

Newsletter

Oregon
Estate Planning
and Administration
Section Newsletter

Volume II, No. 3
January 1986

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

NEW FACES

At the Annual Meeting of the Estate Planning and Administration Section on October 4, 1985, new members of the Executive Committee were named. The following are the current members:

| | |
|------------------------|------------------|
| Chairperson | Jeffrey Boly |
| Chair-Elect | Laurie Caldwell |
| Past Chair | Nancy Cowgill |
| Secretary | Stanley Loeb |
| Treasurer | Valerie Vollmar |
| Members-at-Large | Rees C. Johnson |
| (One-Year Term) | Stephen Lane |
| | James Casteel |
| | Robert Heffernan |
| Members-at-Large | Carol Kyle |
| (Two-Year Term) | Barry Rubenstein |
| | John Hassen |
| | Carolyn Wilson |

These members will serve until the next Annual meeting of the Section.

Beginning with the next issue (May 1986), the Newsletter will be the responsibility of a new Editorial Board. The Executive Committee is now looking for Section members who want to serve on the Board. Any Section member interested in serving as a member should contact Jeffrey Boly. All Section members are strongly encouraged to contribute articles or contact members of the Editorial Board with any ideas they may have for future articles.

Please send suggestions for future articles and ideas for improvement of the Newsletter to Oregon Estate Planning and Administration Section Newsletter, 1300 Orbanco Building, 1001 SW Fifth Avenue, Portland, Oregon 97204, Attention: Jeffrey Boly. Telephone: (503) 224-5430.

EXECUTION OF WILLS

Execution of a will in compliance with Oregon law is an important part of the estate planning process. No matter how carefully the will has been prepared, failure to satisfy these requirements may result in an invalid will, disinherited beneficiaries and malpractice liability.

A. Statutory Procedures:

The proper procedures for executing a will are found in ORS 112.235 and are as follows:

1. In the presence of each witness (who need not necessarily be together), the testator must either sign the will or direct one of the witnesses (or another person) to sign the testator's name to the will. If someone signs for the testator, that person must sign the person's own name and write on the will that the testator's name was signed at the testator's direction. If the testator signs the will or has someone sign the testator's name without the witnesses present, the testator must acknowledge the signature in front of each witness.

2. At least two witnesses must each see the testator sign the will or hear the testator acknowledge the signature and sign their name as witnesses. The witnesses need not sign in the presence of each other. The statute formerly required that the witnesses sign in the presence of the testator, but this requirement has been eliminated. However, as illustrated by the recent case of *Rogers v. Rogers*, 71 Or App 133, 691 P2d 114 (1984), the witnesses must sign the will before the testator's death.

In the *Rogers* case, the decedent signed his will in the presence of his wife and attorney and they saw the decedent sign his will. The attorney attested the will by signing his name to it as a witness in the presence of the decedent and his wife. The wife did not attest the will at that time. The decedent died on July 23, 1981. On June 23, 1982, the wife signed her name to the will as an attesting witness. The trial court ruled that the will had not been validly executed because it had not been signed by two witnesses before the decedent's death. The Court of Appeals affirmed.

The proponents of the will argued that the legislature, in eliminating the requirement that the will be signed in the testator's presence and at his request showed an intent to eliminate any requirement that the testator still be alive when attestation occurs. The Court of Appeals agreed that ORS 112.235 no longer required the witnesses to attest the will

at the time and place it was signed by the testator, but disagreed that attestation could occur after the testator's death. Since the will takes effect on the testator's death, the requirements of execution must be met at the time of death of the testator. Therefore, if the will has not been validly attested at the time the testator dies, the will is not valid.

B. Practice Tips:

1. Although not required by ORS 122.235, it is good practice to have the client initial or sign the bottom of each page of the will.

2. If the client wishes to make a minor change in the original will, such as correcting a typographical error, the client should make the change in the client's own handwriting and initial the change in the margin opposite the change. The witnesses should place their initials in the margin next to those of the testator.

3. The testator should indicate the testator's desire to have the witnesses attest the will. This can be accomplished by asking the client to state aloud that this is the client's will and that the client asks the witnesses to attest it.

4. The affidavit of attesting witnesses should be signed and notarized at the time the will is executed and kept with the original will. This avoids the cost and inconvenience of locating the witnesses to obtain their affidavit when it is time to have the will admitted to probate.

5. Although a named beneficiary may witness a will under Oregon law, it is prudent to use disinterested witnesses if any are available, especially since the testator may move to a jurisdiction that does not permit beneficiaries to act as witnesses. Keep in mind that a fiduciary benefits from the will by receiving compensation.

6. Only one original will should be signed. This prevents confusion and makes it easier to revoke the original by destroying it.

7. Immediately after the will is signed, prepare conformed copies of the will showing the date of execution, the signatures of the testator and witnesses and the location of the original.

8. Make sure that the original is kept in a safe place, such as the law firm's vault or in the client's safe deposit box. Consider whether it is advisable to keep the original in the firm's vault due to the uncertainty of what disposition may be made of the will if the firm is dissolved.

9. If the client keeps the original, remind the client that any markings or revisions on the will may revoke it.

10. Maintain a file system with a separate card (or computer catalog) for each will showing the date, names of witnesses and location of the original. This provides easy reference in the event of a client's death or change in the estate tax laws.

11. Encourage clients to review their wills periodically and contact an attorney if there are any significant changes in their financial or family circumstances.

12. Discourage clients from giving copies of the will to their beneficiaries, as they may create confusion or hard feelings if the will is later changed. A client may want to notify the named fiduciaries that they have been nominated in the client's will and the client should inform the personal representatives of the location of the original. If a bank is named as a fiduciary, it is good practice to notify the bank that the will has been signed and provide a copy of the will if the bank so requests (assuming the client consents to giving the bank a copy of the will).

13. Although the client's will may state that it revokes all prior wills and codicils, it is good practice to physically destroy any former documents or clearly mark them as having been revoked.

NO-CONTEST CLAUSES

A testator may attempt to decrease the risk of a will contest by inserting an "*in terrorem*" or no-contest clause in the will. Such clauses typically provide that a beneficiary receives \$1 in lieu of other bequests if the beneficiary challenges the will. Will these clauses be upheld in Oregon unless the beneficiary had probable cause to bring the will contest or only if the provision is unlawful or in contravention of a specific public policy?

The Oregon Court of Appeals in *Larson v. Naslund*, 73 Or App 699, 700 P2d 276 (1985), recently held that "*in terrorem*" clauses will be enforced unless it is unlawful or in contravention of a specific public policy. Since the beneficiary was unable to show that the will and codicil were executed in violation of the law or that the no-contest provisions contravened public policy, the no-contest provision was enforced and the beneficiary received only \$1 instead of one-eighth of the residue of the estate. A beneficiary who contests the will has a heavy burden to show that the no-contest clause should be enforced. Bringing a will contest in good faith, or with probable cause, will not be sufficient to overcome the strong public policy to allow testators' to dispose of their estate as they wish.

The Court of Appeals reviewed the two prior decisions on the effect of "*in terrorem*" clauses. In *Wadsworth v. Brigham*, 125 OR 428, 259 P 299, 266 P 875 (1928), the Oregon Supreme Court held that "*in terrorem*" clauses void as against public policy if the prosecution of the will contest was in good faith. This good faith exception was overruled *subsilentio* in *U.S. Bank of Portland v. Snodgrass*, 202 OR 530, 275 P2d 860 (1954), in which the Oregon Supreme Court was persuaded by the strong policy to give great latitude to a testator in the disposition of his estate. Unless some other public law or policy is violated, a no-contest provision will be enforced.

Practitioners should review *Larson v. Naslund* before advising beneficiaries of a will to contest a will with a no-contest provision. In preparing wills, practitioners may also consider using an "*in terrorem*" clause, particularly if the testator anticipates a beneficiary may challenge the will.

FROM YOUR EXECUTIVE COMMITTEE

The Executive Committee has met twice since the last newsletter: on October 25, 1985 in Chair Jeff Boly's office in Portland and on December 6, 1985 in the Dean's Conference Room at Willamette Law School, Salem, where member Valerie Vollmar is a professor of law.

At the October 25 meeting the Executive Committee approved a section budget of \$8,350 for this fiscal year and heard interim reports from the legislative subcommittee, the probate manual subcommittee and the CLE subcommittee. Doug Grimm of the Professional Liability Fund Board reported on reaction to the section's proposed amendment to PLF exclusion 17. Valerie Vollmar discussed a possible Oregon State Bar estate planning system to be developed by the section.

At the December 6 meeting, probate system subcommittee chair Mark Perrin reported that a draft probate systems manual should be circulated by February 1986 for editorial review and that the system should be available for Oregon State Bar distribution by late 1986. The system would be introduced through an appropriate section CLE meeting to be coordinated by the section's CLE subcommittee. The legislative subcommittee chair reported that the 1984 Uniform Statutory Wills Act was considered at length by the subcommittee. The subcommittee recommends against present enactment in Oregon of the Uniform Statutory Wills Act. The subcommittee is also considering the California Statutory Wills Act, central will filing and destruction of wills. The CLE subcommittee reports plans for an intermediate estate planning program in the fall of 1986 which will focus on estates in the \$600,000 to \$1,200,000 range. The Executive Committee also considered amendment of the Oregon intestate succession statute to treat surviving spouses more realistically than under the present provision. The Executive Committee supported exploration of a limited Oregon State Bar will drafting system under a committee chaired by Valerie Vollmar.

The Executive Committee will continue its policy of meeting in different parts of the state to equalize the travel burden. Its future meetings are:

- January 31, 1986 — Portland
- March 15, 1986 — Medford
- May 9, 1986 — Eugene
- July 19, 1986 — Sisters

SCHEDULE OF SEMINARS AND EVENTS

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

JANUARY 30-31, 1986: P.L.I., POST MORTEM ESTATE PLANNING, Denver, Westin Hotel.

FEBRUARY 1, 1986: Estate Planning Council of Portland and Northwestern School of Law at Lewis & Clark College, FARM ESTATE PLANNING AND BUSINESS PLANNING IN A DECLINING VALUATION MARKET, Neil Harl, speaker, Red Lion, Jantzen Beach, Portland (Contact Chris Stamness, 244-1181).

FEBRUARY 6-7, 1986: P.L.I., INCOME TAXATION OF ESTATES AND TRUSTS, New York, St. Moritz.

FEBRUARY 13, 1986: ALI-ABA Video Law Review, TRUST & GIFT TECHNIQUES FOR FINANCING CHILDREN'S EDUCATION, Salem, Oregon.

FEBRUARY 25, 1986: Oregon State Bar, ACCOUNTING FOR LAWYERS, Willamette Center.

FEBRUARY 26-28, 1986: ALBI-ABA, TAX & BUSINESS PLANNING FOR THE 80's, Scottsdale, Arizona.

FEBRUARY 27-28, 1986: P.L.I., EXECUTIVE COMPENSATION: PLANNING TECHNIQUES & STRATEGIES, San Francisco, Hyatt on Union Square.

MARCH 6-7, 1986: P.L.I., INCOME TAXATION OF ESTATES & TRUSTS, San Francisco, Hyatt Regency.

MARCH 10, 11 & 12, 1986: THREE DAY ESTATE PLANNING SERIES, New York City, New York, The Halloran House —

1. Tax Planning for Marital Dissolution.
2. Marital Deduction Tax Planning.
3. Estate Planning — Domicile.

APRIL 2-4, 1986: ALI-ABA, PENSION, PROFIT SHARING AND OTHER DEFERRED COMPENSATION PLANS, San Francisco, California.

APRIL 10, 1986: ALI-ABA Video Law Review, WILL DRAFTING.

MAY 5-9, 1986: ALI-ABA, PLANNING TECHNIQUES FOR LARGE ESTATES, New York City, New York.

JUNE 5, 1986: ALI-ABA Video Law Review, PENSION LAW.

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Volume III, No. 1
May 1986

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EXECUTIVE COMMITTEE MEMBERSHIP

This summer a nominating committee will nominate new members to the Executive Committee. The nominations will be voted on by the Section Members at the annual meeting. The new members will begin their terms this fall. The current members of the Executive Committee are:

Jeffrey E. Boly, *Chair*
Nancy L. Cowgill, *Past Chair*
Laurie N. Caldwell, *Chair-Elect*
Stanley R. Loeb, *Secretary*
Valerie J. Vollmar, *Treasurer*

Members-at-Large (1 year term):

Rees C. Johnson
Stephen O. Lane
James L. Casteel
Robert D. Heffernan, Jr.

Members-at-Large (2 year term):

Carol J. Kyle
Barry Rubenstein
John R. Hassen
Carolyn E. Wilson

WOULD YOU LIKE TO SERVE ON THE EXECUTIVE COMMITTEE?

The best way to become involved with the Executive Committee is to serve on one of its Sub-Committees. These Sub-Committees and the name, address and telephone number of its Chair are as follows:

Legislative Committee

Stanley R. Loeb, 800 Pacific Building, 520
S.W. Yamhill, Portland, OR 97204, 226-6151

Continuing Legal Education Committee

Laurie N. Caldwell, 710 S.W. Third,
Portland, OR 97204, 224-6383

Newsletter Editorial Board

Jeffrey E. Boly, Ste. 1300, 1001 S.W. Fifth,
Portland, OR 97204, 224-5430

By serving on a committee you gain first hand knowledge of the Section's activities and you can display your own talents. Although committee service can be time consuming, it is an excellent way to sharpen your skills, meet other practitioners and establish your credentials in estate planning. If you are interested, call one of the Sub-Committee Chairs or any of the other Executive Committee Members and get involved.

Jeffrey E. Boly
Chair Executive Committee

TASK FORCE STUDIES NEW DEATH WITH DIGNITY ACT

Early this year Oregon Senate President John Kitzhaber appointed a Senate Interim Task Force on Death with Dignity. Its purpose is to seek public input into the proposed new Death with Dignity Act, Senate Bill 812, and to make its recommendations. Co-chaired by Senator Nancy Ryles and Representative Jane Cease, its members include Bob Shoemaker, attorney; Roy Payne, M.D.; Joyce Colling, R.N., Ph.D., director of the home nursing program at Oregon Health Sciences University; Alide Chase, hospital administrator at Bess Kaiser Hospital; and Marshall Wattles, citizen representative from Eugene.

The Task Force will hold a series of public hearings, the last of which is to be held in Salem on June 3, 1986, at the State Capitol Building. Nancy Ryles says that "... there is a need for grassroots involvement." Estate planners' comments would be especially valuable and welcome.

Oregon's Present Statute

In connection with a new will, many estate planners routinely discuss with their clients Oregon's Directive to Physicians (living will), ORS 97.050, *et seq.* This law provides a statutorily sanctioned form which gives legal significance to a competent adult's statement that useless medical treatment which would only extend the dying process be withheld, should such a situation arise while he or she is incompetent.

Living wills are generally popular. But, now that we have had almost a decade of experience with them—although Oregon has no reported cases—the question arises, "Do they really work?" Increasingly, the answer is in the negative. Why so? More often than not, a living will is never used, whether because its existence is unknown, it is too cumbersome, it does not meet the patient's individual needs, or it lacks specificity to deal with the variety of medical situations which could arise.

Senate Bill 812

Proposed Senate Bill 812, also known as Draft J, is intended to enable a person to die naturally. It provides a non-exclusive, suggested directive (living will) form, which requires two witnesses and allows oral declarations. A directive may be revoked at any time and in any manner, without regard to mental or physical condition. Once made, the directive must become part of the patient's medical record.

Where an incapacitated patient has not given a directive, the Bill specifies those individuals who could make medical decisions on his or her behalf. Much like the laws of intestate succession, the list is headed by a spouse, followed by a legal guardian, a majority of adult children, and parents.

Under the Bill, physicians who follow a directive could not be sued for malpractice or found guilty of criminal offenses. Physicians failing to comply could be cited for unprofessional conduct and hospitals failing to comply could have their license suspended or revoked. The Bill imposes criminal penalties for falsifying, forging, concealing or destroying directives or revocations.

Living wills executed under present law will not be impaired or superseded. Likewise, insurance policies will not be impaired or invalidated simply because one has executed a directive.

S.B. 812 Issues

Physicians, attorneys, religious organizations, patient advocates and the general public have brought up the following issues to the Task Force:

1. How should the terms "life-sustaining procedure," "terminal condition," and "incompetence" be defined.

2. Whether the age of the declarant should be limited to adults over the age of 18.

3. Whether the list of individuals to make health care decisions is the most appropriate one.

4. Whether the term "life-sustaining procedure" should include mechanical and artificial provision of nutrition.

5. Should the Bill contain a provision allowing a person to document that he or she does *not* desire withdrawal of life-sustaining procedures.

Durable Power of Attorney Favored

In testifying before the Task Force on March 21, 1986, Paul Blaylock, M.D., J.D., stated that the greatest oversight in S.B. 812 was omission of a durable power of attorney provision. Similarly, a number of those testifying, including attorney Rees C. Johnson, said they personally favor its inclusion, as did the President's Commission for the Study of Ethical Problems in Medicine and by Medical and Behavioral Research. In its report entitled "Deciding to Forego Life-sustaining Treatment," the Commission concluded, "Durable powers of attorney are preferable to 'living wills' since they are more generally applicable and provide a better vehicle for patients to exercise self-determination, though experience with both is limited." In a letter to President Reagan dated March 21, 1983, its

Chairman, Morris B. Abram, stated, "When patients are incompetent to make their own decisions, others must act on their behalf. The Commission found that existing legal procedures can be adapted for the purpose of allowing people while competent to designate someone to act in their stead and to express their wishes about treatment."

Two states—Pennsylvania in 1982 and California in 1984 (C.C. 2424 to 2429)—include authority to make health care decisions in their durable power of attorney statutes. A third, Colorado, implicitly covers such decisions. The New Jersey Supreme Court has approved the use of durable powers of attorney for such purposes.

Conclusion

Any proposed statute would not give new rights, but would merely reaffirm rights which already exist. Ultimately, any decision regarding withholding or providing medical care balances the individual's unwritten right of privacy under the Bill of Rights and the common law right to self-determination against the state's interest in preserving life, protecting interests of third parties, preventing suicide, and promoting the ethical integrity of medical practice.

For additional background information, bibliography, list of reported cases, and/or a copy of S.B. 812 (no charge) contact:

Shirley A. Bass, Cyr & Moe, P.C., Suite 1010,
400 S.W. Sixth Avenue, Portland, Oregon
97204, (503) 224-1148

If you would like to present comments and/or testify before the Task Force, contact:

Kiska A. Johnson
Senate Interim Task Force
on Death with Dignity
331 State Capitol
Salem, Oregon 97310
(503) 378-5720

Shirley A. Bass

RETIREMENT PLAN BENEFITS; THE ESTATE PLANNER'S TAR BABY

Retirement plan benefits have become an immense component of personal wealth in America. Popularity of individual retirement accounts, generous retirement plans for professionals, and the breadth of collectively-bargained pension plans have generated a uniquely complicated form of asset to be dealt with in estate planning and administration. The ordinary rules of property law do not apply to these assets; they are subject

to inordinately complicated rules of income taxation; and Congress is particularly disposed to revise the rules as a matter of "reform" every two years. Substantial distortion of an estate plan can result if the retirement plan benefit is not accorded special attention.

In general, distributions not attributable to nondeductible employee contributions are income in respect of a decedent "IRD." Under certain circumstances the surviving spouse (as a death benefit beneficiary) can rollover a distribution received at death, and thereby postpone income taxes. In all other instances the recipient of a death benefit distribution includes payments from the retirement plan in gross income. As a wasting asset, retirement plan distributions should not be made to the Credit Shelter Trust.

As a result of the Retirement Equity Act, August 23, 1984, most retirement plans (excluding IRA's and certain profit sharing plans) must provide at least a "50% survivor annuity" to the surviving spouse of a participant. What this means, in general, is that a surviving spouse is the compulsory beneficiary of an actuarially determined portion of the plan benefit. In most first marriage situations this presents no problem, because an outright distribution to the surviving spouse carries the IRD and qualifies for the marital deduction. However, with the advent of QTIP trusts, we have become accustomed to dealing with second marriage situations by providing a life income interest in property to a surviving spouse, with the remainder (net of death taxes) to children by the first marriage. The new retirement plan laws do not lend themselves to accommodating this general scheme for the retirement plan benefit.

The right of a spouse to receive the survivor annuity can only be waived during marriage, subsequent to specific disclosures, and only on a form acknowledged by a notary public or representative of the plan. Current commentators believe that a prenuptial or postnuptial agreement cannot compel a second spouse to relinquish rights under the plan. In addition, it appears that the designation of a QTIP trust as beneficiary will be ineffectual from the standpoint of qualification for the marital deduction and may violate general pension plan laws.

The Service has taken the position that the income interest of a surviving spouse in the QTIP trust must be recognized by the pension plan. This appears to mean that distributions from a pension plan must include a special distribution to the surviving spouse of income earned on the pension plan interest from the date of death. Few, if any, plans would be in a position to accommodate this level of accounting. In addition, Treasury appears to take the position under Section 401(a)(9) of the IRC that the QTIP trust must meet certain

minimum benefit distribution requirements as a conduit for the plan distribution. If this is the case, the QTIP trust will be required to distribute not only income, but some portion of principal on an ongoing basis over the lifetime of the surviving spouse. Though articulation of these problems is certainly in an embryonic state, immense caution is warranted if a retirement plan benefit is to be merged with a QTIP arrangement.

Another feature of the Retirement Equity Act is the introduction of Qualified Domestic Relations Orders (QDRO) in divorce situations. State courts now have jurisdiction to award interests in retirement plans among divorcing spouses. A QDRO does not necessarily create survivor benefits. Unless specific provisions are made in the Order, the death of the employee participant may cut off the rights of the nonparticipant spouse. Likewise, the interest of the nonparticipant spouse is not assignable at his or her death, and survivor benefits only arise if provided for in the Order. To the extent the estate planning attorney has an opportunity to become involved in a divorce situation, careful planning should be addressed to these questions.

In implementing an estate plan where retirement plan benefits are significant, the estate planning attorney should discuss the operational and administrative requirements of the plan with the plan's attorney. Frequently individualized beneficiary designations should be prepared to meet individual needs. Simply signing the "printed" form may, in some instances, produce unwanted results.

ORS 118.050 exempts from taxation under the Oregon inheritance tax benefits payable from a pension or retirement plan that qualifies for income tax exemption under the Internal Revenue Code, including individual retirement accounts. The note to ORS 316.680 provides an exemption from income taxes for any interest or dividends payable by the United States government and included in a distribution from an IRA or to a self-employed person from a retirement plan. The income tax exemption provision certainly provides a challenge for accountants, but may deserve close attention at the time of a distribution.

For an excellent article on these and other aspects (including community property) see *Estate Planning and Qualified Plans After DEFRA and REA*, University of Southern California Law Center Institute on Federal Taxation Proceedings, Cecil A. Ray, Jr. and Rivat Johnson, December 23, 1985 and *Beware of REA Rules re Retirement Plan Distributions*, The Florida Bar Journal, Vol. LIX, No. 7, pp. 49-53 (reprinted in the February issue of the *Digest of Tax Articles*, pp. 44-50).

Stephen O. Lane

FROM YOUR EXECUTIVE COMMITTEE

Your executive committee has met twice since the last newsletter: on January 31, 1986 in Rees Johnson's eastside Portland office and on March 15, 1986 in a meeting room in the old US Hotel Building, Jacksonville, Oregon.

At the January 31, 1986 meeting the executive committee:

- Heard a report on the proposed Probate Manual.
- Heard a report from legislative committee chair Stan Loeb and then voted to seek amendment of ORS 112.025 in the 1987 legislative session to read as follows:

"If the decedent leaves a surviving spouse and issue, the [surviving spouse shall have a one-half interest in the net intestate estate.] *intestate share of the surviving spouse is:*

"(1) If there are surviving issue of the decedent all of whom are issue of the surviving spouse also, the entire net intestate estate.

"(2) If there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse, one-half of the net intestate estate."

and instructed the legislative section chair to seek enactment of the proposed amendment in the 1987 session.

- Heard a report from CLE Committee Chair Laurie Caldwell on an Intermediate Size Estate Planning seminar to be held on November 21, 1986 at the Portland Marriott Hotel.
- Heard a report from section newsletter chair Jeffrey Boly on upcoming articles in the newsletter.
- Discussed the need for amendment of ORS 115.005 as the result of *Willbank v. Goodwin*, and referred that matter and other possible amendments to ORS Chapter 115 to

executive committee member Carol Kyle and to the section legislative committee.

At a full day March 15, 1986 meeting and planning session the committee:

- Approved use of the Oregon State Bar CLE admission fee schedule for Section CLE events (thereby discontinuing the previous section practice of additional subsidy for section members and new bar members beyond the discount specified in the Bar CLE fee schedule).

- Deferred consideration of any increase in section dues above the \$5 per year current section dues level.

- Approved, on a one year trial basis, a policy to reimburse executive committee members for attending out-of-town section executive committee meetings.

- Conducted a broad evaluation of executive committee operation and adopted a number of operating changes.

- Heard a legislative committee report from committee chair Stan Loeb, encouraged further work on an amended "rule against perpetuities" bill in the 1987 session with the OSB Trust Legislation Committee, discussed the need for amendment of the Oregon Principal and Income Act and approved a resolution encouraging merger by the OSB Board of Governors of the OSB Trust Legislation Committee into the Estate Planning and Administration Section.

- Heard a report on "Planning for the Taxable Estate" CLE Session (referred to in the January 31 report above as "Intermediate Size Estates Seminar") from section CLE committee chair Laurie Caldwell, and considered a possible future CLE session on "Administering the Taxable Estate".

- Heard a report on the status of the Probate Manual from Jeff Boly, executive committee chair, and considered holding the probate manual instruction program at two sessions in Eugene and Portland in the Spring of 1987.

The executive committee will continue its policy of meeting in different parts of the state

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to equalize the travel burden on executive committee members (two of whom come from Medford, two from Eugene, one from Salem and the balance from Portland). Future board meetings are:

May 30, 1986—Portland

July 19, 1986—Bend area.

Stanley R. Loeb

WHAT'S NEW

In *Waybrant v. Bernstein*, 75 Or App 550 (1985), the Court of Appeals ruled on the issue of whether a defendant should receive notice of closure of an estate under ORS 116.093. Plaintiff filed a wrongful death action against decedent that was dismissed *without* prejudice. Subsequently, the personal representative of the estate obtained an order closing the estate without notice to plaintiff. The plaintiff filed a motion to vacate the order closing the estate in an attempt to have the estate reopened on the basis that the plaintiff had no notice that the estate or the decree closing the estate had been entered. ORS 116.093(1) requires that notice be made to heirs, devisees, creditors and any other person known to the personal representative to have or to claim an interest in the estate being distributed. The Court of Appeals held that personal representatives must give notice of closure to parties with known tort claims which are not time-barred.

In the January 1985 issue, we discussed the decision of the Oregon Court of Appeals, *Wilbanks v. Goodwin*,

70 Or App 425 (1984). The Oregon Court of Appeals held that the time limitation set forth in ORS 115.005(3) did not apply in an action for specific performance of a contract to make a will. Upon review, the Oregon Supreme Court reversed. 300 Or 181 (1985). However, the Supreme Court reversed on the issue of whether a contract was made and did not reach the question of whether ORS 115.005 bars an action for specific performance of a contract to make a will which was not presented to a personal representative within the time limitations set forth.

C. Jeffrey Abbott

Please send suggestions for future articles and ideas for improvement of the Newsletter to Oregon Estate Planning and Administration Section Newsletter, Attn: Helen Rives-Hendricks, Suite 800, 520 S.W. Yamhill Street, Portland, Oregon 97204. Telephone: (503) 226-6151.

SCHEDULE OF SEMINARS AND EVENTS

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

MAY 9, 1986: Willamette University, LIQUIDATIONS AND REORGANIZATIONS and PROFESSIONAL RESPONSIBILITY IN TAX PRACTICE, M. Carr Ferguson, Martin D. Ginsburg and Leslie S. Shapiro, speakers (Contact Patricia Scheidt, 370-6046).

JUNE 5, 1986: ALI-ABA Video Law Review, QUALIFIED PLANS AFTER REA: CURRENT ISSUES AND ANSWERS.

JUNE 16-18, 1986: P.L.I., FEDERAL ESTATE TAX RETURNS AND COMPUTER PROGRAMS FOR ESTATE PLANNING, San Francisco, Hyatt Regency.

JUNE 16-20, 1986: University of Wisconsin Law School, ESTATE PLANNING IN DEPTH.

JUNE 19-20, 1986: P.L.I. PREPARATION OF THE FIDUCIARY INCOME TAX RETURN, San Francisco, Hyatt Regency.

JULY 28-AUGUST 1, 1986: ALI-ABA and University of Virginia School of Law, POSTMORTEM PLANNING AND ESTATE ADMINISTRATION.

SEPTEMBER 12, 1986: Eugene Chapter, Oregon Estate Planning Council, ANNUAL ESTATE PLANNING SEMINAR, Stanley M. Johanson and Norman S. Rachlin, speakers, Emerald Valley Forrest Inn, Creswell.

OCTOBER 23-24, 1986: Washington State Bar, ANNUAL ESTATE PLANNING SEMINAR, Seattle, Westin Hotel.

NOVEMBER 21, 1986: Oregon State Bar and Oregon Estate Planning and Administration Section, PLANNING FOR THE TAXABLE ESTATE, Portland, Marriot Hotel.

Oregon State Bar
Estate Planning and
Administration Section
1776 S.W. Madison Street
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SECTION 9506 OF COBRA: A VENOMOUS BITE FOR THE UNWARY ATTORNEY

PL. 99-272, the Consolidated Omnibus Budget Reconciliation Act of 1985, better known as **COBRA**, enacted on April 7, 1986, poses a nasty bite for the attorney who drafts a trust for the family of an impaired individual. If the impaired individual requires or will require extensive, long duration care, Medicaid (not Medicare) planning considerations may outweigh any other single consideration for the long term financial health of this family. Knowledge of **COBRA** is important to practitioners because it restricts eligibility for Medicaid when an irrevocable living trust is used as a planning vehicle. A lack of awareness of **COBRA** could potentially result in a malpractice claim.

Consider the increasing number of families facing chronic degenerative neurological impairments such as Alzheimer's Disease, Parkinson's Disease, ALS (Lou Gehrig's Disease), Huntington's Disease. As the severity of the impairment increases, the family must plan for creating surrogate decision makers for legal and financial affairs, health care decisions and must plan for the financial drain of care costs. For example, an adult child of two impaired parents recently shared with the author her family's situation. Her mother had Alzheimer's Disease and her father was under treatment for Parkinson's Disease. Each month the family paid \$7,000 for 24 hour care in the parent's home. Although this figure is high, care costs of \$1,500 to \$3,000 per month are routine. Even the most affluent of families cannot pay such costs for long.

Advising a family on planning strategies where extensive or high cost care is involved, must include Medicaid considerations because Medicaid is the only public benefits program available to the majority of these families. Medicaid, known as "Medical Welfare," is a needs-based program. Eligibility is usually granted to individuals having liquid assets of \$1,700 or less and monthly income of less than approximately \$1,008 per month. Medicaid reimburses certain monthly care costs in excess of the monthly income of the Medicaid recipient (including individual income and one-half of all joint income).

For families, an irrevocable living trust provided an ideal planning vehicle to obtain the non-Medicaid advantages of a trust (avoid conservatorship, guardianship and probate; provide for a well-thought-out succession of decision makers), as well as a means to qualify for Medicaid without "spending down" the assets of the potential Medicaid recipient. The

"Medicaid Qualifying Trust" provided eligibility as soon as the assets were transferred to an irrevocable living trust because the assets were then "unavailable" to the trustor.

Congress apparently felt this loophole was being abused by affluent trustors and attempted to close it by drafting Section 9506 of **COBRA** entitled "Treatment of Potential Payments from Medicaid Qualifying Trusts."

COBRA now treats the maximum amount of trust assets and income distributable to the Medicaid recipient under a trust as "available" to the recipient and, thus, subject to "spend down" for purposes of the \$1,700 liquid asset eligibility limit. However, **COBRA** applies only to trusts established by the recipient or spouse permitting discretionary distributions to the potential Medicaid recipient.

At a recent meeting in Manhattan of private attorneys who devote most of their practice to serving families facing astronomical care costs, the following ideas were shared about creating trusts not considered as Medicaid Qualifying: gifting assets to family members other than the Medicaid recipient or spouse and then establishing the trust with the family member as trustor (although gifting assets results in a minimum of 24 months of ineligibility); limiting the trustee's discretion to distribute income and principal to the Medicaid recipient in a variety of ways such as allowing income distributions but no invasion of principal for the recipient; limiting the time during which the trustee can make distributions to the Medicaid recipient to two years from the date of the last transfer to the trust.

Oregon Medicaid officials are not certain what changes in eligibility guidelines will result from **COBRA**. The federal administrative agency, Health Care Financing Administration (HCFA) which has responsibility for Medicare and Medicaid programs, is in the process of drafting procedures and policies on the **COBRA** treatment of trusts to be carried out by the states. HCFA says we should expect final policy to be implemented by the states within 90 to 180 days.

In the meantime, practitioners should take the following precaution: advise former trust clients of the changes in Medicaid eligibility rules regarding trusts and, if appropriate, advise clients about the "undue hardship" exception to application of **COBRA**. Advise new or present clients about **COBRA** and help them weigh the non-Medicaid benefits of a trust against the possible loss of future Medicaid reimbursement. Then, once HCFA translates **COBRA** into policies and procedures, we can determine whether families will be forced to choose between Medicaid eligibility and the non-Medicaid benefits of a trust.

Tim Nay

DECLINE IN REAL ESTATE MARKET MAY NECESSITATE PRESENTMENT OF CLAIMS AGAINST DECEASED DEBTOR'S ESTATE BY CREDITORS AND CO-OBLIGORS

Creditors

In today's real estate market, it is not uncommon to find that the amount owed against a property exceeds the fair market value of that property. Therefore, it is important that upon the death of a purchaser-debtor, holders of obligations secured by such property should consider whether to present a claim against the decedent's estate. In view of the time limitations involved, creditors must move swiftly to protect their interests. Unless a claim is timely filed, their only remedy in the event of a default by the decedent's successors will be to regain the property; recovery of a deficiency against the debtor's estate will be precluded.

Claims are timely filed if they are filed within four months of the date of the first publication of notice to interested persons. Claims may be presented after the four-month period and before the personal representative files the final account or 12 months after the date of first publication, whichever occurs first, but such claims will be paid after those filed within the four-month period. Claims presented after the filing of the final account or 12 months from the date of first publication are barred. See ORS 115.005.

The creditor's decision whether to present a claim will, for the most part, be based upon what the creditor perceives to be the prospects for appreciation of the property. The value of the decedent's estate obviously will also influence the decision, as will the likelihood of continued payments of installments on the debt by the decedent's successors. The creditor's claim, presented under ORS 115.075, would, if allowed, entitle the creditor to "an amount equal to the value of the debt on the date of the allowance," presumably, the present value of the debt.

Co-obligors

Co-obligors of a debt secured by property which has decreased in value and who are jointly and severally liable for payment must also consider whether to present a claim against the estate of a deceased co-obligor. Their decisions will, similar to that of the creditors, be influenced by their expectations for recovery of the real estate market, but ultimately will be dictated by whether the

secured creditor submits a claim against the estate. Absent such claim, recovery by the creditor of any portion of the potential deficiency from the decedent's estate would be precluded, leaving the co-obligors liable for the entire deficiency including the decedent's pro rata share. The co-obligor's claim, filed under ORS 115.085, would, if allowed, require the personal representative to arrange for payment of the decedent's share when and if the debt became absolute or liquidated, by setting aside estate property or giving security for payment.

Co-obligors should not be lulled into a false sense of security merely because the personal representative continues to contribute the decedent's share of installments on the debt on time. The personal representative may, after the time for presenting claims has passed, decide the prospects for sufficient appreciation of the property are remote and discontinue contributions. The decedent's successors likewise could make contributions for a time and then simply abandon their interest in the property. In either event, the remaining co-obligors would be required to pay the entire deficiency.

Michael R. Sandoval

FROM YOUR EXECUTIVE COMMITTEE

Your Executive Committee has met twice since the last newsletter: On May 30, 1986 in Carolyn Wilson's Portland office and on July 19, 1986 in the Fremont Room Sunriver Lodge, Sunriver, Oregon.

At the May 30, 1986 meeting the Executive Committee:

- Heard a report from Valerie Vollmar, Treasurer.
- Heard a report on the Probate System manual setting a September 1, 1986 target date for submission of the edited manual to the Bar office, and a probate system CLE report indicating two 'How-To' seminars scheduled for March 6, 1987 and March 13, 1987 respectively.

• Heard a report from the Legislative Committee regarding its April 16 and May 22 meetings and authorized the Legislative Committee to proceed with endorsement in principal, amendment and comment upon LC-204, a proposed Oregon Durable Power of Attorney for Health Care statute.

• Heard a report that the Trust Legislation Committee of the Oregon State Bar had passed a resolution recommending merger of that committee into this Section.

• Heard a report from the Section CLE Committee regarding the November 21, 1986 intermediate estate planning program ('Plan-

ning for the Taxable Estate').

- Heard a report from the Newsletter Committee regarding the May 1986 issue.
- Heard a report from Carolyn Wilson regarding communications with other state bars concerning their newsletters.
- Was advised by chair Jeff Boly that the nominations committee would consist of Jeff Boly, Laurie Caldwell and John Hassen.
- Was informed that the annual Section meeting would be held on Thursday, September 11, 1986 at 3:00 PM at the Marriott Hotel, Portland, Oregon and that the speaker at the meeting would be Steven Cyr of Portland speaking on estate planning aspects of the 1986 Tax Reform Act.

At the July 19, 1986 meeting the Committee:

- Heard the treasurer's report and budget projections for the remainder of the current fiscal year.
- Heard reports on the status of the probate manual and the CLE program introducing the probate manual
- Heard a report from the Legislative Committee indicating its decision not to advocate passage of a Statutory Simple Will act and not to proceed with an accelerated probate statute in the form previously considered, and also heard, update reports on the Durable Power of Attorney With Regard to Health Care Decisions proposed act and various Will Depository or Disposition acts.
- Heard an update report on integration of the Oregon State Bar Trust Legislation Committee into the Section Legislative Committee and a possible new Section Legislative Committee structure.
- Heard an update report on the November 21, 1986 CLE program 'Planning for the Taxable Estate.'
- Heard a report on the September 1986 Newsletter.
- Heard an interim report from the Nominations Committee and request for suggestions of possible nominees.
- Set the first meeting of the 1986-7 operating year Executive Committee for October 3, 1986 at the offices of Laurie N. Caldwell's firm.

Stanley R. Loeb, Secretary

INVITATION

The *Newsletter Editorial Board* invites the submission of topic suggestions for future issues and the submission of unsolicited manuscripts, as well as suggestions for improvement of the Newsletter.

Communications should be addressed to: Oregon Estate Planning and Administration Section Newsletter 520 S.W. Yamhill, Portland, Oregon 97204 Attn: Helen Rives-Hendricks, (503) 226-6151.

SEMINAR: PLANNING FOR THE TAXABLE ESTATE

On November 21, 1986, the Section, and the Oregon State Bar, will present "Planning for the Taxable Estate," a seminar designed to address the estate planning needs of the client with assets totaling \$600,000 to \$2,000,000. An expert lineup of speakers will cover the most current developments in topics ranging from marital trust planning, drafting and use of disclaimers, tax apportionment, practical applications of estate planning techniques and the use of computers in estate planning. The seminar is intended to be a comprehensive and practical discussion of the estate planning techniques and drafting for the estate affected by the Federal estate tax.

Steve Cyr will present an introduction to tax concepts. He will use hypothetical client situations to illustrate the major estate tax issues and planning opportunities. The same client factual situations will be utilized by all of the speakers. The hypotheticals will be distributed in advance to the people attending the seminar.

Mike Morgan and Dave Andrews will discuss when to use the fractional formula or the pecuniary formula in marital deduction and bypass trust planning in a volatile economy. Both the human and tax aspects will be considered. Planning for second marriage families as well as first marriage families will be discussed. They will also discuss the form of the marital deduction gift, including QTIP trust planning.

Laurie Caldwell will discuss the use of qualified disclaimers in estate planning, and the interrelationship with local disclaimer law. She will present Internal

Revenue Code requirements and provide an analysis of the Regulations to IRC §2518 and recent private letter rulings in connection with such topics as partial disclaimers, disclaimers of joint property and trust interests. Her analysis will include revisions made by the IRS in the recently adopted final regulations. She will give examples of creative uses of disclaimers. Planning with the disclaimer receptacle trust for the surviving spouse will highlight her presentation.

Steve Kantor will review Oregon and Federal laws of tax apportionment and collection in various situations: probate and nonprobate property, testate and intestate estates. Special situations will include marital/bypass trust planning, allocation of taxes to QTIP property and on generation skipping transfers, coordination of tax clauses between pour-over wills and trusts and equitable adjustments.

Valerie Vollmar will provide forms and a discussion on drafting for the marital deduction. She will coordinate her presentation with the prior speakers to cover various forms of the marital trust, including general power of appointment and QTIP trusts, as well as outright marital devises. She will also discuss design of the by-pass trust, including options for income and principal distributions, powers of appointment in the surviving spouse, and choice of trustee. A form of disclaimer receptacle trust will also be provided.

Chuck Mauritz will present practical applications of estate planning techniques. He will direct attention to determination of when a tax plan is necessary, liquidity problems, coordination of documents (i.e., beneficiary designations, powers

of attorney) and division of property. He will discuss freezing estate values and lifetime gifting. Planning for the professional client, the client with out of state property and planning for the client with a family business (and transfer of the business to the next generation) will be addressed, as well as probate avoidance through the use of trusts and joint ownership.

A trio of computer users, Steve Lane and Rich Miller in private practice and Rich Eichen with the IRS, will complete the seminar. They will discuss their personal experiences in getting started with computers and the choices available to the practitioner. Spread sheet programs will be demonstrated with ideas on how to choose and learn to use a program that will illustrate the options available to meet the client's tax and dispositive intentions. Charts with tax projections and graphs will be presented to show the client the tax and economic effects of the plan. They will illustrate interrelated calculations and the use of the computer in estate administration, including preparation of the Federal Estate Tax Return, planning for IRC §303 stock redemptions, payment of tax under §6166 and valuation adjustments. Finally, the speakers will reveal how the IRS auditor uses the computer to analyze the tax effect of the estate plan.

The November 21 seminar will be held one time only at the Portland Marriott Hotel from 9:00 am to 5:00 pm. Mark your calendar!

Laurie N. Caldwell
Chair, CLE subcommittee

SCHEDULE OF SEMINARS AND EVENTS

SEPTEMBER 19-20, 1986: ALI-ABA and Massachusetts CLE, SOPHISTICATED ESTATE PLANNING TECHNIQUES, Boston, Massachusetts, Ritz-Carlton Hotel.

SEPTEMBER 22-23, 1986: National Law Foundation, TENTH ANNUAL FIDUCIARY INCOME TAX CONFERENCE, New York, Hilton Hotel.

OCTOBER 2-NOVEMBER 13, 1986: ALI-ABA Video Law Review Programs on TAX REFORM ACT OF 1986, series of seven 4-hour programs, 40 cities to be announced.

OCTOBER 20-22, 1986: ALI-ABA and ABA Section of Taxation, TAX REFORM ACT of 1986, Washington, D.C. (contingent upon timely legislation), Omni Shoreham.

OCTOBER 22-25, 1986: Sixth Annual Southern California Tax & Estate Planning Forum & Workshops, San Diego, Hotel Intercontinental.

OCTOBER 23-24, 1986: Washington State Bar, ANNUAL ESTATE PLANNING SEMINAR, Seattle, Westin Benson Hotel.

OCTOBER 28-30, 1986: ALI-ABA and ABA Section of Taxation, TAX REFORM ACT of 1986, Houston, Texas (contingent upon timely legislation), Hotel Meridien.

OCTOBER 29-31, 1986: ALI-ABA and ABA Section of Taxation, TAX REFORM ACT of 1986 (contingent upon timely legislation), Los Angeles, Century Plaza.

OCTOBER 29-31, 1986: National Association of Estate Planning Councils, ANNUAL CONFERENCE, Tampa, Florida, Hyatt Regency Tampa.

NOVEMBER 17-18, 1986: Portland State University, Internal Revenue Service and Oregon Department of Revenue, TAX PRACTITIONERS INSTITUTE, Portland, Red Lion Motor Inn, Jantzen Beach. Cal: 229-4820 for information and registration. Repeats:

November 20-21, Eugene, Eugene/Springfield Red Lion Motor Inn.

December 2-3, Wilsonville, Holiday Inn Portland South, Wilsonville.

December 4-5, Medford, Nendel's.

December 11-12, Portland, Thunderbird, Jantzen Beach.

NOVEMBER 17-21, 1986: ALI-ABA, PLANNING TECHNIQUES FOR LARGE ESTATES, San Francisco.

NOVEMBER 21, 1986: Oregon State Bar and Oregon Estate Planning and Administration Section, PLANNING FOR THE TAXABLE ESTATE, Portland, Marriot Hotel.

DECEMBER 5, 1986: Oregon Law Institute, PROBATE PRACTICE, Portland.

JANUARY 24, 1987: Estate Planning Council and Lewis and Clark College, SIXTEENTH ANNUAL ESTATE PLANNING SEMINAR, Portland, Red Lion Motor Inn, Jantzen Beach.

WHAT'S NEW

The Oregon Court of Appeals has concluded that a transfer of title to personal property as joint tenants with right of survivorship was not an inter vivos gift. *Neuschafer v. McHale*, 76 Or App 360 (1985). Plaintiffs reregistered securities showing defendant's ownership. However, plaintiffs

retained possession. When plaintiffs requested that the defendant remove his name as a joint tenant, he refused. The Court of Appeals reversed the trial court's decision in the action to quiet title to the securities and concluded that the creation of the joint tenancy was intended merely as a substitute for making a will. The donor must have an intent that the gift go into immediate and absolute effect to be a valid inter vivos gift. Attorneys advising in this area should attempt to clarify the nature of transfers of personal property in joint tenancy. Attorneys should inform the donee of the donor's intent in making the donee a joint owner.

INDEPENDENT LEGAL COUNSEL FOR INTRA-FAMILY GIFTS

In the Oregon Court of Appeals opinion, *Ryan v. Colombo*, 77 Or App 71 (1985), the Court set aside a deed transferring real estate held by husband and wife as tenants by the entirety to the wife's revocable living trust. This action arose after the wife's death. Under the terms of the trust, the husband could live in the house for the rest of his life or he could choose to sell the home and receive one-half of the proceeds. The remaining one-half would be distributed to the wife's relatives. The trust could be amended or revoked by the wife at any time.

It was clear that the wife was the dominant partner in the marriage. The husband received an explanation of tenancy by the entirety but there was no evidence that he was told that there were disadvantages in giving up his interest and no one suggested that the husband obtain independent legal advice.

The court pointed out that if he had received independent legal advice the following points would have been explained to him: (i) the transfer to the trustee was irrevocable; (ii) if he did not sign the deed he would own the

property if he survived his wife whereas under the trust agreement he had a right to live there as long as he wanted to but if he requested the trustee to do nothing, his relatives received none of the trust property; and (iii) the wife could amend the trust at any time.

Testimony revealed that nothing was hidden from the husband. Although this case involved a transfer to a third party, the trustee, it was essentially an intra-family transfer. This case could bring into question the validity of other types of intra-family transfers where the transferee is the moving party and independent counsel was not suggested or sought.

C. Jeffrey Abbott

SEMINAR: CURRENT TAX DEVELOPMENTS

Steve Cyr will present a seminar on current tax developments in trust and estate planning following the short annual meeting of the Estate Planning and Administrative Section. The annual meeting will be held at 3:00 pm on Thursday, September 11, 1986 at the Marriott Hotel. Steve is familiar with the current House and Senate bills and has managed to keep on top of legislative developments. He will provide an information-packed afternoon—a MUST for all practitioners!

Laurie N. Caldwell
Chair, CLE Subcommittee

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