newsletter

Oregon Estate Planning and Administration Section Newsletter

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INCAPACITATED PERSONS

THE DUTY OF PARENTS AND CHILDREN TO SUPPORT EACH OTHER

Under Oregon law, parents and children are generally responsible for supporting each other. This parent/child support obligation has evolved under two separate statutory provisions. One of these provisions, now found in ORS 109.010, was originally contained in the State's civil laws. The other, the Relatives' Responsibility Law (ORS 416.010 to 416.280), was included in the statutes which provided for the public support of the poor. See *Haxton v. Haxton*, 299 Or. 616, 705 P.2d 721 (1985) for an explanation of the historical development of these laws in Oregon.

The purpose of this article is two-fold: first, to review the general scope of these support obligations; and, second, to examine the conflicts of interest which may exist as a result of the support obligations when a parent or a child represents the other or the other's estate in a fiduciary capacity. For an in-depth analysis of these support obligations, see Chapter 3 and Chapter 5, Family Law, OSB CLE publication, 1983.

ORS 109.010

The duty of support under ORS 109.010 is dependent upon the existence of two separate facts. First, a legal parent-child relationship must exist. For the purpose of this statute, the age of the child or the parent is irrelevant. *Haxton*, supra.

Secondly, the person seeking support must be poor and unable to work to maintain himself or herself.

The existence of a parent-child relationship is determined under various provisions of ORS Chapter 109. Generally, the relationship exists between a person and that person's natural mother and father. In the case of an adoption, however, the adopted person shall be considered to have been born in lawful wedlock to the adoptive parents, for all legal purposes after the entry of the decree. ORS 109.041(1), 109.050. If a person is adopted by a stepparent, the person is considered to be the child of the adoptive parent and the natural parent who is the spouse of the adoptive parent. ORS 109.041(2). As a result, when an adoption occurs, the persons entitled to and responsible for support under ORS 109.010 will change.

There is no precise rule under ORS 109.010 which determines when a person is poor and unable to work to maintain himself or herself. Generally, a person is entitled to such shelter, food, clothing, medical services, education and social protection and opportunity as are consistent with normal living conditions and that person's situation and station in life. When a person is unable to provide that level of support, ORS 109.010 imposes upon that person's parents or children the duty to supply the required support. This duty is limited, however, by the financial ability and resources of the person from whom the support is sought. For one of the earliest discussions of these issues by an Oregon court, see *State v. Langford*, 90 OR. 251, 176 P 197, 200 (1918).

INDEX

Valerie Vollmar will be resuming her series of articles on ethics in estate planning and administration in the April 1990 issue of the Newsletter.

Helen Rives-Hendricks

Once the statutory prerequisites to support have been met, there are few defenses available to the obligated person other than the person has insufficient financial ability or resources to provide support. When more than one person is obligated to support a parent or child under ORS 109.010, the fact that one of them alone has sufficient income or resources to provide the required support does not excuse the others from providing an amount of support consistent with their ability. *Westby and Westby*, 30 Or App 431, 567 P.2d 145 (1977). Similarly, the willingness of a third party to contribute to the support requirement does not affect the obligation of the parent or child. *Dooley and Dooley*, 30 Or App 989, 569 P.2d 627 (1977). The fact that a mother has the ability to terminate a pregnancy or put the child up for adoption does not affect the obligation of the child's father to support his child. *Ince v. Bates*, 28 Or App 71, 558 P.2d 1253 (1977).

The duty of support under ORS 109.010 is not dependent upon a pre-existing court order. *State v. Langford*, supra. A person entitled to such support, however, may bring an action directly under ORS 109.010 only if no specific statutory method for enforcing the support obligation is provided. If such a method does exist, it is the sole avenue for seeking to obtain the support. *Haxton*, supra. Compliance with a support order issued pursuant to a statutory procedure constitutes a defense to an action under ORS 109.010. *Coastal Adjustment Bureau, Inc. v. Wehner*, 246 Or. 115, 423 P.2d 967 (1967). Furthermore, in such cases, the support obligation can be changed only through an action to modify the original support order and not through an independent action under ORS 109.010. *State ex. rel. Adult and Fam. Serv. v. Lester*, 45 Or. App. 389, 608 P.2d 588 (1980).

Methods for enforcing a parent's support obligations exist in the following statutes: when an action for dissolution, separation or annulment of marriage has been commenced, ORS 107.095(1)(b) and ORS 107.105(1)(c); when parents are married and an action for dissolution, separation or annulment has not been commenced, ORS 108.110(1); by minor child against parents, ORS 109.100; as part of filiation proceedings, ORS 109.155(4); under the Revised Uniform Reciprocal Enforcement of Support Act, ORS 110; when public assistance payments have been made to or for the benefit of a dependent child, ORS 416.400 to ORS 416.470; and when support of a child is within jurisdiction of the juvenile court, ORS 419.513. Curiously, ORS 109.555(1)(b) provides that an emancipation decree terminates the obligation imposed upon parents and children by ORS 109.010 until the child reaches the age of majority.

With the exception of ORS 110, these statutes are concerned with enforcing support obligations to children under 18 years of age, or 21 if the child is attending school. Consequently, an action for support directly under ORS 109.010 may only exist for persons over 18, or 21 if attending school, who are not eligible for public assistance. In all other cases, the relevant statutory procedure must be used.

The duty of support under ORS 109.010 is enforceable by various parties. Generally, it may be enforced directly by the person to whom it is owed. This rule, however, is subject to an exception which exists in the case of support for minor children when no court order for support exists. Both parents are obligated to provide the required support. If either parent does not do so, the child may enforce the delinquent parent's obligation to provide **future** support under ORS 109.100. The child may not, however, bring an action for past support that should have been provided. That right belongs to the person who provided the support. *Baker v. Baker*, 22 Or. App. 285, 538 P.2d 1277 (1975). The person with the right to collect delinquent support may waive that right. *Miller v. Miller*, 29 Or. App. 723, 565 P.2d 382 (1977).

Furthermore, the State of Oregon may enforce the obligation on behalf of the person entitled to support, as the assignee of such person or under its own statutory right. For examples of such statutory authority, see ORS 109.100 (authorizes State to act on behalf of person entitled to support), ORS 418.042 (enables State to become assignee of person entitled to support), and ORS 25.080 (gives State independent right to enforce support obligation). When acting on behalf of a person or as an assignee, the State is subject to the same limitations and restrictions as the person entitled to support. This is not necessarily the case, however, when the State proceeds under its own statutory authority. *State ex. rel. Adult & Fam. Serv. v. Lester*, supra.

Additionally, in the absence of a court decree establishing a parent's specific support obligation to children, it is possible for a creditor to recover against either or both parents for "family expenses" provided to the children under ORS 108.040.

ORS 416.010 to 416.280

Under the Relatives' Responsibility Law, a needy person has a cause of action against living responsible relatives for a monthly contribution to the needy person's support. A judgment in such action may be entered for all accumulated contributions for which the responsible relative is liable. ORS 416.090. Responsible relatives include parents and children of the needy person 21 years of age or over. ORS 416.010(4). Certain relatives are exempt from the support obligation under ORS 416.030 and 416.035. A needy person is defined as one who is eligible for public assistance under State law. ORS 416.010(3). A grant of public assistance is prima facie evidence that recipient is entitled to support. ORS 416.070. Furthermore, ORS 416.220 permits an applicant or recipient of public assistance to petition the circuit court for an order requiring a relative to pay monthly support for the applicant or recipient. The amount of support for which a responsible relative is liable, is a question of fact dependent upon the relative's financial ability. The maximum amount is set forth in ORS 416.061.

Prior to July 1, 1973, the Adult and Family Services Division was authorized to enforce a responsible relative's support obligation, but as of that date, it may no longer recover most assistance payments. The needy person's right to compel support has not been changed. While numerous cases have been reported which involve the procedures under which the State enforced this obligation, no cases have been found where the needy person has attempted to directly enforce the obligation.

Potential Conflicts of Interest

As a direct result of the duty of children and parents to support each other, a conflict of interest may result when one is acting as a fiduciary for the other or the other's estate. Such a conflict will exist when the protected person

is entitled to support from the fiduciary or when the fiduciary owed such a duty to a decedent. The duties of a fiduciary include undivided loyalty to the person upon whose behalf the fiduciary is acting. *In re Perry's Estate*, 181 Or. 332, 181 P.2d 783 (1947). Oregon courts have specifically held that a personal representative acts as a trustee for both creditors and beneficiaries of the decedent's estate. *In re Larabee's Estate*, 193 Or. 543, 239 P.2d 597 (1952). Consequently, if the fiduciary is or was obligated to provide support, the fiduciary's self interest may be in direct conflict with the fiduciary's duty to enforce that support obligation.

There are no reported cases in Oregon discussing this issue. It is not unreasonable, however, to assume that it may be raised in the future. It would seem most likely to be raised by a creditor in the case of an insolvent estate or, in the case of a solvent estate, by someone who would suffer from a failure to collect the support. If it was raised, the propriety of the fiduciary's continued service would be questionable.

In each case where an attorney represents a fiduciary or a person to whom the fiduciary's duties are owed, the issue of the fiduciary's duty to support the protected person or the decedent should be examined. If such a duty may exist, it should be considered in advising the fiduciary or other party on how to proceed. To avoid possible ethical violations, under DR5-105, the attorney should also clearly establish at the outset of representation who the client is and to advise all other interested persons to seek independent representation.

Daniel C. Re

ESTATE ADMINISTRATION

PRACTICE NOTE

Kidney Association of Oregon v. Ferguson, 97 Or App 120 (1989), has caused a stir among probate practitioners in the State of Oregon. The court denied attorney fees for representing the personal representative of the Ragan estate because of a conflict of interest in violation of DR 5-105. However, the court also stated, in denying any fee to the firm, that "the firm . . . performed substantial amounts of nonlegal work for the personal representative, such as maintaining the estate's checkbook, making bank deposits, visiting an apartment house, negotiating to sell a boat and motor vehicles and searching the decedent's files for tax information; . . .". This language has caused many practitioners to ask if performance of such activities was one of the grounds for denial of the fee, and if so, how they can alter their practices to conform to such a ruling while monitoring administration of an estate in a manner likely to prevent mismanagement and to satisfy bond companies.

The footnotes to the case, which respond to the dissent written by Judge Graber, seem to indicate that the conflict of interest was the controlling factor in the fee denial decision. For instance, the court quotes the tasks listed above and states that "it is not inconsistent to approve the personal representative's delegation of these tasks, while denying (this attorney) any fees for performing them." The court states that "under normal circumstances, the attorney would be compensated for performing them". The court added that "These are not normal circumstances and we do not deny (his) fees on the basis that the tasks were improperly delegated to him." Page 129, Fn. 11.

The footnote appears, therefore, to refute the implication in the body of the opinion that the delegation was improper. Many probate courts are now aware that some bond companies are unwilling to issue a bond unless the attorney's office controls the estate checkbook, for instance. Delegation of the personal representative's duties should always be fitted to the facts and circumstances, and the delegation of complicated tasks by an unsophisticated personal representative would probably not be objectionable. On the other hand, delegation of simple tasks by a sophisticated personal representative, unless cost effective, could be challenged, particularly after this case.

Although the KAO case should not be cause for alarm, it may well cause probate practitioners to analyze and segregate delegable tasks more carefully in the future, to the benefit of the estates being administered.

Sally C. Landauer

WHAT'S NEW

BRISCOE V. SCHNEIDER, 97 OR. APP. 352 (1989)

Decedent died in 1987. He was survived by three sisters. After his death no original will could be located but an unsigned conformed carbon copy of a will executed in 1961 was found. Under the terms of that will, two of the surviving sisters received $1.00 each and the residue of the estate went to the third sister. The third sister originally petitioned for the administration of decedent's estate alleging that he had died intestate. She was appointed personal representative. Seven months later, she petitioned for probate of the 1961 will alleging that the original had been lost, but not revoked prior to decedent's death. At trial, the evidence established that decedent took possession of the original 1961 will in 1976 and placed it in his safe. Only the decedent and the third sister had access to the safe. Decedent's two remaining sisters appealed an order denying their petition to revoke the probate of the 1961 will.

The Court of Appeals reversed, holding that when a will is last known to be in the sole possession and control of the decedent and cannot be found after decedent's death, it is presumed to have been destroyed with the intent to revoke it. The strength of the presumption depends upon the decedent's control of the will repository and the extent to which others had access to it. Here, decedent had absolute control over the safe in which the will was kept and the only other person having access to it, the third sister, would have benefitted from the will. In such a case, the presumption will only be overcome by clear and satisfactory evidence. The proponent of the will failed to produce such evidence.

Daniel C. Re

BALTHROP V. BERRYMAN, 96 OR. APP. 354 (1989)

Plaintiff filed a complaint for wrongful death against defendant, as personal representative of the tortfeasor's estate. Plaintiff did not allege that he presented a claim to the personal representative that was denied prior to filing the action. The trial court dismissed the claim for failure to state ul-

timate facts sufficient to constitute a claim. The Court of Appeals affirmed that the complaint must allege that a claim was presented to the personal representative and denied in order to state a claim.

Helen Rives-Hendricks

MCKEE V. STODDARD, 98 OR. APP. 514 (1989)

Edward McKee's wife of 47 years died in 1979. After her death, Edward became the owner of all of their property as the surviving joint tenant. He consulted with his attorney to determine if his existing will should be changed. Edward was advised that his will devised all of his property to his three children and, if that was his desire, no change was necessary. Edward indicated that he wanted his children to receive his property.

In June, 1980, Edward remarried. At that time, he considered changing his will to divide his estate between his wife and children. In April, 1981, after a dispute with two of his three children concerning his new wife, Edward went to his wife's attorney, accompanied by his wife, and executed a new will leaving all of his property to his wife and making her a joint owner with the right of survivorship in certain assets.

Edward died in 1984, survived by his wife. His children initiated this action to invalidate Edward's 1981 will and the property transfers to his wife on the ground of undue influence. The trial court found the will and property transfers to have been the product of undue influence and voided them.

Held, affirmed by a divided court. The burden of proving undue influence is generally on the proponent. However, when both a confidential relationship and suspicious circumstances exist, an inference of undue influence arises and the party disputing the claim of undue influence must present evidence which overcomes that inference. In this case, a confidential relationship existed between husband and wife. (The concurring opinion agreed with this point only because the evidence established that Edward was dominated by his wife and he reposed confidence in her.) His wife's involvement in the preparation of his new will and property transfers, her failure to seek independent advice for him with respect to those matters, his change in attitude towards all of his children, and his disinheritance of them constituted suspicious circumstances. Although his wife presented evidence which was sufficient to establish a reason why Edward would decide to disinherit the two children he had argued with in 1981, that evidence did not explain the exclusion of the third child. Consequently, his wife did not meet her burden of proof and Edward's will and property transfers were void. Edward's previous will, made in 1972, was revoked by operation of law upon his second marriage. Therefore, Edward died intestate. One-half of his estate was distributable to his wife and the other one-half to his children.

Daniel C. Re

CALENDAR

The following is a selective schedule of seminars which may be of particular interest to Section Members:

JANUARY 15-19, 1990: 24TH ANNUAL PHILIP E. HECKERLING INSTITUTE ON ESTATE PLANNING, University of Miami, Fountainbleau Hilton Resort and Spa, Miami Beach, Florida (305) 284-4762

JANUARY 15-18, 1990: 42ND ANNUAL INSTITUTE ON FEDERAL TAXATION, University of Southern California, Central Plaza Hotel, Century City, Los Angeles (213) 743-7557

FEBRUARY 7-9, 1990: TRUSTS & ESTATES 1ST ANNUAL CONFERENCE ON ESTATE PLANNING AND ADMINISTRATION, Sponsored by Trusts & Estates Magazine, Grand Hyatt, San Francisco, California (800) 241-9834

FEBRUARY 22-24, 1990: ALI-ABA: ADVANCED ESTATE PLANNING TECHNIQUES, Hyatt Regency Maui, Maui, Hawaii (800) 253-6397

MARCH 12-16, 1990: ALI-ABA: POSTMORTEM AND ESTATE PLANNING, University of Miami Law School, Coral Gables, Florida (800) 253-6397

APRIL 4, 1990: TAXATION OF TRUSTS AND ESTATES, Satellite Program, Oregon State Bar, Lake Oswego, Oregon, 224-4280

APRIL 23-27, 1990: ALI-ABA: PLANNING TECHNIQUES FOR LARGE ESTATES, Waldorf Astoria, New York, New York (800) 253-6397

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Conflicts of Interest Between a Current Client and a Former Client

This article is the fourth in a series discussing conflicts of interest. The first article, published in April 1989, addressed general issues such as identification of the "client," vicarious disqualification, and waiver. The second and third articles, published in July 1989 and October 1989, dealt with conflicts of interest between current clients (known as "open file" conflicts). This article focuses on conflicts of interest between a current client and a former client (known as "closed file" conflicts).

As noted in the July 1989 article, the ethical standards which apply to "closed file" conflicts are derived from *In re Brandsness*, 299 Or. 420, 702 P2d 1098 (1985), and are now found in DRs 5-105(C) and (D). Under these disciplinary rules, a lawyer has certain ethical duties if the lawyer either knows or by the exercise of reasonable care should know of an "actual" or "likely" conflict of interest (as defined in DR 5-105(A)) between a current client and a former client. In effect, DRs 5-105(C) and (D) codify the *Brandsness* analysis of "closed file" conflicts.

DR 5-105(C) sets out the general rule that, absent client consent, a lawyer shall not represent a current client if either (1) a *matter-specific* conflict or (2) an *information-specific* conflict with a former client exists:

> **(C) Former Client Conflicts — Prohibition**
>
> Except as permitted by DR 5-105(D), a lawyer who has represented a client in a matter shall not subsequently represent another client in the same or a significantly related matter when the interests of the current and former clients are in actual or likely conflict. Matters are significantly related if either:
>
> (1) Representation of the present client in the subsequent matter would, or would likely, inflict injury or damage upon the former client in connection with any proceeding, claim, controversy, transaction, investigation, charge, accusation, arrest or other particular *matter* in which the lawyer previously represented the former client; or
>
> (2) Representation of the former client provided the lawyer with confidential *infor-*

INDEX

mation the use of which would, or would likely, inflict injury or damage upon the former client in the course of the subsequent matter.

DR 5-105(D) provides that, even if a matter-specific or information-specific conflict exists, the lawyer *may* proceed to represent a current client if "both the current client and the former client consent to the representation after full disclosure." (As noted in prior articles, "full disclosure" is defined in DR 10-101(B). That rule requires the lawyer to give an explanation sufficient to apprise the client of the potential adverse impact of consenting to the representation, to recommend that the client seek independent advice about whether consent should be given, and to confirm the disclosure contemporaneously in writing.)

Two distinctions between "open file" conflicts and "closed file" conflicts are worth noting. First, a current client is entitled to "veto" *any* adverse representation on behalf of another current client — even as to an unrelated matter about which the lawyer possesses no confidential information. A former client, on the other hand, has the power to "veto" a subsequent representation only if a matter-specific or information-specific conflict exists. Second, although an "actual" conflict between current clients cannot be waived, an "actual" conflict between a current client and a former client *can* be waived. These two distinctions implicitly recognize that the lawyer's duty of loyalty is less for a former client than for a current one.

When analyzing "closed" file conflicts, a lawyer must always begin by determining whether a particular client has in fact changed from *current* client to *former* client status. Unless the lawyer has explicitly documented termination of the representation, the client's status is likely to depend on the client's reasonable expectations under the circumstances. Clients who consult a lawyer on estate planning and business matters, for example, often do so only intermittently. In many cases, such clients may reasonably view themselves as current clients even though no work is currently pending. *See, e.g., In re Robertson,* 290 Or. 639, 624 P2d 603 (1981), holding that a couple who had been represented by a lawyer for several years in various matters reasonably believed that he was still representing them, as well as the purchaser, in a land sale transaction. *See also In re Galton,* 289 Or. 565, 581, 615 P2d 317 (1980).

How can a lawyer be sure that a current client has become a former one? One possible approach is to send a letter to the client when a particular matter is concluded, stating that the representation has ended. However, many lawyers believe that such letters tend to discourage desirable clients from returning in the future. In the absence of such a letter, a lawyer should attempt to document in writing that the client has in fact become a former client. If the client objects, the lawyer should not attempt unilaterally to "fire" the client and thereby convert the client from a current client to a former one. *See Unified Sewerage Agency v. Jelco, Inc.,* 646 F2d 1339, 1345 n.4 (9th Cir. 1981). Rather, the lawyer should treat the client as a current client unless the facts clearly establish that the client's position is unreasonable (*e.g.*, because the lawyer has done nothing for the client except prepare a simple will many years ago).

Once a lawyer has concluded that the former client rules apply, the next step is to determine whether a matter-specific or information-specific conflict exists under DR 5-105(C). Oregon cases which provide helpful guidance include the *Brandsness* case itself; *In re Renn,* 299 Or. 559, 704 P2d 109 (1985); and *Collatt v. Collatt,* 99 Or. App. 463, 782 P2d 456 (1989).

The case most relevant for estate planners is *Brandsness,* in which the lawyer had represented both Mr. and Mrs. Zingg in (1) the preparation of their wills and (2) the organization of their business. The lawyer undertook, following the termination of his attorney-client relationship with Mrs. Zingg, to represent Mr. Zingg in the dissolution of the parties' marriage.

The Oregon Supreme Court found in *Brandsness* that the prior estate planning work for Mrs. Zingg created neither an information-specific nor a matter-specific conflict, as nothing in the record suggested that the lawyer had obtained any relevant confidential information in the preparation or execution of her will and Mrs. Zingg had since executed a new will superseding the one the lawyer had prepared. 299 Or. at 433. The court did, however, note that an information-specific conflict could easily arise under such circumstances:

> "We can easily imagine situations in which the lawyer who drafted a former client's will would be barred from representing that former client's spouse in a dissolution proceeding. The confidential information acquired in the preparation of the will could include intimate details of the person's financial background, history, and holdings that would, or would likely, give the lawyer's present client an unfair advantage in the subsequent dissolution proceeding, damage the former client's financial interests, create the impression of unfairness, and leave the former client with a legitimate feeling of betrayal." *Id.* at 432-33.

As to the lawyer's prior work in organizing the business for the Zinggs, the court found that a matter-specific conflict existed, warranting the lawyer's discipline. By seeking to obtain a restraining order in the dissolution proceeding, the court held, the lawyer effectively sought to bar his former client from participating in the very business which he had helped to organize. *Id.* at 433. More generally, the court noted that the potential for matter-specific conflicts in dissolution proceedings is very high whenever a lawyer has previously represented the former client in such matters as establishing a business, purchasing property, or preparing an inter vivos irrevocable trust. *Id.*

Renn also involved a matter-specific conflict, but in the context of estate administration. In that case, the

Oregon Supreme Court found that a matter-specific conflict existed when the lawyer, as attorney for Mr. Branam's personal representative, attempted to compromise a claim against the estate which was founded on a dissolution decree and lien which the lawyer had previously obtained on behalf of the claimant, his former client.

Unlike the other two cases, *Collatt v. Collatt* involved not a disciplinary action, but a motion to disqualify plaintiff's counsel, Winslow. Winslow had organized a closely-held corporation and later represented both parties in transferring the corporate stock from Ronald Collatt to his mother. Winslow's relationship with the mother then terminated. Subsequently, Winslow filed a complaint on behalf of Collatt against his mother and other defendants, alleging conversion and duress in connection with the stock transfer. The trial court granted the defendant's motion to disqualify Winslow on the basis of a "closed file" conflict. On appeal, the Oregon Court of Appeals affirmed, finding that, even if Winslow's prior representation of the mother did not provide him with information giving rise to an information-specific conflict, a matter-specific conflict clearly existed.

The *Brandsness* case contains further examples of situations in which a matter-specific conflict and/or an information-specific conflict may exist. 299 Or. at 431-32. *See also* Oregon Ethics Op. 519 (1988).

Another context in which the "closed file" conflicts rules may be relevant is where a lawyer (Lawyer) moves from one private law firm (Old Firm) to another (New Firm). By virtue of the move, the clients remaining with Old Firm become former clients with respect to Lawyer. After the move, can either Lawyer or New Firm ethically undertake or continue to represent current clients adversely to these former clients?

Opinion 519 answers this questions by applying the "closed file" analysis developed under *Brandsness*. According to the opinion, Lawyer is not prohibited from acting adversely to a former client unless either a matter-specific or an information-specific conflict exists. If no such conflict exists, the vicarious disqualification rule (now found in DR 5-105(G) and (H)) is inapplicable and the other lawyers in New Firm are likewise free to handle a matter. If such a conflict does exist, Lawyer may proceed with the representation only if both the current client and the former client consent after full disclosure. Even if consent cannot be obtained, the other lawyers in New Firm may represent the current client if they observe "Chinese wall" screening procedures (now found in DR-5-105(I)).

A variation on the above scenario involves Lawyer's taking some of Old Firm's clients to New Firm. By virtue of the move, the clients who go with Lawyer become former clients with respect to Old Firm. After the move, can Old Firm ethically represent current clients adversely to these former clients?

Until recently, DR 5-105 provided no answer to this question. Effective January 2, 1990, however, the Oregon Supreme Court adopted new DR 5-105(J) to govern this situation. The new rule reads as follows:

> **(J) Effect of a Lawyer's Departure.**
> When a lawyer has terminated an association with a firm, the firm is not prohibited by reason of the formerly associated lawyer's work from thereafter representing a person in a matter adverse to a client that was represented by the formerly associated lawyer unless one or more of the lawyers remaining at the firm would be disqualified pursuant to DR 5-105(C) or unless the closed file or other confidential information remains at the firm and consent is not obtained pursuant to DR 5-105(D).

As can be seen, the rules governing conflicts of interest between a current client and a former client are somewhat complex. Nonetheless, DR 5-105 and the decided cases set forth those rules in a clear and understandable manner. In order to avoid ethical violations, Oregon lawyers must be familiar with those rules and must be constantly on the alert for situations which may give rise to a "closed file" conflict.

The next article in this series will address conflicts of interest between a client's interests and the lawyer's own interests.

Valerie J. Vollmar

Loving and Living Trusts

Most Oregon estate planners have by now encountered the phenomenon of the "Loving Trust." The Loving Trust is, in essence, a revocable living trust, though it is sold by its promoters as a unique and different entity from a living trust. The promoters' literature states that:

> "Loving Trusts are fleshed-out living trusts which are brought fully to life with loving directions. Unfortunately, most living trusts being prepared today are bare-bones documents right out of a form book. Used solely for the purpose of avoiding probate, those living trusts are terse sets of instructions that merely set out where property will go at death. Bare-bones living trusts only do part of the job; they are the zombies of the trust world, only half alive. Their emphasis is on one benefit, probate avoidance, and that is all." Loving Trust Seminar, page 14.

The Loving Trust Seminar material is itself "bare-bones" factual. It recites that there are "huge problems created by a simple will or a joint tenancy ownership" and that "wills guarantee probate on your death or disability." It states that if you are disabled, someone will have to care for you and act for you, and "it is highly unlikely that 'someone' will be a loved one." It states that it is highly likely that a "local probate court . . . will manage most details of your life." The promoters' literature ignores the use of powers of attorney and of representative payees and states without qualification that the only way to avoid conservatorship and guardianship is to have a living trust.

Other portions of the written material misrepresent the law or imply that Loving Trusts have tax advantages that wills and living trusts do not. For instance, the Seminar material states that "[j]oint accounts can be absolutely frozen by law if one of the owners is declared legally incapacitated." In addition, the material implies that only Loving Trusts obtain a $600,000 federal estate tax exemption. It says "A Loving Trust can reduce and eliminate federal estate taxes. With a Loving Trust, a married couple can transfer $1,200,000 absolutely free of federal estate tax."

The authors also state that Loving Trusts will involve no attorneys' fees and no delay in distributing assets. As anyone who administers decedent's trusts knows, most of the duties required in settling a probate estate are necessary in settling a decedent's revocable living trust. Claims of creditors, valuation of assets for both estate tax purposes and for basis purposes, preparation of estate and income tax returns, tax audits, transferring assets, and income tax planning are required whether the decedent's assets are probated or not. Attorneys and accountants will continue to be involved, and if they are not, they will be involved later when the beneficiaries of the Loving Trust have encountered difficulties arising from lack of proper attention to such matters.

The Loving Trust literature says that the Loving Trust is a "complete will substitute." It states that as a technique, it has few, if any, disadvantages compared to the other methods they discuss, joint ownerships and wills. It does not mention other "will substitute" techniques, nor does it ever mention the need for a pourover will.

Campbell Richardson's and Donna M. Muehleck's excellent article, "Avoiding Probate with Revocable Trusts: Advantages and Disadvantages," *Journal of Taxation of Investments*, Volume 5, No. 4, Summer 1988 points out that probate provides protection from creditors' claims which may not be available to trustees and beneficiaries. Additionally, if a trustor neglects to register an asset in the trustee's name or to be aware of all assets, the trustor may omit assets from the trust, creating a need for a probate anyway. Other disadvantages to living, and hence Loving, trusts are the difficulty of holding certain assets in trusts caused by some state law restrictions on permissible shareholders of professional corporations; ordinary loss treatment disqualification for trusts; loss of tax benefits; and the general discomfort that title companies have in dealing with trustees.

Richardson and Muehleck also point out the substantial differences in tax treatment of probate estates and revocable living trusts. Besides the more commonly known differences such as the larger personal income tax exemption for an estate and a trust's inability to select a fiscal year in order to spread income and/or defer taxes, there are other disadvantages such as disallowance of loss if a trustee sells an asset to a beneficiary for a price less than basis, throwback rules applicable to trusts but not to estates, ordinary income treatment on sales or exchanges of depreciable property between related persons imposed on trusts, a trust's requirement to make estimated tax payments in the first year after the death of the trustor, and the separate share rule of IRC § 663. Furthermore, privileges allowed to executors are not allowed to trustees, as trustees do not have the power to request discharge from personal liability for payment of estate tax until after an executor has been discharged and also do not appear to have the ability to request prompt assessment or to obtain discharge from personal liability for income and gift taxes.

Finally, the Loving Trust Seminars emphasize over and over again the high expense of probate. Given the fact that Oregon probate fees are minimal, that Oregon attorneys' fees are not based on a percentage of estate assets (though fiduciary fees for trusts are based on percentages of estate assets), the advantages and disadvantages of probate and living trusts may balance, or even weigh in favor of probate. The planner must consider the cost of establishing a revocable trust and transferring assets to it, then maintaining the trust so that assets do not get omitted as future acquisitions are made. Such costs, paid with present dollars, will frequently outweigh the cost of the probate itself incurred at a later time.

Sally C. Landauer

Amendments to Code of Professional Responsibility

Effective January 2, 1990, the Oregon State Bar's Code of Professional Responsibility was amended as follows:

1. DR 1-102, Misconduct: Responsibility for Act of Others. New DR 1-102(C) was added to the Code. Under its provisions, lawyers are bound by the rules of professional conduct when acting at the direction of another person.

2. DR 1-103, Disclosure of Information to Authorities; Duty to Cooperate. DR 1-103(A) was amended to require a lawyer possessing knowledge that another lawyer has committed a violation of DR 1-102 (Misconduct) that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to inform the appropriate professional authorities, *if* that knowledge is not protected by DR 4-101 and ORS 9.460(3). Those provisions deal with protecting a client's confidences and secrets. The rule previously required informing the authorities if the conditions were met unless the information was privileged.

3. DR 2-101, Publicity and Advertising. DR 2-101(D) was amended to change the identification requirement for direct mail advertising. Now, the word "Advertisement" must appear on the envelope and at the bottom, rather than the top, of each page. The entire word need not be capitalized, but the bold print type size was increased from ten to fourteen point.

4. DR 2-110(C), Withdrawal from Employment; Permissive Withdrawal. DR 2-110(C)(1)(e) was amended to delete the phrase "in a matter not pending before a tribunal". This is not a substantive change, however, since permissive withdrawal under DR 2-110(C) is not permitted in matters pending before a tribunal.

5. DR 5-101, Conflict of Interest; Lawyer's Self Interest. DR 5-101(A) was amended to provide that "a lawyer's own financial, business, property or personal interests" does not include occasional, temporary service on a court, board or administrative body, if the compensation for such service is incidental to the lawyer's other income. The rule previously provided that such occasional, temporary service was not considered to be "employment".

6. DR 5-105, Conflicts of Interest: Former and Current Clients. DR 5-105(C), *Former Client Conflicts-Prohibition*, was amended to define when matters are significantly related. This rule prohibits representation of a client in the same or in a significantly related matter in which a former client was represented if the interests of the present and former clients are in actual or likely conflict unless both consent to such representation under DR 5-105(D). Under the definition, matters are significantly related if either:

a. representation of the present client in the subsequent matter would, or would likely, inflict injury or damage upon a former client in connection with any matter in which the lawyer previously represented the former client; or

b. representation of the former client provided the lawyer with confidential information, the use of which would, or would likely, inflict injury or damage upon the former client in the course of the subsequent matter.

Consequently, if the interests of a present and former client are in actual or likely conflict, the consent of both is required to represent the present client in a matter which is the same as, or is significantly related to, the matter in which the former client was represented. No consent is required to represent the present client if there is no actual or likely conflict of interest or, if such a conflict exists, the matter is not the same, as or significantly related to, the matter in which the former client was represented.

This amendment reduces the possibility that a strict "issues conflict" will prohibit a lawyer from representing a client without a former client's consent. The disciplinary rules have not been amended, however, to address the "issues conflict" problem that exists for current clients.

7. DR 5-105, Conflicts of Interest: Former and Current Clients. New DR 5-105(J), *Effect of Lawyer's Departure*, was added. Under this provision, when a lawyer terminates an association with a firm, the firm is not prohibited, by reason of the formerly associated lawyer's work, from representing a person in a matter adverse to a client represented by the formerly associated lawyer unless a lawyer remaining with the firm is disqualified under DR 5-105(C) or the closed file or other confidential information remains at the firm and consent is not obtained under DR 5-105(D).

8. DR 7-101, Representing a Client Zealously, was amended by adding DR 7-101(C), which permits a lawyer to seek the appointment of a guardian for a client or to take other protective action which is least restrictive with respect to a client, but only when the lawyer reasonably believes the client cannot adequately act in the client's own interest.

Daniel C. Re

Relevant Highlights of the Revenue Reconciliation Act of 1989

Estate Planning techniques were affected by the following provisions of the Revenue Reconciliation Act of 1989:

Employee Stock Ownership Plans. Act § 7304(b), effective for decedents dying after July 12, 1989, repealed the special rule of IRC § 2210 which had shifted the estate tax liability from a ESOP participant's estate to the ESOP when certain securities were sold to the ESOP. Act § 7304(a) repealed the fifty percent estate tax deduction previously allowed by IRC § 2057 for the sale of certain employer securities by the owner's estate to the ESOP.

Qualified Domestic Trusts. Act § 7815, amending IRC §§ 2056 and 2056A, generally liberalizes the transition and reformation rules for transfers to a noncitizen spouse. In addition, only one trustee of a qualified domestic trust must now be a U.S. citizen or a domestic corporation, although that trustee must approve all distributions from the trust. The surviving noncitizen spouse need not receive all of the income of the qualified domestic trust, as long as the trust would qualify for the marital deduction if it were for the benefit of a citizen spouse. Estate tax treatment of distributions from qualified domestic trusts was also modified.

Medicare Catastrophic Coverage. The premium imposed to finance the expansion of Medicare Part A benefits was retroactively repealed by § 102 of the Act.

Donna M. Muehleck

What's New

Citizens Action League v. Kizer, 887 F2d 1003 (9th Cir. 1989)

Plaintiffs brought a class action challenging California's practice of recovering Medicaid benefits from former joint tenants of deceased recipients. Plaintiffs argued that the state statute violated controlling federal law. The Ninth Circuit Court of Appeals agreed and reversed the district court. [1]

The federal Medicaid act limits the recovery of correctly paid medical assistance to the benefits paid for individuals 65 and older. States may collect those benefits from the "estates" of the individuals. 42 USC § 1396p(b)(1)(B). "Estates" is not defined in the act or by administrative rule.

The California law at issue authorized the state Medicaid agency to recover such medical benefits through a "*** claim against the estate of the decedent, or against any recipient of the property of that decedent by distribution or survival ***." Plaintiffs contended that "estates" did not include jointly held property which passed by right of survivorship. Defendants submitted a letter from the Health Care Financing Administration (HCFA) to support their position. The letter stated that HCFA had not construed "estates" as being limited to probate estates.

The Court of Appeals held that the California statue was overly broad and inconsistent with federal law. The court's analysis focused on the plain meaning of the statute, and relied upon the presumption that Congress intended to use the common law term in its common law sense. The court also ruled that the HCFA letter was not entitled to judicial deference since it concerned statutory construction and appeared to be written expressly for the purpose of pending litigation. The court concluded that "estates" did not include property formerly held in joint tenancy. Defendants have petitioned the Supreme Court for review.

Commentary: *Oregon's Medicaid recovery statute, ORS 414.105, does not authorize the state to make claims against former joint tenants. However, it does permit the state to make a claim for Medicaid benefits against the estate of a deceased recipient's surviving spouse or against the guardianship or conservatorship estate of a living recipient. Under the Ninth Circuit's analysis in Citizens Action League v. Kizer, Oregon's statute also might be found to be overbroad.*

Penny Davis

1. The district court decision, at 670 F Supp 874 (N D Cal 1987) was noted in Daniel C. Re's article in the July 1989 edition of the *Newsletter.*

Palmer v. White, 100 Or App 37 (1989)

Defendant personal representative appealed a declaratory judgment which upheld plaintiff's partial disclaimers. The validity of the disclaimers permitted the disclaimed property to pass directly to plaintiff, rather than to be held in trust as provided under decedent's will.

Under the will, the residue of decedent's estate was left to a trust which contained a spendthrift provision. Plaintiff was entitled to $200 per month for 10 years. At the end of the 10 year period, plaintiff was to receive 45% of the remaining trust property. The will further provided that, if under any contingency not provided for in the will there was no named or described beneficiary for any property, such property would go to the persons then living who would be entitled to the intestate personal property of the decedent and the decedent's spouse. Plaintiff was the only natural person described by that provision.

Plaintiff filed conditional disclaimers with the defendant disclaiming her right to income and principal from the trust, but only if she would then be permitted to immediately receive the property free of trust.

Held, affirmed. The court of appeals rejected defendant's contention that a disclaimer must specifically disclaim the "right of succession" and found that it is sufficient if it

disclaims an interest in property. The court then held that a disclaimer, under Oregon law, may provide that it will be rescinded if a court holds that it will have an unintended effect. The court also noted that Oregon's disclaimer law does not preclude the disclaimant from receiving the disclaimed property. Consequently, the court concluded that plaintiff's disclaimer created property for which there was no named or described beneficiary and, under the contingency provision of the will, plaintiff was entitled to such property.

Daniel C. Re

Naito v. Naito, 99 Or App 608 (1989)

Wife was appointed conservator of her husband's estate. Husband's sons from a prior marriage filed a petition to remove wife as conservator on the ground of self-dealing. They also requested attorney fees from the estate. The trial court granted the petition to remove wife as conservator, but denied attorney fees to the petitioners. Both parties appealed. Subsequent to the trial court's order granting the petition, husband died.

Held, wife's appeal moot, petitioners' appeal on attorney fees affirmed. The Court of Appeals found that the trial court's order removing wife as conservator was final for purposes of appeal, even though it required wife to file a subsequent accounting. This was so because the main purpose of the action was to remove wife and the accounting was incidental to the action. However, when husband died, the conservatorship was terminated and wife's appeal became moot. On the petitioners' claim for attorney fees, the court found that the evidence did not establish that their petition to remove the wife as conservator benefitted the estate.

Daniel C. Re

Estate of Whitlatch v. Richardson, 99 Or App 548 (1989)

Richardson appealed from a judgment dismissing her petition to probate in Oregon a signed handwritten document. The evidence established: that the decedent might have written the document in California; that after the handwritten document was prepared, its provisions were then typed and the typed document was signed by decedent and his signature was notarized; and that decedent took possession of the typed document. The trial court found that the typed document was intended to be the decedent's will and, since it was not properly witnessed, the decedent died intestate.

Held, affirmed. The handwritten document, if executed in California and intended as the decedent's will, would be valid in Oregon. ORS 112.255(1)(c). In this case, even if the document was executed in California, the evidence indicated that the typed document, not the handwritten one, was intended to be the decedent's will. Since that document was not properly witnessed, it was not valid under the laws of California or Oregon and could not be probated.

Daniel C. Re

Bryan v. Eastside Free Methodist Church, 99 Or App 698 (1989)

The personal representatives of an estate appealed the trial court's order sustaining Eastside Free Methodist Church's (Church) objection to discharge of the personal representatives and awarding a judgment against them. The personal representatives, contrary to decedent's will and the decree of final distribution, only distributed to the Church part of the property to which the Church was entitled. The personal representatives argued that the actual distribution was consistent with an oral agreement with the Church.

Held, affirmed. A decree of final distribution is a conclusive determination of the persons entitled to the estate, subject only to appeal and the court's power to vacate the decree. ORS 116.113(4). The personal representatives had no authority to make an inconsistent distribution.

Daniel C. Re

Legislative Committee Report

Although 1990 is an off-year for the legislature, the Estate Planning and Administration Section has a busy agenda of Legislative projects for refinement and submittal to the 1991 Legislature.

The legislative projects on the drawing board (and their project leaders) are:

1. Trust statute construction legislation, wherein the statutory law of anti-lapse, divorced spouse, advancements, etc., applied to wills may also be applied to trusts (Bob Dayton).
2. Spouse's elective share legislative modification to a sliding-scale approach, depending on the length of marriage (Chuck Mauritz).
3. Guardianship and conservatorship code simplification (Ron Bailey).
4. Special needs trust facilitating legislation (Sarah Baker and Shirley Bass).
5. Uniform probate accounting legislation (Jim Perry).
6. Funeral arrangements — who has the statutory authority (Laurence Thorp).
7. Disclaimer statute (Laurie Caldwell-Lee).
8. Contract to make a will/will contest due process modification, statute of limitations and evidentiary revisions (Walter Crow).
9. Power of Attorney — property (Mike Sandoval).
10. Disposition of personal property by separate memo (Don Denman).
11. Alternative dispute resolution (Chris Brown).

All bar members are invited to join the Estate Planning and Administration Section and become active in the section's Legislative Committee. There are no waiting lists or nomination intricacies.

Interested persons should contact Warren Deras, legislative committee chair, at 222-0106 in Portland.

Reprinted from *For the Record*, January 1990

CLE Committee

Gretchen Morris, Chairman of the CLE Program Planning Committee, is seeking volunteers to help plan the Section's CLE program which is set to be given in November 1990. The topic for the program is basic estate planning.

Please contact Gretchen Morris directly at 810 SW Madison Avenue, Corvallis, Oregon 97333, (503) 754-1411.

Notice

Practitioners who are planning for closely held businesses or their owners should read Treasury Notice 89-99, 1989-38 IRB 4, which provides guidance with respect to selected issues arising under IRC § 2036(c).

Calendar of Seminars and Events

The following is a selective schedule of seminars which may be of particular interest to Section Members:

APRIL 23-27, 1990 (ALI-ABA), "PLANNING TECHNIQUES FOR LARGE ESTATES", Waldorf Astoria, New York, New York, Telephone: 1-800-253-6397

APRIL 30 - MAY 1, 1990 (SPONSORED BY NEW YORK UNIVERSITY), "TRUSTS & ESTATES", Grand Hyatt, Park Avenue at Grand Central, New York, New York, Telephone: (212) 790-1320

MAY 3 - 5, 1990 (ABA), "SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW", Spring CLE and Committee Meeting, Marriott's Orlando World Center Hotel, Orlando, Florida, Telephone: (312) 988-5263

MAY 18, 1990 (WILLAMETTE UNIVERSITY, COLLEGE OF LAW), "11TH ANNUAL WILLAMETTE TAX CONFERENCE", Willamette University, Salem, Oregon, Telephone (503) 370-6046, Anastasia Tibbetts

JUNE 4 - 5, 1990 (SPONSORED BY NEW YORK UNIVERSITY), "TRUSTS & ESTATES", Beverly Hilton, 9876 Wilshire Boulevard, Beverly Hills, California, Telephone: (212) 790-1320

JUNE 18 - 22, 1990 (SPONSORED BY UNIVERSITY OF WISCONSIN AT MADISON, SCHOOL OF LAW), "ESTATE PLANNING IN DEPTH", University of Wisconsin, School of Law, Madison, Wisconsin, Telephone: 1-800-253-6397

JULY 16 - 20, 1990 (SPONSORED BY NEW YORK UNIVERSITY), "TAXATION OF TRUSTS AND ESTATES", Waldorf Astoria, New York, New York, Telephone: (212) 790-1320

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newsletter

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Conflicts of Interest Between Lawyer and Client

This article is the fifth in a series discussing conflicts of interest. The prior three articles dealt with conflicts of interest *between clients*. This article, however, focuses on a very different sort of conflict: one which arises when the interests of *a client* and those of *the client's own lawyer* differ.

DRs 5-101 through 5-104 all cover potential conflicts between a client's interests and the lawyer's own interests. Several of these rules, however, will rarely apply to the lawyer engaged in estate planning and administration. These rules will be mentioned only briefly, to illustrate some of the situations which can give rise to conflicts between lawyer and client.

DRs 5-102, 5-103, and 5-104(B) all apply to situations in which a trial lawyer's exercise of professional judgment on behalf of a client might be compromised by the lawyer's competing interests. DR 5-102, for example, in most cases prohibits a lawyer (though not other members of the lawyer's firm) from acting as an advocate at a trial in which the lawyer is likely to be a witness on behalf of the lawyer's client. DR 5-103(A) prohibits a lawyer from acquiring any proprietary interest in the client's litigation, other than legally permissible contingent fees or liens to secure the payment of fees and expenses; DR 5-103(B) prohibits advancing or guaranteeing financial assistance to a client in connection with litigation, unless the client remains ultimately liable to the extent of the client's ability to pay. DR 5-104(B) prohibits a lawyer from negotiating with a client for media rights to the client's story prior to the conclusion of the representation.

Unlike the rules mentioned above, DR 5-101 and DR 5-104(A) are extremely important for every lawyer engaged in estate planning and administration. In particular, lawyers must be familiar with DR 5-101(A) and DR 5-104(A), which set forth two general rules of wide application. These two rules are similar in certain respects and will often need to be considered simultaneously, but their focus is somewhat different.

The ethical question addressed by DR 5-101(A) is whether a lawyer may *accept employment* by a particular client, even though the lawyer's own interests may potentially conflict with the client's. This rule generally prohibits a lawyer from accepting employment if the exercise of the lawyer's professional judgment on behalf of the prospective client "will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests."

DR 5-104(A), unlike DR 5-101(A), assumes that a professional relationship *already* exists between lawyer and client. Where such a

INDEX

relationship exists, DR 5-104(A) generally prohibits a lawyer from *entering into a business transaction* with the client "if they have differing interests therein and if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client."

(The actual reach of DRs 5-101(A) and 5-104(A) is in fact somewhat broader than their literal language would suggest. The Oregon Supreme Court has held that these two DRs preclude not only the lawyer's *accepting* employment or *initially* entering into a business transaction, but also *continuing* representation of the client when a conflict of interest later develops. See *In re Moore*, 299 Or. 496, 504-05, 703 P.2d 961 (1985), and *In re Griffith*, 304 Or. 575, 630-31, 748 P.2d 86 (1987). In addition, the Board of Governors recently approved a proposed amendment to DR 5-101(A) that would codify the *Moore* holding. Thus, the lawyer may need to reassess the situation as circumstances change.)

Despite their difference in focus, both DR 5-101(A) and DR 5-104(A) share one important feature. Under either rule, an otherwise impermissible conflict can always be waived by client consent, provided "full disclosure" has been made. As defined in DR 10-101(B), "full disclosure" requires the lawyer (1) give an explanation sufficient to apprise the client of the potential adverse impact of giving consent, (2) recommend that the client seek independent legal advice to determine if consent should be given, and (3) confirm the disclosure contemporaneously in writing.

Obviously, one way to avoid violations of DRs 5-101(A) and 5-104(A) is to understand the operation of the rules themselves and to be sensitive to the situations in which ethical problems most frequently arise. The chief purpose of this article is to illustrate how the rules operate in common situations, using Oregon disciplinary cases and ethics opinions.

Perhaps the most effective way to avoid violations of these two DRs, however, is to adopt a relatively conservative approach to the practice of law. Particularly in the case of lawyer-client conflicts, a lawyer's philosophy of practice may dramatically increase or decrease the risk that ethical violations will occur. Opportunities abound for lawyers to "wear more than one hat" by joining with clients in business ventures, inviting appointment as a fiduciary, operating ancillary businesses to which clients may be referred, and so forth. The economic incentives may seem irresistible. Moreover, proceeding despite the ethical risks may often seem to the lawyer to be in the client's own best interests. Nonetheless, a lawyer who chooses a more aggressive approach to practice should first consider the risks carefully, and should then be prepared to apply the ethical rules meticulously.

DR 5-101

DR 5-101(A) is a very broad rule which may apply in a wide variety of situations. Regardless of the circumstances, however, the rule in effect requires the lawyer to proceed in the following manner before accepting or continuing employment by a client;

> (1) The lawyer must identify any "financial, business, property, or personal interests" of the lawyer which may bear on the representation.
>
> (2) If any such interest exists, the lawyer must decide whether the lawyer's exercise of independent professional judgment "will be or reasonably may be affected."
>
> (3) If the lawyer's judgment will be or reasonably may be affected, the lawyer may proceed only if the client consents after full disclosure.

In all too many cases, Oregon lawyers have simply been oblivious to conflicts involving their own self-interest. A recent example of the unfortunate results is *In re Carey*, 307 Or, 315, 767 p.2d 438 (1989).

Carey, an experienced and respected probate lawyer, had been appointed as guardian/conservator for the estates of an elderly woman and her two retarded sons, all of whom were close friends as well as clients. Because he was concerned that their financial resources would be inadequate to pay for nursing home care, Carey made several loans to personal friends (including his legal secretary) from the assets of the estates at interest rates higher than those available at a financial institution. He did not consult with his clients or with the court prior to making the loans, nor did he advise that independent,legal advice be sought. The Oregon Supreme Court issued a public reprimand, notwithstanding the court's finding that Carey acted out of ignorance, that he was motivated by kindness rather than self-interest, and that his clients suffered no economic loss because Carey personally satisfied the bad loans.

The court in *Carey* held that DR 5-101(A) applied to two of the loans involved. In one instance, the court found that Carey's' personal guarantee of the loan gave him a "financial interest" which "Could have been affected" by the loans. As to the loan made to Carey's secretary, the Court found that Carey's independent judgment "reasonably may have been affected" by his "personal relationship" with his secretary, citing the prior case of *In re Harrington*, 301 Or. 18, 718 P.2d 725 (1986), involving a similar loan. Since Carey failed to satisfy the disclosure and consent exception to DR 5-101 (A), both loans were ethically improper. [*Note*: As to the latter loan, *Carey* states in dictum that loaning estate money to a lawyer's partners, associates, or employees is *per se* unethical, and that "[n]o amount of disclosure" can cure such an "actual conflict." *Id.* at 318. This conclusion seems to contradict the language of DR 5-101(A) and may well be incorrect, but lawyers must be aware that such loans are especially risky.]

Several earlier disciplinary cases illustrate other situations in which a lawyer may be disciplined for failing to identify and deal appropriately with existing financial or business interests. See *In Anson*, 302 Or. 446, 730 P.2d 1229 (1986) (lawyer arranged for client to purchase security devices without informing her that he and his wife owned the firm making the sale); *In re Germundson*, 301 Or. 656, 724 P.2d 793 (1986) (lawyer undertook to represent the estate of a deceased client when the lawyer

owed the estate $60,000 borrowed from the client prior to the client's death); *In re Moore*, 299 Or. 496, 703 P.2d 961 (1985) (lawyer continued to represent multiple clients in connection with the purchase of a corporation despite outstanding loans to the lawyer from two of the clients); *In re Boyer*, 295 Or. 624, 669 P.2d 326 (1983) (lawyer had a financial and business interest in the negotiation of a loan transaction between two clients due to the lawyer's expectation of a finder's fee and of continued representation of one client in connection with development of property); *In re Brown*, 277 Or. 121, 559 P.2d 884 (1977) (lawyer undertook to represent the personal representative of a deceased client's estate, despite an outstanding note from the lawyer to the client, the lawyer's potential liability to the estate arising from a prior business relationship with the client, and conflict over a buy-sell agreement with the client).

Various Oregon ethics opinions likewise illustrate situations in which a lawyer's self-interest mandates compliance with DR 5-101(A). Of particular relevance for estate planners is Oregon Ethics Op. 525 (1989), holding that a lawyer who serves on a charity's board of directors may represent a client in drafting a unitrust or will in favor of that charity only if the client's consent is obtained after full disclosure. See also Oregon Ethics Op. 526 (1989) (lawyer representing city when lawyer's partner is city mayor), Op. 502 (1984) (possible personal and financial interests where lawyer-spouses or their firms represent opposing clients), Op. 475 (1982) (sexual relations with divorce client), and Op. 461 (1981) (lawyer as director or shareholder of corporation that is lawyer's client).

Lawyers engaged in estate planning and administration must be especially sensitive to two situations in which DR 5-101 applies, The first involves gifts or bequests from clients; the second, appointment of the lawyer as a fiduciary.

As to client gifts or bequests, Oregon lawyers should be aware that DR 5-101(B) now explicitly forbids *preparing an instrument* giving the lawyer or the lawyer's parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee. No rule explicitly forbids accepting such a gift from a client who has obtained independent legal advice, but doing so is clearly fraught with risk. See also Oregon Ethics Op. 468 (1981) (lawyer may prepare a will for his mother and father naming him as a devisee along with his siblings, and may serve as attorney for the estate with the consent of all concerned, but serving as attorney "should not be encouraged" because of the potential for conflicts).

As to fiduciary appointments, a number of Oregon ethics opinions acknowledge that an Oregon lawyer may accept appointment as a personal representative or other fiduciary. See, e.g., Oregon Ethics Op. 444 (1980) and Op, 441 (1980). However, EC 5-6 suggests that the lawyer should not "consciously influence" a client to make such an appointment, and the Oregon Supreme Court has warned that lawyers who serve in a dual role "would be well advised to carefully peruse" DR 5-101, *In re Coe*, 302 Or. 553, 568, 731 P.2d 1028 (1987). At a minimum, the lawyer must carefully comply with the disclosure and consent requirements of DR 5-101(A). (For a discussion of risks surrounding fiduciary appointments, see deFuria, *A Matter of Ethics Ignored: The Attorney-Draftsman as Testamentary Fiduciary*, 36 Kan. L. Rev. 275 (1988), and Laurino, "The Duties and Responsibilities of the Attorney/ Fiduciary," 19 U. Miami Inst, on Est. Plan. 1600 (1985). An ABA Task Force has been working on a Statement of Principles governing attorneys in fiduciary roles.)

DR 5-104 (A)

One of the easiest ways to commit an ethical violation is to become involved with clients in business transactions. To avoid violating DR 5-104(A), the lawyer must proceed as follows:

(1) The lawyer must determine whether the proposed conduct involves a *business transaction* with a *client.*

(2) If so, the lawyer must decide:

(a) Whether the lawyer and the client have *differing interests* in the transaction, and

(b) Whether the client *expects the lawyer to exercise the lawyer's professional judgment* for the client's protection.

(3) If all the above elements are present, the lawyer may proceed only if the client *consents* after *full disclosure.*

The lawyer who is sensitive to conflicts issues should find it fairly easy to identify a "business transaction." The type of transaction which most often leads to discipline under DR 5-104(A) is borrowing money from clients without disclosure and consent. See, e.g., *In re Germundson*, 301 Or. 656, 724 P.2d 793 (1986); *In re Montgomery*, 292 Or. 796, 643 P.2d 338 (1982); and *In re Drake*, 292 Or. 704, 642 P.2d 296 (1982). But lawyers also risk ethical violations when they become involved in other types of business transactions with their clients. See, e.g., *In re Bishop*, 297 Or 479, 686 P.2d 350 (1984) (guarantee of client's bank loan); *In re Gant*, 293 Or, 130, 645 P.2d 23 (1982) (business partnership); *In re Brown*, 277 Or. 121, 559 P.2d 884 (1977) (business corporation); and *In re Boivin*, 271 Or. 419, 533 P.2d 171 (1975) (lease of building owned by lawyer).

Once a "business transaction" has been identified, in most cases a lawyer will be able to proceed only if full disclosure is made and client consent obtained. Rarely will the interests of the lawyer and the client in the transaction be identical, rather than "differing." Ordinarily, a court will infer that a client "expects" the lawyer to exercise professional judgment, even in the absence of direct evidence. See *In re Luebke*, 301 Or. 321, 327-29, 722 P.2d 1221 (1986). A lawyer on occasion may be able to establish that the other party to a business transaction is not a "client," but the prudent lawyer will nonetheless want the protection of full written disclosure. See Oregon Ethics Op. 506 (1986) (lawyer contributing legal services in exchange for a partnership interest first advised prospective partners of potential conflicts and of fact that lawyer would not be repre-

senting them).

If a lawyer wishes to avoid violating DR 5-104(A), the safest course is *never* to enter into a business transaction with clients, no matter how much business sophistication and experience those clients may have. A lawyer who decides to proceed with such a transaction should be aware that disclosure and consent alone will often not be enough to protect against ethical violations. Rather, the lawyer should insist from the start that the client obtain independent advice from competent legal counsel. Moreover, in order to ensure malpractice coverage under the Professional Liability Fund, the lawyer must be careful to comply with Section I.3(h) of the PLF Plan by promptly executing Disclosure Form DR 5 and forwarding it to the PLF.

For further discussion of business transactions with clients, see Multz, "Lawyer-Client Business Transactions: Caveat Counselor," 3 Georgetown J. Legal Ethics 391 (1989).

The next article in this series will address conflicts of interest arising from the lawyer's relationship with third parties who are not clients.

Valerie J. Vollmar

Annual Meeting

The Annual Meeting of the Estate Planning and Administration Section will be held on Thursday, October 4, 1990 from 5:00 to 6:00 p.m. at the Portland Convention Center. The election of new members of the Executive Committee will be held at the annual meeting.

IRS Concedes Joint Tenancy Disclaimers Effective

The long-standing position of the IRS, articulated in Treas. Reg. 25.2518-2(c)(4)(i), has been that the survivorship interest in joint tenancy property could only be disclaimed within nine months following *creation* of the joint tenancy, not nine months from the date of death of the first joint tenant to die. This issue has been litigated frequently, on the basis of state law, with the IRS recently losing a number of significant cases. *See McDonald v. Com'r.*, 853 F.2d 1494 (8th Cir. 1988).

The IRS Chief Counsel's office has now recommended acquiescence in the *McDonald* decision, and indicates that the disclaimer regulations will be revised. If the joint tenancy was severable by either joint tenant during life, the survivorship interest that passes upon the death of the first joint tenant is now disclaimable by the survivor. As a matter of state property law, ORS 105.627 already permits disclaimers by surviving joint tenants. However, if the property is a tenancy by the entirety, it is not severable and the IRS will measure the nine-month time limit for the survivor's disclaimer from the date of creation of the tenancy. If the property is real property held pursuant to ORS 93.180 with right of survivorship, the IRS will measure the nine-month time limit from the date of creation of the tenancy unless the tenancy is severable by either "joint tenant" during life.

For many years it has been common and appropriate practice to advise married clients with aggregate estates over $600,000, and all property jointly held, to divide a portion of their joint tenancy property into the separate names of the joint tenants. The purpose was to permit funding of a credit shelter bypass trust which could not be accomplished by disclaimer of joint tenancy property. Now joint tenancy personal property can be disclaimed. If the deceased spouses's will has a disclaimer credit shelter trust, a disclaimer of the survivorship interest will cause the deceased spouses's interest in the property to pass to his or her probate estate, and a second disclaimer by the surviving spouse can fund the disclaimer credit shelter trust.

Stephen O. Lane

What's New

Mest v. Dugan, 101 Or App 196 (1990)

Plaintiff, a trust beneficiary, filed an action against the trustees for damages based on a breach of fiduciary duty in managing trust assets. The trustees had leased trust real property to themselves without determining the fair rental value of the property. The trial court found that the lease allowed self-dealing by the trustees and limited the trustees' liability to actions taken in bad faith. It then held that the trustees' failure to determine the fair rental value prior to executing the leases constituted bad faith and awarded damages to the plaintiff.

On appeal, the court of appeals held that an exculpatory clause in a trust document may relieve a trustee of personal liability provided it does not completely eliminate liability. Since the clause in this case imposed liability for bad faith, it was a valid provision. The court then stated that bad faith did not require an intentional or conscious element. Bad faith exists whenever a trustee ignores the interests of the beneficiaries. While the lease of the trust property to themselves was permissible, the trustees' failure to determine the fair rental value of the properties at the time the leases were executed constituted bad faith because that information was essential to the beneficiaries' interests.

Daniel C. Re

Masters v. Bissett, 101 Or App 163, 101 Or App 184, and 101 Or App 239 (1990).

These appeals arose out of five separate cases between the same parties, the trustee and the beneficiaries of three separate trusts. Each case involved the propriety of actions taken or requested by the trustee. This summary is not intended to examine every issue raised in the appeals, but serves merely to review some of the major points that were discussed. You are encouraged to read the text of each opinion to fully understand the facts involved in the case and all of the issues which were resolved.

Burden of Proof. The court held that in an action by trust beneficiaries seeking *damages* against the trustee for breach of fiduciary duty and undue influence, the beneficiaries have the burden of proving that improper conduct occurred. In an *accounting* case, however, in which certain expenses incurred by the trus-

tee are questioned, the trustee has the burden of proving that the expenses were reasonable, proper, and for trust purposes. This burden will be met where the trustee establishes that the expenses were authorized by the trust and were directly related to it, such as expenses for a legal opinion on whether a proposed action was authorized by the trust. The burden will not be met if the expenses are primarily for the trustee's personal benefits as in the case of expenses for the preparation of a document intended to release the trustee from personal liability.

Undue Influence. An inference of undue influence exists when both a confidential relationship exists and suspicious circumstances have occurred. The existence of a confidential relationship requires that one person place trust and confidence in a second person with the result that the second person is in a position of superiority or influence over the other. Without a showing that the second person was in a position of dominance over the other, there can be no confidential relationship and, therefore, no inference of undue influence, even if suspicious circumstances existed.

Indemnity of Trustee Expenses. If a trustee distributes trust assets prior to approval of the trustee's accounting by the trust beneficiaries or the court, reasonable expenses incurred by the trustee after the distribution cannot be recovered from the trust beneficiaries personally or from the distributed trust property.

Distribution of Trust Property. In this case, the trustee was also a trust beneficiary. The trust provided that final distribution was to be based on the fair market value of the trust property on the distribution date and that the trustee's decision on distribution of specific assets was binding and conclusive on all parties. The trustee distributed the trust's only income producing asset to himself while distributing non-income producing assets with the required fair market value to the other beneficiaries. The trial court ordered the income producing asset to be distributed to all beneficiaries as tenants-in-common. The court of appeals upheld the trial court's redistribution of that trust asset under ORS 128.135(2)(c) and (6) because the initial distribution was at least partially motivated by an improper motive to benefit the trustee at the expense of the other beneficiaries.

Daniel C. Re

Seminar

The Estate Planning and Administration Section is sponsoring a CLE program entitled "Basic Estate Planning" on Friday, November 2, 1990 at the Portland Convention Center, 777 N. E. Martin Luther King, Jr. Blvd., Portland, Oregon. The program's topics will include the concepts of basic estate planning; simple will provisions; planning for minor children; trusts and other alternatives to wills; related estate planning documents; planning for special situations; practice management; and drafting techniques.

New Notarial Act

All attorneys and their staff who are notaries should read the amendments to ORS 194.005 to 194.210. This note is only for the purpose of bringing certain exceptions listed in the Administrative Rules to the members' attention and is not an analysis of the new provisions. OAR 164-100-230 provides that a notary public is not required to record in a notarial journal any information about certain notarial acts performed or documents notarized by the notary public, including: administering an oath or affirmation; certifying or attesting a copy of a document; and affidavits. The Secretary of State is also considering issuing a temporary regulation that would except the verification of pleadings from the journal recording requirement. The Secretary had not made a decision about this exception at the time of publication.

Helen Rives-Hendricks

Preventive Planning for Health Care Decisions

Planning for the client's possible incapacity is an integral part of estate planning, no less important than the centerpiece of the process, the testamentary document. As estate planners and family legal advisers, practitioners have a strong responsibility to educate themselves to draft documents that will work. That job just got a bit easier.

Effective October 3, 1989, Oregonians have available to them a statutory form for a power of attorney for health care (PAHC), ORS 127.505-.585. Practitioners now have a new legal stratagem in their repertoire of preventative planning tools for a client's possible incompetency. Prior to the new law, practitioners were forced to draft creative documents based on the consent rules under general tort theory, the common law right of self-determination, the Constitutional right of privacy (both Oregon and federal), and perhaps an extension of the general durable power of attorney. Health care providers understandably were often reluctant to accept such documents.

With its enactment, Oregon joins some fifteen other states with such laws. At least ten additional states have proposed acts pending in 1990. Also, in October 1989, Senators John C. Danforth (R.-Mo.) and Daniel P. Moynihan (D.-N.Y.) introduced a bill titled "Patient Self-Determination Act of 1989" (U.S. Senate, Bill S.1766 101st Congress First Session) which mandates a kind of health care Miranda warning requiring institutions that receive federal funding to notify all patients of their right to self-determination and of the availablilty to them of living wills and durable powers of attorney forms. Attempts at uniform acts include the Uniform Rights of the Terminally Ill Act, Uniform Right to Refuse Treatment Act, Medical Treatment Decision Act and Uniform Model Health-Care Consent Act.

Note that the new statute mandates a specific form. Practitioners with clients who have existing "common law" forms should notify clients ac-

cordingly.

Comparison with Living Will

The PAHC differs from a so-called Living Will, more properly known as a Directive to Physicians, ORS 127.605-.650, in that the latter simply establishes a written statement or directive to the attending physician prohibiting certain life-sustaining procedures in the event of a diagnosis of terminal illness. By using a PAHC, the principal appoints an agent to make health care decisions in the event of his or her future incompetency. Statutory language must be used in both advance directives. However, the authority of the attorney-in-fact under a PAHC supersedes both a Living Will and a court-appointed guardian and/or conservator. ORS 127.545. It is important to note that in the event a terminally ill person has not executed a Living Will, decisions regarding withdrawal of life-sustaining procedures may be made by a hierarchy of decisionmakers, starting with the closest family members. ORS 127.635. This fact is important to remember when planning for a client desiring a non-family decisionmaker who may better understand that client's beliefs and desires.

Principal Requirements

Anyone who is a competent adult, age 18 or over, can execute a PAHC. Of course, these requirements eliminate minors, adults who have become incompetent, and adults who have never been competent.

Choice of Attorney-in-Fact

Like the "financial" general durable power of attorney, ORS 127.005-.015, the PAHC not only allows the principal to appoint an agent ("attorney-in-fact"), but also allows the principal to specify the scope of the agent's authority. Crucial to the efficacy of the PAHC is the client's choice of decisionmaker. The attorney's role as counselor can greatly assist the client in the proper choice. Certainly a different set of personality traits come into play with regard to health care decisions than for financial management. Many clients will have no one appropriate for the task and will have to depend upon the Directive to Physicians.

Once the choice of agent is made, the client should fully air his or her beliefs, attitudes and desires. The agent's mandate is to act consistently with the desires of the principal as expressed in the PAHC unless otherwise made known to the attorney-in-fact at any time. ORS 127.534(4). This subjective standard is the so-called, misnamed "substituted judgement" standard referred to in *In re Quinlan*, 355 A.2d 647 at 663 (1976). The decision is based on the patient's subjective preferences before becoming incompetent, which are determined by evaluating past expressions, general attitudes and beliefs. Therefore, it is vital that the principal delineate his or her desires as clearly as possible to the attorney-in-fact, probably in writing.

If that instruction is lacking, then "the attorney-in-fact has a duty to act in what the attorney-in-fact in good faith believes to be in the best interest of the principal." This second-level objective standard is the best interest standard, one quite familiar to attorneys representing guardians. Although vague and paternalistic, this standard requires the decisionmaker to "assess what medical treatment would be in the patient's best interests as determined by such objective criteria as relief from suffering, preservation or restoration of functioning and quality and extent of sustained life. *Rasmussen v Fleming*, 741 P.2d 674 at 689 (1987).

Scope of Agent's Authority

Unlike the all-encompassing general durable power of attorney, ORS 127.530 limits the PAHC to health care decisions which are defined as "consent, refusal of consent or withdrawal of consent to health care." This authority includes "all the authority that the principal would have if not incapable...," including the right to receive, review, and consent to the disclosure of medical records. However, the attorney-in-fact is not personally responsible for the principal's health care costs, ORS 127.535.

Note that the PAHC is not the appropriate document for the client's funeral instructions or anatomical gifts. A separate writing, such as an authorization to inter or cremate under ORS 97.141 or direction to make an anatomical gift under ORS 97.275, would be the proper vehicle.

The statute does not authorize the attorney-in-fact to consent to the following procedures: (1) commitment to or placement in a mental health facility, (2) convulsive treatment, (3) psycho-surgery, (4) sterilization or (5) abortion.

Triggering Events and Termination

Contrary to Oregon's general durable power of attorney, the PAHC is of the "springing" type, i.e., it does not go into effect until the triggering event occurs. The triggering event is the determination by the principal's attending physician and one other attending physician that the principal is "incapable." This incapability is defined as the impairment of ability to receive and evaluate information effectively or communicate decisions to such an extent that the principal presently lacks the capacity to make health care decisions. At this point, the attorney-in-fact has the affirmative duty to make health care decisions or to withdraw. ORS 127.510-525.

A PAHC can be revoked by a number of events. These include:

1. Revocation by the principal, either orally or in writing, without regard to the mental or physical condition of the principal.

2. Seven years after the execution of the PAHC. The statute, ORS 127.501(2) is unclear just which date controls here: (a) the date the principal signed, (b) the date the witnesses signed, or (c) the date one or both attorneys-in-fact accept their appointment. In any event, the attorney would be well advised to docket the client's file for approximately six years (from the earliest date) to remind the client to "renew" his or her PAHC. Hopefully, this automatic termination date will ultimately be removed by the legislature. Otherwise, we will see many PAHCs inadvertently revoked. Note that if the principal is incompetent at the end of the seven years, automatic revocation does not occur at that

time.

3. If both the attorney-in-fact and his or her alternative, if any, withdraw.

4. The principal dies.

New Presumption Codified

The new statute codifies a troublesome new presumption. ORS 127.580 now presumes that every person who is temporarily or permanently incapable has consented to artificially administered hydration and nutrition (water and food). While such consent has traditionally been assumed by the medical community, its codification requires an extra step in completing the statutory form, if the client wishes to overcome the presumption.

What to do? First, the principal must check the box stating "Withholding or withdrawal of artificially administered hydration or nutrition or both with the understanding that dehydration, malnutrition and death may result." By doing so, the client simply authorizes his attorney-in-fact to make such a decision. If the principal wishes to make clear his or her desires with regard to this decision, then either (a) that fact must be written in the limited space provided in the form or in an addendum which is incorporated by reference, or (b) the client can utilize the 1990 Stevens-Ness version which provides additional boxes to check. These boxes, a total of four, are mutually exclusive in a general yes/no pattern.

The second set of boxes deals with yet another potential pitfall for the client and practitioner. It relates to withholding or withdrawal of "life-sustaining procedures" (basically medical procedures or intervention that utilizes mechanical or other artificial means). Such procedures have been included in the list of limitations on the authority of the attorney-in-fact ORS 127.540(6). Like the nutrition and hydration issue, this limitation can be negated by the client by (a) checking the box in the body of the PAHC form and (b) adding an addendum or checking the additional box in the new Stevens-Ness form.

Addendum

When is an addendum to the statutory form advised? The intent of the legislation, of which Senator Bob Shoemaker was a chief architect, was to create a legal tool that could be understood and used by the general public without the aid of an attorney. However, if your client has been diagnosed with a specific disease, such as AIDS, Alzheimer's Disease, Lou Gehrig's Disease, Multiple Sclerosis, etc., then the prognosis will generally be known, and the PAHC can be tailored to the progress of the disease. Some issues which may be included in an addendum are: admission or discharge from any hospital, nursing home, residential care, assisted living or hospice service; waiver or release of a health care provider from liability; pursuit of legal action and damage suits; nomination of a guardian; religious beliefs; philosophy regarding life-sustaining procedures in the face of certain events; wishes with regard to resuscitation of cardiac arrest whether it be DNR ("do not resuscitate," also known as "no code") or its opposite, Code Blue (intervene by means of cardiopulmonary resuscitation or CPR), or somewhere in between, such as "no pounding on my chest because I'm 80 years old and my ribs will break" or "no endotracheal tube."

Another possible area for consideration is the issue of a secondary condition. AIDS patients in particular might want to authorize refusal to consent to aggressive treatment of a secondary infection when there is no reasonable expectation of recovering from the primary illness.

Forms and Copies

The Oregon Medical Association printed and distributed thousands of copies of the statutory form to its member physicians. Oregon Health Decisions, a nonprofit agency located in Portland, publishes a booklet entitled "Making Health Care Decisions" which contains forms and instructions. As mentioned above, the Stevens-Ness form, No. 1241, was revised in early 1990 to include an addendum to take care of the problems mentioned above relating to (1) the new presumption of consent to artificial nutrition and hydration, and (2) the extra step required to consent to withdrawal of life-sustaining procedures. If the practitioner uses this form, it is advisable to line out by typewriter or pen the unwanted choices and have the principal and witnesses initial (and perhaps date) the boxes which have been checked.

Once executed, a number of copies should be made for (1) the attorney, who may choose to retain the original, (2) the client's regular doctor, (3) the attorney(s)-in-fact, (4) relatives and (5) the client, any time he or she goes to the hospital or travels.

If the client travels a good deal to another state that also authorizes a statutory form, then the client should consider executing that state's form as well.

The Reluctant Planner

Many estate planners may be reluctant to broach the subject of advance directives because the medical jargon is unfamiliar or the subject is uncomfortable. To be sure, at least a passing knowledge of the terminology must be learned if one is to practice in this area. And, if one is to be a true counselor and not merely a drafter of wills and tax technician, then the subject of possible incapacity must be addressed in the same manner as one discusses trusts and buy/sell agreements. At a minimum, the availability of the new planning tool should be explained to the client.

Shirley A. Bass

Health Law Seminar

Thursday, October 4, 1990, the Health Law Section of the Oregon State Bar will present a seminar entitled, "The End of Life". The seminar will be at the Red Lion, Lloyd Center, from 7:30 to 9:00 a.m. and is held in conjunction with the Annual Meeting of the Oregon State Bar. There is no charge for the seminar, which is open to attorneys, physicians, and other interested persons.

The speakers will discuss the practical dilemmas faced when dealing with individuals who are at the end of life. Topics include the practical aspects of advanced directives, estate planning, anatomical gifts and medical/ethical considerations.

Calendar of Seminars and Events

The following is a selective schedule of seminars which may be of particular interest to Section Members:

- July 16-20, 1990 (Sponsored by New York University, ALI-ABA) TAXATION OF TRUSTS AND ESTATES, Waldorf Astoria, New York, New York. Telephone: (800) 253-6397
- July 24, 1990 (Sponsored by National Business Institute, Inc., Oregon MCLE) ESTATE AND PROTECTIVE PLANNING TECHNIQUES IN OREGON, Red Lion Jantzen Beach, 909 N. Hayden Island Drive, Portland, Oregon. Telephone: (715) 835-7909
- September 13-14, 1990 (Sponsored by Practicing Law Institute) ESTATE PLANNING, Holiday Inn - Union Square, San Francisco, California. Telephone: (212) 765-5700, Ext. 271
- October 11-12, 1990 (Sponsored by Practicing Law Institute) ESTATE PLANNING, Dorral Inn, New York City, New York. Telephone: (212) 765-5700, Ext. 271
- October 18-20, 1990 (ALI-ABA) CREATIVE TAX PLANNING AND REAL ESTATE, Sheraton Centre Hotel & Tower, New Orleans, Louisiana. Telephone: (800) 253-6397
- October 24-27, 1990 (Sponsored by The Southern California Tax & Estate Planning Forum) TAX AND ESTATE PLANNING, Meridian Hotel, Coronado Island, San Diego, California. Telephone: (800) 332-3755
- October 28, 1990 (Sponsored by the University of Southern California, Law Center) PROBATE AND TRUST, Westin Bonaventure Hotel, Los Angeles, California. Telephone: (213) 743-7557
- November 2, 1990 (Sponsored by the Oregon State Bar Association) BASIC ESTATE PLANNING, New Convention Center, Portland, Oregon. Telephone: 620-0222
- November 8-9, 1990 (Sponsored by Practicing Law Institute) ESTATE PLANNING, Hyatt Regency Hotel, St. Louis, Missouri. Telephone: (212) 765-5700, Ext. 271
- December 2-8, 1990 (Sponsored by NYU School of Continuing Education) 49TH ANNUAL INSTITUTE ON FEDERAL TAXATION, Fairmont Hotel, San Francisco, California. Telephone (212) 790-1320
- December 6, 1990 (sponsored by Sacred Heart General Hospital) CHARITABLE CONTRIBUTION TAX STRATEGIES, Sacred Heart General Hospital, Eugene, Oregon. Telephone: 686-6868
- January 7-11, 1991 (Sponsored by University of Miami, Law Center) 25TH ANNUAL INSTITUTE ON ESTATE PLANNING, Fontainebleau Hilton Resort & Spa, Miami Beach, Florida. Telephone: (305) 284-4762
- January 20-24, 1991 (Tentative Dates) (Sponsored by the University of Southern California, Law Center) TAX CONFERENCE, University of Southern California, University Park, Los Angeles, California. Telephone: (213) 743-7557

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Anatomical Gifts

One aspect of estate planning frequently overlooked is providing for an effective and timely anatomical gift upon the death of the client. An anatomical gift involves no tax consequences or controversy (so long as the client is so inclined), simply the opportunity for any person to do something truly altruistic that can save the life or sight of another.

The legal requirements for the donor are relatively easy. The Uniform Anatomical Gift Act, ORS 97.250, provides that an anatomical gift may be made by any competent person age 18 years or older by simply making a written declaration in the presence of two witnesses. Obviously, such a clause can be included in a Will. The donor should also carry a common wallet-size Uniform Donor Card at all times. The donor card is particularly helpful, as it will alert hospital personnel to the wishes of the decedent without delay. Timing is everything. Delays of as little as four hours may be critical in a heart transplant, and corneas usually must be recovered within six hours. Therefore, attorneys should have donor cards available in the office at the time a Will, Living Trust, or any other estate and health care planning document is signed.

However, like everything else, there are complications. Although the Uniform Anatomical Gift Act has been adopted by all fifty states, its limitations are just as uniform. Difficulties are usually encountered by those procurement agencies responsible for accepting the gift. For practical reasons, including the difficulty of going against the wishes of a family in deep stress, the desire to maintain positive public relations, and concern for liability, the transplant community almost always requires consent of the next of kin before accepting any gift.

Nevertheless, all indications of the intent of the donor are important, since many organ donations are made upon routine inquiry by hospital personnel. In 1985, Oregon became the first state to require all hospital administrators to make a request to the next of kin for medically suitable anatomical gifts, in the absence of actual notice of a contrary intention by the decedent. Those involved in the process of requesting and accepting anatomical gifts stress that the presence of a completed card is often very useful in suggesting to the next of kin that a gift be made. Also helpful is the presence of the D code on the donor's drivers license.

There has been discussion, but no concensus, regarding legislative amendments to the Anatomical Gift Act that would give agencies more authority to accept a gift once made, in the absence of consent of the family. For now the best way for donors to express their intentions, in addition to filling out donor cards, is to specifically inform their next of kin of their wishes. To order a supply of donor cards, attorneys may contact the Oregon Donor Program at 494-7888. Clients expressing a wish to make a whole body donation in this state should make prior arrangements with the Oregon Health Sciences University School of Medicine. It is particularly critical that the donated remains be embalmed as soon as possible. Embalming costs and the cost of transportation to OHSU are borne by the donor, but the cremation and shipping of the remains are paid by the Department of Anatomy, School of Medicine.

INDEX

As medical technology continues to advance, our clients will expect us to advise them on the legal aspects of health care and medical issues, including organ donations. An awareness of the legal requirements to make an effective anatomical gift can only benefit them and the many grateful recipients of the gift of life.

E. Ted Meece

Conservator's Sale of Protected Person's Primary Residence

ORS 126.229 requires that a conservator give notice, provide opportunity for objection and receive court approval before selling a protected person's primary residence. This requires some additional responsibilities for the attorney for the conservator, when the protected person owns a residence, to be sure that the law is carried out and to try to help all parties understand the underlying reasons for the law.

One of the reasons for the statute was to make conservators aware that a person in a long-term care facility may be allowed to keep the home and still receive benefits (Medicaid, VA aid and attendance pension). The attorney needs to address if there is a likelihood that the protected person (or spouse) will return to the home. Will the sale turn the "exempt" asset into cash, subject to being spent on the cost of care? Is the protected person eligible for in-home Medicaid?

When the conservatorship is first established, the conservator should, of course, be told that any sale of the residence requires court permission.

If a sale is contemplated, petitioner's attorney should have the conservator discuss the sale with the protected person's physician to confirm that there is no reasonable likelihood that the protected person will return home or be adversely affected by the news of the sale.

The attorney should also have the conservator discuss the sale with the protected person and, to the extent possible, include the protected person in all aspects of the transaction. Choosing the buyer, often an emotional issue, should not be ignored.

If the protected person is going to object to the sale, the objector's attorney should consider who pays the legal fees of objection. The attorney should seek authorization for the payment of reasonable fees by the court at the time of the filing of the objection.

Various theories of objection may present themselves, such as whether it is necessary to sell the home if the protected person did not *want* it sold. If it is not necessary to sell the home, would selling it hurt the protected person's confidence, independence, well being, mental health, etc.? Again, is there a likelihood that the protected person would return home?

The protected person should generally be allowed to minimize the restraints placed by the guardian and, in fact, should be allowed to return home and receive in-home supervised care, if possible.

A judge will probably give weight in his decision to the following factors:

a) Merely because the protected person wants to keep the home is not sufficient reason to deny the petition for sale. (This assumes that the protected person has some mental capacity).

b) If expert testimony shows that a return home would be medically beneficial to the protected person, then the petition will be denied.

c) If expert testimony shows that there is a reasonable likelihood that the protected person will return to the home, the petition will be denied. If that return home, however, involves significant home-based care and supervision, it is not clear what the outcome would be.

d) Merely because the home may involve an environment more conducive to independence is not sufficient reason to deny the petition.

The emphasis would be on expert testimony.

Because a conservator now has to get court approval for a sale, restricting the home for the purposes of reducing the bond becomes relatively more cost effective. Approval of the sale will require raising the bond amount at the time the order approving the sale is presented to the court, however.

The inventory including the home must be in the court file for the court to consider the petition for sale.

At the time that a sale is contemplated, the attorney should advise that any earnest money agreement include language that the sale is subject to approval by the Court.

Sam Friedenberg

What's New

Roe v. Pierce, 102 Or App 152 (1990).

Prior to his death, decedent had filed a medical malpractice action, which included a claim for loss of consortium by his wife. Decedent subsequently died as a result of the alleged malpractice. His wife was appointed personal representative of his estate and filed an action for wrongful death under ORS 30.020. She also filed, as personal representative, an amended complaint in the medical malpractice action. The actions were settled, and wife petitioned the probate court to approve the settlement, maintaining that the settlement disposed of the estate's claims for personal injuries to the decedent, for the personal representative's loss of consortium, and for wrongful death. The court held that the portion of the settlement attributable to decedent's pain and suffering should, pursuant to ORS 30.075, be payable to decedent's estate, and then be distributed according to his Will. Decedent's children appealed, arguing the damages for pain and suffering should have been apportioned to decedent's heirs under ORS 30.030(5).

The Court of Appeals affirmed the trial court, holding that a claim for pain and suffering may be maintained under either ORS 30.020, with any recovered damages distributed to decedent's heirs, or under ORS 30.075, with any such damages distributed to his devisees. The court noted that any inconsistency or inequity that existed because of this result should be resolved by the legislature.

Daniel C. Re

Day v. Vitus, 102 Or App 97 (1990).

Husband and wife signed a postmarital agreement, the terms of which provided, in part, that each party waived the right to elect against the other's Will. After wife died, husband argued that the agreement did not prevent him from electing against wife's Will because she had not adequately disclosed her property interests to him.

The Court of Appeals affirmed the trial court's judgment that prevented husband from electing against the Will. The court held that, for the husband to

prevail, the weight of the evidence should have shown that he had not received fair and reasonable disclosure of wife's property and financial obligations before he had signed the agreement. In this situation, the agreement stated that full disclosure had been made. The evidence presented in the lower court established that husband had been given adequate opportunity to learn of wife's assets prior to signing the agreement. Husband also had presented no direct evidence of lack of disclosure.

Daniel C. Re

Legal Ethics Opinion 523, March, 1989

Foreign corporation, which is not authorized to practice law in Oregon, markets an estate planning service in Oregon through sales representatives. Included in the sales presentation are samples and explanations of Wills, revocable inter-vivos trusts, and related documents, including deeds, stock agreements and assignments of contract. If a customer "purchases" the service, a purchase agreement obligates the corporation to evaluate the estate planning needs of the customer, select appropriate planning methods, draft the documents, and forward them to the customer's salesman.

Pursuant to an agency contract signed by the customer at the time of purchase, the corporation obtains local counsel for the customer for the express and limited purposes of reviewing the documents for form to determine whether they comply with Oregon law and for following through on their execution. For each service rendered the corporation pays the attorney $200.

An attorney may not ethically represent the customer of the Foreign corporation under these circumstances.

Daniel C. Re

Legal Ethics Opinion 531, March, 1990

Plaintiff sues widow and the estate of widow's late husband in a personal injury tort action. Widow is the duly appointed personal representative of her late husband's estate pursuant to ORS Chapter 113. Attorney A has been asked to represent widow and the estate in this litigation. Widow's and the estate's potential liability to Plaintiff could be different, and there are no other beneficiaries of the estate whose economic interests differ from those of widow.

Under the above circumstances, an attorney does not violate DR 5-105 in agreeing to defend widow individually and in her capacity as personal representative.

Additionally, if widow informs the attorney during the course of their professional relationship that she has breached a fiduciary duty to the estate, the attorney may not disclose the breach to beneficiaries of the estate.

Daniel C. Re

Powers of Attorney Subcommittee Requests Input

The Powers of Attorney Subcommittee is considering whether powers of attorney legislation is needed. Current statutes do not address issues pertaining to powers of attorney that practitioners contend frequently arise. Senate Bill 303, introduced in the 1989 session of the Oregon Legislature, addressed many of these issues, including use of a power of attorney in estate planning matters, requiring third parties (e.g., banks, title companies) to accept the authority of a person purporting to act under a power of attorney, and requiring attorneys-in-fact to keep records of all transactions entered into on behalf of the principal. For various reasons, SB303 was withdrawn.

Some practitioners have commented that, although problems relating to powers of attorney exist, they have developed ways to cope with the problems and would prefer not complicating the matter by attempting to deal with the problems legislatively. The members of the Subcommittee are interested in determining the extent to which this attitude is shared by attorneys who regularly use powers of attorney, and request that written comments and suggestions be submitted in care of Michael R. Sandoval, Brownstein, Rask, et al, 1200 SW Main Building, Portland, OR 97205. A determination will then be made whether to go forward with a revised SB303.

Executive Committee Note

Multnomah County Probate Judge Lee Johnson is changing the practice of appointing Visitors on guardianship petitions in Multnomah County. Instead of the current practice of appointing a Visitor from a rotating list, three persons will act as permanent Visitors to investigate the allegations in the petition and advise the court on the need for the appointment of a guardian, the appropriateness of the proposed guardian to serve, any limitations on the powers of the guardian, or the need for further review of the guardianship proceeding.

In response to an announcement in the Presiding Judge's Bulletin and an advertisement in The Oregonian, nearly 200 resumes were received by the court from applicants seeking the position. These were reviewed by Judge Johnson and his staff and circulated among an advisory committee appointed by Judge Johnson. Nine individuals were interviewed by Judge Johnson and the committee.

The court will prepare an order appointing a Visitor immediately upon the filing of the petition. Consideration is being given to requiring the attorney, at the time of filing a petition, to include a copy of the petition for the Visitor, a service copy of the petition with a notice of time for filing objections, and affidavit of personal service, so that the Visitor may make personal service on the alleged incapacitated person. Court staff will coordinate this paper flow.

The Visitor will be paid $300 per investigation unless the court makes a finding of indigence and waives the fee. This fee includes the investigation, preparing and filing the Visitor's Report, and appearing to testify at hearing if the matter is contested.

Carol J. Kyle
Chair, Executive Committee

Calendar of Seminars and Events

The following is a selective schedule of seminars which may be of particular interest to Section Members:

- October 11, 1990 (Sponsored by ALI-ABA) **Advanced Tax Issues in Estate Planning**, Via Satellite, 9 a.m. to 1 p.m. PDT. Telephone: (800) 253-6397.
- October 11-12, 1990 (Sponsored by Practicing Law Institute) **Estate Planning**, Dorral Inn, New York City, New York. Telephone: (212) 765-5700, Ext. 271.
- October 25-27, 1990 (Sponsored by ALI-ABA, Cosponsored by California Continuing Education of the Bar) **Uses of Life Insurance in Estate and Tax Planning**, at the Hyatt Regency Embarcadero in San Francisco, California. Telephone: (215) 243-1630.
- October 24-27, 1990 (Sponsored by The Southern California Tax & Estate Planning Forum) **Tax and Estate Planning**, Meridian Hotel, Coronado Island, San Diego, California. Telephone: (800) 332-3755.
- October 28, 1990 (Sponsored by the University of Southern California, Law Center) **Probate and Trust**, Westin Bonaventure Hotel, Los Angeles, California. Telephone: (213) 743-7557.
- October 30, 1990 (Sponsored by Oregon State Bar Continuing Legal Education) **Trusts and Estates: The Current Estate Planning Climate**, Via Satellite from the OSB Center, 5200 S.W. Meadows Road, Lake Oswego, Oregon 97035. Telephone: (800) 452-8260, Ext. 407 or 326.
- November 2, 1990 (Sponsored by the Oregon State Bar Association) **Basic Estate Planning**, New Convention Center, Portland, Oregon. Telephone: 620-0222.
- November 8-9, 1990 (Sponsored by the Washington State Bar Association, CLE, in cooperation with the Estate Planning Council of Seattle) **The 35th Estate Planning Seminar**, at the Seattle Center Exhibition Hall, 500 Westin Building, 2001 Sixth Avenue, Seattle, Washington 98121-2599. Telephone: Debbie Kirchhauser at WSBA (206) 448-0433.
- November 8-9, 1990 (Sponsored by Practicing Law Institute) **Estate Planning**, Hyatt Regency Hotel, St. Louis, Missouri. Telephone: (212) 765-5700, Ext. 271.
- November 29, 1990 (Sponsored by ALI-ABA) **Estate Planning in Late 1990: The Current State of Estate Freezes, Buy-Sell Agreements, GRITS, and Joint Purchases**, Via Satellite. Telephone: (800) 253-6397.
- December 2-8, 1990 (Sponsored by NYU School of Continuing Education) **49th Annual Institute on Federal Taxation**, Fairmont Hotel, San Francisco, California. Telephone: (212) 790-1320.
- January 7-11, 1991 (Sponsored by University of Miami, Law Center; **25th Annual Institute on Estate Planning**, Fontainebleau Hilton Resort & Spa, Miami Beach, Florida. Telephone: (305) 284-4762.
- January 21-24, 1991 (Sponsored by the University of Southern California, Law Center) **Tax Conference**, University of Southern California, University Park, Los Angeles, California. Telephone: (213) 743-7557.

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