if not most irrevocable trust agreements provide for distributions to a beneficiary for “health, education, maintenance and support” (the so-called “HEMS” standard). But what do those words mean, and how should they be applied? These are questions for which there is little guidance. Although it doesn’t provide a significant new interpretation of those terms, the *Cumming* decision sheds some useful light on their use.

I. The Decision.

During their marriage, plaintiff’s father and stepmother created a trust. When father died in 1999, the trust split into two trusts: Trust A (a revocable “survivor’s trust”) and Trust B (an irrevocable “tax credit trust”). Stepmother was the trustee of both trusts at all relevant times. Stepmother had unlimited access to both the income and the principal from Trust A. The trustee could use “as much of the net income” from Trust B “as the trustee, in the trustee’s discretion, shall deem necessary for [stepmother’s] proper health, maintenance, support and education,” taking into consideration stepmother’s other income and resources as the trustee deemed advisable.

Regarding the principal of Trust B, the trust instrument provided:

If the trustee deems income payments to be insufficient, the trustee shall, from time to time, pay to or apply for the benefit of the surviving trustor, a sum out of the principal of Trust B as the trustee, in the trustee’s discretion, deems necessary for the trustor’s proper health,

maintenance, support and education. Such payment may be made after Trust A has been exhausted, or before Trust A is exhausted.

The only asset in Trust B was a condominium in California (“Seagate”). Stepmother had the right to continue to live at Seagate, rent-free, for as long as she desired. Further, the trustee could sell Seagate and buy a replacement home of comparable or lesser value, if stepmother wished. The trustee also had discretion to encumber Seagate with a mortgage “for any valid trust purpose.”

Stepmother lived at Seagate until 2008, when she moved to Oregon to be closer to defendants (stepmother’s granddaughter and her husband). Upon arriving in Oregon, stepmother briefly lived with defendants before moving into an assisted living facility. While stepmother was in Oregon, defendants managed her finances, helped her with moves, and occasionally ran errands for her.

Stepmother’s living expenses were fully covered by her pension and Social Security income. Additionally, stepmother received \$2,000 in monthly rental income from Seagate as income payments from Trust B. According to defendant, stepmother had over \$100,000 in her personal accounts as of October 2010.

In 2010, defendants raised with stepmother the possibility of her moving with them to Portland and their living together. Defendants found a farmhouse property in disrepair that they thought would be perfect if they fixed it up, because it was big enough for stepmother to have her own living area. At some point, however, they discovered that the property did not qualify for conventional financing. Needing to act quickly to get ahead of other buyers, defendants suggested that stepmother borrow \$300,000 against Seagate to purchase the farmhouse.

Stepmother (presumably acting through defendants) took Seagate out of the trust to obtain a mortgage on it in stepmother’s name. That enabled her to obtain \$300,000 (the approximate farmhouse purchase price). Seagate was then put back into the trustee’s name, but now encumbered by a \$300,000 mortgage. Stepmother bought the property in October 2010, deeding a one-half interest to herself and a one-half interest to defendants. Stepmother’s will provided that defendants would inherit stepmother’s half interest upon stepmother’s death. Stepmother died two months after the purchase.

After stepmother’s death, plaintiff (her stepdaughter) obtained title to Seagate. Sometime thereafter, plaintiff discovered the \$300,000 mortgage on Seagate, after it had gone unpaid for nearly a year, such that Seagate was about to go into foreclosure. Plaintiff filed an unjust enrichment claim, asserting that defendants had been unjustly enriched

by stepmother's violation of the trust terms. The plaintiff lost at the trial court level, had the trial court decision vacated by the appellate court and had it remanded back to the trial court, lost again at the trial court level, and appealed again. The decision of that second appeal is presented here.

As a preliminary matter, the appellate court noted that California law governed in this case, as required under the trust agreement. However, the court cited no California precedent that would have required a different outcome than if it had been decided under Oregon law.

The appellate court opened its decision by laying out the standard for proving an unjust enrichment claim in this context:

Plaintiff must establish (1) "that property or a property interest that rightfully belongs to her was taken or obtained by someone else under circumstances that in some sense were wrongful or inequitable"; (2) "that the person who now possesses the property is not a bona fide purchaser for value and without notice"; and (3) that the property upon which the plaintiff seeks to impose a constructive trust is in fact, by clear and convincing evidence, "the very property that rightfully belongs to her, or is a product of or substitute for that property." (Quoting the Oregon Supreme Court.)

Addressing the first prong of wrongful or inequitable taking, the court observed that, although stepmother as trustee had broad discretion to use the net income from Trust B, she had less discretion to invade the principal (only if income payments were "insufficient"). The court found no evidence that the income payments were insufficient or, more importantly, that stepmother ever deemed them so. Although it was undisputed that stepmother had sufficient income to fully cover her living costs and was free to change her living arrangement, it did not mean that she "could simply withdraw \$300,000 from the Trust B principal to buy a second home and deed it half to herself and half to someone else."

The court also noted that transferring Seagate out of the trust just long enough to get a mortgage in stepmother's own name, using the proceeds to buy the farmhouse, and then deeding half to herself personally and half to the defendants was an impermissible way to acquire a replacement home, and was also inconsistent with the trust's overriding intent to keep Trust B assets out of stepmother's estate for federal estate tax purposes.

Further, there was no evidence that defendants' offer to live with stepmother was made contingent upon her giving them an interest in the farmhouse or providing

other payment. In fact, the only evidence is that defendants approached stepmother about living together out of familial feeling and, when she subsequently deeded them a one-half interest in the farmhouse, they viewed it as a "gift."

The court had little trouble finding that the defendants were not "bona fide purchasers," and that the plaintiff as trust beneficiary was entitled to the property at issue (the second and third prongs of the unjust enrichment test). As a result, the appellate court again vacated the trial court's decision in favor of the defendants and remanded the case for a new finding consistent with the appellate court's ruling.

II. The Dissent.

Of some concern is the dissent in this case. The dissenting judge took a different approach, focusing on the connection between the stepmother and the defendants. With little to no evidence on the record, the dissent supported the trial court finding that there was an implied contract between the stepmother and the defendants, under which the defendants agreed to house and support the stepmother in exchange for the purchase of the farmhouse and the transfer of the one-half interest to the defendants outright.

The dissenting opinion states that "understanding [stepmother's] decades-long relationship with [defendants and their family] is essential to understanding [stepmother's] decision to withdraw trust principal, why withdrawing trust principal was authorized under the terms of the trust, and the inferences that the trial court permissibly drew [of a contract for support between them] from the evidence." Indeed, seven and a half pages of the dissenting opinion are dedicated to describing the relationship between the stepmother and her granddaughter (going back to the granddaughter's birth!), but interestingly with no discussion of the relationship between the trustor and the plaintiff (an actual trust beneficiary and the trustor's daughter).

With respect, such a view (while perhaps emotionally satisfying) is legally unsupportable and (much more importantly) ignores the purpose of the trust and the probable intent of the trustor. As the majority points out, the trust was designed to save federal estate tax (hence the limitations on principal distributions). Further, the remainder beneficiary of the trust was the trustor's daughter only; the stepmother's granddaughter was excluded. Had he wished her to benefit from the trust property, the trustor could have drafted the trust appropriately. Further, the farmhouse could have been purchased as a trust asset; it didn't need to be owned outright by stepmother and defendants. Encumbering

trust property for the sole purpose of benefiting a non-beneficiary was in this case a breach of fiduciary duty, pure and simple.

III. The Lessons.

In one respect, this decision is appropriate and unsurprising. However, there are still important lessons to be learned from it:

1. **This was a really expensive process.** The parties went to the trial court twice and to the appellate court twice. And one of the three appellate court judges dissented. As someone who has focused his entire career on estate planning and administration, I was surprised at the difficulty of the process the parties went through. So the first lesson must be to never take trust distribution language for granted, even when you think you know exactly what it means.
2. **Add purpose language.** It may have helped (and couldn't have hurt) if the trustor had been more clear about who was to benefit from the trust and who had priority of distribution (for example, was the main purpose to benefit the spouse? his daughter? both equally?).
3. **"May" really should mean "shall."** Many trust agreements give the trustee the flexibility to consider a beneficiary's other assets and income when determining how much to distribute for "support." But this flexibility is illusory. If the trustee, given such flexibility, chooses to consider other assets, that trustee is almost certainly free from criticism by either party. However, if that same trustee does not consider other assets and pays the full amount of the beneficiary's support from trust assets, the trustee is almost certainly open to criticism by the remainder beneficiary. That is why corporate trustees take other assets into account even when given that flexibility. I would argue that this is the correct practice for individual trustees as well. And if that's true, perhaps we should as drafters start replacing "may" consider other assets with "shall," at least in the boilerplate. Such a change in this case might have made the process easier.

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Events Calendar

Central Oregon Estate Planning Council

New Member Wine Social
Stoller Tasting Room at the Box Factory
Bend, Oregon
September 15, 2021, 5-7 pm

Annual Estate Planning Seminar 2021

Univ. of Washington School of Law
and Estate Planning Council of Seattle
Washington Convention Center, Seattle
October 28 and 29, 2021
In-person and/or online

Basic Estate Planning 2021

Oregon State Bar Estate Planning
and Administration Section
November 12, 2021 (tentative date)
Online only

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.