newsletter

Oregon Estate Planning and Administration Section Newsletter

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# A Review of Oregon's Medicaid Eligibility Rules

This article discusses some of the current requirements for establishing eligibility of an aged person for Medicaid. The article focuses on financial resources which the state may deem available to an applicant for purposes of establishing eligibility.

There are two general categories under which a person may be eligible to receive Medicaid: Categorically Needy and Medically Needy.

**1. Categorically Needy.** A person who receives Supplemental Security Income (SSI) benefits under Title XVI of the Social Security Act is categorically needy and automatically eligible for Medicaid in Oregon. OAR 461-160-610(1); *Stilger v. AFSD*, 89 Or App 503, 749 P2d 1204 (1988). To be eligible for SSI, a person must be aged, blind or disabled and meet prescribed income and resource standards.

A person who does not have an SSI-eligible spouse is eligible for SSI:

(1) if the person's income, other than income excluded as noted below, is no more than $166 per month; and

(2) if the person's resources, other than resources excluded as noted below, do not exceed $3,000 if the person has a spouse with whom the person is living or do not exceed $2,000 if the person has no spouse with whom the person is living. 42 USCA §§ 1382(a)(1), 1382f(c).

A person who has an SSI-eligible spouse is eligible for SSI if the person's nonexcluded income, together with the income of the spouse, is no more than $249 per month, and if the person's nonexcluded resources, together with the resources of the spouse, are no more than $3,000. 42 USCA §§ 1382(a)(2), 1382f(c).

**Excluded Income.** In determining the income of a person and the person's eligible spouse the following are among the items of income that may be excluded:

(1) The first $240 per year of income other than income paid on the basis of need.

(2) Payments made by a state to persons who become eligible for the payments upon reaching the age of 65 and satisfying residency requirements.

(3) Unearned income not to exceed $20 per month, and earned income not to exceed $10 per month, if such income is received too infrequently or irregularly to be included.

## In this issue

(4) Under certain conditions, the first $780 per year of earned income.

(5) Refunds of taxes paid on real property or food.

(6) State public assistance.

42 USCA § 1382a(b).

**Excluded Resources.** In determining the resources of a person and the person's eligible spouse, if any, the following are among the resources that may be excluded:

(1) The home.

(2) The reasonable value of household goods, personal effects and automobile.

(3) The value of burial space.

(4) Other property essential to self-support.

(5) The cash surrender value of life insurance policies totalling $1,500 or less.

(6) An amount not to exceed $1,500, set aside for burial expenses, reduced by the cash surrender value of life insurance policies under (5) above and amounts in an irrevocable trust or arrangement that are available to meet burial expenses.

42 USCA § 1382b(a), (d).

**2. Medically Needy.** A person who is aged, blind or disabled and who would meet categorically needy standards except for income may still qualify for Medicaid under a state Medicaid assistance plan in the "medically needy" category. 42 USCA § 1396a(a). Applicants qualifying as medically needy may have a higher income and may retain more resources than persons qualifying as categorically needy.

**Income.** Oregon law provides that the Department of Human Resources shall establish a medically needy program to provide services to persons who meet categorical eligibility requirements but whose income is too high to meet the requirements of those programs. Maximum income may be no more than 133-1/3 percent of the payment standard for aid to dependent children eligibility. ORS 414.039; OAR 461-155-110. A person in a nursing home whose monthly income is $1,221 or less is considered to be medically needy by the state and would be eligible for full Medicaid services, including physician services, nursing home care and prescription drugs.

The treatment for nursing home residents whose monthly income is greater than $1,221 has changed drastically as a result of amendments to the Oregon Medicaid plan, which were implemented after the 1991 legislative session and which create a prioritized list of state-provided services. According to the Senior and Disabled Services Division of the Department of Human Resources, prior to the amendments, if a person had monthly income of over $1,221, the person could "spend down" to the Medicaid qualifying level by incurring medical and other qualifying expenses that would reduce the income to $1,221 or below, and would then be eligible to receive a full range of state-provided medical services, including nursing home care, physician services and prescription drugs. However, under Oregon's current Medicaid program, if a person has monthly income of $1,221 or more, the person may still spend down to the $1,221 level but will qualify only for a medical card entitling the person to payment for prescription drugs. Essentially, Medicaid services for the elderly who need nursing home care, but whose income is greater than $1,221, have been eliminated.

Under the "spend down" provision, a person in a nursing home may retain a $30 per month personal allowance and, if the person has a spouse or family living at home, an allowance to provide for those family members. The remainder of the person's income must be applied to the cost of nursing home care. If the person's income is $1,221 or below, the state will provide the balance of the cost of care. If the person's income is above the Medicaid qualifying limit, the excess income, less a $30 personal allowance and any family maintenance deductions, must be used to reduce the cost of the nursing home care, i.e., the nursing home resident must "spend down" to become eligible for Medicaid. However, under the new program, the state will pay only for the nursing home patient's prescription drugs and will not cover the cost of the nursing home or other medical expenses. Consequently, state-subsidized nursing home care for individuals with monthly income of over $1,221 is no longer available to Oregon residents, even if they "spend down" to the $1,221 level.

**Resources.** Medicaid applicants may retain cash or cashable assets of up to $2,000 for one person and $3,000 for two persons. Other resources that may be retained include:

(1) The home.

(2) $6,000 equity in income-producing property if yearly income from such property equals at least six percent of such equity.

(3) A vehicle worth up to $4,500.

(4) Household goods and personal effects worth no more than $2,000.

(5) Cash surrender value of life insurance of up to $1,500.

(6) Term life insurance.

(7) Prepaid burial arrangements, burial plot and $1,500 burial fund.

(8) Resources needed for self-support by a blind or disabled recipient.

**Transfer of Resources.** If an applicant for Medicaid attempts to avoid having assets counted in determining eligibility by disposing of resources in excess of the Medicaid-qualifying level, the person may lose eligibility if the transfers are for less than fair market value and occur within 30 months before the person applies for Medicaid. OAR 461-140-210, -220. The person would lose eligibility for the lesser of (a) 30 months; or (b) the number of months equal to the uncompensated value divided by $1,970 for individuals in long-term care, or $1,000 for individuals in the community. OAR 461-140-290.

**Availability of Resources.** The Oregon Administrative Rules provide that "[a] resource is available if the client has a legal interest in the resource and has the legal ability to sell or use the resource." OAR 461-140-020(1). "A resource is not available if *** [t]he resource is an irrevocable or restricted trust and cannot be used to meet the

basic monthly needs ***." OAR 461-140-020(3)(e). The Rules also provide that, "to be eligible for benefits, a person must actively pursue any asset for which they have a legal right or claim," OAR 461-120-330(1), and "[p]ursue legal remedies to obtain assets from any other source if they can secure legal counsel on a contingency fee basis." OAR 461-120-330(2)(b).

In certain circumstances, the income and principal of a trust will be considered as an available resource for the purpose of determining Medicaid eligibility. The State of Oregon counts a trust fund as a resource if the fund is legally avilable for use. If the fund is not legally available, the State Administrative Rules require the applicant to attempt to remove the legal restrictions on the trust unless such action would create an expense for the applicant. OAR § 461-145-540.

**Medicaid-Qualifying Trust.** In addition, federal law has addressed the issue of when trust funds are to be deemed available to a Medicaid applicant. A "Medicaid-qualifying trust" is defined as

> a trust, or similar legal device, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.
>
> 42 USCA § 1396a(k)(2).

The Social Security Act, as amended by the Consolidated Omnibus Budget Reconciliation Act of 1985, provides for the treatment of potential payments from Medicaid-qualifying trusts:

> In the case of a medicaid qualifying trust ***, the amounts from the trust deemed available to a grantor [defined as the individual who established the trust, or that individual's spouse] *** is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. ***
>
> 42 USCA § 1396a(k)(1).

All amounts from a Medicaid-qualifying trust that the trustee could make available to the grantor are considered available resources. Even if a trustee does not exercise its discretion to make distributions, any amounts which it could distribute from the trust will be deemed available resources to the grantor for purposes of qualifying for Medicaid. 42 USCA § 1396a(k)(3). Consequently, if a trust is deemed to be a "Medicaid-qualifying" trust, the effect may be to disqualify the grantor from Medicaid eligibility by deeming trust assets or income as available resources.

Case law suggests that courts will construe the language of the Medicaid-qualifying trust statute narrowly. *Miller v. Ibarra*, 746 F Supp 19 (D Colo 1990), involved four trusts that had been established by Colorado probate courts for the benefit of four mentally incompetent nursing home patients. The patients all received monthly incomes which were too high to enable them to qualify for Medicaid but too low to cover the costs of their nursing home care. Under the Colorado Medicaid rules, the patients were not permitted to "spend down" their incomes to the qualifying level but instead were totally disqualified for any Medicaid assistance, a predicament known as the "Utah Gap." At the time of this decision, Colorado was one of only 15 states that had not elected to participate in a federal "spend down" program that would bridge the Utah Gap. [The recent changes to the Oregon Medicaid program that limit benefits after spend down appear to create an effect similar to that of the Utah Gap.]

To alleviate the hardship caused by the Utah Gap, the Colorado probate courts established the trusts, providing that the trustees could disburse funds up to a level $20 below the applicable Medicaid maximum income eligibility level. The Colorado Department of Social Services denied Medicaid benefits, claiming that the trusts were Medicaid-qualifying trusts and that all of the assets in the trusts should be deemed resources available to the Medicaid applicants.

Finding that the trusts were created by the Colorado probate courts, not by the patients themselves, the court held that the trusts were not Medicaid-qualifying trusts as defined in the statute. Alternatively, the court held that, even if the trusts were Medicaid-qualifying trusts, by their terms the trustees could distribute no more than an amount $20 less than the Medicaid income eligibility level and the trusts would not make the patients ineligible for Medicaid.

In dicta, the court noted that "[t]he Congressional purpose for prohibiting Medicaid qualifying trusts is the same as that behind banning transfers without fair consideration. Congress sought to prevent wealthy individuals, otherwise ineligible for Medicaid benefits, from making themselves eligible by creating irrevocable trusts in order to preserve assets for their heirs. *** [T]his clearly was not the motive for creating the instant trusts." *Miller, supra*, 746 F Supp at 34.

Notwithstanding the dicta in *Miller*, its holdings are consistent with the clear language of the Medicaid statute; assets of a Medicaid-qualifying trust are deemed available to a Medicaid applicant only to the extent the trustee has the discretion to disburse them.

Consequently, if a trust is established by a person for the benefit of the person or the person's spouse, and the trust instrument grants the trustee full discretion to distribute income and invade principal, the entire value of the trust probably would be considered an available resource to the trust beneficiary, rendering that beneficiary ineligible for Medicaid until the trust has been exhausted. On the other hand, if the trust instrument limits the trustee's discretion to make distributions (*e.g.*, places a limit on the amount of income distributions per month or prohibits invasion of the principal without obtaining the consent of a third party), only the amounts the trustee can distribute, in the trustee's sole discretion, should be considered resources available to the beneficiary

for purposes of determining Medicaid eligibility.

Karen E. Bendler

## *Feeling Drained By Your Clients?: Professional Distance, Role Definition and Getting Out From Under the Needy Client*

There is simply not enough time in the day to get through the cases on my desk. Mrs. Smith is so demanding, and she's getting older, she seems a bit forgetful...maybe she has Alzheimer's. She asks me more frequently to read her mail and sometimes needs me to review her bills. I feel like I have another mother to take care of. I can't bill her for all the extra time I put in. It doesn't feel right. But I feel that I *should* be doing these things for her. No one else seems to be able to help her. I feel like I'm her support system, her family. I do feel good about what I do for her...but I have other responsibilities and I think she's becoming dependent on me. I didn't go to law school to review Medicare claims!

If the preceding paragraph even remotely rings a bell, it is because attorneys belong to the "helpful" caregiver, gatekeeper, advocate, and advisor group of professionals along with C.P.A's, physicians, psychologists, social workers and nurses.

Those attorneys especially vulnerable to over-involvement with clients and their families are those who have close client contact, foster warm personal relationships with clients, and must relate on a personal level about very personal issues. Estate planning and probate work demands involvement in human issues. Legal counseling in estate planning requires that a practitioner have a degree of empathy, foresight, timing and intuition. The problem of over-identification or "counter-transference" is prevalent within service-oriented professions.

### Know When You're Hooked

Planning for death, and helping clients and their families through transitions is an area where it is easy to blur personal boundaries and become emotionally involved and stressed. In order to prevent excessive responsibility and "overcare" of the client and resulting burn-out, it is necessary to develop the self-awareness to know when you are becoming "hooked" by a client. This self-knowledge is critical in any service-oriented profession, not to mention in our own family situations. Rescuing yourself from over-involvement and establishing some distance from the client and his or her situation increases your control over the situation, allows you to focus on the task at hand, and increases your ability to perform work for that particular client, and others.

Is it possible to remain more emotionally detached yet still seem involved and caring? Absolutely. Part of the reason advisors get more involved than we want to with clients is because the word "no" disappears from our vocabularies, and we lose focus and get confused about our roles. A "cleaner" attorney-client relationship results from a clear definition of where your role begins and ends. Attorneys who have rudimentary knowledge of where clients can seek additional assistance for the advice and activities they do not care to provide can reasonably and in a caring way re-define their roles.

Attorneys and other advisors cannot be all things to all people. Naturally, there are many reasons attorneys decide to practice law. The least healthy reasons are those that relate to filling personal deficits (*i.e.*, the need to be needed and ever-helpful). Excessive client dependency is often created in those cases. There is a fine line between establishing a level of client dependency that will bring the client in to see you, and establishing a level of client dependency that causes you to lose both yourself and billable time. After all, if there is *no* dependency, there won't be any attorney-client relationship at all.

Excessive client dependency can be fostered by an attorney striving to meet all the client's personal needs. This may be damaging to both the attorney and the client. Every professional who is in the business of giving advice has had clients with whom they have become more than just an advisor. It is a good idea to watch for your own inclination to foster that kind of attorney-client relationship. You may observe this tendency in your partners or associates and bring it to their attention in a non-judgmental way.

The attorney may be giving a client advice with good intentions in areas outside the attorney's expertise, *i.e.*, medical and psychological advice. Poor advice, outside the realm of a professional's area of expertise, may contribute towards client misunderstanding and misdirection. Attorney malpractice may also result. The safest way to give advice outside of one's expertise is to refer the client elsewhere for specific services.

Utilizing the services of a private geriatric care manager is a responsible solution to the problem of linking up an elderly or disabled client to necessary services. Such services can include in-home care, placement, assessment, medical claims filing, care monitoring and other personal services. The care manager can assist the attorney by coordinating the entire process of referral or only certain aspects as requested. This coordination and monitoring can occur locally or across the country depending upon the requirements of a particular client.

### Unhook Yourself: Know and Use Community Resources

The stress experienced by attorneys who become over-involved with clients may be harmful to their practices and their family lives, not to mention their health. By recognizing the types of clients who are most likely to hook us, *e.g.*, clients who are most like our parents or children, we can be aware of our likely responses and tendencies. Self-awareness is the key to avoiding the high stress resulting from doing too much for clients and their families. Once you have the self-awareness, let the clients know that you can indeed help them by providing references to

experts who truly can help them with the difficulty they are experiencing. Private for-profit resources and non-profit resources abound in Oregon. There are services, programs and residential options existing in this state that make Oregon unique in many ways. Utilization of these services can relieve you from a tremendous burden of responsibility for emotionally and physically needy clients.

Because many of the issues that tug on our time and on our heart strings, as well as our telephone lines, concern aging and disabled clients, a fairly new tool, called "PASARR", the acronym for Pre-Admission Screening Annual Resident Review, is helpful for attorneys and other professionals who have concerns about an aging client.

Mandated by the Oregon State Legislature in 1989, PASARR is provided to non-Medicaid individuals who are considering admission to a nursing facility. The screening can assist attorneys with clients who are a risk at home and who may require placement unless services are brought into the home. The screening provides an assessment of the client's condition, services currently being used and those needed, and options available in the community for that client.

Because the cost of PASARR is provided by the state and federal government, you can reassure yourself that professionals are objectively evaluating your clients in their own homes without putting a financial strain on them. At the same time you are removed from the problem for the moment. PASARR'S objective is to assist seniors with mental illness, dementias such as Alzheimer's Disease, or developmental disabilities from unnecessary nursing home placements. PASARR is available by simply telephoning a certified screening program and requesting a screening of your client. A list of certified screening programs is available from the Oregon Senior and Disabled Services Division.

Another pragmatic way to avoid becoming entangled in a client's web is to know where to call for assistance with client issues such as Alzheimer's disease and other dementias, mental illness, Medicare claims assistance, geriatric assessment, chemical dependency, in-home services and out-of home placement, and care management. Such assistance can be located in the blue "Community Service Numbers" section of the telephone directory, or by calling the Aging Services Division, Senior and Disabled Services Division or Agency on Aging in your county. Other services can be located by checking under "Social Service Organizations", "Senior Citizens' Services" or "Alcohol Information and Treatment" in the yellow pages. Referrals can be obtained by calling the National Association of Private Geriatric Care Managers at (602) 881-8008, by calling United Way at 222-5555, by obtaining a Services for Seniors Directory from Providence Senior Services at 230-6048, or by calling the Good Samaritan Medical Center's Education and Family Support Services at 229-7348. For personal assistance with the tendencies discussed in this article, you may call the Professional Liability Fund, which offers a variety of programs to assist attorneys.

Susan Goldsmith, L.C.S.W., B.C.D.
Health Access, Inc.

## The Uniform "TOD" Security Registration Act

The 1991 Oregon Leigslative Assembly enacted the Uniform "TOD" Security Registration Act as Chapter 306 of the Oregon Laws of 1991. The act, which applies to the transfer of securities at an owner's death, became effective on September 29, 1991 and applies to all decedents dying on or after that date. The purpose of this article is to discuss the general provisions of the act. In developing estate plans for clients with securities subject to the act, and should consider the possibility of registering those securities in beneficiary form.

The act provides that a security may be registered in beneficiary form. This type of registration permits a sole security owner or joint owners with the right of survivorship to designate a beneficiary for the security. Upon the death of the sole owner or surviving joint owner of the security, the ownership of the security passes to the named beneficiary as a matter of contract and is not a testamentary transfer. If no beneficiary survives the owner, the security becomes an asset of the deceased owner's estate. The beneficiary may be an individual, a corporation, an organization or other legal entity.

The designation of a beneficiary does not affect the ownership of the security until the owner's death. Prior to that time, the beneficiary has no interest in or right to the security and the owner may cancel the beneficiary form registration or change the beneficiary designation at any time without the beneficiary's consent.

Under the act, "security" is defined as a share, participation or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a security account. A security need not be certificated.

A security may be registered in beneficiary form if that form of ownership is authorized by a statute of the state of: organization of the issuer or the registering entity; the location of the registering entity's principal office; the location of the office of the organization's transfer agent or the organization's office making the registration; or, the owner's address at the time of registration. The registering entity is a person who originates or transfers a security title by registration. It includes a broker maintaining security accounts and transfer agents or other persons acting for or as an issuer of securities.

The act does not require the registering entity to register securities in beneficiary form. If the registering entity permits such a registration, it may establish the terms and conditions under which requests for registration of a security in beneficiary form will be received and for the implementation of such registrations, including the cancellation of previous registrations and the change of beneficiaries.

Upon proof of death of all owners of the security and compliance with any

applicable requirements established by the registering entity, the security may be re-registered in the name of the surviving beneficiary. The registering entity will be discharged from all claims by the owner's estate, the owner's creditors, or the owner's heirs and devisees if the re-registration is made prior to its receipt of written notice from a person claiming an interest in the security who objects to implementation of the registration.

The act does not limit the rights, under Oregon law, of creditors of a security owner against that owner's beneficiaries and other transferees. Consequently, the creditor of a deceased security owner would have a minimum of one year and a maximum of two years after the owner's death to initiate legal action to recover the debt from the owner's beneficiary or other transferees.

The right to register a security in beneficiary form depends upon whether such registration is permitted by the registering entity. In situations where a security owner does not control the registering entity (a New York transfer agent for example), there is no guarantee that this type of registration will be allowed. However, if the security owner controls the registering entity, the owner would have the right to permit this type of registration.

Such a situation would exist in the case of a closely held corporation organized under Oregon law. The corporation itself is the registering entity. If the corporation's shareholders wish to register their securities in beneficiary form, they would direct the board of directors to develop a written policy under which the corporation would receive requests for registration of securities in beneficiary form and for implementation of such registrations. The policy should include procedures for designating and changing beneficiaries, including determining what rights a deceased beneficiary's issue would have in the security, cancelling previous beneficiary form registrations, determining how the death of the security owner will be established, and determining how the corporation will treat fractional shares.

While the obvious example of a security to which the act applies is stock in an Oregon corporation, there are other property interests which consittute securities. Any security which meets the requirements of the act may be registered in beneficiary form. Although the registration of a security in beneficiary form will not be apropriate in every case, it will always be appropriate to discuss the possibility of such registration with the security owner and to evaluate the effectiveness of this type of registration in the owner's estate plan.

Daniel C. Re

## What's New

### *O'Brien v. Belsma*
### 108 Or App 500 (1991)

The special administrator of the decedent's estate brought an action to rescind and cancel deeds and to require the return of funds that the decedent had given to the defendant, decedent's daughter, when the decedent was allegedly incompetent. Plaintiff alleged that decedent was not competent at the time she transferred the property because she was suffering from Alzheimer's disease, and that defendant unduly influenced the decedent to transfer the property. The court noted: "The test for competence to convey property is whether at the time of the conveyance, the grantor had the 'ability to understand the nature and effect of the act in which [she] is engaged and the business which [she] is transacting.'" 108 Or App at 503.

The court reviewed the testimony of five medical experts and 36 lay witnesses and discussed the nature of the three stages of Alzheimer's disease before it concluded that decedent was competent at the time of the transfer.

Plaintiff further argued that the burden of proving undue influence should be on Defendant if a confidential relationship existed. The court held that the burden does not shift until the party asserting undue influence has established: 1) that a confidential relationship exists between a grantor and a grantee, 2) that the grantee has a position of dominance over the grantor and 3) that suspicious circumstances exist. 108 Or App at 505. The court did not find suspicious circumstances in this case because the decedent had not changed the recipients of her gifts, only the timing, from a testamentary transfer to a lifetime transfer.

Helen Rives

### *Bigej v. Boyer*
### 108 Or App 663 (1991)

Plaintiff successfully contested decedent's will, alleging that the decedent lacked testamentary capacity and was laboring under undue influence. The court discounted the testimony of the attorney who both prepared the will and was one of the subscribing witnesses to the will, because he had had minimal contact with the decedent, and was unaware of decedent's medical condition and mental problems at the time the will was executed. The court found the testimony of the physician and the attending nurses more persuasive, since they were familiar with the decedent's medical and mental condition for several months prior to the execution of the new will. Based on the medical testimony, the court concluded that decedent would not have been capable of having a "lucid interval" even though she had good days and bad days surrounding the time that she executed the will.

Helen Rives

## Executive Committee Report

At the Annual Meeting of the Section held during the Oregon State Bar Annual Convention on October 3, 1991 in Seaside, Oregon, new members were elected to the Executive Committee. The current Executive Committee Members are:

Jill Golden, Chair
Daniel Re, Past Chair
Stephen Kantor, Chair-Elect
Helen Rives, Secretary
Gretchen Morris, Treasurer

Members-at-Large (1 year term):
Allyn Brown
Rita Batz Cobb
Robert Dayton
Sarah (Sally) Landauer

Members-at-Large (2 year term):
Christine Brown
Donald Denman
Donna Muehleck
Robert Saalfeld

The Section will have four subcommittees this year, the legislation committee, the continuing legal education committee, the newsletter committee and the public affairs committee. All of the committees are looking for volunteers to work on their projects. For the legislative committee call Steve Kantor at 226-2966, for the continuing legal education committee call Gretchen Morris at 754-1411, for the newsletter committee call Dan Re at 382-4331 and for the public affairs committee call Rita Batz Cobb at 648-8879.

The Section is sponsoring a CLE on trusts which is slated for February 20, 1992.

Helen Rives, Secretary

## Seminar

On February 20, 1992, the Estate Planning and Administration Section of the Oregon State Bar is presenting a program entitled "Using Trusts in Estate Planning" at the Red Lion-Lloyd Center. The program will discuss revocable trusts, special needs trusts, and tax-motivated trusts, (such as life insurance trusts, trusts for minors and qualified Subchapter S trusts,) along with taxation of trusts, trust administration, drafting for trusts, modification, revocation, termination and ethical considerations involved.

If you have a question about trusts, let us know and we'll try to answer your question at the Seminar. All questions should be directed to Keir Karson, c/o the Oregon State Bar office.

Carolyn Wilson Miller, Chair
CLE Committee

## Questions To The Editor

The following question was submitted to the editor.

**Facts:**

Decedent's Will devises her estate to her three children equally and names one son as personal representative.

Subsequent to his appointment, the personal representative discovers several bank accounts on which the decedent had established as "pay on death" account for his benefit.

The personal representative had no knowledge of these accounts prior to decedent's death and had contributed no funds to the accounts.

The decedent was competent at the time the accounts were created and when the Will was executed. The bank accounts predate the Will.

**Questions:**

1. Are these assets included in the decedent's estate?

2. Does the acceptance of ownership of the accounts create a conflict of interest for the personal representative?

3. Is acceptance of ownership a breach of the personal representative's fiduciary duty?

4. Upon acceptance of the accounts, what disclosure is required?

**Discussion:**

At the time decedent had her Will prepared, the drafting attorney should have investigated the extent of the decedent's assets and the form of title to each. When attorney learned of the accounts, attorney should have advised decedent that the effect of the form of ownership would be to pass those assets outside of probate and create an unequal distribution to her children.

If that is the case, then this is the decedent's intended estate plan. The personal representative may claim the accounts outside of the probate. The answers to the questions above are -

(1) The assets are part of the decedent's taxable estate, but not part of the probate estate;

(2) There will be no conflict of interest unless the accounts are tainted by undue influence, lack of capacity, mistake, or some other fact which would invalidate the "pay on death" designation;

(3) There will be no breach of fiduciary duty, for the same reason mentioned in (2) above;

(4) Disclosure would be required if the elements were present to raise a challenge to the accounts passing outside of the probate. This situation would create a conflict of interest which would disqualify the personal representative from serving. This issue should be analyzed on a case by case basis, taking into account whether the Will provides payment of taxes out of the residue, whether disclaimer issues are present, and whether the family enjoys a harmonious relationship. *See Estate of Leda Mae Grove v. Selken*, 109 Or App 668 (1991), decided November 13, 1991, for a case involving similar facts where disclosure was not made until the personal representative's final account was filed.

Readers are encouraged to submit questions at the following address:

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

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

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

# Calendar of Seminars and Events

- January 6-10, 1992 (Sponsored by University of Miami, Law Center) **The 26th Annual Institute of Estate Planning,** Fontainebleau Hilton Resort & Spa, Miami Beach, Florida, Telephone: (305) 284-4762
- January 10, 1992 )Sponsored by the Oregon Society of CPAs) **State and Local Tax Conference,** Oregon Convention Center, Portland, Oregon, Telephone: 641-7200 (in Oregon 1-800-255-1470
- January 17, 1992 (Sponsored by Prentice Hall Law and Business) **Estate Freezes and Valuation Under Chapter 14,** Parc Fifty Five, San Francisco, California, Telephone: 1-800-223-0231
- January 20-22, 1992 (Sponsored by ALI/ABA) **Advanced Estate Planning Technics,** Maui, Hawaii, Telephone: 1-800-CLE-NEWS
- January 22-24, 1992 (Sponosred by ALI/ABA) **Basic Estate and Gift Taxation and Planning,** New Orleans, Louisiana, Telephone: 1-800-CLE-NEWS
- January 26-28, 1992 (Sponsored by Trusts and Estates) **The 3rd Annual Conference on Estate Planning and Administration,** The Mark Hopkins, San Francisco, California, Telephone: Stacey Leigh Strickland (404) 256-9800
- January 27-30, 1992 (Sponsored by University of Southern California) **The 44th Annual Institute on Federal Taxation,** Beverly Hilton, Beverly Hills, California, Telephone: (213) 740-2582
- January 31, 1992 (Sponsored by Northwestern School of Law and The Oregon Estate Planning Counsil) **The 21st Annual Estate Planning Conference,** Red Lion Inn at Lloyd Center, Portland, Oregon, Telephone: 768-6642
- February 20, 1992 (Sponsored by Oregon State Bar) **Using Trusts in Estate Planning,** Red Lion Inn at Lloyd Center, Portland, Oregon, Telephone 620-0222 ext. 326 (in Oregon 1-800-452-8260)
- February 28, 1992 (Sponsored by Professional Education Systems, Inc) **Conference on Medicaid Law,** (hotel to be announced) Portland, Oregon, Telephone: 1-800-621-5336
- March 5-7, 1992 (Sponsored by ALI/ABA) **Tax and Business Planning,** Scottsville, Arizona, Telephone: 1-800-CLE-NEWS

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# The Right of an Unsecured Creditor to Recover From a Decedent's Nonprobate Property

If a person dies owning property that becomes subject to a probate proceeding, that person's unsecured creditors will have the opportunity to recover the amounts owing to them from the probate property. In this situation, the procedures for notice to creditors and for filing claims against the estate are clearly defined by statute, ORS 115.001 to 115.215. It is possible, however, for a person to die owning little or no property that is automatically subject to a probate proceeding. In these cases, the ability of an unsecured creditor to recover the amount owing to it is far less certain. The purpose of this article is to review various types of property which, under Oregon law, are not automatically subject to probate and to examine the right of an unsecured creditor to reach such property.

## Property Not Automatically Subject to Probate

**I. Property Owned Jointly with the Right of Survivorship.** When an owner of property that is owned jointly with the right of survivorship dies, his or her interest in that property is transferred to the surviving joint owner or owners without a probate proceeding. The right of an unsecured creditor of the deceased joint owner to recover the debt out of the jointly owned property depends upon whether the joint property interest was in real property or personal property.

**A. Real Property.**

1. *Tenancy by the Entirety.* When real property is owned by a husband and wife as tenants by the entirety, their interest in the property is similar to a tenancy in common with an indestructible right of survivorship. The death of the first spouse will cause the surviving spouse to automatically become the sole owner of the property. A creditor of the first

## In this issue

spouse to die cannot recover from that spouse's interest in the tenancy by the entirety property. *See Brownley v. Lincoln County,* 218 Or 7, 343 P2d 529 (1959).

2. *Joint Ownership with the Right of Survivorship.* The same result occurs as with tenancy by the entirety property when real property is owned jointly with the right of survivorship under ORS 93.180. That statute provides that each joint owner is a tenant in common in the life estate and has a cross contingent remainder in the fee simple. As a result, when one joint owner, dies no property interest remains from which the unsecured creditors of the deceased owner may recover.

**B. Personal Property.** ORS 105.920 allows personal property to be owned with the right of survivorship. That statute specifically provides, however, that a joint tenancy in personal property does not derogate from the rights of creditors. Consequently, the interest of a deceased joint tenant in personal property would be subject to the claims of that deceased joint tenant's creditors even though the interest was automatically transferred to the surviving joint tenant without a probate proceeding. The surviving joint tenant would take the deceased joint tenant's interest subject to the claims of the deceased tenant's creditors.

**II. Property Held in a Revocable Living Trust.** Property held in a revocable living trust will not be subject to a probate proceeding when a trustor dies if the trust names a beneficiary for the property. The property in such trust, however, will be subject to the claims of a deceased trustor's creditors under the rule set forth in *Johnson v. Commercial Bank,* 284 Or 675, 588 P2d 1096 (1978). According to *Johnson,* if the trustor retains a life estate in the trust property and the right to revoke the trust, the trustor is treated as having the equivalent of a general power of appointment over the trust property and will be treated as the owner of that property. The transfer to the trust is considered void against the trustor's existing and subsequent creditors and the trustor's creditors can reach the trust property after the trustor's death, subject only to the usual rule of laches.

**III. Property for which there is a Designated Beneficiary.** If a decedent dies owning property for which a valid beneficiary designation has been made, the property will be transferred to the beneficiary without a probate proceeding. Property for which a beneficiary may be designated includes life insurance policies, retirement benefits, certain bank accounts and securities.

**A. Life Insurance.** The proceeds of a life insurance policy are not subject to creditor claims if the proceeds are paid to someone other than the person effecting the policy or that person's estate or legal representative. *See* ORS 743.046. Proceeds of a group life insurance policy are not subject to creditor claims if the proceeds are paid to someone other than the insured or the insured's estate. *See* ORS 743.047.

**B. Bank Accounts.** Oregon law permits certain types of bank accounts to have designated beneficiaries. Bank accounts for which beneficiaries may be designated are P.O.D. accounts under ORS 708.641 and trust accounts under ORS 708.646. The statutes that create these accounts do not address the ability of a creditor of the deceased account owner to reach the account proceeds in the hands of the beneficiary. Consequently, a creditor could argue that since the account owner has retained a life interest in the account and the right to designate a beneficiary, which is equivalent to a general power of appointment, the account balance is subject to the claims of the deceased account owner's creditors under the theory adopted by the court in *Johnson v. Commercial Bank, supra.*

Another statute, ORS 708.520, permits banks to pay accounts held in the separate name of a decedent directly to certain persons without a probate if specific requirements are met. This statute, however, requires that if the deceased owner's estate is probated, amounts paid under its provision must be accounted for to the decedent's personal representative. As a result, funds in accounts that

are distributed under this statute will be subject to creditor claims.

**C. Securities.** Securities subject to Oregon's Uniform TOD Security Registration Act (the Act), ORS 59.535 to 59.585, may have designated beneficiaries. Such beneficiaries will be entitled to ownership of the securities at the owner's death. ORS 59.575(2) specifically provides that the Act does not limit the rights of a security owner's creditors against the beneficiaries. As a result, a creditor would be entitled to recover the debt out of such securities.

**D. Retirement Plans.** Retirement plans generally permit the participant or owner to designate a beneficiary for any benefits that are unpaid at the participant's or owner's death. Section 401(a)(13) of the Internal Revenue Code prohibits creditors from acquiring an interest in benefits to be paid by certain retirement plans to the plan beneficiary. Additionally, ORS 23.170 conclusively presumes that the retirement plans to which it applies are valid spendthrift trusts and the interest of the person for whom the retirement benefits are provided and the interest of that person's spouse are exempt from execution and all other process. Retirement benefits protected by federal or state law will not be subject to creditor claims. Other retirement benefits, however, would be subject to such claims, such as benefits from an Individual Retirement Account (IRA) payable after the owner's death that named the owner's children as the beneficiaries. An IRA is not protected from claims under federal law, and, since it is payable to persons other than the owner's spouse, it is not protected by ORS 23.170. Although there are no Oregon cases addressing this issue, the general principles are discussed in the Kansas case of *Bartlett Co-op. Ass'n v. Patton,* 239 Kan 628, 722 P2d 551 (1986).

## Procedures Available to Unsecured Creditors to Collect Amount Owing.

### I. The Right of a Creditor to Proceed Directly Against the Decedent's Surviving Spouse, ORS 108.040.

Each spouse is liable individually for expenses of the family and for education of their children under ORS 108.040. If one spouse dies owing unsecured obligations incurred for matters subject to ORS 108.040, the creditor may maintain an action to recover the debt directly against the surviving spouse. Expenses of the family include items necessary for the family's immediate sustenance and comfort. Business expenses of either spouse are not considered family expenses. *Chamberlain v. Townsend,* 72 Or 207, 142 P 782 (1914). Medical and funeral expenses are considered family expenses. *Hansen v. Hayes,* 175 Or 358, 154 P2d 202 (1944).

ORS 108.040 further provides that "an action maintained against a wife must be commenced within two years after the cause of action accrued"; after a divorce, the wife is not responsible for family expenses incurred by the husband while they were living together; and, after a wrongful separation, the wronged spouse is not responsible for debts contracted by the other spouse subsequent to the separation, except for those related to maintenance, support or education of the parties' minor children.

**II. The Right of a Creditor to Require A Personal Representative to Recover Property.** The personal representative of an estate is a fiduciary and trustee for the creditors and beneficiaries of the estate. *In Re Workman's Estate,* 156 Or 333, 68 P2d 479 (1937). The personal representative is required to recover property which was transferred by the decedent in such a way that the transfer is void or voidable as against the decedent's creditors if that property is necessary to pay expenses, claims or taxes of the estate. ORS 114.435. Also *see Estate of Hendrickson v. Warburton,* 276 Or 989, 557 P2d 224 (1976). Any interested person may petition the court for instruction under ORS 114.275. A creditor has the right under that statute to ask the court to instruct the personal representative to recover assets not included in the estate if the requirements of ORS 114.435 are met. A creditor with an allowed but unpaid claim would also be entitled, under ORS

116.103, to object to the personal representative's final account if the personal representative did not take all necessary steps to recover property from which the creditor's claim could be paid. The court has the power to surcharge the personal representative for loss caused by any breach of duty and to deny the personal representative's right to compensation, in whole or in part, under ORS 116.123.

**III. The Right of a Creditor to Initiate a Probate Proceeding, ORS 12.190(2).** If a person against whom an action may be commenced dies before the expiration of the applicable statute of limitation, ORS 12.190(2) provides that an action may be maintained against the personal representative of such person after the expiration of the limitation period and within one year of the person's death. This statute requires that the decedent's estate be probated since an action initiated under it must be maintained against the decedent's personal representative. Also, see ORS 115.305, which provides in part that all causes of action against a person survive to that person's personal representative and ORS 115.325, which prohibits an action on a claim from being commenced against a personal representative until the claim has been presented and disallowed.

A creditor may initiate a probate and be appointed personal representative of the deceased debtor's estate under ORS 113.035, ORS 111.005(19) and ORS 113.085(1)(f). ORS 115.005(4) requires such a creditor to initiate the probate proceeding and file the claim not later than two years after the decedent's death since claims not filed within that two year period are barred from payment from the estate.

In the case of an estate that has been probated and closed, a reasonably ascertainable creditor who did not receive the written notice required under ORS 115.003(2) has the right to reopen the estate under ORS 116.233 and file a claim within two years from the date of the decedent's death. Such a creditor's claim is not otherwise barred until 30 days after mailing or delivery of the required notice. ORS 115.005(2)(b).

As personal representative, the creditor has the power to void transfers and recover property necessary for the payment of claims and expenses under ORS 114.435. The personal representative would also have the right to receive compensation under ORS 116.173 and to recover expenses and reasonable attorney fees under ORS 116.183. A creditor serving as personal representative must be aware of ORS 115.105, which contains specific procedures for claims made by the personal representative.

**IV. Right of Creditor to Proceed Directly Against the Transferee.** In the case of *First Nat. Bank of Portland v. Connolly*, 172 Or 434, 138 P2d 613, 143 P2d. 243 (1943), the court noted that in certain circumstances a creditor of a decedent whose claim is not satisfied through a probate proceeding could maintain an action, in equity, directly against the heir receiving estate assets. It is possible that the same equitable remedies would exist for a creditor against a recipient of property transferred outside of probate.

It may also be possible for a creditor of a decedent to proceed directly against a transferee of the decedent's property under Oregon's Uniform Fraudulent Transfer Act, ORS 95.200 to 95.310, if the requirements of that Act have been met.

Daniel C. Re

## *Revision of Guardianship/ Conservatorship Statutes*

The Estate Planning and Administration Section Legislative Subcommittee, through a task force composed of Scott W. McGraw, Carole Kyle and Margaret Nightingale, is working on a complete revision of Oregon's guardianship and conservatorship statutes. It is planned that the proposed revision will be submitted to the 1993 Legislative Assembly. Anyone having questions, comments or requiring additional information

should contact Scott McGraw at Pound, Dorszynski and McGraw, 1049 Oak Street SE, Salem, Oregon 97301, phone: 399-7370.

## What's New

### *Blessing v. Nicholas*
### 110 Or App 28 (1991)

One daughter objected to the final account of the personal representative, who was the other daughter of the decedent, because the personal representative had not included a certificate of deposit, a money market account and a checking account in the inventory of the estate. These accounts were in the joint names of the decedent and the daughter appointed personal representative during the decedent's lifetime. In holding that the accounts passed to the daughter appointed personal representative by right of survivorship, the Court of Appeals stated that the language of ORS 708.616 is clear and unambiguous.

ORS 708.616 provides in pertinent part;

> (1) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent, unless there is clear and convincing evidence of a different intention at the time the account is created.
>
> . . .
>
> (5) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a trust account, or a P.O.D. payee designation, cannot be changed by will.

The objecting daughter relied on ORS 708.621 to assert that a certificate of deposit was not subject to ORS 708.616 because neither the decedent nor the personal representative signed any documents in connection with the creation of the certificate of deposit. The court noted that ORS 708.621 only requires a written order to alter an account, not to create one. Since it was not the bank's practice to require signature cards to establish certificates of deposit, it was not necessary for the decedent to sign any to create a jointly owned certificate. In addition, the court noted that ORS 708.600(3) defines joint account to mean, "an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship." (Emphasis added by the court.) Id. at 31. Thus, it is not necessary to use the words "right of survivorship" to create a joint account with survivorship rights.

### *Estate of Leda Mae Grove v. Selken*
### 109 Or App 668 (1991)

The decedent hired Selken, an attorney, to prepare his will. Selken met with the decedent while he was in the hospital to discuss his affairs, prepared the will and met with him a second time to execute the will. Selken's wife was present at both meetings. After decedent left the hospital, Selken's wife visited him a number of times. The decedent then returned to the hospital and died about two months after executing the will.

Right after decedent died, Selken went to the decedent's house to look for the will and found the will with a typewritten page signed by the decedent which stated:

> "Before my will, I give an undivided half interest [sic] in my books to Sally Selken as a joint owner. I expressly declare this interest [sic] created to be a joint tenancy with right of survivorship. 105.920. This does not include my plays or foreign language books which she does not care about. She is kind, and admires my books."

Selken was appointed personal representative and included only part of the books in the inventory. He did not inform the devisees of the estate about the books that were omitted from inventory. All of the books were sold and the proceeds were divided between Mrs. Selken and the estate. At the time the final account was filed, the devisees first learned of the sale and division of the proceeds from the books. One of the devisees objected to the final account on several grounds, claiming that the books should be included in the inventory, that Selken had charged excessive attorney fees and that, as personal representative, he had made accounting errors.

The Court of Appeals held that the purported gift of the books did not meet the requirements of an *inter vivos* gift because there was

no delivery, an essential element of an *inter vivos* gift. The document did not qualify as a testamentary gift because there were no witnesses to the decedent's signature. Thus the books should have been included in the assets of the probate estate.

The trial court found that Selken had charged excessive attorney fees because much of the work included as attorney fees was more properly classified as administrative work of the personal representative and because he made accounting errors as personal representative, for which he was surcharged.

The second issue before the Court of Appeals was whether a probate court has authority to enter a judgment imposing personal liability against a personal representative for breach of fiduciary duties. The Court of Appeals held: "A probate court has authority to enter a personal judgment against a personal representative for willful or negligent misconduct in the administration of his fiduciary duties." Id. at 676. The Court of Appeals also noted that Selken had conflicts of interest in serving as personal representative and attorney of the estate while representing his wife's interest regarding the books.

### *Scarlet v. Hopper*
### 110 Or App 457 (1992)

Decedent and her husband executed a joint, mutual and reciprocal will. Article three of the will provided that decedent give all of the residue of the decedent's estate to her husband. Article five of the will, however, provided that certain property which was owned by each before marriage was to be given to the respective families on the death of the survivor. The decedent provided that her house was to be sold on the death of the survivor and the proceeds distributed to her two daughters and grandson. The husband claimed and the drafting attorney so testified that the decedent intended that the husband receive a fee interest in the house and that article five should have contained the words "if not previously sold." The lower court found the omission to be a scrivener's error and construed the will as if the omitted words were included in the will. The Court of Appeals reversed, stating that "the overriding principle in the construction of wills, reiterated in *LaGrand,* is that an unambiguous will 'speaks for itself and resort to extrinsic evidence may not be had to ascertain a testator's intent.'" Id. at 460. The court held that a court may not correct a scrivener's error when the effect of the correction would be to change the beneficiaries that a will unambiguously defines. The court declined to rule on whether it would be appropriate to correct scriveners' errors in other instances.

### *Peven v. Holladay*
### 109 Or App 336 (1991)

The decedent was a minor child who contracted leukemia. His parents were not married and his mother, who had custody, was receiving public assistance. The mother sought public funds for a bone marrow transplant, but was denied funds in Oregon. The mother moved the child to Washington, where the transplant was performed.

The doctors subsequently discovered that a sponge had been left in the child, and the hospital began negotiating with the mother to settle the matter. Meanwhile, the child died, the father was appointed personal representative of the child's estate in Oregon and commenced an action against the hospital. The hospital settled with the mother, and the father sought to have the settlement treated as a portion of the child's estate. The Court of Appeals ruled that the mother's negotiation with the hospital was governed by Washington law, which gives the parent of a minor child a cause of action for death. The settlement that she obtained, therefore, was independent of any claim the child's estate may have had against the hospital, and the child's estate was not entitled to any portion of the settlement paid to the mother.

### *In re Hedrick*
### 312 Or 442 (1991)

Hedrick prepared a will for the decedent which named Hedrick as the

personal representative and provided that the will would not be revoked by a subsequent marriage. The decedent remarried three years later and executed a new will five years after the marriage naming his wife the personal representative and sole devisee of his estate. The decedent died a year later, and Hedrick prepared, but did not file, a petition to probate the first will. Hedrick subsequently learned of the existence of the second will, but he and the devisees under the first will decided to probate the first will. Hedrick's petition did not inform the court of the existence of the second will. The court admitted the first will to probate and named Hedrick as personal representative. Later Hedrick sent a letter directly to the widow, with a copy to her counsel, demanding the return of certain of the decedent's funds. The widow's counsel had not authorized Hedrick to communicate directly with his client.

The Supreme Court found that Hedrick violated DR 1-102(A)(3) when he failed to disclose the existence of the second will to the court. The court noted that judges rely on the candor, honesty and integrity of the lawyer appearing before them in *ex parte* matters. The failure to disclose a material fact is as much a misrepresentation as a lie. The court further found that Hedrick violated DR 7-104(A)(1) when he sent the demand letter to the widow, because her counsel had not consented to such communication. The fact that he sent a copy to her counsel did not mitigate his violation of the rule.

***In re Boardman***
**312 Or 452 (1991)**

Boardman was counsel for the widow in the *Hedrick* case discussed above. In January 1988, Boardman filed a petition to admit the second will to probate and appoint the widow personal representative. The judge did not immediately appoint the widow personal representative because Hedrick had already been appointed the personal representative. Due to various continuances, the trial on the contested appointment was delayed until November, 1988, and the parties settled a few days before trial, with the widow being appointed the personal representative. The decedent had owned some property jointly with another couple. The property had sold prior to the decedent's death, but the transaction was not closed at the time of the decedent's death. Boardman represented to the attorney for the couple that the widow was the personal representative and had authority to execute the documents for the sale at the time that Hedrick was still the personal representative appointed by the court. The court noted that Boardman made his representation on the belief that the widow was legally entitled to be the personal representative and that Boardman did not appear to have intended any harm to the couple. Even so, Boardman knowingly made a misrepresentation of the facts as they existed at the time and, therefore, violated DR 1-102(A)(3) and DR 7-102(A)(5).

Helen Rives

## Executive Committee Report

The Executive Committee regrets to report that Jill Golden, Chair of the Section, died in December, 1991. Stephen Kantor, Chair-Elect, has assumed the duties as Chair for the rest of the year.

The trust seminar given in February, 1992, was very popular, with over 400 people attending. The Section is planning to publish a brochure about revocable living trusts. The brochure, when published, will be geared to the general public and will be available for attorneys to purchase and give to their clients.

The legislative subcommittee is working on various bills for the 1993 session. Carol Kyle, Scott McGrew and Meg Nightingale have drafted a proposed revision to ORS Chapter 126. Anyone interested in this project should contact one of them.

Helen Rives
Secretary

# Calendar of Seminars and Events

- May 7-9, 1992 (Sponsored by American Bar Association), **Third Annual Section of Real Property, Probate and Trust Law**, Opryland Hotel, Nashville, Tennessee, Telephone: (615) 883-2211.
- May 6-7, 1992 (Sponsored by New York University School of Continuing Education), **Trusts and Estates**, Grand Hyatt New York, Telephone: (212) 790-1320.
- June 2, 1992 (Sponsored by Oregon Estate Planning Council and Eugene/Springfield Tax Association), **Imminent Death Estate Planning and Hot Chapter 14 Issues**, Speaker: Jonathan Blattmachr, Hilton Hotel, Eugene, Oregon, Telephone: (503) 687-1170.
- June 8-9, 1992 (Sponsored by New York University School of Continuing Education) **Trusts and Estates**, Hyatt Regency, San Francisco, Telephone: (212) 790-1320.
- July 23, 1992 (Sponsored by PESI), **Oregon/Federal Estate and Gift Tax Workshop**, Portland, Oregon, Telephone: 1-800-621-5336.
- July 27-31, 1992 (Sponsored by New York University School of Continuing Education) **Trusts and Estates**, New York, New York, Telephone: (212) 790-1320.
- October 21-24, 1992 (Sponsored by The Southern California Tax and Estate Planning Forum) **Twelfth Annual Southern California Tax & Estate Planning Forum**, Meridian, San Diego, California, Telephone: (619) 696-6773.

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# newsletter

**Oregon Estate Planning and Administration Section Newsletter**

Volume IX, No. 3
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## Is a Mandatory Arbitration Clause in a Will Enforceable under Oregon Law?

Generally, the resolution of disputes through mandatory arbitration is a matter of contract. In the absence of an agreement to arbitrate, a party cannot be required to do so. This principle has been recognized under Oregon law. *Ficek v. Southern Pac. Co.*, 338 F2d 665 (9th Cir. 1964). A will, in most cases, is not a contract and the devisees have not agreed to be bound by its provisions. Consequently, under the general rule concerning arbitration, a will provision requiring that all disputes arising under the will be determined through binding arbitration would not be enforceable. However, the right of a decedent to put such a provision in his or her will has been recognized in a number of jurisdictions. See *Pray v. Belt,* 26 US 670, 7 L. Ed. 309 (1828), in which the court recognized the general enforceability of such a provision, but held that the decision of the arbitrator was subject to court review. Also see, 104 ALR 363. Other jurisdictions, have held that it is against public policy to have probate matters determined by arbitration. *Berger v. Berger*, 437 NYS 2d 690 (1981).

There do not appear to be any Oregon cases that address the issue of whether a decedent can require that disputes over his or her will be resolved through mandatory arbitration. If mandatory arbitration provisions in wills are enforceable in Oregon, such provisions could be an important part of a person's estate plan. The decedent would have the ability to remove the court from the dispute resolution process, to select the person who would resolve disputes and to set forth the rules under which the disputes would be resolved.

If you have had any experience with this issue in Oregon or another state, or if you have any thoughts about it, please write to the Editor, Estate Planning and Administration Section Newsletter, P.O. Box 1151, Bend, Oregon, 97709-1151. Your comments will be appreciated.

By Daniel C. Re

## New Bar Publication Helps Seniors Understand the Law

Older Oregonians have a new resource to guide them through legal dilemmas. The Oregon State Bar's new publication, *Senior Law Handbook: An Oregon Legal Information and Reference Guide for Older Adults,* addresses nearly 100 legal topics of interest to seniors. Written by attorneys, the book

## In this issue

also cross-references readers to federal, state and local sources of help in a unique compilation of reference materials.

The 14-chapter Senior Law Handbook discusses the legal facts about health care, including Social Security, Medicare and Medicaid benefits. The book also helps seniors understand estate planning and property management issues, such as wills, trusts, deeds, gifts, and powers of attorney. Older adults can learn how to protect their rights against age discrimination and fraud regarding employment, rental agreements, contracts and credit. Detailed resource lists of agencies and services direct seniors to additional help; glossaries help readers understand important legal terms; and an index gives readers easy access to any topic.

Eight Oregon attorneys with extensive experience in senior law donated their time to author and edit the handbook. Judge Donald Ashmanskas, chair of the bar's Public Service and Information Committee, said, "This handbook is of great public benefit because it addresses the lack of legal information available to seniors. The book is the first of its kind in explaining how the law affects seniors, directing them to additional help if needed."

The handbook costs $8.00 and may be ordered by calling the Oregon State Bar Order Desk at 1-800-452-8260 (toll-free in Oregon) or 620-0222, ext. 413. The book also will be available at Oregon Legal Services offices statewide. The nonprofit project was supported by the Oregon Law Foundation. Any net proceeds from book sales will be used to publish future reprints.

## What's New

### *BAKER v. MOHR*
### 111 OR APP 592 (1992)

The plaintiff, the daughter of the decedent, sued the defendant, the second husband of the decedent, to enforce a premarital agreement by imposing a constructive trust over the assets that he had acquired from the decedent. The plaintiff alleged that defendant had destroyed or concealed the premarital agreement; the defendant claimed that no premarital agreement ever existed. The trial court granted summary judgment to the defendant because the plaintiff failed to produce any written evidence of the premarital agreement pursuant to ORS 112.270(1)(c), which requires that a contract to make a will be established only by a writing signed by the decedent.

The Court of Appeals reversed, holding that ORS 112.270 "does not operate to bar a claim if the contract to make a will was in writing and signed by the decedent, but was subsequently destroyed or concealed by the person seeking to evade its provisions." Id. at 596. The plaintiff produced an affidavit of the minister who married the couple which stated that the day before he married them, the decedent had shown him a copy of a premarital agreement signed by the decedent and the defendant.

The court also noted that the Statute of Frauds (ORS 41.580) does not apply in cases where the law imposes a constructive trust on the basis of fraudulent acts by the person receiving the property. In this case the defendant could not invoke the Statute of Frauds to protect a fraud.

The opinion noted that when the decedent died, defendant acquired decedent's interest in the assets by right of survivorship, because the assets were held jointly. The purported content of the premarital agreement was to leave one-half of the couple's assets to plaintiff subject to a life estate in the defendant. Query whether the subsequent creation of the survivorship interests would negate the creation of the life estate in defendant with remainder to the plaintiff?

By Helen Rives

### *PERRY v. ADAMS*
### 112 OR APP 7 (1992)

The plaintiff alleged that the defendant (a lawyer) was negligent in failing to have witnesses sign a will under which plaintiff was the sole beneficiary. The testator had a history of mental illness and was admitted to the hospital for a nervous breakdown. Six days later, she was moved to a nursing home. The testimony of various witnesses indicated that she was disoriented and that her mind "wandered". After the testator was admitted to the hospital, plaintiff showed a will to a Ms. Layton. The will was written in pencil on the back of an envelope and was signed twice, but was not witnessed. After the testator was moved to the nursing home, the plaintiff hired the defendant to determine if the will was valid. The defendant determined that the will was not valid because it had not been witnessed and agreed to see if it could be properly witnessed. Ms. Layton and another person went to the nursing home and asked the testator a series of questions supplied to them by the defendant. They then called the defendant and asked the questions again in his presence. The defendant testified that the testator did not track well with what was going on and that he recommended that it would be better to seek a clearer acknowledgment of the will from the testator. The testator died three days later, and the witnesses signed the will about two weeks after the testator's death. The plaintiff probated the will and the court set it aside based on the Court of Appeals decision in *Rogers v. Rogers,* 71 Or App 133, 691 P2d 114 (1984), which held that in order for a will to be valid, witnesses must sign it before the testator's death.

The plaintiff alleged that testamentary capacity should be measured at the time a will is executed

by the testator, rather than when it is acknowledged and that the failure of the trial court to give this instruction to the jury constituted error. The Court of Appeals held that while testamentary capacity is determined at the time a will is executed, a will is **not** executed until all of the requirements of ORS 112.235 have been satisfied. One of the requirements is that two witnesses attest to the will. Thus, the will was not executed until it was witnessed.

By Helen Rives

## Executive Committee Report

The Executive Committee met April 24, 1992. The Committee agreed to co-sponsor a seminar with the Oregon State Bar as part of its practical skills program. The seminar will be a full day program on basic estate planning, to be given this fall. The Committee is planning to revise the Probate Systems Manual, to have software developed to make the manual fully computerized, and to produce a brochure on revocable living trusts. The Bar has asked the Executive Committee to review and edit the current Tel Law tapes and brochures currently available to the public.

By Helen Rives
Secretary

## Tax Developments

### TAM 9208003, Disclaimer of Survivorship Interest.

Five years prior to her death, decedent and her spouse acquired real estate as tenants by the entirety. After the decedent's death, the surviving spouse executed a disclaimer, intended to be a qualified disclaimer under both IRC §2518(b) and Arkansas law, covering the undivided one-half interest that otherwise would have passed to him as a result of his surviving the decedent. The estate maintained that, as a result of the disclaimer, an undivided one-half interest in the property passed to the decedent's estate for eventual distribution to a trust established under the decedent's will, while the other half remained in the possession of the surviving spouse.

The Service disagreed, distinguishing three recent decisions of the Courts of Appeals in which a similar issue was presented. Each of those cases involved a joint tenancy, rather than a tenancy by the entirety. In those cases, because the decedent could have unilaterally severed the joint tenancy interest at any time prior to death, the transfer creating the survivorship rights in the property did not actually take place until death. In this situation, however, Arkansas law prohibited any right to partition an estate by the entirety when the tenants were still married, except by voluntary action of both parties. Consequently, because the decedent could not have severed her portion of the tenancy without the consent of the surviving spouse, the interest of the surviving spouse was created when the decedent and spouse acquired the property five years prior to the date of death. Since the disclaimer was not executed within nine months after the transfer that created the interests, it was not a qualified disclaimer for purposes of IRC §2518(b).

### Rev Rul 92-26, IRB 1992-14, Reverse QTIP Election/Move Up of Generation.

Decedent's will provided for a $600,000 pecuniary bequest to a child and a $1 million pecuniary amount to be distributed to a QTIP trust, with the income payable to the surviving spouse for life, remainder to a grandchild. The residue was to be distributed to a separate QTIP trust, income to the surviving spouse for life, remainder to the child. On the estate tax return, QTIP elections were filed for both trusts, and the decedent's personal representative elected reverse QTIP treatment for the $1 million trust.

The child died before the surviving spouse, and both trusts were distributed directly to the grandchild at the surviving spouse's death. The question raised was whether, as to the QTIP trust for which reverse QTIP treatment was elected, the grandchild's generation assignment was raised one level under IRC §2612(c)(2), thereby treating the grandchild as the decedent's child for GST purposes.

The Service ruled that IRC §2612(c)(2) raises the grandchild's generation one level only if the transfer constituting the GST is a direct skip. In this case, because the reverse QTIP election was made, the decedent was treated as the transferor, and the transfer was made upon the decedent's death. Because at that time a non-skip person, the surviving spouse, had an interest in the trust, no direct skip occurred upon the transfer. Consequently, even though the child died before the surviving spouse, no moveup in generation occurred. No reverse QTIP election was made for the residuary QTIP, so the surviving spouse was treated as the transferor for GST purposes with respect to that trust. Because at the time of the transfer (i.e., the surviving spouse's death), the child had already predeceased the grandchild and a direct skip would otherwise therefore occur, the predeceased child exception applied and the grandchild was moved up one generation.

By Richard W. Miller

# Calendar of Seminars and Events

- July 16, 1992 (Sponsored by National Business Institute, Inc.) **Protecting Estate Assets From Creditors and the Internal Revenue Service in Oregon**, Red Lion Columbia River, Portland, Oregon. Telephone: (715) 835-7909.
- July 17, 1992 (Sponsored by National Business Institute, Inc.) **Protecting Estate Assets From Creditors and the Internal Revenue Service in Oregon**, The Eugene Hilton, Eugene, Oregon. Telephone: (715) 835-7909.
- July 18, 1992 (Sponsored by Southern California Tax & Estate Planning Forum) **Drafting Wills and Trusts**, Miyako, San Francisco, California. Telephone: 1-800-533-4567.
- July 23, 1992 (Sponsored by Professional Education Systems, Inc.) **Oregon Federal Estate and Gift Tax Workshop**, Red Lion Lloyd Center, Portland, Oregon. Telephone: 1-800-621-5336.
- July 25, 1992 (Sponsored by Southern California Tax & Estate Planning Forum) **Drafting Wills and Trusts.**, Hyatt, Los Angeles, California. Telephone: 1-800-233-1234.
- July 27-31, 1992 (Sponsored by New York University School of Continuing Education) **Trusts and Estates**, Grand Hyatt, New York, New York. Telephone: 1-800-228-9000 or (212) 883-1234.
- August 1, 1992 (Sponsored by Southern California Tax & Estate Planning Forum) **Drafting Wills and Trusts**, Alexis Park, Las Vegas, Nevada. Telephone: 1-800-453-8000.
- August 8, 1992 (Sponsored by Southern California Tax & Estate Planning Forum) **A Practical Estate Planning Workshop Using the Computer**, Hyatt Hotel, Los Angeles, California. Telephone: 1-800-233-1234.
- August 20-21, 1992 (Sponsored by ALI-ABA and ABA Sections of Taxation and of Real Property, Probate and Trust Law) **Estate Planning for the Family Business Owner**, Ritz Carlton, San Francisco, California. Telephone: (215) 243-1631.
- September 17-18, 1992 (Sponsored by Practising Law Institute) **Twenty-Third Annual Estate Planning Institute**, Ambassador West Hotel, Chicago, Illinois. Telephone: (212) 765-5710.
- September 17-18, 1992 (Sponsored by National Law Foundation) **Advanced Fiduciary Income Tax Seminar**, Eastside Marriott Hotel, New York, New York. Telephone: (302) 656-4757.
- September 17-18, 1992 (Sponsored by ALI-ABA and Massachusetts State Bar) **Sophisticated Estate Planning Techniques**, Westin Copley Place, Boston, Massachusetts. Telephone: (215) 243-1631.
- September 25, 1992 (Sponsored by Washington State Bar) **Living Trusts**, Washington Athletic Club, Seattle, Washington. Telephone: (206) 727-8202.
- October 21-24, 1992 (Sponsored by Southern California Tax & Estate Planning Forum) **Twelfth Annual Southern California Tax & Estate Planning Forum**, Le Meridien, San Diego at Coronado, California. Telephone: 1-800-332-3755.
- October 28-30, 1992 (Sponsored by ALI-ABA and California State Bar) **Uses of Insurance in Estate and Tax Planning**, Ritz Carlton, San Francisco, California. Telephone: (215) 243-1631.
- November 5-6, 1992 (Sponsored by Washington State Bar and Estate Planning Council of Seattle) **Estate Planning Seminar**, Washington State Convention & Trade Center, Seattle, Washington. Telephone: (206) 727-8202.
- November 8-11, 1992 (Sponsored by Washington Society of Certified Public Accountants) **Northwest Tax Institute**, Intercontinental Hotel, Maui, Hawaii. Telephone: (206) 644-4800.
- November 13, 1992 (Sponsored by Oregon State Bar) **Fundamentals of Estate Planning**, Embassy Suites, Tigard, Oregon. Telephone: (503) 620-0222, extension 407.
- November 13-14, 1992 (Sponsored by Southern California Tax & Estate Planning Forum) **Fiduciary Income Taxation: Comprehensive Two-Day Workshop**, Hyatt Hotel, Los Angeles, California. Telephone: 1-800-233-1234,
- November 16-20, 1992 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, Grand Hyatt on Union Square, San Francisco, California. Telephone: (215) 243-1631. (Limited registration)
- December 16, 1992 (tentatively scheduled) (Sponsored by Washington State Bar) **How to Draft Wills**, (Location not yet determined), Spokane, Washington. Telephone: (206) 727-8202.
- December 18, 1992 (tentatively scheduled) (Sponsored by Washington State Bar) **How to Draft Wills**, (location not yet determined), Seattle, Washington. Telephone: (206) 727-8202.
- January 4-8, 1993 (Sponsored by University of Miami) **Twenty-Seventh Annual Philip E. Edward Heckerling Institute on Estate Planning**, Fontainebleau Hilton Resort and Spa, Miami Beach, Florida. Telephone: (305) 284-4762.
- January 8, 1993 (Sponsored by Washington State Bar) **How to Probate an Estate**, (location not yet determined), Olympia, Washington. Telephone: (206) 727-8202.

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# newsletter

Oregon Estate Planning and Administration Section Newsletter

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## What Happens When a Parent Transfers Land to an Adult Child

Sometimes our clients do things without telling us first. Occasionally a client will try to "simplify" his or her estate by transferring land to an adult child, with the hope of avoiding probate. A typical form of transfer is placing the title jointly with survivorship. Other times, the transfer is by outright gift. The parent may also retain an express or implied right to continue in possession of the property. All of the above do avoid probate, but they also create many other consequences, not all of them good.

The chart on page two summarizes some of the tax consequences of various forms of transfer of land by a parent to an adult child.

Other consequences to be aware of when a parent transfers land to an adult child include the following:

**Implied Life Estate.** Even if a gift by a deed does not expressly reserve a life estate, if there is an implied agreement that the parent may continue to reside on the property, the IRS may seek to include the value of the land in the parent's estate under §2036(a)(1). *See* Rev. Rul. 78-409. If the parent's estate is under $600,000, and including the property in the estate does not result in a tax, it may be advantageous for the child and not the IRS to argue that the parent had a retained life interest, since the child receives a full step up in basis to fair market value at the parent's death. However, it is a lot easier for the IRS to argue substance over form than for a taxpayer to do so.

**Medicaid.** The lifetime transfer of land by the parent to the child without adequate

## In this issue

consideration within 30 months of the parent's qualifying for Medicaid will cause the uncompensated value of the home to be counted as a resource. This means the parent is ineligible for Medicaid for a period of up to 30 months from the date of transfer. For a parent with sufficient resources to pay for nursing home care, this is not an issue. However, a parent with limited means who transfers the residence may find that the transfer causes ineligibility for Medicaid and an inability to pay for nursing home costs.

**Creditors.** All of the transfers listed in the chart below except number 5 involve the possibility of a child's creditors attempting to reach the property during the parent's lifetime.

**Loss of Control.** Again, all of the transfers except number 5 cause the client to lose at least some control over the property. For instance, following a transfer into joint ownership with the child, the parent must get the child's consent to any later sale of the property.

**Imputed Interest.** If the client sells the property on an installment sale for an interest rate that is below the rate pursuant to §7872, then the client will have imputed interest. The client is treated as if the child paid the interest, and the client then made a gift of the interest to the child. Thus, the client is taxed on interest he or she never actually received.

**§1034 Deferral of Gain on Residence.** A parent's gain on sale of a principal residence can

**Comparison of Tax Consequences of Transfers of Land by Parent to Adult Child**

| | Transfer Method | Gift Tax | Income Tax | Child's Basis | Estate Tax |
|---|---|---|---|---|---|
| 1. | Outright Gift. | Yes. $10,000 annual exclusion applies. | None. | Carryover basis of parent. §1015. | None. Property is out of estate. |
| 2. | Transfer to Joint Tenancy with Right of Survivorship. | Yes. The value of the gift of the income and remainder interests is determined by IRS tables, pursuant to Reg. §25.2512-5(e). ORS 93.180; *Halleck v. Halleck*, 216 Or 23 (1959). Annual exclusion available for value of life estate only. Reg. §25.2503-3(b). | None. However, if property is parent's residence and is later sold by parent and child, parent would get less than the full $125,000 §121 capital gain exclusion. | Same as parent's basis if later sold during parent's life. §1015. If not sold, full step up at parent's death §1014(b)(9). | Full value in estate. §2040. |
| 3. | Gift with Retained Life Estate. | Yes. The value of the gift of the remainder interest is determined by IRS tables, pursuant to Reg. §25.2512-5. Annual exclusion unavailable because gift is of a future, not present, interest. Reg. §25.2503-3(a) | None. If property is parent's residence and is later sold by parent and child, parent's §121 capital gain exclusion applies only to gain on retained life interest. Rev. Rul. 84-43. | If child sells before parent dies, child is subject to gain on remainder interest, which receives pro rata carryover basis. If no sale during parent's life, child receives full step up at parent's death. §1014(b)(9). | Full value in estate. §2036(a)(1). |
| 4. | Sale. | None, unless sale is not for full fair market value. | Yes, on gain. Parent may be able to use §121 capital gain exclusion on residential property. | Purchase price, unless part gift - part sale. | The proceeds remaining at death and any contract receivable are includible in estate. §2033. |
| 5. | Transfer at Death by Will or Living Trust. | None. | None. | Full step up at parent's death. §1014(a). | Full value in estate. §2033. |

be rolled over into another principal residence and not be recognized, as long as: (1) the purchase occurs within two years of the sale (either before or after), and (2) the cost of the new residence is greater than or equal to the adjusted sale price of the old residence. §1034. A parent's transfer of a principal residence to a child, other than by sale for fair market value, would reduce or eliminate the parent's ability to defer gain under §1034.

**Special-Use Valuation Under §2032A.** Real property used as a farm or in a trade or business may qualify to be valued under the special-use valuation rules of §2032A for death tax purposes. A transfer of land may cause the parent's estate to fail to meet the percentage test under §2032A.

**Due on Sale.** A transfer of land may cause an acceleration of the due date of any mortgage because of the "due on sale" clause.

**Loss of Senior Citizen's Property Tax Deferral.** A client age 62 or older with annual income less than $19,500 may defer residential property taxes. ORS 311.666 et. seq. This right will be lost if the residence is transferred to the child during the parent's life, even if the transfer is to joint ownership or with a retained life interest.

**Loss of Exemption for Veteran's Widows and Widowers.** A widow or widower of a veteran of a foreign war can exempt the first $7,500 of the value of the residence from property tax. ORS 307.250 et. seq. A lifetime transfer of the residence to the child, even to joint ownership or with a retained life interest, will disqualify the parent from receiving this benefit.

**Property Management Issues.** For any type of lifetime transfer in which both the parent and a child are to have an interest in the property, there are several property management issues that need to be resolved, including:

1. Who is entitled to any revenues?
2. Who has the obligation to do repairs and maintenance?
3. Who has the right to condemnation proceeds?
4. Who has authority to transfer the property?
5. Who pays the mortgage, taxes, insurance, utilities, etc?

**What If The Child Dies First?** Whenever property is transferred to a child, the parent should consider what happens if the child dies before the parent. If the property was owned jointly with the child, the entire property passes back into the parent's name and the property again is subject to probate at the parent's death. If the transfer to the child is by a method other than joint ownership and the child dies first, the property interest will pass to the child's estate. Is the passing of the property to the child's spouse or creditors consistent with the parent's wishes?

**What About The Other Children?** Many times a parent wishes to treat all children equally. A parent may therefore intend that the child to whom a transfer is made should share the property with his or her siblings after the parent's death. This sharing may not actually occur; even if it does, there are gift tax consequences to the child who makes the transfers if the amount transferred exceeds the annual exclusion.

**Summary.** Clients are familiar with changing their bank accounts to joint ownership with an adult child. It is simple to do and they know it avoids probate. However, a client can be lulled into thinking that the partial or complete transfer of land to an adult child has the same simplicity. It definitely does not. As this article points out, there are many hidden pitfalls to be evaluated before a parent transfers land to an adult child.

(Note: I would like to credit Shirley A. Bass' article, *Tax Implications and Planning Pitfalls*, published in Oregon Medicaid Law, Professional Education Systems, Inc. (1992), for some of the information in this article. Another helpful resource was *Tax Planning for Retirement* (Warren, Gorham, & Lamont, 1990).)

Robert J. Saalfeld

## Bar and Section Cosponsor November Seminar

On Friday, November 13, the Oregon State Bar and the Estate Planning and Administration Section will cosponsor a seminar entitled "Fundamentals of Planning, Drafting and Administering the Oregon Estate." The program will be held at the Embassy Suites Hotel in Tigard from 9 a.m. to 5 p.m.

Aimed at attorneys new to estate planning or those who desire a refresher, the program will cover wills; documents

necessary to manage property or make health care decisions for incapacitated persons; trusts and other alternatives to probate; estate administration; and ethics issues in estate practice. The program planners are Mary K. Hickman, Carolyn Wilson Miller, Margaret Nightingale, Martin W. Rohrer, and Robert A. Stout.

The program has been approved for seven general MCLE or Practical Skills credits, including one Ethics credit. Regular preregistration is $105; Section member preregistration is $95; new lawyers, law students, and legal assistants preregistration is $65; and Season Ticket holder preregistration is $15. A luncheon is available for $10. For more information or to register, call the CLE registrar at 684-7404 or toll-free, 1-800-452-8260, ext. 407.

## What's New

### *McDonald v. United States National Bank of Oregon*
### 113 Or App 113 (1992)

The plaintiffs were the beneficiaries of a trust administered by the defendant. The trust owned real property that was the subject of land-use hearings in 1982 and 1983. As a result of the hearings, the real property was removed from the Urban Growth Boundary. The trustee distributed the real property to the plaintiffs in 1985.

In 1988, the plaintiffs sued the trustee, claiming that negligent trust administration caused the real property to decrease in value. The defendant asserted that the suit was barred by ORS 12.110(1), the two-year statute of limitations. The trial court granted the defendant's motion for a directed verdict, holding that the action was barred by the statute of limitations. The trial court also denied the defendant's claim for attorney fees.

The Court of Appeals affirmed the lower court's ruling based on testimony that one of the plaintiffs knew by 1985 that he had sustained damages because the real property had been removed from the Urban Growth Boundary. The statute of limitations began to run when the plaintiffs knew or should have known that the property had diminished in value due to the defendant's alleged negligence.

In a cross appeal, the trustee sought reimbursement of attorney fees. ORS 128.009(3)(z) authorizes trustees to "defend actions * * * for the protection of * * * the trustee in the performance of duties." The Court of Appeals stated:

> Because the defense of an action necessarily involves the employment of legal advisors, *see* ORS 128.009(3)(x), it follows that ORS chapter 128 authorizes the trust to reimburse the trustee for attorney fees incurred when the trustee is required to defend an allegation that it was negligent in its performance of its duties.

113 Or App at 116.

The Court of Appeals remanded the case to the lower court to clarify whether it denied the claim for attorney fees because it thought it had no authority to order reimbursement or because, in the exercise of the court's discretion, defendant was not entitled to fees.

### *Estate of Mary M. Blettell v. Snider*
### 114 Or App 162 (1992)

The plaintiffs brought an action for a declaratory judgment that a deed conveying property to the defendant was void because it was not delivered. The Court of Appeals found the action to be in the nature of an equitable proceeding to quiet title and reviewed it de novo.

The decedent owned a residence before her marriage to the plaintiff in 1951. The decedent and the plaintiff moved into the residence in 1965, but the plaintiff's name was never added to the title. In 1974, the decedent executed a deed to the defendant, the decedent's daughter by a previous marriage, but did not deliver or record it. In 1978, the decedent told the defendant about the deed and that it was located in the decedent and the plaintiff's joint safety deposit box. In August 1987, the decedent went to live with the defendant; the plaintiff continued to live in the residence. About two weeks later, the decedent told the defendant to get the deed and put it in the defendant's safety deposit box, but not to record the deed until after the decedent's death. The defendant recorded the deed the day after the decedent's death in 1989.

The plaintiff contends that the deed was not a valid inter vivos transfer because it was not delivered. The Court of Appeals stated:

> To effect a valid *inter vivos* transfer, the deed must be delivered. * * * Whether delivery is accomplished depends on the grantor's intention. At the time of the purported delivery, the grantor must intend to convey her interest and deprive herself of control over that interest. * * * When an executed deed is found in the possession of a grantee, a presumption arises that the deed was delivered and the burden of overcoming the presumption is on the party contending the contrary.

114 Or App at 165 (citations omitted.)

The Court of Appeals, in affirming the trial court's finding that the delivery had occurred, stated: "Weighing the evidence in light of the presumption that delivery occurred when [the defendant] was given exclusive possession of the deed before [the decedent's] death, we are not persuaded the plaintiffs have overcome the presumption." The Court of Appeals noted that the failure to record the deed was not determinative of whether delivery occurred, even though the recording of the deed would have created a presumption of delivery. 114 or App at 165.

### *Roe v. Pierce*
### 313 Or 228 (1992)

The plaintiffs, who are the adult children of the decedent, appealed an order by the probate court apportioning a personal injury and wrongful death settlement. The Oregon Supreme Court accepted review solely to address the question of appealability of the order and to determine if the Court of Appeals had jurisdiction.

The decedent filed a personal injury action, but died before the action was completed. The decedent's wife continued the action as personal representative and added a claim for wrongful death. The probate judge approved a settlement apportioning the funds between the estate and the decedent's wife after payment of attorney fees and costs. The amount allocated to the estate included general damages for the decedent's disability, pain, and mental distress as well as special damages for his medical expenses. The amount allocated to the decedent's wife was for loss of society and companionship.

The plaintiffs challenged the apportionment for failing to allocate wrongful death damages. Under Oregon law, personal injury damages are distributable according to the decedent's will, but wrongful death damages are distributable according to the laws of intestate succession. Presumably, the plaintiffs were not beneficiaries under decedent's will.

The Oregon Supreme Court held that the plaintiffs could only appeal from an order of final distribution entered pursuant to ORS 116.113(4) or an order of distribution pursuant to ORS 30.030(5). Because the order appealed from provided for allocation but not distribution of the proceeds, the Court dismissed the case for want of appellate jurisdiction.

Helen Rives

## *Charitable Gifts of Personal Libraries*

One source of specific charitable bequests that is often overlooked in estate planning is personal libraries. Practitioners might consider, as part of the estate planning process, asking clients if they have a large number of books and whether they would like to donate the books to their local library. Public libraries are often pleased to receive donations of books. Even if the libraries do not want to add the books to their collections, the libraries can sell the books to raise operating funds.

Helen Rives

## *Tax Developments*

### Technical Advice Memorandum 9229004 - Qualified Terminable Interest Election on Personal Residence

The decedent died in 1988. The decedent's will devised the decedent's residence to her surviving spouse, "subject, however, to the condition of his occupancy." On the sooner of the surviving spouse's abandonment of the residence or upon his death, ownership of the residence would pass to the decedent's children.

The decedent's children were concerned about the devise to the surviving spouse because he was unable to care for himself and because his only source of income was a pension. Consequently, shortly after the decedent's death, the surviving spouse and the decedent's children entered into an

agreement that the surviving spouse would have a life estate in the residence and, if he were to move, the residence would be sold and he would be entitled to a portion of the proceeds equal to the value of the life estate.

The Internal Revenue Service (the "Service") ruled that in the circumstances described above, the interest the decedent finally received (after the agreement) was not eligible for QTIP treatment under IRC §2056(b) (7). Because the decedent's will provided that the surviving spouse's lifetime interest in the residence was subject to his occupancy, he could not convey his right to reside there and obviously could not rent it out. Therefore, the surviving spouse's interest did not rise to the level of the qualifying income interest required by the Internal Revenue Code. Nor did the agreement entered into between the surviving spouse and the decedent's children affect this result.

The taxpayer asserted that the interest received as a result of the agreement (which conceivably *would* have qualified for QTIP treatment) should be treated as having been assigned from the decedent to the surviving spouse, pursuant to Treas. Reg. §20.2056(e)-2(d) (2), which recognizes such treatment in case of a transfer to a spouse in bona fide recognition of the surviving spouse's enforceable rights and as a result of a will controversy. The Service, however, ruled that the surviving spouse had no enforceable right to any of the decedent's property, other than the right that was created under the will. Moreover, there was no will controversy involved, only a voluntary agreement by the decedent's children and the surviving spouse as to a disposition of the residence different from that found in the decedent's will.

### Estate of Lydia G. Maxwell 98 TC No. 39 (1992) - Transfers with Retained Life Estate

In 1984, the decedent "sold" her personal residence to her son and daughter-in-law, but continued to reside there until her death in 1986. The terms of the "sale" were a $20,000 down payment, with the balance secured by a $250,000 note and mortgage. Each year until her death, the decedent forgave $20,000 of the deferred obligation. No payments of principal were made during the decedent's lifetime. At the time of the "sale," the decedent leased the property from her son and daughter-in-law for an amount approximating the interest that was due on the mortgage obligation.

The Tax Court ruled that the 1984 transfer was not a "bona fide sale for an adequate and full consideration in money or money's worth" sufficient to escape the reach of IRC §2036(a). The court held that the transfer was made by the decedent with a retention of the right, either by express or implied understanding, to the possession and enjoyment of the property until death; and, consequently, the residence was includable in the decedent's estate for estate tax purposes.

Looking at substance over form, the court held that the $20,000 "down payment," the payment of which was immediately forgiven, had no economic substance and so did not constitute consideration paid for the property. The mortgage note, representing the balance due, had no value at all because there was no intention that it would ever be paid. The annual forgiveness of $20,000 suggested a family understanding that the practice would continue until the decedent's death, when the balance would be totally forgiven. Even though there was no legal obligation on the decedent's part to follow such a plan, that was not necessary since there was an implied understanding that the mortgage would never be paid. Moreover, the execution of the lease merely provided a means by which the son and daughter-in-law could make the monthly interest payments required by the note.

Richard W. Miller

## *Correction*

The July 1992 issue of this Newsletter announced the availability of the new Senior Law Handbook published by the Oregon State Bar. The handbook costs $11, including shipping and handling, not $8 as reported in the July Newsletter. The Bar accepts only VISA and Mastercard for telephone orders (call 1-800-452-8260 or 620-0222, ext. 413). Otherwise, send a check with a written request for the book.

## Section Election Results

The Estate Planning Section held its annual meeting at the Bar Convention in Seaside on September 24. The following people were elected to serve as officers and members-at-large during 1992-93:

- Chairperson Elect
  Gretchen R. Morris
- Treasurer
  Helen Rives
- Secretary
  Donald K. Denman
- Members-at-Large
  *(two-year terms)*
  Rita Batz Cobb
  Allyn E. Brown
  Sally C. Landauer
  David E. Peterson
- Member-at-Large
  *(one-year term)*
  David Phillip A. Seulean

The following people will continue to serve on the Executive Committee during 1992-93:

- Past Chairperson
  Daniel C. Re
- Chairperson
  Stephen E. Kantor
- Members-at-Large
  *(one-year terms)*
  Donna M. Muehleck
  Christine P. Brown
  Robert J. Saalfeld

## Executive Committee Report

The Executive Committee of the Estate Planning and Administration Section met on June 12, June 26 and August 1, 1992. The primary focus of the meetings was to review proposed legislation to determine if the Section wanted to endorse any of the proposed bills. After significant discussion, the Executive Committee voted to endorse two bills and referred the other bills back to the drafters for further changes. One bill the Executive Committee endorsed would shorten the time period for filing a claim that may be covered by liability insurance in a probate proceeding to the same time period as allowed for other claims. The other bill would give courts the statutory power to modify trusts if all parties to the trust agree to the modification. The Executive Committee has also spent considerable time reviewing and suggesting changes to the proposed bill to revise Chapter 126 regarding guardianships and conservatorships.

Valerie Vollmar has been appointed the new Chair of the CLE sub-committee. The Section presented a one-hour CLE at the Oregon State Bar Annual Meeting.

## New Editor-In-Chief

The Editorial Board has selected Jennifer B. Todd of Salem to fill the position of editor-in-chief of the Section Newsletter. In addition to coordinating the publication of the Newsletter, Ms. Todd will be responsible for the final editing of the Newsletter.

Ms. Todd, a 1978 graduate of Whitman College, completed her law degree in 1983 at Willamette University College of Law. During her five years of private practice with the Salem law firm of Clark, Lindauer, McClinton, Fetherston & Edmonds, Ms. Todd's practice emphasized estate planning, probate, business, and qualified retirement plans. Ms. Todd withdrew as a partner to devote her time to her family.

## Reader Input Requested

Readers who encounter estate planning and administration questions that may be of interest to other readers of this Newsletter are encouraged to submit those questions to the Editor at the following address:

Jennifer B. Todd, Editor
Oregon Estate Planning & Administration Section Newsletter
736 Browning Ave. SE
Salem, OR 97302-3806

The names of people submitting questions will not be published.

The Editorial Board will provide general advice in response to the questions. The responses will not necessarily represent the position of the Section or its Executive Committee, nor will they be intended to constitute legal advice. The Newsletter staff reserves the right to respond only to those questions approved by a majority of the Editorial Board and to edit letters to conform to its form and length requirements.

Readers with articles to publish or ideas for future Newsletter articles are also encouraged to contact the Editor at the above address.

# Calendar of Seminars and Events

- October 15-16, 1992 (Sponsored by Practising Law Institute) **23rd Annual Estate Planning Institute**, The New York Hilton, New York, New York. Telephone: (212)765-5710.
- October 21-24, 1992 (Sponsored by Southern California Tax & Estate Planning Forum) **Twelfth Annual Southern California Tax & Estate Planning Forum**, Le Meridien San Diego at Coronado, Coronado, California. Telephone: 1(800)332-3755.
- October 28-30, 1992 (Sponsored by ALI-ABA and California State Bar) **Uses of Insurance in Estate and Tax Planning**, The Ritz-Carlton, San Francisco, California. Telephone: (215)243-1630.
- October 29-30, 1992 (Sponsored by Practising Law Institute) **23rd Annual Estate Planning Institute**, Hyatt-Regency-Embarcadero Center, San Francisco, California. Telephone: (212)765-5710.
- November 5-6, 1992 (Sponsored by Washington State Bar and the Estate Planning Council of Seattle) **Thirty-Seventh Annual Estate Planning Seminar**, Washington State Convention & Trade Center, Seattle, Washington. Telephone: (206)727-8202.
- November 8-11, 1992 (Sponsored by Washington Society of Certified Public Accountants) **Northwest Tax Institute**, Intercontinental Hotel, Maui, Hawaii. Telephone: (206)644-4800.
- November 8-13, 1992 (Sponsored by New York University) **51st Institute on Federal Taxation**, Grand Hyatt, New York, New York. Telephone: (212)998-7171.
- November 13, 1992 (Sponsored by Oregon State Bar) **Fundamentals of Planning, Drafting and Administering the Oregon Estate**, Embassy Suites, Tigard, Oregon. Telephone: (503)684-7407 or 1-(800)-452-8260, extension 407.
- November 13-14, 1992 (Sponsored by Southern California Tax & Estate Planning Forum) **Fiduciary Income Taxation: Comprehensive Two-Day Workshop**, Hyatt Hotel, Los Angeles, California. Telephone: 1(800)233-1234.
- November 16-20, 1992 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, Grand Hyatt on Union Square, San Francisco, California. Telephone: (215)243-1631. [Limited registration]
- December 3-4, 1992 (Sponsored by New York University) **State and Local Taxation**, Grand Hyatt, New York, New York. Telephone: (212)998-7171.
- December 6-11, 1992 (Sponsored by New York University) **51st Institute on Federal Taxation**, Fairmont Hotel, San Francisco, California. Telephone: (212)998-7171.
- December 16, 1992 (tentatively scheduled)(Sponsored by Washington State Bar) **How to Draft Wills**, [location not yet determined], Spokane, Washington. Telephone: (206)727-8202.
- December 18, 1992 (tentatively scheduled)(Sponsored by Washington State Bar) **How to Draft Wills**, [location not yet determined], Seattle, Washington. Telephone: (206)727-8202.
- January 4-8, 1993 (Sponsored by University of Miami Law Center) **Twenty-Seventh Annual Philip E. Heckerling Institute on Estate Planning**, Fontainebleau Hilton Resort and Spa, Miami Beach, Florida. Telephone: (305)284-4762.
- January 8, 1993 (Sponsored by Washington State Bar) **How to Probate an Estate**, [location not yet determined], Olympia, Washington. Telephone: (206)727-8202.
- January 12-15, 1993 (Sponsored by University of Southern California Law Center) **The Forty-Fifth Annual Institute on Federal Taxation**, Beverly Hilton Hotel, Beverly Hills, California. Telephone: (213)740-2582.
- January 21, 1993 (Sponsored by Washington State Bar) **How to Probate an Estate**, [location not yet determined], Seattle, Washington. Telephone: (206)727-8202.
- January 23-30, 1993 (Sponsored by National Law Foundation) **Estate Tax and Financial Planning Conference**, Royal St. Lucian, St. Lucia. Telephone: (302)656-4757.
- February 12, 1993 (Sponsored by Northwestern School of Law and the Estate Planning Council of Portland) **Twenty-Second Annual Estate Planning Seminar**, Red Lion Lloyd Center, Portland, Oregon. Telephone: (503)768-6629.

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Jennifer B. Todd
Editor-in-Chief