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Estate Planning for a Protected Person

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Clients create estate plans for a variety of reasons: to dispose of the assets of their estate in accordance with their wishes, to grant decision-making authority regarding themselves and their property to persons they trust and respect, to help their survivors by minimizing the inconvenience and other burdens associated with caring for them or their estates, or to identify candidates for the court to consider in appointing a guardian for minor children. These reasons apply to protected persons as well as to anyone else.

This article addresses estate planning for a protected person. It does not address estate planning for a person who is not a protected person, but probably should be. In developing this article we have interviewed persons who have prepared estate plans for protected persons or have litigated issues arising from estate plans prepared for protected persons. Based upon these discussions, bear in mind that preparing an estate plan for a protected person is unusual. None of the persons we spoke with has done it more than twice. It is hoped that this is because most protected persons either already has an estate plan before they became a protected person, or because the needs of most protected persons are sufficiently addressed through the guardianship or conservatorship or applicable Oregon law.

With regard to estate planning attorneys and estate planning for protected persons, an unscientific analysis would divide them into three groups:

- those who would never under any circumstances prepare an estate plan for a protected person
- those who believe that preparing an estate plan for a protected person is the same as any other estate planning with some additional care required at the signing, and
- those who have never confronted the issue, so they have never really thought about it

Estate planning for a protected person is different. Additional care is required at all steps of the process. Also, it is best to think through the issues related to estate planning for a protected person and to develop a plan of action before a protected person shows up in your office accompanied by persons who may have very definite ideas on what can be done and what you should do.

The estate plan

The tools typically used in crafting an estate plan are:

- Documents or financial instruments where the assets or benefits can be conveyed to a survivor by operation of law. These would include the beneficiary designation on a life insurance policy, a 401(k) plan, or an

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IRA, a payable-on-death provision for a checking or savings accounts, or a jointly held asset with a right of survivorship

- A will which when properly prepared and executed can, among other things, provide for a distribution of estate assets to designated devisees, the nomination of someone to serve as the guardian for minor children, the creation of a testamentary trust for minor children or disabled beneficiaries, or a disclaimer trust or other estate tax planning provisions
- A revocable living trust which—when properly prepared, executed, and funded—can among other things provide for a distribution of trust assets to designated devisees, provide for the care of the settlor in the event he or she is legally incapacitated, or create a disclaimer trust, or include other estate-tax planning provisions
- An appointment of a person for the disposition of remains. This authorizes a designated person to make certain burial decisions upon the death of the person making the appointment.
- An advance directive that provides for the appointment of a health care representative and permits the person creating the advance directive to give instructions to the health care representative as to whether or not healthcare should be continued under certain circumstances
- A durable power of attorney that creates an agent to manage the assets of the person who created the durable power of attorney and whose authority survives the legal incapacity of the person creating the durable power of attorney or springs into effect at that time

An estate plan is the incorporation of these tools as may be appropriate to meet the needs and desires of the client. The point here is that creating an estate plan involves more than creating a legally viable will.

Protected persons

For our purposes, a protected person is a person for whom either a guardianship or a conservatorship has been established by judgment of a court. The requirements for appointing a guardian or a conservator are not the same.

Guardianship

A guardian is much like a legal parent. When the protected person is an adult, this results in a substantial change in legal status. When a guardianship is established, it "deprives a person of precious individual rights, and Oregon's statutory process is designed to protect those rights with 'extensive procedural requirements and substantive requirements,'" *Shaefer v. Shaefer*, 183 Or App 513, 516, 52 P3d 1125 (2002); V*an v. Van*, 14 Or App 575, 580-581, 513 P2d 1205 (1073); *Guardianships, Conservatorships, and Transfers to Minors* (Oregon State Bar CLE GCT-OSB, Section 3.2.)

A guardian for an adult may be appointed only when it is determined by clear and convincing evidence that a guardianship is "necessary to promote and protect the well-being of the protected person." ORS 125.300(1).

A guardianship can only be ordered "to the extent necessitated by the person's actual mental and physical limitations." ORS 125.300(1); GCT-OSB, Section 3.2. In order for a guardian to be appointed the protected person must be incapacitated. A person is incapacitated if a "person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety." ORS 125.005(5). Meeting the essential requirements for physical health and safety means "those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur." ORS 125.005(5); GCT-OSB, Section 2.5.

Conservatorship

A conservator has authority over a more limited range of activities than a guardian has. Even so, a conservator is vested with the broad authority to handle the financial and business affairs of a protected person, the authority for which centers on the personal welfare of the protected person. GCT-OSB, section 4.2.

In order to appoint a conservator, the court must find by clear and convincing evidence that the protected person is financially incapable and has money or property that requires management or protection. ORS 125.400; GCT-OSB, section 4.3.

A person is financially incapable if "unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental deficiency, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power, or disappearance." The phrase "manage financial resources" means "those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income." ORS 125.005(3); GCT-OSB, section 2.5.

Diminished capacity rules of ethics

An attorney who represents a protected person is subject to the ethical rules that apply to persons with diminished capacity.

The key feature of these ethical rules is the burden placed upon the attorney to try and determine what is or is not appropriate.

Oregon Rule of Professional Conduct (ORPC) 1.14 (a) states that "[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." How exactly to do this may not be easy or obvious. The inescapable fact is that a protected person is impaired in some significant way. The representation of a protected person is not routine and cannot and should not be treated as routine. The diminished capacity must be addressed or accommodated in some way.

ORPC 1.14 (b) states that when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian. With a client of diminished capacity, the attorney is responsible for deciding whether or not to take action to protect the client. There may be ethical consequences if the decision not to protect the protected person results in financial elder abuse under ORS 124.110.

ORPC 1.14(c) states that information related to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is by implication authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests. Again, in a case involving a client with diminished capacity, the burden is on the attorney to determine what information should or should not be shared with others.

For an example of relevant ethical considerations addressed in an estate planning situation, See, *In re Zanotelli*, 23 DB Rptr 124 (2009).

Getting started

As part of the initial intake process, an attorney asked to do estate planning for a protected person should consider the following questions:

Who is asking you to do the estate planning? Who is approaching you? The protected person? The guardian? The conservator? A caregiver? A domestic partner? A child? If approached by someone other than the protected person, an estate planning attorney should promptly and clearly state that

if he or she is retained, the client would be the protected person, and as the client would be the one telling the attorney what to do. The attorney should also make it clear that before any decision about representation can be made he or she must meet and talk with the protected person alone.

If the person contacting the estate planning attorney has a problem with this, the attorney will probably never hear from that individual again. This is not a problem. The lost aggravation will more than make up for the lost income.

What are you being asked to do? Are you being asked to create an estate plan where one does not exist or amend an existing estate plan? Are you being asked to do something that makes sense and is useful to the protected person? Are you being asked to do something that is a radical change from the existing estate plan and does not appear to benefit the protected person at all? How likely is it—based, for example, on possible issues of incapacity or undue influence—that doing what is requested will commit you to participation in litigation or other dispute resolution activities long after the estate plan is completed? Is the primary reason for the requested estate planning that someone other than the protected person wants it done? Does the purpose of representation and the locus of the decision-making authority appear to be murky?

What accommodations are going to be necessary to work with the protected person? Who do you need to consult with to find out? What will you need to do to provide evidence that the protected person was competent to sign the estate planning documents when signed? Is the estate planning attorney able to make the necessary accommodations to get the job done? The protected person is a protected person for a reason. A plan must be made to identify the potential problems inherent in this type of representation and address them.

On top of everything else, the status of the protected person may change during the course of the representation. The answers to these questions may change. The estate planning attorney must be prepared to identify these changes and deal with the consequences. These could include the determination that what the estate planning

attorney had originally agreed to do can no longer be done and the attorney must withdraw.

Capacity to hire the attorney

ORS 125.300(3) states that a protected person has the right to retain counsel. An estate planning attorney approached by a protected person for representation must also determine whether the protected person has the legal capacity to form a contract and hire the attorney.

Retaining an attorney is creating a contract. Persons are presumed to be competent to enter into a contract. *Cloud v. U.S. National Bank*, 280 Or 83, 90, 570 P2d 350 (1977). Under common law a protected person was presumed not to be able to enter into a contract. *First Christian Church v. McReynolds*, 194 Or 68, 74–75, 241 P2d 135 (1952)

Under current law, a protected person under a guardianship is not presumed to be incompetent. ORS 125.300(2). A protected person under a conservatorship is not competent to enter into a contract. ORS 125.300(2). A specific concern is that a retainer agreement entered into by a person who lacks the competence to enter into a contract can be voided.

In the case of a protected person, an attorney has certain tools to deal with the issue of the capacity to retain an attorney. The conservator has the authority to hire professionals on behalf of the protected person. ORS 125.445(25). So even if there is doubt about whether the protected person has the capacity to hire an attorney, the conservator can authorize it. Another option is to ask the court to appoint the attorney to represent the protected person. If the court or the conservator agrees, any doubt is removed. A clearly competent party has approved the contract. The terms of the retainer agreement have been approved and should be enforceable.

A concern associated with asking the court to appoint the estate planning attorney to represent the protected person is the concern that in a will contest the fact that a request was made could be considered an admission that the protected person lacked the capacity to create the estate plan. This concern can be addressed in the pleadings making the request.

Legal capacity to create the estate plan

The estate planning attorney must also determine whether the protected person has the capacity to execute the required estate planning document.

Generally, a person has the testamentary capacity to create a will if a person is 18 years of age or older or has been lawfully married, and who is of sound mind, ORS 112.225; A*dministering Oregon Estates* (AOE-OSB), section 4.2-1

In order to be of sound mind to be able to make a will, a person must:

- be able to understand the nature of the act in which the person is engaged, that is, the execution of a will
- know the nature and extent of his or her property
- know, without prompting, the claims, if any, of those who are, should be, or might be the natural objects of the person's bounty
- be cognizant of the scope and reach of the provisions of the document. *Golden v. Stephan,* 5 Or App 547, 550, 485 P2d 1108 (1971)

Testamentary capacity is determined at the precise moment that he or she executes a will. *Perry v. Adams*, 112 Or App 77, 81, 827 P2d 930 (1992); *Matter of Unger's Estate*, 47 Or App 951, 955, 615 P2d 1115 (1980) citing *Kastner v. Husband,* 231 Or. 133, 136, 372 P2d 520, 522 (1962).

To create a testamentary trust or a revocable trust, the settlor must have the capacity to create a trust. ORS 130.155. A person who has the testamentary capacity to create a will also has the testamentary capacity to create a revocable living trust. See comment by Valerie J. Vollmar, "The Oregon Uniform Trust Code and Comments," 42 Willamette L Rev 187, 249 (2006); *Administering Oregon Trusts* (AOT-OSB), section 2.6-1

A protected person who is a protected person based upon "mental capacity" is presumed not to have the mental capacity sufficient to execute a will. Wood v. Bettis, 130 Or App 140, 142-143, 880 P2d 961(1994); GCT-OSB, section 4.18. However, if "mentally competent," a protected person has the power to make a will, change life insurance and annuity beneficiaries, and exercise a power of appointment, or elect to share in the estate of deceased spouse. ORS 125.455(1).

On the one hand, a protected person subject to a guardianship is presumed not to have the testamentary capacity to create a will. On the other hand, a guardianship must be designed to minimize restrictions to the protected person to what is necessary to meet the needs of the protected person. Somehow the presumption and the minimum restriction requirement must be reconciled.

Establishing that a protected person has legal capacity

If an estate planning attorney is representing a protected person, the protected person's capacity to execute the estate plan cannot be taken for granted. Following are some thoughts on various techniques for establishing and preserving evidence of testamentary capacity.

Recording the signing

The idea here is to memorialize the condition of the protected person at the time of the signing of the will or

other estate planning documents. Typically, the protected person's attorney asks the protected person questions whose answers are intended to demonstrate testamentary capacity at the time of the signing.

Videotaping. The problem with videotaping is that there is no perspective, no basis for comparison. What is videotaped may demonstrate the protected person having a really good day when compared to other persons of a similar age.

However, those other elderly people are not on the videotape. You are relying on the judge to be able to correctly appraise behavior that shows a person who is merely elderly from behavior that reveals incapacity. The videotape requires the judge to be able to put what appears on the video in a proper perspective. The litigators interviewed all agreed that videotaping is not advisable.

Audio taping. The advantage of audio taping the signing is that it preserves what is important, the answers to the questions, without any distractions due to the protected person's appearance or manner. The focus is on the ability of the protected person to express his or her comprehension of what the protected person needs to be aware of in order to establish capacity. The litigators interviewed had mixed feelings about audio taping.

Witnesses

In addition to the witnesses who will see the signing and presumably sign the attestation clause to the will and the affidavit of attesting witnesses, the attorney may choose to bring in neutral persons who are familiar with the protected person. These persons could be friends, caregivers, or healthcare professionals. They would be in a position to offer some perspective with regard to how the protected person was doing on the day of the signing. The best perspective would come from an expert witness who can offer an opinion as to what the expert is observing. These additional witnesses may also be more likely to be able to answer any additional questions that might be asked at a subsequent trial.

The attorney

There is anecdotal evidence that in establishing the legal capacity to create an estate plan, a court relies heavily upon the testimony of the attorney who conducts the signing. Regardless of whether or not this is correct, the estate planning attorney should not rely solely upon this. If an estate plan for a protected person is being contested, the estate planning attorney who supervised the signing will be expected to testify as to why the attorney believed that the protected person was good to go on the day the estate plan was signed.

Actions to take prior to the signing

The estate planning attorney can do several things prior to the signing to make sure that the protected person has the necessary capacity.

Consult the health care professionals and care givers who work with the protected person. Is the protected person more active and alert at certain times of the day? What is the best way to communicate with the protected person? What things might be distracting or confusing to the protected person?

Meet with the protected person on as many occasions as necessary to become comfortable with the protected person's strengths and limitations. Did the protected person remember what was discussed in prior meetings? Did the protected person appear to have thought about or considered what had been previously discussed? Did the protected person ask good questions? Did the protected person consistently express the same concerns or goals? Be in a position to say that the estate plan reflected input from the protected person.

Learn the protected person's strengths and weaknesses and adjust accordingly. Get a list of the medications that the protected person is taking and be aware of what they are for and how they might affect the protected person. When testifying to the judge, admit the existence of those strengths and weaknesses and discuss how they were addressed and accommodated.

Address any concerns about undue influence. In the future, a court may consider whether the estate plan created for the protected person is the product of undue influence. Are any of the undue influence factors potentially in play? See *In re Estate of Reddaway*, 214 Or 410, 329 P2d 886 (1958). If they are, the estate planning attorney needs to address these concerns as part of the estate planning process. The estate planning attorney may be asked in the future how these concerns were addressed.

Questions asked at the signing

At the signing, the estate planning attorney will ask the protected person questions to establish the protected person's competence to execute the estate plan.

In asking these questions, the attorney should treat the protected person like a trial court witness. A litigation attorney will typically interview the witness before trial to learn what information the witness has to share with the court, brief the witness as to the questions the attorney intends to ask, and learn the answers the witness has to these questions. Frequently, the litigation attorney discovers during these pre-trial discussions that a witness can provide little or none of the information needed to address the contested issues in the case. If that is the situation, the witness either is not called to testify or during

testimony is not asked questions that the witness cannot answer.

In a similar way, an estate planning attorney working with a protected person must know prior to the signing what questions the protected person can and cannot answer. If a protected person cannot answer the questions necessary to establish competence, then—like a litigation attorney in a similar situation—the estate planning attorney must accept that the witness (the protected person) cannot testify. Trying to find a way to get a witness or a protected person to provide testimony that he or she cannot provide is asking for trouble.

The point of asking the protected person questions is to preserve the protected person's testimony, not the testimony of the attorney who poses the questions. The objective is to show the ability of the protected person to provide information, not to simply say "yes" to information provided by the attorney. If the objective is to convince someone that the protected person is competent, asking leading questions is neither effective nor convincing.

When asking questions to establish competence, the attorney should frame the questions in a way that makes it as easy as possible for the protected person to understand and respond accurately. One way to do this is to avoid asking questions that require the protected person to provide a lot of specific detail: e.g.: What are the names of your children? When were your children born? What schools did your children attend? What are names of their wives and children?

The attorney wants to give the protected person the best opportunity to succeed. An example of a possible line of inquiry might be:

Q. Do you know anyone name Robert Smith?

A. Yes.

Q Who do know named Robert Smith?

A. My son.

Q. Tell me about your son, Robert Smith.

Then follow up with questions based upon the protected person's recollection.

An attorney can do the same thing to establish an awareness the protected person's financial matters: What is a bank account? Do you have a bank account? Tell me about your bank account. What is a credit card? Do you have any credit cards? Tell me about your credit cards. Do you have a house? Tell me about your house.

In this way the protected person tells the court or the witnesses what she or he knows at the time of the signing, without sorting through what the protected person may or may not remember.

Crafting the document: comprehension

Even if the protected person has the testamentary capacity to execute a will, the attorney in drafting it must consider whether to include provisions that the protected person is not in a position to comprehend, much less consent to. One of the requirements for testamentary capacity is whether the protected person is "cognizant of the scope and reach of the provisions" in the estate planning document. It may be easier to get the court to accept the capacity of the protected person to understand the estate planning document if that document is relatively easy to comprehend.

The best way to transform something complex into something simple is to eliminate the complexity. We were advised of a will created for a protected person that consisted of five or six sentences. The will expressed what the protected person was capable of comprehending and expressing—nothing more. We are advised that this will was successfully probated.

Crafting the document: avoiding objections

Issues of capacity and the other problems discussed up to this point primarily arise if someone objects to the estate plan. It is amazing what can be accomplished if no one objects. If the distribution provisions of a will do not substantially deviate from what would occur if there was no will at all, then that will is less likely to be contested.

The creation of an estate plan for a protected person appears to become a problem when there is a significant change in the devisees. The distribution plan either ignores intestate heirs or eliminates devisees in an existing estate plan that was created when the guardianship or conservatorship was not needed.

One way to avoid a challenge to an estate plan is to design it in a way that is less likely to be challenged. For example, in carrying out a protected person's wishes to provide for someone new, it may not be necessary to disinherit everyone else. The new devisee could be added to the existing heirs or devisees whether those existing heirs or devisees are currently the intestate heirs or the devisees in a will.

Good work by an attorney for a protected person may involve more than taking dictation from the client. It may also involve working with the protected person to accomplish his or her goals in a way that the court and other interested parties are likely to acknowledge and accept.

Estate planning: guardians and conservators

Even if the protected person lacks the legal capacity to create or revise an estate plan, guardians and conservators have the authority to engage in estate planning-type activities for a protected person.

A guardian has the authority to make funeral arrangements and authorize the disposition of the protected person's remains in a manner akin to those provided for in an appointment of person for disposition of remains. ORS 125.315(1)(d)(A).

A guardian has the authority to withhold health care for a protected person in a manner similar to a health care representative in an advance directive. The prior applicable statute was amended in 2019 to clarify this. ORS 125.315(3).

An attorney working on an estate plan for a protected person subject to a guardianship would want to discuss these issues with the protected person and discuss her or his wishes with the guardian. This would be particularly important if capacity is an issue for the protected person. If a guardian has the authority to make these decisions, then the court does, too. If necessary, a guardian could be ordered to address these issues, preferably in the form of a stipulated order.

ORS 125.440 states that a conservator has the authority with the prior approval of the court to:

> 2. Create revocable or irrevocable trusts of property of the estate. A trust created by the conservator may extend beyond the period of disability of the protected person or beyond the life of the protected person. A trust created by the conservator must be consistent with the will of the protected person or any other written or oral expression of testamentary intent made by the protected person before the person became incapacitated. The court may not approve a trust that has the effect of terminating the conservatorship unless:
>
> (a) The trust is created for the purpose of qualifying the protected person for needs-based government benefits or maintaining the eligibility of the protected person for needs-based government benefits
>
> (b) The value of the conservatorship estate, including the amount to be transferred to the trust, does not exceed $50,000
>
> (c) The purpose of establishing the conservatorship was to create the trust, or
>
> (d) The conservator shows other good cause to the court. ...
>
> 4. Disclaim any interest the protected person may have by testate or intestate succession, by inter vivos transfer, or by transfer on death deed

Anecdotal evidence indicates the courts routinely approve trusts created for protected persons under ORS 125.440(2)(a).

Regardless of the legal capacity of the protected person, it would make sense to attempt to obtain the cooperation and approval of the guardian or the conservator in developing the estate plan for the protected person. It may not always be possible, but it is advisable for the attorney for the protected person to seek to enlist the assistance and support of the conservator or the guardian in preparing an estate plan for the protected person.

Conclusion

We have identified the likely categories that estate planning attorneys may fall into with regard to creating an estate plan for a protected person. Depending on the category that may apply to you, the following are some thoughts to consider.

If you are an estate planning attorney who would never under any circumstances prepare an estate plan for a protected person, your caution is justified. Only take on the work if what you are being asked to do makes sense in the context of the protected person's current situation. It is possible to successfully and safely prepare an estate plan for a protected person if you:

- focus on representing the protected person and not other interested parties
- take nothing for granted; make sure you have the authority to do what you are doing; make sure that you can prove that the protected person has the legal capacity to do what she or he is being asked to do
- work within the context of the protected person's strengths and weaknesses
- are willing to put in the additional time and effort
- work with the guardian and/or conservator
- try to develop an estate plan that can survive or avoid serious objections

If you are an attorney who believes that preparing an estate plan for a protected person is the same as any other estate planning with some additional care required at the signing, you are mistaken. See above. Estate planning attorneys are used to working in a context where the attorney and the client control most if not all of the moving parts. When one is in a situation where litigation is highly likely, the attorney and client may not completely control any of the moving parts and must plan accordingly.

If you are an estate planning attorney who has never thought about creating an estate plan for a protected person, keep in mind that just because you have not planned for something does not mean that it will not occur. You may be an email away from having a valued client or referral source drop a situation like this onto your lap. The issue is likely to come up when you are least prepared to deal with it. Now you are in a better position to develop

a policy for how you will address estate planning for a protected person should the issue arise in your practice.

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Approval of Attorney Fees by the Probate Court

by Holly N. Mitchell, Duffy Kekel LLP

**Editor's Note: With the permission of the author and the Estate Planning & Administration Section, this article is also being published in the *in*Brief, the malpractice prevention publication of the OSB Professional Liability Fund. Visit www.osbplf.org.

The Oregon Professional Liability Fund and the Oregon State Bar have been receiving an increasing number of inquiries regarding the acceptance of attorney fees from probate estates and from guardianships and conservatorships ("protective proceedings") without prior court approval. Acceptance of such fees without prior court approval raises both malpractice and ethical concerns. Fortunately, these situations are entirely preventable by following a few simple rules. In addition, the Oregon State Bar Board of Governors has recently issued an ethics opinion that clarifies some of these issues with regard to probates.

Attorney Fees in Probate Estates and Protective Proceedings

Attorneys who represent personal representatives in Oregon probate estates cannot accept payment for attorney fees from the estates without prior court approval. ORS 116.183; *In re Altstatt*, 321 Or. 324, 897 P2d 1164 (1995); ORCP 1.5(a). Similarly, prior court approval is required before the payment of fees from the funds of a guardianship or conservatorship to any "attorney who has provided services relating to a protective proceeding, including services provided in preparation or anticipation of the filing of a petition in a protective proceeding." ORS 125.095.

Attorneys cannot accept such fees without prior court approval, and they need to educate their clients that attorney fees cannot be paid without prior court approval. In some counties, fiduciaries are required to take a class that will instruct them regarding the payment of fees, but it is still the attorney's responsibility to make sure that payment of such fees is not accepted without prior court approval.

During the probate or protective proceeding, the attorney can and should send monthly informational bills to the client to keep them informed. Such informational bills should be clearly marked - FOR INFORMATION ONLY. DO NOT PAY. Attorneys also need to educate their bookkeepers that fees for probates and protective proceedings cannot be deposited without court approval. In Oregon, an attorney is required to make reasonable efforts to ensure that their staff complies with the professional obligations of the attorney. ORCP 5.3. These files need to be flagged so that payments are not accepted. If a client accidentally pays a bill without court approval, the bookkeeper should be told not to deposit it. The check should be returned to the client, uncashed. To be cautious, an attorney could consider putting the policy regarding probates and protective proceedings in writing.

The prohibition of payment without court approval applies to all attorney fees incurred by the personal representative of a probate estate, not just fees of the attorney who is administering the estate. It applies to all attorneys hired by the personal representative for any purpose, including specialized purposes such as litigation, real estate, patrimony, or government benefits. It also applies to ancillary proceedings if funds of the Oregon probate are being used to pay the attorney fees incurred in the ancillary state.

The relevant statutes applicable to probate estates and applicable to protective proceedings are different and should be reviewed carefully before accepting payment for attorney fees. ORS 116.183; ORS 125.095.

The prohibition against accepting attorney fees without prior approval of the court applies only to attorney fees. It does not apply to court filing fees, costs of letters testamentary, costs of publication, costs of death certificates, bond premiums, or fees paid to accountants or appraisers. Those are costs that can be advanced by the attorney and reimbursed by the estate, all without prior court approval.

In probate estates, the prohibition against accepting attorney fees without prior approval of the court does not apply to payment of attorney fees from non-probate sources. In a 2021 formal ethics opinion, the Oregon State Bar Board of Governors has ruled that attorneys may accept payment of fees from the personal funds of the personal representative without prior court approval. *OSB Formal Opinion No. 2021-197*. The opinion also states that the personal representative may later seek court approval for reimbursement from the estate for attorney fees previously paid with the personal representative's own funds. However, the opinion qualifies its holding by

stating that "This opinion is not intended to address more restrictive local court rules or standing orders regarding the approval of attorney fees in probate cases, and attorneys are advised to review any such rules or orders before accepting payment from a personal representative." (Please note that the prior ethics opinion on this same subject, *OSB Formal Opinion No. 2005-63*, has been withdrawn.)

An attorney who accepts payment from the personal funds of a personal representative who intends to later seek reimbursement from the estate should caution the personal representative that their funds might be at risk if the court does not approve the full amount of fees charged by the attorney.

If attorney fees are paid from the personal representative's own funds and the personal representative does not seek reimbursement from the estate, it would be helpful to the court to disclose in the final accounting that attorney fees were paid with non-probate sources.

In protective proceedings, the statute prohibits the use of the protected person's funds to pay attorney fees without prior court approval, but the statute does not prohibit the use of other funds, such as the funds of a family member. ORS 125.095.

When requesting attorney fees in probate estates, guardianships or conservatorships, the attorney should review UTCR Chapter 9 and the supplementary local rules (SLRs) for the county in which the probate, guardianship or conservatorship is being administered. Every county in Oregon has adopted SLRs and in every county the rules relating to estates, guardianships and conservatorships can be found in Chapter 9 of the SLRs.

For more information about the payment of attorney fees in probate estates, guardianships, and conservatorships, see the Oregon State Bar's publications *Administering Oregon Estates*, Chapter 2, and *Guardianships, Conservatorships, and Transfers to Minors*, Chapter 2.

Use of a Lawyer Trust Account

Can an attorney use a lawyer trust account to hold funds from a probate or protective proceeding as a retainer against fees, which can be paid to the attorney once the fees have been approved by the court?

It is important to note that, except for funds deposited as a retainer that will eventually be paid to the attorney as attorney fees following court approval, as a general rule funds of an estate or protective proceeding should not be held in a lawyer trust account. Instead, such funds should be held by the fiduciary in a separate account in the name of the estate or protective proceeding.

Attorney fees paid into a lawyer trust account are not considered to have been paid as legal fees to the attorney or to the attorney's firm, but nevertheless care must be taken to avoid running afoul of the ethics rules, including the prohibition of payment of attorney fees without prior court approval in probates and protective proceedings.

Let's assume that an attorney is representing a personal representative, conservator, or guardian in an estate, conservatorship, or guardianship. In each case, the statutes described above prohibit the attorney from accepting payment of fees using funds of the estate, conservatorship, or guardianship, unless those fees have been approved by the court. But for one reason or another, let's assume that the attorney wishes to hold a retainer as security for the fees that might subsequently become approved by the court. In that situation, the attorney may accept a payment of future (or past) fees, as long as those fees are held in a lawyer trust account until court approval is obtained.

The best way to do this is to clearly establish in writing the conditions under which the fees way be withdrawn from the lawyer trust account by the attorney or may be returned to the client. At a minimum, the agreement should state that the funds may not be paid to the attorney without prior court approval. But under what conditions may the client demand that the fees be returned to the client? If the purpose of the retainer is to provide security for the attorney, then the agreement should state that the funds may not be returned to the client without the approval of the attorney or upon order of the court. When the court does approve payment of the fees to the attorney, the best practice would be to specify in the order approving the fees that the appropriate amount may be withdrawn from the lawyer trust account without further approval of the client. The agreement should also specify what happens if the funds in the lawyer trust account are insufficient to pay all of the fees approved by the court.

The agreement should also state that in the event of any dispute of any kind, the attorney may decline to release the funds to the attorney or to the client without an appropriate order of the court.

The author would like to thank Ted Reuter of Wool Landon for reviewing a draft of this article.

The Mobile QTIP – Part 2

By Philip N. Jones, Duffy Kekel LLP, Portland

What happens when a QTIP trust moves from one state to another? Or, more particularly, what happens when the beneficiary of a QTIP trust moves from one state to another? Much of the answers to these questions depends on whether the new state has a state estate tax, or not.

As noted in a previous article (The Mobile QTIP, *Oregon State Bar Estate Planning and Administration Section Newsletter*, January 2021), the Oregon Tax Court recently held that when Husband dies in another state and his estate makes a federal QTIP election, and his Wife later dies in Oregon, the state of Oregon is entitled to tax the assets remaining in the QTIP trust as part of the gross estate of the Wife. *Evans v. Department of Revenue*, ___ OTR ___ (Docket No. TC 5335, Oregon Tax Court Regular Division, 5/28/20). The Wife's estate had argued that the imposition of an estate tax under those circumstances violated the due process clause of the Fourteenth Amendment of the U.S. Constitution.

Wife's estate appealed from the Oregon Tax Court to the Oregon Supreme Court, and the Oregon Supreme Court has now affirmed the Oregon Tax Court. *Evans v. Department of Revenue*, 368 Or. 430 (2021).

In *Evans*, at the time of his death Husband had lived in Montana, which does not have a state estate tax, and Wife lived in Oregon even before Husband died. Wife continued to live in Oregon up until the time of her death, three years after her Husband died. Based on the fact that Wife had been a beneficiary of her late Husband's QTIP trust, the Oregon Supreme Court held that Wife had had at least a minimum connection with the state of Oregon sufficient to link her to the state and justify the state taxation of the QTIP.

The court noted that Wife's estate was not questioning the provisions of ORS 118.010, which permit the taxation of a QTIP trust on the second death under these circumstances. Instead, Wife's estate was questioning whether such statute was constitutionally permitted.

Among other arguments, Wife's estate contended that no state estate tax marital deduction had been allowed when Husband died, neither in Montana (which has no estate tax) nor in Oregon (where Husband neither lived nor owned any assets). Therefore, the estate argued, it would not be fair to impose a state estate tax on the QTIP trust at the time of the second death, because no state had granted a deduction at the first death. The Supreme Court rejected that argument, noting that the granting of a federal deduction in the first estate was made in exchange for the imposition of both federal and state estate taxes at the second death. That fact is the "result of permissible differences in the tax laws of the states that are involved . . . a risk that (Husband's) executor took when he made that (federal) election." In fact, the court noted that Husband's will even included a clause that referred to Wife's estate paying its share of the taxes, both federal and state, imposed on the QTIP trust at the time of Wife's death. And the fact that Wife lived in Oregon at the time of her death was not unforeseen: She moved to Oregon prior to her Husband's death, "many months" before the federal QTIP election was made.

The conclusion reached by the Oregon Tax Court and the Oregon Supreme Court in *Evans* is similar to the conclusions reached by courts in three other states under similar facts. *Comptroller of the Treasury v. Taylor*, 465 Md. 76, 213 A.3d 629 (Md. App. 2019); *Brooks v. Commissioner of Revenue Services*, 159 A.3d 1149 (Conn. 2017) cert. denied 138 S.Ct. 1181 (2018); *Shaffer v. Commissioner of Revenue*, 485 Mass. 198, 148 N.E.3d 1197 (2020) cert denied Dkt. No. 20-501, 2020 WL 6551805 (mem), 11/9/20.

In addition to a federal QTIP election, Oregon allows a similar QTIP election to be made for purposes of the Oregon estate tax, but Oregon specifically permits the Oregon election to be in a different amount than the federal election. ORS 118.010(8)(a); OAR 150-118-0080(1). Such an Oregon election in a different amount than the federal election is known as an inconsistent QTIP election.

The previous article on the *Evans* case raised the following query: In *Evans*, could Husband's estate have made an inconsistent Oregon QTIP election when Husband's federal estate tax return was filed? Could Husband's estate have relied on ORS 118.010(3) and (8) to make separate (inconsistent) QTIP elections for federal and Oregon purposes? In other words, could Husband's estate have made an Oregon QTIP election of $0 or of $1, thus making all or most of the federal QTIP trust not includable in Wife's Oregon taxable estate? In footnotes 7 and 13 of the Oregon Tax Court's opinion in *Evans*, the court indicated that the court had asked both parties at oral argument whether they felt that the Oregon inconsistent election provisions had an impact on the result in the case. Both attorneys replied that the Oregon inconsistent election statute was not "applicable to the facts in the present case." As a result, the Oregon Tax Court specifically declined to address the applicability of the Oregon inconsistent QTIP election statute. And of course, since that question was not addressed by the Oregon Tax Court, it was not addressed by the Oregon Supreme Court.

But it does raise an interesting question: Can the estate of a nonresident of Oregon who owns no tangible assets

in Oregon, and thus has no estate tax liability to Oregon and no filing requirement in Oregon, nevertheless file an Oregon estate tax return and elect out of Oregon QTIP treatment, even though a federal QTIP election was being made? Or can the federal return, which makes a federal QTIP election, specifically state that no state QTIP election is being made? Can that statement apply on a blanket basis to every state in which the surviving spouse might possibly take up residence in the future?

Neither the Oregon Tax Court opinion nor the Oregon Supreme Court opinion answers these questions.

Oregon Estate Planning and Administration Section Newsletter

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Events Calendar

Central Oregon Estate Planning Council
All events have been cancelled for now.

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 virtual

Basic Estate Planning 2021
Oregon State Bar Estate Planning
and Administration Section
November 12, 2021
Virtual only

Portland EPC Seminar
Hilton, Downtown Portland
February 4, 2022
In-person

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.