

newsletter

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OBRA 1993 Amendments to Spousal Impoverishment Provisions of Medicaid

On August 10, 1993, President Clinton signed the Omnibus Budget Reconciliation Act ("OBRA 93"). The Act made substantial changes to the spousal impoverishment provisions of Medicaid regarding long-term care payments. Both the House and Senate versions of the changes to the spousal impoverishment provisions focused on three areas: (1) estate recovery, (2) treatment of living trusts, and (3) asset transfers.

Had either version of the bill been enacted in original form, OBRA 93 would have gone down in history as the most devastating bill for families facing long-term care. However, major changes made in Conference Committee softened the blow.¹ Under the enacted amendments, married couples with one spouse who requires long-term care appear to benefit most and single people with low monthly income, small estates, and imminent or already-existing 24-hour care costs appear to fare worst.

A technical correction amendment is expected soon. Oregon implemented these federal Medicaid amendments through permanent administrative rules recently adopted by the Senior and Disabled Services Division of the Department of Human Resources ("SDSD").

1. Estate Recovery²

OBRA 93 requires each state to aggressively attempt to recover from recipients or their estates medical assistance dollars provided for long-term care. Currently, Oregon's recovery program ranks first in the nation, recovering more dollars than any other state. Oregon's program has been well managed for years and has benefitted from a partnership between state government and private attorneys. Oregon's SDSD intends to implement OBRA 93 estate recovery provisions after legislative changes in 1995.³

a. Restrictions on Recovery.

The OBRA 93 provisions apply to people who received medical assistance on or after October 1, 1993, and who die on or after that date. Federal statutes provide for recovery of assistance funds from the Medicaid recipient through liens on

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property and claims against the recipient's estate after death, with certain restrictions.

One such restriction prohibits states from imposing liens on the home of a recipient who resides in an institutional care facility (1) if the recipient has a reasonable probability of returning home or (2) if any of the following individuals reside in the home: a spouse, a minor or disabled child, or a sibling holding an equity interest in the home who has resided in the home for one year or more. The state administrative agency (in Oregon, the SDSO) determines whether a long-term care resident has a reasonable probability of returning home. This determination is made after the resident receives notice and an opportunity for hearing. If a lien is imposed, it dissolves upon the recipient's discharge and return home.

Another restriction prohibits recovery by claims against the deceased recipient's estate during the lifetime of the surviving spouse, minor child, or disabled child.⁴ In addition, liens on a recipient's home may not be foreclosed if the person holding the equity interest has continuously resided in the recipient's home since the resident was placed in institutional care and is (1) a sibling who has resided in the home for one year or more or (2) a son or daughter who has resided in the home for two years or more and who provided care to the recipient.

b. Definition of "Estate"

OBRA 93 will likely produce a new body of Medicaid case law regarding the definition of "estate." Under OBRA 93, state administrative agencies will rely on state law for the definition of estate.⁵ A state may also include in the term "estate" all real and personal property in which a Medicaid recipient had "any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." The expanded definition of "estate" is also subject to the restrictions on liens and estate claims discussed above.

OBRA 93 creates numerous problems for state administrative agencies and courts. The interface of established state case law addressing the definition of "estate" and the state administrative election to expand estate recovery to broader interests of the recipient may result in extensive litigation. State administrative agencies and courts will have the difficult task of construing congressional intent for the phrases "any legal title or interest at the time of death" and "to the extent of such interest." For example, if the recipient was a life beneficiary of a special needs trust executed prior to August 10, 1993, is the state entitled to make a claim against the remainder beneficiary interest for medical assistance rendered to the

life beneficiary? If a recipient owns real property with right of survivorship, is the full value of the real property or only a proportionate share subject to recovery claims? Uncertainties of this nature might not be answered for years.

2. Living Trusts⁶

OBRA 93 repeals former 42 USC 1396a(k) regarding living trusts executed on or after August 10, 1993. Oregon's new trust rules are found in OAR 461-145-540.

a. Trusts Subject to OBRA 93

Subject to certain restrictions, OBRA 93 applies to inter vivos trusts established on or after August 10, 1993,⁷ that are funded with the Medicaid recipient's assets, regardless of whether the trust is revocable or irrevocable and regardless of who is the grantor, including trusts established by court order, family members, fiduciaries, or any other person.

Special needs living trusts executed on or after August 10, 1993,⁸ and funded with the Medicaid recipient's assets will not enjoy the protection allowed in the majority of prior court cases in which assets in a properly drawn trust were determined to be "unavailable" and thus not counted in determining Medicaid eligibility. It is unclear how case law will develop regarding (1) special needs trusts executed prior to August 10, 1993,⁹ (2) trusts funded with someone else's assets, (3) testamentary special needs trusts, and (4) trusts described in the OBRA 93 exceptions. Presumably, the previous line of cases holding special needs trust assets unavailable should apply. As under prior federal law, testamentary trusts are expressly not subject to the amendments.

If the Medicaid recipient is an income or principal beneficiary of the trust, regardless of the terms of the beneficial interest, the trust corpus must be spent down to \$2,000 or less. If the Medicaid applicant's assets are transferred to an irrevocable trust and the applicant is not a beneficiary, the transfers create a period of ineligibility for the applicant and spouse and trigger a 36-month look-back period, as discussed below.

OBRA 93 specifies that a Medicaid applicant has established a trust if his or her assets were transferred into the trust and if any of the following people was a grantor of the trust: (1) the Medicaid applicant, (2) the spouse of the applicant, (3) fiduciaries acting on behalf of the applicant or spouse, or (4) persons, including a court or administrative body, acting at the direction or upon the request of the applicant or spouse.

The OBRA 93 living trust provisions fail to clearly address an important question: Will a special needs living trust established on or after August 10, 1993,¹⁰ by someone other than an applicant/recipient and funded with assets that were never owned by the applicant/recipient be subject to the new provisions? The phrase "if assets of the individual

were used to form all or part of the trust" in OBRA 93's definition of applicable trust should prevent trusts established with no assets of the applicant from being subject to the OBRA 93 trust rules.

With respect to trusts subject to OBRA 93, trust distributions, whether distributions of income or principal, are considered unearned income to the beneficiary. Trust distributions, in addition to the beneficiary's other fixed income such as Social Security, pensions, annuities, or other fixed income, are subject to income caps in states like Oregon that do not participate in the Medically Needy Program under the Medicaid rules. Trust income would not disqualify a beneficiary in Washington and other states that participate in the Medically Needy Program.

Any other distribution from the trust to beneficiaries other than the recipient is considered a transfer of assets by the Medicaid applicant and are subject to the transfer-of-asset penalties. If the trust contains more than one person's assets, the OBRA 93 provisions apply only to the assets of the Medicaid applicant. Annuities may receive similar treatment if federal regulations regarding treatment of annuities are promulgated in the future.

b. Trusts Exempt from OBRA 93

The following trusts are not subject to the OBRA 93 trust provisions: (1) living trusts established prior to August 10, 1993,¹¹ (2) testamentary trusts, and (3) living trusts for disabled people under age 65 if the trust was (a) established by a parent, grandparent, or appointed guardian of the recipient, or a court, and (b) funded with the recipient's assets. Presumably, Oregon's recently promulgated rule, OAR 461-145-540(8), applies only if the recipient's assets are transferred into the trust.

To qualify for exempt status under OBRA 93, the trust for the disabled person must fall into one of several categories. Under the first exempt category, upon the death of the disabled person, the trustee must be required to distribute the remaining trust assets and income to the state, up to the amount of medical assistance provided to the disabled individual. OBRA 93 is silent about the exempt status of such a trust after a beneficiary attains age 65. Oregon's SDSB has initially decided that such a trust will not disqualify a recipient who is age 65 or above if the recipient was granted Medicaid eligibility prior to age 65.¹² Attorneys might consider terminating conservatorships and pouring the assets into a special needs trust before the client applies for Medicaid. In the long run, this strategy will provide a cushion for quality of life not available after the spend down. This strategy, however, is not allowed in Multnomah County, according to probate court policy.

OBRA 93 also exempts "pooled" trusts for disabled people of any age when the trust is established and managed by a nonprofit association and individual accounts are

established for an individual by a parent, grandparent, legal guardian, or court. When the disabled person dies, the remaining amounts in the decedent's account may be retained in the trust for other individual beneficiaries or refunded to the state, up to the amount of medical assistance provided. In 1989, the Legislature enacted ORS 412.700 and 412.710 to create Oregon's Self Sufficiency Trust Fund and Disability Trust Fund, with provisions that mirror the OBRA 93 exempt "pooled" trust. At the time of this writing, however, the nonprofit entity had not been established.

The final category of exempt OBRA 93 trusts is the *Miller* income trust,¹³ which contains deposits or accumulations of monthly income from Social Security, pension, or other periodic income that would otherwise disqualify an individual from Medicaid because of a state "income cap." In 1991, Ballot Measure 5 created an income limit in Oregon equal to 300% of the SSI standard; currently this income limit is \$1,338. People with monthly income over this amount are ineligible for Medicaid unless the disqualifying income can be redirected to a spouse through a support order. Although the specifics of the income trust instrument have not yet been established, this spousal redirection approach to the income cap may prove useful.

In some cases, however, the loss of the unimpaired spouse's use of the disqualifying income could be devastating. This could occur if the disqualifying income is far above \$1,338 and the monthly income of the unimpaired spouse is at or below the current Community Spouse Monthly Maintenance Needs Allowance ("CSMNA") set under the spousal impoverishment provisions of the Medicaid rules. In that case, a support order splitting the income at the source would be the best solution to the income cap problem. Another solution may be transferring the impaired spouse to a facility in a state without an income cap. As with the exempt trusts for disabled people, all remaining trust accumulations, up to the amount of the medical assistance provided, must be distributed to the state upon the death of the recipient.

3. Asset Transfers¹⁴

OBRA 93 creates the most significant changes in the Medicaid transfer rules since the Medicare Catastrophic Coverage Act of 1988 ("MCCA"). The new rules became effective August 10, 1993, for assistance provided on or after October 1, 1993. Oregon's administrative rules apply only to transfers made on or after October 1, 1993.¹⁵

a. Calculating Ineligibility Periods

Subject to the exempt transfer rules discussed below, certain asset transfers by a Medicaid applicant or spouse for less than fair market value create a period of ineligibility for the applicant or spouse. The period of ineligibility is computed by dividing "the total, cumulative uncompensated

value of all assets transferred” by “the average monthly cost to a private patient of nursing facility services in the State * * * at the time of application.” If both spouses require Medicaid, the period of ineligibility may be apportioned between the spouses.

Prior to the enactment of OBRA 93, the average monthly cost of care in Oregon (the divisor in the above computation) was \$1,970 for nursing care and \$1,000 for all other care.¹⁶ Oregon’s administrative rules create a new divisor amount of \$2,595 for all forms of care.¹⁷ Thus, asset transfers after August 10, 1993,¹⁸ will trigger shorter periods of ineligibility. In addition, individuals requiring less expensive, community-based care will be able to transfer assets and wait through a period of ineligibility based upon the cost of more expensive nursing home care.

b. “Look-back” Periods

OBRA 93’s most significant change to the asset transfer rules was to abolish a maximum period of ineligibility (formerly 30 months). Instead, OBRA 93 establishes “look-back” periods dating from the time of Medicaid application. Based on the cumulative value transferred, asset transfers within that look-back period will create a period of ineligibility extending from the date of the transfer into the future. Transfers prior to the look-back period, although technically disqualifying, will not be reviewed. If application is made before the look-back period has run, the period of ineligibility could extend far beyond the look-back period, depending upon the value transferred.

There are two look-back periods. The general rule is for the administrative agency to review transfers within 36 months of application. However, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the applicant, the look-back period is 60 months. The intent for the distinction in look-back periods is unclear. The position of Oregon’s SDSD is that transfers “to” a nonexempt trust shall receive a 36-month look-back period, not a 60-month look-back period.¹⁹ The 60-month look-back period applies to transfers “from” a nonexempt trust to a beneficiary other than the applicant.²⁰

c. Duration of Ineligibility

The period of ineligibility begins “the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility * * *.” This language allows the possibility that penalties for a November transfer will begin November 1 or December 1.

OBRA 93 provides that the period of ineligibility shall take into account “the total, cumulative uncompensated value of all assets transferred.” This language precludes successive monthly transfers of smaller amounts to shorten the period of ineligibility. The policy will be implemented by dividing the cumulative total of all nonexempt transfers

during the look-back period by \$2,595 to determine the period of ineligibility. If less than \$90,825 is transferred, ineligibility is less than 36 months.

However, OBRA 93 may allow a reduction of the period of ineligibility for multiple transfers made before and then immediately after a transition in care status. The “care transition reduction clause” reduces the period of ineligibility in a way that appears completely illogical. If assets are transferred (1) prior to long-term care placement or (2) prior to discharge from long-term care and then additional assets are transferred after the transition, the period of ineligibility of the pre-transition transfers is reduced by the period of ineligibility resulting from the post-transition asset transfers.

Example: On the day prior to long-term care placement (or discharge from care), the applicant or spouse transfers \$100,000 resulting in a period of ineligibility of 38.5 months (100,000 divided by 2,595). On the day following placement (or discharge), \$50,000 is transferred, resulting in ineligibility period of 19.27 months. Application of the reduction clause makes the ineligibility period for both transfers 19.23 months. As a result, the applicant will be eligible for Medicaid 19.23 months after the post-transition transfer. If all \$150,000 had been transferred at once, the period of ineligibility would be 57.8 months.²¹

d. Transfers Exempt from Ineligibility Rules

Consistent with prior law, OBRA 93 exempts certain asset transfers from the ineligibility rules discussed above. The transfer of “a home” remains exempt if it is made to (1) the spouse of the applicant, (2) a minor, blind, or disabled child of the applicant, (3) a sibling living in the home for one year or more who has an equity interest in the home, or (4) a child living in the home for two years or more who provided care forestalling long-term care placement of the parent.

Transfers of other assets, including a home, to a disabled child, a spouse, or another person for the sole benefit of the spouse also remain exempt. OBRA 93 also exempts transfers to living trusts for the benefit of disabled people and income trusts, as described above.

OBRA 93’s most intriguing exempt transfer expands language that appeared in a parenthetical remark in pre-OBRA 93 spousal impoverishment provisions. The OBRA 93 language exempts from ineligibility rules assets that “(i) were transferred to the individual’s spouse or to another for the sole benefit of the individual’s spouse, or (ii) were transferred from the individual’s spouse to another for the sole benefit of the individual’s spouse.”²² This language is adopted almost verbatim in the new post-OBRA 93 Oregon Administrative Rules.²³

It is unclear what to infer from this change. One possibility is that assets transferred to an irrevocable trust established by someone other than either spouse for the sole benefit of the applicant's spouse do not disqualify the applicant and are not counted in determining the value of the Community Spouse Resource Allowance. It is hoped that the expansion of this previously exempt transfer is evidence of congressional intent to prevent spousal impoverishment.

The OBRA 93 changes to the transfer rules will encourage transfers to people, rather than to trusts, to avoid the 60-month look-back period. (This assumes that those people are advised that a transfer "to" a nonexempt trust triggers a 60-month look-back period, which is contrary to the SDDS's current position.)²⁴ However, potential lawsuits, IRS liens, bankruptcy, or divorce in the life of the transferee, and the lack of fiduciary duty of the transferee will make such transfers less secure for the transferor.

In addition, because the transferee must personally report all income produced by the transferred assets, that income may be subject to taxation at a higher marginal rate than if the income was passed through to the transferor-beneficiary on IRS forms 1041 and K-1. Furthermore, if the assets are transferred to a transferee who later dies, the transferred assets are includable in the transferee's estate. Therefore, the transferee's estate plan must create a testamentary special needs trust for the benefit of the transferor.

It will be years before the OBRA 93 amendments are fully understood by all parties involved in the Medicaid planning arena. In the meantime, practitioners will have to make their best educated guesses and advise their clients of the uncertainties created by OBRA 93.

Tim Nay, M.S.W. &
Sam Friedenberg

Endnotes

¹Medicare and Medicaid Guide, No. 767 (CCH) (Sept. 23, 1993); Professional Liability Fund, *In Brief* (Sept. 1993); *The ElderLaw Report*, Vol. V, No. 1 (Aug. 1993); Russo, *NAELA Summary* (OBRA 1993 - MEDICAID) (available through the National Academy of Elder Law Attorneys); *NSCLC Washington Weekly*, Vol. XIX, No. 31 (Aug. 6, 1993).

²Unless otherwise noted, all citations of authority relating to estate recovery are to 42 USC 1396p(b).

³October 4, 1993, meeting between SDDS officials and elder law lawyers regarding implementation of OBRA 93.

⁴Because there is currently no statutory or case law providing for the imposition of a lien after the death of these people, it is likely the lien will be overlooked.

⁵See Re, "The Right of an Unsecured Creditor to Recover from a Decedent's Nonprobate Property," *Oregon Estate Planning and Administration Section Newsletter*, Vol. IX, No. 2 (Apr. 1992).

⁶Unless otherwise noted, all citations of authority relating to the treatment of living trusts are to 42 USC 1396p.

⁷Oregon implemented this rule on October 1, 1993.

⁸See endnote #7.

⁹See endnote #7.

¹⁰See endnote #7.

¹¹See endnote #7.

¹²October 4, 1993, meeting between SDDS officials and elder law lawyers regarding implementation of OBRA 93.

¹³*Miller v. Ibarra*, 746 F Supp 19 (D Colo 1990).

¹⁴Unless otherwise noted, all citations of authority relating to asset transfers are to 42 USC 1396p(c)(1).

¹⁵OAR 461-140-210, 242, 295.

¹⁶OAR 461-140-290.

¹⁷OAR 461-140-295(2).

¹⁸See endnote #7.

¹⁹October 4, 1993, meeting between SDDS officials and elder law lawyers regarding implementation of OBRA 93.

²⁰42 USC 1396p(c)(1)(B)(i).

²¹Oregon's new transfer rules omit this provision, which is a violation of federal law.

²²42 USC 1396p(c)(2)(B).

²³OAR 461-140-242.

²⁴See endnote #15 and accompanying text.

Trust Pamphlets Available

The Section has published a brochure, "Revocable Living Trusts," which is available in large quantities for distribution to clients or other interested people. The price is \$25 per 100, plus \$4 for handling, prepaid. To obtain a free copy, send a self-addressed, stamped envelope to: OSB Public Service Pamphlets, P.O. Box 1689, Lake Oswego, OR 97035.

What's New

**Becker and Becker,
122 Or App 567 (1993)**

Wife appealed the property division outlined in a dissolution judgment which awarded Wife most of her trust interests and Husband most of the marital assets. Husband also received a judgment in excess of \$1 million payable in installments, with the balance due when a contingent trust interest of Wife's vested. (Prior to

the separation, neither Wife's income nor principal interests in that trust had vested.) Wife argued (1) that her trust interests were her separate property and not subject to the court's dispositional authority and, alternatively, (2) that the amount awarded to Husband was inequitable.

At the time of the marriage, Wife was a named beneficiary of seven trusts. During the 27-year marriage, Wife received significant income from one trust (which she commingled with Husband's income) and her interest in four other trusts vested. The appeals court found that such income and vested trust interests became marital assets. While acknowledging that Wife rebutted the presumption of equal contribution (i.e., that both parties contributed equally to the acquisition of assets received during the marriage), the appeals court stated that, upon dissolution, the court may distribute "the real or personal property, or both, of either or both of the parties." ORS 107.105(1)(f). The appellate court quoted two decisions of the Oregon Supreme Court to support the proposition that ORS 107.105(1)(f) describes a class of property encompassing more than "marital assets" and can include separate property and property owned prior to the marriage: *Stice and Stice*, 308 Or 316, 326 (1989) and *Pierson and Pierson*, 294 Or 117, 122 (1982).

As required by ORS 107.105(1)(f), the appeals court affirmed the circuit court's disposition as "just and proper in all the circumstances." The court identified various events that occurred during the marriage to support that conclusion: (1) Wife used her trust income to supplement Husband's income and planned to continue using it in their retirement, (2) Wife's entitlement to the trusts was certain, and (3) the couple used Husband's salary and did not save for retirement in anticipation that Wife's trust receipts and Husband's pension would provide for them during retirement.

Furthermore, the court denied Wife's argument that the judgment for installment payments exceeding \$1 million was a lien on the trust corpus and, therefore, violated the instrument's spendthrift provision. The appeals court explained that the judgment was timed to coincide with the corpus distribution but did not have to be paid from the trust corpus; therefore, Husband received no interest in the trust itself and the spendthrift provision was not violated.

***Connell v. Franklin,*
123 Or App 68 (1993)**

This decision reconsidered and modified *Connell v. Franklin*, 120 Or App 414, reported in the October 1993 issue of this newsletter.

Plaintiff filed a complaint in Lincoln County asking for rescission of a contract or, alternatively, for a declaratory judgment recognizing an equitable right of redemption. Subsequently, a conservator was appointed for Plaintiff in a

Benton County conservatorship proceeding, and Plaintiff petitioned to terminate the conservatorship. Defendants petitioned the court to appoint a special conservator for Plaintiff in the Lincoln County matter.

On reconsideration, the appeals court reiterated that (1) the appointment of a special conservator under ORS 126.227 is a statutory proceeding within the jurisdiction of the probate court and separate from a civil claim for rescission of a contract/declaratory judgment and (2) a probate court order appointing a special conservator is a final order under ORS 19.010(4), requiring appeal to be taken within 30 days of the entry of the order. ORS 19.026. In addition, the court stated that ORS 126.227 does not imply that the circuit court presiding over a civil trial has the authority to initiate a conservatorship as part of the civil proceeding.

The court's only modification to its prior opinion was to clarify that Defendants should have obtained a ruling on Plaintiff's petition to terminate the Benton County conservatorship before filing Defendant's petition (in the Benton County proceeding) to appoint a special conservator for Plaintiff in the Lincoln County matter.

Tax Developments

***Estate of Wall v. Commissioner* 101 TC No. 21 (1993)**

Grantor established three irrevocable trust agreements during her lifetime for the benefit of her daughter and her granddaughters. Each trust agreement provided that Grantor "may remove the Trustee on written notice and appoint a successor Trustee. However, any successor Trustee must be a corporation qualified to conduct a trust business in the United States and be completely independent from the Grantor." Each trust agreement gave the trustee the power to expend principal and income to or for the benefit of the beneficiary, in its sole discretion, with no prescribed standards limiting the trustee's discretion. The initial trustee, First Wisconsin Trust Company, held that position continuously from the time of its initial appointment. Grantor had no significant ownership interest in First Wisconsin.

The Internal Revenue Service ("the Service") assessed a deficiency in the estate tax owed by Grantor's estate, on the basis that the property in each of the three trusts was includable in Grantor's estate under IRC sections 2036(a)(2) and 2038. Section 2036(a)(2) includes in a decedent's estate the value of any transferred property as to which the decedent has retained a power to designate the person or persons who are to have possession or enjoyment of the property or the income from the property. Section

2038 includes in a decedent's gross estate the value of any transferred property the enjoyment of which was subject at death to any change through the exercise of a power to alter, amend, revoke, or terminate.

The issue before the Tax Court was whether Grantor's retained power to change the corporate trustee is to be equated with a power described in sections 2036 or 2038. The court began with the Service's assumption that the trustee's powers, if held by Grantor, would be subject to sections 2036 or 2038.

The Service followed its position set forth in Revenue Ruling 79-353, 1979-2 CB 325, that the reservation by the settlor of the power to remove the trustee at will and appoint another trustee is equivalent to reservation of the trustee's powers. In support of its position, the Service argued in Tax Court that through threat of removal, the Grantor could force the current trustee to comply with her wishes, or could shop for a trustee willing to comply with her wishes. The court rejected this argument, stating that the fundamental fiduciary duty of loyalty of a trustee to the beneficiaries would prevent the trustee from bending to the Grantor's will, and that the Grantor might be motivated for legitimate reasons to replace the trustee. The court held that neither section 2036(a)(2) nor section 2038 applied to the retained power to substitute the corporate trustee for another independent corporate trustee, implicitly overruling Revenue Ruling 79-353.

Annual Meeting News

The Estate Planning and Administration Section held its annual meeting at the Bar Convention in Eugene on October 11. The following people were elected to serve as officers and members-at-large during 1993-94:

- Chairperson Elect: Helen Rives
- Treasurer: Donald K. Denman
- Secretary: Allyn E. Brown
- Members-at-Large (two-year terms):
Christine Brown, Donna Muehleck, Craig Heath,
Shirley Bass
- Member-at-Large (one-year term):
David Andrews

The following people will continue to serve on the Executive Committee during 1993-94:

- Chairperson: Gretchen R. Morris

- Past Chairperson: Stephen E. Kantor
- Members-at-Large (one-year terms):
Rita Batz Cobb, David P. Seulean, David E. Peterson

The Section members present voted to amend the by-laws to allow legal assistants to become members of the Section.

Executive Committee Report

The Executive Committee of the Section met on November 19 at the offices of the Oregon State Bar. Susan Grabe, the Bar's Governmental Relations Assistant, reported on the status of the Chapter 126 Guardianship and Conservatorship Reform bill sponsored by the Section at the last legislative session. Although the bill died in committee, the Senate Judiciary Interim Committee has created a task force of interested parties to study the proposed bill. The first formal meeting of the task force was on December 1 in Salem. People interested in more information about the task force should contact Susan Grabe.

A discussion of remedial legislation in the area of revocable living trusts resulted in the creation of a Subcommittee for Trust Legislation. Helen Rives agreed to chair the Subcommittee. Anyone with suggestions for improving trust planning and administration laws should contact Helen Rives.

Questions, Comments, or Suggestions About This Newsletter?

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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

- February 20-22, 1994 (Sponsored by Trusts and Estates magazine) **Fifth Annual Conference on Estate Planning and Administration**, The Ritz Carlton, San Francisco, California. Telephone: (404) 618-0114.
- February 24-26, 1994 (Sponsored by ALI-ABA) **Advanced Estate Planning**, Grand Wailea Resort & Spa, Maui, Hawaii. Telephone: (800) 253-6397, extension 1631.
- February 25, 1994 (Co-Sponsored by the Estate Planning Council of Portland and Northwestern School of Law) **23rd Annual Estate Planning Seminar**, Red Lion Inn, Lloyd Center, Portland, Oregon. Telephone: (503) 768-6671.
- March 4, 1994 (Sponsored by the Oregon State Bar) **Basic Estate Planning**, Convention Center, Portland, Oregon. Telephone: (503) 684-7407 or (800) 452-8260, extension 407.
- March 5, 1994 (Sponsored by the Southern California Tax & Estate Planning Forum) **Basic Will & Trust Drafting**, [location to be announced], Los Angeles, California. Telephone: (800) 332-3755.
- March 19, 1994 (Sponsored by the Southern California Tax & Estate Planning Forum) **Administration of Trusts: Funding, Testamentary Allocation, and Final Distributions**, [location to be announced], San Francisco, California. Telephone: (800) 332-3755.
- April 16, 1994 (Sponsored by the Southern California Tax & Estate Planning Forum) **Drafting for the Marital Deduction and Generation-Skipping Transfers and Post-mortem Allocation of Assets to the Various Trusts**, [location to be announced], Los Angeles, California. Telephone: (800) 332-3755.
- 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.
- April 29-30, 1994 (Sponsored by the Southern California Tax & Estate Planning Forum) **Federal Estate Tax: Preparation of the 706**, [location to be announced], Los Angeles, California. Telephone: (800) 332-3755.
- May 6-7, 1994 (Sponsored by the American Bar Association) **Practical International Estate Planning, Third Annual Practitioner Update**, Fess Parker Red Lion, Santa Barbara, California. Telephone: (312) 988-6204.
- June 4, 1994 (Sponsored by the Southern California Tax & Estate Planning Forum) **The Family Limited Partnership: The Center Piece of Planning for the Preservation, Control and Transfer of Family Wealth**, [location to be announced], Los Angeles, California. Telephone: (800) 332-3755.



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Oregon's New Health Care Decisions Act¹

This article summarizes the Oregon Health Care Decisions Act (ORS 127.505 to 127.640, here called the "Act"), which was enacted by the 1993 Legislature and became effective November 4, 1993.

1. Introduction

The Act amends Oregon's statutes governing health care decisions for those who cannot make their own decisions. Like the statutes that it supersedes,² the Act is concerned primarily with health care decisions for adults who have signed an advance directive (either a power of attorney for health care or a "living will"). The Act also regulates life-support decisions by representatives for certain people who have not expressed their desires through advance directives.

The Act aims to promote individual autonomy in health care decisions and is generally neutral among the various health care choices people may make for themselves. However, like the prior law, the Act does not authorize mercy killing or any affirmative act to end life; this Act does not legalize physician-assisted suicide.³ In addition, the Act requires comfort care for dying patients and brings decisions about dying more into open view.

The prior law was confusing to consumers, to health care providers, and even to experienced attorneys. The Act attempts to create a law which is more "user-friendly" and which will promote, rather than frustrate, people's values regarding health care.

Although control of health care costs is not the Act's purpose, it could have the effect of saving considerable amounts of money. A substantial percentage of an individual's lifetime medical costs is incurred in the last few months of life, and many of these costs can be avoided by clarifying the authority to cease life-prolonging treatment. When in doubt, the physician typically errs in the direction of furnishing all care technologically possible. Many people get more intensive life support than they would choose. At the same time, the Act protects the minority who desire to have their lives prolonged by all available treatment.

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Under prior law, two statutes existed that contained confusing differences: the directive to physicians statute and the power of attorney for health care statute. The Act combined the two statutes into a simplified, unified framework for health care decisions by surrogates. The rest of this article describes the features of this new framework.

2. Life-Support Procedures

The Act authorizes an appointed representative to decide about life support for an incapacitated principal who is in one of four medical conditions:

- terminal illness in which death is imminent, regardless of treatment;
- permanent unconsciousness, including irreversible persistent vegetative state;
- advanced progressive debilitating fatal illness where the patient has permanently lost all interactive capacity (e.g., late-stage Alzheimer's); or
- conditions in which life support itself will cause extraordinary pain.

Decisions about life support are also authorized if the patient has delegated such authority to the health care representative. Outside these circumstances, the Act neither prohibits nor authorizes life support decisions, and common law continues to govern.

Routine care to sustain patient comfort or hygiene (including pain-control medications) will still be provided even if life support is to be withheld or withdrawn.

VOLUNTEER OPPORTUNITIES

The Estate Planning and Administration Section will have four subcommittees in 1994. The subcommittees and chairpersons are:

CLE Committee	David Seulean, Chair
ORS Chapter 126 Working Group	Shirley Bass and Rita Cobb, Co-Chairs
Legislative Affairs	Ron Bailey, Chair
Trust Legislation	Helen Rives, Chair

Volunteers are welcomed. Section members wanting to serve on any of these subcommittees should contact the appropriate chairperson.

3. Artificially Administered Nutrition and Hydration

A special presumption, enacted in 1989, separated decisions about artificially administered nutrition and hydration ("tube feeding") from other medical decisions. Much debate occurred about whether the language of the statutory power of attorney form sufficed to override the presumption.

The Act amends the special presumption about tube feeding to authorize withholding or withdrawing tube feeding from additional sorts of patients: those who are permanently unconscious or in late-stage Alzheimer's disease and those who have delegated tube-feeding decisions to the representative. The procedure for decisions about tube feeding parallels the procedure for decisions about other life-support procedures. The Act clarifies the effect of the nutrition/hydration check-off box on the power of attorney form.

4. Rights of Capable Adults

Under the prior laws, confusion existed about the relationship between the constitutional and common-law rights of capable adults and statutory definitions of incapability. The Act codifies the right of capable adults to make health care decisions for themselves, and clarifies the common-law and constitutional rules by specifying a standard to be used for determining whether a person is capable of consent.

As the reverse of the right of an individual to appoint a representative, the Act allows an individual to disqualify designated persons from acting as representative.

5. Procedural Protections for Patients

The protective provisions that previously applied to powers of attorney for health care are extended to cover all advance directives and a broader class of health care representatives. These protections include: definition of incapacity, witnessing procedures, standard of conduct for decision making, court proceedings, effect on insurance and admission to care, and immunities for health care providers and representatives. New protections for vulnerable patients are added, including consultation with a case manager and verification that a person is not found incapable because of the manner of communication.

6. Advance Directive Forms

The separate statutory forms for the power of attorney for health care (which the Act renames "Appointment of Health Care Representative") and for

the directive to physicians (renamed "Health Care Instructions") have been combined into two parts of a single form called an "Advance Directive." A person can execute both parts of the advance directive form, or can execute either part separately.

The form is more flexible, allowing people to express a broader range of wishes by answering a sequence of questions about the effect of the form (e.g., its term and its relationship to other documents), the representative's authority, and the health care instructions when the principal is in one of four specified medical circumstances.

The form is more readable and precise, and it includes information and instructions that should allow consumers to use it without legal assistance. Although longer, it is easier to use.

A person may specify an expiration date: if none is specified, the form is effective until revoked. Directives to physicians and powers of attorney for health care that were valid under prior law will remain valid, subject to any expiration date set forth in the forms. Prior-law forms signed after the effective date of the new law are also valid.

7. Revocation and Reinstatement

Prior rules for superseding and revoking advance directives were ambiguous. An incompetent patient could revoke an advance directive without being able to reinstate it. The Act's provisions for suspension, supersession, and revocation of advance directives establish clear priority rules. An incompetent patient may revoke a directive only if the decision involves life support. An advance directive may be reinstated in writing.

8. Medical Providers Are More Likely to Cooperate

Under prior law, medical providers could decline to follow the decisions of a patient or representative out of concerns for liability or lack of authority. The Act adds requirements for medical confirmation that the patient is in one of the four medical conditions specified in section 2 above. By clarifying the authority of health care representatives, the Act should encourage medical providers to follow the decisions of a health care representative. Providers will gain immunity from liability by relying on the standards set forth in the Act. The immunities, record-keeping obligations, and transfer obligations of providers are clarified. Providers can rely on the validity of an instrument, absent notice of a defect.

9. Health Care Representatives

If a patient has not executed an advance directive and is in one of the four medical conditions described in section 2 above, one of the patient's relatives or close friends (in a specified order) may serve as health care representative for life support decisions. In the absence of any relatives or friends, the attending physician may serve as health care representative. (As under section 2, common-law standards continue to govern circumstances that the Act does not address.) Any such representative must consult with other concerned family members and close friends.

The provisions that apply to an attorney-in-fact now apply to a guardian or other person appointed by a court to make health care decisions for an individual. All health care representatives will be governed by the same rules. For example, the representative is to follow the patient's desires to the extent known and is to try to act in the patient's best interest if the patient's desires are unclear.

10. Comity with Other States

The Act authorizes non-residents to execute the Oregon forms. The Act also gives effect, under the substantive law of Oregon, to any form of advance directive validly executed under the laws of another state.

11. Decisions the Representative Cannot Make

As mentioned above, the Act does not authorize mercy killing. In addition, the representative may not make decisions about abortion, sterilization, mental health treatment, shock treatment, or psychosurgery. Decisions about mental health treatment can be made through a "Declaration for Mental Health Treatment," which was created by the 1993 Oregon Legislature and is codified at ORS 127.700 to 127.737.

12. Additional Resources

A detailed monograph analyzing the Act will be published by the Health Law Section of the Oregon State Bar under the title *End of Life Decisions in Oregon*. This monograph, originally published in 1993 to describe prior law, is being revised to reflect the Act.

A statement of patients' rights, as required by the state and federal Patient Self-Determination Acts, entitled *Your Right to Make Health Care Decisions in Oregon*, has been approved by the Health Law Section of the Oregon State Bar and has been incorporated into state agency rules.

A 16-page booklet entitled *Making Health Care Decisions When You Can't Speak For Yourself: A*

Summary of Oregon's Advance Directive Law has been published by:

Oregon Health Decisions
921 SW Washington, Suite 723
Portland, OR 97205
Telephone: (503) 241-0744

This booklet contains the Act's Advance Directive form, some instructions and introductory materials, and the statement of patients' rights described above. It is widely used for compliance with the Patient Self-Determination Act.

Oregon Health Decisions, the Center for Ethics at Oregon Health Sciences University, and the Oregon State University Extension Service are collaborating on additional publications which are expected to be available later this spring.

*Theodore C. Falk, J.D., Ph.D.*⁴

Endnotes

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²Former ORS 127.505 to 127.585 (power of attorney for health care) and former ORS 127.605 to 127.650 (directive to physicians).

³Some acts of physician-assisted suicide would be legalized by an initiative petition that has been filed with the Secretary of State. As of this writing, determination of the initiative's ballot title is pending before the Oregon Supreme Court. Community meetings examining the ethical issues raised by physician-assisted suicide are being organized by Oregon Health Decisions and the Oregon Hospice Association.

⁴Mr. Falk drafted Senate Bill 286, the Oregon Health Care Decisions Act.

Ethical Issues Of Advance Directives

Advanice directives are a common component of the estate planning package prepared for clients. Because the directive involves the client's health care decisions, lawyers may overlook the legal ethics implications of including the directive with estate planning services. Rather, they may suggest that clients take any questions about the directive to their physicians.

While it is true that the primary effect of the directive is medical, execution of the directive affects the client's legal rights as well. A prudent lawyer will do more than pass the form across the desk to the

client and suggest that the client's physician can answer any questions the client may have. That suggestion may be valid for the various medical care options from which the client can choose. However, the client also needs advice about legal issues associated with the directive.

Lawyers are required to provide competent representation, to not neglect the client's matters (DR 6-101), and to represent the client zealously and avoid prejudicing or damaging the client (DR 7-101). This means that the lawyer must ensure that the client understands the legal effect of the advance directive. The lawyer should explain the following issues to the client:

- the consequences of giving another person the right to make health care decisions;
- the duration of the directive and how it can be revoked, amended, or otherwise changed; and
- the consequences of executing either of the two parts of the directive, or both.

In addition, the lawyer should help the client evaluate and select the persons to whom the decision-making authority should be delegated.

The lawyer should also inquire whether the client has made any necessary or appropriate medical inquiries and ascertain that the client adequately understands the consequences of the health care choices indicated in the directive. If a client has questions about the *medical* consequences of the directive, the client may need to meet with the lawyer at another time to execute the advance directive, depending on the client's sophistication and ability to follow instructions. For clients well able to follow directions, the lawyer could explain how to execute the directive and then give it to the client with instructions to execute the directive after getting answers to the medical questions from a physician.

A case could arise in which grieving relatives claim that the lawyer committed malpractice or violated the duties of competent and zealous representation by not fully informing the client of the consequences of the choices made. A lawyer can limit exposure to such claims by treating the advance directive exactly like the other components of the client's estate plan, remembering that the directive is not only a health care tool, but a legal document having profound consequences to the client.

*Sylvia Stevens,
Assistant General Counsel,
Oregon State Bar*

What's New

Knutsen v. Krippendorf, 124 Or App 299 (1993)

Contestant, who was disinherited under his mother's Will, sought to have the Will declared invalid; he assigned error to the trial court's finding that his deceased mother's paramour ("Beneficiary") did not exert undue influence over Decedent when she executed her Will.

In a will contest, the burden of proving undue influence is usually upon the contestant of a will. However, an inference of undue influence arises if the contestant proves (1) a confidential relationship existed between the testator and the beneficiary, such that the beneficiary held a position of dominance over the testator and (2) suspicious circumstances surrounded the procurement or execution of the will. *In re Reddaway's Estate*, 214 Or 410 (1958); *Doneen v. Craven*, 204 Or 512, 522 (1955); *In re Southman's Estate*, 178 Or 462, 482 (1946); *McKee v. Stoddard*, 98 Or App 514, *rev den* 308 Or 660 (1989). Dominance can be expressed subtly, such as by suggestion or persuasion, or by fostering a sense of need and dependence. *Knutsen*, 124 Or App at 309.

Based upon its consideration of the seven factors pertinent to determining whether circumstances exist to support an inference of improper influence, the Court of Appeals identified a suspicion of undue influence which required Beneficiary to "go forward with the proof and present evidence sufficient to overcome the adverse inference." *In re Southman's Estate*, 178 Or at 482. Because Beneficiary failed to overcome the adverse inference, the appeals court concluded that the Will was the product of undue influence and was therefore invalid.

Estate of Cummins v. Commissioner, TC Memo 1993-518, 66 TCM 1232 (CCH) (Nov. 9, 1993)

Hours before his death, an Oregon resident ("Decedent") executed an "Irrevocable Letter of Instructions" directing his stockbroker ("Broker") to pay \$10,000 to each of Decedent's 20 nieces and nephews. While the brokerage firm accepted and agreed to the terms of the letter, it was unable to effectuate the distributions before Decedent's death. The day after Decedent's death, the firm liquidated some of his mutual funds and credited his money market account; the following day, the firm issued checks to the named individuals and debited

Decedent's account for \$200,000. The co-personal representatives excluded the \$200,000 from Decedent's gross estate and the IRS objected.

In considering whether the funds transferred constituted completed gifts prior to Decedent's death, the U.S. Tax Court noted that two of the elements required to complete a gift under Oregon law were established: (1) a present intent to make the gift on the part of the donor and (2) the acceptance of the gift by the donees. The sole question was whether the decedent made effective delivery of the gifts prior to his death.

In answering this question, the court rejected the estate's argument that the letter delivered to Broker established a trust relationship with Broker; thus, there was no effective delivery of the gifts to a third party as trustee prior to Decedent's death. Noting that a stockbroker or a commodity broker is generally considered to be the customer's agent, the Tax Court accepted the IRS's argument that the relationship between Decedent and Broker was that of principal and agent rather than settlor and trustee. The court further noted that the duties enumerated in the letter suggested the continuation of an agency rather than the establishment of a trust relationship. Under the laws of agency, upon Decedent's death, Broker had no interest in or right to transfer the funds to donees.

Lack of a trust relationship was further evident because (1) the letter did not contain an explicit reference to a trust relationship, (2) there was no trust res (the letter directed Broker to liquidate "such assets as it deemed appropriate at its discretion"), and (3) Broker had neither legal nor equitable title to the securities in Decedent's brokerage account. Because the funds were not used to make completed gifts (to the individuals named in the letter or to a trustee) prior to Decedent's death, they were includible in Decedent's gross estate.

Naito v. Naito, 125 Or App 231 (1993)

Plaintiff was removed as conservator of her husband's estate prior to his death. Plaintiff appealed from final orders of the probate court allowing successor co-conservators ("Defendants") to retain conservatorship assets after death to pay expenses of administration of the conservatorship.

The appeals court noted that when a protected person dies, the conservator's powers and duties are those described in ORS 126.337; "the Conservator remains subject to the court's authority so that the purposes of the conservatorship are fulfilled." 125 Or

App at 235. Upon the ward's death, ORS 126.337(1) directs that the conservator retain the conservatorship estate for delivery to the personal representative. The appellate court commented, however, that, pursuant to ORS 126.387(2)(a), assets required for its expenses remain in the conservatorship estate until those expenses are paid; such assets are subject to the conservator's powers under ORS 126.313(7). The court also cited ORS 126.263 to authorize the use of estate funds, including those generated by a sale of estate assets, to pay attorney fees with court approval.

The Court of Appeals affirmed the trial court's decision in full, holding that the lower court did not err in: (1) ordering the sale of real property to pay administration expenses, (2) denying Plaintiff's motion to terminate the conservatorship immediately upon death, or (3) awarding attorney fees where Defendants filed detailed accountings establishing that the attorneys' work supported the purpose of the conservatorship and that the expenses incurred were reasonable.

Shannon M. Connelly

Common-Law Marriage Update

Representative Kevin Mannix of Salem has agreed to work with Stephen Kantor and Warren Deras to draft legislation to repeal House Bill 2854 (codified at ORS 112.017), which created common-law marriages for purposes of intestate succession. Representative Mannix has further agreed to sponsor that legislation during the next legislative session.

Tax Development

Private Letter Ruling 9342003 Published October 22, 1993

This private letter ruling considered whether the gross estate should include lifetime gifts made on behalf of a principal by attorneys-in-fact under a durable power of attorney.

In 1984, an Oregon resident ("Principal") executed a durable power of attorney ("Power") naming his two sons as attorneys-in-fact ("Attorneys"). The document stated that the powers were to be exercised for the benefit of Principal, and gave the Attorneys broad powers to manage Principal's affairs, including "full power and authority to do everything necessary in exercising any of the powers herein granted as fully as I might or could do if personally present" and the power "to prepare, sign, and file gift tax returns with respect to gifts made by me for any year or provisions or other tax elections * * *."

In 1986, after Principal became incapacitated, the Attorneys made gifts to themselves of listed securities valued at \$129,000 and elected gift-splitting treatment with Principal's spouse. Later that year, the Attorneys executed on behalf of Principal a revocable inter vivos trust agreement naming themselves as trustees and authorizing discretionary distributions of income or principal to Principal or other persons he designated. The agreement authorized trustees, during Principal's lifetime, to make "gifts of a tax-saving nature in accordance with any program of lifetime gift-giving of the trustor of which the trustees are aware and [to] initiate [such] a program * * * if the trustees deem [it] to be in the best interest of trustor, his wife, and his two sons, their wives and children * * *." The trustees funded the trust with some of Principal's assets. In 1989 and 1990, the trustees made split-gifts of cash to themselves and their spouses. The Principal died in 1991.

The IRS questioned whether two types of transfers during Principal's lifetime were includible in Principal's gross estate under IRC section 2038: (1) gifts made by his Attorneys under a power of attorney that did not expressly authorize the Attorneys to make gifts, and (2) distributions from a trust governed by an agreement that had been executed by Attorneys under a power of attorney that did not expressly authorize the Attorneys to make gifts of Principal's property.

Citing *Estate of Casey v. Commissioner*, 948 F2d 895 (4th Cir 1991), and three decisions of the Oregon Supreme Court, the IRS reasoned that none of the

questioned transfers by Attorneys were valid gifts because the Power did not expressly authorize gifts, to individuals or to the trust. Thus, because none of the transfers were valid gifts or made for consideration, the IRS concluded that Principal held a power to alter, amend, revoke or terminate the donees' interests in the property at Principal's death. Because such a power falls within the purview of IRC section 2038(a)(1), all gifts were required to be included in Principal's gross estate.

On the issue of the trust distributions, the IRS concluded that, even if the Power authorized gifting to the trust, the 1989 and 1990 gifts from the trust would be includible in Principal's gross estate under the three-year rule. IRC §§ 2035(d)(2) and 2038. Citing *Estate of Jalkut v. Commissioner*, 96 TC 675 (1991), the IRS reasoned that distributions after Principal's incapacity were not direct *withdrawals* from a grantor trust to a grantor (Principal); rather, Principal had *relinquished* his power to revoke the trust with respect to the distributed property. Thus, sections 2035(a), 2035(d)(2), and 2038(a)(1) would require that the estate include all property over which Principal relinquished his power of revocation within the three-year period ending on Principal's death.

Shannon M. Connelly

Executive Committee Report

The Executive Committee of the Estate Planning and Administration Section met on January 15 and March 11, 1994.

The Executive Committee unanimously selected two Section members as candidates for the Oregon State Bar President's Awards: Warren Deras for the Membership Service Award and Steve Kantor for the Public Service Award. The recipients of the awards will be announced at an awards banquet at the Bar's annual business meeting in Portland on September 27.

The Section will sponsor three CLE programs during 1994. Two of the programs will be traditional CLE seminars: a basic skills program entitled "Planning and Drafting for the Small Oregon Estate," set for May 6, and an advanced program entitled

"Administration of the Taxable Estate," set for November 14. The third program will be an interactive CLE immediately preceding the Section's annual business meeting on September 27. That program will be entitled "A Fireside Chat About Living Trust Problem Areas and Suggested Legislative Remedies."

The Executive Committee discussed legislative topics for the 1995 legislative session including ORS Chapter 126 revisions; disclaimers; several uniform laws; and remedial legislation in the areas of revocable grantor trusts, fiduciary legislation, *in terrorem* clauses, ademption clauses, and the new definition of "surviving spouse" now found in ORS 112.017. Anyone wishing to work on legislative proposals should contact Ron Bailey, Chair of the Legislative Affairs Subcommittee.

Helen Rives, Chair of the Grantor Trust Legislation Subcommittee, reported 16 different areas into which remedial grantor trust legislation could extend, concluding that the issue may be too large to tackle in one year. The Grantor Trust Legislation Subcommittee will meet to develop short-term and long-range goals, and to identify the appropriate philosophical premise from which to proceed. In shaping its proposals, the Subcommittee will also consider comments made at the interactive CLE preceding the Section's annual meeting in September.

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

- 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.
- April 29-30, 1994 (Sponsored by the Southern California Tax & Estate Planning Forum) **Federal Estate Tax: Preparation of the 706**, Baltimore Hotel, Los Angeles, California. Telephone: (800) 332-3755.
- May 5, 1994 (Sponsored by the Oregon State Bar) **Basic Estate Planning**, Oregon Convention Center. Telephone: (503) 620-0222 or (800) 452-8260, extension 326.
- May 5-6, 1994 (Sponsored by Section of Real Property, Probate and Trust Law, American Bar Association) **5th Annual Spring CLE and Committee Meeting**, Stouffer Mayflower Hotel, Washington, D.C. Telephone: (312) 988-5263.
- May 6-7, 1994 (Sponsored by The Southern California Tax & Estate Planning Forum) **Federal Estate Tax: Preparation of the 706**, Miyako Hotel, San Francisco, California. Telephone: (800) 332-3755.
- May 6-7, 1994 (Sponsored by the American Bar Association) **Practical International Estate Planning, Third Annual Practitioner Update**, Fess Parker Red Lion, Santa Barbara, California. Telephone: (312) 988-6204.
- June 4, 1994 (Sponsored by The Southern California Tax & Estate Planning Forum) **The Family Limited Partnership: The Center Piece of Planning for the Preservation, Control and Transfer of Family Wealth**, Biltmore Hotel, Los Angeles, California. Telephone: (800) 332-3755.
- June 4, 1994 (Sponsored by The Southern California Tax & Estate Planning Forum) **The Family Limited Partnership: The Center Piece of Planning for the Preservation, Control and Transfer of Family Wealth**, Biltmore Hotel, Los Angeles, California. Telephone: (800) 332-3755.
- June 11, 1994 (Sponsored by The Southern California Tax & Estate Planning Forum) **The Family Limited Partnership: The Center Piece of Planning for the Preservation, Control and Transfer of Family Wealth**, Miyako Hotel, San Francisco, California. Telephone: (800) 332-3755.
- June 18, 1994 (Sponsored by The Southern California Tax & Estate Planning Forum) **Administration of Trusts: Funding, Testamentary Allocation, and Final Distributions**, Miyako, San Francisco, California. Telephone: (800) 332-3755.
- June 19, 1994 (Sponsored by ALI-ABA/Co-Sponsored by the University of Wisconsin Law School) **Estate Planning In-Depth**, University of Wisconsin Law School, Madison, Wisconsin. Telephone: (800) 253-6397, extension 1631.
- July 14 and 15, 1994 (Sponsored by ALI-ABA/Co-Sponsored by ABA Real Property Tax Sections) **Estate Planning for the Family Business Owner**, Sheraton Palace Hotel, San Francisco, California. Telephone: (800) 253-6397, extension 1631.
- July 21-23, 1994 (Sponsored by ALI-ABA/Co-Sponsored by the Alaska Bar Association) **Advanced Estate Planning Techniques**, Regal Alaskan Hotel, Anchorage, Alaska. Telephone: (800) 253-6397, extension 1631.
- September 9 and 10, 1994 (Sponsored by ALI-ABA/Co-Sponsored by the Massachusetts CLE) **Sophisticated Estate Planning Techniques**, Westin Copley Place Hotel, Boston, Massachusetts. Telephone: (800) 253-6397, extension 1631.
- October 19-23, 1994 (Sponsored by The Southern California Tax & Estate Planning Forum) **Fourteenth Annual Southern California Tax & Estate Planning Forum**, Le Meridien Hotel, San Diego at Coronado, California. Telephone: (800) 332-3755.
- November 4, 1994 (Sponsored by the Oregon State Bar) **Administering the Taxable Estate**, Oregon Convention Center. Telephone: (503) 620-0222, extension 326.
- November 14-18, 1994 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, Grand Hyatt Hotel, San Francisco, California. Telephone: (800) 253-6397, extension 1631.



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The Continuing Joint Trust Debate

Part I

1. Introduction

Like it or not, the so-called "joint" trust is becoming increasingly popular in Oregon and elsewhere. A joint trust can provide a married couple with all the benefits of a revocable living trust generally (including avoidance of probate, privacy, enhanced financial management, and planning for incapacity), incorporated into a single, relatively simple trust instrument, and at the same time preserve the basic joint ownership or "marital partnership" format preferred by many couples.

A joint trust can be complicated and dangerous if improperly drafted or funded, but it can also be a simple and flexible estate planning "package" for married clients, particularly those with estates of less than \$600,000. At this time, however, there are many more unresolved questions than clear answers, so careful planning and drafting is critical. As evidence of these uncertainties about joint trusts, estate planning attorneys and commentators seem either to love them or hate them — viewing them alternatively as the ultimate estate planning panacea or merely dangerous shrapnel from the living trust explosion.

This article will *briefly* summarize some of the basic tax benefits and problems of joint trusts. Part I discusses the basic theory of joint trusts and some inherent tax and other problems. Part II, which will appear in the October 1994 issue of this newsletter, will discuss an approach to avoid these problems. Readers should review the issues raised in this article and make their own conclusions before proceeding.

Recent articles favoring joint trusts include Esperti and Peterson, *Joint Trusts are a Good Planning Tool for a Married Couple*, 20 Estate Planning 148 (May/June 1993) and Williams, *The Benefits and Pitfalls of Joint Revocable Trusts*, 131 Trusts and Estates 41 (Nov 1992); a recent article

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generally opposing joint trusts is Adams and Abendroth, *The Joint Trust: Are You Saving Anything Other Than Paper?* 131 *Trusts and Estates* 39 (Aug 1992); and something of a "middle of the road" article is Flanagan, *Designing Trusts for Couples Owning a Substantial Amount of Jointly-Held Assets*, 15 *Estate Planning* 94 (Mar/Apr 1988).

2. A Question of Nomenclature

The first uncertainty about "joint" trusts is definitional. The term can be construed to include virtually any arrangement providing for one or more revocable living trusts created by husband and wife in the same trust instrument. The term is frequently used to mean:

1. completely distinct trusts for each spouse funded with each spouse's separate property, with the provisions of both trusts incorporated into one instrument for purposes of simplicity;
2. a single trust commingling whatever interests are transferred by the spouses, usually having many of the attributes of a joint tenancy;
3. a single trust with separate "shares" for each spouse, each share designed to hold an undivided one-half interest in all the assets of the "joint" trust estate;
4. a single trust, but combined with unilateral powers of revocation, at least as to the property transferred by each spouse; or
5. any combination of the above.

This article uses the term "joint" trust in the traditional sense, meaning a single trust commingling whatever property interests (whether joint, community, or separate) are contributed by the spouses (alternative 2 in the preceding paragraph). The trust has most of the same "survivorship" and other attributes commonly associated with a common law joint tenancy or tenancy by the entirety, and thus may be revoked or amended only with the consent of both spouses. The trust generally continues as a single revocable or irrevocable trust for the lifetime benefit of the surviving spouse, but in larger estates it may also include a separate "Family Trust" designed to take advantage of the deceased trustor's \$600,000 unified

credit exemption equivalent, and escape estate taxation in the surviving trustor's estate.

Although many practitioners also use the term "joint" trust to refer to a single trust providing for separate shares or unilateral powers of revocation (alternatives 3 and 4 above), this article uses the more descriptive term of "common trust."

3. Dangers of the Joint Trust

A. Gift Tax

Many estate planners assume that, because the interests of the spouses in a true "joint" trust are somewhat similar to the interests of joint tenants or tenants by the entirety, the trust will be treated as a joint tenancy for gift and estate tax purposes; the assumed result is that any deemed "transfers" resulting from unequal contributions will qualify for the unlimited gift and estate tax marital deductions. That is not the case. Technically, the spouses are not joint tenants or tenants by the entirety, but rather are trust beneficiaries with retained beneficial life interests and (at most) contingent cross-remainders.

The spouse making the larger contribution will be deemed to make a taxable gift to the other spouse. The gift generally will be a "completed gift" even though the trust is fully revocable, assuming that (as in a common law joint tenancy) the right of revocation may be exercised only with the agreement of both spouses. Treas Reg § 25.2511-2(e). Moreover, because the transferor spouse would have the right to use and enjoy the property if he or she survives the nontransferor spouse, the gift would be of a "terminable interest" ineligible for the gift tax marital deduction. IRC § 2523(b). (Note that the gift tax marital deduction problem is not present in the case of a true joint tenancy or a tenancy in common. Treas Reg § 25.2523(d)-1.) The effect of any such deemed gift would be to reduce the transferor spouse's \$600,000 unified credit exemption equivalent, and in larger estates the gift could even cause an immediate gift tax.

These potential gift tax problems can be avoided by giving each spouse a unilateral power of revocation, as to either the property transferred by the spouse (which renders any deemed gift as

“incomplete”) or an undivided one-half interest in all the trust assets (which is the basic theory of the “common trust” format discussed in Part II of this article).

An even greater gift tax problem can arise at the death of the first spouse to die. If the trust is drafted to become irrevocable at the first death, the surviving spouse could be deemed to make a taxable gift of his or her share of the trust assets to the remainder beneficiaries, reduced only by the actuarial value of the surviving spouse’s income interest. Priv Ltr Rul 8617006; *see also Chase National Bank of New York*, 259 F2d 231 (5th Cir 1958). This problem can be avoided by giving the surviving spouse a limited or general power of appointment over the trust assets remaining at his or her death, which renders any gift by the surviving spouse as incomplete. Treas Reg § 25.2511-2.

B. Estate Tax

A joint trust can also cause unexpected estate tax problems due to the inherent “commingling” of the spouse’s assets. The commingling could result in the surviving spouse being deemed to be the transferor or “grantor” of all or part of the trust assets. If so, the surviving spouse could be deemed to possess a retained life estate within the meaning of Internal Revenue Code section 2036 or a revocable interest within the meaning of section 2038, which would cause inclusion of the trust assets involved in the surviving spouse’s gross estate.

The precise operation of sections 2036 and 2038, and the amount included in the surviving trustor’s gross estate, would depend on the nature and amount of the spouse’s contributions and the specific terms of the instrument. Suffice it to say, however, that sections 2036 and 2038 could thwart any estate tax planning involved in the joint trust. For example, if the trust instrument created a Family Trust at the first death designed to take advantage of the deceased spouse’s \$600,000 unified credit exemption equivalent, and the trust assets were not clearly identifiable as originating from the deceased spouse, sections 2036 and 2038 could cause inclusion of all or part of the Family Trust assets in the surviving

trustor’s gross estate, which would be contrary to the entire purpose of the Family Trust.

C. Creditor Claims

Because of critical differences between trust law and property law, in many cases a creditor of either spouse would be able to reach all the assets of a joint trust, rather than just the debtor spouse’s interest. *See Williams, supra*, at 42-43.

D. Joint Trusts in the Small Estate

Although the gift and estate tax problems noted above can be fatal in larger estates, as a practical matter the transfer tax consequences of a joint trust can largely be ignored in the case of spouses with combined assets of less than \$600,000. Any taxable transfers for gift and estate tax purposes would fall within the spouses’ respective \$600,000 unified credit exemption equivalents, without the need for a separate Family Trust. The transfer tax problems would reappear, however, if the spouses’ combined estates increased to more than \$600,000. Thus, in smaller, nontaxable estates, the use of a joint trust may be less risky.

Part II of this article will discuss the basic theories of the “common trust,” which can avoid the transfer tax problems discussed above and at the same time preserve the basic “joint” nature of the estate plan.

Jeffrey C. Thede

Questions, Comments, or Suggestions about this Newsletter?

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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.

Unintended Consequences of Directions to Pay Debts in Revocable Trusts

Revocable trusts often use many of the provisions found in wills to direct disposition of trust assets following the trustor's death. One provision frequently used in both documents is a direction to pay the decedent's debts. This article discusses unexpected consequences that may result if a trust contains a provision directing payment of the trustor's debts, and suggests ways to avoid those consequences.

1. Assets Exempt from Creditors' Claims

Certain assets are generally exempt from the claims of a decedent's creditors: life insurance proceeds and retirement benefits (hereinafter called "exempt assets"). Life insurance proceeds payable to someone other than the estate of the person "effecting" the policy are generally not subject to claims of that person's creditors. ORS 743.046(1). Similarly, the proceeds of group life insurance payable to a person other than the estate of the insured are exempt from the claims of the creditors of the insured. ORS 743.047(1).

Retirement plan benefits are also generally exempt from the claims of creditors. ORS 23.170. The interests of both the plan beneficiary and the beneficiary's spouse are exempt. ORS 23.170(1)(a).

These assets remain exempt when payable to a revocable trust. ORS 128.490 provides that certain "death benefits" received by a trustee are not subject to the debts of the person designating the recipient of the benefits to any greater extent than if the proceeds were paid directly to the trust beneficiaries. The term "death benefits" includes life insurance proceeds and pension and retirement plan benefits. ORS 128.460(1). Therefore, although a personal representative may recover assets transferred to a revocable trust in order to pay creditor's claims, ordinarily insurance proceeds and retirement benefits cannot be recovered.

2. Creditor as Trust Beneficiary

A trust provision directing the trustee to pay the trustor's debts may elevate the trustor's creditors to the status of trust beneficiaries and, thereby, entitle those creditors to payment of the amounts owed them out of all trust assets, including exempt assets, notwithstanding ORS 128.490.

No Oregon cases have specifically addressed this issue. The *Restatement (Second) of Trusts* ("Restatement"), however, contains provisions supporting the position that a trustor's creditors become beneficiaries of the trust if the trust directs payment of the trustor's debts.

The *Restatement* states that a trust beneficiary is a person for whose benefit trust property is held, *Restatement* § 3(4), and that a trust beneficiary need not be ascertainable when the trust is created, *Restatement* § 112 cmt a. It is sufficient if the beneficiary can be ascertained from facts that must come into existence at some time within the period of the rule against perpetuities. *Id.*

A trustee who is directed to pay the debts of the deceased trustor arguably holds trust property for the benefit of the trustor's creditors. Under the *Restatement* definition, the trustor's creditors would be beneficiaries of the trust, and their identities are ascertainable from facts in existence at the time of the trustor's death.

A creditor-beneficiary would have the same rights as any other beneficiary, and the trustee has a duty to protect the interests of all beneficiaries. *See Hold v. Rice*, 282 Or 203 (1978). If the trustee fails to distribute property to a beneficiary entitled to distribution, the beneficiary is entitled to maintain an action against the trustee, including an action for money had and received. *See Fleishman v. Krause*, 261 Or 505 (1972), *Clark v. United States National Bank*, 11 Or App 437 (1972). Since ORS 12.080 (1) provides a six-year statute of limitations for filing such an action against the trustee, the creditor-beneficiary would not be subject to the two-year maximum period for bringing claims against the estate as provided in ORS 115.005(4).

3. Protection of Exempt Assets

A trust agreement can be drafted in different ways to avoid giving the creditor the rights of a beneficiary and the ability to seek payment out of assets otherwise exempt from creditor's claims. One way is to provide that the trustee may only pay debts of the trustor which are legally enforceable against the trustee and to expressly prohibit the payment of claims from assets that would be exempt from the debts of the trustor under ORS 128.490. Another way is to omit the provision requiring the trustee to pay the trustor's debts, but authorize the trustee to do so in the trustee's discretion. A third way is to omit entirely the provision requiring the trustee to pay the trustor's debts.

4. Claims by Non-Beneficiary Creditors

When advising clients about payment-of-debt clauses in trusts, lawyers should inform clients that even if the trustee is not authorized to pay debts, creditors may still be able to reach the assets of a revocable trust for payment of their claims, although indirectly. Clients may wish to authorize payment of debts from non-exempt property to streamline administration of the trust estate and any probate estate.

Regardless of whether the trust directs payment of creditors' claims, the trustor's creditors may be able to make a claim against non-exempt assets under the Uniform Fraudulent Transfers Act. ORS 95.200 to 95.310. A creditor would also have the right to maintain an action against the personal representative of the debtor's estate. ORS 114.435 gives a personal representative the right to set aside fraudulent, void, or voidable transfers, including assets transferred to revocable trusts, and requires that the personal representative take necessary steps to recover property so transferred. *See Johnson v. Commercial Bank*, 284 Or 675, 681 (1978).

If a probate has been initiated, the creditor may bring a claim against the estate within the applicable statute of limitations period. If the assets of the estate are insufficient to pay the claim, the personal representative must recover property transferred to a revocable trust.

If a probate has not otherwise been initiated, a creditor may initiate a probate and be appointed as

personal representative of the estate of the deceased trustor in order to reach trust assets. ORS 113.035, 111.005(19); *Johnson*, 284 Or at 670. (Due to the personal representative's fiduciary duty to all creditors and beneficiaries of the estate, a creditor may not be willing to do so. ORS 114.265; *see In re Larabee's Estate*, 193 Or 543 (1952).) The claim must be made by certain time deadlines or it could be barred. *See* ORS 12.190(2), ORS 115.003 to 115.005, ORS 115.215.

5. Conclusion

When preparing a revocable trust for a client, the lawyer should advise the client about the different options for payment of debts and the consequences those options produce for the client's creditors, beneficiaries, and trustee. The client should select the alternative that best accomplishes the client's wishes.

Daniel C. Re

Employee Benefits Exclusion from the Estate Tax Lives On¹

The gross estate of a decedent who dies after 1982 generally includes death benefits from qualified pension plans and Individual Retirement Accounts; prior to 1983 such benefits were excluded. As the law changed in the 1980s, however, Congress continued the exclusion for certain benefits. Attorneys involved in estate administration should be familiar with these grandfathering rules because they can result in significant estate tax savings.

Under section 525 of the Deficit Reduction Act of 1984 ("DEFRA"), Pub L No 98-369, 98 Stat 494, decedents who die after December 31, 1984 may exclude up to \$100,000 of benefits from qualified plans or IRAs if (1) the decedent was a participant in a plan and was in pay status on December 31, 1984 and (2) the decedent made an irrevocable election designating the form of retirement benefit he or she would receive prior to July 18, 1984. The IRS considers a "plan" to include an IRA if it provided for a series of substantially equal payments to be made to

the beneficiary for life or over a period of time at least 36 months after the decedent's death.

The Tax Reform Act of 1986 ("TRA 86"), Pub L No 99-514, 100 Stat 2085, modified the grandfathering rules somewhat, although it left the DEFRA rule discussed above in place. TRA 86 section 1952 (e), a provision not incorporated into the Internal Revenue Code, provides that a decedent will be deemed to meet the DEFRA requirements of pay status and irrevocable election if the decedent (1) separated from service prior to January 1, 1985, (2) met the other requirements established by DEFRA (i.e., was a participant in a "plan"), and (3) did not change the form of benefit before death. TRA 86 does not define "separated from service," but in the employee benefit context the IRS has defined the term to mean death, retirement, resignation, or discharge. Rev Rul 79-336, 1979-2 CB 187. Thus, there are two bases on which up to \$100,000 of qualified plan or IRA benefits may be excluded from a decedent's gross estate.

M. Read Moore

Endnote

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What's New?

Kassahn v. Kassahn 126 Or App 158 (1994)

Decedent's two sons and one stepson ("Plaintiffs") sought specific performance of Decedent's contract to make a will. Plaintiffs brought the action against Decedent's second wife ("Mabel"), individually and as personal representative of the intestate estate. Plaintiffs argued that Decedent and his first wife ("Hortense") executed mutual wills to prevent the stepson from being disinherited if his mother (Hortense) predeceased Decedent; both wills distributed all property to the surviving spouse and then equally among Plaintiffs. Both wills prohibited the surviving spouse from revoking or altering his or her will by language that recognized the joint, mutual, and reciprocal nature of the wills.

Decedent survived Hortense; his subsequent marriage to Mabel revoked his will. ORS 112.305.

Decedent never executed a new will. During Decedent's 20-year marriage to Mabel, the couple equally contributed to a joint savings account and to the construction of a home they owned as tenants by the entirety; during that time, Decedent also "carefully maintained a separate estate." 126 Or App at 161. Seeking specific performance of Decedent's will contract with Hortense, Plaintiffs sought a constructive trust on the savings account and house.

Reasoning that Mabel made substantial personal and financial contributions to the house and marriage, the appeals court denied the constructive trust as to the joint savings account and house. However, the court reversed the trial court's refusal to enforce the will contract. The appeals court acknowledged that a contract within a will is enforceable, *Irwin v. First National Bank*, 212 Or 534 (1958); that such a contract existed between Decedent and Hortense; and that the stepson would receive nothing if Decedent's share passed by intestacy. Reasoning that Decedent maintained separate property to honor the will contract with Hortense and to benefit all three Plaintiffs, the court granted specific performance of the will contract.

Wallender v. Wallender 126 Or App 614 (1994)

For nine years after dissolution of their 15-year marriage, Plaintiff and Defendant continued to live together "in an intimate relationship" on Defendant's farm (formerly the family home). Upon subsequently vacating the farm, Plaintiff sought judgment for one-half of the value of all assets to which Decedent took title during their post-divorce cohabitation, offset by one-half of the value of all assets Plaintiff acquired during that period.

Citing an Oregon Supreme Court decision, the appeals court acknowledged that the parties' intent determines whether assets acquired during a period of cohabitation will be considered joint property and be equitably divided. *Beal and Beal*, 282 Or 115 (1978). The *Wallender* court reasoned that, because Plaintiff understood and accepted Defendant's intention not to share the farm and related assets, she was not entitled to a share of those assets. Likewise, the court found no evidence of a common intent to share in separately-held bank accounts and other real property.

However, relying upon evidence that Plaintiff contributed to the improvement and maintenance of one piece of property and that the parties discussed plans for developing it, the court found that the parties intended to share that property. Consequently, the court held that Plaintiff was entitled to an equitable share of that asset, including one-half of its net rental proceeds.

Shannon M. Connelly

1995 Legislation Opportunities

The Legislative Affairs Subcommittee of the Section has been working on proposed legislation for the 1995 session. Volunteer opportunities are still available for the following projects, which are listed with a summary of their objectives:

Uniform Probate Accounting (propose minimum requirements for accountings to assure that they provide basic information in an understandable format; change statutory accounting period to conform to federal income tax year)

Funeral Arrangements (clarify and coordinate existing inconsistent legislation on disposition of human remains)

Disclaimer Statute (review Uniform Probate Code revisions for possible adoption in Oregon)

Uniform Probate Code Revisions (review revisions for possible adoption in Oregon)

Uniform Multiple-Person Accounts Act (review for possible adoption in Oregon and to look for solutions to problems associated with joint accounts as probate avoidance devices)

Small Estates (propose a method to satisfy title companies for passage of real property title by

affidavit; consider whether current small estate value limitations are still appropriate)

Application of Law of Wills to Living Trusts (consider whether provisions of the Oregon Probate Code should also be applied to living trusts)

"In Terrorem" Clauses (propose a statute to clarify the effect of "in terrorem" clauses, possibly limiting their application to allow in certain circumstances challenges to documents containing those clauses)

Apportionment of Estate Taxes (evaluate existing Oregon laws regarding tax apportionment and propose rules to coordinate apportionment between estates and trusts.)

Anyone wishing to participate in any of the above projects should contact Ron Bailey at 232-3171 in Portland.

Executive Committee Meetings: An Invitation

All Section members are welcome to attend meetings of the Executive Committee, which traditionally meets six times each year at various locations throughout Oregon. The Executive Committee will meet next on August 6 in Medford at Don Denman's office. The final meeting for the year will be in Eugene on October 15.

Calendar of Seminars and Events

- July 21-23, 1994 (Sponsored by ALI-ABA/Co-Sponsored by the Alaska Bar Association) **Advanced Estate Planning Techniques**, Regal Alaskan Hotel, Anchorage, Alaska. Telephone: (800) 253-6397, extension 1631.
- July 25-29, 1994 (Sponsored by the New York University, School of Continuing Education) **Trusts and Estates**, New York University, Department of Finance, Law, and Taxation. Telephone: (212) 998-7171.
- August 15, 1994 (Sponsored by the Oregon Society of CPAs) **Estate Planning for the Small Business Owner**, Sun River Resort, Sun River Lodge, Oregon. Telephone: (503) 641-7200.
- September 9 and 10, 1994 (Sponsored by ALI-ABA/ Co-Sponsored by the Massachusetts CLE) **Sophisticated Estate Planning Techniques**, Westin Copley Place Hotel, Boston, Massachusetts. Telephone: (800) 253-6397, extension 1631.
- September 19-20, 1994 (Sponsored by the Northwest Planned Giving Roundtable (NWPGR)) **Seventh Annual Planned Giving Conference: Blueprints of a Planned Giving Program**, Oregon Convention Center, Portland, Oregon. Telephone: (503) 228-1731.
- September 23, 1994 (Sponsored by the Oregon Society of CPAs) **Estate Planning for Medium and Small Size Estates**, Windmill's Ashland Hills Inn, Ashland, Oregon. Telephone: (503) 641-7200.
- September 27, 1994 (Sponsored by Professional Development Institute) **Special Problems in Fiduciary Income Taxation**, Meeting Center West, Beaverton, Oregon. Telephone: (800) 255-1470.
- September 30, 1994 (Sponsored by American Institute of CPAs) **Strategic Estate Planning: Hot Tips to Help Your Clients**, OSCP Center, Beaverton, Oregon. Telephone: (800) 255-1470.
- October 6, 1994 (Sponsored by American Institute of CPAs) **Estate and Gift Taxation Simplified**, OSCP Center, Beaverton, Oregon. Telephone: (800) 255-1470.
- October 6 and 7, 1994 (Sponsored by Seattle Estate Planning Council and Washington State Bar) **39th Annual Estate Planning Seminar**, Washington State Convention and Trade Center, Seattle, Washington. Telephone: (206) 727-8258.
- October 17, 1994 (Sponsored by the Oregon Society of CPAs) **Estate Planning for Medium and Small Size Estates**, Airport Ramada Inn, Portland, Oregon. Telephone: (503) 641-7200.
- October 20-23, 1994 (Sponsored by The Southern California Tax & Estate Planning Forum) **Fourteenth Annual Southern California Tax & Estate Planning Forum**, Le Meridien Hotel, San Diego at Coronado, California. Telephone: (800) 332-3755.
- October 21, 1994 (Sponsored by the University of Southern California Institutes and Conferences) **Twentieth Annual Probate and Trust Conference**, Westin Bonaventure Hotel, Los Angeles, California. Telephone: (213) 740-2582.
- October 23-29, 1994 (Sponsored by Chaminade University Tax Foundation, Hawaii Tax Institute) **31st Annual Hawaii Tax Institute**, Hawaiian Regent Hotel, Honolulu, Hawaii. Telephone: (808) 946-2966.
- October 26, 1994 (Sponsored by American Institute of CPAs) **Income Taxation of Estates and Trusts**, OSCP Center, Beaverton, Oregon. Telephone: (800) 255-1470.
- October 26-28, 1994 (Sponsored by ALI-ABA) **Uses of Insurance in Estate and Tax Planning**, Le Meridien Hotel, San Diego at Coronado, California. Telephone: (800) 253-6397, extension 1631.
- October 29, 1994 (Sponsored by American Institute of CPAs) **Using Trusts in Income and Estate Tax Planning**, OSCP Center, Beaverton, Oregon. Telephone: (800) 255-1470.
- November 3 and 4, 1994 (Sponsored by American Institute of CPAs) **Fiduciary Income Tax Returns**, OSCP Center, Beaverton, Oregon. Telephone: (800) 255-1470.



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The Continuing Joint Trust Debate

Part II

1. Introduction

This is the second part of an article briefly summarizing some of the basic benefits and problems of joint trusts. Part I, which appeared in the July 1994 issue of this newsletter, discussed the fundamental theory of joint trusts and some inherent tax and other problems. This part discusses an approach to avoid these problems. Readers should review the issues carefully and make their own conclusions before proceeding.

This article uses the term "joint trust" in the traditional sense, meaning a single trust commingling whatever property interests (whether joint, community, or separate) are contributed by the spouses. Although many practitioners also use the term "joint" trust to refer to a single trust providing for separate shares or unilateral powers of revocation, this article uses the more descriptive term of "common trust."

2. The "Common Trust"

As discussed in Part I, a true "joint trust" can cause unexpected gift and estate tax problems at the time of initial funding, at the death of the first spouse to die, and at the death of the surviving spouse. A "common trust" can avoid virtually all of these transfer tax problems and at the same time preserve the basic "joint" nature of the estate plan.

A. Basic Approaches

One common trust approach is, in effect, to provide for two separate trusts or shares combined in one instrument, each trust holding an undivided one-half interest in all the assets of the joint trust estate. Each spouse retains the unrestricted right to amend or revoke his or her respective separate trust, but

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has no similar powers or vested rights in connection with the surviving spouse's trust.

This "separate trust" format avoids any gift tax consequences at funding, because any disproportionate contributions by either spouse would qualify for the unlimited gift tax marital deduction. This format also ensures that only one-half of the assets of the total joint trust estate would be included in the estate of the first trustor to die. Moreover, if the trust instrument provides for a Family Trust, designed to take advantage of the \$600,000 unified credit exemption equivalent of the first spouse to die and to escape estate taxation in the surviving spouse's estate, the trust assets should not be subject to Internal Revenue Code ("IRC") section 2036 or 2038. Neither spouse would be deemed to hold an interest in the other spouse's trust assets, except as lifetime beneficiary after the first death, so there would not be a "retained life estate" under section 2036 or a "revocable interest" under section 2038.

The "separate trust" approach has the benefits of simplicity of record keeping and administration, automatic equalization of the spouses' estates, and tax certainty. However, it also requires the creation of two trusts within one instrument, which adds an unfortunate layer of complexity to the plan. This format also restricts non pro rata allocations or distributions between the trusts at the death of the first spouse.¹ Only the undivided one-half interest held by the deceased spouse's trust would be entitled to a "stepped-up" income tax basis at the first death, so any unequal allocations or distributions of assets between the trusts could result in capital gain income to the surviving spouse's trust. (Capital gains would be recognized, but losses would not.)

Perhaps the better "common trust" format would be a single trust combined with unilateral powers of revocation, under which any assets with respect to which the trust is revoked would be distributed to the spouses as equal tenants in common. This format might be viewed as the "functional equivalent" of a tenancy in common, because each spouse's greatest right or power in the trust would be to unilaterally revoke the trust as to all or part of its assets, and thereby receive an undivided one-half interest in such assets as an equal tenant in common. It would provide the same benefits of the "separate trust" format, but it would have the added benefit of additional simplicity through the use of a single trust.

With the "common trust" approach, at the death of the first spouse to die, the trust assets would be divided into equal shares for the deceased spouse and the surviving spouse; the trust instrument can include for each share whatever dispositive provisions are appropriate to further the spouse's estate planning goals. Unlike the "separate trust" approach, this segregation of assets should be treated as an allocation or distribution of assets from a single trust, and trust assets could be allocated non pro rata between the deceased spouse's share and the surviving spouse's share, assuming that the trust instrument contains an appropriate provision authorizing the trustee to do so. Priv Ltr Rul 8119040; *see also* Rev Rul 69-486, 1969-2 CB 159. For example, assets with higher yields or favorable potential for appreciation could be allocated to the Family Trust, and less productive assets (such as a personal residence) could be allocated to the survivor's trust, which would be subject to estate tax at the surviving spouse's death.

B. When to Use It

A properly drafted common trust avoids the adverse gift and estate tax consequences of a joint trust, and it can be used for virtually any property interest of either spouse, whether joint, community, or separate. Because a common trust automatically equalizes the spouses' estates, which can be beneficial for estate tax planning purposes, some commentators advocate its use as almost the exclusive estate planning vehicle. Notable exceptions would include cases in which the spouses do not want to own their assets equally (for example, in second marriages) or cases in which the spouses want to gamble on which spouse will die first and intentionally "bulk up" that spouse's estate for stepped-up basis reasons.

Perhaps the better and more cautious approach is to use a common trust only for property already held jointly (or as tenants by the entirety or tenants in common) and to use separate trusts for the spouses' respective separate assets. The rationale behind this approach is that the spouses previously decided to hold the property in common ownership and presumably are comfortable with the arrangement. Many estate planning attorneys subscribing to this philosophy include common and separate trusts in one "family" trust instrument (something of a "his, hers, and theirs" format).

A common trust is also perfectly suited to hold community property. In fact, the common trust likely had its origin as a probate avoidance vehicle for community

property. Properly drafted, a common trust will preserve the community character of community property eligible for a "double step-up" in basis at the first death under IRC section 1014(b)(6). See Rev Rul 66-283, 1966-2 CB 297.

3. A Basis "Gold Mine"?

In Oregon and other non-community property states, it may be possible to use either a joint trust or a common trust to obtain a stepped-up income tax basis for *all* the assets of the joint trust estate at the first death, much the same as with community property. The most common method of attempting to achieve this "double step-up" is to give each spouse a general power of appointment over *all* the assets of the joint trust estate, rather than just the spouses' respective one-half interests. Theoretically this would result in inclusion of all the trust assets in the gross estate of the first spouse to die under IRC section 2041, and a complete basis step-up under IRC section 1014(b)(9).

A variation of this approach was held to be ineffective in Technical Advice Memorandum 9308002 (which involved an Oregon estate). In TAM 9308002, a husband and wife created essentially a common trust funded with various separate and joint property. The trust instrument granted each spouse a general power of appointment in the form of a right to direct payment of his or her debts and taxes from any of the trust assets. The wife died less than two months after creating the trust, without exercising her power of appointment.

The Internal Revenue Service (the "Service") in TAM 9308002 reasoned that the surviving spouse retained "dominion and control" over his portion of the trust assets by virtue of his unilateral power of revocation. Because of this "dominion and control," the Service found that the surviving spouse's portion of the trust assets was not "acquired from" the deceased spouse within the meaning of section 1014, even though the assets were included in the deceased spouse's estate under section 2041. The Service held that the surviving spouse's share of the trust assets thus was ineligible for a stepped-up basis.

For a detailed discussion of the underlying facts of TAM 9308002 and possible flaws in the Service's analysis, written by the author of the estate plan involved, see Fletcher, *Tax Basis Revocable Trusts*, Tax Notes (May 30, 1994).

TAM 9308002 has been substantially criticized as unsupported by either the Internal Revenue Code or public policy, and arguably it is by no means dispositive of the issues involved. The Service, however, has clearly drawn its "line in the sand" with TAM 9308002, and planners seeking a double step-up should expect to be challenged.

4. Conclusion

A properly drafted common trust can provide a married couple with all the benefits of a revocable living trust generally, incorporated into a single, relatively simple trust instrument, and at the same time preserve the basic joint ownership or "marital partnership" format preferred by many couples. It also avoids the transfer tax problems associated with traditional "joint" trusts. There are many more unresolved questions than clear answers, however, particularly after TAM 9308002, so careful planning and drafting are critical.

Jeffrey C. Thede

Endnote

¹This assumes that the assets of the deceased spouse's trust are not merely added to the surviving spouse's trust, which would never be the case in estate tax planning situations, because all the assets of the combined trust would then be included in the surviving spouse's gross estate for estate tax purposes.

Questions and Answers About Advance Directives

In the April 1994 issue of the Estate Planning and Administration Section newsletter, Ted Falk presented an overview of the Oregon Health Decisions Act,¹ of which he was a principal drafter. Here Mr. Falk answers questions about advance directives that have been raised by members of the Executive Committee of the Estate Planning and Administration Section and readers of this newsletter.

Q-1 Is the advance directive an exclusive form that must be used after the effective date of the law (November 4, 1993)?

A-1 No. Prior-law forms signed after the effective date of the new law are also valid. ORS 127.515(2) and (3) specifically authorize continued

use of a directive to physicians or power of attorney for health care after the effective date of the law creating the advance directive form. Although some ambiguity is created by the requirement that an advance directive be in the form set forth in ORS 127.531 to be valid,² the legislative history shows that the Legislature did not intend to eliminate current use of a prior-law form. In allowing prior-law forms, the Legislature intended to avoid creating a trap for consumers who obtained the prior-law forms and waited some time before completing them.

Q-2 Does a power of attorney for health care signed after November 4, 1993, still expire in seven years?

A-2 Yes. All advance directives default to no expiration date.³ This includes a power of attorney for health care (renamed "Appointment of Health Care Representative" under current law).⁴ However, the statutory power of attorney for health care created under former ORS 127.505 to 127.585 (the "old statutory power of attorney") is limited by its terms to a seven-year expiration date.⁵ The new statute allows the advance directive to limit the period of effectiveness.⁶ While the statute expressly authorizes striking out unwanted words from the new advance directive form,⁷ no similar permission is granted when the old statutory power of attorney for health care is used. Therefore, the expiration date cannot be crossed out on the old form.

Q-3 Can a person physically separate Parts C and D of the advance directive form?

A-3 No. While the statute expressly authorizes executing either Part B or Part C without the other part, the statute also prescribes that the advance directive has to be in the statutory form.⁸ The legislative history makes clear that this means the form must be *verbatim* the same form. I attempted to persuade the Legislature to allow some flexibility in the form, but this suggestion was squarely rejected.

Q-4 How should a lawyer describe to a client "extraordinary suffering" and "permanent and severe pain" (Part C, Item 4)?

A-4 The first thing to explain is that if pain or suffering is controllable, the health care provider must

take steps to relieve it. The statute requires that "[m]edication * * * and other measures to relieve pain and suffering" be given as part of basic, humane care.⁹ This is care to which all patients are entitled and which cannot be withheld.

The second thing to explain is that this part of the advance directive form does not describe pain or suffering from the patient's *disease*; rather, it describes suffering from the patient's *life support apparatus*. An example might be a feeding tube that provokes intolerable nausea. Properly understood, the clause is narrow. It does *not* mean "if I am in terrible pain I want to die."

Q-5 In Part C, does Item 5 (General Instruction) relate only to the medical conditions set forth in Items 1 through 4 (Close to Death, etc.)?

A-5 No. The instructions set forth in Questions 1 through 4 are specific examples of the general instruction set forth in Question 5 but do not exhaust its meaning. The bill was introduced with two advance directive forms: a short form (having language similar to Question 5) and a long form (having Questions 1 through 4). Unfortunately, the Legislature eliminated the short form and made the long form longer by combining the general instruction with four specific instructions.

Q-6 What happens if a client initials a desire for life support and tube feeding under Items 1 through 4 and yet initials Item 5?

A-6 An advance directive documents the principal's intent. An advance directive is not rendered invalid by containing self-contradictory instructions. Readers of this newsletter will undoubtedly understand how a person's declared intent may be self-contradictory. Although the statute gives particular weight to intent expressed in an advance directive, the statute also requires the health care representative to take account of desires that the principal has made known to the health care representative through other means,¹⁰ and to consider technically invalid instruments as evidence of intent.¹¹ The statute nowhere rules out use of extrinsic aids in interpreting the declarant's intent. Patient advocates report that with diligent investigation, additional evidence can almost always be found to clarify intent.

Q-7 What if the health care representative's directions about health care conflict with the choices that the client made under Part C? Which does the physician follow?

A-7 The health care representative is not at liberty to depart from declarations made in an advance directive,¹² although the representative can resign.¹³ Physicians are not at liberty to depart from instructions made by the principal or decisions of validly appointed health care representatives, although the physician can resign from the case or transfer the patient.¹⁴

If the physician believes that the health care representative is violating the conditions of the advance directive, the physician must promptly notify the health care representative.¹⁵ If the health care representative refuses to follow the declarations in the advance directive, the representative or physician may ask a court to resolve the dispute.¹⁶

The statute provides that before withholding or withdrawing life support, "the attending physician shall determine that the conditions of ORS 127.540, 127.580, and 127.635 have been met."¹⁷ I asked the Legislature to clarify that this referred only to the *medical* determinations involved in a life-support decision, but the Legislature declined to do so. Accordingly, the physician is arguably responsible for ensuring that the health care representative has *authority* to make decisions about life support.¹⁸ Unless notified of a discrepancy, the physician is not responsible for determining that the representative properly followed the instructions in the advance directive.

Q-8 In Part B, Item 1, does "I have executed a Health Care Instruction or Directive to Physicians" relate to the advance directive being signed (since the instructions are not signed until Part C) or only to documents signed prior to the advance directive being signed?

A-8 The legislative intent was to refer to documents other than the advance directive being signed, because there would be no need for a special question to indicate that a physically attached Part C has been completed. No harm is done, however, if the principal interprets the question in the other way, because

execution of Part C would supersede any directions contained in a previous advance directive.¹⁹

Q-9 Is it acceptable to amend Part B, Item 1, to specifically describe the document referred to?

A-9 Yes. The statutory form provides that "[y]ou may cross out words that don't express your wishes or add words that better express your wishes."²⁰

Q-10 Relating to Part C, Item 7, is it possible for a client to direct that (1) future advance directives executed in Oregon would revoke the advance directive being signed, and (2) future advance directives executed in other states would not revoke the advance directive being signed?

A-10 It is possible to make those directions for the health care instruction portion of the advance directive (Part C), but not the health care representative portion (Part B).²¹

Executing a valid health care instruction revokes a prior health care instruction, "[u]nless the health care instruction provides otherwise."²² The syntax of this sentence and the statutory preference for free revocation²³ suggest that if a later instruction is *not* intended to revoke an earlier one, that proviso must be stated in the later instruction.

By contrast, ORS 127.545(4) provides simply that execution of a valid power of attorney for health care revokes any prior power of attorney for health care. No similar exception exists for the later power of attorney to provide that it does not revoke the earlier one. This makes sense, given the confusion that would arise if two concurrently valid documents were to appoint different health care representatives.

Q-11 Why is the form mandatory?

A-11 Politics. I would have preferred an optional statutory form, following the approach of the Uniform Act. The Legislature, however, would not even permit a substantially similar form to be used. While the form itself says that words may be crossed out or added, I believe the intent was that these interlineations be visible as modifications to the statutory form.

Q-12 Can an anatomical gift be made on an advance directive?

A-12 No. An advance directive is no longer in effect after the principal dies,²⁴ whereas an anatomical gift is given effect after death. The Oregon Donor Program will be introducing the 1987 Uniform Anatomical Gift Act during the 1995 Legislature, and that bill would permit an anatomical gift to be made on an advance directive.

Q-13 What is the most common serious error made in executing the form?

A-13 Failing to sign Part B. The form has separate signature lines for Parts B and C. If the principal fills out Part B without signing it, the representative's appointment is uncertain.

Q-14 Can the advance directive form be translated into a foreign language?

A-14 Yes. Although the Legislature did not authorize any change in the statutory form, legislative history clarifies that translation into a foreign language is not considered a change. Oregon Health Decisions will soon be publishing translations of the form in Spanish, Russian, and Vietnamese. Each translation will have been reviewed by a bilingual attorney.

Q-15 Will there be a technical corrections bill in 1995?

A-15 I hope not. I am the first to acknowledge that the statute has technical flaws, but it also passed by a hair's breadth after a noisy debate on numerous policy issues. I am reluctant to reopen those policy debates, and I know of no way to ensure that a technical corrections bill will remain technical.

Q-16 What other legislation can we anticipate in this area?

A-16 The members of the Estate Planning and Administration Section may be interested in obtaining the text and measure summary of Ballot Measure 16 on the November ballot, pertaining to physician-assisted suicide. The Oregon Health Decisions Act addresses decisions for the person who is incapable, while the initiative would authorize a certain kind of decision by a person who is capable.

Q-17 How should estate planning attorneys inform themselves about the law governing end-of-life decisions?

A-17 The Health Law Section of the Bar is updating its monograph *End of Life Decisions in Oregon*, which was originally published shortly before the advance directive legislation was enacted. This will be available as a separate monograph, and in the future it will be republished as part of the *Oregon Health Law Manual*, available from the Oregon State Bar's Distribution Center.

Q-18 What materials should an estate planning attorney use to inform clients about advance directives?

A-18 I suggest that lawyers give every estate planning client a copy of the Oregon Health Decisions booklet, *Making Health Care Decisions When You Can't Speak For Yourself: A Summary of Oregon's Advance Directive Law*, regardless of whether the client has mentioned an interest in advance directives. This booklet costs 25 cents in bulk orders and can have the name of the lawyer or law firm imprinted on the cover. The booklet has the statutory form in a readable size of type, the statement of rights prepared by the Health Law Section of the Bar, and some instructions. Oregon Health Decisions is a nonprofit organization in Portland (241-0744 or toll free 1-800-422-4805).

Many hospitals and other health care facilities distribute this booklet to patients to comply with the Patient Self-Determination Act,²⁵ over a third of a million of these booklets have been distributed in the last year and a half. The client will receive more consistent guidance upon receiving the same booklet from the hospital and the client's attorney. In addition, Oregon Health Decisions is preparing a more detailed consumer guidebook, which should be published this fall.

*Theodore C. Falk, J.D., Ph.D.*²⁶

Endnotes

1. Codified in ORS Chapter 127.
2. ORS 127.531.
3. ORS 127.510(3).
4. ORS 127.505(2), 127.505(20).
5. ORS 127.658(2)(c).
6. ORS 127.510(3).
7. ORS 127.531(2), sixth paragraph under "Facts About Completing This Form."

8. ORS 127.531(1).
9. ORS 127.642(3).
10. ORS 127.535(4).
11. ORS 127.535(6).
12. ORS 127.535(4).
13. ORS 127.525.
14. ORS 127.625(2).
15. ORS 127.625(2)(a).
16. ORS 127.625(2)(b).
17. ORS 127.640.
18. *See* ORS 127.540(6)(a), 127.580(1)(c).
19. ORS 127.545(5)(a).
20. ORS 127.531(2), sixth paragraph under "Facts About Completing This Form."
21. ORS 127.545(4).
22. *Id.*
23. ORS 127.545(1)(b).
24. ORS 127.510(4)(b).
25. ORS 127.646 to 127.654.
26. Theodore C. Falk is Vice President and General Counsel of PACC Health Plans.

Trust Administration Book Planned

A new, in-depth resource about Oregon trust administration will be available in mid-1995. The Estate Planning and Administration Section plans to present the Bar's new CLE publication, *Administering Trusts in Oregon*, at a seminar in May.

The 15-chapter book examines all areas of trust administration, including chapters on investments, tax and environmental issues, litigation, ethics, and several other topics.

The book was originated by Carolyn W. Miller, who, along with Steve Kantor and Jeff Thede, enlisted trust experts throughout Oregon to contribute chapters of practical interest to attorneys involved in trust administration. This trio also serves as the editorial board.

The one-volume book will fill a gap in the Bar's CLE library, which currently lacks information on administering trusts. Periodic updates are also planned.

What's New?

In re Baxter 128 Or App 91 (1994)

Petitioner Richard Baxter ("Baxter") sought to have the court establish a Medicaid income-cap trust for his benefit pursuant to ORS 126.227. Baxter resided in a nursing home and received semi-skilled nursing care. Baxter received Social Security and pension benefits totaling approximately \$1,460 per month, and his disabled wife received Social Security benefits of \$429 per month. Prior to filing his petition, Baxter was privately paying for his nursing home care — a cost of approximately \$2,555 a month. After Baxter had spent all his money on his care and had no other assets or income with which to pay for his care, the nursing home sought to transfer Baxter to another facility. At that time the Senior and Disabled Services Division issued an order preventing the nursing home from transferring Baxter until the nursing home located a facility that would meet his needs and accept him for placement.

Baxter was ineligible for Medicaid benefits to pay for his nursing home care because his income exceeded the Medicaid income cap by approximately \$200 per month. Baxter petitioned the court to create a trust to be funded with \$200 per month of his pension income, which would bring his income below the Medicaid income cap and thereby qualify him for Medicaid. The trial court denied Baxter's request, stating that the purpose of ORS 126.157 and ORS chapter 126 is to conserve assets from waste or dissipation and not to give persons an entitlement they would not have otherwise had. The Court of Appeals affirmed the trial court's decision but on other grounds.

The Court of Appeals noted that ORS 126.227 allows the court to establish a trust for a person but only if the person meets the criteria set forth in ORS 126.157. Under ORS 126.157, a court can intervene in the management of a person's affairs only if the person is unable to manage his or her property and affairs effectively because of physical illness or incapacity. Because Baxter failed to present evidence to the trial court that he was unable to manage his property and affairs effectively, the appeals court affirmed the trial court's decision denying Baxter's petition for a court-established trust.

In reaching its conclusion, the court distinguished *Miller v. Ibarra*, 746 F Supp 19 (D Colo 1990), upon which Baxter relied. The court pointed out that the *Miller* court made findings about each plaintiff's incompetence, and emphasized that a finding of incompetence is one of the necessary steps before the court can order creation of a trust.

This author notes that the recent changes to Medicaid law set forth in the Omnibus Budget Reconciliation Act (OBRA 93) exempt the type of *Miller* income cap trust sought by Baxter from the OBRA 93 Trust Rules. After the passage of OBRA 93, the Oregon Administrative Rules pertaining to Medicaid were amended to allow for the creation of such trusts. For further discussion of OBRA 93 and the new Oregon rules, see Nay & Friedenberg, *OBRA 93 Amendments to Spousal Impoverishment Provisions of Medicaid, Or Est Plan & Admin Sec Newsl* (OSB) Jan. 1994, at 1.

Werden v. Thorpe
126 Or App 97 (1994)

Darin Werden ("Darin"), the son of decedent Robert Werden ("Werden"), filed a petition to set aside Werden's 1983 will. Werden married his second wife, Linda, in November of 1978 in Baja, Mexico; however, no formal record of the marriage exists. In 1983 Werden fought with Darin and executed a new will in which he disinherited Darin and left his entire estate to Linda. Werden told the attorney drafting his 1983 will that he was uncertain about the legal effect of the 1978 Mexican marriage and instructed the attorney to state in the will that Werden was not married. In 1989 Werden and Linda were married in an Oregon ceremony, which they described as a reaffirmation ceremony. Werden died in 1990.

Darin argued that the 1978 Mexican marriage was void and, therefore, Werden was not married when he executed his 1983 will. Thus, when Werden married Linda in 1989, the 1983 will was revoked by operation of law under ORS 112.305. If so, Darin would succeed to one-half of his father's estate pursuant to Oregon's intestate succession laws. The trial court ruled that Darin had not met his burden to prove that the 1978 marriage was invalid and also ruled that Darin was without standing to challenge the validity of the Mexican marriage. Upon de novo review, the Court of Appeals affirmed.

The appeals court stated that to challenge the validity of a marriage, a person must show that the marriage was void ab initio. The party challenging the validity of a marriage has a heavy burden of proof to overcome the strong presumption that marriages are valid. *Davis v. Davis*, 55 Or App 982, 986, *on reconsideration* 57 Or App 145 (1982).

The appeals court analyzed the civil code of Mexico with regard to void and illegal marriages. The court concluded that a marriage was rendered void ab initio only by impediments such as lack of age, adultery, duress, and idiocy. The court further concluded that a marriage was merely rendered voidable by failure to fulfill certain procedural requirements for formalizing the marriage contract, such as witness signatures, medical certificates, fingerprints, and recording of personal information about the parties. The court concluded that, at the most, Werden's marriage to Linda was voidable. However, because Darin could not prove the marriage was void ab initio, the appeals court did not declare Werden's 1978 Mexican marriage invalid, and affirmed the circuit court decision denying Darin's petition to set aside the 1983 will.

Meyers v. Weems
128 Or App 444 (1994)

In 1986, Plaintiff executed and recorded a deed that purported to create joint ownership of real property with Plaintiff's daughter, Defendant. Plaintiff had previously owned the property individually. Defendant gave no consideration for the transfer. In 1992, Plaintiff brought an action against her daughter to cancel the deed. The trial court ruled in favor of Plaintiff. On de novo review, the Court of Appeals affirmed the trial court's decision.

On appeal, Defendant argued that the trial court should not have set aside the deed for two reasons. First, Defendant argued that Plaintiff's claim was barred by laches, contending that Plaintiff's delay in seeking to set aside the deed substantially prejudiced her. The Court of Appeals concluded that Defendant was not substantially prejudiced by Plaintiff's delay and thus, laches did not bar Plaintiff's claim.

Second, Defendant argued that the trial court erred in setting aside the deed as the transfer was a gift that could not be revoked. The Court of Appeals recited the requirements for an inter vivos gift as (1) a present intent by the donor to make a gift that goes into effect

immediately; (2) delivery of the thing given or a document evidencing ownership to the donee; and (3) acceptance of the gift by the donee. 128 Or App at 447. In addition, the court noted the presumption that a gratuitous transfer of land from a parent to a child is intended to be a gift. *Ingersoll v. Ingersoll*, 263 Or 376, 379 (1972).

The Court of Appeals found that Plaintiff successfully rebutted the presumption of a gift because the evidence showed that Plaintiff did not intend to transfer a present interest in the property, but merely signed the deed to effect a future transfer of the property to her daughter. At trial, Plaintiff testified that she signed the deed to avoid probate and paying taxes, and so that her daughter would get the property when she passed away. Further, Plaintiff testified that she did not intend to give any present interest in the property to her daughter at the time the deed was recorded. Finally, Defendant testified that Plaintiff transferred the property so that Defendant would someday inherit the property.

Defendant supported her argument in favor of a completed gift by pointing out the similarities in the facts in her case to the facts in *Halleck v. Halleck*, 216 Or 23 (1959). In *Halleck*, Mr. Halleck deeded property to a third party who then deeded the property back to Mr. Halleck and his son with the right of survivorship. Mr. Halleck's will purported to devise all of his property to his wife. After Mr. Halleck died, his son brought an action in ejectment against Mr. Halleck's wife. There was evidence that Mr. Halleck had told his son and others that he transferred his property to his son to avoid probate with the idea that he could get the property back if he asked for it. There was also evidence, however, of Mr. Halleck's intent to pass a present interest in the property to his son. On de novo review, the Oregon Supreme Court concluded that the evidence showed that Mr. Halleck intended to create in himself and his son a present concurrent interest with a provision for survivorship.

The Court of Appeals found some facts of *Halleck* similar to the case at hand. However, the court distinguished *Halleck* because Mr. Halleck was not alive to testify about his intent to create a present or future interest in his son. In the case at hand, Plaintiff was alive to testify that she did not intend to give her daughter a present interest in the property at the time the deed was executed, and had only transferred the property to her

daughter as a means of allowing her daughter to inherit the property without probate at Plaintiff's death.

Lisa N. Bertalan

Proposed Legislation

The Section is working on proposed legislation for the 1995 legislative session. The following legislative changes and concepts were discussed at the June and August meetings of the Executive Committee.

- *Chapter 126.* The Chapter 126 Working Group has been meeting since December 1993 to draft revisions to the guardianship and conservatorship statutes. The group is working on its fourth draft. The prototype still adheres to Judge Lee Johnson's concept of simplicity and one basic procedure.

- *"Common Law Marriage."* Everything is in place for the repeal of ORS 112.017.

- *Uniform Probate Accounting.* Warren Deras has proposed legislation for a standard accounting period for estates and conservatorships. Rita Cobb expressed strong opposition to such legislation. Cobb felt that probate courts would have great difficulty reviewing accountings if they all came in at the same time each year. Cobb felt that probate courts may lose their ability to effectively oversee the accountings in conservatorships and estates if the standard accounting period were adopted. The Committee voted unanimously to oppose this measure.

- *Statutory Certification of Trusts.* The Committee agreed to support legislation similar to California Probate Code Section 18.11.5, which would establish a standard form of trust memorandum and would absolve from liability third parties who relied upon any misinformation contained in such memoranda. Allyn Brown will draft the bill.

- *Disclaimer Statute.* Laurie Caldwell-Lee does not feel any changes are appropriate for the existing disclaimer statute; also, the IRS may be coming out with some new regulations in the area. Consequently, no new legislation is being considered.

- *Funeral Arrangements.* No legislation will be proposed.

• *"In Terrorem" Clauses.* The Executive Committee agreed that legislation in this area is needed. Dave Andrews and Bernie Vail will draft the bill.

• *Slayer Statute.* The Committee agreed to support revisions of ORS 112.455 to 112.555, regarding a slayer's ability to inherit or otherwise receive property as a result of the death of a homicide victim. Dave Petersen, Jim Light, and John Hutchinson will draft the bill.

• *Uniform Multiple Persons Account Act.* Sally Landauer and Donna Muehleck will review revisions proposed by Stan Loeb.

Ron Bailey, Chair of the Legislative Affairs Subcommittee, reported that the Banking Section is interested in legislation that would (1) allow personal representatives to assign the responsibility to bring wrongful death claims; (2) exempt banks from the home sale disclosure requirements; and (3) standardize trust memorandum forms.

Anyone with suggestions or comments about any proposed bill should address them to the drafters of the bill or Ron Bailey.

Chair:

Helen Rives, Portland

Past Chair:

Gretchen R. Morris, Corvallis

Directors (one-year terms):

Christine P. Brown, Portland

Donna M. Muehleck, Portland

Charles C. ("Craig") Heath, Eugene

Shirley A. Bass, Portland

Prior to the annual meeting, the Section presented a Revocable Trusts Forum discussing whether some Oregon statutes that currently apply only to wills should also apply to revocable trusts. Most of the people who expressed comments at the forum thought legislation is needed to insure some basic consistency between trusts and wills. The group reached no consensus, however, on the specific areas the legislation should address. The Section will study the issue further.

Annual Meeting News

The Estate Planning and Administration Section held its annual meeting at the Portland Conference Center on September 27. The following people were elected to serve on the Executive Committee during 1994-95:

Chair Elect:

Donald K. Denman, Medford

Treasurer:

Rita Batz Cobb, Hillsboro

Secretary:

Christine P. Brown, Portland

Directors (two-year terms):

David P.A. Seulean, Medford

David E. Petersen, Bend

David B. Brownhill, Ontario

James G. Heltzel, Salem

Director (one-year term):

Wesley D. Fitzwater, Portland

The following people will continue to serve on the Executive Committee during 1994-95:

Practice Tip

Before filing any estate tax return, the practitioner should determine the amount of the decedent's unused unified credit; to do so, the practitioner must obtain copies of all gift tax returns filed during the decedent's lifetime. The following procedure should be followed for investigating the existence of any gift tax returns for a decedent and obtaining copies of the returns:

1. File IRS Form 2848, **Power of Attorney and Declaration of Representative**, which enables the IRS to furnish confidential tax information to the practitioner. This form may be sent via facsimile to the IRS, Attention: Hotline, at (503) 326-5457 (Portland number).
2. Call the Practitioner's Hotline, (503) 326-2381 (Portland number), and request a list of all gift tax returns filed from 1977 to the present.
3. After the list is received, request a copy of each return by submitting IRS Form 4506, **Request for Copy of Tax Form**, with a check covering the cost.
4. Copies of the gift tax returns must be filed with IRS Form 706.

Shannon M. Connelly

Executive Committee Report

The Executive Committee of the Estate Planning and Administration Section met on June 11 at Salishan and on August 6 in Medford.

Congratulations go to Steve Kantor. The Bar accepted the Section's nomination of Kantor for the President's Membership Service Award. The award was presented at the Bar's annual meeting on September 27.

The Committee discussed sponsoring the production of three videos: one for clients explaining advance directives, one for lawyers and clients on choosing a fiduciary, and one for training visitors appointed by courts in guardianship proceedings. The Committee is considering whether to include the cost of producing these videos in the Section's 1995 budget.

David Seulean, Chair of the CLE Subcommittee, reported that 372 people attended the Practical Skills Program (not including the video replay), which is an increase over last year. The program was rated "excellent" or "very good" by 98% of the attendees. The next one-day CLE scheduled is "Administering the Taxable Estate," set for November 4, 1994. The Section also plans to present a spring program entitled "Administering Trusts in Oregon" to introduce a CLE publication by that name.

The next meeting of the Executive Committee will be on November 18 in Eugene. All Section members are welcome to attend.

Volunteer Opportunities

The Professional Liability Fund is sponsoring the production of a free seminar and video about malpractice traps relating to living trusts. This will be a joint project of the PLF and the loss prevention subcommittees of the Tax Section and the Estate Planning and Administration Section of the Oregon State Bar.

The focus of the seminar will be the planning and pre-death administration of living trusts for people with estates of less than \$600,000. The Tax Section's portion of the program will focus on valuation issues, inclusion of pension and life insurance benefits, and other frequent estate tax traps. The Estate Planning and Administration Section's portion of the program will focus on client suitability and screening, asset transfer, responsibility for monitoring trusts, and other estate planning traps.

The program will be presented in Portland in the spring of 1995. Video replays will be presented throughout Oregon. The seminar will qualify for MCLE credit. It is expected that the seminar will be two to three hours long.

The Estate Planning and Administration Section is seeking volunteers to help in planning and speaking at the seminar. Volunteers should contact Carolyn W. Miller at 226-1371 in Portland.

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 26, 1994 (Sponsored by American Institute of CPAs) **Income Taxation of Estates and Trusts**, OSCPACenter, Beaverton, Oregon. Telephone: (800) 255-1470.
- October 26-28, 1994 (Sponsored by ALI-ABA) **Uses of Insurance in Estate and Tax Planning**, Le Meridien Hotel, San Diego at Coronado, California. Telephone: (800) 253-6397, extension 1631.
- October 29, 1994 (Sponsored by American Institute of CPAs) **Using Trusts in Income and Estate Tax Planning**, OSCPACenter, Beaverton, Oregon. Telephone: (503) 641-7200.
- November 2-4, 1994 (Sponsored by The Practicing Law Institute) **Tax Strategies for Corporate Acquisitions, Dispositions, Spin-offs, Joint Ventures, and Other Strategic Alliances, Financings, Reorganizations and Restructurings**, Bel Age Hotel, Los Angeles, California. Telephone: (212) 765-5710.
- November 3-4, 1994 (Sponsored by American Institute of CPAs) **Fiduciary Income Tax Returns**, OSCPACenter, Beaverton, Oregon. Telephone: (800) 255-1470.
- November 4, 1994 (Sponsored by the Oregon State Bar) **Administering the Taxable Estate**, Oregon Convention Center, Portland, Oregon. Telephone: (503) 620-0222 or (800) 452-8260, extension 326.
- November 13-18, 1994 (Sponsored by New York University School of Continuing Education) **53rd Institute on Federal Taxation**, Sheraton, New York City, New York. Telephone: (212) 998-7171.
- November 14-18, 1994 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, Grand Hyatt Hotel, San Francisco, California. Telephone: (800) 253-6397, extension 1631.
- November 15, 1994 (Sponsored by the Colorado Society of CPAs) **Estate Planning Strategies and Techniques**, Oregon Society of CPAs Center, Beaverton, Oregon. Telephone: (503) 641-7200.
- November 16 or 17, 1994 (Co-sponsored by the American Society of CLU & ChFC and the National Association of Estate Planning Councils) **Protect Your Clients' Assets: Working Towards a Zero Estate Tax Plan Using Modern Tax Planning Building Blocks** (Video Replay), four locations: Central Oregon Community College, Bend, (503) 463-3764; Lane Community College, Eugene, (503) 683-7012; Equitable Center Building, Salem, (503) 463-3764; G.M. Training Center, Tigard, (503) 282-9288.
- November 29, 1994 (Sponsored by American Institute of CPAs) **Using Trusts in Income and Estate Tax Planning**, OSCPACenter, Beaverton, Oregon. Telephone: (800) 255-1470.
- December 1-2, 1994 (Sponsored by New York University School of Continuing Education) **State and Local Taxation**, Sheraton, New York City, New York. Telephone: (212) 998-7171.
- December 2, 1994 (Sponsored by the Oregon State Bar Labor and Employment Law Section) **Labor and Employment Law Section CLE**, Oregon Convention Center, Portland, Oregon. Telephone: (503) 620-0222 or (800) 452-8260, extension 407.
- December 4-9, 1994 (Sponsored by New York University School of Continuing Education) **53rd Institute on Federal Taxation**, Fairmont Hotel, San Francisco, California. Telephone: (212) 998-7171.
- January 9-13, 1995 (Sponsored by University of Miami Law Center) **Estate Planning Conference**, Fountainebleau Hotel, Miami Beach, Florida. Telephone: (305) 284-4762.
- March 4, 1995 (Sponsored by the Washington State Bar Association) **The Coming of Age of Elder Law**, Sheraton Spokane Hotel, Spokane, Washington. Telephone: (206) 727-8201.



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