

# newsletter

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Section Newsletter

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## ***Ethical Concerns When Representing a Client Who Is Acting in Multiple Capacities***

**A**n attorney's conduct in representing a client is subject to the Oregon Code of Professional Responsibility (the "Code"). See ORS 9.490 and 9.527(7). This article examines the Code's restrictions on an attorney representing a client when that client is acting in multiple, potentially conflicting, capacities.

This situation can occur when an attorney is asked to represent the personal representative of a decedent's estate who is also a beneficiary of that estate. In such a case, the client's duties as personal representative to the estate's creditors and beneficiaries may conflict with the client's personal interest in the estate. Although the client is entitled to zealous representation in both capacities, it may be unethical for one attorney to provide that representation.

When an attorney is requested to represent a client acting in multiple capacities, several ethical issues are raised:

### **1. Will representing the client result in a conflict of interest under DR 5-105 of the Code?**

This issue was examined in Formal Opinion No. 1991-119. An attorney was representing a widow who was sued individually and as personal representative of her husband's estate. The opinion stated that when an attorney represents one person who is acting in multiple capacities, a conflict of interest under DR 5-105 cannot exist because DR 5-105 applies only when an attorney is representing *multiple* clients. The opinion concluded that representing the client in both capacities was permissible as long as the attorney did not assist the

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client in breaching any duty owed to others. The attorney would be prohibited from doing so under DR 1-102(A)(3) and DR 7-102(A)(7).

The opinion did not address the issue of disclosure of the potentially conflicting interests to the client. If the conflict of interest rules had applied, such disclosure and the client's consent would be prerequisites to the attorney's representation of the client. See DR 5-105(D) and (F) and DR 10-101(B).

## **2. Will representing the client result in conduct involving dishonesty, fraud, deceit, or misrepresentation under DR 1-102(A)(3)?**

While it is unlikely that this question can be answered before beginning to represent the client, the attorney must be mindful of it at all times during the representation.

As personal representative of an estate, the client is a fiduciary who represents the creditors and beneficiaries of the estate. *In re Workman's Estate*, 156 Or 33 (1937). The personal representative must see that creditors are paid to the extent permitted by the estate assets and has a duty to the beneficiaries to act in utmost good faith and to not take advantage of the position. *First Nat. Bank of Portland v. Connolly*, 174 Or 434 (1943).

As an estate beneficiary, however, the client is not acting in a fiduciary capacity and has no duty to the estate's creditors or other beneficiaries. Generally, a beneficiary is interested only in receiving his or her share of the estate, the size of which would be reduced by amounts paid to creditors and distributions to other beneficiaries.

A person who is both the personal representative and a beneficiary of an estate may be inclined to put his or her personal interest in the estate above the rights of the creditors or other beneficiaries, thereby breaching his or her duty as personal representative. As recognized in Formal Opinion No. 1991-119, an attorney cannot assist a client in breaching a duty.

For example, a personal representative/beneficiary could also be the joint owner of a bank account with the decedent. Under ORS 708.616(1), the surviving joint owner, rather than

the decedent's estate, is entitled to the account at the decedent's death unless there is clear and convincing evidence of another intention at the time the account was created. If such evidence existed, the personal representative would have a duty to recover the account for the estate if the estate was insolvent. If the estate was solvent, the personal representative would have a duty to notify the other beneficiaries of their right to initiate action to recover the account. See *Ledford v. Yonkers*, 278 Or 37 (1977); *Estate of Hendrickson v. Warburton*, 276 Or 989 (1976). Even if the personal representative was unaware of any evidence concerning the decedent's intent about the survivorship interest in the account, the duty of good faith may require notice to estate creditors (if the estate is insolvent) and to the other estate beneficiaries. Depending on the circumstances, the attorney representing the personal representative would be required to advise the client of the duty to initiate recovery action or to give notice of the account and could not assist the personal representative in refusing to do so.

If a dispute arose concerning the ownership of the account, it is unlikely that one attorney could represent the personal representative/beneficiary in both capacities. Furthermore, if representing the client in only one capacity would cause the attorney to reveal a confidence or secret of the client, as defined in DR 4-101, the attorney may be prevented from representing the client in either capacity.

## **3. Will representing the client result in assisting the client in conduct that the lawyer knows to be illegal or fraudulent under DR 7-102(A)(7)?**

As discussed in section 2 above, representing a client with dual capacities can lead to situations in which the client's interests and obligations in each capacity conflict. The attorney may not assist the client in any conduct known by the attorney to be illegal or fraudulent.

Under the section 2 fact situation, a violation of DR 7-102(A)(7) could occur if the attorney prepared and filed pleadings that failed to disclose the existence of the joint bank account. Such

conduct might also violate DR 7-102(A)(5), which prohibits an attorney from knowingly making a false statement of law or fact.

### Avoiding Problems

An attorney should take steps to avoid ethical problems when representing a client acting in multiple capacities. The following course of action is suggested:

1. Identify the capacity in which the client will be represented. In the case of the personal representative/beneficiary, the attorney should discuss the different, potentially conflicting, interests that exist and determine with the client which interest the attorney will represent. The attorney should confirm this agreement with a letter that emphasizes that the attorney is representing the client in only one capacity, and, if the client desires representation of the other capacity, independent representation should be sought.

2. If a conflict between the multiple capacities arises, the attorney should notify the client of the conflict in writing and recommend that the client seek independent legal advice for the capacity not represented by the attorney. The attorney should not advise the client about both sides of the conflict.

3. If the client refuses to follow the attorney's advice about the obligations of the capacity the attorney represents and such refusal would cause the attorney to violate a disciplinary rule, such as DR 1-102(A)(3) or DR 7-102(A)(7), the attorney should withdraw from the representation under DR 2-110(B)(2).

Daniel C. Re

### Questions, Comments, or Suggestions about this Newsletter?

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Salem, OR 97302-3806

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**The Editorial Board welcomes your input.**

## Rule Against Perpetuities: Does "Later-of" Make You Too Late?

**D**rafters of rule against perpetuities savings clauses should be aware of a trap caused by the Oregon Uniform Statutory Rule Against Perpetuities ("USRAP"), codified as ORS 105.950 to 105.975. The common law rule against perpetuities states that an interest is void ab initio unless it must vest, if at all, no later than 21 years after the lives in being at the creation of the interest. *Closset v. Burtchaell*, 112 Or 585, 601 (1924); *City of Klamath Falls v. Bell*, 7 Or App 330, 335 (1971) (citing Gray, *The Rule Against Perpetuities* 191, 201 (4th ed 1942)). Many drafters prevent operation of the common law rule by adding a "savings clause" to their documents which provides that any interest must terminate within 21 years after the death of certain named persons or classes of persons.

Oregon's USRAP adds a 90-year "look back" to the common law rule against perpetuities so that a "nonvested property interest is invalid unless:

(a) When the interest is created, it is certain to vest or to terminate no later than 21 years after the death of an individual then alive; or

(b) The interest either vests or terminates within 90 years after its creation." ORS 105.950(1).

### "Later-of" Drafting

In response to the "look back" provision, many wills now contain a savings clause, such as:

Unless sooner terminated or vested in accordance with other provisions of this will, all interests not otherwise vested shall terminate (1) 21 years after the death of the last survivor of my spouse and my lineal descendants living on the date of my death, or (2) 90 years after the date of my death, *whichever period is later*, at the end of which time distribution of all principal and all accrued, accumulated and undistributed income shall be made to the persons then entitled to distributions of income and in the manner and proportions herein stated, irrespective of their then-attained ages.

The following examples illustrate the intended use of this "later-of" savings clause:

## Facts:

D's will creates a trust for his children for life, remainder to grandchildren or other lineal descendants in trust until age 25. D dies, leaving a four-year-old daughter.

## Situation 1:

D's daughter lives to 95 (year 91 of the trust), and her only descendant is a grandson, age ten. Under the savings clause given above, after the daughter's death, the trust can continue for 21 more years, since she was a life in being. The trust continues for the benefit of the grandson for 15 more years, until he is 25.

## Situation 2:

Assume the same facts, except the daughter dies at 20 (year 16 of the trust), leaving a one-year-old child. The drafter intends the trust to continue until the grandchild is 25, well before year 90. Without the reference to a 90-year period, the savings clause would require that the trust be distributed to the grandchild when the grandchild is 22 (year 37).

The problem with the "later-of" drafting becomes apparent when the examples are tested under the Oregon USRAP. In the two-prong statute, the test in clause (a) is measured at the time the interest is created, while clause (b) tests what actually happened—did the interest in fact vest within 90 years? In both situations above, the trust fails clause (a) of the statute because we are not certain at the time of D's death (when the interest is created) whether Situation 1 or Situation 2 will occur. In Situation 1, the trust will vest within the lives-in-being-plus-21-years period. However, Situation 2 illustrates the possibility that the trust may extend beyond the lives-in-being-plus-21-years period if that period is shorter than 90 years. In Situation 1, the trust also fails clause (b) of the statute because it does not in fact vest within 90 years of creation—it vests in year 116. The Notes and Comments to the USRAP confirm this analysis. 8A ULA 348, 362-65 (Supp 1992).

## Choice of Savings Clauses

Because of this defect in a "later-of" savings clause, drafters should choose between the following savings clauses for wills:

## Traditional 21-Year Drafting

No trust shall continue for a period longer than the lives of my spouse, my children, any grandchildren of mine who are living at the time of my death and the survivor of all of them and 21 years thereafter, at the end of which time distribution of all such trust property shall be made to those persons then entitled to distributions of income and in the manner and proportions herein stated, irrespective of their ages.

## 90-Year Drafting

No trust shall continue for a period longer than 90 years after the date of my death, at the end of which time distribution of all such trust property shall be made to those persons then entitled to distributions of income and in the manner and proportions herein stated, irrespective of their ages.

The language of the USRAP appears to permit either form, though a statement in the Prefatory Note encourages 21-year drafting. *Id.* at 348 ("Lawyers can and should continue to use the same traditional perpetuity-saving/termination clause, using specified lives in being plus 21 years, [that] they used before enactment."). However, 90-year drafting may be preferable for some situations in which the measuring lives are fairly old, there are only one or two measuring lives, or there are provisions for after-born descendants.

## Legislative Solution

The drafters of the USRAP have attempted to correct this "later-of" drafting problem. The 1990 amendment to the USRAP added section 1(e) as follows:

(e) **Effect of Certain "Later-of" Type Language.** If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of (A) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement, or (B) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

Incorporation of this paragraph in ORS 105.950 would cure "later-of" drafting problems in the perpetuities savings clauses of existing and future wills. This amendment has not been enacted by the Oregon Legislature, and is not expected to be introduced in the 1993 legislative session.

### **Additional Problems**

There are three more problems with "later-of" drafting. First, it may cause a constructive addition to a grandfathered trust for generation-skipping transfer tax purposes, particularly if a holder of a power of appointment attempts to switch from a lives-in-being-plus-21-years period to a 90-year period or vice versa. Second, it may prevent the use of the "Delaware tax trap" as an option in a generation-skipping trust. Last, it may cause a perpetuity problem if the interest is governed by the law of a jurisdiction using the common law rule. This could occur, for example, if an Oregon resident executes a will with a "later-of" savings clause, moves to a state using the common law rule, and dies without changing the savings clause. These issues are covered in more detail in the Notes and Comments to the USRAP, 8A ULA 342, 352-58, 362-65, 369-72 and Fellows, *Testing Perpetuity Reforms: A Study of Perpetuity Cases 1984-89*, 25 Real Prop Prob & Tr J 597 (Winter 1991).

Emily V. Karr

### **Section Seeks Input on Guardianship and Conservatorship Bill**

**T**he 1993 Legislature will consider a complete overhaul of Oregon's guardianship and conservatorship laws. The Section asks lawyers actively practicing in the areas of guardianships and conservatorships to review and comment on the proposed bill. Direct requests for copies of the bill and comments to Scott McGraw, 1049 Oak St. SE, Salem, OR 97301; phone 399-7370.

### **Tax "Un" Alert: Legislative Update on Proposed Reduction in Unified Credit**

**R**ecently, many estate planning attorneys have been contacted by clients who have heard rumors about attempts by Congress to lower the unified credit.

Congress convenes this month. At the close of the last Congress, there were no pending bills containing provisions which would lower the unified credit.

In 1992, there were some attempts to pass such legislation. In April, H.R. 4848 was introduced, which would have lowered the unified credit from \$192,800 to \$54,800 (i.e., lowering the exemption equivalent amount from \$600,000 to \$200,000). This was proposed to finance amendments to the Social Security Act designed to ensure universal access to long-term health care. H.R. 4848 died in committee. The health care portion of the bill was later introduced as H.R. 6076, without the unified credit provision. A companion bill, which included the unified credit provision, was introduced in the Senate as S. 2571. Both of these bills also died in committee.

A shift in legislative goals and priorities will undoubtedly occur after the Clinton Administration takes office. However, at this time, a reduction in the unified credit is not believed to be in Mr. Clinton's plans. The earlier congressional proponents of such a move are said to be backing away from the idea. Although it is always possible that a renewed effort in this area might be made by Congress or the new Administration, congressional sources indicate that a reduction in the unified credit is unlikely to be enacted in the near future.

Peter J. Duffy

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## *Tips and Traps*

- Use care when drafting rule against perpetuities savings clauses for irrevocable trust agreements. Do not use a savings clause from a will or revocable trust. The rule against perpetuities period begins to run on the date the interest is created. With an irrevocable trust, the interest is created on the date the trust is created, so the savings clause should measure lives in being from the trust creation date. With a will or revocable trust, the interest is created on the client's date of death, so the savings clause should measure lives in being from the date of death.
- Be alert when drafting wills for spouses who want different dispositive schemes if all lineal descendants predecease them: the wills may need to be coordinated. For instance, assume the husband wants to benefit his niece, the wife wants to benefit her nephew, and the wills are drafted accordingly. If the wife dies and leaves everything to the husband, his will would leave everything to his niece when he dies. The wife's nephew would receive nothing. One way to avoid this problem is for both wills to contain bequests of 50% to the niece and 50% to the nephew. The spouses must understand, however, that the survivor of them will be free to change his or her will after the first spouse dies.
- Sometimes spouses want to make a single pecuniary bequest to a charity, friend, or relative after they both die. Draft carefully to be sure the distribution can be made only once. Sometimes, because of disclaimer or other failure of beneficiaries, the bequest can be distributable twice from one estate or more than once from two estates. For example, assume a husband and wife want their church to receive \$50,000 after they both die. Their wills give everything to the survivor of them, and then \$50,000 to the church and the rest to the children when the survivor dies. Assume the husband dies first, the wife dies a short time later, and her

personal representative files a disclaimer to take advantage of the husband's unified credit. The church will get \$50,000 from each estate. Also, if a will contains a pecuniary bequest in an article that is cross-referenced elsewhere in the will as the contingent disposition of a portion of the estate or a trust, the bequest may be made twice. If it is possible that a bequest can be made more than once, add language to prevent that result.

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## *Executive Committee Report*

**T**he Executive Committee of the Estate Planning and Administration Section met on October 16 and December 11, 1992. The primary focus of both meetings was proposed legislation.

The Executive Committee asked the Section's Legislative Subcommittee to examine statutes about payment of lottery proceeds following a winner's death. Currently, the Lottery Commission does not allow a lottery winner to designate a trust as a beneficiary, which could trigger unnecessary probates.

The Legislative Subcommittee will watch closely the proposed Legal Technicians' Bill during the 1993 legislative session. This bill would allow non-lawyers to be licensed to perform certain legal tasks that are now performed only by attorneys. The Bar opposed a similar bill in the 1991 session.

In October, the Executive Committee revised and approved a final draft of a proposed bill to revise ORS Chapter 126 regarding guardianships and conservatorships. After formatting by Legislative Counsel, the proposed bill is expected to be introduced early in the legislative session. People who wish to receive a copy of the proposed bill should contact Scott McGraw, 1049 Oak St. SE, Salem, OR 97301; phone: 399-7370.

In December, Warren Deras, Chairman of the Legislative Subcommittee, reported on the status of the Section's legislative projects. The projects,

and the Subcommittee's objectives for the projects, are as follows:

- **Uniform Probate Code Revisions:** Examine amendments to the Uniform Probate Code for possible adoption in Oregon.
- **Uniform Act on Intestacy, Wills and Donative Transfers:** Examine for possible adoption in Oregon.
- **Uniform Multiple-Person Accounts Act:** Propose solutions to problems with joint accounts as probate avoidance devices.
- **Uniform Custodial Trust Act:** Examine for possible adoption in Oregon.
- **Uniform Probate Accounting:** Propose minimum requirements so accountings provide basic information in an understandable format. Change the statutory accounting period to conform with the federal income tax year.
- **Disclaimer Statute:** Review Uniform Probate Code revisions for possible adoption in Oregon.
- **Funeral Arrangements:** Clarify and coordinate existing, inconsistent legislation on disposition of human remains.
- **Small Estates:** Propose procedures for passing title to real property by affidavit that will satisfy title companies.
- **Trusts as Partners:** Propose solutions to the problem of the *In Re The Corey Partners* bankruptcy case, which held the trustee personally liable for debts of a partnership in which the trust was a partner.
- **Rights of Creditors in Living Trusts:** Review for possible adoption in Oregon a California statute requiring notice to creditors before distribution of revocable living trust assets to beneficiaries.
- **Rule in Shelley's Case:** Examine the relationship of ORS 112.345 to ORS 93.050, which was adopted in 1991.

- **Lottery Account Ownership:** Propose amendments to lottery statutes to allow a winner to designate a trust as beneficiary.

If you wish to volunteer to help with any of these projects, please contact Warren Deras, 1400 SW Montgomery St., Portland, OR 97201; phone: 222-0106. The committee for each project is limited to three people.

At its December meeting, the Committee created a Loss Prevention Subcommittee of the Section, and appointed Carolyn Wilson Miller as chair. The new subcommittee will review areas of attorney malpractice in estate planning and administration and propose ways to reduce malpractice, including seminars, educational materials, information for this Newsletter, and so on. One of the early focuses of the Subcommittee will be errors in administering revocable living trusts.

The Committee also considered a letter from the Bar regarding complaints about possible deceptive advertising practices for revocable living trusts. The committee members agreed to review the ads sent by the Bar.

Donald K. Denman,  
Secretary

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### ***Free CLE Tapes***

**T**hanks to the efforts of the Loss Prevention Subcommittee of the Oregon State Bar Taxation Section, a taped seminar entitled "Pitfalls in Estate Administration" is now available for loan from the Professional Liability Fund at no charge. The program, available in audiotape or videotape, qualifies for 2.5 MCLE credits. To borrow the tape, write to Linda D'Agostino, Professional Liability Fund, PO Box 1600, Lake Oswego, OR 97035-0889, or fax your request to 684-7250. Please specify audiotape or videotape format, and allow four to six weeks for delivery.

## Calendar of Seminars and Events

- January 15, 1993 (Sponsored by Oregon State Bar) **Finding, Valuing and Keeping Marital Property**, Portland Hilton, Portland, Oregon. Telephone: (503)684-7407 or 1(800)452-8260, extension 407.
- January 21, 1993 (Sponsored by Washington State Bar) **How to Probate an Estate**, Seattle Sheraton Hotel, 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 5, 1993 (Sponsored by Oregon State Bar) **Finding, Valuing and Keeping Marital Property**, Valley River Inn, Eugene, Oregon. Telephone: (503)684-7407 or 1(800)452-8260, extension 407.
- 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.
- February 18-20, 1993 (Sponsored by ALI-ABA) **Advanced Estate Planning Techniques**, The Grand Hyatt Wailea, Maui, Hawaii. Telephone: (215)243-1631.
- March 9, 1993 (Sponsored by Practising Law Institute) **Income Taxation of Estates and Trusts**, PLI Training Center, New York, New York. Telephone: (212)765-5710.
- March 20, 1993 (Sponsored by Practising Law Institute) **The Closely Held Business**, PLI Training Center, New York, New York. Telephone: (212)765-5710.
- April 26-30, 1993 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, New York Sheraton, New York, New York. Telephone: (215)243-1631.
- May 5-6, 1993 (Sponsored by New York University) **Trusts and Estates**, Helmsley Park Lane Hotel, New York, New York. Telephone: (212)790-1320.
- June 2-4, 1993 (Sponsored by ALI-ABA and Continuing Legal Education for Wisconsin) **Basic Estate and Gift Taxation and Planning**, Pfister Hotel, Milwaukee, Wisconsin. Telephone: (215)243-1631.
- June 7-8, 1993 (Sponsored by New York University) **Trusts and Estates**, Stouffer Stanford Court, San Francisco, California. Telephone: (212)790-1320.
- June 21-25, 1993 (Sponsored by ALI-ABA and the University of Wisconsin Law School) **Estate Planning In Depth**, University of Wisconsin, Madison, Wisconsin. Telephone: (215)243-1631.



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# newsletter

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## *At the Frontier of Probate Litigation: Intentional Interference With the Right to Inherit<sup>1</sup>*

### Part I

#### 1. Introduction

**T**he typical repertoire of a probate litigator consists of will contests based on fraud, duress, undue influence, and ineffective execution.

Increasingly in vogue among probate litigators, however, is the tort action of damages for intentional interference with inheritance.<sup>2</sup> No reported case in Oregon recognizes this tort, and many attorneys, upon hearing of the tort, quickly conclude that it is a novel theory of liability, perhaps originating in California. Surprisingly, the tort has been part of the American legal system since at least the early 20th century,<sup>3</sup> and—more remarkably—there is no precedent for its use in California.<sup>4</sup> The torts recent rise in popularity can be traced to the fact that it is a useful weapon in the arsenal of the litigator challenging testamentary and other dispositive plans.

The tort significantly differs from traditional will contest causes of action because it permits a plaintiff to recover compensatory and punitive damages from a third person, as opposed to estate assets. This makes the tort an attractive alternative to a will contest when an estate has little or no property. In addition, a plaintiff can bring a case before the testator has died, thus resolving issues such as fraud that would normally be postponed until after the testator's death.

On the other hand, the tort's similarity to will contests creates many potential traps for the unwary. In particular, the overlap between the tort cause of action and statutory probate proceedings gives rise the thorny issues of when and where a plaintiff must bring the action after a testator has died.

This article briefly examines a variety of aspects of this tort. Where appropriate, it notes Oregon law that may be useful to the litigator considering bringing a claim. Part I addresses the uses for and elements of the tort, proof of the case, and remedies. Part II, to be published in the July 1993 issue of this newsletter, will examine several procedural issues raised by the tort.

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## 2. The Fundamentals

A plaintiff can use the tort to recover damages for almost any conceivable interference with a testamentary plan. Over the years, plaintiffs have been quite inventive in their use of the tort, and to a certain extent courts have indulged this experimentation. In general, courts have permitted suits for damages under the following circumstances:

- Interfering with the execution of a will;<sup>5</sup>
- Causing or frustrating the alteration or revocation of a will;<sup>6</sup>
- Suppressing or destroying a will;<sup>7</sup>
- Offering a forged will for probate;<sup>8</sup> or
- Inducing or preventing inter vivos transfers that affect expected bequests or inheritances.<sup>9</sup>

Obviously, the facts that give rise to a tort action are in many instances identical to those that would support a traditional will contest. As discussed in Part II, this overlap leads to a variety of procedural issues that the practitioner must fully understand before setting out for a journey on the frontier of probate litigation.

The essential elements of the tort resemble the essential elements of the tort of intentional interference with prospective economic advantage.<sup>10</sup> To make a prima facie case, the plaintiff must present evidence (1) of the existence of the expectancy; (2) of intentional interference with the expectancy by the defendant; (3) that the interference itself was tortious, such as fraud, duress, or undue influence; (4) that the plaintiff was reasonably certain to have received his expectancy but for the interference; and (5) of damages.<sup>11</sup> Proof of these elements is discussed in more detail below.

## 3. Proving the Case

Depending on the forum, the tort case may be tried by a jury, one of the tort's most significant differences from a traditional will contest. If a plaintiff brings an action in the context of estate administration proceedings, the case will be tried by the judge.<sup>12</sup> If, however, the plaintiff properly brings an action for damages in district or circuit court, as with any other tort action, the plaintiff has the right to a trial by jury.<sup>13</sup>

Although several of the elements of the tort are self-explanatory, some deserve elaboration. To prove intent, the plaintiff must present evidence that the defendant either actually intended to interfere or knew that the deprivation of the plaintiff's expectancy was substantially certain to occur as a consequence of the defendant's actions.<sup>14</sup> A plaintiff cannot hold a defendant liable for inadvertently or incidentally interfering with his expectancy.<sup>15</sup>

As in all cases, a plaintiff must prove damages with reasonable certainty.<sup>16</sup> If the plaintiff brings the action while the decedent is still alive, however, it will be difficult to prove the value of the expectancy, given its inherent speculative and uncertain nature. To prove damages after death, the plaintiff must produce

satisfactory evidence of how the decedent's estate would have been distributed but for the interference. A plaintiff may also recover punitive damages for interference with inheritance by proving that the defendant acted willfully, maliciously, or wantonly.<sup>17</sup>

In the alternative, the plaintiff may seek the equitable remedy of a constructive trust if the defendant, through wrongful means, acquired property originally destined for the plaintiff.<sup>18</sup> The plaintiff, however, must prove the defendant's wrongful conduct by clear and convincing evidence to obtain a constructive trust, not merely by a preponderance of the evidence.<sup>19</sup> In addition, the plaintiff must prove that monetary damages are an inadequate remedy.<sup>20</sup> A plaintiff, however, can do so by showing that the defendant's conduct deprived the plaintiff of unique property<sup>21</sup> or that the plaintiff's damages simply are too difficult to calculate, but equity still demands a remedy.<sup>22</sup>

## 4. Part II

Part II of this article will address several procedural issues raised by the tort, including when a plaintiff may file the action and the effect of probate proceedings on the action. Part II will be published in the July 1993 issue of this newsletter.

M. Read Moore

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<sup>2</sup> See generally *Restatement (Second) of Torts* §774B (1979) (recognizing tortious interference with an expectancy as a valid cause of action).

<sup>3</sup> See, e.g., *Mitchell v. Langley*, 85 SE 1050 (Ga 1915); *Creek v. Laski*, 227 NW 817 (Mich 1929). See generally Annotation, *Liability in Damages for Interference With Expected Inheritance or Gift*, 22 ALR4th 1229 (1983).

<sup>4</sup> The California Court of Appeals at first recognized the cause of action in *In re Estate of Legeas*, 256 Cal Rptr 117 (Cal Ct App 1989). The court, however, later "depublished" the opinion, so it is no longer precedent in California.

<sup>5</sup> E.g., *Peffer v. Bennett*, 523 F2d 1323 (10th Cir 1975) (applying Colorado law); *Carlton v. Carlton*, 575 So 2d 239 (Fla Dist Ct App 1991); *Cooke v. Cooke*, 278 So 2d 683 (Fla Dist Ct 1973).

<sup>6</sup> E.g., *Frohwein v. Haesemeyer*, 264 NW2d 792 (Iowa 1978).

<sup>7</sup> E.g., *Allen v. Lovell's Adm'x*, 197 SW2d 424 (Ky 1946); *Wilburn v. Meyer*, 329 SW2d 228 (Mo Ct App 1959). See also, e.g., *In re Estate of Legeas*, 256 Cal Rptr 117 (Cal Ct App), *decertified for publication*, 210 Cal App 3d 385 (1989).

<sup>8</sup> E.g., *First National Bank of Mayfield v. Gardner*, 376 SW2d 311 (Ky 1964); *King v. Acker*, 725 SW2d 750 (Tex Ct App 1987).

<sup>9</sup> E.g., *Davison v. Feuerherd*, 391 So 2d 799 (Fla Dist Ct App 1980); *Allen v. Leybourne*, 190 So 2d 825 (Fla Dist Ct App 1966); *Nemeth v. Banhalmi*, 425 NE2d 1187 (Ill App Ct 1981); *Cyr v. Cote*, 396 A2d 1013 (Me 1979).

<sup>10</sup> See generally, *Straub v. Larson*, 287 Or 357, 360-62 (1979). The widespread acceptance of the tort of intentional interference with prospective economic advantage persuaded many courts to recognize the tort of intentional interference within the right to inherit. E.g., *Cyr v. Cote*, 396 A2d 1013 (Me 1979).

<sup>11</sup> E.g., *Davison v. Feuerherd*, 391 So 2d 799, 801 (Fla Dist Ct App 1980); *Estate of Jeziorski v. Tomera*, 516 NE2d 422, 424 (Ill App Ct 1987); *Cyr v. Cote*, 396 A2d 1013, 1018 (Me 1979).

- 12 ORS 111.205.
- 13 Or Const Art I, §17. See generally *Molodyh v. Truck Ins. Exch.*, 304 Or 290 (1987).
- 14 See *Straube v. Larson*, 287 Or 357, 361 (1979).
- 15 See *American Sanitary Serv. v. Walker*, 276 Or 389, 394 (1976).
- 16 E.g., *Owens v. Haug*, 61 Or App 513, 517 (1983).
- 17 E.g., *Honeywell v. Sterling Furniture Co.*, 310 Or 206, 210-11 (1990). Several courts have allowed punitive damages for intentional interference with the right to inherit. E.g., *In re Estate of Legeas*, 256 Cal Rptr 117, 119 (Cal Ct App 1989); *King v. Acker*, 725 SW2d 750 (Tex Ct App 1987). The Oregon Supreme Court has upheld an award of punitive damages for the analogous tort of intentional interference with contractual relations. *Lewis v. Oregon Beauty Supply Co.*, 302 Or 616, 629 (1987). See also *Harm v. Central Life Assurance Co.*, 107 Or App 708, 715 (1991).
- 18 See generally *Derenco v. Benj. Franklin Fed. Sav. & Loan*, 281 Or 533, 558 (1978); *Osterberg v. Osterberg*, 278 Or 277, 285 (1977); *Suiter v. Thompson*, 225 Or 614 (1960); *Restatement of Restitution* §167 (1937).
- 19 *Pantano v. Obbiso*, 283 Or 83 (1978).
- 20 E.g., *Johnson v. Steen*, 281 Or 361 (1978).
- 21 See *Barnes v. Eastern & Western Lbr. Co.*, 205 Or 553, 612 (1955).
- 22 See generally 27 Am Jur 2d, *Equity* §98 (1966).

## **Testamentary Apportionment of Estate Taxes and Abatement of Estate Shares to Pay Claims and Expenses**

Oregon probate law sets forth rules for determining which assets will bear the payment of estate taxes, claims against the estate, and estate administrative expenses. ORS 116.303 to 116.383 and ORS 116.133, respectively. Those statutes permit a testator to direct which property will be used to pay the taxes, claims, and expenses. In the absence of such direction, the statutes assign responsibility for these payments. The purposes of this article are to (1) summarize the rules for apportionment of estate taxes and payment of claims and administrative expenses, (2)

### **Questions, Comments, or Suggestions about this Newsletter?**

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**The Editorial Board welcomes your input.**

examine the consequences of certain testamentary directions or lack of direction, and (3) suggest a procedure to enhance the attorney's ability to draft a will that carries out the client's intent regarding these issues.

## **1. Apportionment of Estate Taxes, ORS 116.303 to 116.383.**

Unless the decedent's will provides otherwise, the general statutory rule requires each beneficiary of the decedent's estate to pay that part of the estate taxes equal to the proportion that the value of that beneficiary's interest in the estate bears to the value of all interests in the estate. Thus, a person receiving ten percent of the estate generally would be responsible for ten percent of the estate taxes. For purposes of this statute, "estate" means the gross estate for federal estate tax and Oregon inheritance tax purposes, rather than the probate estate. "Tax" means the federal estate tax and Oregon inheritance tax together with any interest and penalties on those taxes.

An exception to the general rule occurs if the estate is allowed an exemption or deduction in computing the estate tax because of a person's relationship to the decedent or because of the purpose of the gift. The benefit of the exemption or deduction is given to the person bearing the relationship or receiving the property. ORS 116.343. As a result, the recipient of any property for which a marital or charitable deduction is allowed will not be subject to apportionment to the extent of those deductible property interests. The tax is apportioned only to the recipients of property upon which estate tax is imposed.

Another exception to the general rule exists for split-interest devises. Generally, the tax on property subject to an income interest or a term for years or for life is charged against the recipient of the principal and not against the income beneficiary or other intermediate interest. ORS 116.353.

## **2. Abatement of Devises to Pay Claims and Expenses, ORS 116.133.**

"Abatement" is the reduction of a devise to pay estate claims and expenses, according to ORS 111.005(1). ORS 116.133, however, provides that abatement applies not only to devises but also to intestate shares of the estate. If the testator's intent is known, shares of the estate abate consistent with that intent. Such intent may be stated in the will, or may be determined from the decedent's testamentary plan or from the express or implied purpose of a devise.

In the absence of a testator's contrary intent and except as otherwise provided in ORS 112.405 (concerning the shares of pretermitted children) and ORS 114.165 (concerning payment of the elective share of a surviving spouse), the shares of an estate abate in the following order, without distinction between real or personal property:

- 1. Property not disposed of by the will.** Although the statute does not so specify, the presumption is that

this description refers to intestate property which is subject to probate administration and not to property transferred outside of probate by contract or by operation of law. This latter type of property generally is not subject to the probate proceeding.

**2. Residuary devises.** See *Grimes v. Grimes*, 242 Or 58 (1965).

**3. General devises.** A general devise is chargeable on the estate generally and not distinguishable from other parts of the estate. ORS 111.005(17).

**4. Specific devises.** A specific devise is a specific thing or part of the estate described so it is capable of identification. It is identified and differentiated from all other parts of the estate. ORS 111.005(30).

In general, property abates proportionately within each of the above classifications. However, devisees of tangible personal property not used in trade, agriculture, or business are not required to contribute from that property unless the property forms a substantial part of the estate and the court specifically orders contribution.

### 3. Application of Statutory Provisions.

**a. Apportionment of Estate Taxes.** Unless the testator directs otherwise, everyone receiving property subject to estate taxes will pay their proportionate share of those taxes. Wills, however, often contain a provision stating that estate taxes will be paid from the residue of the estate without apportionment. In the absence of a contrary intent, such a direction should be interpreted to mean the residue of the *probate* estate and not the estate as defined for estate tax purposes. See *Grimes*, supra. The effect of such a provision is to require all estate taxes first to be paid by the residuary devisees. Only if the residue is insufficient to pay estate taxes will other recipients be required to pay.

A direction to pay estate taxes from the residue will not create a problem if all property subject to estate taxes is distributed as part of the estate's residue. In that case, all residuary beneficiaries will share in the tax burden. Seldom, however, is all property that is subject to estate taxes transferred exclusively through the residue of the estate. Common examples of property transferred outside of the residuary estate and subject to estate tax include specific devises, certain trust interests, property transferred by right of survivorship, and life insurance proceeds or retirement plan benefits transferred to a designated beneficiary. A will provision directing payment of taxes from the estate residue permits the recipients of this property to receive it free of tax, at least to the extent of the residue. This result is appropriate only if it is consistent with the testator's intent.

**b. Abatement of Devises to Pay Claims and Administrative Expenses.** Many wills do not state what property should be responsible for payment of claims against the estate and administrative expenses. Without this direction or other evidence of the testator's intent, claims and expenses will be paid first from intestate property, if any, and then from the estate residue. If the

intestate property and residue are insufficient to pay those obligations, general devises and then specific devises will be used for those purposes.

If all estate property passes under the will's residuary clause and there is no evidence of the testator's intent, all devisees will contribute proportionately to the payment of administrative expenses and allowed claims. This equal burden will not result, however, if the will contains specific or general devises. In that case, the residuary devisees will be the first to pay the estate's claims and expenses. Only if the residue is insufficient for those purposes will other beneficiaries of the estate share in the costs of administration. As with payment of estate taxes, this result is correct only if it is what the testator intended.

### 4. Recommended Course of Action.

To prevent unintended results regarding the payment of estate taxes, claims, and administrative expenses, the attorney must know the client's intent. One way to discover that intent is to ask the client the following questions:

a. If your estate is required to pay estate taxes, who do you want to pay those taxes?

(1) the persons receiving the taxable property;  
or

(2) Only the following persons: \_\_\_\_\_?

b. Who do you want to pay the claims against your estate and the estate's administrative expenses?

(1) Everyone receiving property from the estate;  
or

(2) Only the following persons: \_\_\_\_\_?

After these questions have been answered, the attorney can draft appropriate provisions to carry out the client's intent. Finally, before the client comes in to sign the will, the attorney should send the client a letter recounting the attorney's understanding of the client's intent so the client can identify any misunderstandings and the attorney can make any necessary corrections.

Following this procedure will help insure that the will accurately reflects the client's intent concerning who will pay the estate's taxes, claims, and expenses. It will also preserve evidence of the client's intent if anyone raises that question after the client's death.

Daniel C. Re

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## WHAT'S NEW

### *Marquess v. First Interstate Bank, 116 Or App 1 (1992).*

**A**widow and her daughters were the beneficiaries of the marital and family trusts established by the decedent's will. They claimed that the corporate trustee breached its fiduciary duty in dealing with certain

real property by (1) failing to collect the fair market rental for property held in trust; (2) failing to test the market before selling the property to the co-owner; and (3) releasing all claims for back rent when it sold the property to the co-owner.

The trustee (the "defendant") prevailed on its motion to dismiss, which contended that plaintiffs failed to establish the applicable standard of care because they did not call an expert to testify that another corporate trustee would have acted differently under similar circumstances. The trial court held that, alone, the standard of care set forth in ORS 128.057(1) is not sufficient to establish a breach of fiduciary duty. The trial court did not reach the question whether the defendant's performance measured up to the statutory duty of care, because it granted the motion to dismiss.

The Court of Appeals reversed, declared the lower court's decision wrong as a matter of law, and held that expert testimony from another corporate trustee was not necessary to establish a prima facie case of breach of trust. In addition, the court reaffirmed that ORS 128.057(1) establishes the statutory standard of care for trustees generally: "[I]n the absence of different specific instructions in the trust document, the statutory standard [of care] applies to corporate as well as to noncorporate trustees." *Id.* at 4, citing *Jarrett v. U.S. Nat'l Bank*, 81 Or App 242, *rev den*, 302 Or 476 (1987).

***Rose v. O'Reilly,***  
***116 Or App 512 (1992).***

**T**he deceased trustor's wife and daughter appealed the probate court's holding that the daughter, named as successor trustee in the trustor's will, could not serve as trustee of two testamentary trusts because she was also a beneficiary of the same trusts. The Court of Appeals reversed the lower court's decision, reasoning that Oregon case law is clear that a person is not disqualified from acting as a trustee simply because that person is a trust beneficiary. *United Pacific Ins. Co. v. First Nat'l Bank*, 206 F Supp 94 (D Or 1962); *Morse v. Paulson*, 182 Or 111 (1947).

***Gardner v. Cox,***  
***117 Or App 57 (1992).***

**P**rior to his conservatorship, the ward purchased common stock in Borealis Exploration, Ltd. ("Borealis") at defendant Cox's suggestion. After the ward suffered a stroke and entered a coma-like state, Cox was appointed as conservator for the ward.

During the 18 months preceding the conservatorship, the value of the Borealis stock dropped, but the ward did not sell any of it. In both the first and second years of the conservatorship, the Borealis stock continued to decline in value; at the end of the second year, the conservatorship estate was in debt to the ward's residential care facility for \$34,510. However, the defendant conservator refused to sell the Borealis stock because he wanted to carry out the ward's desire to

maximize the remainder for charitable beneficiaries of the ward's inter vivos trust.

The Court of Appeals affirmed the trial court's decision that defendant Cox had violated the "prudent person" standard of ORS 128.057(1) and was obligated to sell enough stock to pay for the ward's living and other expenses. The appeals court acknowledged that ORS 126.347 required the conservator to consider any known estate plan of his ward in deciding whether and when to sell the Borealis stock. The Court of Appeals declared, however, that a conservator's first duty is to preserve and manage the estate for the care of the protected person during his or her life. Therefore, it was a breach of duty to fail to sell enough stock to pay the protected person's living expenses. The court noted that while a conservator does not necessarily breach his fiduciary duty by retaining speculative stock held by the protected person before the conservatorship estate is established, the defendant breached this duty to the extent that he failed to pay bills for the ward's care.

***Holst v. Purdy,***  
***117 Or App 307 (1992).***

**D**ecedent died simultaneously with one of her two sons, leaving, among other things, a \$300,000 IRA. The deceased son was survived by a common law wife and their minor daughter. The other son was appointed personal representative.

Based upon the advice of the decedent's accountant that the IRA distribution was controlled by the beneficiary-designation form, the personal representative removed the IRA from the asset inventory for his mother's estate. Then, pursuant to the accountant's advice that the personal representative was a beneficiary of at least one-half of the IRA, the personal representative transferred \$40,000 to his own account. Later, the accountant cautioned that the beneficiary designation did not specify how the IRA was to be distributed in this situation in which the co-beneficiary of the IRA (the brother) died simultaneously with the decedent.

Soon after that, the personal representative found an undated beneficiary-designation form bearing the faxed signature of the decedent. Suspecting that this form raised questions about which beneficiary designation would apply, the personal representative immediately petitioned the probate court for instructions about the IRA. At the same time, a conservator appointed for the personal representative's niece (the only other estate beneficiary) petitioned the court to remove the personal representative for breach of fiduciary duties to the estate.

Both the probate court and the Court of Appeals rejected the conservator's suggestion that the personal representative acted in bad faith. The appeals court stated that the personal representative neither violated any fiduciary duty to the estate nor created a conflict of interest when he removed the IRA from the estate inventory. Therefore, nothing in the personal representative's dealings with the IRA justified removing him as personal representative.

The conservator also sought to remove the personal representative as trustee of two trusts established for the niece's benefit. The conservator alleged that by bringing a wrongful death action on behalf of his mother's estate against his brother's estate, the personal representative was attempting to deplete the brother's estate to the niece's detriment. Emphasizing the personal representative's duty to "preserve, settle and distribute the estate" under ORS 114.265, the appeals court recognized a potential corollary duty of the personal representative "to pursue personal injury and wrongful death actions on behalf of the decedent." *Holst* at 314, citing ORS 114.305(20). Thus, the court concluded that filing such actions did not create a conflict of interest for the personal representative. However, acknowledging the personal representative's plan to deplete his brother's estate in order to prevent the brother's common law wife from misusing funds, the Court of Appeals remanded the case to the probate court with instructions to impose a bond requirement on the personal representative as trustee of his niece's two trusts.

***Erwin & Erwin v. Bronson,  
117 Or App 443 (1992).***

**T**he corporate trustee of a joint living trust sought removal of its co-trustees, the surviving spouse and another person. The individual co-trustees moved for summary judgment, contending that the corporate trustee lacked standing because ORS 58.075 prohibits a professional corporation engaged in the practice of law from acting as trustee.

The court affirmed the trial court's removal of plaintiff trustee, concluding that professional corporations may not serve as trustees. The court found that a professional legal corporation organized under ORS Chapter 58 is not empowered to serve as trustee because serving as trustee is not "ancillary" to the practice of law, which is the limitation imposed on the activities of a professional legal corporation by ORS 58.075. The court further reasoned that because the shareholders of a professional corporation are not personally liable for the wrongful acts of the corporation, ORS 58.185, and because there is no PLF coverage for corporations, a professional legal corporation violates the requirement of ORS 707.050 that a corporation conducting a trust business be financially solvent. The court also noted "that ORS 709.160 expressly prohibits a trust company organized under 709 from furnishing legal advice or holding itself out as practicing law." *Erwin* at 447 n.3.

***Kidney Ass'n of Oregon, Inc. v. Ferguson,  
315 Or 135 (1992).***

**R**evue was urged by five lawyers who claimed to have an "active interest in legal ethics matters and/or trusts and estates matters." *Id.* at 138 n.2.

The estate's sole beneficiary was the Kidney Association of Oregon, Inc. ("KAO"). At the personal representative's request, KAO recommended the petitioner for review (who served on KAO's board of

directors) as attorney for the personal representative. Before accepting this position, the petitioner obtained the formal consent of KAO's president and executive director. Years later, during the conclusion of the probate proceedings, KAO objected to the estate's final accounting and asserted that the petitioner-attorney should be denied fees because he violated DR 5-105, which governs lawyers representing multiple clients with actual or likely conflicting interests.

The Oregon Supreme Court affirmed the probate court's determination that the personal representative and the beneficiary (KAO) had "unity of interests." *Id.* at 140, et seq. "By definition, a personal representative owes a duty of loyalty to the beneficiary's interests and shares the common goal of prompt and efficient distribution of estate assets." *Id.* at 146, citing ORS 114.265. The Supreme Court stated that a personal representative's interest in paying the estate's bills (such as the attorney's fees at issue in this case) does not conflict with a beneficiary's interest in proper distribution of the estate. *Id.* at 147. Thus, the court concluded that the petitioner-attorney did not represent actual or likely conflicting interests and, therefore, had not violated a disciplinary rule.

Finally, the Supreme Court clarified that "it is the breach of fiduciary duty owed to a client, rather than a violation of a disciplinary rule, that may result in reduction or loss of a fee. The disciplinary rules, where relevant, are no more than one potential reference source for analyzing a lawyer's duty." *Id.* at 144. In addition, the high court cautioned that disciplinary rules are enforceable only by the state Supreme Court and the disciplinary board appointed by that court. But recognizing that courts authorized "to review and allow a lawyer's fees have authority to address breaches of that lawyer's duty of loyalty to the lawyer's client by denying part of or all the fees[,] the court acknowledged that a lower court may use "[c]ertain disciplinary rules [which] describe \* \* \* aspects of a lawyer's duty of loyalty \* \* \* to inform an analysis of the lawyer's conduct \* \* \*." *Id.* at 148.

Shannon M. Connelly

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***Rule Against Perpetuities Revisited:  
A Rescue Attempt***

**E**mily Karr's article on rule against perpetuity savings clauses in the January issue of this newsletter caused a small furor in the estate planning community. Several well respected law firms and exceptional estate planners were chagrined to realize the "later-of" savings clauses they were using fall into the trap described in that article. Lawyers who fall into this category should take some comfort in knowing that they are in good company.

Several states, including Oregon, adopted USRAP before the drafters added section 1(e) (the "savings clause savings clause") to prevent accidental violation of the rule against perpetuities by "later-of" savings clauses. Senator Neil Bryant of Bend has introduced SB 1061, which would add the "savings clause savings clause" to the Oregon rule against perpetuities statute. Future issues of this newsletter will report on the progress of SB 1061 and its effective date, if it is enacted.

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## Legislative Update

**T**hree of the four Section-sponsored bills are not faring well this session. Legislative Subcommittee Chair Warren Deras does not expect SB 287, the proposed revisions to the guardianship and conservatorship statutes, to get out of committee because it would require state funds for court-appointed attorneys to represent protected persons. The Section is laying the groundwork for passage in 1995.

SB 214, the Insured Claims Bill, reached a snag because of objections raised by the Oregon Trial Lawyers Association. The bill originally required insured claims to be presented in the same manner as other probate claims. The bill may be revived, if negotiations between the Section and the OTLA succeed. The goal for the revised bill will be to eliminate the malpractice trap, and to preserve the protection from claims following the close of probate.

SB 211 and SB 238 are similar bills proposed by the Estate Planning and Administration Section and the Oregon Bankers' Association. These bills would allow modification of trusts when all parties agree. These bills have been through a hearing and work session, have been substantially revised, but are not expected to progress far because of opposition by judges and others.

The fourth Section-sponsored bill is SB 1061, which would revise the Uniform Statutory Rule Against Perpetuities to cure "later-of" drafting problems in perpetuities savings clauses. The Section has some concerns about the wording of this bill, but will propose amendments to eliminate those concerns.

The Section is supporting two bills that appear to be progressing through the normal channels. HB 2798 would make bonds in guardianships discretionary rather than mandatory. SB 461, would address the problem of the *In Re The Corey Partners* bankruptcy case, which held the trustee personally liable for debts of a partnership in which the trust was a partner. This bill would revise the Uniform Partnership Law definition of "person" to include trusts, would allow the trustee to enter into partnership agreements in certain cases, and would define personal liabilities of trustees in the partnership arena.

The Section is taking no position on SB 286, the Oregon Health Care Decisions Act. This bill would merge

provisions for powers of attorney for health care and directives to physicians into unified provisions for advance directives. This bill is more complex than the current statutes. Many hearings have been held, and some action on this bill is likely. The initial bill has been amended significantly.

The area of anatomical gifts is receiving considerable attention this session. The Section opposes HB 2589, which amends the Uniform Anatomical Gift Act, because it would confuse the order of authority to make anatomical gifts. The Section has not yet taken a position on SB 487, which clarifies that a person other than the donor cannot revoke an anatomical gift. The Section has decided to take no position on SB 2510, which requires hospitals to provide all patients with information and forms on anatomical gifts.

The Section has decided to take no position on SB 412, which would allow the creation of hardship income trusts for nursing home residents who do not have enough income to pay for care but have too much income to qualify for assistance. A task force is working on SB 412, but it is expected to have problems passing. The Section has not yet taken a position on SB 488, which would allow a competent adult to instruct a cemetery authority that a person is to be cremated after death. The Section is reviewing SB 574, which would allow trustees to resign without court approval if authorized to do so by the trust instrument. This bill would also limit liability of the successor trustee.

## An Invitation

**The Real Property, Probate and Trust Section of the Washington State Bar Association will hold its Midyear Meeting and Seminars in Vancouver, Washington, on June 4-6. That Section invites members of the Estate Planning and Administration Section to attend.**

**Seminar sessions are designed to appeal to lawyers who concentrate their practices in the areas of real property, estate planning, and probate. This year's sessions feature comparisons of Oregon and Washington law of benefit to attorneys on both sides of the border and topics of interest for the intermediate- to advanced-level practitioner.**

**The WSBA Real Property, Probate and Trust Section also invites all members of the Estate Planning and Administration Section to attend a special wine-tasting and hors d'oeuvres reception on Friday, June 4. All Section members will receive registration materials by mail. The Washington Section asks those who plan to attend the reception to RSVP as directed in the program materials.**

## CALENDAR OF SEMINARS AND EVENTS

- April 26-30, 1993 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, New York Sheraton, New York, New York. Telephone: (215)243-1631.
- May 5-6, 1993 (Sponsored by New York University) **Trusts and Estates**, Helmsley Park Lane Hotel, New York, New York. Telephone: (212)790-1320.
- May 11, 1993 (Sponsored by Washington Society of Certified Public Accountants) **1993 Washington State Tax Conference**, Westin Hotel, Seattle, Washington. Telephone: (206)644-4800.
- May 14, 1993 (Sponsored by the Washington State Bar Association Continuing Legal Education) **Managing Client Trust Accounts**, Washington State Convention Center, Seattle, Washington. Telephone: (206)727-8202.
- May 20, 1993 (Sponsored by Washington Society of Certified Public Accountants) **Community Property**, Washington Society of Certified Public Accountants Learning Center, Bellevue, Washington. Telephone: (206)644-4800.
- June 1, 1993 (Sponsored by Washington Society of Certified Public Accountants) **Estate Planning—Medium, Small Estates**, [location to be announced], Seattle, Washington. Telephone: (206)644-4800.
- June 2-4, 1993 (Sponsored by ALI-ABA and Continuing Legal Education for Wisconsin) **Basic Estate and Gift Taxation and Planning**, Pfister Hotel, Milwaukee, Wisconsin. Telephone: (215)243-1631.
- June 4-6, 1993 (Sponsored by Washington State Bar Association Real Property, Probate and Trust Section) **Midyear Meeting, Seminar and Reception**, Red Lion at the Quay, Vancouver, Washington. Telephone: (206)727-8258.
- June 7-8, 1993 (Sponsored by New York University) **Trusts and Estates**, Stouffer Stanford Court, San Francisco, California. Telephone: (212)790-1320.
- June 10, 1993 (Sponsored by National Business Institute) **Planning Opportunities with Living Trusts in Washington**, Red Lion at the Quay, Vancouver, Washington. Telephone: (715)835-7909.
- June 10, 1993 (Sponsored by Washington State Bar Association Continuing Legal Education) **Tax Planning**, Sheraton Hotel, Seattle, Washington. Telephone: (206)727-8202.
- June 18, 1993 (Sponsored by Willamette University College of Law) **12th Annual Tax Conference**, Willamette University College of Law, Salem, Oregon. Telephone: 1-370-6046.
- June 21-25, 1993 (Sponsored by ALI-ABA and the University of Wisconsin Law School) **Estate Planning In Depth**, University of Wisconsin, Madison, Wisconsin. Telephone: (215)243-1631.
- July 26-30, 1993 (Sponsored by New York University) **Trusts and Estates**, New York University, New York, New York. Telephone: (212)998-7171.
- August 12, 1993 (Sponsored by Washington Society of Certified Public Accountants) **Taxation of Exempt Organizations**, Washington Society of Certified Public Accountants Learning Center, Bellevue, Washington. Telephone: (206)644-4800.
- September 9-10, 1993 (Sponsored by ALI-ABA) **Sophisticated Estate Planning Techniques**, Westin Copley Place, Boston, Massachusetts. Telephone: (800)253-6397, extension 1631.
- September 10, 1993 (Sponsored by Washington Society of Certified Public Accountants) **Estate Planning—Medium, Small Estates**, [location to be announced], Spokane, Washington. Telephone: (206)644-4800.
- October 5-6, 1993 (Sponsored by Washington Society of Certified Public Accountants) **Fiduciary Income Tax Return Workshop**, Washington Society of Certified Public Accountants Learning Center, Bellevue, Washington. Telephone: (206)644-4800.
- October 6-8, 1993 (Sponsored by ALI-ABA) **Uses of Insurance in Estate and Tax Planning**, [location to be announced], Boston, Massachusetts. Telephone: (800)253-6397, extension 1631.
- October 18, 1993 (Sponsored by Washington Society of Certified Public Accountants) **Post Mortem Tax Planning/Death Distribution**, [location to be announced], Seattle, Washington. Telephone: (206)644-4800.



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# newsletter

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## *At the Frontier of Probate Litigation: Intentional Interference with the Right to Inherit*<sup>1</sup>

### Part II

#### Surviving a Motion to Dismiss: Some Procedural Concerns

##### 1. Introduction.

This is the second part of a two-part article examining the tort action of damages for intentional interference with the right to inherit. Part I, which appeared in the April 1993 issue of this newsletter, addressed the uses for and elements of the tort, proof of the case, and remedies. Part II examines several procedural issues raised by the tort.

##### 2. When Should the Plaintiff Bring the Action?

###### a. Before the Testator Dies.

One of the most significant advantages of a tort action over a traditional will contest is that before the donor dies a plaintiff may bring a tort action to recover damages for interference with an expectancy that will not vest until the donor's death.<sup>2</sup> Thus, a plaintiff may maintain a cause of action during a testator's lifetime for interference with an intended legacy, for instance, due to revocation or execution of a will as a result of undue influence or fraud. In this situation, the tort action is something of a "living" will contest in that it may conclusively resolve many of the issues that ordinarily would be considered only after a decedent's death, such as whether a will was the product of undue influence. This in turn has the advantage of preventing relitigation of those issues after death under the doctrine of collateral estoppel, or issue preclusion, which prevents uncertainty in estate administration and facilitates the expeditious resolution of the decedent's affairs.<sup>3</sup>

At least one court has found that once a testator executes a will creating a legacy, the expectant legatee acquires an interest of immediate economic value, one that can be transferred for consideration.<sup>4</sup> Any interference with the right to inherit that occurs during the testator's life injures the expectant heir at the moment of the wrongful act.

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### *In This Issue*

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A suit during the testator's lifetime also has certain practical advantages. A significant problem with a will contest is that the person with the most important testimony--the testator--is unavailable. If the action is brought while the testator is still alive, this testimony may be available. Another problem with will contests and other attacks on testamentary plans, particularly those brought well after the acts in dispute, is the availability and recollection of other witnesses. An action filed shortly after the wrongful conduct has the advantage of available witnesses with relatively fresh memories.<sup>5</sup>

The practical realities of a suit during the testator's lifetime, however, diminish its value. As discussed in Part I of this article, the plaintiff may have difficulty proving damages with any degree of certainty, given that he possessed only a contingent expectancy, and damages are therefore quite speculative. Given the difficulty in proving damages, an equitable remedy such as a constructive trust would be an attractive alternative. At least one court, however, has limited a plaintiff's remedy during life to damages. In *Chambers v. Kane*,<sup>6</sup> the Delaware Court of Chancery held that equitable remedies, such as constructive trusts, were unavailable because they would have the improper effect of impounding testators' assets during their lifetimes.<sup>7</sup>

A plaintiff who chooses to bring an action in Oregon during the testator's life has two years from the date of the injury to bring the action.<sup>8</sup> If the injury arises from fraud, the cause of action does not accrue until the plaintiff discovers the fraud.<sup>9</sup> In many cases the plaintiff will be unaware of the injury. In those cases, the "discovery rule," or perhaps the doctrine of equitable tolling,<sup>10</sup> may provide the plaintiff relief from the harsh bar of the statute of limitations.<sup>11</sup>

#### **b. Limitation of Actions After the Testator's Death.**

A plaintiff may bring an action for damages after the testator's death, and it should not be subject to the four-month statute of limitations for a will contest under ORS 113.075(3). The tort action is not a will contest--although it resembles one--either under the statutory definition or under general legal principles.<sup>12</sup>

According to ORS 113.075(1), a will contest is an action to contest the probate of a will, to contest the validity of a will, or to assert an interest in the estate either because a will is ineffective, because another will exists, or because the decedent breached a contract to make or revoke a will. A tort action for damages, however, does not seek to challenge the probate or validity of a will, nor assert an interest in a decedent's estate. Rather, the action seeks damages from a third party for tortious interference by that person with the plaintiff's expectancy. Furthermore, a will contest action "accrues" only at the moment a petition to probate an invalid will is filed, whereas a tort cause of action accrues at the

moment of injury. Accrual may be before the testator's death, after his death, or even after probate proceedings have ended.

Of course, the statute of limitations may have already run by the time the probate proceedings have begun, such as in the case of interference during the decedent's lifetime by fraudulently procuring the revocation of a will. In that case, the plaintiff would have to rely on equitable tolling or file a will contest, although in many cases the will contest may not provide an adequate remedy.<sup>13</sup>

### **3. Preserving the Integrity of the Probate System.**

#### **a. Must the Plaintiff First Attempt a Will Contest Before Bringing Suit for the Tort?**

The tort of intentional interference with the right to inherit may appear superfluous in light of statutory will contest procedures. A plaintiff, for instance, may base a tort action on undue influence, fraud, or forgery, which are also proper grounds for a will contest. Recognizing this overlap, a number of courts have conditioned tort causes of action brought after a decedent's death upon the plaintiff's exhaustion of all remedies afforded by the probate proceedings or upon a showing that the probate proceedings will not provide the plaintiff an effective remedy.<sup>14</sup> Courts have based this rule on the need to protect and promote the states' interests in their carefully designed probate systems to efficiently settle title to a decedent's estate and provide for orderly succession.<sup>15</sup>

In practice, this rule is not an insurmountable bar. A plaintiff can obtain an adequate remedy in probate proceedings only if the denial of a petition to probate a will, or the revocation of probate of a will, is certain to give the plaintiff everything to which he claims to be entitled.<sup>16</sup> This requires the existence of some other valid estate plan under which the plaintiff can obtain a remedy, such as another valid will. If, however, the plaintiff cannot necessarily secure the admission of a favorable will to probate, a will contest cannot guarantee the plaintiff adequate relief.<sup>17</sup> A defendant cannot rely on the presumption that a prior will is valid to prove that the plaintiff had an adequate remedy in the probate proceedings.<sup>18</sup>

Of course, a tort action within probate proceedings may be inappropriate. For instance, if the case involves interference with or improper inducement of lifetime gifts, it is properly litigated in a court of general jurisdiction.<sup>19</sup> Similarly, cases involving interference with expectancies from revocable trusts do not necessarily belong in probate court.<sup>20</sup> In such a situation, this rule will not hamper a plaintiff, who is free to bring a tort action without first filing a will contest.

#### b. The Preclusive Effect of Probate Proceedings.

The common law principles of *res judicata*<sup>21</sup> also limit a plaintiff's ability to ignore probate proceedings by requiring the plaintiff who has filed a will contest to join a claim for tortious interference with inheritance with the will contest under certain circumstances. Under *res judicata*, a plaintiff must bring all claims that arise from a single set of operative facts at the same time if the court has jurisdiction to hear the claims. A plaintiff who fails to do so forfeits the right to bring a subsequent action on the claims that were not joined in the first proceeding.<sup>22</sup>

Under Oregon law, a court supervising the probate of a decedent's estate has jurisdiction to hear a claim of intentional interference with the right to inherit.<sup>23</sup> Thus, *res judicata* prohibits a plaintiff from splitting a will contest and a tort action if both are based on the same set of facts, such as undue influence, fraud, or forgery. *Res judicata* will not, however, bar a subsequent tort action based on facts not necessarily decided in a will contest, such as interference with a gift from an *inter vivos* trust.<sup>24</sup> Thus, the application of *res judicata* is limited to subsequent tort actions based on facts already adjudicated in a will contest.

*Res judicata* may not bar an action by a plaintiff who received only published notice of the probate proceedings pursuant to ORS 113.155. A judgment can bind only those parties to the proceeding in which it is given. Under the United States Constitution, however, a judgment cannot bind a person joined in a proceeding by published notice unless the person's name and address were not known and could not be determined through the exercise of reasonable diligence.<sup>25</sup> Thus, if the personal representative knew a potential tort plaintiff to have an interest in filing a will contest, or could have discovered the plaintiff's identity through the exercise of reasonable diligence, *res judicata* will not bar a subsequent tort action by the plaintiff who received only published notice of the proceedings and failed to file a will contest.

#### 4. Conclusion.

The tort of intentional interference with inheritance has great potential as an instrument of attack on testamentary and other dispositive plans. Its use, however, presents many procedural traps for the unwary. Thus, a litigator considering filing such a case must proceed with caution. The risks of an excursion along the frontier of probate litigation demand a thorough understanding of both the legal and, perhaps more importantly, the procedural issues involved with a claim of tortious interference with the right to inherit.

M. Read Moore

#### Endnotes

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<sup>2</sup>*Carlton v. Carlton*, 575 So 2d 239, 241 (Fla Dist Ct App 1991); *Chambers v. Kane*, 424 A2d 311 (Del Ch 1980); *Harmon v. Harmon*, 404 A2d 1020, 1025 (Me 1979).

<sup>3</sup>Collateral estoppel prevents relitigation of issues actually litigated and determined in a prior case where the fact finder's determination was essential to its final decision. *Drews v. EBI Companies*, 310 Or 134, 139-40 (1990).

<sup>4</sup>*Harmon v. Harmon*, 404 A2d 1020, 1024-25 (Me 1979).

<sup>5</sup>*See id.* at, 1025.

<sup>6</sup>424 A2d 311, 316 (Del Ch 1980).

<sup>7</sup>According to the court, if a person wrongfully obtains property from a testator, the testator, not a third person, has the right to get the property back. *Id.*

<sup>8</sup>ORS 12.110(1).

<sup>9</sup>*Id.*

<sup>10</sup>The discovery rule provides that the period of the statute of limitations does not begin to run until the plaintiff should have known, through the exercise of reasonable care, of the harm or that the harm was caused by the defendant. *U.S. Nat'l Bank v. Davies*, 274 Or 663, 667-69 (1976).

<sup>11</sup>Equitable tolling allows a plaintiff to avoid the bar of the statute of limitations if the plaintiff was in some extraordinary way prevented from asserting his rights, such as in the case of misleading statements by the defendant or where a cause of action has not manifested itself with sufficient certainty to be susceptible of proof at trial. *See* 54 CJS, *Limitations of Actions* § 86 (1987).

<sup>12</sup>*See generally Barone v. Barone*, 294 SE2d 260 (W Va 1982).

<sup>13</sup>*See infra* notes 14-18 and accompanying text.

<sup>14</sup>*E.g., In re Estate of Hoover*, 513 NE2d 991 (Ill App Ct 1987); *DeWitt v. Duce*, 408 So 2d 216 (Fla 1981); *Benedict v. Smith*, 376 A2d 774 (Conn Super Ct 1977).

<sup>15</sup>*E.g., In re Estate of Legeas*, 256 Cal Rptr 117, 124-25 (Cal Ct App 1989); *DeWitt v. Duce*, 408 So 2d 216, 219 (Fla 1981).

<sup>16</sup>*See DeWitt v. Duce*, 408 So 2d 216, 220 (Fla 1981).

<sup>17</sup>*E.g., In re Estate of Knowlson*, 562 NE2d 277, 280 (Ill App Ct 1990).

<sup>18</sup>*Id.*

<sup>19</sup>*E.g., Watts v. Haun*, 393 So 2d 54 (Fla Dist Ct App 1981); *Cyr v. Cote*, 396 A2d 1013 (Me 1979).

<sup>20</sup>*E.g., Davison v. Feuerherd*, 391 So 2d 799 (Fla Dist Ct App 1980).

<sup>21</sup>Many courts use the term "*res judicata*" to refer to both claim preclusion and issue preclusion, two different doctrines. "*Res judicata*" as used in this article takes on its traditional meaning of claim preclusion. "*Collateral estoppel*" is the traditional meaning of issue preclusion.

<sup>22</sup>*E.g., Drews v. EBI Companies*, 310 Or 134, 141 (1990).

<sup>23</sup>*See* ORS 111.085.

<sup>24</sup>*See Drews v. EBI Companies*, 310 Or 134, 140 (1990); *Conner v. Delon Oldsmobile Co.*, 66 Or App 394, 397 (1984).

<sup>25</sup>*See Tulsa Collection Servs. v. Pope*, 485 US 478 (1988); *Mullane v. Central Hanover B. & T. Co.*, 339 US 306, 314, (1950).

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## ***Stepped-up Basis and Joint Property: A New Tax Opportunity and Trap***

### **Resurrection of the "Consideration Furnished" Test**

**G**allenstein v. U.S., 975 F2d 286 (6th Cir 1992), brings back, in part, the "consideration furnished by the decedent" test for determining the post-death tax consequences for joint tenancies created between spouses before 1977. In this remarkable bit of statutory analysis, the Sixth Circuit Court of Appeals examines the evolution of section 2040 of the Internal Revenue Code ("IRC") and concludes that a joint tenancy with right of survivorship created between husband and wife before 1977 has basis and taxable estate inclusion characteristics determined under pre-1977 law. As a result, the entire value of pre-1977 joint property is includable in the gross estate of the spouse who furnished the entire consideration to acquire the property, with a corresponding basis step-up. "Joint tenancy property" includes joint tenancies in personal property and tenancies by the entirety in real property.

This new analysis under *Gallenstein* means estate planners and general practitioners must rethink the consequences of joint tenancy property when advising married clients of their estate planning options. An excellent article on the *Gallenstein* court's reasoning and analysis appears in *Estate Planning Studies*, April 1993, which is distributed by the Personal Trust and Financial Services Department of First Interstate Bank.

### **New Opportunities and Traps for Joint Property**

In Oregon, the conveyance of real property to a husband and wife constitutes them tenants by the entirety, unless a contrary intent is expressed in the conveying document. *Ganoe v. Ohmart*, 121 Or 116 (1927). Likewise, Oregon recognizes joint tenancy with right of survivorship in personal property. ORS 105.920. It is common, if not usual, to find the property of married couples to be held in these two forms, implemented at the suggestion of realtors, stockbrokers, and bankers. Whether by design, or pure luck, many couples arrive at the lawyer's office with a substantial portfolio of survivorship property.

Given the prevalence of joint property, the following matters deserve special attention under the *Gallenstein* holding.

#### **1. Consideration furnished.**

When married clients have joint tenancy property, the lawyer planning their estates should review their financial history to identify pre-1977 joint tenancy property and to determine which spouse furnished the

funds to acquire that property. This requires the lawyer to analyze inheritances, employment histories, and so on. The initial estate planning interview is the best opportunity to gather facts.

#### **2. Transfer of assets to a living trust.**

Living trusts are in vogue, if not the standard estate planning device these days. Often clients with nontaxable estates will wish to preserve the "joint" character of their property by executing a joint living trust. The transfer into the trust of joint tenancy assets may destroy the joint tenancy character of the property. See *Black v. Commissioner*, 765 F2d 862 (9th Cir 1985). For joint tenancies created before 1977, a division of the property between spouses could destroy a valuable potential basis step-up. If there is an indication that one spouse is likely to survive the other, the lawyer must analyze the creation date and consideration furnished before any split or transfer of joint property.

#### **3. Splitting joint tenancy property to fund the credit shelter trust.**

Clients often have substantial estates exceeding the \$600,000 taxable estate threshold, but have accumulated their wealth as joint tenancy property. A typical estate planning convention has been to divide the joint tenancy property into separate interests so that, regardless of who dies first, the estate of either spouse could fund a credit shelter bypass trust. Before *Gallenstein*, planners assumed that no income tax detriment would occur because only one-half of the joint property would receive a stepped-up basis upon the first death. Now, the estate planner must determine whether the joint tenancy property was created before 1977 or after 1976, must determine which spouse furnished the consideration to acquire the property, and

... continued on page 9

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## ***Malpractice Avoidance-- Tickler Systems and Checklists***

**T**his issue of the Newsletter is four pages longer than usual to disseminate some practice aids for avoiding malpractice, courtesy of the Loss Prevention Subcommittee of the Section. The PLF will also distribute these forms to lawyers seeking its assistance in handling probate matters.

The tickler system on page 5 was provided by Mark W. Perrin of Eugene. The tickler system on page 6 was provided by Carolyn Wilson Miller at Duffy, Kekel, Jensen & Bernard of Portland. The checklist on pages 7 and 8 was provided by Dave Andrews at Hershner, Hunter, Moulton, Andrews & Neill of Eugene.

Estate of: \_\_\_\_\_  
 Social Security No.: \_\_\_\_\_  
 Personal Representative: \_\_\_\_\_  
 \_\_\_\_\_

File No.: \_\_\_\_\_  
 Probate No.: \_\_\_\_\_  
 Date of Death: \_\_\_\_\_  
 Tax ID No.: \_\_\_\_\_

ACTION	DATE DUE	DATE MAILED	DATE FILED
Disclaimer			
Petition for Appointment			
Order Appointing			
Notice to Heirs			
First Date of Publication			
End of Creditor's Period			
Inventory			
Elective Share			
Inventory and Will to Dept. of Revenue			
Insurance			
Decedent's Final Tax Return			
Inheritance Tax Return			
Federal Estate Tax Return			
Partial Distribution Petition			
1st Annual Accounting			
2nd Annual Accounting			
Inheritance Tax receipt			
Federal Estate Tax Closing Letter			
Request Release Dept. of Revenue			
Final Accounting			
Notice to File Objections			
Decree of Distribution			
Personal Representative's Deed			
Receipts			
Supplemental Final Account/Order Closing			
Order Closing/Deeds in other counties			
Fiduciary income tax returns			
Tax Year Ends			
1st Returns			
Quarter Estimated Tax Due After First Tax Year			
First Quarter			
Second Quarter			
Third Quarter			
Fourth Quarter			

Bond Amount \_\_\_\_\_ Filed \_\_\_\_\_ Exonerated \_\_\_\_\_

PROBATE/NONPROBATE TICKLER SYSTEM

ESTATE OF \_\_\_\_\_ Attorney \_\_\_\_\_  
 Date of Death \_\_\_\_\_ Legal Assistant \_\_\_\_\_  
 Date of PR's \_\_\_\_\_ Probate \_\_\_\_\_ Nonprobate \_\_\_\_\_  
 Appointment \_\_\_\_\_ (Nonprobate - complete only \* cards)  
 Date of 1st Publication \_\_\_\_\_

Card No.	Card Description	Directions	Date
	If our law firm prepared decedent's will (whether or not it is the one that is entered into probate), the information in the will data base should be removed.	Mark date and by whom change in will data base has been done.	___/___/___
*1	(a) File Application for War Veteran's Property Tax Exemption for surviving spouse by April 1. (b) File Form 70R (HARRP) by April 15.	Refer March 1. If d/o/d is after March 20 but before July 1, file claim within 30 day of d/o/d.	3/01/___
2	Inventory is due 2 weeks from today on _____ (60 days from PR's appointment). Prepare fee agreement letter, particularly if probate is in Multnomah County.	Refer 2 weeks before date on Card #3.	
3	Inventory is due today. File Abstract of real estate. Submit Form A609(A). Request for Final Audit. Send fee agreement letter to personal representative, if probate is in Multnomah County.	Refer 60 days from date of PR's appointment.	
4	Search period to identify claimants ends today (3 months from date of appointment of PR). Give notice to claimants before _____ (not later than 30 days after end of search period).	Refer 3 months from date of PR's appointment. Fill in blank with date not later than 30 days after end of search period.	
5	File affidavit of compliance and notice to claimants by _____ (not later than 60 days after end of search period.)	Refer 4 months after date of first appointment. Fill in blank with date not later than 60 days after end of search period.	
6	4 month period for creditors to file claims expires today.	Refer 4 months after date of first publication of Notice to Interested Persons.	
*7	(a) Determine fiduciary income tax period. Latest date is _____. (b) Establish waiver filing date.	Refer 2 months after date of death. Fill in blank with date one year after last day of month before death	
*8	(a) Alternate valuation date. (b) Consider disclaimer.	Refer 6 months after date of death.	
*9	Decedent's final individual income tax returns due one month from today on April 15, 19____	Refer March 15th of year following year of death.	03/15/___
*10	File decedent's final individual income tax returns today.	Refer April 15th of year following year of death.	04/15/___
*11	(a) Death tax returns due 2 months from today on _____ (9 mos. after date of death). (b) Consider disclaimer	Refer 7 months after date of death.	
*12	Death tax returns due today. Final day for filing disclaimer.	Refer 9 months after date of death.	
13	Fiscal year ends today (1 year from date of PR's appointment). Accounting due 30 days from today on _____.	Refer 1 year from date of PR's appointment.	
14	Accounting due today.	Refer 30 days after date on Card #13	
*15	Fiduciary income tax returns due 1 month from today on _____.	Refer 15th day of 3rd month following close of estate's tax year.	
*16	Fiduciary returns due today.	Refer 15th day of 4th month following close of estate's tax year.	
17	Quarter estimated tax payments due after first tax year of estate on _____.	Refer 15th day of 4th, 6th, 9th and 13th months following end of first tax year of estate.	

# KEEP ON TOP

## Probate Checklist

File No. \_\_\_\_\_ Testate \_\_\_\_\_ Intestate \_\_\_\_\_  
**PERSONAL REPRESENTATIVE** ESTATE OF \_\_\_\_\_  
 Name: \_\_\_\_\_ Probate No.: \_\_\_\_\_ DOD: \_\_\_\_\_  
 Address: \_\_\_\_\_ S.S. No.: \_\_\_\_\_ Age: \_\_\_\_\_  
 \_\_\_\_\_ Federal Taxpayer I.D. No.: \_\_\_\_\_  
 Telephone: \_\_\_\_\_ Notification of Fiduciary Relationship: \_\_\_\_\_

<b>Petition for Appointment of P/R</b>	<b>Approximate File/Action Date</b>
Est. Estate \$ _____ Fee \$ _____ To Court _____	_____
Order Appointing Letters: Admin. _____ Test. _____ Date _____	_____
Bond: Agency _____ Amount _____	_____
Notice Due _____ Mailed _____ Aff. of Mailing _____	_____
Publication of Notice 1st Date _____ Aff. of Publication _____	_____
Objections to Will Due _____ or _____	_____
<b>Insurance</b> (Amount/premium due date)	
Residence _____ Auto _____ Other _____	_____
\$ _____	
<b>Inventory</b>	
Amount _____ Add'l Fee _____ Due _____	_____
<b>Notify Assessor</b> (of mailing address for tax statements)(All counties in which real property is located)	
Counties _____	_____
<b>Department of Revenue</b>	
Audit:	
Requested _____ Rec'd _____	
Action Required: _____	
Release:	
Requested _____ Rec'd _____ Expires _____	_____
Decedent's Final Tax Return: _____	
<b>Claims</b> (Due dates)	
Search _____ Notice Claimants _____ Aff. of Compliance _____	_____
<b>Partial Distribution</b> (anytime after Inventory filed)	
Petition _____	_____
Order _____	_____
Receipts _____	_____
<b>Waiver of P/R Fees</b> (6 mos. after appt.)	Due _____
<b>Disclaimer</b> (9 mos. from DOD)	Due _____
<b>Estate Taxes</b> (9 mos. from DOD)	
Federal Estate T/R 706	Due _____
State Pickup T/R	Due _____
Federal Estate Tax Closing Letter	Rec'd _____
Oregon Dept. of Revenue Clearance	Rec'd _____
<b>Annual Accounting</b> (Anniversary of P/R appointment, plus 30 days; or at FYE)	Due _____
	Due _____

**Final Accounting/Petition for Decree of Final Distribution**

(w/statements verifying assets--bank, investment, etc.)

4 mos. from 1st publication After \_\_\_\_\_ ) \_\_\_\_\_

30 days from Notice to Claimants After \_\_\_\_\_ ) \_\_\_\_\_

Attorney Fee Affidavit Fees \_\_\_\_\_ ) \_\_\_\_\_

P/R fees Fees \_\_\_\_\_ ) \_\_\_\_\_

Vouchers No. \_\_\_\_\_ ) \_\_\_\_\_

Notice mailed \_\_\_\_\_ Affidavit filed \_\_\_\_\_

Order approving F/A; Decree of Distribution After \_\_\_\_\_ ) \_\_\_\_\_

**Supplemental Final Accounting**

**Receipts** \_\_\_\_\_

**Order of Discharge** \_\_\_\_\_

**P/R Deed** \_\_\_\_\_

**Fiduciary Income Tax Return** Tax year ends \_\_\_\_\_ ) \_\_\_\_\_

**Release Bond** (after Order of Discharge, notify agent)

**Final Vouchers** Nos. \_\_\_\_\_ ) \_\_\_\_\_

**Termination of Fiduciary Relationship** (w/copy of Order of Discharge) \_\_\_\_\_

**Purge Special Attention Billing** \_\_\_\_\_

**Administrative Tasks at Close**

	Filed/Recorded
P/R Deed _____	_____
Assignments _____	_____
Amend Escrow _____	_____
Other _____	_____
_____	_____
_____	_____

Specific devises:

Distribution:

Special considerations:

Trusts:

Change of address for decedent \_\_\_\_\_

Special Attention Billing \_\_\_\_\_ Letter to Client \_\_\_\_\_

Fee Agreement? \_\_\_\_\_ Estimated fees? \_\_\_\_\_

continued from page 4 . . . .

must balance the potential value of a full (or no) stepped-up basis, based upon the possible order of deaths of the spouses. Planners should now consider advising their clients to divide joint tenancy property created after 1976 and to leave pre-1977 joint property in place.

#### 4. Closely held business interests.

The lawyer must review the title instruments to determine the ownership of partnership interests and corporate stock. Spouses frequently own these entities as joint tenants with right of survivorship.

#### 5. Securities records.

Spouses often register certificated securities and street-name brokerage accounts as joint tenancy property. The lawyer may need to investigate closely to trace the date of creation of the joint property. "Tacking" issues may arise from sales, reorganizations, and exchanges. For instance, if a street-name brokerage account holds assets for spouses as joint tenants, presumably any *new securities* purchased with joint tenancy property, if continued as joint tenancy property, are treated as pre-1977 joint tenancy property if derived from pre-1977 assets. Since dividends and interest are frequently accumulated in brokerage accounts, as well as deposits of new funds, a complex tracing effort may be required during life, or after death, to analyze the *Gallenstein* consequences of ongoing brokerage accounts.

#### 6. Death tax returns.

In the past, for taxable estates, 50% of the value of the joint tenancy property was included in the estate of the first spouse to die, as reflected on the federal estate tax return. The lawyer must now carefully examine that practice, as well as the historical facts and income tax consequences in developing the filing position. If no death tax return is required, during estate or trust administration the lawyer should provide the surviving spouse with an analysis of basis adjustments as well as fair market value for joint tenancy property.

#### 7. The dying noncontributing spouse.

An income tax planning opportunity, or, more accurately, an opportunity to avoid an adverse result, may exist if the noncontributing spouse with pre-1977 joint tenancy property is terminally ill. Clearly, there is an income tax advantage to *destroying* the pre-1977 joint tenancy if no stepped-up basis would be available. Division of the joint tenancy property into tenancy in common, or division and re-registration as joint tenancy property (creating post-1976 joint tenancy property), would trigger the "qualified joint tenancy" rule of IRC section 2040(b), permitting one-half of the value of the property to be included in the estate of the decedent who furnished no consideration, with a resulting step up in basis under IRC section 1014(b)(9).

## Conclusion

The *Gallenstein* case bears close watching from the standpoint of appeals, legislative action, and especially adoption by other jurisdictions, since it is a Sixth Circuit case. The result, however, is clearly a two-edged sword, presenting tax opportunities and pitfalls for the taxpayer and IRS alike. Since the *Gallenstein* tax consequences apply to both taxable and nontaxable estates, all practitioners, and particularly those analyzing the property of clients from an estate planning standpoint, need to expand their thinking and analysis to properly advise and guide their clients.

Stephen O. Lane

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## What's New

### *Bekooy and Bekooy, 118 Or App 227 (1993)*

**H**usband's mother died shortly after he and Wife separated but five months before the trial for dissolution of their marriage. Mother's will left her estate to her son, Husband, and his two siblings; Husband's share of the estate was stipulated to be worth \$173,000. Prior to the dissolution trial, Husband received insignificant amounts from the estate's sale of personal property.

The trial court deemed Husband's interest in his mother's estate to be sufficiently vested at the time of dissolution and included his inheritance as part of the "marital property" to be disposed of as is "just and proper in all the circumstances." *Bekooy* at 230, citing ORS 107.105(1)(f); *Seefeld and Seefeld*, 294 Or 345 (1982). In affirming the lower court's decision, the appeals court acknowledged that the inheritance was not a "marital asset" because it was not acquired during the marriage. Instead, the court reasoned that the inheritance was "marital property": "property received after a dissolution to which a party's entitlement is clear before the dissolution [and which] may be subject to disposition by the court under appropriate circumstances." *Id.* at 231. The appeals court found appropriate circumstances present in this case: \$150,000 in gifts received from Wife's parents during the marriage were used for family expenses and financing the children's college educations; Wife maintained a close relationship with Husband's mother; and Wife kept the family home during the 25-year marriage. Based upon Wife's significant economic and noneconomic contributions, the appeals court affirmed the dissolution judgment awarding Wife one-half of the value of Husband's inheritance.

**O'Connor v. Zeldin,  
118 Or App 620 (1993)**

In open court during a dissolution proceeding, Husband and Wife orally agreed to a property settlement. Decedent Wife died before the written dissolution judgment was entered. In an action for specific performance of the property settlement brought by Personal Representative, the trial court held the agreement enforceable and imposed a trust for the benefit of Wife's estate on the property Wife was to receive under the agreement.

Husband appealed the lower court's decision, arguing that entry of the written judgment was a condition precedent to the enforceability of the agreement. The appeals court denied the existence of a condition precedent because the oral agreement recorded in court contained definite and unambiguous promises which the parties had begun to perform prior to Wife's death: personal property had been physically divided between the spouses, a sale of their home was pending, and Husband was collecting rent from the prospective purchasers.

The appeals court concluded that no condition to the agreement's enforceability existed and that it became effective "when made." Thus, the court found it unnecessary to consider Husband's second assignment of error: the agreement contained a condition subsequent--if one spouse died prior to entry of the dissolution judgment, the agreement was intended to extinguish the parties' intestate inheritance rights under ORS 112.035. Noting that Decedent Wife died testate, the appeals court denied applicability of the intestate succession statute and affirmed the trial court's holding that Husband must assert his right to a spousal elective share under ORS 114.105 in the probate proceeding.

*Shannon M. Connelly*

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## **Tax Developments**

### **IRS Ltr. Rul. 9232002**

Grantor, an Oregon resident, transferred property worth \$1,000,000 to an eight-year grantor retained income trust ("GRIT") and named his three sons as trustees and remainderpersons. Contrary to ORS 129.115(3)(b) of the Oregon Principal and Income Act and notwithstanding any income distribution requirements in the trust instrument, the trust language gave the trustees authority to apply income to the payment of principal and interest on any notes owing by the trust and secured by trust assets.

The IRS found that, under this specific grant of discretion, the trustees could allocate all trust income to

the payment of note obligations and that this discretionary power rendered the value of Grantor's retained income interest unascertainable for purposes of Internal Revenue Code section 2512. Therefore, the Service forbade Grantor's use of the actuarial methods prescribed by section 25.2512-5 of the gift tax regulations. See Treas Reg §§ 25.2511-1(e), 25.2512-5(a). The IRS noted that actuarial factors prescribed under the Treasury Regulations may not apply "if specific provisions of the trust materially alter the manner in which the beneficial interests would otherwise be treated under the Uniform Principal and Income Act." IRS Ltr. Rul. 9232002. In addition, the IRS dismissed Grantor's argument that, because exercise of this power would violate the primary purpose of the trust, no Oregon court would permit the trustee to exercise it. Thus, Grantor was deemed to have made a taxable gift of the entire \$1,000,000.

*Shannon M. Connelly*

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## **Legislative Update**

Many of the bills of interest to the Estate Planning and Administration Section have passed both houses of the Legislature and are awaiting the Governor's signature.

The Section sponsored or supported six bills that have passed so far, including:

- HB 3231, which would require the State Lottery Commission to allow lottery winners to designate trusts as beneficiaries of unpaid lottery winnings;
- SB 211, which would allow modification of trusts when all parties agree;
- SB 214, which would allow insured claims to be the subject of litigation without prior claim, and would require that insurance continue after death as if the decedent had survived;
- SB 1061, which would revise Oregon's Uniform Statutory Rule Against Perpetuities to cure "later-of" drafting problems in perpetuities savings clauses;
- HB 2798, which would make bonds in guardianships discretionary rather than mandatory; and
- SB 461, which would reduce liability of trustees in entering into partnership agreements.

The two bills the Section is opposing are also awaiting the Governor's approval. SB 574 would permit a trustee to resign without court approval if authorized to do so by the trust instrument, and would limit the liability of successor trustees. The Section opposes this bill because it would delete the \$25,000 limit for termination of small trusts provided under ORS 128.009(4), allowing

trusts of any size to be terminated for being uneconomical. The Section opposes HB 2589, which would amend the Uniform Anatomical Gift Act, because it would change the order of authority to make anatomical gifts.

The Section has taken no position on several bills that are progressing through the legislative process. Two bills that have passed and are awaiting the Governor's approval include SB 855, which would amend ORS 115.125 to add child support as a priority claim in probate, and HB 3429, which would prohibit funeral directors from serving as personal representatives except for family members or partners.

Different versions of the Oregon Health Care Decisions Act have passed in the House and Senate, and a conference committee is expected to work on a compromise. These are very complicated bills that would merge provisions for powers of attorney for health care and directives to physicians into unified provisions for advance directives.

SB 412 is making some progress, but is still in the Senate. That bill would allow the creation of hardship income trusts for nursing home residents who do not have enough income to pay for care but have too much income to qualify for assistance. The Section is concerned that this bill is inappropriate and is an overly complicated resolution to a difficult problem.

The only Section-sponsored bill that did not pass is SB 287, a comprehensive revision of the guardianship and conservatorship statutes. The Section will work toward passage in 1995.

## ***Lottery Alert***

**A** warning to lawyers representing lottery winners: The Portland office of the IRS is scrutinizing the division of lottery winnings. People who try to share lottery winnings after the fact may incur a gift tax, based on the present value of the income stream given. The IRS appears to be satisfied that no gift occurs if the winning ticket is jointly purchased by the people that divide the winnings. If anyone who receives a share of winnings did not contribute part of the money to purchase the ticket--watch out!

### ***Questions, Comments, or Suggestions About this Newsletter?***

#### **Contact:**

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Salem, OR 97302-3806

*phone: 362-7730*

**The Editorial Board welcomes your input.**

## CALENDAR OF SEMINARS AND EVENTS

- July 26-30, 1993 (Sponsored by New York University) **Trusts and Estates**, New York University, New York, New York. Telephone: (212)998-7171.
- July 30, 1993 (Sponsored by Washington State Bar Association) **Washington Wills in the 1990s**, Washington Athletic Club, Seattle, Washington. Telephone: (206)727-8200.
- August 12, 1993 (Sponsored by Washington Society of Certified Public Accountants) **Taxation of Exempt Organizations**, Washington Society of Certified Public Accountants Learning Center, Bellevue, Washington. Telephone: (206)644-4800.
- August 20, 1993 (Sponsored by Washington State Bar Association) **Probating an Estate**, Tyee Hotel, Olympia, Washington. Telephone: (206)727-8200.
- September 9-10, 1993 (Sponsored by ALI-ABA) **Sophisticated Estate Planning Techniques**, Westin Copley Place, Boston, Massachusetts. Telephone: (800)253-6397, extension 1631.
- September 10, 1993 (Sponsored by Washington Society of Certified Public Accountants) **Estate Planning--Medium, Small Estates**, [location to be announced], Spokane, Washington. Telephone: (206)644-4800.
- September 17, 1993 (Sponsored by Oregon State Bar Association) **Revocable Living Trusts**, Oregon Convention Center, Portland, Oregon. Telephone: (800)452-8260, extension 407.
- October 5-6, 1993 (Sponsored by Washington Society of Certified Public Accountants) **Fiduciary Income Tax Return Workshop**, Washington Society of Certified Public Accountants Learning Center, Bellevue, Washington. Telephone: (206)644-4800.
- October 6-8, 1993 (Sponsored by ALI-ABA) **Uses of Insurance in Estate and Tax Planning**. [location to be announced], Boston, Massachusetts. Telephone: (800)253-6397, extension 1631.
- October 18, 1993 (Sponsored by Washington Society of Certified Public Accountants) **Post-Mortem Tax Planning/Death Distribution**, [location to be announced], Seattle, Washington. Telephone: (206)644-4800.
- October 20-23, 1993 (Sponsored by the Southern California Tax and Estate Planning Forum) **13th Annual Southern California Tax and Estate Planning Forum**, Le Meridien at Coronado Island, San Diego, California. Telephone: (800)332-3755.
- October 24-27, 1993 (Sponsored by Washington Society of Certified Public Accountants) **1993 Northwest Tax Institute**, Caesars Hotel, Lake Tahoe, Nevada. Telephone: (206)644-4800.
- November 4-5, 1993 (Sponsored by Washington State Bar Association Continuing Legal Education and the Seattle Estate Planning Council) **38th Annual Estate Planning Seminar**, Washington State Convention Center, Seattle, Washington. Telephone: (206)727-8202.
- November 8-12, 1993 (Sponsored by New York University) **52nd Annual Institute on Federal Taxation**, New York Hilton, New York, New York. Telephone: (212)790-1320.
- November 12-13, 1993 (Sponsored by ALI-ABA) **Conference on Life Insurance Company Products, Current Securities, Tax, ERISA and State Regulatory Issues**, L'Enfant Plaza, Washington, DC Telephone: (800)253-6397, extension 1631.
- November 15, 1993 (Sponsored by Washington Society of Certified Public Accountants) **Tax Considerations in Nonprofit Organizations**, [location to be announced], Seattle, Washington. Telephone: (206)644-4800.
- November 15-19, 1993 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, Grand Hyatt, San Francisco, California. Telephone: (800)253-6397, extension 1631.
- December 2-3, 1993 (Sponsored by ALI-ABA) **Tax-Exempt Charitable Organizations**, Madison Hotel, Washington, DC Telephone: (800)253-6397, extension 1631.
- December 6-10, 1993 (Sponsored by New York University) **52nd Annual Institute on Federal Taxation**, Fairmont Hotel, San Francisco, California. Telephone: (212)790-1320.



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# newsletter

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## Legislative Recap

**B**esides producing the longest session in Oregon history, the 1993 Legislature passed some significant bills in the field of estate planning and administration, especially in the area of trusts. A surprise amendment during the last week of the session also established common-law marriage for purposes of intestate succession.

This article is a synopsis of an excellent and in-depth legislative summary written by Warren Deras and Steve Kantor. That summary appears as chapter 11 of the Oregon State Bar's *1993 Oregon Legislation*, which was distributed at the Annual Meeting and is available from the Oregon State Bar Order Desk for \$45.

### 1. Decedent's Estates

#### a. HB 2854 (ch 598): Common Law-Marriage for Intestacy

**P**robably the biggest surprise to the Section during the legislative session was the last-minute amendment of HB 2854 to create a new category of "spouse" for purposes of intestate succession. This change is retroactive, applying to decedents who died on or after September 15, 1992, and for whom probates are still open on November 4, 1993. This change was not presented to the Oregon State Bar or any of its committees before enactment, so many questions and potential problems exist.

A person qualifies for the new category of "spouse" if (1) "the person and the decedent lived together for at least 10 years," and (2) "the person and the decedent represented themselves, and conducted their affairs, as husband and wife." The new category applies only if "the decedent was not legally married to another person at the time of the decedent's death." A qualifying "spouse" under the new statute is entitled to the surviving spouse's intestate share.

The personal representative is required under ORS 113.145 to list in the petition to open probate any person qualifying as a "spouse" under this law and also to give that person notice of the probate, even if the decedent died testate. This is because the person will be an heir under ORS 111.005(18).

Several problems could arise if the new law is applied literally. Examples of such problems include former spouses qualifying as heirs and more than one "spouse" qualifying as an heir. These problems and potential solutions are discussed in more detail in chapter 11 of *1993 Oregon Legislation*.

Legislative history indicates that the purpose of the new statute is to qualify the new category of common-law spouses for Social Security survivors benefits. The new law appears to accomplish that objective.

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- 8 Calendar of Seminar and Events

**b. HB 3231 (ch 206): Lottery Beneficiary Designations**

At the request of the Estate Planning and Administration Section, language was added to HB 3231 to amend ORS 461.250(7) to provide that unpaid lottery proceeds be paid according to the deceased prize winner's signed beneficiary designation filed with the Oregon State Lottery Commission or, if no such form has been filed, to the estate of the deceased prize winner. The forms need not be completed with testamentary formality and are not considered will substitutes under ORS chapter 112.

HB 3231 also exempts active military personnel from the requirement that a winning lottery ticket be redeemed within one year.

**c. SB 214 (ch 214): Insured Claims in Probate**

SB 214 was introduced at the request of the Estate Planning and Administration Section to correct a problem brought to the Section's attention by the Professional Liability Fund. The bill's purpose was to eliminate confusion regarding the relationship between ORS 115.005 and ORS 115.325.

Problems have arisen when an estate may be liable for a tort for which the decedent was covered by insurance. The injured person may choose to negotiate with the insurer rather than file a claim with the personal representative, as allowed by ORS 115.005(5)(b). If the parties come to an impasse, then the injured person appears to have the right under ORS 115.005 to file an action. Under ORS 115.325, however, the action would be barred unless the claim was first presented to and then disallowed by the personal representative. In some cases, by the time the injured person discovered the problem (usually on dismissal of a complaint under ORS 115.325) and filed the claim with the personal representative, the statute of limitations on the claim had run.

SB 214 amends ORS 115.325 to remove the requirement that an insured claim be filed with the personal representative before an action on the claim can be commenced. This exception applies only to the limits of insurance protection, and not to any uninsured portion of the claim. The exception applies only if the estate is protected by liability insurance at the time the proceeding is brought. If "claims made" insurance coverage lapses before the claim is asserted, a timely probate claim must have been filed or a subsequent action will be barred.

**d. HB 3429 (ch 287): Funeral Directors Serving as Personal Representatives**

HB 3429 amends ORS 113.095 to prohibit a licensed funeral service practitioner from acting as personal representative unless the decedent was a relative or was a licensed funeral practitioner who was a partner, employee, or employer of the practitioner who is petitioning for appointment as personal representative.

**2. Trusts**

**a. SB 211 (ch 222): Modification of Trusts**

SB 211 was introduced at the request of the Estate Planning and Administration Section. The legislative history demonstrates an intent to overrule the decision in *In re*

*Harrell*, 104 Or App 332 (1990), which held that Oregon courts lack authority to make any modification to a trust not authorized by common law.

The act provides two methods for modifying trusts. The first method is a written agreement, signed by the trustor (if living), by the trustee, and by all persons having a beneficial interest in the subject of the agreement. The second method is by court order, extending the authority of a court under ORS 128.135 to include the making of any modification that the parties could make by agreement.

It is unclear whether the modifications allowed by the act would extend to the creation of special needs trusts. The act does provide much latitude for correcting faulty drafting or addressing unforeseen circumstances when the common-law rules against self-created spendthrift trusts do not present an obstacle.

**b. SB 461 (ch 226): Trusts as Partners; Liability of Trustees**

SB 461 was introduced at the request of the Oregon Banker's Association and was supported by the Estate Planning and Administration Section. The act responds to *In re the Corey Partners*, CV-92-6073-HO (D Or Aug 7, 1992), in which the court held that trusts may not be partners in general partnerships, so, therefore, the bank trustee itself was the general partner and had unlimited liability for the debts of the partnership.

The act permits a trustee to be a partner by providing that a trust is a "person" as defined in the Uniform Partnership Law, and thus may be a partner. The act does not protect the trustee if a court order or the trust instrument expressly prohibits the trustee from holding a partnership interest.

The provisions permitting trusts to be partners do not apply retroactively to partnerships in existence before the effective date of the act. A trustee holding a partnership interest in trust may need to execute formal documents after the effective date of the act, quitclaiming ownership of the partnership interests to the trust to avoid future liability under the rule of *In re the Corey Partners*.

The act limits the trustee's contract and tort liability as a partner to the assets of the trust. This does not protect the trustee from liability for negligence or other wrongdoing. The act provides that a trust agreement may not absolve the trustee from liability to the trust estate or its beneficiaries for breach of fiduciary duty or for any tort for which the trustee is personally at fault.

**c. SB 574 (ch 228): Termination of Trusts; Resignation of Trustees**

SB 574 was proposed by the Oregon Banker's Association. Under ORS 128.009(4), a trustee could terminate a trust as uneconomical only if the market value of the trust was below \$25,000. SB 574 removes the \$25,000 limitation from ORS 128.009(4).

If the trustee determines that, in relation to costs of administration, the continuation of a trust will defeat or substantially impair accomplishment of the trust purpose, then the trustee may terminate the trust and distribute the trust property to the beneficiaries. Any termination of a trust

under ORS 128.009(4) now requires notice of the termination to current income beneficiaries and to any ascertainable remainder beneficiaries.

SB 574 also adds ORS 128.009(3)(bb), which permits the existing trustee to resign without court order if (1) resignation is permitted by the trust instrument, (2) the trust instrument provides for the appointment of a successor trustee, and (3) the successor agrees to serve as trustee.

### 3. Incapacitated Persons

#### a. SB 286 (ch 767): Oregon Health Care Decisions Act

SB 286 replaces the directive to physicians and the health care power of attorney (ORS chapter 127) with a single, comprehensive document governing health care decisions called an "advance directive." The act specifies the form to be used, which is considerably longer and more complex than the old forms.

Significant changes for practical use of the new form include:

- Elimination of the seven-year time limit on the power of attorney. The form may now be effective for life.
- The new form may be witnessed based on "proof of identity," in addition to "personal knowledge," which was the sole basis for witnessing the old form.
- The act repeals ORS 127.535(5), which allowed an incompetent principal to overrule the attorney-in-fact, and ORS 127.545(1), which allowed revocation "without regard to the mental or physical condition of the principal." Although the new language is not entirely clear, it appears that the advance directive will remain in place for routine medical care despite the objections of a principal who suffers advanced Alzheimer's disease or other mental illness.
- The provisions of the act governing "health care representatives" regulate the persons designated in an advance directive, as well as guardians and family members authorized to make decisions by ORS 127.635. Guardians must study this act carefully before making health care decisions.

### 4. Miscellaneous

#### a. SB 1061 (ch 273): Uniform Statutory Rule Against Perpetuities

Oregon adopted the Uniform Statutory Rule Against Perpetuities (USRAP) in 1989. The following year, the National Conference of Commissioners on Uniform State Laws (NCCUSL) amended the USRAP to correct a flaw that had developed in practice. SB 1061 incorporates the substance of the 1990 NCCUSL amendments into the Oregon law.

The USRAP adopted a 90-year "look back" rule that prevented operation of the common-law rule against perpetuities to defeat a property interest that in fact vests in 90 years. The problem that led to the amendment was the popularity of "later-of" savings clauses providing that a trust would terminate after the later of 90 years or the common-law period (21 years plus lives in being). For technical reasons explained in an article by Emily Karr in the January 1993 issue of this Newsletter, these clauses did

not work. The act makes all such clauses operate in the same manner as traditional, common-law savings clauses, thus terminating a trust with a "later-of" savings clause after 21 years plus the specified lives in being. The 90-year alternative is ignored.

The amendment is not retroactive. Documents prepared using the "later-of" savings clause should be examined to assure that they do not violate the rule against perpetuities.

#### b. HB 2589 (ch 218): Anatomical Gifts

Oregon adopted the Uniform Anatomical Gift Act before the National Conference of Commissioners on Uniform State Laws revised it in 1987. ORS 97.265 establishes a schedule of priorities for people who may make an anatomical gift. Under the old law, a donee could not accept a gift from anyone in the priority schedule if the donee knew of contrary indications from the decedent or someone else higher on the schedule. HB 2589 departs from the 1987 version and the earlier version of the Uniform Act by allowing the donee to accept a donation authorized by a person lower on the priority schedule despite actual notice of opposition from a person other than the decedent with the same or higher priority on the schedule.

#### c. Other Changes

- SB 689 (ch 377) reduces regulations regarding charitable remainder annuity trusts.
- HB 2058 (ch 726) adds inheritance tax penalties for untimely payment of taxes, and changes the time period for adjusting the tax returns of estate and trust beneficiaries.
- HB 2270 (ch 98) eliminates the registry of international wills.
- SB 966 (ch 230) extends for certain military personnel the time period that a parent or guardian of a minor or incapacitated person may delegate authority under ORS 126.030.
- SB 580 (ch 484) generally revises the Oregon statutes governing civil commitments, effective July 1, 1994.
- HB 2846 (ch 92) clarifies procedures for hospitals to notify next of kin after the death of a patient.

The Section will soon begin preparing legislative proposals for the 1995 legislative session. Among other things, the Section hopes to reintroduce proposed revisions to ORS chapter 126, relating to guardianships and conservatorships. Anyone wishing to work on legislative proposals for the next session should contact Gretchen Morris, 810 SW Madison Ave., Corvallis, OR 97333; telephone (503) 754-1411.

# Practical Tips for Making IRA Beneficiary and Distribution Elections

## 1. The Importance of IRAs

Congress created the Individual Retirement Account ("IRA") under the Employee Retirement Income Security Act of 1974. See IRC § 408. From the beginning, IRAs have had two distinctive attributes important to tax planners. First, taxpayers can make deductible contributions to IRAs, subject to certain limitations. The importance of deductible contributions has varied as Congress periodically has modified the deductibility limitations. Second, and more important, an IRA can receive a rollover from another IRA or qualified retirement plan.

A qualified rollover continues the income tax deferral inherent in qualified plans, and creates a vehicle with immense flexibility for income and estate planning. When a participant receives a large distribution from a qualified plan, before retirement or upon termination of the plan, an IRA rollover becomes the logical way to handle the distribution. Rules implemented by the Unemployment Compensation Amendments of 1992 require mandatory withholding of federal income tax, at a flat 20% rate, for any retirement plan distribution that is not directly rolled over into a successor plan or IRA. When an older client is implementing his or her estate plan, qualified funds are most likely to be in the form of an IRA.

## 2. IRA Characteristics

Two complimentary tax characteristics are essential to dealing with IRA benefits. First, IRA benefits are Income in Respect of a Decedent ("IRD"). This means that the recipient of an IRA distribution who does not roll it over must pay income tax on the amount actually received. This tax applies to the IRA owner as well as his or her designated beneficiaries. Second, the rule of constructive receipt does not apply to IRA benefits. Even though the IRA owner or beneficiary has the option to receive IRA funds, those amounts are taxable only when paid. This leads to the first cardinal rule of dealing with IRA benefits: Deferral is always better than acceleration. The tax-deferred compounding of investment growth in the IRA is a powerful economic tool for building and accumulating wealth.

From a non-tax standpoint, IRAs also offer the flexibility of institutional management. Almost every financial and investment institution offers IRAs because "that's where the money is" (as John Dillinger said when asked why he robbed banks). Many of these institutions are highly skilled at addressing the distribution and beneficiary designation issues discussed below; as a result, they are perhaps best able to implement the periodic distribution rules to optimize tax deferral.

Finally, another benefit of IRAs is the lack of IRS scrutiny they receive. While by no means simple in

operation, IRAs are so prevalent that the IRS has not taken the time to develop an auditing system for IRA rule compliance.

## 3. IRA Distribution Rules Before Age 70½

Before age 59½, any distribution from an IRA that is not rolled over is subject to current income taxation and a 10% premature distribution tax. Between the ages of 59½ and 70½, an IRA owner may take distributions in any amount (including none at all) without concern for taxes other than ordinary income tax. (This article omits a discussion of the excess accumulation and excess distribution taxes generally applied to distributions exceeding \$144,551.) From the standpoint of lifetime distributions, the point of greatest complexity is when the IRA owner reaches age 70½.

## 4. Distributions Beginning at Age 70½

To prevent excessive accumulations of qualified retirement funds, Congress created a system of mandatory distributions. Distributions must begin the calendar year in which the IRA owner reaches age 70½. In that year, the IRA owner must:

- (1) Select a beneficiary or beneficiaries; and
- (2) Select a method for computing the life expectancy under a distribution formula.

For the first distribution year and each following calendar year, the IRA owner must receive from the IRA an amount equal to the account balance at the end of the prior calendar year divided by a life expectancy factor.

The life expectancy factor is based upon the ages of the IRA owner and his or her beneficiary or beneficiaries. Although it is possible to name multiple beneficiaries (children, issue, grandchildren, and so on), this discussion assumes that one person is named as beneficiary. In general, the life expectancy factor is the joint and survivor life expectancy of the owner and the designated beneficiary, as calculated from an IRS table.

To prevent IRA owners from deferring tax too long by naming very young beneficiaries, Congress created the "minimum distribution incidental benefit" rules. Under these rules, the life expectancy factor based upon the age of the owner and designated beneficiary cannot be *greater than* that determined from a table found in Treasury Regulation § 1.401(a)(9)-2, Q & A-4. For an owner aged 71, that factor is 25.3. Therefore, calculating a minimum distribution amount requires two calculations and the larger computed amount must be distributed.

The required distribution can be minimized by annual recalculation of certain life expectancies. While the life expectancy of the *owner* may be recalculated each year, the life expectancy of the designated beneficiary (other than a spouse) may not be recalculated. Normally, the beneficiary designation and distribution election forms provided by IRA custodians will not include a recalculation option for a non-spouse beneficiary, and typically, the life expectancy factor is simply reduced by one in each year following the initial distribution year.

If the owner's spouse is the designated beneficiary, the owner has two options for adjusting the life expectancy factor: the "subtraction method" and the "recalculation method." The choice of method is irrevocable. The subtraction method redetermines the life expectancy factor by subtracting one from the divisor each year. The recalculation method recalculates the combined joint life expectancies each year. For example, if both husband and wife are 71, the combined joint life expectancy is 19.8 years. By using the subtraction method, the divisor will be 18.8 when they are both 72. However, by using the recalculation method, the divisor will be 18.9 when both spouses are age 72. Under the subtraction method, the entire account is distributed by age 91 if both spouses live that long; whereas under the recalculation method, the divisor is still 6.9 if both spouses live to age 91.

In deciding which method to choose for adjusting the life expectancy factor, the owner must also consider the consequences upon the death of either the owner or beneficiary. Under the subtraction method, the required minimum distributions may continue under the same schedule regardless of who dies first and even after both the owner and beneficiary are dead. Under the recalculation method, if the beneficiary dies, the required distributions must then be determined based upon the single life expectancy of the owner. Moreover, under the recalculation method, upon the death of the survivor of the owner and the designated beneficiary, the combined life expectancies are reduced to zero and all amounts must be distributed from the IRA before the last day of the year of the survivor's death.

As a general observation, if either the owner or beneficiary die early in the payout period or if deferral by the surviving spouse or children is desired, the subtraction method permits longer deferral of required minimum distributions and provides more flexibility to both owner and beneficiary. This observation is especially true if either spouse is in poor health. If both spouses live to old age (beyond their 70s), the recalculation method produces significantly greater deferral with the risk of payout acceleration at the death of the owner and the beneficiary.

## 5. The Spouse is the Best Beneficiary

In general, the owner's spouse is the best beneficiary of IRA benefits unless the spouse is likely to die first. Because the beneficiary spouse can accelerate distributions from the IRA, the IRA qualifies for the estate tax marital deduction. Also, the surviving spouse is the *only person* who can rollover a death benefit distribution and continue the tax deferral based on his or her own life expectancy. Moreover, a surviving spouse may elect to take death benefit payments from the deceased spouse's IRA and treat the IRA as his or her own IRA. If this is done, the surviving spouse can, in turn, designate another beneficiary (including another spouse) and optimize the continuation of tax deferrals.

The general IRA rules require a surviving spouse who has reached age 70½ to begin minimum required distributions from the "inherited" IRA. Normally, a surviving spouse will name children as primary IRA beneficiaries. In the case of a designated beneficiary other than a spouse, the "minimum distribution incidental benefit"

("MDIB") rules will apply. In general, for a surviving spouse in his or her 70s, the new distribution rate will be *less than* the required distributions being made while the deceased spouse was alive.

For example, if both spouses are age 71, the combined joint life expectancy is 19.8. If the owner dies at that age, and the spouse takes a rollover of the IRA and designates children as beneficiaries, the life expectancy factor under the MDIB is 25.3. Upon the death of the IRA owner, a surviving spouse designated beneficiary should consider rolling the IRA over into the surviving spouse's name and beginning required minimum distributions under the MDIB schedule using the subtraction method. The surviving spouse's other option is to continue the payments under the payment method in effect while the owner was alive.

## 6. Death of the Surviving Spouse Beneficiary

Upon the death of a surviving spouse who was over age 70½ and did not remarry, beneficiaries of the surviving spouse may continue distributions under the minimum distribution schedule in effect at the surviving spouse's death, thus prolonging the IRA's tax deferral. If the surviving spouse dies before reaching age 70½, distributions can be made to beneficiaries based upon their own life expectancies, which can produce very prolonged periodic distributions. Commercial financial institutions are in the best position to implement this kind of complex and long-term distribution schedule.

Assuming no marital deduction is available, the IRA is includable in the gross estate of the deceased surviving spouse; consequently, questions of estate tax apportionment and the Internal Revenue Code section 691 deduction must be addressed.

## 7. Beneficiaries Other than the Surviving Spouse or Children

IRA distributions to trusts are permissible but fraught with tax dangers. *See, e.g.*, Treas Reg § 1.401(a)(9), Q & A D-5. A distribution to a credit shelter trust may accelerate all of the IRA's taxable income in a single year and would fund the credit shelter trust with a "wasting" asset. Funding a QTIP trust with IRA benefits can be done in a way that qualifies for the marital deduction, but this requires great care. Before considering a QTIP trust as the IRA beneficiary, review the bibliography materials in chapter 7 A of Oregon State Bar CLE, *Advising Professionals*, May 8, 1992.

Designating grandchildren as beneficiaries raises Generation Skipping Transfer Tax issues and, in a very large estate, can result in depleting the benefit to 15% net of income and transfer taxes.

Finally, a client with charitable inclinations should consider naming a charity as the primary or alternate beneficiary of an IRA. *See* PLR 9237020 (confirming that a charitable beneficiary of IRA benefits is not income taxable on the net proceeds and confirming that the estate tax charitable deduction is available for such a distribution).

## Conclusion

This article has provided only a thumbnail sketch and some general guideposts for dealing with IRA benefits. With governmental encouragement of IRA rollover distributions, the IRA is likely to be a significant and common device for holding wealth in the future. As a creature of the Internal Revenue Code, however, the IRA is complex. Therefore, careful review of the applicable rules and regulations is necessary whenever IRA dispositions are being integrated in an estate plan.

Stephen O. Lane

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## What's New

### *First Interstate Bank v. Young,* 121 Or App 1 (1993)

**T**rustee brought a declaratory judgment action to determine how a portion of the residue of Decedent's estate should be distributed. The Will directed that the residue be given to First Interstate Bank ("Trustee"), in trust, and that, if Husband survived Decedent, Trustee establish a separate Marital Trust with an amount equal to the pre-September 13, 1981, marital deduction (the greater of 50% of Decedent's adjusted gross estate or \$250,000).

The Will gave Husband a testamentary special power of appointment over the Marital Trust principal; if Husband did not exercise this power, the Will named six beneficiaries to receive the Marital Trust property. The Will also specified that, if Husband did not survive Decedent by 90 days, the personal property would pass to the Trustee and be distributed to Decedent's nieces and nephews. However, the Will failed to provide for two contingencies: (1) disposition of the testamentary trust if Husband predeceased Decedent and (2) disposition of the portion of the testamentary trust not allocated to the Marital Trust even if Husband survived Decedent. Husband predeceased Decedent and Trustee sought a determination whether Decedent died testate or intestate as to the testamentary trust.

In the declaratory judgment action, two of the people named as contingent beneficiaries of the Marital Trust at Husband's death ("Defendants") argued that the Marital Trust provision "clearly manifested Decedent's intent that the estate be distributed to [them]." *Id.* at 5. Additionally, they argued that the Will was ambiguous as to the existence of a residuary clause and that the deposition of the drafting attorney established that the Will contained a residuary clause before his secretary accidentally deleted it. The attorney testified about the text of the residuary clause and that he did not notice its deletion because he was not at the Will execution ceremony.

The Circuit Court of Wasco County held: "the Will was not ambiguous as a matter of law, . . . the extrinsic evidence offered by [Defendants as to the existence and text of the residuary clause] could not be considered, and . . . Decedent died intestate as to the residue of her estate." *Id.* at 6-7. In proving a Will, ORS 41.740 permits use of extrinsic

evidence to explain an intrinsic or extrinsic ambiguity. Thus, after the court determined that the language used in the Will was not ambiguous and "that the absence of a separate and distinct residuary clause" did not create an ambiguity, it denied the admissibility of extrinsic evidence. *Id.* at 8. The court found it irrelevant that the inclusion of survivorship language raised questions about whether Decedent intended to make provisions for Husband's failure to survive.

Two University of Oregon law professors filed an amicus curiae brief arguing that, due to mistake based on clerical error, the court should admit extrinsic evidence of Decedent's intention. In addressing this argument, the appeals court emphasized that appellants asked the court to construe the Will's language from the drafting attorney's notes and memories; the court further noted that it did not receive a copy of an earlier Will draft or of the alleged missing paragraph. Thus, the court concluded that, in the absence of a copy of the deleted language, there was no clerical error. As a result, the Court of Appeals "found it unnecessary to decide whether evidence of intended language in a Will may . . . be inserted if it was omitted because of 'clerical error.'" *Young* at 8; see also *Scarlett v. Hopper*, 110 Or App 457, 461 (1992).

The Court of Appeals affirmed the circuit court's decision that the testamentary trust passed to Decedent's heirs by the laws of intestate succession.

### *Connell v. Franklin,* 120 Or App 414 (1993)

**A**n order appointing a special conservator is a "special statutory proceeding" within the jurisdiction of the probate court. Because the order appointing the special conservator is a final order under ORS 19.010(4), an appeal must be taken within 30 days of the entry of the order. ORS 19.026.

### *Taylor and Taylor,* 121 Or App 635 (1993)

**D**uring the marriage, Wife expressed concern that the couple should save for retirement. In response, Husband told Wife that it was unnecessary for them to save because they would "always have [his] parents' inheritance." *Id.* at 638. The appeals court deemed it undeterminative that Husband's trust interests and inheritances did not vest or become possessory until after the parties separated. While Oregon case law provides that property acquired by gift or inheritance during a marriage is a marital asset, *Pierson and Pierson*, 294 Or 117, 122 (1982), the appeals court stated, "the fact that Husband's interests became possessory after he initiated dissolution proceedings is not dispositive." *Taylor* at 639, citing *Reynolds and Reynolds*, 21 Or App 373 (1975).

The trial court determined and the appeals court agreed that, in light of the frequent and generous monetary gifts Husband's family made to them during their marriage, Wife reasonably relied upon Husband's assurance that they would receive an inheritance. For that reason, Wife was properly awarded a share of Husband's inheritances and trust

interests. *Taylor* at 640. However, the appeals court modified the judgment by omitting from the marital assets available for division a trust that Husband learned he was a beneficiary of seven months after he filed for dissolution. The Court of Appeals reasoned that, because Wife could not rely upon an asset about which she had no knowledge, the trial court erroneously awarded Wife a share of the trust interest neither spouse knew about until after they separated. In addition, the appeals court modified Wife's judgment to account for the trial court's undervaluation of Husband's inheritances.

*Shannon M. Connelly*

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## ***Omnibus Budget Reconciliation Act of 1993 Raises Tax Rates for Estates and Trusts***

**O**n August 10, 1993, President Bill Clinton signed into law the Omnibus Budget Reconciliation Act of 1993. The Act adds a new 36% tax bracket retroactively effective to the beginning of 1993. The 36% bracket applies to taxable income over \$115,000 for single individuals, and \$140,000 for married couples filing jointly. In addition, a 10% surtax is added for single and joint filers who have taxable income over \$250,000. The surtax is computed by applying a 39.6% rate to taxable income in excess of the threshold. The maximum tax on capital gains is still 28%. The penalties for underpayment of estimated taxes are waived for underpayments of tax occurring in 1993, attributable to the tax rate changes.

The Act narrows the tax bracket levels for estates and trusts, and adds a new 36% bracket. Beginning in 1993, income taxes are imposed on estates and trusts as follows:

- 15% on taxable income not over \$1,500
- 28% on taxable income over \$1,500 but not over \$3,500
- 31% on taxable income over \$3,500 but not over \$5,500
- 36% on taxable income over \$5,500.

The 10% surtax is also imposed on estates and trusts, creating a tax rate of 39.6% on taxable income over \$7,500. Estates with fiscal years beginning after January 31, 1992, are not subject to the new tax rates until the fiscal year ending in 1994, contrary to Internal Revenue Code section 15.

In addition to these income tax changes, the Act retroactively reinstates the pre-1993 estate and gift tax rate

structure, retaining a maximum rate of 55% for taxable transfers over \$3,000,000. The pre-1993 phase out of the lower tax brackets is also retained.

*Stephen J. Klarquist*

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## ***Pro Bono Opportunity***

**T**he Oregon Lawyers for Children is seeking volunteers to provide pro bono probate and conservatorship legal services for children. The services would benefit children whose parents have died and who are in the legal custody of Children's Services Division. To learn more, contact Nancy Monroe, Program Coordinator, Oregon Lawyers for Children, 7031 NE Halsey, Portland, OR 97213; her phone number is (503) 255-9727.

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## ***Section Committee Openings***

**T**he Estate Planning and Administration Section has opportunities for volunteers to fill openings on Section committees, such as Continuing Legal Education, Legislative Review, and others. The new Chair of the Section, Gretchen Morris, urges Section members to become involved, for their own professional development, as well as to benefit the Section and its programs. Anyone interested should contact Ms. Morris at 810 SW Madison Ave., Corvallis, OR 97333; her phone number is (503) 754-1411.

### ***Questions, Comments, or Suggestions About this Newsletter?***

#### **Contact:**

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#### **The Editorial Board welcomes your input.**

Please direct requests for additional copies of this Newsletter to Heidi Borrmann, Distribution Center Manager at the Oregon State Bar.

## CALENDAR OF SEMINARS AND EVENTS

- October 20-23, 1993 (Sponsored by Southern California Tax and Estate Planning Forum) **13th Annual Southern California Tax and Estate Planning Forum**, LeMeridien at Coronado Island, San Diego, California. Telephone: (800) 332-3755.
- October 24-27, 1993 (Sponsored by Washington Society of Certified Public Accountants) **1993 Northwest Tax Institute**, Caesars Hotel, Lake Tahoe, Nevada. Telephone: (206) 644-4800.
- October 27-29, 1993 (Sponsored by ALI-ABA) **Uses of Insurance in Estate and Tax Planning**, Copley Plaza, Boston, Massachusetts. Telephone: (800) 253-6397, extension 1631.
- October 28, 1993 (Sponsored by ALI-ABA) **VLR: How to Determine the Capital Necessary to Retire, Including Tax and Estate Planning Applications: A Survival Guide**, [location to be announced]. Telephone: (800) 253-6397, extension 1631.
- October 28-29, 1993 (Sponsored by Practising Law Institute) **24th Annual Estate Planning Institute**, Four Seasons - Clift Hotel, San Francisco, California. Telephone: (212) 765-5710.
- November 2, 1993 (Sponsored by National Business Institute, Inc.) **Elder Law Taking Control**, [location to be announced], Portland, Oregon. Telephone: (715) 835-7909.
- November 3-5, 1993 (Sponsored by Practising Law Institute) **Tax Strategies for Corporate Acquisitions, Dispositions, Spin-offs, Joint Ventures and Other Strategic Alliances, Financings, Reorganizations, and Restructurings - 1993**, the Bel Age Hotel, Los Angeles, California. Telephone: (212) 765-5710.
- November 4-5, 1993 (Sponsored by Washington State Bar Association Continuing Legal Education and the Seattle Estate Planning Council) **38th Annual Estate Planning Seminar**, Washington State Convention Center, Seattle, Washington. Telephone: (206) 727-8202.
- November 8-12, 1993 (Sponsored by New York University) **52nd Annual Institute on Federal Taxation**, New York Hilton, New York, New York. Telephone: (212) 790-1320.
- November 12, 1993 (Sponsored by Oregon State Bar) **Planning for the Taxable Estate**, [location to be announced]. Telephone: (800) 452-8260, extension 407.
- November 15-19, 1993 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, Grand Hyatt, San Francisco, California. Telephone: (800) 253-6397, extension 1631.
- December 6-10, 1993 (Sponsored by New York University) **52nd Annual Institute on Federal Taxation**, Fairmont Hotel, San Francisco, California. Telephone: (212) 790-1320.
- December 7, 1993 (Sponsored by Washington Society of Certified Public Accountants) **Estate Planning—Medium, Small Estates**, Washington Society of Certified Public Accountants Learning Center, Bellevue, Washington. Telephone: (206) 644-4800.
- December 15, 1993 (Sponsored by Practising Law Institute) **Handling Your First Basic Will**, PLI Training Center, New York City, New York. Telephone: (212) 765-5710.
- January 3-7, 1994 (Sponsored by University of Miami Law Center) **28th Annual Philip E. Heckerling Institute on Estate Planning**, Fontainebleau Hilton Resort and Spa, Miami Beach, Florida. Telephone: (305) 284-4762.
- February 24-25, 1994 (Sponsored by ALI-ABA) **Advanced Estate Planning**, Grand Wailea Resort & Spa, Maui, Hawaii. Telephone: (800) 253-6397, extension 1631.
- March 3-5, 1994 (Sponsored by ALI-ABA) **Tax and Business Planning and Restructuring for the '90s**, Hotel del Coronado, Coronado, California. Telephone: (800) 253-6397, extension 1631.
- April 25-29, 1994 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, The Plaza, New York, New York. Telephone: (800) 253-6397, extension 1631.



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