newsletter

Oregon Estate Planning and Administration Section Newsletter

Volume VIII, No. 4
October 1991

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

1991 Estate Planning and Administration Legislation

Introduction

The 1991 Session of the Oregon Legislative Assembly enacted a number of bills affecting estate planning and administration. The purpose of this article is to give members of the section an advance look at legislation which will affect their practice. This summary should guide you to new statutes you may wish to study in more detail. Unless otherwise indicated, all statutes became effective September 29, 1991.

I. Decedents' Estates

A. HB 2266 (Ch 704)
Will Contest and Contract to Make a Will Procedures Revised; Supplemental Notice of Probate

HB 2266 was introduced at the request of the Estate Planning and Administration Section of the Oregon State Bar with two primary purposes in mind. The first was to relax the statute of frauds for contract to make a will cases, ORS 112.270. The second was to establish clear procedures for both contract to make a will cases and will contests which would meet the due process requirements illustrated by *Tulsa Professional Collection Services v. Pope*, 485 US 478, 108 SCt 1340, 99 LEd2d 565 (1988). The first purpose was eliminated in the House Judiciary Committee, and the bill became a purely procedural revision making no substantive changes in the law.

To comply with the notice requirements of *Tulsa*, ORS 113.035 now requires that any person known to the petitioner in a probate proceeding to have a potential will contest or contract to make a will interest in the estate be named in the petition, and ORS 113.145 now requires that such persons be served a copy of what was formerly the Information to Heirs and Devisees.

Under previous law Information to Heirs and Devisees was only required for those named in the petition. ORS 113.145 is amended to require such notice to all heirs, devisees, and the additional parties now entitled to notice who were *required* to be named—i.e., those "known" to the petitioner, whether or not listed—and further to require notice to those of whom the personal representative receives actual knowledge during administration. This conforms to the due process requirements of *Tulsa*.

Contract to make a will cases previously fell into an undefined procedure somewhere between claims and will contests. The procedure for such cases is now defined by ORS 113.075 as very similar to will contests, except that they may be brought outside the probate court in order to enable either party to demand a jury trial.

New rules for calculating time limits for commencing will contests and contract to make a will cases are established in ORS 113.075. Consistent with the new requirement of notice, the time limit in most cases will run from the giving (not the receipt) of notice, if notice is required, or from publication, if notice is not required. The time limit remains at four months.

One significant change came in the conference committee on the bill to resolve differences between the House and Senate versions. The original bill would have eliminated the fraudulent promise to make a will cause of action allowed in *Hocks v. Hocks*, 95 Or App 40 (1989). The Senate version dropped the provision. The conference committee bill which was ultimately adopted followed the Senate version in this respect, but it went on to provide in new ORS 113.075(4) that *Hocks*-type actions may not be brought as claims. Thus the new contract to make a will procedure in ORS 113.075 becomes the exclusive means of pursuing such a cause of action.

Section 4 of the act provides that it applies to probate proceedings commenced on or after the effective date (September 29, 1991), except that the new time limits do not apply to preexisting causes of action protected from the old statute of limitations by the principles of *Tulsa* until July 1, 1992.

B. SB 175 (Ch 191)
Personal Representative's Deed Replaces Abstract of Probate

Since 1987, ORS 113.165 has required a personal representative filing an inventory including Oregon real property to record an abstract of probate in the deed records. ORS 116.223 required that the decree be recorded in counties other than the county of probate when real property was distributed from an estate. This left the assessor in the county of probate with no notice of the name and address of the distributee who would pay the tax in the future, and the assessor in other counties with only a name. The result (especially given widespread ignorance by the bar of the abstract requirement) was that tax bills and other notices were not delivered.

This Department of Revenue bill eliminates the requirement of an abstract of probate, but requires recording of a personal representative's deed for all real property distributed from an estate, including that in the county of probate. Unfortunately (given the higher cost for recording deeds) the option of an abstract was not preserved.

If it is anticipated that real property will be tied up in a lengthy probate it would remain advisable to record an abstract of probate when the inventory is filed to assure that the personal representative will receive tax notices. This will assure both notice of (and the opportunity to appeal) assessment increases and the opportunity to receive the 3% discount on timely payment of the tax.

The act makes similar changes in the Small Estate Law.

C. HB 2376 (Ch 306)
Uniform Transfer-on-Death Security Registration Act

This uniform law expands the available probate avoidance systems with respect to securities by allowing both individual securities and "street name" accounts to be registered in a form under which the owner retains full control over the account during life, but a beneficiary succeeds to ownership on death without probate. This eliminates the numerous potential problems associated with use of joint ownership to avoid probate.

This act was the subject of official commentary by the National Conference of Commissioners on Uniform State Laws at its adoption by them in 1989 and is also discussed at length in Wellman, "Transfer-on-Death Securities Registration: A New Title Form," 21 *Ga L Rev* 709 (1987).

Prior to using this form, consideration should be given to the effect of subsection (2) of Section 9, which provides that the act does "not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state." In the official commentary it is suggested that, "Consideration should be given to the desirability of adapting the section as necessary to fit local principles regarding the rights of a surviving spouse to protection against disinheritance by nonprobate transfers effective at death." If that consideration was given, it is not apparent on the face of the statute as enacted. However, it appears that this section has the effect of making transfers under the act subject to the remedies of the Uniform Fraudulent Transfer Act, ORS Ch 95.

II. Wrongful Death

A. HB 2354 (Ch 608)
Extends Wrongful Death Statute of Limitations to 3 Years from Discovery or Death

This act incorporates a discovery rule into ORS 30.020, effectively overruling *Eldridge v. Eastmoreland General Hospital*, 307 Or 500 (1989). The new time limit for commencing a wrongful death action is three years from discovery of the injury causing death. However, the act creates a new statute of ultimate repose at three years from the date of death. It also incorporates by a general reference all other statutes of ultimate repose that might bar the action.

B. HB 2593 (Ch 471)
Allows Wrongful Death Recovery by Stepchild or Stepparent

This OTLA-sponsored act extends the classes of persons entitled to share in the proceeds of a wrongful death cause of action to include stepchildren and stepparents.

After the bill passed the House, the sponsors recognized significant problems in defining these relationships and added definitions at ORS 30.020(4). Under these provisions the stepparent-stepchild relationship must be created while the stepchild is a minor and in the custody of the "biological" parent who marries the stepparent, and it does not survive divorce of the stepparent and "biological" parent.

Apparently the writers of the Senate corrective amendments never heard of adoption or considered the practical realities of joint custody. It can be anticipated that there may be difficulties applying the statute in those situations, which will not be helped by legislative history. In the adoption situation any question should be resolved by ORS 109.350, which provides that an adopted child is "to all legal intents and purposes" the child of the adoptive parents. However, the "biological" language in the act is troubling, especially since it was completely unnecessary.

III. Incapacitated Persons

A. HB 2708 (Ch 546)
Temporary Guardians

In *Grant v. Johnson*, 757 F Supp 1127 (D Or 1991) Judge Helen J. Frye ruled ORS 126.133 unconstitutional for failure to provide due process to persons subject to temporary guardianship proceedings. This act is intended to correct the deficiencies found by the federal court.

Amended ORS 126.133(2) now requires at least two days' notice to the proposed protected person prior to appointment of a temporary guardian. ORS 126.133(5) was amended to require a hearing on request and within two days of demand. An exception to the advance notice requirement is made by ORS 126.133(2) in the event an "emergency requires immediate appointment," in which case notice must be given within two days after appointment. An "emergency" is defined by new ORS 126.003(3) to mean "an immediate and serious danger to life or health." It is noteworthy that under ORS 126.133(1) an "emergency" remains a prerequisite to appointment of a temporary guardian. It would appear almost invariably that a case calling for a temporary guardian would allow waiver of the advance notice requirement.

ORS 126.133(1) was amended to require that the "specific finding" on which a temporary guardianship is based be established by "clear and convincing evidence" and also to impose a new 30-day time limit on temporary guardianships. Under ORS 126.133(3) this time may on good cause be extended by 30 days.

The statute does not specify whether a court can appoint a temporary guardian 48 hours after notice is given, even though a hearing has just been requested and will not be held until two days later. New ORS 126.133(4) provides that a visitor must be appointed only if no hearing is requested. However, a hearing could eliminate the need for a visitor, so ORS 126.133(4) is not decisive as to whether the scheduling of a hearing forecloses immediate appointment.

ORS 126.103 is amended to allow appeals from orders appointing temporary guardians and to provide for continuation of the guardianship during appeal.

The statute contains an emergency clause which made it effective on July 14, 1991.

B. HB 2709 (Ch 895)
Guardians and Conservators

Amended ORS 126.050 adds the requirement in both guardianship and conservatorship proceedings that a person nominated or appointed as a guardian/conservator inform the court of a conviction of a Class A misdemeanor or the filing of a petition for relief under bankruptcy laws. Prior to this the only disclosure required was of a felony conviction. As before, the disclosure does not per se disqualify the nominee, but allows the court to evaluate whether the facts underlying the conviction or bankruptcy filing are such as to give rise to a reasonable belief that such person will be unfaithful to or neglectful of trust or to suggest that the appointment will not be in the best interests of the proposed incapacitated or protected person.

ORS 126.103, relating to guardianships, is amended to require that the original petition disclose whether the proposed guardian is a public or private agency or organization or employee thereof which provides services to the alleged incapacitated person. A similar amendment is made to ORS 126.183, relating to conservatorships. However, in many cases such disclosure will disqualify the nominee under another new law, section 1 of 1991 Or Laws ch 413, discussed below.

The remaining provisions of this act relate only to guardianship proceedings.

Amended ORS 126.098 includes language that an incapacitated person retains the right to contact and retain counsel and have access to personal records, and amended ORS 126.127 requires that the notice of the proceedings served on an alleged incapacitated person contain an expanded statement of these rights. Consistent with these new rules, ORS 126.137(6) is added to provide that, "A guardian may not prevent the ward from contacting or retaining counsel, or releasing records to counsel."

Amended ORS 126.103 also now directs that, except as otherwise provided by law, the visitor must submit a written report to the court within thirty days of being appointed. It further prohibits the visitor from serving the required notice of the proceeding except in a temporary guardianship proceeding.

This act contains an emergency clause and became effective on August 7, 1991.

C. SB 510 (Ch 744)
Reporting Abuse of Mentally Ill or Disabled Adults

This act creates a comprehensive system for reporting abuse of mentally ill or developmentally disabled adults. It appears to be modeled loosely on the child abuse reporting law, ORS 418.740. Reporting by

any "public or private official who has reasonable cause to believe" abuse has occurred is mandatory. Attorneys are included in the definition of "public or private official," but under section 3(2) information obtained in an attorney-client relationship need not be reported.

It is noteworthy that the conference committee report adopted when the bill was passed adds section 3a, requiring an interim committee study of the professional exemption.

D. SB 682 (Ch 413)
Limits Authority of Management of Residential Care Facilities

This act resulted from an AARP bill and states several limits on the authority of residential care facilities over residents. Of significance to attorneys planning for residents of such facilities is the prohibition on owners, administrators and employees of the facilities from serving as guardian, conservator, trustee or attorney-in-fact for unrelated residents.

Of significance to attorneys representing these facilities is the requirement that the facilities establish separate trust accounts for resident funds and maintain records of resident funds and property.

E. SB 787 (Ch 761)
Requires Health Care Facilities to Provide Health Care Decision Information

The 1991 session labored long and hard over the problems with the 1989 Health Care Power of Attorney law. The only result of the several bills before the session was this act, which requires health care organizations to maintain written policies to assure that patients are informed on health care decision-making procedures and that they receive copies of the directive to physician and health care power of attorney forms.

IV. Fiduciaries

A. SB 722 (Ch 968)
Statute of Limitations for Breach of Express Trust

Section 4 of this act (which generally demonstrates the weakness of the constitutional requirement that legislative bills relate to one subject only) requires that actions against a trustee for breach of an express trust, whether in contract, tort or otherwise, be commenced within six years of discovery, but in any event within the later of ten years of the act or omission or two years after termination of any fiduciary account established under the trust.

B. SB 798 (Ch 336)
Trust Record-Keeping Rules for Banks

This bill was submitted at the request of the Oregon Bankers Association. While on its face it imposes a duty to maintain records of fiduciary accounts until three years after termination of the fiduciary relationship, its purpose was to establish a basis under Comptroller of the Currency regulations to destroy the records after three years.

C. SB 832 (Ch 353)
Investment Limits on Bank Trust Departments

This Oregon Bankers Association bill reconciles two inconsistent statutes to allow bank trust departments holding trust funds pending investment or distribution to be deposited in the same bank, provided security is given to the trust department. It also contains new and very general language prohibiting investment of bank trust department funds with individuals or organizations where "there exists an interest" which might affect the exercise of judgment by bank.

D. HB 2990 (Ch 620)
Principal and Income Act Rules on Bond Premiums and Discounts

This Oregon Bankers Association bill eliminates the prohibition in the Principal and Income Act on amortization of bond premiums and accumulation for discount. The purpose is to conform fiduciary accounting practices to tax accounting requirements.

E. HB 3349 (Ch 680)
Fiduciary Liability for Pollution Cleanup

As initially proposed, this Oregon Bankers Association bill would have exempted lenders and fiduciaries in certain circumstances from liability for pollution cleanup. As finally enacted, the law requires the Environmental Quality Commission to promulgate such rules. As of this writing the rules have not been issued.

V. What Was Not Done

As happens every session, many bills relating to estate planning and administration were introduced and not passed. As you may have read in the August issue of "For the Record," one defeated bill would have allowed "independent legal technicians" to provide estate planning and administration services directly to the public. This section is intended to give you some flavor of other defeated bills in the 1991 session.

Enactment of Measure 5 brought efforts to raise money for pet projects in connection with probate. Two bills would have added alternative dispute resolution fees to the cost of probate proceedings. Another bill would have imposed a 12% inheritance tax and dedicated the proceeds to various projects for seniors. None of these bills ever left committee.

Two section bills died in the House Judiciary Committee. One would have allowed use of written memoranda separate from wills to dispose of personal property. That bill floundered on concern of attorneys on the committee over use of such informal procedures to dispose of such items as expensive artworks. Another section bill would have reconciled the inconsistent provisions for disposition of human remains in ORS 97.130 with those for making anatomical gifts under the Uniform Anatomical Gift Act, ORS 97.250, et seq. Thanks to the opposition of Oregon funeral directors, the whole is not necessarily the sum of the parts, and it is possible to have legal disputes when a decedent's gift of a body part is opposed by a family member with authority to dispose of the body.

Numerous bills aimed at clearing up the problems with the Health Care Power of Attorney died in the dispute over euthanasia, and it is possible that the Hemlock Society will mount an initiative campaign on this subject similar to the one that has already resulted in a measure to be voted on later this year in Washington.

The two bills on guardianships and conservatorships that were enacted were not followed into law by a number of bills which would have imposed much more stringent restrictions. With support for such bills coming from the AARP, they received a respectful hearing in the 1991 session, but no more votes than they deserved.

Finally, for those of you who still remember such things from law school, there was a bill to repeal ORS 112.345, thus reinstating the Rule in Shelley's Case.

It can be anticipated that many of these bills, along with a new crop, will be back before the Legislative Assembly in 1993, where they will again merit the close attention of the section.

Warren C. Deras
Carol Kyle
Legislation Subcommittee

Newsletter to Start Advice Column

Beginning with the January 1992 issue, the Newsletter staff will offer general advice to questions related to estate planning and estate administration. Readers are encouraged to submit questions at the following address:

Attn: Editor
Oregon Estate Planning and
Administration Section Newsletter
P.O. Box 1151
Bend, OR 97709-1151

The name of the person submitting the question will not be published.

All questions received at least 60 days before a Newsletter publication date will be considered for publication and response in the next issue of the Newsletter. The Newsletter reserves the right to respond only to those questions approved by a majority of the editorial board and to edit letters to conform to its form and length requirements. The response will not necessarily represent the position of the Section or its Executive Committee, nor is it intended to constitute the giving of legal advice.

Tax Development:

Estate of Maria Cristofani, 97 TC No. 5 (1991)—Permitted *Crummey* Powerholders

Decedent established an irrevocable trust of which her children were primary, and her grandchildren, contingent beneficiaries. The trust instrument provided that the two children and five grandchildren possessed rights to withdraw contributed amounts from the trust not to exceed the annual exclusion amount under IRC §2503(b). In each of the two years prior to her death, decedent conveyed to the trust undivided interests in improved real property worth $70,000. Decedent claimed annual exclusions for all of the trust beneficiaries, vested and contingent, for each of the years in which the transfers occurred. The Service disallowed the annual exclusions taken for the gifts made to decedent's grandchildren, ruling that they were not transfers of present interests for purposes of the annual exclusion.

The tax court held against the Service, focusing on the legal right of the minor beneficiaries to demand payment from the trustee. In response to the Service's argument that annual exclusions should only be allowed for powers of withdrawal held by "primary beneficiaries," the tax court held that the *Crummey* case did not require a powerholder to have a vested present interest or a vested remainder interest in the trust corpus in order that gifts subject to the power qualify for the annual exclusion. The court stated that the legal ability to exercise their right of withdrawal, and not the likelihood that the beneficiaries would do so, was the test for determining whether a present interest was received. Moreover, the court held as irrelevant the decedent's tax-saving motives for giving the grandchildren withdrawal powers.

Richard W. Miller

Calendar of Seminars and Events

- October 3-4, 1991 (Sponsored by National Law Foundation) **Annual Fiduciary Tax Conference,** Hotel Pennsylvania, New York, New York, Telephone: (302) 656-4757
- October 3-5, 1991 (Sponsored by ALI-ABA) **Creative Tax Planning for Real Estate Transactions in a Depressed Market,** Washington Vista, Washington, DC, Telephone: 1-800-CLE-NEWS
- October 7-8, 1991 (Sponsored by National Law Foundation) **The Comprehensive Estate, Gift and Trust Workshop,** Omni Inner Harbor Hotel, Baltimore, Maryland, Telephone: (302) 656-4757
- October 9-12, 1991 (Sponsored by Southern California Tax & Estate Planning) **11th Annual Southern California Tax & Estate Planning Forum,** Meridien Hotel, San Diego, California, Telephone: (619) 696-6773
- October 16-18. 1991 (Sponsored by ALI-ABA) **Third Annual Uses of Insurance in Estate and Tax Planning,** The Omni Hotel, Charleston, South Carolina, Telephone: 1-800-CLE-NEWS
- October 17-18, 1991 (Sponsored by Washington State Bar - Estate Planning Council of Seattle) **Estate Planning 1991,** Washington State Convention & Trade Center, Seattle, Washington, Telephone: (206) 448-0433
- October 17-18, 1991 (Sponsored by Practicing Law Institute) **22nd Annual Estate Planning Institute,** Omni International Hotel, Orlando, Florida, (Also in New York City, October 24-25, 1991; and San Francisco, November 7-8, 1991), Telephone: (212) 765-5700
- October 24-25, 1991 (Sponsored by the ABA) **Health and Welfare Benefit Plans,** Washington Hilton, Washington, DC, Telephone: (312) 988-6214
- October 27-November 1, 1991 (Sponsored by Hawaii Tax Institute - Chaminade University of Honolulu) **28th Annual Hawaii Tax Institute** (Includes Estate Planning 10/27-10/28), Hawaiian Regent Hotel, Waikiki, Oahu, Hawaii, Telephone: (808) 946-2966
- November 12, 1991 (Sponsored by National Business Institute) **Administration of an Estate in Oregon,** Columbia River Red Lion, Portland, Oregon (at Eugene Hilton Inn on November 14, 1991), Telephone: (715) 835-7909
- November 18-22, 1991 (Sponsored by American Law Institute) **Planning Techniques for Large Estates,** Grand Hyatt, San Francisco, California, Telephone: 1-800-CLE-NEWS
- December 18, 1991 - Tentative (Sponsored by Washington State Bar) **How to Draft Wills and Other Estate Planning Documents,** Spokane Sheraton (at Seattle Westin Hotel on December 20, 1991), Telephone: (206) 448-0433
- January 1-2, 1992 (Sponsored by National Law Foundation) **Estate Planning Seminar,** Frenchman's Reef Hotel, St. Thomas, Virgin Islands, Telephone: (302) 656-4757
- January 6-10, 1992 (Sponsored by University of Miami, Law Center) **26th Annual Institute of Estate Planning,** Fontainebleau Hilton Resort & Spa, Miami Beach, Florida, Telephone: (305) 284-4762
- January 27-30, 1992 (Sponsored by University of Southern California) **Institute on Federal Taxation,** Beverly Hills Hilton, California, Telephone: (213) 740-2646
- January 22-24, 1992 (Sponsored by ALI-ABA) **Basic Estate and Gift Taxation and Planning,** New Orleans, Louisiana, Telephone: 1-800-CLE-NEWS

OREGON STATE BAR 1935

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

BULK RATE
U.S. Postage
PAID
Portland, Oregon
Permit No. 341

Oregon Estate Planning and Administration Section Newsletter

Donna M. Muehleck
Editor-in-Chief

Editorial Board
Laurie Caldwell-Lee
Richard W. Miller
Daniel C. Re
Helen Rives-Hendricks
Timothy R. Strader

Warren C. Deras
1400 SW Montgomery Street
Portland, OR 97201