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

Newsletter

Oregon Estate Planning and Administration Section Newsletter
Volume XXXVIII, No. 1
Winter 2022

Oregon State Bar Estate Planning & Administration Section

Editor's Note: I'm so sorry to tell you all that Steve Kantor passed away on November 14, 2021, after complications associated with prostate cancer. A lifelong Oregonian, he attended the University of Oregon and Lewis and Clark law school. He began his career as a CPA, was licensed to practice law in Oregon in 1977 and joined the firm now known as Samuels Yoelin Kantor LLP, becoming a partner in his third year and staying there his entire career.

In addition to building a very successful law practice, Steve took great joy in mentoring younger attorneys and giving back to his community. Steve served on the boards of the Estate Planning and Administration section of the Oregon State Bar, OSB Joint CPA Committee and was a member of several OSB standing committees. Steve was the recipient of an OSB President's Award, Lawyer of the Year in Taxation Award, and an OSCPA Speaker of the Year Award. He gave many presentations and wrote many articles and publications for the section. He was a fellow of the American College of Trust and Estate Council.

The true measure of a person, though, isn't by professional achievement, but rather by his kindness, generosity and humor. By those standards, Steve was a giant. He was a real mensch, and will be missed terribly.

2021 Oregon Legislative Updates

By Eric Wieland, Samuels Yoelin Kantor, LLP

The 2021 Oregon legislative session was unique, and progress moved a little bit slower than what has been experienced in recent sessions. Due to the COVID-19 pandemic, most of the legislative activities occurred remotely. There was much concern that by limiting the session to remote interaction and shutting the Capitol to all but essential personnel, Oregonians would not be heard or be able to participate. In some ways, by having remote access, more Oregonians were able to participate this year than in the past because a trip to Salem was not required. At the same time, there were real concerns that those with limited or no internet access, or those who do not have access to the necessary computer equipment, were left out or not heard. Not only were representatives dealing with the impact of the pandemic on the legislative session, many communities were still feeling the impact from the September wildfires and the February snow and ice storms that disrupted power and internet capabilities for many Oregonians. The last year also saw a renewed interest in addressing racism, economic disparity, and equitable policing. To help address all these issues, the House divided the Judiciary Committee into two subcommittees: Civil Law and Equitable Policing.

In the fall of 2019, the Estate Planning and Administration Executive Committee identified five legislative concepts that it wanted to see addressed in the 2021 legislative session to help estate planning practitioners and their clients. They worked with the Oregon State Bar Public Affairs Committee who assisted in the drafting of the proposals. For the greatest likelihood of success, the Bar recommended pursuing only matters that were not controversial, had no revenue impact, and to focus on a very limited number of proposals. The first

In This Issue

proposal addressed a technical ambiguity with respect to the application of the Oregon QTIP election. On the advice and recommendation of the Bar, this proposal was not pursued because a pending Oregon Supreme Court case might address the issue that the proposal sought to clarify.

Following the Bar's advice, the section moved forward with the remaining four legislative concepts, which resulted in Senate Bill 182. Senate Bill 182 initially addressed these four issues:

1. The impact of divorce on a spouse's agency established under powers of attorney,
2. Extension of liability protection for property held as tenants by the entirety when transferred to a revocable living trust,
3. The length of time an attorney must hold an original will, and
4. Use of the small estate procedure, regardless of the non-trust asset's value, over property that was intended to be titled in a revocable living trust but was still held in the decedent's name at the time of death, if a Pourover Will named the Trust as the beneficiary of the asset in question.

Prior to the public hearing and subsequent work session in the Senate, concerns were raised that there may be unintended negative consequences to creditors, including to the State, if the 4th item (using the small estate procedure for property left out of an RLT) were to go forward. Due to the timing constraints of this Session, it was decided to remove this proposal from SB 182 through amendment and move forward with the other three proposals during the 2021 Session. The Committee will work with the Bar and its stakeholders to have this proposal considered during the next legislative session.

The three remaining proposals are found in SB 182A and explained below. SB 182A was passed by the Senate and the House and was signed by the Governor. The provisions take effect January 1, 2022.

1. Termination of Authority of Spouse as Agent Upon Dissolution of Marriage.
   - Current Law: the filing and subsequent judgment for an annulment, separation, or dissolution of marriage has no impact on the agency of an ex-spouse unless the controlling document or divorce decree says otherwise.
   - Proposed Law: After a petition for annulment, separation, or dissolution is filed and upon service of summons and petition upon the respondent, a restraining order is in effect restraining a spouse from exercising authority as an agent for their spouse under any type of power of attorney (financial, health, or mental health treatment) unless the controlling document, petition, or the Court states otherwise.
   - A judgment of annulment, separation, or dissolution terminates the authority of an agent for their now ex-spouse under any type of power of attorney (financial, health, or mental health treatment) unless the court in the judgment, the controlling document, or the parties state otherwise.
   - This does not revoke or terminate the power of attorney, only the ex-spouse's agency. To the extent the power of attorney provides for an alternate or successor agent, the alternate or successor agent steps into the shoes of the former spouse as the new agent.
2. Conveyance of Property Held as Tenants by the Entirety
   - Current Law: the transfer of tenants by the entirety property to a joint RLT or separate RLTs terminates the immunity of claims of a spouse's creditors given to owners of property held as tenants by the entirety.
   - Proposed Law: Real property of spouses married to each other that was held as tenants by the entirety and subsequently conveyed to the trustee or trustees of the joint revocable trust of the spouses or of the separate revocable trust of each spouse shall have the same immunity from the claims of a spouse's creditors as would exist if the spouses had continued to hold the property as tenants by the entirety, if:
     a) The spouses remain married to each other;
     b) The real property continues to be held in trust by the trustee or trustees or the successor trustee or trustees; and
     c) Both spouses are beneficiaries of the trust or trusts, including where both spouses are current beneficiaries of one trust that holds the entire property or each spouse is a current beneficiary of a separate trust and the two separate trusts together hold the entire property, whether or not other persons are also current or future beneficiaries of the trust or trusts.
   - Impact: Currently, if a married couple transfers their home that is held as tenants by the entirety to a joint revocable living trust or separate

revocable living trusts, the couple loses the creditor protection that tenancy by the entirety provides. This means that if one spouse has a creditor, the creditor can pursue relief against the debtor's interest in the home. Tenancy by the entirety prevents this from happening. In order for a creditor to pursue tenancy by the entirety property, the creditor must wait for divorce or death of the non- debtor spouse. If the debtor spouse dies first, the creditor is out of luck.

3. Disposition of Wills
   - Current Law – An attorney must hold an original will for at least 40 years after its execution, even if the testator is deceased. After 40 years, before destroying the will, an attorney must first publish notice in a newspaper, and then after 90 days, must file with the probate court and pay an associated filing fee and give notice that the will has been destroyed. There is a cost to publish the notice in the newspaper as well. As a result of these rules, many original wills are stored in law firm files for years. This makes it difficult for solo and small firms, especially when the attorney dies. It also creates additional costs to the firm storing the old Wills, as the current trend is to move away from paper files.
   - Proposed Law:
   - If an attorney is licensed to practice law in Oregon and the will is not subject to a contract, and
   - If the attorney knows that the testator is deceased for at least 5 years and the attorney is unable to locate the named personal representatives (or convince them to accept delivery of the will), or
   - If the attorney does not know if the testator is deceased and it has been at least 20 years since the execution of the will and the attorney is unable to locate the testator, then:
   - The attorney must provide notice by mail, email, telephone, or any other reasonable means to the testator, or if testator is dead, to the personal representative, of attorney's intention to destroy the will.
   - If the testator or named personal representative does not respond within 90 days and agree to accept delivery of the will, the attorney must make a complete digital scan of the will and witness affidavits, including all codicils, and sign an affidavit documenting the steps the attorney took to contact the testator or named personal representative. The affidavit may either be retained or scanned as a digital record.
   - The attorney must retain the digital record, including the affidavit, for at least 20 years before destroying the digital record.

Some Recent Oregon Decisions In Estate Planning and Administration

By Susan Gary, Professor Emerita of Law, University of Oregon School of Law

Ed. Note: The following cases were decided over the past three years, but had not previously been reported in the Newsletter. Our thanks to Professor Gary for allowing us to reprint her summaries of these cases, taken from the materials she will be presenting at the 51st Annual Estate Planning Seminar, sponsored by the Estate Planning Council of Portland.

1. Interpretation of Wills

***Matter of Estate of Todd* (Garcia v. Clark), 300 Or. App. 463 (2019)**

Leatha Todd's will identified her three children by name after stating, "I have three (3) children now living…." The will also stated, "My husband was previously married and has two (2) children now living" and identified those stepchildren by name. The will then said, "All references in this Will to 'my children' or any similar term shall refer not only to my children named above but also to any children or children hereafter born to or adopted by me."

The personal representative of Todd's estate asked the court for instructions on the construction of the will. The question was whether the stepchildren were included as the testator's children for purposes of distribution of the estate. The court concluded that the will was unambiguous and that the term "my children" did not include the stepchildren. The stepchildren appealed. The Court of Appeals held that the term "my children" was unambiguous and could not be reasonably construed to include the stepchildren. A dissent argued that the term "my children" was ambiguous and could have been construed in another way. When a term is ambiguous a court can consider extrinsic evidenced to determine the testator's intent. Because the majority held the term unambiguous, the construction was based on the language in the will itself. The court upheld the lower court's ruling.

2. Who Can Bring a Financial Abuse Claim on Behalf of Vulnerable Person

***Tyler on behalf of Butler v. Whetzel*, 301 Or. App. 504 (2019)**

Subsection (2) of ORS 124.100 provides:

> A vulnerable person who suffers injury, damage or death by reason of physical abuse or financial abuse may bring an action against any person who has caused the physical or financial abuse or who has permitted another person to engage in physical or financial abuse.

ORS 124.100(3) then provides that an action may be brought by the vulnerable person or by a guardian, conservator, or attorney-in-fact, by the personal representative of the estate of the vulnerable person, or by a trustee for a trust on behalf of the trustor.

Monique Tyler, as trustee of the Audrey B. Butler Revocable Trust, brought an elder abuse claim against three attorneys who had been involved in proceedings involving Butler and Butler's assets, including elder abuse claims against Tyler and Tyler's spouse. The court granted defendants' motions to strike the financial abuse claims and dismissed the complaint without prejudice. The court also awarded fees and costs to the defendants. Shortly after the entry of the judgment, Butler died. A few weeks later, Tyler filed a notice of appeal. Over a year later, defendants filed a motion to dismiss, arguing that Tyler lacked authority to pursue an appeal.

When Tyler brought the claim initially, Butler was alive, and Tyler brought the claim in her capacity as trustee of Butler's trust. However, when Butler died, Tyler could no longer pursue the claim as trustee. The claim was personal to Butler and did not belong to the trust. The claim survived to Butler's personal representative, but no personal representative was substituted on the appeal. Under ORCP 34(B)(1) and ORAP 8.05(1) the one-year period for substitution had expired. The Court of Appeals dismissed the appeal and affirmed the judgments for attorney fees.

3. Substitution of Personal Representative on Death of Defendant

***Lacey v. Saunders*, 304 Or. App. 23 (2020)**

Richard Lacey brought a claim against David Saunders for breach of contract and other claims. Saunders died before the claim was decided, and the personal representative of Saunders' estate moved to dismiss the action because Lacey had failed to substitute the personal representative as the party within 30 days of notice of death, as required by ORCP 34 B. The court dismissed the claim, without prejudice. The personal representative of Saunders' estate appealed, arguing that dismissal with prejudice was required. The Court of Appeals agreed, stating, "ORCP 34 B is effectively a statute of limitations, operating as the sole procedural means through which a claimant may continue an action that commenced before a defendant's death."

4. Good Cause to Remove a Personal Representative

***Matter of Estate of Gould* (Warkentin v. Shirey), 308 Or. App. 1 (2020)**

Almost four years after Lois Irene Gould died, Warkentin purchased a debt of decedent to become a creditor of the estate. He then opened a probate and was appointed personal representative. Gould's closest relatives were nieces and nephews, and one of them, Shirey, filed a petition to remove Warkentin as personal representative and have herself appointed. She stated that Warkentin should be removed because he was not related to the decedent and the family did not know his purpose in being appointed. On appeal he discussed his desire to protect the estate for creditors and to receive an adequate personal representative fee. He seemed unconcerned about needing to protect the interests of the beneficiaries. The probate court concluded that removing Warkentin and replacing him with Shirey would avoid discord between the beneficiaries and the personal representative concerning the disposition of the estate's property.

On appeal Warkentin argued that the court lacked grounds to remove him. The court pointed to ORS 113.195(4), which was added in 2017. The opinion cites to statements by the Oregon Law Commission that accompanied the bill. The subsection was added to address a concern voiced by probate judges that courts should be able to remove a personal representative when the court determines, in its discretion, that removal would better serve the estate and avoid future problems. The "other good cause shown" need not be wrongful acts on the part of the personal representative. The Court of Appeals found that the probate court had not abused its discretion in removing the personal representative. The court also found that the probate court was permitted to waive the bond requirement for the personal representative.

5. Legal Malpractice

***Sherertz v. Brownstein, Rask, Sweeney, Kerr, Grim, Desylvia, and Hay, LLP*, 314 Or. App. 331 (2020)**

The law firm of Brownstein Rask provided estate planning services to William Sherertz. Sherertz owned a company worth $50 million at his death. Given the size of the estate, the lawyer working with Sherertz advised him to create an irrevocable life insurance trust (ILIT) to

provide liquidity to pay the estate taxes. The amount of the insurance, $10 million, was intended to be sufficient to pay the estate taxes. At the time the initial estate planning work was done Sherertz intended to leave the shares of the company equally to each of his four children, so the ILIT was created with all four children as beneficiaries. Later, Sherertz changed his mind and decided to leave all the shares of the company in trust for his youngest child, Cole, with some monetary distributions to the other children. The lawyer drafted a will accomplishing that plan but did not recommend changing the ILIT. The consequence of the change was that when Sherertz died, the trustee of the ILIT was unwilling either to buy stock from the estate or to loan money to the estate using the stock as collateral, because the beneficiaries of the ILIT were all four children and only one child would eventually own the company stock. The plan to be able to access funds in the ILIT to pay the estate taxes could not be accomplished, so the personal representative of Sherertz's estate sold all the stock held by the estate and used a portion of the sales proceeds to pay the estate taxes.

Sherertz's surviving spouse filed the action against the law firm in three capacities: as personal representative of the estate, as guardian *ad litem* for Cole, and as trustee of the trust for Cole. The action asserted negligence in the estate planning work, arguing that the law firm failed to prepare an estate plan that fulfilled Sherertz's intent and preserved the stock for Cole's benefit and failed to modify the ILIT when Sherertz decided to leave all the stock in trust for Cole.

In the first trial the jury found the defendant not negligent. The judgment was reversed on appeal based on a jury-instruction error. In the second trial the defendant moved for directed verdict, which was granted on the ground that there was no evidence of damages. The estate had received fair market value for the stock and the amount of the estate taxes paid was not affected by the alleged negligence. The estate would have had to pay the taxes regardless of the alleged negligence.

The Court of Appeals affirmed the directed verdict, holding that the law firm was not liable to the estate for legal malpractice because the estate was not damaged by the alleged negligence. The court explained that under Hale v. Groce, 304 Or. 281 (1987) a lawyer can be sued for legal malpractice by someone other than the client, but the plaintiff must prove the existence of a duty to the plaintiff as a third-party beneficiary. With respect to Cole, the court explained that to give rise to a duty to a third-party beneficiary, an attorney must make an actual promise to the client to achieve a particular objective to benefit the third party. The record did not show that the lawyer had promised Sherertz that the lawyer would change the ILIT so that Cole would receive the entire $10 million benefit.

6. Statute of Limitations for Breach of Fiduciary Duty

***Matter of Bonome*, 314 Or. App. 364 (2021)**

Crystal Bonome Diens filed a claim for breach of fiduciary duty against her grandmother and aunt. Crystal's father died in 1985, when Crystal was six. In 2018, Crystal's brother found their father's will, which said that their father's real property was to be held in trust for the two children, but nothing had been distributed to the children from their father's estate. Crystal filed the claim for breach in 2019, alleging that her grandmother and aunt misrepresented that her father died insolvent and hid his will and the trust it created. The grandmother and aunt asserted that Crystal's father died insolvent, that his real estate was sold to pay his debts, and that no trust was created. The trial court granted summary judgment on statute-of-limitations grounds, relying on the 10-year statute of limitations in ORS 12.140.

On appeal, the court did not decide which statute of limitations applied and focused on the discovery rule—when the petitioner knew or in the exercise of reasonable care should have known facts that would make a reasonable person aware of a substantial possibility that a claim existed. The court concluded that there was a triable issue of fact as to when the statute of limitations began running. The court reversed and remanded.

Personal Insurance and Risk: Key Considerations for the Successful Individual and Family

by Candace Jennings, Candace Jennings Consulting

Estate planning attorneys often face a wide range of questions when advising clients about personal financial risks, many of which involve topics beyond the law. Property and casualty insurance is one such topic. Although often thought of as a routine matter best addressed by insurance agents, property and casualty insurance can be complex for successful individuals and families. This is especially true now, as our clients face new and dynamic types of risks: the pandemic, the Great Wealth Migration, civil unrest, cyber-crime. More specifically, record catastrophic weather and climate events in the last two years have increased insurance costs, and often have made even finding insurance difficult.

This article will provide a brief overview of property and casualty issues wealthy clients may face. It also provides a checklist that attorneys may find helpful for their clients.

LIABILITY

Catastrophic events – permanent injury or death – are life altering, both emotionally and financially. Having adequate liability limits with a carrier that understands the unique needs of the client and offers sufficient limits, is crucial. Client insurance reviews reveal that liability insurance coverage is often overlooked; for example, many clients don't even have uninsured or underinsured motorist liability.

What are adequate liability limits? While there is no simple formula (like X times net worth), there are several things to consider. Are there young drivers in the family? Does the family have household employees? Do they entertain on a larger scale? Do they have a visible media presence? There are many variables to consider, but liability coverage is inexpensive and not the area to try to save dollars.

PROPERTY

In the event of a total loss – losing a home, vehicle or valuable collectibles – can the client be made whole? The recent fires in California and Oregon have shown that many people were not adequately covered and did not have sufficient coverage to rebuild. Sadly, premium is more often a focus than coverages.

Oregonians should strongly consider earthquake coverage. While many clients may be comfortable with a higher deductible, few would choose to self-insure for the full replacement of their home. During risk reviews we often find clients with very low deductibles, and they have no idea they could increase the deductible and take that savings to purchase important additional coverages.

Successful individuals often have expensive vehicles. In the event of a total loss – theft or accident – they may find their coverage includes terms like actual cash value or depreciation. It may be difficult to replace the vehicle with the same make and model and value. Insurance carriers that specialize in coverage for the successful client understand the importance of replacing the vehicle and offer something called agreed value. In advance of a claim the client agrees to a value for their vehicle and in the event of a total loss the claim settlement is for that stated amount.

Successful clients often have passions for collecting, whether it be fine art, jewelry, watches, wine, spirits, autos. Values have fluctuated greatly in this area since the pandemic. Having coverage that takes that into consideration can be helpful.

While a liability loss is life altering, with the proper coverage it is possible to recover financially from a property loss with the proper coverage and carrier.

FAMILY SAFETY

Cyber-crime has become a significant threat to clients of means, particularly since they may not have the same sophistication with cyber-protection. Many cyber-criminals have shifted focus from the better protected corporations to the less protected individuals. The increase of working from home, students learning virtually, shopping online and more digitally connected has created an increase. In addition, the "internet of things" (including devices like Google Home, Amazon Echo, Nest thermostats, doorbell cams) create more entry points for hackers. Working with these clients to help them fashion a plan to reduce their chances of being a target, utilizing a password manager like Last Pass or Dashlane and Dual Authentication can go a long way to protect them, because the bad actors will move on to other, easier targets.

Many clients like to travel, and unique destinations are becoming more popular. Visiting such destinations, however, can make a client more vulnerable. With proper planning and a team of professionals to help guide them, these clients can travel more safely and with less worry.

TEAM APPROACH

A recent study shows that successful individuals and families appreciate and expect more from their trusted advisors. Those advisors that collaborate with other like-minded professionals can provide a cohesive, holistic team approach that many clients prefer. Working collectively to care for our clients, is very rewarding.

What follows is a questionnaire that an estate planning attorney can use to begin the property and casualty insurance discussion. It is in no way meant to make the attorney into an insurance advisor, or to provide answers to client questions. Rather, it is a first step in the process of analyzing a client's risk exposure, and helping them achieve the level of comfort they are seeking.

RISK ANALYSIS

Personal Residence

- Has your residence been appraised for its insurance replacement value?
- Do you know the amount your insurer will pay for a total loss to your home?
- Do you have earthquake insurance for your residence?
- Do you own a secondary residence?
- Has your agent presented you with various deductible options and the estimated savings?

Valuable Possessions

- Do you know how your insurance would respond if your personal property was damaged or destroyed?
- Do you collect jewelry, fine art, silver, or other fine possessions?
- Do you have dedicated insurance coverage (a valuable articles policy) for the items you collect?
- Do you maintain a thorough inventory of your valuable possessions?

Personal Security

- Do you have children either at home or away at school?
- Do you worry about personal security risks such as home invasion, child abduction or carjacking?
- Do you have insurance coverage for personal security threats to you or your family?

Personal Liability

- Do you employ domestic staff such as a housekeeper or nanny?
- Do you serve as a director, office or member of the board for a public, private and/or non-profit organization?
- Do you conduct business from your home?
- Do you know how much liability coverage you have?
- Have you updated your liability limits regularly to reflect your personal net worth?

Travel

- Do you or any family member travel outside of the United States?
- Do you travel domestically or internationally more than three times a year?
- Do you have medical evacuation coverage if you become injured or ill overseas?
- Does someone reside or check daily on your residence while you are traveling?
- Is your home protected by a central station burglar system?

Identity Theft/Cyber Security

- Do you or a family member use the internet for personal business?
- Does any third party have access to your personal information, (accountant, attorney, banker, domestic employee, etc.)?
- Do you utilize up-to-date anti-virus and anti-spyware programs on all computers in your home?
- Do you utilize wireless technology (laptop, phone, camera, etc.)?
- Does your personal liability policy include coverage for identity theft?
- Do you know the appropriate steps to take if you are a victim of identity theft?

Personal Risk Management

- Do you review your insurance coverage with you agent on an annual basis?
- Do you currently work with a captive agent that represents only one company or an independent agent, that represents several?

To obtain copies of this risk analysis questionnaire, please contact Candace Jennings Consulting at 503.481.8159 or email at candace@candacejennings.com.

Events Calendar

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.