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Newsletter

# Do your clients qualify for the new Family Farms, Forestry, and Fishing Business $15 Million Estate Tax Exemption?

*By Mayra A. Gonzalez and Ryan W. Collier*

**Introduction**

Oregon is known for its stunning landscapes and abundant natural resources. About 50 to 60 taxable estates currently use the natural resource credit each year. However, it is estimated, based on yearly property value, income, and wealth statistics, that currently about 170 Oregon estates have some natural resource property but are not using the credit due to property value, ownership or business use limitations. This means that roughly 170 Oregon estates each year are left with heavy tax burdens on the decedent's family, often resulting in the sale of part or all of the natural resource property. The Oregon legislature expanded the opportunity to increase tax savings by signing into law an updated Natural Resource (NR).

Qualifying residents may now shield more assets from taxes following the enactment of the state's new Family Farms, Forestry, and Fishing Business Estate Tax Exemption, Senate Bill (SB) 498. The new senate bill signed into law on July 13, 2023 by Governor Tina Kotek provides up to a $15 million exemption from estate tax for estates holding an interest in NR property. This exemption plays a key role in the estate planning of landowners, business owners, and their families alike. For landowners and businesses involved in qualified activities, understanding and leveraging the NR Exemption can result in both financial rewards, and the satisfaction of knowing that they are contributing to a more sustainable future for Oregon. This article will highlight the key elements in both the NR Credit and the NR Exemption. Furthermore, it will focus on areas where further clarification may be required.

**Old Law:**

Prior to the passing of SB 498, estates with NR property had the option to maximize tax savings through the NR credit. ORS 118.140 provides a NR credit for qualified property and applies to estates in which a decedent dies on or after January 1, 2007. Qualified applicants may choose to take all, part, or none of the credit. To qualify for this credit, (1) the total adjusted gross estate must not exceed $15 million, (2) the total value of the NR property must be at least 50 percent of the OR adjusted gross estate, (3) the NR must be transferred to a family member beneficiary, and (4) the RP must have been owned by the decedent or a family member during a total period of five out of eight years immediately preceding the date of death. Because there is a maximum value of estate and minimum portion of estate that is required to be NR property, the tax

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is reduced in proportion to the NR property as a fraction of the value of the total estate.

**New Law:**

The legislature intended to expand the NR credit that was already in existence by providing less stringent requirements for ownership, increase in maximum value of property, and complete elimination of property value maximums.

While SB 498 went into effect September 24, 2023, only estates of decedents who die on or after July 1, 2023 can qualify for this exemption. The exemption applies to "family members" who are within third degree of relation by blood, marriage, adoption, civil union, or domestic partnership, to the other person.

Under the old law, the NR credit limited eligible family members to ancestors, descendants, and descendants of parents, as defined in Internal Revenue Code Section 2032A. The amended law extends the eligibility requirement to family members who are within a third degree of relation by blood, marriage, adoption, civil union, or domestic partnership, to another person.

In order to qualify for the natural resource property exemption, (1) the property must be held by a decedent for at least five years before the death of the decedent; (2) the decedent or any family member must "materially participate" in the farm business, forestry business, or fishery business during at least 75% of the days of each of the five calendar years prior to the death of the decedent; (3) the property must be transferred, as a consequence of decedent's death, to one or more family members of decedent, and the interest must be subsequently owned by the family members for at least five consecutive calendar years immediately following the date of decedent's death, and (4) during at least 75% of the days of each of the five years following the date of decedent's death, any family member of decedent must materially participate in the farm business, forestry business, or fishing business.

For example, if your client died July 2nd, 2023 and your client's family operated a forestry business since July 2nd, 2018, and they continued to operate the business through July 2nd, 2028, then that NR property, up to $15 million, is exempt from the Oregon estate tax. Thus, assuming the Oregon estate tax is $1 million, (and there is no spouse or charitable gift), the estate tax rate gradually increases as the taxable estate increases, however, the family-owned forestry business' NR property is not subject to this tax, unless it surpasses $15 million.

Under the old law, a decedents estate would only be allowed to shield $7.5 million of that NR property. The remaining amount would be taxed at about a 14% rate (ORS 118.010).

**Areas that may require further clarification**

While the eligibility requirements between Oregon's NR credit and SB 498 have similar categories, there are significant differences in its application. An estate claiming this NR exemption may not also claim the NR credit allowed under ORS 118.140. While the legislature intended to expand the options for land and business owners, the NR credit remains in existence and is still available depending on the individual's situation. Although Oregon residents may find it easier to meet the eligibility requirements in the new NR exemption, further clarification may be necessary to properly plan for transfer of NR property.

**Like the NR credit, does SB 498 include entities as those qualified to make transfers?**

The first area that may require further clarification lies within the definition of who may hold property. SB 498 states that a decedent qualifies for this exemption so long as they had maintained ownership of the property for at least five years prior to their death. While individuals may hold property, the new law does not specifically address entities owned by the decedent or family members that own natural resource property. Trusts are entities such as LLCs holding natural resource assets may also be eligible for the exclusion since it appears that the legislature intended to structure this exclusion in a similar manner to the NR credit. The NR credit was clear in including these types of entities so long as the property was owned indirectly by the decedent or a family member that qualifies for a credit under this section [IRC 2032A(g)]. Furthermore, under the NR credit, trusts are specifically included as vehicles upon which ownership may be carried, so long as the property is includible in the gross estate of the decedent. [IRC 2032A (E)(9)(c)]. Further guidance regarding the ownership of entities, like trusts or LLCs, is essential in providing needed clarity.

**If SB 498 applies to other entities, further clarification will be necessary to determine the material participation requirement is met.**

While the requirement of material participation has not changed, it is crucial to note that the inclusion of entities, as stated above, would also shift the definition of material participation. Under SB 498(1)(b), material participation means to engage in the active management of a farm business, forestry business or fishing business owned by the decedent. The IRC states that this determination is based upon a factual determination and may shift as the manner in which the NR property is owned. The IRC has provided ample guidance in this area. For entities, such

as trusts, the requirement still exists through indirect ownership. For trusts, the material participation may derive from an appointment as a trustee, the arrangement may result from an employer-employee relationship in which the participant is employed by a qualified closely held business owned by the trust in a position requiring his or her material participation in its activities. Third, the participants may enter into a contract with the trustees to manage, or take part in managing, the real property for the trust. Fourth, where the trust agreement expressly grants the management rights to the beneficial owner, that grant is considered sufficient to constitute the arrangement required under this section. While this element remains consistent with the NR credit, it is important to note that any differences in ownership types would impact the manner in which "material participation" is analyzed. Additional guidance from future administrative rulemaking specific to farm business, forestry business and fishing business may be required.

**Further clarification is needed regarding a transfer for estate planning purposes.**

As previously stated, the NR property interest must be transferred as a consequence of the decedent's death, to one or more family members of the decedent, and the interest must be subsequently owned by the family members for at least five consecutive calendar years following the death of the decedent. SB 498 does not provide for the possibility of, for example, a surviving parent gifting NR property to a child. While gifting can be a strategic manner to transfer property to future generations, it is unclear whether this is a qualified transfer under SB 498. It also does not provide for the transfer to a child for consideration to give the parent funds to live on the property or to pay healthcare costs. While this scenario seems like a transfer in preparation for end of life, it would be important for rule makers to clarify. Lastly, if entities are considered eligible for the exemption, rule makers may consider identifying when those transfers are qualified or not.

While rule makers have shown a strong commitment to the intergenerational transfer of the natural resources located in our state, expanding the original NR credit, future clarification by statute would allow for more efficient estate planning.

**Summary of the differences:**

| | NR Exemption | NR Credit |
|---|---|---|
| Definition of Family Member | 3rd degree of relation | An ancestor, lineal descendant, or their spouses |
| Maximum Value of NR Property | $15M | $7.5M |
| Minimum Portion of Estate that is a NR Property | No limit | 50% |
| Ownership Requirement | 5 years prior to death and 5 years after death | 5 of 8 years prior to death and 5 of 8 years after death |
| Tax Reduction | Tax is calculated after deducting NR property value from total estate | Tax is reduced in proportion to NR property value as fraction of total estate |

**Conclusion:**

The passage of SB 498 marks an important step forward in the state's commitment to responsible resource management. While the NR credit laid important groundwork needed to incentivize sustainable land use, SB 498 expands the scope of eligibility in a meaningful manner.

In order to maximize the use of this important exemption, clarification is critical. Future rulemaking or legislation should assist in clarifying whether SB 498 intended to include entities, similar to the NR credit. Such clarification will help professionals determine how to best advise business owners or NR property holders when planning for future transfers.

As practicing attorneys, it is crucial to stay informed about these changes and guide clients towards SB 498's forward-looking approach which provides for a significant financial incentive, while simultaneously representing an important investment in the long-term planning of resource management and preservation. Our clients now have an additional tool to meet their family goals.

# Even Grown-Up Children Need Protection: Age-Based Distribution Trusts Unwrap Asset Protection

*By Tara Hendison, JD, CTFA, Allen Trust Company and Caitlin Wong, JD, LL.M. in Taxation, U.S. Bank Private Wealth Management*

One of the biggest decisions to make when crafting an estate plan is not only who gets the assets upon death but how and when the assets are distributed. An individual can give assets outright or have the asset continued in trust for the chosen beneficiaries. A trust can be drafted for the short-term, making liquidating distributions based on simple milestones such as age, or the long-term, such as the life of a beneficiary or even past their death. Short term planning with trusts may be short-sighted depending on the circumstances of such beneficiaries. Upon distribution of assets to a beneficiary, those assets may then be available to the IRS, creditors, spouses, ex-spouses, or even just the beneficiary at a time where that is not in their best interest.

**Wealth Creators v. Inheritors: Where does your "trust" lie?**

In many cases a beneficiary who receives significant assets will manage them differently than the one who created them. The reasons vary such as generational differences, economics of the time, and station in life. Underlying the management are also the motivations. The creator of the wealth may hope to impart their own values to those inheriting. Those inheriting must grapple with how they *feel* about the inheritance. Both the motivations in creating the plan and the experience of receiving the assets may have an effect on the ultimate management of the assets.

It may sound simple, but a conversation about expectations and feelings from both the creator's and beneficiary's perspective can help bridge any perceived or actual gaps. Common questions the creator of the wealth may ask include:

- What happens if the beneficiary lacks the maturity and skills to manage significant assets?
- What happens if there are unscrupulous people around the beneficiary who are coveting their assets? What if the people around the beneficiary are well-meaning without the knowledge or sophistication to give good advice?
- What should I do if the beneficiary is subject to actual or potential claims by others or possibly even a divorce?

A common mantra among parents is that their children are perfectly capable of handling wealth. In some cases they may be right, but leaving it to chance may not only be unwise but also irresponsible to the preservation of wealth and maybe even the beneficiary themself.

*Age-based distributions: More than just a number*

Old habits die hard. Forms used by attorneys either developed over time or were purchased by vendors, local bar associations or national groups. These forms often include distributions that can be released at ages approved by the settlor. Some distributions start at 18 or 21, but can extend to ages 25, 30, 40 and so forth depending on the preference of the settlor. Settlors have made certain assumptions about the financial and social judgement of the recipient by picking distribution ages that will hopefully result in improved maturity after the estate plan is executed.

The perception of distributing assets in a lifetime trust is that the beneficiary is not trusted enough to make good financial decisions with assets distributed to them outright. This lack of trust is justified in some cases and is likely what gave rise to these trusts in the first place. Old habits do die hard and entrenched perceptions are difficult to change. However, in today's evolving world and changed tax code, Settlors should consider crafting estate plans for beneficiaries because they DO trust them.

The historical assumption that trusts are created for the "marginally competent" or the super wealthy lead to the common practice of *irrevocable* lifetime trusts being designed with the same language to serve both concerns. A tragic outcome.

Trusts can distribute income, principal, or both. Distributing income is the most common but trusts often give the trustee discretion to distribute principal and/or income. Trusts also need to have a termination clause. In the old way of drafting, lifetime trusts would pay the beneficiary only income during life and then terminate upon the death of the beneficiary. Age-based distribution trusts would similarly pay income to the beneficiary but would also pay out a portion of the principal when the beneficiary attained certain ages. Age was assumed to be an absolute indication of maturity and competence, or to be an opportunity to learn if the beneficiary misspent the first funds distributed when they turned 18/21/25.[1]

Age-based distribution can be a good tool for preserving wealth. Principal can be preserved and protected for decades which can protect trust assets from creditors.[2] However, it is not uncommon for the beneficiary to prove incapable of managing or safeguarding their own finances— or for unexpected and unfortunate events to impact the beneficiary's

1 Age based distributions are not always changed based upon the individual beneficiary or in consideration of the overall amount of assets held in the trust. If one-third of the trust assets are to be distributed when the beneficiary reaches age 21 then one-third of the assets are distributed regardless of if the trust is worth $100,000 (a distribution of about $33k) or $10,000,000 (a distribution of about $3.3M). Most settlors today, however, are uncomfortable with the thought of a 21-year-old receiving $3.3M with no restrictions.

2 See Chapter 10: Creditor Rights and Spendthrift Clauses in *Administering Trusts in Oregon* (2018 e.d.).

ability to safeguard and grow the assets. Examples include poor spending habits, excessive borrowing, accident or illness resulting in long term disability, spouses (and former spouses) with keenly interested intentions, poor choice of investments, and substance abuse issues.

*Spendthrift clause: Help me, help you*

Most trusts these days include a *spendthrift* clause – critical language that prevents assets going to creditors or misuse by the beneficiary. *When talking to your clients, it's important to explain*:

- The spendthrift clause prevents a creditor from recovering a beneficiary's debt against the assets of the trust while the asset is still in the hands of the trustee. Its protection ends once the distribution is made.[3]
- Simple trusts[4] distribute ***net income*** to named beneficiaries. Once made, distributions are not asset protected, and may be open to creditor judgment or available to a non-beneficiary during a divorce.
- Complex trusts[5] give the trustee discretion for both principal and income distributions. Said simply, if nothing is distributed, assets are protected.

Therefore, when either the principal or income are distributed, those funds are fair game for any beneficiary tax or debt obligations.

- The trust agreement includes directions from the settlor to the trustee (selected by the settlor) regarding the management of the trust. The trustee considers both the language of the trust and the settlor's intent in exercising its discretion. Therefore, it is paramount the trustee understands the language of the trust; the settlor's intent, goals, and values; and any special or important needs of a beneficiary. Those directives should be reflected in the trust language and additional guidance provided in the trust language as well as any outside letters or instructions.[6]

With any trust, language should be as restrictive or as broad as required. For easily influenced beneficiaries or those with limited wealth accumulation skills, distribution language should be more restrictive. For beneficiaries with more developed wealth management skills, distribution language may be broader. Just be sure it's not so broad that asset protection provisions set forth in the spendthrift language are destroyed.[7]

*A tale of two (wealthy) children*

Most people know, just because siblings share the same blood, does not mean they share anything else. One may be financially frugal, while the other blows through money in a heartbeat. When crafting a trust to benefit children who have different spending habits, the language can be similar – but for very different reasons.

For example, Bob and Bridgette are adult children whose parents have left behind the proceeds from their closely held $10 million business. The parents engaged in tax planning to benefit each child equally with $5 million in separate trusts. Bob has no assets of his own except his parents' trust. If he receives income using the generally accepted 4% sustainable withdrawal rate[8], he will receive about $16,000 per month. His parents chose that so Bob could have a comfortable lifestyle without jeopardizing the principal. Since the trust language was established by his parents, the remaining principal will go either to Bob (for special circumstances discussed in the Trust and at the sole discretion of the Trustee), his children, his siblings, other family members, or to charity depending on the language of the trust and any limited power of appointment.

Let's now take Bridgette, Bob's sister. Bridgette not only created a COVID-19 vaccine, she also negotiated a percentage of royalties for every vaccine given. This will likely lead to considerable wealth accumulation for Bridgette, which means she will not need any distributions from her parents' trust. Had she been receiving age-based or outright distributions from her trust, it would add to her overall estate – and her tax liability. Since the trust language was established by her parents, the remaining principal will go either to her children,

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3 ORS 130.305.

4 A simple trust must distribute all its income currently. Generally, it cannot accumulate income, distribute out of corpus, or pay money for charitable purposes. A creditor (including a former spouse) would be able to learn when the distributions are required to be made and could easily time voluntary payments or involuntary payments (via garnishment for example) to coincide with the trust's mandatory distribution schedule.

5 A complex trust is any trust that does not meet the requirements for a simple trust. Complex trusts may accumulate income and distribute amounts other than current income. Because distributions are not on a mandatory set schedule and can be directly made for the benefit of the beneficiary, it would be harder for a creditor (including an ex-spouse) to know when to time collection efforts.

6 Letters of Instruction are extremely helpful for professional and corporate trustees. In honoring the intent, values, and goals of the settlor, a wise trustee with discretionary powers will strongly consider and appreciate additional guidance and context from the settlor. This is particularly true in blended families, when there is a history of family conflict, or when family members may have conflicting values regarding religious, political, or social issues.

7 ORS 130.315(6). *See also* ORS 130.315 cmt, printed in Valerie J. Vollmar, The Oregon Uniform Trust Code and Comments, 42 Willamette L Rev 187, 292 (2006). There is a good discussion of these issues in Section 10.4 and Section 10.5 of *Administering Trusts in Oregon* (2018 e.d.).

8 Choosing an amount you can withdrawal annually from your portfolio and still be reasonably certain you will not run out of money during your lifetime https:/docs.rbcwealthmanagement.com/us/68276-sustainablewithdrawal-rates-in-retirement.pdf

her siblings, other family members, or to charity, depending on the language of the trust and any limited power of appointment.

**Conclusion**

In designing trust distributions there are many options that protect both the assets and the beneficiary. Although age-based distribution language has traditionally been used, the changing economic conditions and evolving cultural demographics now suggest that a better option may be to grant lifetime distribution powers to the trustee of a continuation trust for a beneficiary. By doing so, the Trustee has the ability to provide for the beneficiary's current needs, prospects, and risks in a responsible manner that reflects the motivations, values, and desires of the wealth creator. Customized trust distributions take more time to draft, but also result in more satisfied clients who are confident in their estate plan.

# Estate Planning For a Protected Person

*By Conrad G Hutterli, Attorney at Law and Prof. Susan Cook, Attorney at Law*

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 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); *Van 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 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 per- son 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 protected person would be the client, 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; *Administering 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 be- come 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 protect- ed 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 of 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 per- son 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 are 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. 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 per- son 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 trans- fer, 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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# Recent Case Summary

*By Joshua J. Capp, Attorney at Thorp Purdy Jewett Urness & Wilkinson, PC.*

*Williamson v. Zielinski,* 326 Or App 648 (2023).

**Testamentary Capacity and Undue Influence**

Testator's granddaughter (Williamson) petitioned the court to admit a will executed in 2018. Testator's son (Zielinski) petitioned the court to admit a will executed in 2020. Williamson objected to the 2020 will from being admitted to probate. The trial court held that Zielinski met his burden of production in that the testator had testamentary capacity and that Zielinski did not exert undue influence over the testator in the procurement and execution of the 2020 will.

Williamson appealed making two arguments: 1) that the trial court erred in determining that the testator had testamentary capacity when it found that testator knew the nature and extent of her property; and 2) that the trial court erred in not ruling that Zielinski unduly influenced testator. The Court ultimately disagreed and affirmed the trial court's ruling.

**Testamentary Capacity**

The trial court found that the attesting witnesses to execution of the will testified credibly that the testator had capacity at the time of executing the will. The parties stipulated that after the sale of the testator's property, the funds from that sale were deposited into the testator's bank account. Williamson argued that the testator falsely believed that Williamson had misappropriated the testator's funds and therefore the testator did not know the nature and extent of her property. The Court did not find this persuasive as the funds could have been misappropriated after the funds were deposited into the testator's bank account. Ultimately, the Court held that testator had testamentary capacity because she knew that her real property was sold by Williamson and that at the time of making the will, the testator was reviewing her bank statements and knew the total values in the bank.

**Undue Influence**

A contestant bears the burden to establish that a will was executed due to undue influence. To show a suspicion of undue influence, the contestant must show that there was a confidential relationship between the testator and the beneficiary and there are suspicious circumstances surrounding the procurement or execution of the will. *Knutsen v. Krippendorf*, 124 Or App 299, 308 (1993). If a contestant establishes that a confidential relationship exists and there are suspicious circumstances, then there is a rebuttable inference of undue influence and the burden shifts to the beneficiary to produce evidence to overcome the undue influence. *Id*. at 308-09.

Here, Zielinski did not dispute the trial court's conclusion that there was a confidential relationship. Williamson argues that there were suspicious circumstances that were present because of 1) a change in testator's plan of disposing her property; 2) testator's susceptibility in influence; and 3) a lack of independent legal advice for the testator.

**Change in the Testator's Plan of Disposing Her Property**

A suspicion of undue influence can arise if a testator changes their estate plan that ignores the natural objects of the testator's bounty or disregards the continuity of purpose running through prior estate plans. *Walker v. Roberds*, 182 Or App 121, 127 (2002). Here, the testator executed six wills in her lifetime. Only the 2018 will offered by Williamson changed the testator's prior plan that left everything to the testator's children. The 2020 will offered by Zielinski returns to that original plan of leaving items to her children except for Williamson's mother because the testator believed that Williamson and her mother already benefited from the money Williamson took from testator's account. Under these circumstances, the Court agreed with the trial court that the testator's decision to disinherit Williamson's mother did not ignore the natural objects of the testator's bounty or disregard the continuity of purpose from the other wills.

**Testator's Susceptibility to Influence**

The Court has held that the physical and mental condition of the testator is a factor of importance in determining if a will was executed under undue influence. *In re Reddaway's Estate*, 214 Or 410, 426 (1958). Here, the testator suffered from dementia, had issues with mobility and reading, and suffered from a stroke the year prior to execution of the 2020 will. Zielinski successfully provided evidence to overcome the inference of undue influence by having disinterested witnesses testify that the testator was of sound mind. Williamson herself even testified that the testator was not easily led and that everything was done in the testator's direction. However, Williamson argues that there was undue influence because Zielinski provided false information to the testator regarding the handling of testator's funds. Zielinski provided evidence that the testator was concerned about this mishandling of testator's funds because testator talked with her own attorney about this issue prior to executing the 2020 will. Therefore, the Court agreed with the trial court's determination that Zielinski did not exert undue influence over the testator to the extent testator understood

the issues surrounding Williamson's handling of testator's money.

**Independent Legal Advice**

Williamson argued that the testator did not have independent legal advice. If there is a confidential relationship between a beneficiary and testator, the beneficiary has a duty to ensure that the testator receives independent and disinterested advice. Reddaway, 214 Or at 422. Here, Zielinski offered evidence which showed that the testator met with two attorneys who had no relationship with Zielinski. Furthermore, the testator spoke with the attorneys in private and Zielinski was not present at the time of the execution of the 2020 will. The court noted that even though Zielinski was present at some of the meetings with the attorneys, there was no evidence to suggest that Zielinski spoke to or instructed the attorney about the content of the 2020 will. The Court stated that the testator approached both attorneys and gave specific instructions to the drafting attorney regarding the content of the 2020 will. Therefore, there was no undue influence for lack of independent legal advice.

**Oregon Estate Planning and Administration Section Newsletter**

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## Events Calendar

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 Stuart Allen at stuart@allentrust.com for inclusion in the next issue of the Newsletter.