newsletter

Oregon Estate Planning and Administration Section Newsletter

Volume I, Number 3
January 1985

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

APPOINTMENT OF NEW MEMBERS TO EDITORIAL BOARD

This issue marks the third issue of the first inaugural year of publishing the Newsletter. We believe the Newsletter has achieved many of our goals. Communication of the Executive Committee activities to the Section members has significantly improved with the Newsletter. Articles in the Newsletter have highlighted recent rulings and decisions concerning Oregon law and proposed and new Oregon law of interest to Section members.

The members of the current Editorial Committee are identifed on page 1 of the Newsletter. At the next meeting of the Executive Committee of this Section on February 1, 1985, new members of the Editorial Committee will be named. Your participation in the publication of the Newsletter is needed. This is an excellent way to become involved in Section activities. Please contact any member of the Editorial Board or the Executive Committee if you are interested in serving on the Editorial Board or contributing articles.

Oregon Estate Planning and Administration Section Newsletter
is published by the Estate Planning and Administration Section of the Oregon State Bar

Editorial Committee

Nancy L. Cowgill
Editor in Chief
Laurie Caldwell
member
Stanley R. Loeb
member
Jeffrey E. Boly
member

additional contributing **authors**
Allen Reel
Conrad Moore

ESTATE PLANNING FOR THE HANDICAPPED

A large number of persons in our society are handicapped to the extent that they cannot take care of their own affairs. The major question confronting those concerned with the handicapped is who will care for them, both physically and financially, when their immediate families are no longer available.

Almost every developmentally handicapped adult is receiving, or is at least eligible for, governmental assistance. There are many forms and types of such assistance. The primary programs are Social Security, Medicare, Supplemental Security Income (SSI) and Medical Assistance (Medicaid). The estate planner should become familiar with such benefits and should know for which benefits the handicapped person is eligible and which he or she is receiving.

The estate planner should also consider where the handicapped person is residing. The more severely or profoundly handicapped may be residing in a state institution. The moderately and less severely handicapped may be living in a group home or smaller residence operated by a local governmental or private agency. The handicapped individual may also be participating in sheltered workshops, training centers or other programs supported by public funds and controlled by governmental rules and regulations.

The handicapped person's eligibility to receive such benefits and to participate in such programs will be directly affected by the person's income and assets. All such aid, including monthly Social Security or Supplemental Security Income, contains limitations and restrictions on the amount of private funds and property of the handicapped person. *See* 42 USC §§ 1381-385.1396;20 CFR 416.1100-.1266; 42 CFR 433.1 *et seq.*; 45 CFR 302.0 *et seq.*; and OAR Chapter 461. A person living at a state institution may be liable under Oregon law to reimburse the state in whole or in part for his or her care if possessed of sufficient income or assets. ORS 179.620.

In planning for the disposition of their estates, the families of handicapped persons must consider the effect of a bequest or devise upon the eligibility of the handicapped person for such assistance. If the family leaves funds or assets directly to die handicapped person, that person will probably be disqualified from governmental assistance.

There are several choices available to the family of the handicapped. The family can choose to simply disinherit the handicapped person outright. This choice is usually philosophically and psychologically impossible to

make. A second choice is an informal arrangement by which the parents of the handicapped child give their estate to another person, such as a non-handicapped offspring, who agrees informally to manage the estate for the handicapped brother or sister. There are obvious dangers and difficultiesin such an arrangement. A third choice, the traditional conservatorship, while more formal. unfortunately does not insulate the estate from claims by public or governmental agencies.

for many the estate planning tool of choice is the trust, either inter vivos or, in most instances, testamentary. The key to the drafting of such a trust involving a handicapped person is to expressly limit the purpose of the trust to provide *extra* and *supplemental* care, *maintenance, support and* education *in* addition *to* and *over* and above the *benefits the handicapped person otherwise receives from local, state or federal* government, *or from private agencies* including, bur *nor limited to,* Social *Security, Supplemental* Security Income, *Medicare, Medicaid,* and any other *such* benefits.

This supplemental or restricted trust should provide absolute and unfettered discretion in the trustee or trustees to determine when and if any benefits should be paid. The trustee should be able to make or to withhold payments at any time and in any amount deemed appropriate in the trustee's sole discretion, which discretion should be conclusive and binding on all persons. Further. the trust should provide that no distributions may be made if such distributions would affect the handicapped person's right to receive any governmental payments or assistance, unless in the discretion of the trustee it would be in the handicapped person's best interests to receive distributions from the trust. Of course, the estate planner should also include standard spendthrift language in the trust, although it must be emphasized that such limiting language is not in itself sufficient to accomplish the primary purpose of the supplemental trust.

In any event, the estate planner must caution the client that there is no guarantee such a trust will actually or absolutely protect the handicapped's governmental assistance. The issue is still an open one, at least in Oregon. Some courts have held that the state cannot reach all of a discretionary trust. See. e.g., In re *Johnson's Estate*, 198 Cal App 2d 503, 17 Cal Rptr 909 (1961). *See* also *Estate of Escher*, 407 NYS2d 106 (1978). The Oregon courts have not ruled direcdy on the issue. The Oregon Supreme Court criticized basic spendthrift provisions which result in the public supporting a beneficiary's children. *Shelley* v. *Shelly* and *U.S.* Nat. *Bank,* 223 Or 328,337,354P2d 282 (1960). On the other hand, when proper protective language is used, there is recent authority to support tlie view that the intent of the testator or settlor should control even if it may mean defeat of a public claim against a beneficiary. *See Owens* v. *Heisel*, 67 Or App 537,679 P2d 331 (1984).

The prudent planner may wish to consider additional terms in the trust for even greater protection. for instance, the drafter may include a provision that at least some of the income will be distributed periodically to other beneficiaries rather than being used or accumulated for the handicapped individual. This may provide an additional safeguard against anack by a governmental agency since there would be other interested beneficiaries of the trust, not only the remaindermen. with equitable rights. Furthermore, depending on the size of the estate and other circumstances, the anorney may wish to include an "automatic termination" clause or discretion in the trustee to terminate the trust for the handicapped person if the trust is challenged or if it appears an anack will be successful. However, careful consideration of tax and other consequences must be given before any such terms are used. Certainly the powers of the trustee should be broad enough to authorize the trustee to expend trust funds to defend any attempt by the government to reach the trust.

While the financial welfare of the handicapped person is important, the personal welfare is no less so. The estate planner must be concerned with who will make the important decisions regarding the life of the handicapped when immediate family and friends are gone. Who will decide the living situation? Who will consent to medical care? Who will approve education, work and social activities? A guardianship will normally be the preferred method of providing for the handicapped person's well-being. although in some instances an advisor or advocate will suffice.

The parents of the handicapped child are the natural guardians until the child reaches eighteen years of age. This "natural" guardianship ends when the child reaches majority even though the child is handicapped and is not self-sufficient. The parents should, therefore, be named legal guardians during their lifetimes, and should then nominate successor guardians in their wills to look after the child when they are no longer alive or able to directly concern themselves with the handicapped child's well-being. Of course, they should be advised that their nominations in the will are not binding upon the court, but will be given preference. ORS 126.035. If no family or friends are available or qualified, the parents may wish to nominate an organization such as tlie Association for Retarded Citizens of Oregon, which is a private, non-profit corporation dedicated to assuring tlie legal, social and personal rights of mentally retarded Oregonians. The ARC maintains a Guardianship, Advocacy and Protective Services *(GAPS)* program which provides for future planning, parental assistance and intervention for handicapped persons, and which can serve as the guardian for persons who need protection, yet lack the involvement or network of family or friends.

Regardless of who is nominated or appointed as guardian, the client may also wish to name advisors or advocates to assist in caring for the handicapped person. The advisors or advocates may include friends, counselors, medical providers, and even the attorney who does the estate planning. They might also include the *GAPS* Board of the ARC which offers such services.

The parents can augment the future planning for the handicapped by preparing a document separate and apart from the will called a Letter of Intent. This document, usually kept with the will, sets forth the parents' desires for the personal life of the handicapped child after the parents are gone. Although not legally binding, the Letter of Intent can be very helpful to those concerned with the future well-being of the child including the trustees, the guardians, the advocates and advisors, and the court as well. The Letter of Intent gives the parents the opportunity to set forth in non-legal terms their personal desires concerning the life of the handicapped, such as home atmosphere, companionship, privacy, personal habits, visits, vacations, daily routine, social contacts, dress, personal appearance, health care, and medical treatment. The Letter can be especially important during the transitional period after the last parent's death. The will should direct the guardians and others to refer to and to follow to every extent possible the intentions set forth by the parents.

This article has addressed only a limited aspect of future planning for the handicapped. Many other issues should be given consideration including the role of life insurance, the use of a durable power of attorney for the elderly, and similar matters.

An estate planner for tlie handicapped may wish to review some of the resource materials available on the subject. E.g., C. Davis, *Financial and Estate Planning for Parents of a Child with Handicaps*, 5 West. N. Eng. L. Rev. 495 (1983); 1. Frolick, *Estate Planning for Parents of Mentally* Disabled Children, *40* U. Pitt. L. Rev 305 (1979). Anyone doing estate planning in this area should start by obtaining and reviewing a booklet, which is available for a modest fee, entitled. "future Planning on Behalf of Developmentally Disabled Persons, A Guide for Estate Planners," published by the GAPS Board of the *ARC* of Oregon. The address of ARC is 3085 River Road North, Salem, Oregon 97303.

FROM YOUR EXECUTIVE COMMITTEE

In the short time since the annual meeting, the Executive Committee has been actively planning and participating in several projects and activities. The following is a brief summary of these projects and activities, other than those which may be discussed elsewhere in this Newsletter.

The Estate Planning and Administration Section and the Oregon State Bar are co-sponsoring a new comprehensive probate systems manual (the "Orange Book) which will coordinate with the current Administering Oregon Estates (the "Black Book"). The authors of the systems manual are Jeffrey Boly, Conrad hloore, Mark Perrin, Dwight Purdy and Merritt Yoelin. This will be a master system designed for use by the anorney and support staff involved in the probate process. The next step after completion of the manual will be to computerize the system.

The CLE Subcommittee chaired by Laurie N. Caldwell has completed the Portland and Eugene presentation of the basic estate planning seminar, and video replays will be held around the state in December and January. The seminar was very successful in providing a practical approach to estate planning for clients with small to medium-sized estates. The large anendance and enthusiastic response confirmed our understanding that there is a continuing need for courses of his nature.

The Section intends to co-sponsor a seminar with the Oregon Stale Bar next fall or winter in connection with the probate systems manual. Additional seminar topics of interest to the Section include intermediate estate planning and probate administration, with an emphasis on malpractice issues. The CLE Subcommittee is currently working on obtaining video tapes from national estate planning seminars sponsored by such organizations as ALI-ABA and OLI. These tapes would be shown in various locations around the state with the assistance of local estate planning organizations or interest groups. The CLE Sub-committee for the coming year consists of Laurie Caldwell, Jim Casteel and Valerie Vollmar with assistance by Steve Lane for the video taped seminars.

The Legislation Subcommittee chaired by Stan Loeb is in the process of screening proposed bills and suggesting legislation. There are numerous issues under consideration, including statutory rule against perpetuities legislation and changes or clarifications in tlie laws concerning survivorship, tax apportionment, elective share, intestate shares, interest charged on pickup tax and timing of split gifts under the gift tax laws. In addition, the committee will look at the changes made recenlly by the Washington State legislature, including automatic revocation of beneficiaq designation in the event of divorce, allocations to income beneficiary under the Principal and Income Act, non-judicial dispute procedure and listing of tangible personal properly separate from a will. The Legislation Subcommittee will be working with the Trust Legislation Committee in these areas.

A major bill which is being authored by Stan Loeb, Rees Johnson and Walter Pendergrass is an expedited probate administration procedure. Unlike the current Small Estates Act, the new provisions would be incorporated into Oregon's existing statutory scheme for probate adminstration but provide a summary procedure for distribution in appropriate circumstances.

Nancy Cowgill reports from the Oregon State Bar Leaders' Conference held this fall that the Oregon State Bar believes that the indirect costs associated with the Sections should be reimbursed by each Section. At that meeting, the Bar proposed keeping all investment income generated by the Treasury of each Section and, in addition, proposed a 75¢ assessment per Section member to be made March 1 of each year. After discussion by all of the Sections, the Bar proposals have been approved by the Oregon State Bar - Committee on Sections.

The Executive Committee intends to hold another meeting on February 1, 1985 and continue to hold subcommittee meetings 10 be followed by a day-long workshop in the spring.

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

Recent appellate decisions, one issued by the Oregon Court of Appeals and the otlier issued by the Nevada Supreme Court on remand from the United States Supreme Court, raise questions concerning the applicability of Chapter 115 of Oregon Revised Statutes which governs claims Ned against an estate.

In *Wilbanks v. Goodwin*, 70 Or App 425 (1984), the Oregon Court of Appeals held that the time limitations set forth in ORS 115.005(3) did not apply in an action for specific performance of a contract to make a will. Section 115.005 bars claims not presented to a personal representative within 12 months after the date of first publication of notice to interested persons, or before the date the personal representative files his final account, whichever first occurs. The Court concluded that an action for specific performance of a contract to make a will was not a claim against the estate within the meaning of ORS 115.005. This apparently means that tlie six-year statute of limitations specified in ORS 12.080 applies to actions for specific performance of a contract to make a will.

In *Continental Insurance* Company *v. Moseley*, — Nevada — (1984). 683 P2d 20, tlie Nevada Supreme Court on remand from the United States Supreme Court held that, where an estate had actual knowledge of a claim against decedent, the estate's failure to take any action to notify claimant of the probate proceedings, other than publishing notice pursuant to statute, was insufficientto afford claimant due process. In *Moseley*, a civil action was pending against the decedent at the time of her death which had been filed by the claimant. However, the claimant failed to file a claim against the estate until two days after the last day specified in the published notice to creditors for filing claims. The Nevada statute required creditors of the estate to file their claims within 60 days alter the first publication of notice to creditors and further specified that any claim not so Ned would be barred forever. In its initial opinion, the Nevada Supreme Court concluded that the published notice to appellant and that the claims statute, which was designed to foster the efficient and expedient administration of estates, should be enforced in accordance with its terms.

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

☐ Enclosed is a check for $10 payable to the Oregon State Bar for my subscription to the Oregon Estate Planning and Administration Section Newsletter.

Please print or type

Name

Phone

The United States Supreme Court granted certiorari, vacated the judgment and remanded *Moseley* to the Nevada Supreme Court for further consideration in light of Mennonite Bd. of Missions v. Adams, 462 US ____, 103 S Ct 2706, 75 L Ed 2d 180 (1983). The *Mennonite* case involved an Indiana quiet title action and the question of whether notice to a mortgagee of a pending tax sale was adequate. The Court relied on *Mullane v. Central Hanover* Bank and *Trust Co.*, 339 US 306 at 314, 70 CT 652 at 657, 94 Ed 865 (1950), which establishes Ilie fundamental principal that notice must be reasonably calculated under all circumstances to apprise interested parties of the pendancy of the action. The Court found that publication and posting are not reasonable where an inexpensive and efficient mechanism, such as mail service, is available. Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid.

ORS 115.005 is quite similar to the Nevada statute and it seems likely that its effectiveness will be subject to the same challenge. The issue was previously raised in Oregon in the case of *Chalaby v. Driskell*, 237 Or 245 (1964). The Court found the *Mullane* doctrine inapplicable because although the creditor had no actual notice of the time for filing claims, he did have actual notice that the estate was opened. In those cases in which the creditor does not have actual notice of the probate proceedings, the reasoning in *Moseley* may apply to require the estate to give actual notice to the creditor. Practitioners should consider whether *Moseley* will apply to claims which were not known to the personal representative but which could have been discovered with reasonable diligence.

Based on these two decisions, practitioners should be aware that the shoner time limitations in Chapter 115 may not apply to all claims against an estate, either because Ilie claim (such as an action for specific performance of a contract to make a will) is not governed by Chapter 115 or because *actual* notice to a known creditor was not given. This may result in uncertainty of a beneficiary's right to property received from an estate.

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

PLF EXCLUSION 17

The Professional Liability Fund has experienced a significant increase in claims attributable to lawyers performing services of a purely financial nature, such as arranging loans or mortgages or recommending the purchase of specific securities, commodities or precious metals. The Fund never intended to cover such activities.

On the other hand, the Fund does cover the preparation of documents which relate to such transactions. The problem is the functions in the middle which involve both investment advice and legal services.

In the September Newsletter, the Executive Committee reported that the Professional Liability Fund Board proposed to address this problem by changing Exclusion 17 to read

> "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."

That wording has now been adopted by the Fund Board.

In response to continuing concern raised by lawyers involved in the fields of taxation, securities, banking, trusts and probate law, Donald B. Bowerman, Chairman of the PLF Board, appointed and the Board approved a continuing ad hoc committee which will screen and approve all assertions of the Exclusion 17 defense. That ad hoc committee consists of the following members:

Merritt S. Yoelin
Douglas R. Grim
Donald J. DeFrancq
Jeffrey E. Boly
Donald B. Bowerman
Joyle C. Dahl

Two of the members of the ad hoc committee are also members of this Section: Merritt S. Yoelin and Jeffrey E. Boly.

The theory behind the ad hoc committee is that naked investment advice is like obscenity: the comminee will know it when it sees it.

In the November 1984 Professional Liability Fund publication "In Brief' the Fund Board reported as follows regarding Esclusion 17:

> "It has been concluded that any investment function where a lawyer is making a specific recommendation as to the purchase of stocks, bonds or other securities, as well as specific investments in real estate or other tangible or intangible property, does not come within the definition of the private practice of law."

Unless rescued by the ad hoc committee, a lawyer may not have coverage where he advises a client regarding the economics of a proposed tax shelter investment or advises the personal representative of an estate how the proceeds of estate sale assets should be invested. There are many other situations where lawyers traditionally have given advice that may not be covered.

The Esecutive Committee has decided to draft standards for the guidance of the Ad Hoc Esclusion 17 Committee. These standards will be submitted to the PLF for approval.

SCHEDULE OF SEMINARS AND EVENTS

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

January 14-17, 1985: THE 37TH ANNUAL INSTITUTE ON FEDERAL TAXATION, sponsored by University of Southern California at Century City, Los Angeles.

February 1, 1985 (Spokane) and February 8, 1985 (Seattle): ESTATE AND TRUST LITIGATION PRACTICE, sponsored by CLE Committee of Washington State Bar.

February 2, 1985: 14TH *ANNUAL* ESTATE PLANNING SEMINAR, Portland, co-sponsored by Estate Planning Council of Portland, Inc. and the Northwestern School of Law at Lewis and Clark College.

February 20-22, 1985: NEW YORK UNIVERSITY LAW SCHOOL, Workshop on Tax Reform Act of 1984, San Francisco, California.

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

March 25-28, 1985: THE PACIFIC RIM FEDERAL TAX CONFERENCE, Maui, Hawaii, sponsored by the Washington State Bar Association, The Pacific law Institute, The Oregon Law Institute.

April 29-May 3, 1985 ALI-ABA CLE, PLANNING TECHNIQUES FOR LARGE ESTATES, New York, New York.

June 16-21, 1985: ESTATE PLANNING IN DEPTH, co-sponsored by ALI-ABA, Continuing Legal Education for Wisconsin and The University Wisconsin Law School, Madison, Wisconsin.

PUBLICATION OF NOTICE

An estate may be probated in any county in Oregon which has venue. Venue is in the county where the decedent (1) was domiciled or had his or her place of abode at time of death, (2) had property located at the time of death or the time probate is commenced or (3) died. ORS 113.015. Once probate is initiated, a personal representative must cause notice to interested persons to be published once in each of three consecutive weeks. ORS 113.155. Section 113.155(1) requires the notice to be published in a newspaper published in the county, or if no newspaper is published in that county, then in a newspaper designated by the court.

Those practitioners who occasionally probate estates in counties other than where they practice may find it difficult to determine where the notice should be published. They may also find that the cost of the publication varies significantly from county to county.

The following is a list of rhe newspapers that are typically used for publication of notice to creditors in the various counties in Oregon. The list may not be complete because ORS 113.155 permits notice to be published in any newspaper in the county in which the probate is pending. Those practitioners who publish notice in newspapers other than those indicated may want to contact the editor with information on the other newspapers so die list may be complete.

County	Newspaper	Price ner column Inch Per Run	Approximate cost
Baker	*Democrat* Herald 1915 First Street Baker, Oregon 97814	$2.50	$ 45.00
Benton	Gazette Times Sixth and Jefferson Corvallis, Oregon 97330	4.57	54.84
Clackamas	Enterprise Courier Eighth & Main Streets Oregon City, Oregon 97045	2.66	63.84
Clatsop	Daily Astorian 949 Exchange Astoria, Oregon 97103		100.00
Columbia	*Sentinel-Mist* Chronicle 195S Fiheenth St. Helens, Oregon 97051	2.18	52.26
coos	The World 350 Commercial Coos Bay, **Oregon** 97420		75.12
Crook	*Central Oregonian* 558 N Main Prineville, Oregon 97554		48.23
Curry	Curry County Reporter 510 N Ellensburg Cold Beach, Oregon 97444	3.30	49.50
Deschutes	Bend *Bulletin* 1526NW Hill Bend, Oregon 97701	3.95	59.25
Douglas	News Review 345 NE Winchester Roseburg, Oregon 97470	3.50	50.00
Gilliam	Condon *Times* Journal PO Box 746 Condon. Oregon 97823	2.40	41.76
Grant	Blue Mountain Eagle 741 West Main John Day, Oregon 97845		63.00
	Burns Times Herald 355 N Broadway Burns. Oregon 97720	2.55	47.79
Hood River	Hood River News 409 Oak Street Hood River, Oregon 97031		56.00
Jackson	*Medford Mail* Tribune Fir at Sixth Street Medford, Oregon 97501	8.75	91.89
Jefferson	Madras Pioneer 452 Sixth Street Madras, Oregon 97741	3.34/1st week, 2.50/thereafter	66.72
Josephine	Grants Pass Daily Courier 409 SE Seventh Grants Pass, Oregon 97526		50.00
Klamath	Herald and News* 1301 Espanade Klamath Falls, Oregon 97601	6.65	69.84
Lake	Lake County Examiner 101 N F Street Lakeview, Oregon 97630	3.28	51.66

* requires prepayment for customers outside circulation area.

** may be used to publish notice in Washington County and Clackamas County, as well as Multnomah County

County	Newspaper	Price per column Inch Per Run	Approximate cod
lane	Register Guard 975 High Street Eugene, Oregon 97401	$ .74/line	$ 125.00
Lincoln	Newport News Times 831 NE Avery Newport, Oregon 97365		50-65.00
Linn	Albany Democrat Herald 138 Sib Avenue SW Albany, Oregon 97321		45.00
Malheur	The Argus Observer PO Box 130 Ontario. Oregon 97914		87.75
Marion	Statesman-Journal 280 Church Street NE Salem, Oregon 97301	10.12	146.21
Morrow	Hepner Gazette Times 147 W Willow Hepner, Oregon 97836	2.75	51.10
Multnomah	Daily Journal of Commerce** 2014 NW 24th Podand, Oregon 97210		49.00
Polk	Itemizer-Observer 147 SE Court Dallas, Oregon 97338	4.52	60.00
Sherman	Sherman County journal Moro, Oregon 97039		45-50.00
Tillamook	Headlight Herald 1908 Second Street Tillamook, Oregon 97141	$ 3.20	$ 45-50.00
Umatilla	East Oregonian 211 SE Byers Pendleton, Oregon 97801		71.94
Union	Observer 1710 Sixth Sweet LaGrande, Oregon 97850		56.70
Wallowa	Wallowa County Chieftan 106 NW First Enterprise, Oregon 97828	2.55	38.25
Wasco	The Dalles Chronicle 414 Federal Sweet The Dalles, Oregon 97058		61.61
Washington	Hillsboro Argus PO Box 588 Hillsboro, Oregon 97123	4.10	60.00
Wheeler	Timesjournal PO Box 746 Condon, Oregon 97823	2.40	41.76
Yamhill	News Register 611 E Third Street McMinnville, Oregon 97123		45.00

* requires prepayment for customers outside circulation area.

** may be used to publish notice in Washington County and Clackamas County, as well as Multnomah County.

Oregon State Bar
Estate Planning and
Administration Section
1776 S.W. Madison Street
Portland, Oregon 97205

newsletter

Oregon Estate Planning and Administration Section Newsletter

Volume II, Number 1
May 1985

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

NOMINATIONS TO EXECUTIVE COMMITTEE

In the next few months, a nominahng committee will nominate new members to the Executive Committee. The nominahons will be voted on by the Section members at the annual meeting. The new members will begin their terms this fall. Those who are interested in serving on the Executive Committee should contact members of the present Committee to express their interest.

The Executive Committee meets approximately every two months. These meetings are two hours in length and are held at various locations in the State. In addition, the Executive Committee held an all-day meeting on Saturday, April 20, 1985. There may also be various subcommittee meetings during the year.

Although members may find the Executive Committee time consuming, they also will find it a rewarding opportunity to share ideas, participate in the legislative process and help other practitioners with continuing legal education. Section members are encouraged to become involved in Section activities.

The current members of the Executive Committee are:

Chairperson:
Nancy L. Cowgill

Chair-elect:
Jeffrey Boly

Secretary:
Laurie Caldwell

Treasurer:
Daniel Ritter

Members-At-Large (1 Year Term):
Valerie Vollmar (Salem)
Conrad L. Moore (Portland)
Stanley R. Loeb (Portland)
Mark W. Perrin (Eugene)

Members-At-Large (2 Year Term):
Rees Johnson (Portland)
Stephen Lane (Eugene)
James Casteel (Portland)
Robert Heffernan (Medford)

Please send suggestions for future articles and ideas for improvement of the Newsletter to Oregon Estate Planning and Administration Sechon Newsletter, 900 S.W. Fifth Avenue, 24th Floor, Portland, Oregon 97204, Attention: Nancy L. Cowgill. Telephone: (503) 224-3380.

ATTORNEY FEES: ARE THEY COLLECTIBLE AGAINST THE ESTATE?

When an attorney's employment for a personal representative ceases, and the personal representative refuses to pay the attorney, may the attorney pursue a claim against the estate for fees, or is the attorney limited to an action against the personal representative individually?

Until recently, Judge William S. McLennan, Multnomah County's Probate Judge, though that the pre-1969 probate code law controlled and that the attorney was limited to a claim against the personal representative individually. However, in a letter opinion dated December 3, 1984, (Estate of Brooks, No. 127699) Judge McLennan held that an attorney may assert a claim against the estate for fees and litigate that right by summary procedure under ORS Chapter 115.

The case law predating the 1969 probate code, according to Judge McLennan, held that the attorney's employment is a personal matter with the personal representative and is no way binding upon the assets of the estate. The personal representative in turn can be exonerated from liability from die assets of the estate if the personal representative can establish the reasonableness of the fees and the value of the services to the estate.

Although the current statutes leave some doubt (for instance, under ORS 111.005(7) the definition of "claim" refers only to liabilities of a decedent), Judge McLennan now believes that ORS 114.405 establishes the attorney's right to proceed directly against the estate. ORS 114.405 provides that the personal representative's personal liability is that of an agent for a disclosed principal, that the personal representative is not personally liable on contracts entered into in a fiduciary capacity, and that a claim based on a personal representative's contract may be allowed against the estate.

Judge McLennan found additional support from the Uniform Probate Code. ORS 114.405 was based on an earlier version of what is now section 3-803 of the Uniform Probate Code. The current version of that section explicitly permits post-death claims to be made against the estate.

Judge McLennan's decision, of course, would apply with equal force to other kinds of contracts with the personal representative or other claims arising after a decedent's death. Judge McLennan believes that other issues relating to post-death claims are unresolved and that legislative action is necessary. For instance, is a post-death claim time barred under ORS 115.005 if not presented within twelve months after the first publication of notice to interested persons or prior to the filing of the final account? Section 3-803(h) of the Uniform Probate Code answers this question by baring post-dead1 claims not presented within four months after they arise.

BUDGET REPORT

The Oregon State Bar provides periodic budget reports for the sections. As of January 31, 1985, the Estate Planning and Administration Section had a fund balance of $9,380.78. The Section received annual dues from its Section members of $3,155 in January. The Section has in excess of 600 members.

The January issue of the Newsletter cost $828.62, which was higher than the previous quarterly issues due to its length. The annual expense of publishing three issues of this Newsletter is approximately $2,100. The largest expense of the Section during the last year was a subsidy of $4,200 given to participants at the seminar on the Basics of Estate Planning in the Fall of 1984.

At the April meeting of the Executive Committee, the financial condition of the Section was reviewed. It is believed that the Section has sufficient funds for its activities for the next year so that no dues increase will be needed.

PLF EXCLUSION 16

Prior issues of this Newsletter have considered Exclusion 17 to the Professional Liability Fund Plan (exclusion of coverage for investment advice). Exclusion 16 of the Plan may also have special applicability to estate planning practices. In particular, Exclusion 16 denies coverage for ". . . any claim arising out of any *business transaction* . . ." in which the lawyer participates with a client unless disclosure has been made in writing to the client and the PLF as required by DR 5-104(A). As with all exclusions, definitions become crucial for the lawyer concerned with maintenance of coverage under the Plan.

Both Exclusion 16 and DR 5-104(A) apply to "business transactions" without further explanation of that term. Exclusion 16 and the DR are refinements of the general proposition that a lawyer must always exercise independent professional judgment for the protection of the client. When a lawyer drafts wills for the lawyers' parents, brothers and sisters, or other relatives, does the lawyer risk loss of coverage through Exclusion 16 because the lawyer may be a direct or contingent beneficiary under the instrument?

The Executive Committee intends to discuss this question with the PLF Staff and report the PLF's position, if a position is taken, in future issues.

AN INTERIM REPORT ON THE 1985 LEGISLATIVE SESSION

The Section Legislation Subcommittee has reviewed a number of Senate and House bills during the 1985 Oregon legislative session. The following are the bills of interest to the Section. Those bills supported or opposed by the Section Executive Committee are noted.

1. Probate Administration:

(a) Senate Bills (SB):

(1) SB 93 – would amend ORS 116.093(3)(d) by requiring the personal representative of an estate to give notice of time for filing objections to the final account to persons, known to the personal representative, *who purport to have a claim against* an estate. This bill, intended to change the result in *Waybrant v. Bernstein,* 294 Or 650 (1983), could open a Pandora's box. The bill does not define "claimants" or "purported claimants." It would create significant uncertainty since persons could seek to reopen an estate claiming to be "purported claimants" who did not receive notice. The bill is opposed by the Section and by the Oregon State Bar Trust Legislation Committee.

(2) SB 168 – allows the Oregon Adult Family Services Division, as preferred claimant, to collect custodial accounts or joint and survivor accounts of a decedent with no surviving spouse, and requires a surviving joint tenant or minor to try to recover the funds from the Adult Family and Services Division. The Section and the Trust Legislation Committee oppose this bill.

(b) House Bills (HB):

(1) HB 2017: would amend ORS 116.083 to excuse bonded trust companies and national banks, serving as personal representatives, from filing cancelled checks or vouchers with annual accountings or final accounts. The bill was introduced at the request of the Oregon Bankers' Association on March 28th. At the Section's suggestion, the bill was amended to require retention of cancelled checks or vouchers for one year after the order approving the final account is entered, to require access to the records by interested persons and to put notice of the retention and availability for inspection and copying in the interim of final accounts.

(2) HB 2360: would amend ORS 93.190 and ORS 93.200 so that co-personal representatives take title as tenants in common with right of survivorship and not as joint tenants. The bill, introduced at the request of the Oregon State Bar Real Property and Land Use Section, is *not* supported by this Section or by the Trust Legislation Committee because the bill appears to create a personal estate in land for co-personal representatives rather than creating the interest in the estate itself. The Section has informed the Senate Judiciary Committee of its opposition.

(3) HB 2599: increases the dollar limits of the Small Estates Act from $10,000 to $15,000 for personal property, from $20,000 to $35,000 for real property, and to a combination of personal property with fair market value of $15,000 or less plus real property with a fair market value of $35,000 or less. The Section supports this bill.

2. Inheritance and Gift Tax:

(a) Senate Bills (SB):

(1) SB 178: authorizes the Department of Revenue to adopt, *by department rule,* its own interest or annuity tables. The Section initially opposed this part of the bill. The bill was then amended to require the Department to "give due consideration" to IRS tables.

The bill also authorizes a gift splitting election by husband and wife on a return filed within an extension period. The Section supports this section of the bill.

(2) SB 181: eliminates the six (6) year statute of limitations for collection of inheritance taxes. The Section opposed this part of the bill.

3. Estate Planning.

(a) Senate Bills (SB):

(1) SB 596 – Uniform Transfers to Minors Act: This bill, introduced at the request of the Oregon State Bar Uniform Laws Committee, expands the types of custodianships for minors, limits multiple custodianships for a single minor, and will make other significant changes in the present Gifts to Minors Act with regard to this valuable alternative to judicially administered conservatorships. The bill is too long to summarize in this article.

THIS IS AN INTERIM REPORT. As of April 3, 1985, none of the above bills had been passed by both Houses. A final report will appear in the September edition of the Section newsletter.

PUBLICATION OF NOTICE

In the January 1985 issue of the Newsletter, a list was provided of the newspapers which are used to publish the notice to creditors required by ORS 113.155. An alternative newspaper which was suggested for Marion County is The Jefferson Review, Post Office Box 330, Jefferson, Oregon 97352. The current rate for publishing the notice for three consecutive weeks is $30.

FROM YOUR EXECUTIVE COMMITTEE

The Executive Committee and its subcommittees have been actively planning for 1985. After its meeting in February, various subcommittee meetings were held to prepare for the all-day meeting on April 20, 1985. Reports and recommendations on various matters were submitted at the day-long meeting which was held in Newport on April 20.

Dan Ritter, Treasurer, submitted a budget for the Section. The surplus from prior years was partially reduced by using funds for seminar subsidies and publication of the newsletter. The Section still has sufficient surplus and current funds for its planned activities.

The Legislation Subcommittee has coordinated its efforts with the Trust Legislation Committee. An article regarding proposed legislation appears in this newsletter. In addition, the Legislation Subcommittee is drafting a proposed Bill for expedited probate proceedings.

The CLE Subcommittee is pursuing the availability of video seminar tapes and is making future plans to co-sponsor with the Bar an intermediate level seminar on estate planning. The CLE Subcommittee is working with the Probate Systems Manual Committee, chaired by Mark W. Perrin, to present a live seminar in Portland and Eugene in conjunction with publication of the new probate manual. The Probate Systems Manual will be a companion to the current black book, *Administering Oregon Estates*. The manual will include tax and procedural sections with sample completed forms, including fiduciary and estate tax returns, claims and other forms and information not previously published. The manual will be the basis for additions and periodic updates as changes in probate law and tax law occur. The proposed seminar dates are tentatively set for sometime during the last week of February 1986.

The PLF Exclusion 17 matter regarding investment advice is still a major concern to the Section. The Fund Board named in the January Newsletter (which includes two members of the Executive Committee) is considering preparation of guidelines which specifically state which transactions constitute excluded investment advice and which transactions come within the scope of the practice of law.

A new editorial board is being sought for the *Newsletter*. Nancy Cowgill has agreed to continue as editor for 1985, but a successor editor-in-chief must be selected to work with her. Editions will normally be published in January, May and September of each year at a cost of approximately $600 to $700 per edition. Contributions of articles of interest to the Oregon practitioner will be welcomed.

OPTIMUM MARITAL DEDUCTION: NO FEDERAL ESTATE TAX?

It is a standard article of faith that the credit shelter trust, coupled with the optimum marital deduction, is the mainstay of tax planning for larger estates. In an effort to explain this complex concept to clients, we are sometimes tempted to claim that this arrangement will eliminate the federal estate tax. However, because of imposition of the Oregon Inheritance Tax, that conclusion is not always true.

The unified credit and credit for state death taxes produce a combined total exemption equivalent as follows:

1985	$422,078
1986	$530,303
1987	$600,000

assuming that the Oregon Inheritance Tax becomes a pick-up tax in 1987. If the Oregon Inheritance Tax exceeds $422,078 in 1985, the exemption equivalent will be consumed, the credit shelter trust will be unfunded and the marital deduction will be reduced by the amount of inheritance tax exceeding $422,078. Because the inheritance tax is not deductible for federal estate tax purposes, a large state tax can cause the creation of a federal taxable estate and the imposition of a federal tax.

Disregarding costs of administration and other estate tax deductions, estates exceeding the following designated amounts will incur a federal estate tax in 1985 and 1986 if the decedent is domiciled in Oregon:

1985	$4,017,317
1986	$4,919,192

For each dollar of inheritance tax in excess of the exemption equivalent there is a corresponding reduction in the marital deduction. Incremental loss of the marital deduction results in a federal tax which, in turn, reduces the marital deduction, and so on. This "multiplier effect" has already motivated some of Oregon's wealthier ccitizens to change their domiciles to California or Washington (both of which have a pick-up tax). In addition, an even greater exodus of wealth from the state could occur if the legislature attempts to repeal the conversion to a pick-up tax in 1987.

Oregon Estate Planning and Administration Section Newsletter
is published by the Estate Planning and Administration Section of the Oregon State Bar

Nancy L. Cowgill
Editor in Chief

Jeffrey E. Boly
member
Laurie Caldwell
member
Stanley R. Loeb
member

additional contributing authors
Rees Johnson
Stephen Lane
Conrad Moore
Allen Reel

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

☐ Enclosed is a check for $10 payable to the Oregon State Bar for my subscription to the Oregon Estate Planning and Administration Section Newsletter.

Please print or type

Name

Address

City State Zip

Phone

SCHEDULE OF SEMINARS AND EVENTS

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

May 10-11, 1985: SEVENTH ANNUAL UCLA-CEB ESTATE PLANNING INSTITUTE, Beverly Hills, California.

May 16-17, 1985: The Closely Held Business, Financial Planning for the Owners, sponsored by Practising Law Institute (PLI), Chicago, Illinois.

May 23-24, 1985: ADVANCED WILL DRAFTING, co-sponsored by PLI and CLE of Colorado, Denver, Colorado.

May 23-24, 1985: ALI-ABA CLE, TAX PLANNING FOR CLOSELY HELD BUSINESSES, Akron, Ohio.

May 24, 1985: PROTECTING THE TRUSTEE AND EXECUTOR IN THE 80'S, co-sponsored by Joint National Institute of the ABA Real Property Probate and Trust Law Section and American Bankers Association Trust Division, Grand Hiatt, New York, New York (cassettes available).

June 16-21, 1985: ESTATE PLANNING IN DEPTH, co-sponsored by ALI-ABA, Continuing Legal Education for Wisconsin and The University Wisconsin Law School, Madison, Wisconsin.

June 24-25, 1985: USE OF TRUST IN ESTATE PLANNING, PLI, New York, New York (also July 25-26, 1985 in Seattle, Washington).

July 12 and 19, 1985: ESTATE PLANNING, Washington State Bar CLE, Spokane and Seattle, Washington.

October 4, 1985: NATIONAL ASSOCIATION OF ESTATE PLANNING COUNCILS, TECHNICAL SESSION, including speakers Edward C. Halbach, Jr., John Price, Roy M. Adams and Carlyn McCaffrey. Tentative luncheon speaker, Robert Packwood, Portland, Oregon.

November 7-8, 1985: 30TH ESTATE PLANNING SEMINAR, Washington State Bar, CLE, Seattle, Washington.

February, 1986 (dates to be announced): PROBATE SYSTEMS MANUAL, co-sponsored by the Estate Planning and Administration Section and the Oregon State Bar, Portland and Eugene, Oregon.

Oregon State Bar
Estate Planning and
Administration Section
1776 S.W. Madison Street
Portland, Oregon 97205

Nonprofit
Organization
U.S. POSTAGE
PAID
Portland, Oregon
Permit No. 341

Return Postage Guaranteed
Address Correction Requested