newsletter

Oregon Estate Planning and Administration Section Newsletter

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

This is the first issue of a Newsletter for the Estate Planning and Administration Section of the Oregon State Bar. As approved by the Executive Committee of the Section, each member of the Section will receive three issues a year, in August, December and April, free of charge.

We have three main objectives with the Newsletter: to discuss Oregon judicial decisions, Department of Revenue rulings and Oregon Attorney General opinions relevant to practice in the estate planning and administration area; to report on proposed and new Oregon legislation of interest to Section members; and to provide better communication between the Executive Committee and Section members. Federal law will be discussed only if it has implications in Oregon.

These objectives can best be met with involvement of Section members. You are encouraged to submit suggestions and articles for future issues. The Newsletter is intended to report and inform, and not to provide a detailed analysis of the various issues in "law review" form. Articles submitted for publication should be short in length and limited in scope. We believe this will make the Newsletter easier to read and also will result in more contributions to the Newsletter.

Prior to publication of the Newsletter, there was no medium for communication between the Executive Committee and Section members. The Executive Committee intends to report its activities to Section members and hopes to generate more involvement by members in Section activities.

Your suggestions for future articles and ideas for improvement of the Newsletter should be directed to Oregon Estate Planning and Administration Section Newsletter, 900 SW Fifth Avenue, 24th Floor, Portland, Oregon 97204, Attention: Nancy L. Cowgill. Telephone: (503) 224-3380.

Nancy L. Cowgill
Editor in Chief

To Charge, Pay or Refund Interest on Inheritance Tax

Effective June 1, 1982, interest charged on late payments of Oregon inheritance tax increased to 18 percent per annum. ORS 305.220(2). The rate was previously 12 percent. ORS 118.260. At the same time, the director of the Department of Revenue was authorized to adjust the rate, not more than once a calendar year, if the prevailing market rate is different by at least one percentage point. The director is to review many factors in determining if a change should be made, one of which is the rate charged by the Internal Revenue Service. Since the three-month statutory notice of a proposed change has not been given, it appears no change in the 18 percent rate is planned for the foreseeable future. ORS 305.220(3). This is a little surprising considering that during most of the second year of the 18 percent rate, the rate on deficiencies of federal tax was 11 percent, compounded daily.

The same 1982 legislation that changed the interest rate on late payments of inheritance tax also obligated the Department for the first time to pay interest on refunds of inheritance tax. Between June 1, 1982 and May 31, 1983 interest on refunds was only 12 percent. Beginning June 1, 1983, the annual rate increased to 18 percent on refunds, and will be subject to the same adjustment made to interest charged by the Department.

Prior to June 1, 1982, the Department lacked authority to pay interest on refunds of inheritance tax. This lack of statutory authority was cited by the Oregon Tax Court in *Bryant v. Dept of Rev*, 6 OTR 559 (1975), in its refusal to require the Department to pay interest on a refund of inheritance tax. In *Bryant*, the Court authorized a refund of that portion of the inheritance tax attributable to half of the joint property for which the surviving joint tenant proved contribution, and also authorized a refund of interest paid by the taxpayer on the amount of tax refunded. In 1978, the holding in *Bryant* was formally adopted by the Department in an administrative rule which stated that the Department lacked "***authority to pay interest on the refund." OAR 150-118.260(6).

This administrative rule was amended December 31, 1982 to reflect the 1982 legislative change:

> "*** [T]he Department does not have the authority to pay interest on the refund for interest periods beginning prior to May 31, 1982." OAR 150-118.206(6).

Under ORS 305.220(2), the Department must pay interest on refunds for interest periods beginning June 1, 1982. This is certainly good news for taxpayers. Previously, a delay in resolving an inheritance tax dispute could seriously hurt a prevailing taxpayer who paid the disputed tax.

To summarize, beginning with interest periods after May 31, 1983, a taxpayer who is charged interest on late payments of inheritance tax must pay an annual rate of 18 percent A taxpayer who successfully claims a refund of inheritance tax will be pad 18 percent annual interest on the refunded tax Both rates may be changed by the Department, but a change made to interest *charged* by the Department will automatically change interest *paid* by it on refunds. If a taxpayer paid a deficiency of inheritance tax, and later successfully clamed a refund, *Bryant* holds that the taxpayer is entitled to a refund of interest pad by the taxpayer on the refunded tax.

Unfortunately, a refund may not always be a "refund which entitles a taxpayer to interest. On certain refunds of inheritance tax, the Department will not pay interest and will not even refund interest paid by the taxpayer if the disputed tax was paid late by the taxpayer. Its reasoning is that inheritance tax may be due at a certain time, but later be properly refunded, so that interest will not be paid for the period the tax was due. This apparently new position was upheld by the Oregon Tax Court in *Estate of Collins v. Dept of Rev,* 9 OTR 344 (1983)*. In *Collins,* the taxpayer filed its Oregon inheritance tax return showing no liability for a "pick up" tax. On audit of its federal estate tax return, the deduction for anticipated interest on estate tax deferred under IRC § 6166 was limited. This increased the federal estate tax and caused a "pick up" tax to be due. As interpreted by a federal ruling, only interest paid or accrued can be deducted as an administration expense under IRC § 2053 However, each year the estate is allowed to amend its federal return and deduct interest which accrued.

In *Collins,* the Department asserted a deficiency of pick up tax based on the federal estate tax audit report The taxpayer pad the asserted deficiency, plus interest. When the federal estate tax was subsequently decreased by an allowance of additional accrued interest as adeduction under IRC § 2053, the taxpayer clamed, and wax refunded, the full amount of pick up tau initially asserted as a deficiency. However, the Department refused to refund interest paid by the taxpayer on the refunded pick up tax. Presumably, the Department also refused to pay interest accruing after May 31, 1982 on the refunded pick up tax.

Agreeing with the Department, the Tax Court in *Collins* found that the pick up tax was validly assessed at the time it was assessed For this reason, the Department was not required to refund interest paid by the taxpayer. The Court analogized the pick up tax with the treatment of N.O.L. (net operating loss) carrybacks for federal income tax purposes. Both involve elections by taxpayers. A taxpayer may elect to extend the payment of federal estate tax under IRC $6166 and to deduct interest accruing on tlie deferred tax for federal income or estate tax purposes The Court found tlie imposition of the pick up tax, which was affected by events under the control of the taxpayer, to be correct even though the "events" caused the tax to be later abated. The Court was also persuaded by the Department's need to collect asserted tax on a timely basis

Beginning in 1987, only a pick up tax will be due under the Oregon inlieritance tax law. The basic inheritance tax rate drops to 0 percent after December 31, 1986 After 1986, and for taxpayers who presently pay a pick up tax, a satisfactory resolution of the federal estate tax audit mill be very important If the state tax maximum credit under IRC § 2011 reported on tlie federal estate tax audit report shows a pick up tax due the State of Oregon, the Department will impose the tax, plus interest from nine months after the decedent's death. If adjustments are subsequently made to the federal estate tax liability which lower the state tax maximum credit, the Department will refund the pick up tax but may not refund the interest paid by the taxpayer. Furthermore, it may not pay interest under ORS 305.220(2). Apparently, the Department's decision to refund the taxpayer's interest and pay interest will depend on whether the adjustment to the federal tax liability was under the control of the taxpayer.

It is easy to imagine a case in which the federal estate tax liability may be adjusted for a variety of reasons, including the deduction of interest on estate tax deferred under IRC § 6166. In such a case, the Department may have difficulty in allocating the refund between that portion which entitles the taxpayer to a refund of the taxpayer's interest and payment of interest by the Department and that portion which entitles the taxpayer to no interest, not even the interest paid by the taxpayer. Furthermore, those taxpayers who prolong their audit, thereby increasing the interest deduction for federal estate tax purposes, may be in a a better position (with lower pick up tax) than those taxpayers who reach a quick resolution of their audit.

At a current rate of 18 percent, interest charged and paid on some refunds of inheritance tax by the Department is almost as important as tlie imposition of inheritance tax. Once the Department only has to collect, and possibly refund, a pick up tax determined by the Internal Revenue Service, the imposition of interest may be the only issue of contention between the Department and die taxpayer To avoid confusion, and perhaps unequal treatment between those taxpayers reaching different results in their federal audits, new legislation may be needed to provide a uniform rule on when interest will be charged, refunded and paid on pick up tax.

*The author was involved in the representation of the Collins Estate.

ORS 112.085 Contains Surprises

In that section of ORS entitled "Intestate Succession" there is a provision that applies to both intestate and testate situations ORS 112 085 provides that any person who fails to survive the decedent by 120 hours (five days) is considered to have predeceased the decedent for *all* purposes of intestate succession and taking under the decedent's will. The result of this provision can he reversed if the decedent provides otherwise in his will.

The effects of this provision can be devastating on the estate plan that attempts to use tlie marital deduction provisions of IRC § 2056, or die spousal credit in ORS 118.035. The marital deduction requires property to pass to tlie surviving spouse and ORS 112.085 will cut off the process of passing. The spousal credit is based on tax apportioned to the surviving spouse and, if no property flows to the surviving spouse, the credit will be lost. Even if the will has negated the simultaneous death provisions of ORS 112.575, et seq., it is necessary to take the further step of specifically negating ORS 112.085 and declaring that it is not to operate on the will of the decedent.

The results of intestate succession are also of concern. If there is a death of tlie surviving spouse within the 120 hour period, except for nonprobate property that may flow to the surviving spouse, the balance of the property will flow to the first dying spouse's heirs, again defeating the marital deduction and spousal credit provisions. ORS 112.085 closes the post mortem planning that could utilize the disclaimer provisions to achieve the desired tax results.

The objectives of the statute are not that different than those of the Uniform Simultaneous Death Act The will drafter should make sure to apply these rules in order to accomplish the desired tax and family results. ORS 112.625 allows for different presumptions in wills, living trusts, deeds, contracts of insurance or any other situation. IRC § 2056 provides that a six month survival requirement is not a terminable interest for marital deduction purposes. The inadvertent use of these provisions can cause the loss of the marital deduction and the increase in total taxes in both estates.

It is suggested that the drafter of wills determine the objectives of the client as to the desired devolution of the property and the tax effects of such transfers. Specific provision' should then be set forth in the will as to die application of both the Simultaneous Death Act and the survivorship provisions so as to assure that the goals are obtained.

FROM YOUR EXECUTIVE COMMITTEE

The current members of the Executive Committee of the Estate Planning and Administration Section are

Officers

Merritt S. Yoelin, Chairperson
Nancy Cowgill, Chair-Elect
Jeffrey E. Boly, Secretary
Robert Huston, Treasurer

Members-At-Large **(One Year Term)**

Laurie Caldwell
James B. Bedingfield
David Andrews
Walter Pendergrass

Members-At-Large (Two Year Term)

Stanley R. Loeb
Conrad Moore
Mark Perrin
Dan Ritter

Since the beginning of its term in September 1983, the Executive Committee has held meetings on November 18, 1983, and January 6, February 3, March 9, and April 27 of 1984.

The pnmary areas of activiiy of the committee and the Chairperson of each subcommittee are as follows:

Subcommittee	Chairperson
Continuing Legal Education	Laurie Caldwell
Legislative Activities	Stanley R. Loeb
Section Newsletter	Nancy Cowgill
Probate System	Mark Perrin
Professional Liability Fund	Merritt S. Yoelin

The Continuing Legal Education Subcommittee is planning a basic estate planning program to be held in Portland and Eugene in late November and early December, 1984. The content of the prognm has been decided and proposed speakers are being approached. The program will be directed at neophyte estate planners with particular emphasis on problem identification and practical solutions. The written material will consist of checklists, helpful hints, bibliographies, brief outlines and problem recognition aids

Stanley R Loeb, Legislative Activities Chairperson, is also the Section's liaison to the Trust Legislation Committee This Section's Legislative Actinties Committee. the Oregon State Bar Uniform State Laws Committee and the Trust Legislation Committee have spent considerable time reviewing the proposed Uniform Succession Without Administration Act A number of the Committee members attended a Februdry 4, 1984, address by Seattle attorney Malcolm A Moore, who is active in the American Bar Association's review of this proposed act. Mr. Loeb has also contacted judges and law professors for their news regarding this act.

The Committee's activities on the Section Newsletter are evident in this publication.

The Estate Planning Section is working with the Bar CLE Committee and the Bar Economics Committee to plan a comprehensive probate system for the Oregon State Bar. Five members of the Estate Planning Section, Mark Perrin, Dwight Purdy, Conrad Moore, Jeffrey E. Boly and Merritt S. Yoelin, will coordinate this project for the Section and submit a draft of the proposed system for review by the Bar CLE Committee and the Bar Economics Committee The System Committee hopes to have the system ready for testing by the end of this summer with a finished product to be presented at the 1985 annual meeting of the Bar.

Chairperson Merritt S. Yoelin has spearheaded the Committee's efforts to induce the Professional Liability Fund to drop or substantially modify the Fund's exclusion of coverage for rendering investment advice concerning specific investments. To date members of the Committee and other interested parties have been able to persuade the Fund to limit the exclusion to "investment" as opposed to legal advice concerning specific investments. However, the Committee believes that there is often an investment advice component to any advice regarding specific investments so that the wording of the current exclusion is unsatisfactory. Further efforts are continuing on this problem.

WHAT'S NEW (OR MAY BE) IN OREGON LAW

The Legislative Activities Subcommittee of the Executive Committee, dormant the last three years, is active again, just in time to begin considering legislation for the 1985 Oregon legislative session.

So far this year, the Subcommittee has considered the Uniform Succession Without Administration Act (adopted July 1983 by the Conference of Commissioners on Uniform Laws), together with the Oregon State Bar's Trust Legislation Committee and Uniform State Laws Committee. The recommendation of the joint study subcommittee is against adoption of this Act in its present form.

The Legislative Activities Subcommittee will also consider other possible legislation: an expedited probate procedure; changes in the survivorship presumption; revision of apportionment provisions and procedures; revision of the surviving spouse's elective share statute; revision of the inheritance pickup tax; and revision of interest provisions with regard to delinquent taxes. Section members may have some excellent ideas concerning additional areas of existing legislation requiring review or areas not previously considered by legislation that now require statutory regulation.

The Legislation Activities Subcommittee needs your ideas, help and participation. If you want to review existing estate planning and estate administration legislation, draft new bills or participate in presenting any Bar-sponsored bills in the 1985 Oregon legislative session, **CALL OR WRITE STANLEY R. LOEB at Spears, Lubersky, 800 Pacific Building, Portland, Oregon 97204 (telephone: 226-6151).**

SUBSCRIPTION

Oregon Estate Planning and Administration Section Newsletter

Members of the Oregon Estate Planning and Administration Section receive direct mailings of the Newsletter. Nonmembers may subscribe by completing the attached subscription and mailing it with a $10 check to Oregon State Bar, 1776 SW Madison Street, Portland, Oregon 97205

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Stanley R. Loeb
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Jeffrey E. Boly
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IMPORTANT NOTICE

Professional Liability Fund Coverage of Legal Services Involving Investment Advice

Effective January 1, 1984, the Oregon State Bar Professional Liability Fund Plan does not apply:

> "17. To any claim caused by an act, error or omission of the Covered Party in the rendering of investment advice concerning specific investments."

On May 9, 1984, Douglas R. Grim, Chairperson of the Securities Section, Donald DeFrancq, Chairperson of the Real Estate and Land Use Section and Jeffrey E. Boly, Secretary of this Section, met with Lester L. Rawls, Chief Executive Officer and Donald B. Bowerman, Chairman of the Board of Directors of the Professional Liability Fund. At that meeting, Mr. Rawls and Mr. Bowerman agreed to place an amendment of Exclusion 17 on the June agenda of the Fund's Board of Directors Meeting and recommend its approval. The proposed amendment is to modify the phrase "investment advice" by inserting before it the following phrase "services consisting principally of".

Therefore, if the Fund Board approves the proposal, Exclusion 17 will read as follows:

> "17. To any claim caused by an act, error or omission of the Covered Party in the rendering of *services consisting principally of* investment advice concerning specific investments."

Apparently, the Fund is already interpreting Exclusion 17 to read as if the proposed amendment had been adopted.

Merritt S. Yoelin, Chairperson of the Estate Planning and Administration Section, worked very hard to effect this change. He believes inclusion of a "principally" standard on the investment advice limitation will substantially improve the Fund's coverage of transactions involving investment advice.

However, even with this improvement all members of the Bar should be aware of the risk they run when giving investment advice. If the services consist principally of investment advice and the advice is bad, the attorney may be liable and have no insurance coverage.

SCHEDULE OF SEMINARS AND EVENTS

The following is a selected schedule of seminars for the remainder of 1984 which may be of particular interest to Section members:

May 2 – June 13; 7 Wednesdays, 4:00 - 6:30 p.m. Portland State Univ., Professional Education in Taxation Series, **"Income Taxation of Estates and Trusts"**

June 6-7; New York University, Institute on Federal Taxation, **"Fifth Annual Conference in Estate Planning"**, San Francisco, CA *Also offered June 27 - 28, New York*

June 17-22; ALI-ABA CLE, **"Estate Planning in Depth"**, University of Wisconsin, Madison, WI

June 27-29; "The Sixth Annual UCLA — CEB — Estate Planning Institute", Chicago, IL

October 29; Washington State Bar Association, **"Twenty-ninth Estate Planning Seminar"**, Westin Hotel, Seattle, WA

November 30 and December 7; Portland and Eugene, Oregon State Bar Estate Planning and Administration Section CLE, **"Basic Estate Planning: A Practical Approach"**

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Annual Meeting of Section

The annual meeting of the Section will be held Wednesday, September 19, 1984, at the Lloyd Center Red Lion, Portland, in the Mt. Hood Room, starting at 2:30 p.m. All members are strongly encouraged to attend the meeting.

This year's annual meeting will be limited to business of the Section. No continuing legal education program is planned. Instead, the Executive Committee plans to hold a separate continuing legal education seminar for Section members later in the year.

The main business of the Section at its annual meeting will be the election of Executive Committee members. Each year the Section Bylaws require the election of three new officers (Chair-Elect, Secretary and Treasurer) and four members-at-large with two-year terms. The Bylaws require that the Chairperson appoint a nominating committee to select nominations for the open positions. This year's nominating committee included Nancy Cowgill, David Andrews, Stanley Loeb and William Kretzmeier.

The nominating committee attempted to identify those qualified Section members who are willing to contribute their time and efforts. In addition, the nominating committee is charged by the Section Bylaws to reflect in the nominations a reasonable geographic balance consistent with the Section membership. Members interested in participating on the Executive Committee, especially those members located outside of Portland, are encouraged to contact the Executive Committee so that next year's nominating committee can be informed of their interest.

This year's nominating committee made the following nominations for the new Executive Committee:

Chairperson-Elect	Jeffrey Boly
Secretary	Laurie Caldwell
Treasurer	Daniel Ritter
Members-at-Large (Two-Year Terms)	Rees Johnson (Portland)
	Stephen Lane (Eugene)
	James Casteel (Portland)
	Robert Heffernan (Medford)
Members-at-Large (One-Year Term to fill vacancy of Daniel Ritter if elected as Treasurer)	Valerie Vollmar (Salem)

Although the nominating committee may nominate only one Section member for each position, the Bylaws allow additional nominations for any position to be made from the floor at the annual meeting of the Section.

The Chair-Elect for the prior year automatically becomes the Chairperson for the new year after the annual meeting. Nancy Cowgill will be the new Chairperson. Other members who will continue on the Executive Committee include Stanley R. Loeb (Portland), Conrad L. Moore (Portland) and Mark W. Perrin (Eugene), each as a member-at-large with a remaining one-year term.

CUSTODIANSHIP GIFTS ARE NOW MORE ATTRACTIVE

Recent legislative changes to Oregon's Gifts to Minors Law found in ORS 126.805 to 126.880 may make custodianship gifts more appropriate in certain situations. Custodianship gifts have always been easy to create. The simple instructions for establishing custodianship gifts are found in ORS 126.810. The authority, liability and duties of a custodian are set forth in ORS 126.805 to 126.880, so no separate instrument must be prepared to cover such matters. Unlike a conservator, a custodian need not be covered by a bond or file annual accountings with a court. This minimizes the expense of establishing a custodianship.

Custodianship gifts can be funded with securities (registered and in bearer form), money, life insurance and annuity policies, other personal property and real property. This coverage was expanded by the 1981 Oregon Legislature to include bequests by wills, transfers under the intestate laws and transfers under trusts. A personal representative and trustee are authorized by ORS 126.810(7) and (9) to select the adult person who will serve as custodian even if the testator or trustor did not specify. Furthermore, if the decedent died intestate, or failed to provide that a distribution to a minor may be distributed to a custodian, a personal representative and a trustee may distribute a minor's share of an estate or trust to a custodian. ORS 126.810(8) and (9).

When appropriate, the use of custodianship gifts in a will or trust may significantly simplify the will or trust agreement. If distribution of a bequest or transfer under a trust to a custodianship is authorized, and a custodian designated, the testator or trustor can exercise control over

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Telephone: (503) 224-3380.

management of a minor's share without elaborate provisions in the mill or trust. Practitioners should advise trustees or personal representatives who arc required to make distributions to a minor to consider whether the distributions should be made to a custodian. A custodianship will involve less expense than a conservatorship, and as noted below, may delay the ultimate distribution past age IS. If a custodianship gift was not contemplated by a testator, or if the decedent died intestate, court approval is required before a personal representative may make the distribution to a custodian. Apparently no court approval is required for a trustee to distribute a minor's share to a custodian even if the trustor did not contemplate a custodianship. Of course, distribution to a custodianship is subject to any limitations in the trust instrument.

The 1983 Oregon Legislature amended the Gifts to Minors Law to delay distribution past age 18. An adult is now defined to be any person who has not attained the age of *21 years.* ORS 126.806. A minor is any person under age 21. *Id.* Under the amended ORS 126.820(3), a custodian must deliver custodial property to the minor upon becoming an adult. If the donor so provided in the original gift instrument, the custodian may be required to deliver the custodial property when the "minor" is 18, 19 or 20. The suggested language for allowing earlier distributions is found in ORS 126.817:

> "(Name of custodian). as custodian under the laws of Oregon, for (name of minor), a minor, until the minor attains (18, 19, 20 or 21) years of age."

A donor may also give another the right to designate a custodian and direct when the custodial property must be distributed. Without any direction, a custodial gift must be distributed at age 21.

The 1983 changes are *not* applicable for gifts made before the effective date of the changes, which was October 15, 1983. This means that for custodianship gifts created prior to October 15, 1983, the custodial property must be distributed by age 18.

Delaying distribution from 18 to 21 may make custodianships more attractive to clients. For this reason, practitioners should consider whether custodianships are more appropriate than conservatorships or trusts for lifetime or testamentary gifts to minors.

"BONNER V. ARNOLD" REVISITED

The Oregon Court of Appeals was presented with a case of first impression in 1983 and its adoption of a new rule of law for Oregon was quickly rejected by the Oregon Supreme Court. The case concerned liability of an intestate estate for contribution to a surviving joint tenant of one-half of the purchase price remaining due on joint tenancy property. Adopting the majority rule, the Court of Appeals held that the estate was liable for the contribution. In early 1984, the Court of Appeals was reversed by the Oregon Supreme Court. The Supreme Court held that an estate is not liable for contribution to a debt secured by joint property passing by right of survivorship unless the decedent *clearly* provided otherwise.

In *Bonner v. Arnold,* 296 OR 259 (1984), rev'g 63 OR App 515 (1983), the decedent during her lifetime purchased real property with her son. The unpaid balance of the purchase price was secured by a trust deed. Since the property was owned as joint tenancy with right of survivorship, it passed directly to the son on her death. The son was appointed personal representative of the estate. Under the intestate laws, the son and his four siblings were the sole beneficiaries of the estate.

As personal representative, the son charged the estate with one-half of the balance of the purchase price of the joint tenancy property. Not surprisingly, his siblings objected to this use of estate funds. There was no indication in either the Court of Appeals' opinion or the Supreme Court's opinion of any evidence of the decedent's intent concerning payment of the remaining purchase price.

The majority rule on contribution in these circumstances, which was adopted by the Court of Appeals, emphasizes the severability of the personal obligation of the debt from the lien on the real property securing the debt. Under the majority rule, it is not significant that the encumbered real property passes outside of the probate estate. If the decedent was personally obligated on the debt, and the debt survives the death (See ORS 115.305), then the right of contribution will also survive.

In reversing the Court of Appeals, and adopting the minority view, the Supreme Court relied on the equitable nature of the right of contribution. The theory of contribution is applied to *avoid* unjust enrichment. In *Bonner v. Arnold,* the Supreme Court held that the right of contribution would result in unjust enrichment. The debt cannot be severed from the lien in determining if it is equitable to apply the theory of contribution.

Perhaps what was most persuasive to the Supreme Court was the rule concerning the exoneration of voluntary encumbrances on real property under ORS 115.255 and ORS 115.001. These two statutes require the payment by an estate of a voluntary encumbrance on specifically devised real property *only* if the will expressly provides for payment. The Court found no reason to treat mortgages on specifically devised real property different than real property held as joint tenants with right of survivorship.

What practioners should remember from *Bonner v. Arnold* is the importance of planning. Information should be gathered on the existance of encumbrances on separately and jointly owned property. In addition, a client's intentions concerning the payment of such obligations should be determined. Those intentions should then be expressed in the will. Due to the "migratory" nature of many clients, it may be advisable to express such intentions in the will even though those intentions may be consistent with the Supreme Court's holding in *Bonner v. Arnold.* The majority rule adopted by other jurisdictions may be inconsistent with a client's intentions. Furthermore, a clear expression of intent in the will may avoid the submission of conflicting evidence of the testator's intent by interested parties.

WHAT'S NEW (OR MAY BE) IN OREGON LAW

The 1983 Legislature added significant requirements for appointment and monitoring of guardians for incapacitated persons. Or Laws 1983, ch 535. The changes appear in Senate Bill 639, which was introduced at the request of senior citizen and retarded citizen organizations. All changes were effective January 1, 1984.

The new statutory provisions require that (1) more factual information be presented in the petition for appointment of an incapacitated person's guardian, (2) a court make more specific findings before appointing such guardian, and (3) a report, in a form specifically set forth in the statute, be filed annually by the guardian. These changes appear in ORS 126.103, 126.107, 126.114 and 126.137, and can be summarized as follows:

Contents of Petition. The petition must contain the names, ages, addresses and relationship of the proposed guardian and ward. It must allege the nature of the incapacity of the proposed ward which necessitates establishment of the guardianship. Facts must also be set forth to support the allegations of incapacity, as well as the names and addresses of persons known to the petitioner who have direct knowledge of the ward's incapacity.

Investigation. *After the filing of a petition,* the previous law permitted the court to appoint a visitor to interview the proposed guardian, ward and examining physicians. The new law *requires* the court to direct a visitor to interview those persons and submit a written report to the court, prior to appointing a guardian.

A psychologist, as well as a physician, may examine the proposed ward and submit a written report to the court.

Necessary Findings. The previous statute required the court to find that the proposed ward was incapacitated and that the appointment of a guardian was necessary or desirable. The court must now find in

addiuon that the nard's incapacitywas in one or more areas as alleged in the petition, and that the proposed guardian is qualified, suitable and willing to sene The statute also directs the court to only enter guardianship orders which are no more restrictive upon tlie liberty of tlie ward than reasonably necessary to protect the nard

Duties of Guardian. It was previously left to tlie court to determine the manner in which the guardian would be required to report the condition of the ward and the ward's estate. This was changed to require the guardian to file a report within 30 days after each anniversary of the guardian's appointment. The report must be in substantially the same form as that appearing at ORS 126.137(6), which form is a fairly detailed statement of tlie guardian's and ward's guardianship activities during tlie preceding year At any time after appointment of a guardian the court may direct a visitor to examine the living conditions of the ward, and to interview tlie guardian and tlie ward's physician or psychologist The guardianship order may also be modified by the court to limit the authority of the guardian to act only in areas where the ward has a demonstrated incapacity.

The changes described above obviously have a direct impact upon the pleadings and forms of orders suhmitted to the courts by lawyers petitioning for the appointment of guardians for incapacitated persons ORS 126 103 through 126 143 should be reviewed by anyone preparing to initiate such proceedings. Finally, it should be noted that Senate Bill 639 apparently has no effect on existing procedures for the appointment of guardians for minors.

FROM YOUR EXECUTIVE COMMITTEE

In its May Newsletter, the Executive Committee reported on its efforts regarding Exclusion 17 of the Professional Liability Fund. This exclusion concerns investment advise from covered service. In May, the proposed amendment of the exclusion would limit it to services consisting *principally* of investment advice. Since May, the Professional Liability Fund Board advanced an alternative proposal which will apply tlie exclusion:

> "To any claim or portion thereof caused by an act, error or omission of the Covered Party in the rendering of investment advice concerning specific investments."

This proposal is to be circulated to interested members of the Bar for comment. The Estate Planning and Administration Section has not yet had the opportunity to officially react to the new proposal.

SECTION SEMINAR ON BASIC ESTATE PLANNING

The Section will sponsor a seminar focusing on the needs of the lawyer with limited experience in estate planning Experienced panelists and individual speakers will present observations and suggestions on planning tor clients with small-to-medium sized estates The emphasis will be on a practical approach to coordinate an estate plan, rather than merely will drafting

David Andrews will introduce the concept and philosophy of estate planning and will discuss the need to identify lifetime goals and priorities, to provide financial and tax planning and to educate the client He will outline useful estate planning measures, including tlie will, power of attorney, living will, gifts, trusts, retirement plans and insurance

A panel consisting of John Fenner, Daniel Ritter and Walter Pendergrass will provide a chronological overview of the role of the lawyer, beginning with the initial telephone call and office interview, discussion of fees and use of input forms. The panel will discuss producing and implementing tlie estate plan, coordinating with other professionals and follow-up. They will also consider business relationships, property ownership and ethical problems.

Mike Morgan will provide a step-by-step analysis of the simple will and will formalities, duties and powers of the personal representative and Oregon laws relating to intestacy, spouse's elective share, ademption, lapse, pretermitted heirs and tax apportionment.

Drafting techniques will be presented by Valerie Vollmar, including use of forms and software, as well as problems with boilerplate language. She will emphasize a modern, concise approach to drafting style.

Campbell Richardson, Laurie Caldwell and James F. Light, Jr., will hold a panel discussion on lifetime and testamentary planning for minor children, elderly clients and second marriages. They will explain the use of inter vivos and testamentary trusts, as well as alternative approaches to trusts. Special problem areas will include providing for liandicapped beneficiaries, grandchildren and stepchildren.

Stephen Kantor will give a brief overview of gift, estate and inheritance tax laws and exemptions. He will identify major tax issues and discuss when estate planning must include planning for gift and estate taxes.

Written materials will include a workbook of document forms, including a simple will and contingent children's trust will, checklists, information sheets and a bibliography, as well as speaker outlines.

The seminar will be held November 30, 1984 in Portland and December 7, 1984 in Eugene, as well as videotape replay sites around the state.

The seminar was planned by a subcommittee of the Executive Committee chaired by Laurie Caldwell.

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USE OF SELF-PROVING AFFIDAVITS

As many practitioners are aware, Oregon law allows a will to be admitted to probate on affidavits of the attesting witnesses. ORS 113.055(1). Personal presence of the witnesses is rarely required.

Affidavits may be executed by the attesting witnesses when the will is executed, or any time thereafter. To avoid delays in opening probate, practitioners are strongly encouraged to prepare an affidavit for the witnesses which can be executed simultaneously with the execution of the will. The original affidavit should be kept with the original will.

The following is a suggested form of affidavit which can be attached to the will:

* * * * * * * *

STATE OF OREGON)
) ss.
County of __________)

We, the undersigned, being sworn, each for myself, say:

On the date of the foregoing will of JOHN DOE, consisting of ______ (__) typewritten pages, including this page, each bearing his signature or initials, JOHN DOE, in our presence signed the will and declared it to be his will, whereupon, at his request and in his presence and in the presence of each other, we attested the will by signing our names thereto.

To the best of our knowledge and belief, the testator was, at that time, over the age of 18 years, of sound mind and not acting under any undue influence or fraud.

____

____

SUBSCRIBED AND SWORN to by each of the affiants above named on ________ __________, 19___ .

____
Notary Public for Oregon
My Commission Expires:

SCHEDULE OF SEMINARS AND EVENTS

The following is a selected schedule of seminars which may be of particular interest to Section members:

September 21-22: ALI-ABA and Massachusetts Continuing Legal Education, SOPHISTICATED ESTATE PLANNING TECHNIQUES, Boston, Massachusetts.

September 24-25: PLI, FIFTEENTH ANNUAL ESTATE PLANNING INSTITUTE, St. Louis (also October 18-19 in New York City and November 15-16 in Miami).

September 28: Pacific Lutheran University School of Business Administration, ESTATE PLANNING TECHNIQUES, Seattle/Tacoma, Washington.

October 10-12: The 21st Annual Conference National Association of Estate Planning Councils, Baltimore, Maryland.

October 12: ABA Real Property, Probate and Trust Law Section and American Bankers Association Trust Division, PROTECTING THE TRUSTEE AND EXECUTOR IN THE 80'S, Milwaukee, WI

October 25-26: Washington State Bar Association, TWENTY-NINTH ESTATE PLANNING SEMINAR, Westin Hotel, Seattle Washington.

November 1-3: Oregon State Bar, 1984 PRACTICAL SKILLS PROGRAM, Greenwood Inn, Beaverton, Oregon.

November 30 and December 7: Portland and Eugene, Oregon State Bar Estate Planning and Administration Section CLE, BASIC ESTATE PLANNING: A PRACTICAL APPROACH.

March 4-8, 1985: ALI-ABA CLE, PLANNING TECHNIQUES FOR LARGE ESTATES, Honolulu, Hawaii.

March 26-28, 1985: Washington State Bar Association, THE PACIFIC RIM FEDERAL TAX CONFERENCE, Maui, Hawaii. Speakers include James E. Peterson, Bend, Oregon, and Joseph Wetzel, Portland, Oregon.

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