

# Newsletter

Oregon Estate Planning  
and Administration  
Section Newsletter

Volume V, No. 1  
January 1988

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

## **PROCEDURES TO SURCHARGE PERSONAL REPRESENTATIVE, GUARDIAN OR CONSERVATOR**

Occasionally a personal representative, guardian, or conservator breaches his or her duty to the estate or protected person. A surcharge proceeding is the way to establish the personal liability of the fiduciary to the estate or protected person involved. This article sets out the mechanics of a surcharge proceeding.

The surcharge proceeding arises either in combination with objections to an accounting, or as a separate action against the fiduciary. The goal is to obtain a judgment against the fiduciary which will be conclusive against the surety or bonding company. The most important points are to give the surety notice as early and often as possible and to pay close attention to the terms of the bond.

### **Grounds for Surcharge**

The court may surcharge a personal representative "for any loss caused by any breach of duty . . ." ORS 116.123. A proceeding for surcharge may be used to determine "Any question of liability between the estate and the conservator individually . . ." ORS 126.383(4). To the extent that a guardian is exercising the powers of a conservator, as under ORS 126.137(1)(d), the same surcharge law should apply.

### **Jurisdiction**

Jurisdiction of a surcharge proceeding is in the probate court. ORS 111.085(5), (7); *Griffith v. Western Surety Co.* 248 OR 198, 432 P2d 1019 (1967) (Decedent's estate; court held that only probate court had jurisdiction to settle accounts of administration).

### **Notice and Service**

The fiduciary submits to personal jurisdiction of the probate court by accepting appointment to his position ORS 113.087; 126.075; 126.113; 126.247. It is a good idea to send any demands, notices or petitions to the fiduciary and surety at the address in the probate file and any last known addresses, by both first-class mail, and certified mail, return receipt requested. The receipt will serve as proof of service. Specific notice requirements are provided for in ORS 111.215, 126.007 and ORS 126.247.

### **Notice to Surety**

There are several reasons to give early notice to the surety. The surety has the right under ORS 33.510 to complete the accounting of the principal. It may also have a right to intervene as a party under ORCP 33. In a

decendent's estate the bond is for the "security and benefit of all interested persons", ORS 113.105. That statute may further impose a duty to inform and cooperate with the surety.

### **Filing of Petition**

If any fiduciary has filed a final accounting, or a guardian or conservator has filed an annual account, a request that the fiduciary be surcharged is combined with objections to the accounting and filed within the deadline given.

If an annual accounting on a decedent's estate is filed, ORS 116.083 does not seem to contemplate giving notice and an order approving. If notice is given, objections should be filed. Otherwise, merely filing the accounting does not determine the fiduciary's liability. However, one should be careful to avoid "estoppel by acquiescence" as in *In Re Estate of Hemsborn* 184 OR 364, 376, 377, 198 P2d 597 (1948).

If no accounting is filed, or if there is suspicion that the fiduciary has breached a duty, the fiduciary may be removed. In a decedent's estate, the sequence of events is:

- motion for an order to show cause why the fiduciary should not be removed; ORS 113.195
- order to show cause; ORS 113.195
- hearing on order to show cause;
- order 1) removing personal representative, 2) appointing successor, and 3) requiring the personal representative to account to the court and turn all property over to the successor;
- demand by the successor for an accounting and possession of the property; and
- filing of the petition to surcharge.

The order to show cause may be on the court's motion, and must be served on the surety. ORS 113.195. Guardianships and conservatorships follow much the same process, except that the statutes do not explicitly mention the order to show cause.

### **Petition to Surcharge**

The contents of the pleading will be guided by Oregon's fact pleading. ORCP 18A. Useful information to allege is:

- how the fiduciary relationship arose, such as when and by whom appointed;
- details of the surety bond - name of company, date issued and number;
- assets the fiduciary is charged with according to the inventory or accounting, and any other assets known to the petitioner;
- an allegation that the fiduciary failed to file an inventory or accounting;
- details of the show cause order and removal, such as when and by whom the order was issued, an allegation that the fiduciary was ordered to appear and that he was removed and the date of removal;

- name of the successor fiduciary and date appointed;
- assets remaining in the estate;
- ways that the fiduciary has breached his duty or otherwise become personally liable to the estate or protected person.

### Service

Upon filing, if the surcharge petition is not combined with objections to the final account, it is common practice to secure ex parte an order requiring the fiduciary to appear in probate court within 30 days and show cause why the fiduciary should not be surcharged. The order is sent to the fiduciary, his or her attorney and surety with a cover letter explaining that the required appearance is merely to set a hearing date on the petition, and that all parties should arrange a time to appear together and set the date.

### Burden of Proof

The fiduciary has the burden of sustaining and establishing the correctness of its actions. *Security Inv. Co. vs. Miller* 189 OR 246, 249, 218 P2d 966 (1950). If the fiduciary presents a prima facie case, the petitioner then bears the burden of proving a breach of duty by the fiduciary.

If the fiduciary makes no appearance, the petitioner should get a default order and put on a short prima facie case to establish the amount of liability, and get a judgment. ORCP69 B(2).

If the surety declines to pay the judgment voluntarily, a separate action against the surety is required.

Benjamin M. Karlin

## SURETY BONDS PROBLEMS AND PRACTICAL SOLUTIONS

**H**ave you heard about what the insurance industry considers a problem of crisis proportion regarding surety bonds? The problem from the insurance industry's viewpoint is escalating losses in both frequency and amount on surety bonds. The potential result to the practicing bar and the public may be fewer insurance companies willing to write surety bonds and escalating bond premiums from those who do.

A personal representative is required to obtain a surety bond in the amount of the aggregate value of the estate's capital assets unless (1) the decedent has specifically provided in his or her will that a bond is not required or (2) the personal representative is the sole heir or devisee of the decedent. ORS 113.105. ORS 126.237 provides that a court may require a conservator to furnish a bond in the amount of the aggregate capital value of the conservatorship estate's assets. As

a matter of practice courts require conservators to obtain bonds. The bond amount may be reduced if the personal representative or conservator requests the court to order that withdrawals cannot be made from certain cash accounts or specified assets cannot be sold without court order. Such an order is called a "freezing order" and allows the bond amount to be reduced by the value of the "frozen assets."

### The Problems:

Perhaps the initial problem is the failure of the insurance companies to underwrite surety bonds properly in the first place. In order to underwrite surety bonds properly the insurance company needs to (1) charge an adequate premium based on sufficient knowledge of the fiduciary and the estate to cover the risk and (2) refuse to insure risks or classes of risks that have too great a potential for loss. Perhaps you have noticed, and have even been surprised, by how little (if any) information the bonding company has asked that you supply in applying for conservatorship/probate bonds in terms of the nature of the estate assets, how estate assets (particularly cash) will be managed or the financial stability of the proposed principal-fiduciary.

Another frequent problem is the lack of control actually exercised by the fiduciary's attorney or the court over the fiduciary. Most of the Oregon Probate Courts do not notify fiduciaries or their attorneys that annual accountings are due or take any action either to press for the filing of an annual or to audit annual accounts once filed. The attorney may or may not have a tickler system to advise the client that the annual accounting is due. Often times the attorney will not press the client-fiduciary to assure a timely accounting.

Perhaps the most critical cause of the problem (from the bonding companies' view) is the attorney's lack of control over estate funds. Fiduciaries can only abscond with estate funds or spend them improvidently if they have free access to the funds. Fiduciary letters issued with restrictions and/or freezing orders are in common use as a method of controlling disposition of assets without judicial supervision and are generally effective. However, even with these devices (often imposed to reduce the surety bond premium amount, rather than because of a particular distrust of the fiduciary) there is typically cash in one or more fiduciary bank accounts that is unrestricted by necessity. When the fiduciary has unrestricted access and control over such accounts, a fiduciary is more likely to use such funds for personal exigencies - often with good intentions of repayment.

Another cause of the present bonding crisis appears to be the economic recession of the early 1980's. Unfortunately, as the economy has improved, the number of claims

have not decreased, indicating a problem of moral laxity as well. A common example of a claim cited by the insurance industry is a claim that the single parent has expended conservatorship funds for unauthorized purposes during the conservatorship and the misuse is not discovered until the final account is filed.

### The Solutions

The basic solution for the insurance industry is to conduct better underwriting by obtaining more information about the estate and the fiduciary before agreeing to issue the bond. Thus the insurance company should eliminate the greater risks. This realistically means that some fiduciaries or potential fiduciaries that are not financially secure will not be bondable. Arguably, it is better to have corporate surety bonds generally available at a moderate cost to qualified fiduciaries rather than to have the insurance companies refuse to issue surety bonds or charge greatly increased premiums for bonds to cover losses caused by failure to eliminate poor risks.

The courts and attorneys should also exercise greater care in providing annual accounts. Arguably if the fiduciary knows that an annual account will be required which will disclose any unauthorized expenditure of funds the fiduciary will be less likely to take the risk of detection by misappropriating funds. The difficulty in implementing this remedy lies in the cost to the courts of initiating accounting notices and enforcement. (Historically only some of Oregon probate courts have provided a series of notices regarding annual accounts and ultimately citations for contempt proceedings for failure to file accounts. Some of these systems, however, are being cut back because of the courts' limited budgets.)

Attorneys also have difficulty exercising control over the fiduciary inasmuch as they are the legal representative for the fiduciary. Realistically, the attorney's duty is to properly advise the fiduciary, not to become involved in an adversary relationship with the fiduciary by seeking to enforce the pertinent accounting statute in the face of the fiduciary's refusal to provide the accounting. An attorney should notify a fiduciary that an accounting is required and the date it is due and offer to assist in the preparation of the account. If the fiduciary refuses to provide the accounting or does not respond to the notice, perhaps the attorney's best alternative is to resign with notice to the bonding company as well as the client and the court. This should trigger an inquiry by both the court and the bonding company as to the status of how the estate is being administered with potential of the ultimate removal of the fiduciary and an audit of the estate in order to limit losses.

The insurance industry would like to see

attorneys maintaining absolute control over the estate's liquid funds. Actually maintaining control of liquid funds needed by the fiduciary to administer the estate is probably the most difficult problem for the attorney and most frequently the area of abuse by the fiduciary. From the attorney's standpoint three levels of supervision are generally possible:

1. The fiduciary's attorney receives directly all bank statements and cancelled checks, the attorney maintains all of the bank books and checkbooks and the attorney is the co-signer on all accounts. Arguably, this format would assure that the client-fiduciary could not even use a countercheck for unauthorized expenditures. All funds, transfers and expenditures would have to go through the attorney's office.
2. The attorney receives directly all bank statements and cancelled checks, the attorney retains all bank books and checkbooks, but is *not* signatory on the account. The attorney's office does however prepare all checks and bank transfers as needed for the client's signature. In decedent's estates, retention of the bank books, checkbooks and submitting checks to the client for signature is manageable because the number of checks is generally small. Irrespective of the bonding issue, the ability to maintain intelligible records for accounting purposes easily mandates this approach. In conservatorship estates, tight administration is more difficult. It is cumbersome and costly for an attorney or an attorney's probate assistant to supervise a conservatorship with ongoing expenses over a long period of time. In addition, the fiduciary has the additional burden of having to make repeated trips to the attorney's office to pay expenses. The result is that the fiduciary is likely to maintain control over the bank accounts rather than the attorney.
3. The attorney has little or no involvement in retaining bank books, preparing or reviewing checks and may or may not receive bank statements and cancelled checks directly from the banks. The attorney initially advises the client on the proper procedure and assists the fiduciary in preparing an accounting at the time required from existing fiduciary records. Typically this procedure, or lack thereof, leads to the most difficult time and greatest expense in the attorney's assistance in the preparation of accountings. Most often this is the approach in decedent's estates where a short form (no detailed cash

accounting) is anticipated or in ongoing conservatorships involving difficulties in tighter controls as discussed above.

### Conclusion

Bonding companies should ask attorneys or fiduciaries to supply more information about the estates and the fiduciaries before writing bonds in the future. Without reduction of risk, bonding rates will surely continue to increase. Consider that the insurance company that does little or no underwriting will logically have to charge higher rates than the insurance company that takes greater care in underwriting and hence limiting its risks.

The freezing of assets and requiring of greater accountability by the courts should also ease the problem. Although the attorney must be deemed to be a representative of the fiduciary and not of the estate or the beneficiaries, the attorney may exercise his or her responsibility to the client-fiduciary as well as an officer of the court by (1) exercising good judgment in the advice to the fiduciary regarding statutory compliance, (2) establishing sound systems for administration, and (3) if a lack of communication or cooperation develops, resigning with notice to the bonding company as well as to the court and the client.

Finally, the attorney needs to determine his or her involvement in the handling/expenditure of estate funds. There is a diversity of opinion as to whether the attorney should be a signatory on the estate bank accounts and it is, generally speaking, discouraged. However, aside from the bonding question, experience has shown that it is well worth the administrative cost to the estate to have the attorney's office directly receiving the bank statements and cancelled checks and retaining the bank books and checkbooks for preparation of checks for the fiduciary's review and signature. In estates where the ongoing expenses are too many (typically conservatorships), or the attorney does not have a sufficiently organized probate department to handle the administrative duties or where the office is inconveniently located for the fiduciary, the attorney will have to exercise his or her best judgment to provide the best system to assure adequate records for purposes of accounting and proper expenditure of estate funds in order to avoid loss to the estate, claims against the bonding company and ultimate claims against the client-fiduciary.

Dwight G. Purdy  
Walter L. Crow, Jr.

## SCHEDULE OF SEMINARS AND EVENTS

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

**JANUARY 11-15, 1988:** University of Miami, 22ND ANNUAL PHILIP E. HECKERLING INSTITUTE ON ESTATE PLANNING, Miami Beach, Florida, Sheraton Bal Harbour Hotel.

**JANUARY 18-22, 1988:** University of Southern California Law Center, THE 40TH ANNUAL INSTITUTE ON FEDERAL TAXATION, MAJOR TAX PLANNING, HIGHLIGHTING UPDATES TO THE TAX REFORM ACT OF 1986, Los Angeles, California, Century Plaza Hotel.  
January 18: Corporate Tax Planning  
January 19: Individual Tax Planning  
January 20: Estate Planning  
January 21: Real Estate Tax Planning  
January 22: Tax Policy

**JANUARY 23-30, 1988:** National Law Foundation, 9TH ANNUAL ESTATE PLANNING CONFERENCE, St. Thomas, Virgin Islands, Frenchman's Beach Resort.

**JANUARY 31-FEBRUARY 1, 1988:** ALI-ABA, ABA Section of Taxation Annual Advanced Study Sessions: ADVANCED ESTATE PLANNING, New Orleans, Louisiana.

**FEBRUARY 6, 1988:** Estate Planning Council of Portland, Inc., 17TH ANNUAL ESTATE PLANNING SEMINAR, CONTINUING EFFECT ON ESTATE PLANNING OF THE TAX REFORM ACT OF 1986, Curt Ford, Stefan F. Tucker, Jonathan Blattmachr and Dan Hastings, speakers, Portland, Red Lion Inn, Jantzen Beach.

**FEBRUARY 18-20, 1988:** ALI-ABA, ABA Section of Taxation Annual Advanced Study Sessions: ADVANCED ESTATE PLANNING TECHNIQUES, Lahaina, Maui, Hawaii.

**APRIL 16, 1988:** Southern California Tax & Estate Planning Forum, DRAFTING WILLS AND TRUSTS, Edward, C. Halbach, Jr., speaker, San Francisco, Cathedral Hill Hotel.  
Repeats: April 30, 1988: Los Angeles, Hyatt at Los Angeles Airport.

**APRIL 25-29, 1988:** ALI-ABA, ABA Section of Taxation Annual Advanced Study Sessions: PLANNING TECHNIQUES FOR LARGE ESTATES, New York, New York, Waldorf-Astoria.

**MAY 12, 1988:** ALI-ABA Video Law Review, INCOME TAX ISSUES AFFECTING ESTATES AND TRUSTS, approximately 50 cities.

**JUNE 20-24, 1988:** ALI-ABA, ABA Section of Taxation Annual Advanced Study Sessions: ESTATE PLANNING IN DEPTH, Madison, Wisconsin.

## EXECUTIVE COMMITTEE REPORT

Stan Loeb, chairperson, convened the first meeting of the Executive Committee elected at the Section's Annual Meeting on October 9, 1987. Future meetings are as follows:

December 11, 1987  
OSB office – 3:00 p.m.  
March 12, 1988  
Bend – 9:30 or 10:00 a.m.  
May 13, 1988  
Springfield – 3:00 p.m.  
July 16, 1988  
Medford/Ashland – 10:00 a.m.

Each committee member has chosen to direct or participate in at least one area of activity. Any section members who want to be involved should contact the committee or subcommittee chairperson.

**Legislative Committee** Chair Walter Crow, Jr.  
Subcommittee Rees Johnson  
Estate Planning  
and Transfers  
Subcommittee Ronald A. Shellan  
on Taxation  
Subcommittee Sarah Baker  
on Estate  
Administration  
and Litigation

These subcommittees will report to the section in this newsletter.

**Continuing Legal Education** – Larry Rew  
and Michael Morgan  
**Newsletter** – Dan Re  
**Specialization** – Carolyn Wilson  
**Committee on Subcommittees** – John  
Hassen

The annual section meeting will be held in connection with the Oregon State Bar Convention in Eugene, September 13-17, 1988.

Carol J. Kyle  
Secretary

## LEGISLATIVE COMMITTEE GEARS UP FOR A BUSY YEAR

The 1987-88 Section Legislative Committee, chaired by Walter (Bud) Crow, is moving ahead with a busy schedule. The Section Legislative Committee is made up of three subcommittees with chairpersons and assignments as follows:

**1. Estate Planning and Transfers**, Rees C. Johnson, Chairperson. Legislative projects include statutory rule against perpetuities, spousal elective share law, powers of attorney (property management and health care), directive to physicians, statutory custody and disposition of Wills, marital property act, flexible termination of trusts, personal property (married couples), trust antilapse and residue savings provisions, and study of the Uniform Custodial Trust Act.

**2. Taxation**, Ronald A. Shellan, Chairperson. No present projects.

**3. Estate Administration and Litigation**, Sarah L. Baker, Chairperson. Legislative projects include review and revision of probate claim statutes, attorney's fees in probate and review and revision of guardianship/conservatorship statutes.

The Legislative Subcommittee is receptive to new projects and members. If you have become involved in a trust, estate, conservatorship or guardianship problem and believe that affirmative legislative action

needs to be taken, you are invited to contact any of the foregoing Chairpersons. Additionally, all section members are invited to join the Legislative Committee to work on a project of your choosing. Simply contact any of the above-named Chairpersons. Your participation is welcome.

Walter L. Crow, Jr.  
Chair

## ALERT

Practitioners should be aware that Generation Skipping Transfer (GST) tax may affect your client's planning. All transfers from grandparents to grandchildren which do not qualify for the \$10,000 annual gift tax exclusion are potentially subject to GST tax.

In order to take advantage of the exemptions available under the GST tax law, practitioners should review the reporting requirements for inter vivos and testamentary transfers. Some generation skipping transfers are required to be reported on a 706 even though a decedent's estate's total value is less than \$600,000. For more information please refer to Carolyn Wilson's article in the May 1987 issue of the newsletter. The Section also plans to provide additional information through a future article in this newsletter or through CLE programs.

Helen Rives-Hendricks  
Editor



Oregon State Bar  
Estate Planning and  
Administration Section  
P.O. Box 1689  
Lake Oswego, OR 97035-0889

### Oregon Estate Planning and Administration Section Newsletter

Helen Rives-Hendricks  
Editor-in-Chief

#### Editorial Board

C. Jeffrey Abbott  
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WARREN C DERAS  
1400 SW MONTGOMERY STREET  
PORTLAND, OR 97201

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# newsletter

Oregon Estate Planning  
and Administration  
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Volume V, No. 2  
May 1988

Published by the  
Estate Planning  
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## **ORS 112.232, THE UNIFORM INTERNATIONAL WILLS ACT: NEITHER UNIFORM NOR INTERNATIONAL**

**T**he Oregon practitioner who prepares a will for a resident of a foreign country who has property in Oregon, or for an Oregon resident with property in a foreign country, must address a number of issues. Not the least of these is compliance with the formal requisites for validity of the will in the jurisdictions in which it is to be offered for probate. The formalities of will execution can vary widely: in China, for example, two or more witnesses are required; in the Philippines, three witnesses are required; in France, two notaries or one notary and two witnesses are required; in Costa Rica, a will can require up to six witnesses if it is not written by the testator, and so on.

In view of the bewildering variation in required formalities, ORS 112.232, the Uniform International Wills Act (the "Act"), might seem a welcome relief. The statute sets forth in plain language the form and procedure for the execution of an international will which, under the terms of the Act, will be valid as to form regardless of the testator's domicile, the place where the will is executed and the location of the testator's assets. Briefly, the formalities required under the Act are that the testator sign or acknowledge his signature of the will before two witnesses and an "authorized person" who also sign the will. The "authorized person" attaches to the will a certificate, the contents of which are prescribed by the Act. In Oregon, an "authorized person" means a currently licensed attorney. ORS 112.232(9). The Act also defines "authorized person" as a person empowered by federal law to supervise the execution of international wills, including members of the U.S. diplomatic and consular service. ORS 112.232(1)(b). In the absence of contrary evidence, the authorized person's certificate is conclusive of the formal validity of the will. ORS 112.232(6).

Unfortunately, the Act is of extremely limited utility. The October 26, 1973 Convention Providing a Uniform Law on the Form of an International Will, the Act's source, has been ratified or acceded to by only a few countries: Belgium, Canada, Cyprus, Ecuador, Libya, Niger, Portugal, the United Kingdom and Yugoslavia. Although the Convention received much attention and support from commentators in the 1970s, the United States

has never considered ratification. The Convention has been pending in the Senate Foreign Relations Committee since July, 1986; no action has been taken on it and no hearings are scheduled. At the state level, in addition to Oregon, the Act has been adopted by California, Connecticut, Minnesota and North Dakota.

Because the United States has never ratified the Convention, no persons have been designated by federal law as "authorized persons" before whom international wills may be executed. Although the Act contemplates that members of the diplomatic and consular service will serve as "authorized persons", the Department of State Foreign Affairs Manual expressly prohibits consular officers from signing a will, as required by the Convention. 7 FAM 835.1.

If a testator's will is to be offered for probate in a country which has not ratified the 1973 Convention, the practitioner must either (a) see that the formalities of will execution required by that country's law are observed or (b) ascertain that the foreign country's courts will recognize a will executed in accordance with the law of the place where executed. Counsel in the foreign country should be retained not only to ensure valid execution of the will, but to ensure that the substantive law of that country is taken into account in the preparation of the will. If, however, the will is to be executed in a foreign country but offered for probate in Oregon, its execution will be valid if it accords with Oregon law. ORS 112.255(1)(a). In this situation, U.S. consular personnel can be of service. While they cannot obtain witnesses for the testator, they can perform notarial acts and are permitted to take acknowledgments of affidavits for self-proving wills. 7 FAM 835.1, 835.2. Thus, an Oregon resident who is overseas can, if properly armed with instructions from his or her attorney, execute a will which will be effective in Oregon.

Because of its reassuring title and the mechanical simplicity of its provisions, the Uniform International Wills Act may tend to give the practitioner a false sense of security. In fact, the Act is useful only in a few situations, i.e., where a will is to be offered for probate in one of the adopting countries or states. Even in those situations, the Act does not address (and may divert the practitioner's attention from) questions of substantive law which must be addressed in each case. These questions include:

(a) How will the testator's dispositive scheme be affected by each jurisdiction's laws governing forced heirship, the rights of surviving spouses and children, the administration of trusts and the powers of fiduciaries? Can the testator make an

effective choice as to governing law?

(b) Should the testator have more than one will, i.e., one for each jurisdiction in which he is domiciled or has property?

(c) Which of the testator's assets in which jurisdictions will bear the burden of debts, expenses of administration, and taxes?

(d) In which jurisdictions will estate, transfer, or inheritance taxes be imposed and on what property?

The following articles and treatises are a helpful introduction to international estate planning:

(a) Beyer, *Drafting Wills for Foreign-Domiciled Clients*, 32 Prac. Law No. 861 (1986). This article also contains a more extensive bibliography.

(b) Hendrickson, *Planning Wills for Non-Residents: Property Here - Testator There*, 105 Tr. & Est. 315 (1966).

(c) J. A. Schoenblum, *Multistate and Multinational Estate Planning* (1982 and Supp. 1985, 1987).

Updated information regarding countries which have ratified or acceded to the 1973 Convention can be had by calling the Department of State, Treaty Information at (202) 647-1345.

Katherine M. Zelko

## WHAT'S NEW

### HALE V. GROCE OMITTED BENEFICIARY MAY SUE DRAFTING ATTORNEY.

The Oregon Supreme Court in *Hale v Groce*, 304 OR 281 (1987) overruled prior Oregon case law to hold that an intended beneficiary of a will or other testamentary instrument has a right of action against the drafting attorney for failure to draft the documents in accordance with his client's (the testator's) instructions. The client had directed the defendant, an attorney, to draft testamentary instruments and to include a gift of a specified sum to the plaintiff. After the client's death, it was discovered that the gift was not included in the testamentary instruments.

The Supreme Court held that the plaintiff could seek recovery under a breach of contract theory as a classic third-party beneficiary of the contract between the defendant attorney and his client. The attorney breached the contract by failing to include the gift in the documents he drafted. The Court further held that the plaintiff could seek recovery under a tort theory because under the third-party analysis the contract creates a

duty by the attorney not only to the client, but also to the intended beneficiary. Negligent nonperformance of the contract may therefore give rise to a negligence action.

Although other states have recognized a beneficiary's right to recover from an attorney for errors in drafting a will, this is the first case in Oregon to so hold.

Helen Rives-Hendricks

### OAK V. PRATTLE DISTRIBUTION OF WRONGFUL DEATH SETTLEMENT PROCEEDS

The Court of Appeals in *Oak v. Prattle*, 86 Or App 299 (1987), affirmed the probate court's determination of the distribution of settlement proceeds resulting from a wrongful death action. The decedent's mother was named the personal representative of the estate. The decedent died in an automobile accident which resulted in the personal representative bringing a wrongful death action. With the approval of the probate court, the personal representative settled the action and requested authorization to distribute the proceeds. The father of the decedent objected to the distribution on the grounds that some of the proceeds should be distributed to him as reflecting his pecuniary loss or alternately, because the father should be entitled to recovery for loss of society and companionship.

The probate court found that neither parent suffered pecuniary loss and that only the mother suffered loss of society and companionship. ORS 30.030 details the priority of distribution of damages for wrongful death. After various costs, including medical expenses and memorial services, the personal representative distributes any damage upon a settlement apportioned among the beneficiaries pursuant to ORS 30.040 for loss, including loss of society and companionship. The remainder of damages are distributed to beneficiaries under the laws of intestate succession. ORS 30.030(4), 30.030(5).

The father argued that the probate court erred in two ways. The first error was that the probate court did not look to the settlement agreement to determine what the agreement was intended to compensate. He stated that the settlement agreement would demonstrate that the parties included amounts the estate suffered in pecuniary loss. Second, the father argued that the probate court erred by not awarding loss of society or companionship to him. The evidence showed that the father had no relationship with his daughter, the decedent, since she was ten months old until her death at age 17. Despite the argument by the father that he intended to reestablish a relationship after his daughter had reached

majority, the court concluded that all of the proceeds should be allocated under the statute to the mother's loss of society and companionship. Because the probate court determined that all of the settlement proceeds should be for the mother's loss of society and companionship, there was no remaining amount to be distributed to intestate heirs under the next category of distribution pecuniary loss, according to ORS 30.030(5).

### LAWVER V. BEESLEY NOTICE TO INTERESTED PERSONS

Suppose notice required in probate proceedings upon appointment of the personal representative under ORS 113.145<sup>1</sup> is not given pursuant to the statutory method but the interested parties receive actual notice of the proceedings anyway. Can the interested parties challenge the proceedings more than a year after the court orders the estate closed?

The Court of Appeals had an opportunity to answer this question in *Lawver v. Beesley*, 86 Or App 711 (1987). The decedent's will gave the entire estate to her sister. The petitioners were the nephews of the decedent who would have inherited a share of the estate had the decedent died intestate. The initial personal representative knew the names and addresses of the petitioners but failed to include them as heirs in the petition for probate of the will. The notice under ORS 113.145 was not provided to petitioners. During the probate the personal representative resigned for reasons unrelated to the matter, and successor co-personal representatives were appointed. The co-personal representatives did publish notice as required under ORS 113.155 but failed to record an affidavit of publication and the record did not disclose the contents of the published notice.

On October 21, 1982, the court ordered the estate closed and discharged the personal representative. On October 10, 1984, petitioners asked to have the estate reopened to allow them to contest the will on the grounds of lack of testamentary capacity, undue influence and fraud. The court denied the petition because more than a year had passed since the order closing the estate and because the petitioners had actual knowledge of the pendency of the estate during its administration at least four months prior to the order closing the estate. The Court of Appeals cited cases involving service of summons and stated that actual notice was not enough. The Court of Appeals reversed the trial court's denial of petitioner's motion to reopen the estate stating that the personal representatives were under a statutory duty to provide notice by a certain method and failed to do so. Probate practitioners should be

reminded that statutes regarding notice must be precisely followed.

<sup>1</sup> (1) Upon appointment a personal representative shall deliver or mail to the devisees and heirs named in the petition for appointment of a personal representative, at the addresses therein shown, information that shall include:

"(a) The title of the court in which the estate proceeding is pending and the clerk's file number;

"(b) The name of the decedent and the place and date of death of the decedent;

"(c) Whether or not a will of the decedent has been admitted to probate;

"(d) The name and address of the personal representative and the attorney of the personal representative;

"(e) The date of the appointment of the personal representative; and

"(f) A statement advising the devisee or heir that the rights of the devisee or heir may be affected by the proceeding and that additional information may be obtained from the records of the court, the personal representative or the attorney for the personal representative."

### **MURPHY V. POWERS LAPSE OF GIFT IN TRUST**

**T**he Court of Appeals in *Murphy v. Powers*, 87 Or App 659 (1987) affirmed the trial court determination that a bequest via a testamentary trust had lapsed. The will of the testatrix stated that the residue of her estate went to a bank as trustee in trust for the benefit of her son. Upon the death of her son, the trustee was to distribute the trust estate to named beneficiaries. The testatrix's son predeceased the testatrix. There was no other residuary language in the testatrix's will. The remainder beneficiaries named under the trust claimed that their interests should not lapse as a result of life beneficiary, the testatrix's son, predeceasing the testatrix, but rather their interests should be accelerated. The trial court declared that the gift in trust lapsed since the sole beneficiary had predeceased the testatrix. Since the will did not contain an effective residuary clause, the trial court concluded that the residue should be distributed to the heirs at law. The Court of Appeals agreed. The Court stated that the trust never came into existence and without language in the will stating that the beneficial interest of the trust survives if the trust never comes into existence, the gift of the residue fails by lapse. This case would have been unnecessary had the practitioner drafted an effective residuary clause.

C. Jeffrey Abbott

## **SCHEDULE OF SEMINARS AND EVENTS**

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

**MAY 12-13, 1988:** New York University School of Continuing Education, TRUST AND ESTATE TAX PLANNING, New York, New York, Grand Hyatt Hotel, 9:00 a.m. - 5:00 p.m., Telephone: (212) 883-1234.

**MAY 19-20, 1988:** Georgetown University Law Center, FREEZING ESTATE TAXES 1988, Washington, D.C. The Grand Hyatt Hotel.

**MAY 26, 1988:** Portland Tax Forum, ESTATE PLANNING, Guy Maxfield, Multnomah Athletic Club, Portland, Oregon, 7:00 a.m. - 8:45 a.m.

**JUNE 8-10, 1988:** ALI-ABA Course of Study, BASIC ESTATE AND GIFT TAXATION AND PLANNING, San Diego, California, Omni Hotel at Horton Plaza, 8:00 a.m. - 5:00 p.m., Telephone: (619) 239-2200.

**JUNE 10, 1988:** Willamette University, WILLAMETTE TAX CONFERENCE, Salem, Oregon.

**JUNE 10-12, 1988:** Washington State Bar Association, REAL PROPERTY, PROBATE & TRUST SECTION MID-YEAR MEETING, Blaine, Washington, Inn at Semi-Ah-Moo.

**JUNE 15-16, 1988:** New York University School of Continuing Education, TRUST AND ESTATE TAX PLANNING, San Francisco, California, Fairmont Hotel, 9:00 a.m. - 5:00 p.m., Telephone: (415) 772-5000.

**JUNE 20-24, 1988:** ALI-ABA Course of Study, ESTATE PLANNING IN DEPTH, Madison, Wisconsin.

**JUNE 20-24, 1988:** ALI-ABA Course of Study, POSTMORTEM PLANNING AND ESTATE ADMINISTRATION, Boulder, Colorado.

**OCTOBER 19-22, 1988:** Eighth Annual Southern California Tax & Estate Planning Forum, San Diego, California, San Diego Marriott.

**OCTOBER 27, 1988:** Portland Tax Forum, USE OF TRUSTS IN ESTATE PLANNING, John Price, Multnomah Athletic Club, Portland, Oregon, 7:00 a.m. - 8:45 a.m.

**NOVEMBER 14-18, 1988:** ALI-ABA Course of Study, PLANNING TECHNIQUES FOR LARGE ESTATES, San Francisco, California.

## **ATTENTION!**

ORS 113.155 and 115.005 which provide the notice requirements for the running of the time period in which creditors' claims must be filed or barred appear to be in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. See: *Tulsa Professional Collection Services, Inc. v. Pope*, 56 US Law Week 4302 (April 19, 1988).

## **STANLEY C. URBIGKEIT**

Stanley C. Urbigkeit of Oregon City and Portland was a friend, associate and teacher of many members of the Oregon State Bar Estate Planning and Administration Section.

At its March 12, 1988 meeting in Bend, the section executive committee authorized the following resolution and expression of appreciation:

**RESOLVED:** that the Executive Committee acknowledges the continuous support and contributions of Stanley C. Urbigkeit to the Estate Planning and Administration Section of the Oregon State Bar, and expresses its sincere sympathy to his family, Mimi, Julie, Emily and Rachel.

Stan was an active member of the section and contributed greatly to the legal education of section members and to ongoing legislative activities. Stan was a friend and mentor to an overwhelming number of attorneys in Oregon.

The death of Stan on March 2, 1988 affected us deeply. We will remember him warmly and with great respect.

Stanley R. Loeb	Lawrence B. Rew
Laurie Caldwell-Lee	James C. Lynch
Valerie J. Vollmar	Daniel C. Re
Carol J. Kyle	Michael M. Morgan
Carolyn Wilson Miller	David B. Beckham
John R. Hassen	Sarah C. Landauer
Walter L. Crow, Jr.	Jill E. Golden

## LEGISLATIVE COMMITTEE PROPOSALS FOR 1989

The Section Legislative Committee is busy preparing proposals for Section approval and introduction to the 1989 legislature. Subcommittee chairmen include:

1. Rees C. Johnson – Estate Planning and Transfers.
2. Ronald A. Shellan – Taxation.
3. Sarah L. Baker – Estate Administration and Litigation.

Current projects include:

1. Statutory rule against perpetuities bill.
2. Comprehensive statutory power of attorney relating to property management, etc.
3. Custody and disposition of wills act.
4. Amendment increasing dollar amount to terminate small trusts.
5. Act creating tenancy by the entireties in personal property.
6. Trust anti-lapse and residue saving amendments.
7. Modification of spouse's elective share statute.
8. Revisions to guardianship and conservatorship chapters.
9. Revisions to probate claim statutes.

Any Section member that has a particular interest in any of the foregoing subjects is welcome to become involved in the finalization of these legislative proposals. Simply contact one of the named chairpersons in order to participate.

Walter L. Crow, Jr.  
Chair

## EXECUTIVE COMMITTEE NOTES

The Executive Committee met in Bend, Oregon, on March 12, 1988. Among the committee reports presented were the legislative subcommittee reports coordinated by Walter Crow, Jr. Board members were presented working drafts of proposed legislation and legislative history in the following areas: Revision of the claims statute, rule against perpetuities, termination of small trusts, custody and disposition of wills, ownership presumption re personal property/tenancy by the entirety, durable power of attorney, and proposed revisions to the conservatorship code.

The Continuing Legal Education Committee is preparing two seminars which will be sponsored by this section. As a follow-up to the highly successful "Planning For The Taxable Estate" seminar which was presented previously, a major seminar entitled "Administering Taxable Estates" will be scheduled for the fall or winter in Portland. Section members who are interested in being speakers or would like to suggest names of speakers are invited to contact Mike Morgan or Larry Rew.

The second CLE will be scheduled in conjunction with the annual meeting at Eugene in September. Ethics will be the topic. It was the consensus of the committee that registration at that seminar should be separate from registration for attendance at the Oregon State Bar annual meeting in order to provide greater flexibility in scheduling for those persons who might wish to attend one or the other.

The next scheduled meeting of the Executive Committee is May 13, 1988, at 2:00

P.M. in Springfield, Oregon. Section members who are interested in attending Executive Committee meetings should contact Stan Loeb, chairperson, for times, locations and to facilitate availability of space.

Carol J. Kyle  
Secretary

## ALERT

You should be aware of the change made by the Omnibus Budget Reconciliation Act of 1987 regarding estate freezes. Effective for decedents dying after December 31, 1987 and effective for estate freeze transfers completed after December 17, 1987, new §2036(c) limits valuation freezes. Generally, if a taxpayer holds an interest in an enterprise and transfers a disproportionately large share of potential appreciation of the enterprise but retains income or other rights in the enterprise, the retention of those rights will be considered to be the retention of the enjoyment of the entire transferred property. The entire property will then be included in the taxpayer's estate under the general terms of §2036(a).

The new rule provides that the exception from §2036 for bona fide sales for an adequate and full consideration in money or monies worth will not apply if the sale is made to family members. The law uses the term "enterprise" for purposes of §2036(c), which is not defined; the Committee Reports provide that an enterprise includes a business or other property which may produce income or gain.

Obviously, this provision could potentially apply in more than just the traditional estate freeze situation, and the actual scope of the new provision will not be known for some time.

Timothy R. Strader



Oregon State Bar  
Estate Planning and  
Administration Section  
P.O. Box 1689  
Lake Oswego, OR 97035-0889

### Oregon Estate Planning and Administration Section Newsletter

Helen Rives-Hendricks  
Editor-in-Chief

#### Editorial Board

C. Jeffrey Abbott  
Stephen O. Lane  
Stanley R. Loeb  
Daniel C. Re  
Timothy R. Strader  
Katherine M. Zelko

WARREN C. DERAS  
1400 SW MONTGOMERY STREET  
PORTLAND, OR 97201

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# newsletter

Oregon Estate Planning  
and Administration  
Section Newsletter

Volume V, No. 3  
September 1988

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

## NOTICE TO CREDITORS IN OREGON PROBATES

The U.S. Supreme Court recently found that, for known and reasonably ascertainable creditors, the Oklahoma probate code's nonclaim statute violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *Tulsa Professional Collection Service, Inc., v. Pope*, 485 US \_\_\_\_\_, 99 L Ed 2d 565, 108 S Ct 1340 (1988). The Court's decision was based upon two prior cases, *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950) and *Mennonite Board of Missions v. Adams*, 462 US 791, 77 L Ed 2d 180, 103 S Ct 2706 (1983).

Under the Oklahoma statute an executor was required to publish a notice to creditors of the deceased. A creditor was then required to file a claim within two months of the date of first publication of the notice. With only a few exceptions, if a creditor did not file a claim within that period, its claim was barred forever.

The Court initially recognized that a creditor's claim constituted a protected property interest and that because the nonclaim statute became effective only after a probate proceeding was initiated in state court, the requisite state action existed. The Court then held that due process prevented the claim of a known or reasonably ascertainable creditor from being terminated unless the creditor was given actual notice that its claim would be barred if not filed within the statutory period. The Court stated that actual notice could be given by personal service, by mail, or by other means as reasonably certain to ensure actual notice. Published notice is sufficient only to bar the claims of creditors who are not reasonably ascertainable and for those with mere conjectural claims. A creditor is considered to be reasonably ascertainable if its identity can be uncovered through reasonably diligent efforts.

Oregon's nonclaim statutes, ORS 115.005 and ORS 114.555, are not identical to the Oklahoma statute found to have violated the due process clause in *Tulsa*. They are similar enough, however, to raise serious doubts as to their constitutionality with respect to the claims of known or reasonably ascertainable creditors. Consequently, if an estate wishes to receive the benefit of the applicable nonclaim statute, attorneys representing personal representatives or claiming successors should advise their clients to:

**1. Make A Diligent Effort To Ascertain the Identity of Creditors.** To be entitled to actual notice, a creditor's name and address

must be discoverable through a reasonably diligent effort. While there is no precise definition of what constitutes a reasonably diligent effort, it would most likely include: a careful examination of the decedent's financial records, including but not limited to tax returns, financial statements, checkbooks, and correspondence, a search for recorded claims, such as judgments or mortgages, and business and consumer credit reports. The efforts made to identify creditors should be specifically documented and retained in the estate's records. An affidavit reciting in detail what efforts were made and the result of the efforts could be filed with the probate court.

**2. Give Actual Notice to Ascertained Creditors.** The notice given to such creditors should contain the same basic information required by ORS 113.155(2) for the published notice to interested persons. The one obvious exception would be that the time period for filing a claim would not begin on the date of the first publication of the Notice, but on the date the notice is considered served. Personal service or service by mail upon the creditor, or the creditor's legal representative, are specifically permitted under *Tulsa*. If service by mail is used, it may be prudent to mail the notice by certified mail with return receipt requested. See *Weyerhaeuser v. Miller*, 306 Or 1, \_\_\_\_\_ P. 2d \_\_\_\_\_ (1988). Proof of service or an affidavit of mailing should then be filed with the court showing the date of service and the name and address of the creditors served.

There is, however, at least one exception to the general actual notice requirement under the Due Process Clause. If the creditor is known to be incompetent and is without a legal representative, actual notice to the creditor is not sufficient. *Covey v. Somers*, 351 US 141, 100 L Ed 1021, 76 S Ct 724 (1956). In such a case, a guardian would most likely have to be appointed for the creditor before the nonclaim statute could be utilized.

**3. Allow Sufficient Time for Creditors to File Claims.** Under ORS 115.005(3) a claim is barred if not filed within 12 months of the date of the first publication of the Notice to Creditors, or before the final account is filed, whichever occurs first. After *Tulsa*, however, this statute is probably unconstitutional as to creditors entitled to actual notice. Consequently, until that statute is amended, it would be reasonable to assume that such a creditor's claim is not barred until 12 months have elapsed after actual notice or, if earlier, the filing of the final account if the creditor has received actual notice and has had a reasonable time in which to file a claim. Thirty days should constitute a reasonable time. It is important to remember that due process only

requires reasonable notice. It is very likely that when ORS 115.005 is amended, creditors having actual notice will be given far less time to file a claim than they have under existing statutes.

For a creditor given actual notice of the nonclaim statute, the period of time in which a claim can be filed will depend on the date the notice is considered served. If personal service is used, the time period will start to run on the date of service. If service by mail is utilized the date of actual notice is not as certain. Under some statutes, mailed notice is effective on the date mailed. See, e.g., ORS 86.740(1) and 93.915(2). In other cases, it is effective 3 or 7 days after mailing depending upon whether the party's address is within or outside of Oregon. ORCP7D(2)(d). Clearly, if the notice is sent by certified mail with return receipt requested and the creditor signs and dates the receipt, the time period would not start later than the date of receipt. Similarly, if the certified mailing is refused by the creditor the time period should begin on the date of refusal. If the notice sent by certified mail is returned as nondeliverable, and there is no forwarding address for the creditor, that could establish that the creditor's address and consequently its identity, is not reasonably ascertainable. The postal service will provide, at an extra charge, the date of delivery and the recipient's name and address if that information is specifically requested on the return receipt form.

It is anticipated that Oregon's nonclaim statutes will be revised by the 1989 Legislative Assembly to require actual notice to known or reasonably ascertainable creditors, and to specify the time period in which a notified creditor must file a claim. Until such legislation becomes effective, however, Oregon attorneys should implement and follow their own procedures to ensure compliance with due process. Failure to comply with the due process requirements may result in a creditor's claim remaining enforceable until the otherwise applicable statute of limitations runs. Attorneys should also review the local rules of the Probate Courts in which they practice to determine if the Courts have implemented any rules involving notice to creditors.

Daniel C. Re  
with assistance from Walter L. Crow

## **PARTNERS SHOULD CONSIDER CLAIMS AGAINST DECEASED PARTNER'S ESTATE**

A previous Newsletter article (September, 1986) generally discussed whether the co-obligors of debt secured by property having a fair market value less than the amount owed should, upon the death of a co-obligor, present claims against the decedent's estate. General partners who have financed the acquisition of real property that has since decreased in value, and for which the likelihood of appreciation is uncertain, will face this issue upon the death of a partner. In circumstances where the surviving partners are potentially liable for any deficiency, the decision must be made whether to present claims against the deceased partner's estate for the decedent's prorata share of the liability. The decision should be considered without delay given the time limitations for presentment of claims.

Each surviving partner's decision whether to present a claim will be based on factors including the following: the value of the decedent's interest in the partnership; the prospects for appreciation of the property; the provisions of the partnership agreement respecting apportionment of liability among the partners; the solvency of the decedent's estate; and whether the creditor files a claim against the deceased partner's estate.

If, after taking into account the fair market value of the property, the decedent's "interest in the partnership" (defined in ORS 68.430) is sufficient to absorb the anticipated deficiency, or, if the surviving partners are confident the property will sufficiently appreciate, no claims need be filed since, in either case, the deceased partner's estate will not be required to contribute additional amounts to satisfy partnership liabilities. If, however, the decedent's interest in the partnership is not adequate to absorb the deficiency or the outlook for recovery of the real estate market is unclear, the surviving partners must decide among various courses of action including: maintaining the status quo (e.g., keep installments on the loan current); defaulting on the loan; renegotiating the terms of the loan or refinancing the property; selling the property; or giving a deed in lieu of foreclosure to establish the amount of the deficiency and each partner's share thereof including that of the deceased partner.

If the decision is made to maintain the status quo and gamble that the property will sufficiently appreciate, the surviving partners should present claims against the deceased

partner's estate to protect their interests in case they are later unable or unwilling to keep installments current and the property fails to rise in value. Such claims would be filed under ORS 115.085 and, if allowed, would require the personal representative to arrange for payment of the decedent's prorata share of the deficiency when and if the debt became absolute or liquidated, by setting aside estate property or giving security for payment.

If the surviving partners elect to default on the loan, renegotiate the terms of the loan, refinance or sell the property, or give a deed in lieu of foreclosure, claims should be presented for the decedent's actual or anticipated share of the resulting deficiency or any additional contribution required to cover the difference between the existing loan and the new loan. Depending on the timing of the action taken, the claims would be filed under ORS 115.055 or ORS 115.085.

The surviving partners should closely monitor the probate administration of the deceased partner's estate. This is especially important if the partnership agreement provides that the deceased partner is responsible for payment of the bulk of the debt. If the creditor does not present a claim, recovery by the creditor from the decedent's estate of any portion of the potential deficiency will be precluded, leaving the surviving partners liable for the entire deficiency including the decedent's prorata share. Accordingly, unless the decedent's interest in the partnership can absorb the potential deficiency or the partners are convinced the property will sufficiently appreciate, the surviving partners should file claims if the creditor does not.

Partnerships with troubled investments in real property should review their partnership agreements, and partners who have no formal partnership agreement should consider drafting a formal agreement with the foregoing in mind. Consideration should also be given to purchasing life insurance as a means of covering potential losses.

Surviving partners may not be aware of their rights, and thus fail to present a claim within the time allowed. The decision in *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S.Ct. 1340 (1988), may serve to alert surviving partners of the existence of their rights to make a claim in that, except in the case of mere "conjectural" claims, that case requires the personal representative to notify reasonably ascertainable creditors of their rights to make a claim.

Michael R. Sandoval

## GET YOUR MCLE ETHICS CREDITS HERE

The Estate Planning and Administration Section and the Oregon State Bar are co-sponsoring a CLE program on Professional Responsibility in Estate Planning and Administration during the Bar's annual meeting in Eugene. The program (which qualifies for 2.5 hours of MCLE credit in ethics) is scheduled for 2:00 - 4:00 p.m. on Thursday, September 15, 1988, in the Soreng Theatre of the Hult Center.

Speaker for the CLE program will be Valerie J. Vollmar, law professor at Willamette University College of Law and chair-elect of the Estate Planning and Administration Section. The Section's annual meeting will be held immediately following the conclusion of the CLE program.

The Bar's Board of Governors has decided that members of the Bar must register for the annual meeting (and pay the full registration fee) in order to receive MCLE credit for attending this CLE program. However, the Executive Committee of the Section has arranged with the Bar to make videotapes of the program available so that Section members unable to attend the live program can also qualify for MCLE credit before the end of the calendar

You may watch the videotaped program and qualify for MCLE credit either by attending one of several video replay sessions scheduled throughout the state during October, November, and December, or by renting the videotape directly from the Bar starting November 14, 1988.

The following video replay sessions have been scheduled:

Location	Date	Time
Ashland	Oct. 20	1:30 - 3:30 p.m.
Newport	Oct. 14	9:00 - 11:00 a.m.
North Bend	Oct. 14	9:00 - 11:00 a.m.
Ontario	Oct. 14	4:00 - 6:00 p.m.
Pendleton	Oct. 14	9:00 - 11:00 a.m.
Redmond	Oct. 14	9:00 - 11:00 a.m.
Salem	Oct. 20	2:00 - 4:00 p.m.
Springfield	Oct. 21	9:00 - 11:00 a.m.

To attend one of these video replay sessions, you must mail in the registration form below together with the registration fee (\$30 for Section members and \$35 for non-Section members). **THIS IS THE ONLY REGISTRATION FORM YOU WILL RECEIVE FOR THESE VIDEO REPLAY SESSIONS.** The Bar's CLE Department will confirm the date and location of the session after you have registered.

You may also watch the videotaped ethics program at the Oregon State Bar offices in Portland as part of the Bar's "Super Video CLE Week," November 29 - December 3. Registration forms for Super Video CLE Week will be mailed later to all members of the Bar. Section members who register to see the ethics videotape during Super Video CLE Week will receive a \$5 discount from the regular registration fee.

Starting November 14, 1988, members of the Bar may also rent copies of the ethics videotape directly from the CLE Department at a cost of \$35 for one person or \$20/person for a group (with a maximum price of \$160). For direct rentals, contact Keir Karson at the Bar, telephone 620-0222 (Portland) or 1-800-452-8260 (toll free in Oregon), extension 366.

### REGISTRATION FORM

Name \_\_\_\_\_ Bar Number \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

Please register me for the video replay of **Professional Responsibility in Estate Planning and Administration:**

- \$35 Non-Section member. (09-5529)  
 \$30 Estate Planning and Administration Section member.

I wish to attend the video replay in:

- Ashland (10/20)       North Bend (10/14)       Pendleton (10/14)       Salem (10/20)  
 Newport (10/14)       Ontario (10/14)       Redmond (10/14)       Springfield (10/21)

Make checks payable to the Oregon State Bar and mail to the CLE Registrar, Oregon State Bar, P.O. Box 1689, Lake Oswego, OR 97035-0889.

## WHAT'S NEW

### BECHTOLD V. MCADAMS

A surviving spouse, Bechtold, brought an action individually and as personal representative of an estate against the trustee of a trust for failure of the trustee to pay certain claims. *Bechtold v. McAdams*, 89 Or App 327 (1988). The decedent created the trust during his lifetime which provided that:

"Upon the death of the Trustor, the trustee shall pay from the assets of the trust estate the expenses of the Trustor's last illness, funeral and final interment, expenses of administration, debts, taxes of every kind and other liabilities of the Trustor and the Trustor's estate or he shall contribute thereto *to the extent he determines to be appropriate* after taking into account funds available for the payment thereof from sources other than the trust." 89 Or App 327, at 330 (1988).

Bechtold presented the Trustee with \$72,000.00 of claims for expenses covered by the trust language. However, the Trustee defendant did not want to make any decisions on the issues as a condition of accepting the position of Trustee. Therefore, the Trustee refused to act on the claim. The trial court determined that the refusal to act was an abuse of discretion. However, the parties stipulated that the refusal to act constituted a denial. Therefore, the Court of Appeals concluded that the only issue to be decided was a determination of whether the Trustee's denial was an abuse of discretion. Since the probate estate was sufficient to meet the claims, the Trustee had authority to refuse to pay the claims out of the trust estate.

### DILLON V. PHILLIPS

In *Dillon v. Phillips*, 92 Or App 65 (1988), Richard Dillon, the decedent, left a holographic will which was later changed by a codicil prepared by an attorney. The will left nothing to his children. Three of the decedent's children brought a will contest action seeking to declare the will void. The decedent made certain statements in the will regarding each of his children. These statements ranged from accusations of stealing his bedsheets to being on the take from the family and a belief that given the opportunity, his daughter would delight in refusing to assist him in any way in his old age.

The trial court found the decedent's will was void as a product of an insane delusion because there was no evidence supporting the decedent's statements. In reversing, the Court of Appeals stated that "an insane delusion is a belief which has no foundation in fact, and even slight evidence which provides a basis for belief negates the existence of a delusion." 92 Or App 65, at 67. Insane delusions are conceived spontaneously without evidence to support them and cannot be explained by any reasonable theory. Although the statements made by the decedent may have been wrong, there were events which provided at least a slight basis for his statements. Further, there was no objective evidence that the decedent was not mentally competent. The Court concluded that the decedent's treatment of his children in his will was consistent with his relationship with them during his lifetime.

### COX V. HENDERSON

The Court of Appeals affirmed the trial court's decision to impose a constructive trust on life insurance proceeds received by the named beneficiary of the policy. *Cox v. Henderson*, 90 Or App 6 (1988). The Court stated that a constructive trust arises when a person in a fiduciary or confidential relationship acquires property in violation to his duty to the grantor. However, the relationship must be one on which the grantor can reasonably rely. Proof of the basis for the constructive trust must be by clear and convincing evidence.

The decedent wrote the defendant, the decedent's brother, Iver, a letter instructing him to use the proceeds of the policy for funeral expenses. Iver claimed to have never received the letter. Testimony revealed that the decedent talked with Iver and had discussed with him the use of the proceeds as stated in the letter. Although Iver claimed not to have consented to the instruction, the Court stated that the obligation could be inferred from the circumstances.

C. Jeffrey Abbott