newsletter

Oregon Estate Planning and Administration Section Newsletter

Volume XII, No. I
January 1995

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

Finality in Probate and Trust Proceedings—Making Your Judgments Stick[1]

1. Introduction

Families and attorneys usually express relief at the conclusion of estate or trust administration proceedings, assuming that the court's final order or judgment has conclusively resolved the issues raised in the proceeding. In general, the doctrine of res judicata will bar subsequent attempts to raise issues that were or could have been raised in the original proceeding. Under Oregon law, however, a disaffected interested person has many opportunities to attempt to set aside or vacate the judgment or final order in a probate or trust case many years after the fact.

An Oregon court has inherent authority to allow a person to collaterally attack a judgment or final order many years after its entry, on a number of grounds.[2] A court has inherent authority to set aside a judgment procured by extrinsic fraud[3] or a judgment that is void because the court lacked personal or subject matter jurisdiction.[4] A court also may set aside a judgment on other equitable bases, such as duress or similar "equally egregious" reasons.[5]

This article addresses four problems for which otherwise final orders and judgments rendered in probate and trust proceedings may be set aside: extrinsic fraud, lack of personal jurisdiction, failure to join all necessary parties, and failure to give proper notice.

2. Extrinsic Fraud

Extrinsic fraud occurs when one party deceives another party in a manner that precludes the latter from presenting his or her case in the proceeding,[6] thus preventing a genuine contest before the court of the matters in question.[7] In contrast, intrinsic fraud, from which no relief is allowed, consists of acts that pertain to the merits of the case, such as perjured testimony.

One form of extrinsic fraud occurs when one party deliberately keeps another party in ignorance of the proceedings. An example is an executor who failed to disclose the contents of the will to potential will contestants, refused to respond to their requests for information, and repeatedly assured them that matters were in order.[8]

Another form of extrinsic fraud occurs when a fiduciary conceals information from a beneficiary that prevents a full consideration of the merits of a case. Examples include an executor who failed to disclose several material facts, including the negative tax ramifications of the sale,[9] and an executor who failed to disclose several important facts about the decedent's last will, including that the decedent had not appeared to be competent when he executed the will and that he died 32 minutes after he signed it.[10]

Another basis for relief from judgments under the rubric of extrinsic fraud arises when a party or the party's attorney has failed to disclose relevant

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conflicts of interest. One court set aside an order approving a trust accounting that adversely affected a minor beneficiary for whom the trustee was also the guardian, because the conflict of interest prevented the trustee from adequately representing the minor's interests.[11] Another court allowed relief because a law firm failed to disclose to the court the dual representation of both the trustee and the minor beneficiaries of the trust.[12]

3. Problems with Personal Jurisdiction

A judgment or final order is void, and thus subject to collateral attack, if the rendering court lacked jurisdiction over the person's meant to be bound by the judgment or order.[13] A nonresident interested person may collaterally attack a judgment rendered under these circumstances if the court could not have exercised personal jurisdiction over the nonresident, even if the nonresident had received proper notice of the proceeding.

Under the Fourteenth Amendment to the U.S. Constitution, a court cannot conclusively determine an interested person's right in property if the person did not have sufficient minimum contacts with the forum state.[14] Although an interested nonresident person may have sufficient minimum contacts with the forum state simply by having an interest in the subject matter of the proceeding,[15] in general a court may not bind a nonresident who has not purposefully availed himself of the benefits of conducting business in the forum state.[16]

Because of this vulnerability to attack of judgments or final orders in proceedings with out-of-state parties, it may be appropriate in some circumstances to obtain consents to the exercise of personal jurisdiction from nonresident interested persons. Of course, a nonresident interested person who appears in a proceeding, other than to argue the jurisdiction question, will be deemed to have waived any objections based on lack of personal jurisdiction.

4. Joining Necessary Parties

Probate and trust proceedings are proceedings in rem because they concern interested person's rights in and to a thing—a decedent's estate or a trust. That means a court's judgment or final order in the proceeding will determine the rights of all persons interested in the property of the estate or trust if those persons are parties to the proceedings.[17] Thus, the finality of an order or judgment rendered in probate and trust proceedings requires the joinder of all interested persons.

If the court has personal jurisdiction, joining all interested persons may be a matter of simply giving those persons proper notice. In many trust and estate cases, however, interested persons may not be of legal age, may be incapacitated, or may be unascertained, as in the case of persons holding contingent future interests. Even though these persons individually cannot be made parties to the proceeding, a judgment or order may bind them if their interests are adequately represented by someone else.

a. Guardians ad Litem

A court's judgment or final order will bind children and other incompetent persons who are represented by a guardian ad litem.[18] In general, a guardian ad litem investigates the facts of a case and the ward's interest and also may file responsive pleadings, participate in discovery and motion practice, and appear at the trial or hearing on the matter. The guardian ad litem also may settle the case on behalf of the ward, although court approval may be required.[19]

The guardian ad litem's role is limited, however, to representing the ward in litigation. A guardian ad litem has no power over the ward's property[20] and therefore cannot admit facts prejudicial to the ward or waive any benefit to which the ward is entitled.[21] In particular, a guardian ad litem cannot consent to the termination of a trust in which the ward has a contingent interest,[22] although a court may allow a guardian ad litem to disclaim or renounce a ward's property interest in some circumstances.[23]

b. Special Representatives

In 1993 the Oregon Legislature passed legislation allowing all persons interested in a trust to modify the trust by agreement, avoiding a court proceeding.[24] The statute provides that minors, incompetents, and unborn and unascertained beneficiaries must be represented in the negotiation and execution of such an agreement by a court-appointed "special representative."[25]

The special representative must be an attorney admitted to practice in Oregon or "a person with special skill or training in the administration of trusts"[26] and must have no conflicting interests.[27] The special representative signs the agreement on behalf of his or her "constituents," who will be contractually bound by the agreement. The subsequent filing of the agreement with a court has the effect of a final order and binds the represented persons as would a court order.[28] Thus, although resembling a guardian ad litem, the special representative can enter into agreements that affect the constituent's interests in the trust.

c. Virtual Representation

Appointment of a guardian ad litem to represent unborn or unascertained beneficiaries may be unadvisable if "virtual representation" of those persons by others with similar interests is available. Virtual representation allows contingent but unborn or unascertained beneficiaries to be represented by beneficiaries in the proceeding if their interests are identical and the court's judgment or order will affect them in the same manner. A judgment or order rendered under these circumstances binds the virtually represented unborn and unascertained beneficiaries, even though they are not official parties to the proceeding.[29]

ORS 128.135 (7) allows virtual representation in probate and trust proceedings brought under ORS 128.135. ORS 128.179 allows virtual representation for the execution of a nonjudicial dispute resolution agreement under ORS 128.177. Oregon statutes do not

specifically allow virtual representation in estate administration proceedings or common law trust proceedings, although the doctrine is such an established feature of the common law of property that it should be available in such cases.

The use of virtual representation has three prerequisites:

> 1) The party and the person the party virtually represented must have a relationship such that the adequate presentation of the party's position is an adequate presentation of the virtually represented person's position;[30]
>
> 2) The judgment or order rendered by the court must accord identical treatment to the party and the virtually represented person;[31] and
>
> 3) The interests of the party and the virtually represented person must not conflict.[32]

Whether the third requirement has been met is often determined after the proceeding, making a judgment rendered with the aid of virtual representation vulnerable to collateral attack. To this extent, virtual representation cannot ensure the same degree of finality as does representation by a guardian ad litem or a special representative.[33]

5. Ensuring Proper Notice

Interested persons become parties to an in rem proceeding and are bound by a judgment through a notice that provides them with an opportunity to be heard.[34] An interested person who does not receive adequate notice of a probate or trust proceeding is not bound by the court's judgment and the judgment is subject to collateral attack.[35]

Notice requirements appear in Oregon statutes and also exist as procedural due process requirements under the Fourteenth Amendment to the U.S. Constitution, as interpreted by the United States Supreme Court. In each case, there are two primary issues: (1) whether the proper persons were notified and (2) whether they were given the appropriate form of notice.

a. Persons Entitled to Notice

Oregon statutes broadly describe persons entitled to notice in probate and trust proceedings.[36] In general, the statutes require notice to all devisees, legatees, and beneficiaries, including unborn or unascertained contingent beneficiaries, no matter how remote their interest might be. In estate administration proceedings, creditors are also entitled to receive notice.[37]

Oregon statutes also require that notice be given to known potential will contestants, but do not require that notice be given to reasonably ascertainable will contestants.[38] Under the U.S. Constitution, however, reasonably ascertainable beneficiaries under prior wills with more than speculative will contest claims may have a property interest—a cause of action—that will be foreclosed by the operation of Oregon's non-self-executing statute of limitations governing will contests. To this extent, a will contest brought by such a beneficiary who does not receive proper notice of the initiation of probate proceedings may not be barred by the statute of limitations.[39]

b. Nailing or Mailing? The Form of the Notice

In estate and trust proceedings, Oregon statutes require notice to be given by mail or personal delivery.[40] In guardianship and conservatorship proceedings, notice must be given by mail or personal service.[41]

In all probate and trust cases, however, if the address (and in trust cases, the existence) of a person is not known and cannot be determined through the exercise of reasonable diligence, notice may be published in a newspaper of general circulation in the county where the proceeding is taking place.[42] This tracks the U.S. Supreme Court's decisions interpreting the Fourteenth Amendment to require personal notice to be given only to interested persons whose identities and addresses are known or reasonably ascertainable through the exercise of ordinary diligence.[43]

6. Conclusion

Because one fundamental goal of probate and trust proceedings is finality, an awareness of the methods by which judgments and final orders rendered in such proceedings may be set aside is essential.

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Endnotes

1. ©1994 M. Read Moore. All rights reserved.
2. *See* ORCP 71 C. The Oregon Court of Appeals suggested that Rule 71 C itself provides an independent basis for collateral attacks based on extrinsic fraud. *Wimber v. Timpe*, 109 Or App 139, 146 (1991).
3. *E.g., JRD Development Joint Venture v. Catlin*, 116 Or App 182, 184 (1992).
4. *Rogue Val. Mem. Hosp. v. Salem Ins.*, 265 Or 603, 611 (1973); *Wood v. White*, 28 Or App 175, 178 (1977).
5. *Eagen and Eagen*, 292 Or 492, 496 (1982).
6. *Johnson v. Johnson*, 302 Or 382, 389 (1986).
7. *See Wimber*, 109 Or App at 146.
8. *Estate of Sanders*, 710 P2d 232 (Cal 1985).
9. *In re Estate of Anderson*, 196 Cal Rptr 782 (Ct App 1984); *see also Estate of Schneider*, 156 Cal Rptr 838 (Ct App 1979).
10. *Matter of Estate of Robinson*, 477 NYS2d 877 (App Div 1984).
11. *Estate of Charters*, 293 P2d 778 (Cal 1956).
12. *Potter v. Moran*, 49 Cal Rptr 229 (Ct App 1966).
13. US Const amend XIV; *State ex rel Karr v. Shorey,* 281 Or 453, 466 (1978).
14. *Shaffer v. Heitner*, 433 US 186, 207, 212 (1977).
15. *Shaffer*, 433 US at 207-08.
16. *Hanson v. Denckla*, 357 US 235 (1958).
17. US Const amend XIV.
18. *See Kessler v. Kerr*, 150 Or 447, 453 (1935). ORCP 27 addresses the appointment of guardians ad litem. *See generally* Begleiter, *The Guardian ad Litem in Estate Proceedings*, 20 Willamette L Rev 643 (1984).
19. *E.g., Whitcomb v. Dancer*, 443 A2d 458 (Vt 1982); *In re Estate of Trojan*, 193 NW2d 8, 11-12 (Wis 1972); *Naujokas v. H. Frank Carey High School*, 292 NYS2d 196, 200 (Sup Ct 1968). *See Alvarez v. Salvation Army*, 89 Or App 63 (1987), *rev denied*, 305 Or 594 (1988).

20. *See Fales v. State*, 438 NYS2d 449 (Ct Cl 1981).
21. *E.g., Torres v. Friedman*, 215 Cal Rptr 604, 608 (Ct App 1985); *In re Interest of Burbanks*, 310 NW2d 138 (Neb 1981).
22. *In re Fletcher's Trust*, 293 NYS2d 177, 180 (Sup Ct 1960). *See generally* Begleiter, *supra* note 18. *But see Appeal of Gannon*, 631 A2d 176 (Pa Super Ct 1993).
23. *See, e.g., In re Estate of De Domenico*, 418 NYS2d 1012, 1013 (Sur Ct 1979).
24. *See generally* ORS 128.177.
25. ORS 128.179.
26. ORS 128.179(4).
27. *Id.*
28. ORS 128.179(3).
29. *See In re Will of Silver*, 340 NYS2d 335 (Sup Ct 1973).
30. Virtual representation assumes that the representing party, in pursuing his own economic interests, will necessarily protect the rights of others who have the same or very similar interests. For examples illustrating this principle, see *Restatement (Second) of Property* §§ 183(a), 184(a) & cmt b, 184(d) & cmt f.
31. *Restatement (Second) of Property* § 183(b) & cmt c.
32. *See generally Restatement (Second) of Property* § 185.
33. *In re Will of Silver*, 340 NYS2d at 339. The court noted, however, that there are very few reported decisions involving collateral attacks on judgments involving deficiencies in virtual representation and that the courts usually sustain the judgments. *Id.* at 340.
34. *In re Radovich's Estate*, 308 P2d 14, 18 (Cal 1957).
35. *E.g., Mennonite Board of Missions v. Adams*, 462 US 791 (1983); *Hughes v. Aetna Casualty Co.*, 234 Or 426, 441-42 (1963).
36. ORS 111.215, 111.005(19) (estate administration proceedings); ORS 128.135(4) (trust-related proceedings); ORS 126.070 (petition to appoint guardian for minor); ORS 126.103, 126.127 (petition to appoint guardian for incapacitated person); ORS 126.187 (petition for appointment of conservator).
37. *Tulsa Collection Servs. v. Pope*, 485 US 478 (1988); ORS 115.003.
38. ORS 113.145(1); 113.035(7).
39. *See generally* M. Read Moore, *Fairness and Finality: Notice to Beneficiaries Under Prior Wills*, 24 Real Prop Tr J ____ (1994) (forthcoming).
40. ORS 111.215(1)(a), (b); 128.135(4).
41. ORS 126.007(1).
42. ORS 111.215(1)(c), 126.007(3), 128.135(4).
43. *Mennonite Board of Missions v. Adams*, 462 US at 800.
44. Joe Wyatt, Los Angeles, California, Jeff Pennell, Atlanta, Georgia, and Warren Deras, Portland, Oregon, provided helpful comments on drafts of this article.

Planning for Disclaimers of IRA and Retirement Plan Benefits

1. Introduction

Careful planning is crucial in designating beneficiaries to receive IRA and retirement plan benefits upon the death of the plan participant. Disclaimers provide flexibility for responding to unexpected post-mortem situations, but prior planning is necessary to allow the effective use of disclaimers.

This article briefly summarizes the rules regarding beneficiary designations, discusses the advantages and disadvantages of different choices for beneficiaries, and describes how to plan for and use disclaimers in conjunction with beneficiary designations.

2. A Review of the Rules: Beneficiary Designations and Required Distributions

Planning for the use of disclaimers with IRA and retirement plan beneficiary designations requires an understanding of the rules regarding beneficiary designations and distribution requirements. A brief summary of these rules follows. See also Lane, *Practical Tips for Making IRA Beneficiary and Distribution Elections*, Or Est Plan & Admin Sec Newsl (OSB) Oct. 1993, at 4.

a. Designated Beneficiaries

Only individuals qualify as a designated beneficiaries.[1] Trust beneficiaries can be deemed designated beneficiaries on a "look through" basis, only under limited circumstances in which the trust is irrevocable and the beneficiaries are identifiable.[2]

An estate does not qualify as a designated beneficiary.[3] For other reasons, naming an estate as a designated beneficiary is a bad choice: it may cause an otherwise unnecessary probate, and funding pecuniary bequests, including pecuniary marital deduction formulas, with qualified plan or IRA benefits will accelerate income tax.[4] (A fractional share formula or specific bequest would avoid acceleration.)

The designated beneficiary must be named at the earlier of the owner/participant's death or the required distribution beginning date (April 1 of the year following the participant's reaching age 70½).[5] A taker under local law is not a designated beneficiary unless named or otherwise identifiable in the instrument creating the taker's interest.[6]

b. Distributions

Generally, if no "designated beneficiary" has been named and if payments to the participant have not yet begun, the entire interest in an IRA or qualified plan must be distributed to the beneficiary by the end of the fifth year following the death of the plan participant.[7] Regardless of whether the participant has a designated beneficiary, if the distributions have begun to the participant prior to death, the payments must continue over the same time frame as the deceased participant would have received such payments.[8]

c. Distribution over Designated Beneficiary's Life-Expectancy

If distributions have not yet begun and the IRA owner or plan participant has a designated beneficiary, the payment of the benefits may extend over the life expectancy of the designated beneficiary for a period not to exceed the designated beneficiary's life expectancy.[9]

The payments to a non-spouse beneficiary must begin within one year of the participant's death.[10]

In determining life expectancy, a non-spouse designated beneficiary is deemed to be no more than ten years younger than the owner/participant.[11] This rule, however, does not apply after the death of the owner/participant.[12]

3. The Surviving Spouse as Designated Beneficiary: the Pros and Cons

a. Advantages of the Surviving Spouse as Designated Beneficiary

The surviving spouse is the ideal outright designated beneficiary for tax purposes since he or she has several choices that are unavailable to other beneficiaries. These choices include:

1) Electing to rollover the benefits to an IRA (except for required distributions under 401(a)(9)).[13]

2) Deferring the application of the excess accumulations tax.[14]

3) Deferring the commencement of payments until December 31 of the year in which the participant (or the surviving spouse in the case of an IRA rollover) would have attained age 70½, or December 31 of the year following the decedent's death, whichever is later.[15] (If the spouse dies prior to the commencement of such payments, the general five-year rule again applies, unless the spouse has named his or her own designated beneficiary.)[16]

An outright designation of the spouse clearly qualifies for the marital deduction.

b. Situations in Which a Non-Spouse Beneficiary May Be More Beneficial

Despite the advantages of naming the surviving spouse as outright beneficiary, in some instances it could be more advantageous to have a beneficiary other than the surviving spouse. In some cases, naming the surviving spouse, but planning for a disclaimer by the spouse may be advisable, such as if the credit shelter amount will not or may not be fully funded unless plan or IRA benefits are utilized, or if the owner/participant wishes to use the benefits to fund the credit shelter amount because the benefits may have more potential for future growth than other assets.

If the owner/participant does not believe the surviving spouse would effectively manage the funds, or the owner/participant does not want the surviving spouse to have outright access to or control of the funds, the surviving spouse should not be named the primary beneficiary.

4. Planning for the Use of Disclaimers

Disclaimer planning can preserve post-mortem flexibility. For example, a contingent beneficiary designation naming the credit shelter trust or disclaimer trust, gives the surviving spouse the choice of either enjoying the benefits of the outright designation, or disclaiming so that the plan benefits pass fully or partially to fund the credit shelter disposition. The owner/participant could reverse the situation by naming a trust as primary beneficiary and the surviving spouse as contingent beneficiary to avoid overfunding the trust. Without disclaimer planning, this flexibility may be unavailable.

In planning for disclaimers, as with planning for retirement plan distributions generally, it is necessary to analyze the choice of the proper beneficiary for tax and non-tax purposes. Clients and their advisors should devote as much care to choosing contingent beneficiaries in contemplation of possible disclaimers as to choosing primary beneficiaries.

The IRS has privately ruled that IRA beneficiaries may disclaim all or an undivided portion of an interest in the account.[17] The IRS has also ruled that an interest in a qualified retirement plan may be disclaimed and, if properly done under federal and state law, the disclaimer will not violate the prohibition against assignment or alienation of plan benefits.[18] Federal law preempts state disclaimer statutes in the area of employee benefit plans subject to ERISA.

a. Disadvantages of Using Plan Assets to Fund Trusts

Despite the potential advantages of using a trust as a plan or IRA beneficiary, there are several reasons to consider avoiding the use of qualified plan and IRA benefits to fund trusts:

1) As explained below, naming a trust as beneficiary creates difficulties in qualifying the benefits for the marital deduction and in qualifying the trust beneficiaries for valuable designated beneficiary status.

2) Only an outright designation of the spouse as beneficiary of all but a de minimis portion of the decedent's benefits will qualify for the spousal election to defer the excess accumulations tax.[19]

3) The IRS has allowed the rollover of retirement benefits received by the surviving spouse as a trust beneficiary only in limited situations.[20]

4) A QTIP trust may cause a partial loss of the deferral of income inherent in IRAs and qualified plans, since distributions of income would have to be made earlier than might otherwise be required.

5) Amounts paid to the trust which are not distributed to the beneficiary are subject to income tax in the trust, with the possible imposition of the top marginal rate structure which applies to trusts.

6) In the case of a qualified plan, the spouse must consent to the naming of a beneficiary other than the spouse, including a trust for the spouse's benefit.[21] The spousal consent rules do not apply to IRAs.

b. Initial Steps

In planning for the use of disclaimers for IRA or qualified plan benefits, it is advisable to review the plan document or IRA instrument to determine the available forms of payout and permitted beneficiaries. Planning may be ineffective to the extent that options are restricted under the terms of the governing documents. In particular, qualification for QTIP treatment depends upon appropriate distribution language in the plan or IRA. It also would be prudent to contact the plan administrator or IRA custodian to discuss the policy on recognizing disclaimers.

c. Designated Beneficiary Status for Trusts

If a trust is named as a primary or contingent beneficiary, great care should be taken to create and maintain designated beneficiary status for the trust beneficiaries. Without maintaining such status, there will be a loss of income tax deferral.

Although a full discussion of these rules is beyond the scope of this article, some of the bigger obstacles are that the trust must be irrevocable,[22] and certain distribution powers cannot exist or there will be a violation of the rule that no person may have the power to change beneficiaries.[23] The contingent beneficiary should not be expressly named as taker in the specific event of a disclaimer, as this could result in a failure to qualify the contingent beneficiary as a designated beneficiary.[24] Rather, it is best to simply name the trust as a contingent beneficiary. Certain powers in the surviving spouse may invalidate the disclaimer in that the disclaimant cannot retain the power to control beneficial enjoyment of the disclaimed property.[25]

d. Credit Shelter Trust as Beneficiary

Naming a credit shelter trust as an IRA or plan beneficiary generally is not advisable if other assets are available to fund this disposition, since IRA and retirement plan benefits are "wasting" assets. Such assets regularly produce income tax liability, which would better be borne by the marital share, in order to diminish the surviving spouse's taxable estate. By using the credit shelter trust as beneficiary, part of the benefit of the unified credit is effectively wasted. Utilization of plan benefits to fund credit shelter dispositions should be a last resort.

e. QTIP Trust as Beneficiary

If the participant or IRA owner wishes to control the management and ultimate disposition of benefits and still qualify for the marital deduction, naming a QTIP trust as beneficiary may be desirable. Challenges exist in qualifying for QTIP treatment benefits that are payable periodically (i.e., not in a lump sum), since the terms of both the IRA and the trust must comply with the QTIP requirements.

The IRA instrument or the qualified plan should provide that the trust receive, at least annually, the greater of the income generated by the IRA or plan, or the minimum distribution amount. As a practical matter, IRAs and qualified plans may not have this specific distribution language. The owner/participant may need to file a customized distribution election in a form acceptable to the financial institution or plan administrator.

The trust agreement should provide that all internal plan or IRA income is to be treated as QTIP trust income and the portion of the distribution which represents accounting income must be distributed out of the trust to the surviving spouse in the same manner as any other income.[26] The QTIP trust's governing instrument should empower the trustee to withdraw part or all of the IRA or plan funds, and the spouse should have the right to direct the QTIP trustee to make the IRA or plan productive. The governing instrument should also require that all trust expenses which are normally chargeable to corpus, including income taxes, must be charged to corpus.

A QTIP election should be made for both the trust and the plan or IRA.

f. Recalculation of Life-Expectancies

If distributions have not begun prior to the participant's death, the surviving spouse (but not other beneficiaries) may elect to recalculate his or her life expectancy annually in an attempt to lengthen the payout period.[27] If the plan contains no provisions for such an election or if no election is made, recalculation is automatic.[28]

A word of caution: although the issue is not settled, a disclaimer could cause unexpected results if life expectancies are being recalculated and the participant dies *after* payments have begun. If the surviving spouse then disclaims, the surviving spouse may be considered to have predeceased the participant as a result of the disclaimer. Therefore, both life expectancies would calculate to zero, and full payment of benefits would be required to be accelerated into the year following the death of the owner/participant.[29]

5. The Mechanics of Disclaiming

a. Special Disclaimer Requirements

Generally, a qualified disclaimer must be made within nine months of the date of death.[30] However, in the case of plan benefits payable in the form of an irrevocable qualified joint and survivor annuity, the surviving spouse must disclaim within nine months of the annuity starting date, which is usually the date on which the retirement benefits are payable to the participant.[31]

b. Disclaimer by a Trust

If a disclaimer is planned, who must disclaim when a trust is named as primary beneficiary? In Private Letter Ruling 8838075, the IRS seemed to indicate that a trustee can disclaim benefits without obtaining disclaimers from the trust's beneficiaries. This ruling, however, runs counter to the general rule that a trustee does not possess the power to disclaim trust property on behalf of the beneficiaries, unless specifically authorized to do so in the trust instrument, because the beneficiaries own the

beneficial rights in the trust property.[32] Given the lack of clarity on this issue, it is advisable to provide in the trust agreement that the trustee may disclaim without consent of the beneficiaries. In all cases, the disclaimant must not retain a wholly discretionary power to direct the enjoyment of the disclaimed interest.

6. Conclusion

Planning for flexibility through disclaimers is only one of many issues which should be reviewed in the area of beneficiary designations. Utilizing a trust as primary or contingent beneficiary raises many complications, which this article can only touch upon briefly. In most cases, the spouse is the simplest and most beneficial choice as beneficiary of retirement plans and IRAs, but disclaimer planning opens the door to other alternatives which might better fit the particular post-mortem circumstances.

Peter J. Duffy

Endnotes

1. Prop Treas Reg § 1.401 (a)(9)-1, Q&A D-2A.
2. Prop Treas Reg § 1.401(a)(9)-1, Q&As D-5, D-6, E-5.
3. Prop Treas Reg § 1.401(a)(9)-1, Q&A D-2A.
4. IRC § 691(a)(2).
5. Prop Treas Reg § 1.401 (a)(9)-1, Q&A D-3.
6. Prop Treas Reg § 1.401 (a)(9)-1, Q&A D-2(a) (1).
7. IRC § 401(a)(9)(B)(ii).
8. IRC § 401(a)(9)(B)(i).
9. IRC § 401(a)(9)(B)(iii).
10. IRC § 401(a)(9)(B)(iii)(III).
11. Preamble to Prop Treas Reg § 1.401 (a)(9)-2; Q&A -6.
12. Prop Treas Reg § 1.401(a)(9)-2.
13. IRC § 402(c)(9).
14. IRC §§ 408(d)(3)(C)(ii), 4980A(d)(5)(A).
15. IRC § 401(a)(9)(B)(iv)(I).
16. IRC § 401(a)(9)(B)(iv)(II).
17. PLR 9037048.
18. GCM 39858; PLRs 9016026, 8838075.
19. IRC § 4980A(d) (5).
20. *See* PLRs 9416039, 9416045, 9423039.
21. IRC §§ 401(a)(11), 417(a)(2).
22. Prop Treas Reg § 1.401 (a)(9)-1; Q&A D-5.
23. *Id.*
24. *See* Prop Treas Reg § 1.401(a)(9)-1, Q&A E-5(b), (e)(1), (f).
25. Treas Reg § 25.2518-2(e)(2).
26. IRC § 2056(b)(7)(B)(ii)(I); Rev Rul 89-89, 1989-2 CB 231; PLR 9416016.
27. IRC § 401(a)(9)(D).
28. Prop Treas Reg § 1.401(a)(9)-1, Q&A E-7.
29. Prop Treas Reg § 1.401(a)(9)-1, Q&A E-8.
30. IRC § 2518(b)(2).
31. *Id.*
32. TAM 8527009; PLRs 8549004, 8409024.

QUESTIONS, COMMENTS OR SUGGESTIONS ABOUT THIS NEWSLETTER?

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What's New

Estate of Thomas v. Senior and Disabled Services Division
319 Or 520 (1994)

In *Estate of Thomas*, the Supreme Court held that a personal representative of an estate must pay interest on claims which are not paid when due. In *Thomas*, the Adult and Family Services Division ("the State") presented a claim against the estate of Thomas for medical assistance payments made on behalf of the decedent. The State's claim did not include a demand for interest. The personal representative allowed the claim and paid it in installments over nine years. No interest was paid on the claim.

The State objected to the personal representative's final account, claiming that it was entitled to interest on its claim from the time the claim was presented to the personal representative. The trial court rejected the State's argument that it was entitled to interest and approved the final account. The Court of Appeals affirmed the trial court's ruling, stating that any claim that the State was entitled to interest should have been presented during the claims period.

The Supreme Court reversed the Court of Appeals, holding that the State was entitled to interest under the "general interest statute" of ORS 82.010(1), which provides a nine percent rate of interest that "is payable on all monies after they become due." The court stated that the accrual of interest under ORS 82.010(1) encourages personal representatives to pay claims quickly.

The court held that the State's claim would begin bearing interest on the earliest date on which it became due. It noted that ORS 115.185 provides that a creditor whose claim has been allowed can seek an order requiring payment of the claim within six months after the date of the first publication of notice to interested persons. Because the law recognizes the personal representative's duty to pay creditors' claims as of that date, that is the date on which the claim became due and interest began accruing.

The court then held that it was unnecessary for a creditor to include in its claim a demand for interest. It noted that the right to interest did not accrue until the personal representative failed to pay the claim in full by the date required under ORS 115.185. Therefore, a creditor's right to interest is a liability incurred by the estate, not a liability of the decedent. The creditor's right to collect interest is not a "claim," as that term is used in the Probate Code.

Last, the court examined whether the State's claim for interest was made in a timely manner. It stated the general rule that a party must include a demand for interest in its pleadings to be entitled to an award of interest on a legal claim, citing *Lithia Lumber Co. v. Lamb*, 250 Or 444 (1969). The court held that the State met this requirement by demanding interest in its objection to the final account.

Stephen J. Klarquist

Calendar of Seminars and Events

- January 6, 1995 (Sponsored by Oregon Society of CPAs) **State & Local Tax Conference**, Oregon Convention Center, Portland, Oregon. Telephone: (503) 641-7200.
- January 9, 1995 (Sponsored by Oregon Society of CPAs) **1994-5 Individual Business and Real Estate Tax Update**, Jantzen Beach Red Lion, Portland, Oregon. Telephone: (503) 641-7200.
- January 9-12, 1995 (Sponsored by University of Southern California) **47th Annual Institute on Federal Taxation**, Beverly Hilton, California. Telephone: (213) 740-2646.
- January 9-13, 1995 (Sponsored by University of Miami Law Center) **Estate Planning Conference**, Fontainebleau Hotel, Miami Beach, Florida. Telephone: (305) 284-4762.
- January 11, 1995 (Sponsored by Oregon Society of CPAs) **Tax Season Update**, Red Lion Inn, Coos Bay, Oregon. Telephone: (503) 641-7200.
- January 12-13, 1995 (Sponsored by Oregon Society of CPAs) **Income Tax Returns Workshop: Individuals**, Meeting Center West, Beaverton, Oregon. Telephone: (503) 641-7200.
- January 19, 1995 (Sponsored by Oregon Society of CPAs) **Mastering the 1995 Tax Season Challenges: an Annual Update**, The Hilton, Eugene, Oregon. Telephone: (503) 641-7200.
- January 20, 1995 (Sponsored by Oregon Society of CPAs) **Mastering the 1995 Tax Season Challenges: an Annual Update**, Oregon Convention Center, Portland, Oregon. Telephone: (503) 641-7200.
- January 23-24, 1995 (Sponsored by Oregon Society of CPAs) **Basic Income Tax Return Preparation Workshop**, OSCPA Center, Beaverton, Oregon. Telephone: (503) 641-7200.
- January 26, 1995 (Sponsored by Oregon Society of CPAs) **Tax Season Update**, Burgundy's, Albany, Oregon. Telephone: (503) 641-7200.
- January 27, 1995 (Sponsored by Or[illegible] Society of CPAs) **Tax Season Update**, Red Lion Inn, Medford, Oregon. Telephone: (503) 641-7200.
- February 3, 1995 (Sponsored by Northwestern School of Law) **24th Annual Estate Planning Seminar**, Oregon Convention Center, Portland, Oregon. Telephone: (503) 768-6672.
- February 15, 1995 (Sponsored by National Business Institute) **Planning Opportunities with Living Trusts in Oregon**, Red Lion Coliseum, Portland, Oregon. Telephone: (715) 835-7909.
- March 1-3, 1995 (Sponsored by ALI-ABA) **Basic Estate and Gift Taxation and Planning**, Radisson Resort, Scottsdale, Arizona. Telephone: (800) 253-6397.
- March 4, 1995 (Sponsored by the Washington State Bar Association) **The Coming of Age of Elder Law**, Sheraton Spokane Hotel, Spokane, Washington. Telephone: (206) 727-8202.

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Oregon Estate Planning and Administration Section Newsletter

Volume XII, No. II
April 1995

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

The Estate Planner and Divorce Lawyer: A Marriage Made in Heaven

1. Introduction

I am a divorce lawyer. I know little about estate planning. I have found, however, that divorce lawyers and estate planing lawyers often strive to accomplish the same goal for their clients: the future disposition of clients' assets and liabilities in accordance with well-laid plans. Estate planners and divorce lawyers are often unaware they have common clients. More importantly, each often fails to accomplish the clients' goals because: (1) the most intricate, complex, well-crafted estate plan can be reduced to worthless paper by a divorce proceeding; (2) the most intricate, complex, well-crafted pre- or post-nuptial agreement can be reduced to worthless paper by a failure to take into consideration a client's already existing estate plan. Many of my divorce attorney colleagues fail to recognize that a divorce planning device such as a pre-nuptial agreement alone is not good estate planning. The job is only partially done.

This article discusses case law affecting estate plans through divorce and briefly touches on the mechanics of drafting pre- or post-nuptial agreements. If you want to know more about this, I highly recommend Josh Kadish's excellent chapter on pre-nuptial agreements found in 1 Family Law (Or. St. Bar CLE 1990) or an earlier article of mine entitled *Pre- and Post-Nuptial Agreements, A Few Suggestions, Strategies and Opinions, Fam. & Juv. L. Newsl. (Or. St. Bar), April 1991. I hope that when you finish reading this article, you believe that divorce lawyers and estate planners need to work together in achieving their common clients' goals.*

2. The Power of the Divorce Court, or Equity Knows No Bounds

Next to the Federal Bankruptcy Court, the dissolution court, particularly in so-called equitable distributions states such as Oregon, is the most powerful and intrusive court in our legal system. How? Generally, the principles which apply to an equitable proceeding are more loose, if not amorphous, than those which apply when the court is sitting in law. The following examples should show you just how powerful the divorce court is.

First, we start with the statute. ORS 107.105(1) provides in relevant part:

"Whenever the court grants a [judgment][1] of marital annulment, dissolution or separation, it has power further to [adjudge] as follows:

* * *

"(f) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties *as may be just and proper in all the circumstances.* * * * Subsequent to the filing of a petition

In This Issue

for annulment or dissolution of marriage or separation, the rights of the parties in the marital assets shall be considered a species of co-ownership, and a transfer of marital assets pursuant to a [judgment] of annulment or dissolution of marriage or of separation entered on or after October 4, 1977, shall be considered a partitioning of jointly owned property."

(Emphasis added.)

This statute alone gives Oregon divorce courts tremendous reach in identifying, valuing, and dividing property interests which might otherwise be thought to be separate or excludable. In the absence of pre- or post-nuptial agreements, courts have exercised this broad grant of authority in ways that can drastically affect the estate planning of the parties or their families.

Now the cases. In *Bentson and Bentson*, 61 Or App 282 (1982), *rev den*, 294 Or 613 (1983), the parties divorced after 20 years of marriage. Midway through the marriage, the husband's father died. The father's will established a trust, the income from which husband was to receive monthly until he reached age 50, at which time he was to receive the corpus of the trust. At the time of the dissolution trial, husband was 42, and the trust principal had a present value of approximately $680,000. 61 Or App at 284.

Wife argued that she should be awarded a share of husband's interest in the trust, to be paid when the corpus was distributed to him. The trial court assigned no value to husband's interest in the trust, and awarded all of it to him free and clear of any claim by wife. *Id.* The Court of Appeals had no trouble accepting the wife's argument on appeal: "Whether vested or contingent, husband's interest in the trust is a marital asset to be considered in the division of marital property." 61 Or App at 284-85.

In *Walker and Walker*, 27 Or App 693 (1976), *rev den* (1977), the parties were married for a much shorter period (nine years), were younger, and had no children. Further, each party had a separate, self-sustaining career. Finally, each party brought into the marriage interests in one or more family trusts. 27 Or App at 695.

The wife had interests in three trusts, one of which vested during the marriage. The husband had an interest in one trust, which was not vested. The trial court held that the trust interests that had not vested should not be considered a part of the marital assets. The wife's trust that was subject to being distributed was included in the court's property distribution. *Id.* The Court of Appeals, in modifying the judgment, disagreed:

> "Regardless of whether the parties' various trust interests are vested or contingent, they are valuable, alienable property. Thus, they should properly be considered by the court when making an equitable distribution of the parties' assets, and the trial court erred in considering only that trust interest which it found to be presently vested. We therefore consider all of the parties' trust interests on de novo review."

27 Or App at 696 (citations omitted). Based on equitable principles stated in the opinion, the Court of Appeals excluded the value of each party's unvested trust interest in its division of the remainder of the marital assets. *Id.* Still, *Walker's* reach is no less shortened by its result.

Taylor and Taylor, 121 Or App 635, *modified,* 124 Or App 581 (1993), is, at least for divorce attorneys, a startling and remarkable opinion. It is perhaps the best example of how the absence of a pre- or post-nuptial agreement can devastate a person's estate plan, or in this case, the plans of a party's family.

In *Taylor*, the parties had been married 20 years. Both were well educated and equally employable with modest incomes. They enjoyed an "opulent" lifestyle through gifts from the husband's parents. The parties separated and filed for divorce in 1990. In 1991, the husband's mother died and his remainder interests in several trusts vested. These trusts, none of which were spendthrift trusts, had been created by the husband's parents and grandmother. Husband did not learn of his interest in his grandmother's trust until 18 months after the parties separated. 121 Or App at 637-641. The trial court valued husband's inherited and trust assets at the time of trial at approximately $1,300,000. *Id.*

The Court of Appeals, reviewing de novo, compared this case to a similar case, *Howard and Howard*, 92 Or App 347, *rev den*, 507 Or 101 (1988), and made the following critical findings:

> "Both were long-term marriages. In both cases, the income potential of the inheriting spouse, in the light of the inheritances, vastly outdistances that of the non-inheriting spouse. In both cases, the non-inheriting spouse expressed concern that the parties should save for retirement, but the inheriting spouse gave assurances that the anticipated inheritances made that unnecessary. In both cases, the non-inheriting spouse relied on those assurances. In this case, wife's reliance was reasonable in the light of the frequent and generous monetary gifts that husband's family bestowed on them during their marriage."

Id. at 640.

The court went on to find that the wife should receive a share of the husband's inheritance and trust interests, but not the grandmother's trust that he was unaware of until after filing for dissolution. The appeals court upheld the trial court's conclusion that the wife should receive a one-third share of the husband's other inheritance and trust interests. *Id.*

For a case involving similar facts, but more modest asset values, see *Bekooy and Bekooy*, 118 Or App 227 (1993) (wife granted one-half interest in an inheritance husband received from his mother's estate after separation, where husband's entitlement to it prior to separation became clear because of his mother's death).

Another case I suggest estate planners read is *McGoldrick and McGoldrick*, 85 Or App 412 (1986), *rev den,* 304 Or 55 (1987). In *McGoldrick*, the husband attempted, shortly before he filed for divorce, but long after the parties had separated, to engage in some interesting estate planning. In making what the Court of Appeals found to be an irrevocable transfer of real property to the parties' children while reserving unto himself a life estate, the timing of the transfer in relation to the dissolution proceeding was not a fraudulent transfer. The Court of Appeals further found:

> "If we divide the property as suggested by wife and award her an offsetting judgment, there will be no assets from which that judgment can be satisfied.

Husband, as life tenant, will be unable to sell the property or mortgage it to pay a judgment to wife. If he prevails on the children to reconvey the property to him so that he can mortgage or sell it to pay the judgment, the estate plan will be defeated. Wife would benefit in the amount of the judgment with a corresponding ultimate loss to the children."

85 Or App at 417. The court found in favor of husband, denying the wife a judgment to reflect the value of the transferred assests.

Chief Judge Joseph dissented:

"There is conclusive evidence that the only real purpose of the transfers was to defeat any claim of wife either in the event of a dissolution or on husband's death. Although the conveyances are absolute in form, their purpose and the secrecy persuades me that the children were not intended to have any benefit, economic or otherwise, during husband's life and that he intended to go on treating the property as his own as long as he lived."

85 Or App at 419-20.

3. Spendthrift Provisions: They Do Matter

a. Property Settlements

The dissolution court generally can fashion a combination of three remedies for the non-inheriting spouse when it decides to include some or all the value of gifted or inherited assets, including trust interests, in the property distribution:

(1) It can divide the remaining marital assets and liabilities, presumably, but not necessarily, equally, and award the non-inheriting spouse a non-interest-bearing judgment for one-half of any future trust distribution when and if made; or

(2) It can simply place the value of the gifted or inherited assets on the receiving spouse's side of the ledger sheet. Depending on what other assets or liabilities are left to distribute, this may result in the non-inheriting spouse receiving a money judgment against the inheriting spouse; or

(3) It can award the non-inheriting spouse some or all of the gifted or inherited assets.

For instance, in *Bekooy, supra*, the trial court included husband's recent inheritance as a marital asset, awarded it to him at its full value and awarded wife other marital assets of equal value. *Bekooy and Bekooy*, 118 Or App at 229.

In *Taylor and Taylor, supra*, after including one-third the value of the husband's gifted and inherited assets on his side of the ledger, the trial court awarded wife a money judgment against husband for $435,000, supposedly immediately due and payable. *Taylor and Taylor*, 121 Or App at 638. As mentioned above, the trust agreement did not contain a spendthrift provision.

Oregon follows the majority rule upholding the validity of spendthrift trusts, i.e. trusts prohibiting a beneficiary from assigning, and creditors from attaching, the beneficiary's right to future payments of income or capital. *Kirk v. Kirk*, 254 Or 44 (1969). Little case law exists applying spendthrift trust provisions in the context of a divorce. Presumably a spendthrift clause would be enforceable against a former spouse in a suit for payment of a property settlement judgment. However, an exception applies in the case of alimony and child support judgments.

b. Alimony and Child Support

The liability of a spendthrift trust for support of children, and for payment of alimony was discussed at length in *Shelley v. Shelley*, 223 Or 328 (1960). In *Shelley*, husband's father created a testamentary trust which provided that all income be distributed to the husband quarterly, and gave the trustee, a bank, power to make distributions of principal in such amounts as the trustee deemed husband capable of investing. The trust contained a spendthrift clause. Prior to the suit, husband disappeared, and his whereabouts were not known at the time of the trial. Consequently, the trustee retained accumulated income. At issue was the liability of the trust for the support of two former wives and four children.

After a discussion of public policy considerations, the court held that the income of the trust was subject to claims of one of the wives for alimony (the other had not been awarded alimony) and to the children for support. The court held that the claimants could reach only so much of the income as the trial court deemed reasonable under the circumstances, taking into account various factors specified by the court.

As to the corpus of the trust, the court held that, for the same policy reasons stated with respect to distributions of income, the husband's interest in the corpus was not immune to the claims of the former wives and children. However, because disbursement of the principal of the trust was within the discretion of the trustee, husband's right to receive any part of the corpus did not arise until the trustee had exercised his discretion to invade the corpus. Therefore, the beneficiaries could not reach the corpus derivatively through husband because husband, as beneficiary, had no realizable interest in it.

A spouse's interest in a trust, whether vested or contingent, may be subject to the dissolution court's dispositional authority notwithstanding the existence of a spendthrift provision. However, if the trust contains a spendthrift provision, then should the former spouse become a money judgment creditor of a spouse who has an interest in the trust, assets which are still held in the trust will not be subject to execution or other form of legal process.

4. Divorce Asset Valuation: At Times a Different World

In dividing property, which necessarily includes both assets and liabilities, ORS 107.105(1)(f) exhorts courts to "require full disclosure of all assets by the parties in arriving at a just property division * * *." However, disclosure is only half the tale. Valuation is the other, and often more adversarial, half. Non-divorce lawyers and other professionals (particularly accountants) are at times surprised to learn the unique rules of valuation that apply in divorce proceedings. Some of the more important and frequently cited valuation rules in divorce cases include:

(1) A business *ordinarily* has some value above and beyond those of its fixed assets, known as goodwill value, unless success or failure of the business depends almost solely on a party's personal services. *Adams and Adams,* 121 Or App 187, 190 (1993); *Lankford and Lankford*, 79 Or App 742, 745 (1986).

(2) Book value is an appropriate basis to value a business only if the business has just been formed or if the owner is contemplating a sale. Otherwise, its greater value to the parties is as an operating entity. Therefore it should be valued as a going concern. *Bors and Bors*, 115 Or App 572, 575 (1992).

(3) Consideration of the tax consequences and other costs of sale is not appropriate if a sale is not contemplated by the parties or ordered by the dissolution court. *Follansbee and Ackerman*, 115 Or App 39, 41 (1992).

(4) Under the asset value method, the value of stock in a closely held corporation may be discounted if it represents a minority interest or if the bylaws contain restrictive provisions, such as a right of first refusal, which inhibit the stock's marketability. However, if there is no evidence that a minority sale is planned or has occurred in the past, the valuation need not contemplate any discount. *Barlow and Barlow*, 111 Or App 179, 182 (1991), *rev den*, 313 Or 299 (1992); *Webber and Webber*, 99 Or App 703 (1989), *modified*, 102 Or App 93, *rev den*, 310 Or 282 (1990).

(5) Assets are valued at the time of the divorce trial, *not* separation, unless there has been both a long period of separation and financial independence. *Crislip and Crislip*, 86 Or App 146, 150 (1987).

The above valuation rules are by no means exhaustive, and indicate that in some instances valuation rules employed by taxing authorities may differ. Nothing prevents a divorce lawyer from including in a pre-nuptial agreement provisions regarding valuation methodology which differs from the case law.

5. The Mechanics of Drafting the Pre-nuptial Agreement

To many lawyers practicing in the '80s, pre-nuptial agreements frequently seemed nothing more than trendy devices representative of that decade's "me" mentality. They often resembled a sledgehammer with which a person with substantial assets (the Have) agreed to marry a person with insubstantial assets (the Have Not) so long as the Have Not forever forsook an interest or claim in the Have's assets. The horror stories associated with pre-nuptial agreements were legion: There was the unsophisticated Have Not who was presented with a pre-nuptial agreement for the first time in the Have's lawyer's office on the way to the wedding ceremony; or, the Have who grossly misstated either the full value, or nature of his wealth.

These stories were in reality few. In 1987 the Oregon legislature codified existing case law by enacting the Uniform Premarital Agreement Act (UPAA). ORS 108.700 *et seq.* With its passage, lawyers and their insurance carriers heaved a big sigh of relief.

The law requires very little: (1) a written pre-nuptial agreement; (2) full disclosure as to the *value* and extent of each party's assets and liabilities; and (3) adequate time for each party to carefully review, consider, and negotiate the agreement's terms. It is astounding how frequently one sees a case in which the Have is in a hurry and attaches very little significance to both the ceremony and legal importance of the pre-nuptial agreement. To lawyers, the rule is very clear: do it right or don't do it at all.

I often find that the process of negotiating and signing a pre-nuptial agreement, if not the very concept itself, has a negative impact on a couple's relationship. The process stands in stark contrast to what is normally a very joyous occasion usually filled with wedding plans, honeymoon plans, and the thinking about a future life together. The strain can be great and often results in the parties' exhibiting behaviors previously unseen in the relationship. Therefore, I often recommend to my clients who are undergoing such strain and frustration to seek mental health counseling during the process, both individually and as a couple, to better understand and deal with new and conflicting emotions.

6. Working with Estate Planners

Usually, the need or desire for a pre-nuptial agreement comes from one of the parties. However, not infrequently the force behind the request comes not from one of the parties, but rather, a party's relative, often a parent. When this occurs, there is usually in place an estate plan. Should this be the case, when drafting the agreement, the attorney should consider the client's (i.e. family's) overall estate plan. If the client assents, the lawyer should ask the family's estate planner to review the drafts and offer comments. In these cases, the pre-nuptial agreement is the final step in a party's overall estate plan. However, there are instances when the drafting of a pre-nuptial agreement is the first step in a party's devising a comprehensive estate plan. Whatever the case, I do not favor turning my client's pre-nuptial agreement into a testamentary document. Therefore, my agreements generally contain language such as the following:

> **"Death of Either Party During Marriage.**
>
> "In the event either party dies during the parties' marriage, the surviving party shall receive, in addition to his or her own 'separate estate,' any such interest as may be created for him or her by the other gift; by the other's will or trust agreement; by beneficiary designation of survivor benefits; by joint ownership with right of survivorship in real property or joint bank accounts; by tenancy-in-common with right of survivorship in securities or other personal property; or by any other method of conveying or transferring property interests."

Because death is not the same as a domestic proceeding such as divorce or separation, most parties are willing to be more generous in death than in divorce. This generosity should be spelled out in a will or testamentary document and not in the pre-nuptial agreement.

7. Conclusion

Divorce planning is estate planning. To do that effectively for our clients, estate planning lawyers and divorce lawyers should work together. Divorce can all but ruin the best laid estate plans. Using either a pre- or post-nuptial agreement will advance a client's already existing estate plan.

Michael A. Yates

Endnote

1 To their consternation, I remind my colleagues that with the effective date of the ORCP, the *procedural* distinction between equity actions and law actions was abolished. *See* ORCP 2. Accordingly, since January 1, 1980, *all* Oregon courts "adjudge," not "decree," and the final adjudicatory document in a legal proceeding is a "judgment" and not a "decree." Old habits die hard.

What's New?

Wood v. Medical Research Foundation of Oregon, 130 Or App 114 (1994)

Decedent's will left her estate to the Medical Research Foundation of Oregon. The will specifically directed that the net income of the estate be used "for the benefit of cardiopulmonary research, development and education under the direction of Dr. Albert Starr and/or Dr. James Wood, or their successors, in the Department of Cardiopulmonary Surgery at the University of Oregon Medical School." Plaintiffs sought to use the funds to conduct research at St. Vincent's Hospital, and to show that Decedent specifically intended to benefit Plaintiffs' research projects, regardless of where such research was conducted. Defendant, on the other hand, took the position that the terms of the will were unambiguous, requiring the money to be used only on research performed *at* Oregon Health Sciences University ("OHSU").

The trial court determined that the will contained a latent ambiguity and admitted extrinsic evidence to interpret the will. Part of such extrinsic evidence was testimony from the lawyer who drafted the will for Decedent. Upon examination of such evidence, the court concluded that Decedent intended that the money be used to further Plaintiffs' research, no matter where conducted.

The Court of Appeals disagreed. The court reviewed the language quoted above and found it to be unambiguous. In the court's view, the syntax of the will provision in question gave no alternative to OHSU as a site for the research.

The court also rejected Plaintiffs' argument that, even if the language is unambiguous, extrinsic evidence is admissible to show the *circumstances* under which the will was made. Citing *Jarrett v. U.S. National Bank,* 81 Or App 242, 246 (1986), *rev den,* 302 Or 476 (1987), the court concluded that, where language in a will is unambiguous, extrinsic evidence cannot properly be admitted to assist the court in determining its meaning, regardless of the circumstances under which the will was made.

Rea v. Paulson, 131 Or App 743 (1994)

Plaintiff, acting as personal representative for his mother's estate, brought this action to set aside a transfer of real property from Decedent to Defendant Paulson, who is Plaintiff's half-brother. Plaintiff asserted that Defendant had unduly influenced Decedent into transferring the property. The trial court found for Plaintiff and set aside the deed. Appellant asserted that the evidence supporting the findings of the trial court was insufficient.

In its de novo review, the Court of Appeals found that Decedent had, from the time she bought the house in 1983, required substantial physical care and that she was dependent on help from others in her daily living. For approximately four years, Decedent's care was rendered by three of her four children, including Plaintiff. During this period, the fourth child, Defendant, did not participate in Decedent's care and never even visited her.

Approximately one year before Decedent's death, Defendant took over Decedent's care, moved into Decedent's home for a brief period, then relocated Decedent to Longview with Defendant, Defendant's girlfriend, and her daughter. Decedent's home was rented out and the rental proceeds were used to pay the expenses of the Longview house. Defendant also obtained a power of attorney from Decedent, using it to exhaust Decedent's savings account and to run up substantial debt on Decedent's credit card. The court also found that the Defendant, on numerous occasions, told Decedent that the state would take away her home if she kept it in her name, which Defendant knew to be false and which was directly contrary to what Plaintiff had previously told Decedent. Because of what Defendant told her, Decedent was afraid of losing her home. Defendant also urged Decedent frequently to make up her mind "about the deed." Throughout this period, the court found that Defendant shielded Decedent from contact with her other children and caused Decedent's relations with her other children to deteriorate.

About four months before Decedent's death, Defendant suggested to Decedent that they go to a title company in Rainier and get a deed to transfer Decedent's home to Defendant, which they did. Defendant drove Decedent there, filled out the deed in his handwriting, then had the Decedent sign it before a notary back in Longview.

The court relied upon *In re Reddaway's Estate,* 214 Or 410 (1958), to determine what is required to support a finding of undue influence. The court pointed out that, although the claiming party bears the burden of proving the existence of undue influence, "an inference of undue influence arises when, in addition to a confidential relationship, there are suspicious circumstances." *In re Reddaway's Estate,* 214 Or at 420. Such an inference does not shift the burden of proof, but may, alone, be sufficient for a court to find undue influence if the inference is unexplained.

Here, the court found that a number of the types of suspicious circumstances outlined in the *Reddaway* decision were present in this case, including, among other factors, (1) Defendant's direct participation in the disputed transaction, (2) Defendant's false statements to Decedent about the loss of her home, (3) Decedent's lack of independent advice in the transaction, and (4) Defendant's efforts to shield Decedent from her other children. As a result, the court concluded that Defendant was in a confidential relationship with Decedent, that suspicious circumstances surrounded the disputed transaction, and that the inference of undue influence was not explained. The court affirmed the lower court and held that there *was* sufficient evidence to support the lower court's findings.

Van Marter v. Van Marter, 130 Or App 500 (1994)

This is the first Oregon appellate case reviewing a summary judgment in an undue influence case. The trial court had granted Defendant's motion for summary judgment in an action by Plaintiffs to set aside Decedent's will on the basis of undue influence. Plaintiffs appealed. The court pointed out that, in a motion for summary judgment, the moving party must show that there are no material issues of fact and that he or she is entitled to judgment as a matter of

law. All inferences must be drawn in favor of the party opposing the motion.

The court stated,

> "In the abstract, ORCP 47 does not preclude summary judgment in a claim for undue influence. In reality, such cases may, indeed, be virtually nonexistent. Each case of undue influence must be decided on its own peculiar facts which, in turn, may reasonably support varying, often conflicting, inferences. *Cline v. Larson*, 234 Or 384, 410 (1963); *see Knutsen v. Krippendorf*, 124 Or App 299 (1993), *rev den*, 318 Or 381 (1994)."

Van Marter v. Van Marter, 130 Or App at 503.

The opinion discusses at length the nature of the "confidential relationship" element in undue influence cases and enumerates the types of "suspicious circumstances" that must be present before undue influence can be inferred. *See In re Reddaway's Estate*, 214 Or 410, 420 (1958). The court pointed out that not *all* of the suspicious circumstances need be present to infer undue influence, but that the most important factor is the beneficiary's participation in the preparation and execution of the will. *Roblin v. Shantz, Executrix*, 210 Or 371, 378 (1957); *Knutsen v. Krippendorf*, 124 Or App at 309.

In this case, certain elements of fact were missing from the evidence offered by Plaintiffs. Despite these missing elements, the court reversed the lower court, and found that material issues of fact remained with respect to some suspicious circumstances and as to whether Defendant was in a position of domination or superiority over Decedent.

Steven W. Moulton

1995 Legislative Update

The Estate Planning and Administration Section sponsored two bills this legislative session. Senate Bill 72 would repeal ORS 112.017. That statute, which was enacted in 1993, created a new category of "spouse" for purposes of intestate succession. It appears that outright repeal may not be feasible because of opposition to repeal. There seems to be general agreement that, if outright repeal is not feasible, technical problems need to be corrected. Corrective legislation has been drafted.

The other Section-sponsored bill is Senate Bill 73, which allows a trustee to present a certification of trust in lieu of providing a copy of the trust agreement to third parties. The bill specifies the contents and effect of the certification. The purpose of the legislation is to provide uniformity in presenting trust information. The Oregon Bankers Association submitted similar legislation under Senate Bill 268. The Section is working with the OBA, joins with it in seeking enactment of Senate Bill 268, and will not seek enactment of Senate Bill 73. Senate Bill 268 has been passed by the Senate.

Other legislation of interest to the Section includes Senate Bills 61, 89, 90 and 92, all pertaining to guardianships and conservatorships. Senate Bill 61 completely rewrites ORS Chapter 126, the guardianship and conservatorship statutes. The Section supports this bill. Senate Bill 89 requires appointment of an attorney for a respondent in certain protective proceedings if the respondent is indigent and objects to the protective proceeding. Senate Bill 90 is similar, and requires the appointment of an attorney if the person nominated as guardian intends to place the respondent in an in-patient facility for purposes of psychiatric or psychological treatment. Senate Bills 89 and 90 have financial impacts, and it appears there will be no action taken on those bills. The Section took no position on those bills. Senate Bill 92 contains several provisions that were deemed too controversial to include in Senate Bill 61. It is unlikely the bill will pass as drafted. The Executive Committee of the Section voted to oppose Senate Bill 92.

Senate Bill 86 amends ORS 293.490 to increase the amount of money that a state agency may pay directly to survivors of decedents from $1,000 to $10,000. It also allows payment to the trustee of a revocable inter vivos trust under certain circumstances. Senate Bill 86 has been passed by the Senate.

Senate Bill 324 increases the limits allowed under the filing of a small estates affidavit to a total of $115,000, if not more than $25,000 of fair market value is attributable to personal property, and not more than $90,000 of fair market value is attributable to real property. Senate Bill 324 has been passed by the Senate.

House Bill 2197 eliminates the requirement that the department of Revenue provide income tax releases to probated estates. It was submitted by DOR. DOR advises it is a "workload issue." DOR apparently does not have the staffing available to timely respond to applications for income tax releases. House Bill 2197 has been passed by the House.

House Bill 2524 allows a decedent to direct the disposition of the decedent's remains. It also expands the list of persons authorized to direct disposition of a decedent's remains and authorizes delegation of authority. Current statutes allow survivors to make the decision regarding disposition of the decedent's remains. The existing statutes are in conflict as to the priority of persons entitled to make those decisions.

House Bill 2650 establishes standards and guidelines for trustees in investing and managing trust assets. It repeals the present "prudent person" rule and directs the trustee to act as a "prudent investor." The prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. The investment provisions will also apply to custodians under the Uniform Transfers to Minors Act and to short-term investment of funds by personal representatives of decedents' estates.

Ron D. Bailey

From the Bench

Restricting Assets

The use of restrictions on a fiduciary's access to assets has become a relatively common way to reduce the amount of bond ordered by the court in probate. UTCR 9.080 requires a written acknowledgment from the depository that the funds are restricted. In addition, the Rule states,

"prompt procurement of the writing is the responsibility of the *attorney* for the fiduciary." (Emphasis added.)

Real property can be effectively restricted by language which indicates that "real property cannot be sold or encumbered without prior court order." Note that when real property is restricted, the court may require proof that the restrictions have been recorded, if the real property is located in some other county or state.

Restricting personal property can present the attorney with problems. Some financial institutions refuse to acknowledge an order restricting an account. In effect, the institution is indicating that they cannot guarantee that funds will be restricted in the account.

Restrictions on an account should generally be utilized when funds are not needed for the ongoing support of the ward or administration of the case. Repeatedly requesting access to funds in a restricted account can be costly and time consuming to the estate.

When deciding whether to restrict a specific asset, it is advisable to consider the role that the asset will play in the overall administration of the estate. In the long run, it may be easier, safer, and more cost effective to bond the fiduciary at the outset.

Rita Cobb
Circuit Court Judge, pro tem
Washington County

Portland To Develop Rules Regarding Estates and Trusts

In August 1994, the City of Portland and Multnomah County issued proposed administrative rules affecting trusts and estates. Specifically, the rules proposed that the City and County business license tax be applied to trusts and estates. In some instances, the proposed rules would have provided that all of the income of trusts, including interest and dividends, would be subject to the City and County business license taxes.

Legal, accounting, and trust professionals objected to the rules as overly broad, and the rules were withdrawn prior to hearing. The City of Portland Bureau of Licenses has formed an advisory committee to review the issues raised by the now-withdrawn proposed rules, and to develop new rules.

Revised proposed rules will not be issued until after the current filing season. Until new rules or policies are adopted, the Bureau advises practitioners to prepare returns consistent with past practices. It also advises that any rules adopted may be applied retroactively to the 1993 or 1994 taxable years, or both, which could require amended returns. Questions should be directed to the City of Portland Bureau of Licenses at 823-5157.

New! Administering Trusts in Oregon

This new, one-volume book includes all you'll need to know on administering a trust in Oregon. Chapters include Succession and Resignation of the Trustee, Tax Aspects, Trust Investments, Creditors' Rights, Administering Charitable Trusts, Special Needs Trusts, Litigation Issues, and Ethics Issues. The book will be available at the June 30 seminar. Watch your mail for the OSB CLE calendar and for the brochure advertising the book and the June 30 program.

Editor Position Open

The current editor-in-chief of this newsletter, Jennifer Todd, has announced her resignation from the post, effective July 31. The editorial board is accepting applications for the position from lawyers with good writing skills and some experience in the area of estate planning and administration.

The position involves arranging for authors, coordinating publication, and editing for style and form. The time requirement is approximately 25 to 35 hours for each quarterly issue. Salary depends on experience.

Those interested should send a resume to Shannon Connelly, Foster Pepper & Shefelman, 15th Floor, One Main Place, 101 SW Main St., Portland 97204.

Do You Write Living Trusts?

The Professional Liability Fund is sponsoring a free seminar entitled *Malpractice Traps for Lawyers Handling Living Trusts for Estates Under $600,000.* This seminar will be presented live on April 27, 1995 at the Oregon Convention Center. In addition, video replays will take place in Eugene (May 12, 1995), Ontario (June 23, 1995), Pendleton (June 14, 1995), and Redmond (August 10, 1995).

The morning portion of the seminar will cover malpractice traps in planning and administering the trust including: Suitability of client, tailoring the trust to the client's needs, selection of a trustee, trust administration and management, duties of a successor trustee, and defining responsibility clearly between lawyer, trustee, accountant and financial planner. The afternoon session will cover segments on hidden tax issues including: Proper valuation and inclusion of assets, gifts from the trust, special problems of non-citizens, tax issues in joint living trusts, joint tax return issues, and special asset issues.

A registration flyer was mailed in mid-March. If you have any questions about registration or about the program, contact Linda D'Agostino at (503) 639-6911 or (800) 452-1639. To request an additional registration form, fax your request to (503) 684-7250.

CALENDAR OF SEMINARS AND EVENTS

- April 27, 1995 (Sponsored by the Oregon State Bar Professional Liability Fund) **Malpractice for Lawyers Handling Living Trusts for Estates Under $600,000**, Oregon Convention Center, Portland, Oregon. Telephone: (503) 639-6911 or (800) 452-1639.
- April 27-28, 1995 (Sponsored by The Bank Tax Institute) **The Taxation of Financial Products**, The Manhattan Club, New York, New York. Telephone: (800) 831-8333.
- May 1-2, 1995 (Sponsored by The Bank Tax Institute) **The Taxation of Financial Products**, Hyatt Regency, San Francisco, California. Telephone: (800) 831-8333.
- May 1-2, 1995 (Sponsored by New York University, School of Continuing Education) **Trusts and Estates**, New York Hilton, New York, New York. Telephone: (212) 998-7171.
- May 12, 1995 (Sponsored by the Oregon State Bar Professional Liability Fund) **Malpractice for Lawyers Handling Living Trusts for Estates Under $600,000**, [site to be announced], Eugene, Oregon. Telephone: (503) 639-6911 or (800) 452-1639.
- May 18-19, 1995 (Sponsored by American Bar Association) **Estate Planning—What Every Estate Planner Needs to Know**, The Grand Floridian, Orlando, Florida. Telephone: (215) 243-1360.
- June 2, 1995 (Sponsored by the Oregon State Bar Professional Liability Fund) **Malpractice for Lawyers Handling Living Trusts for Estates Under $600,000**, [site to be announced], Medford, Oregon. Telephone: (503) 639-6911 or (800) 452-1639.
- June 5-6, 1995 (Sponsored by New York University, School of Continuing Education) **Trusts and Estates**, Nikko Hotel, San Francisco, California. Telephone: (212) 998-7171.
- June 14, 1995 (Sponsored by the Oregon State Bar Professional Liability Fund) **Malpractice for Lawyers Handling Living Trusts for Estates Under $600,000**, [site to be announced], Pendleton, Oregon. Telephone: (503) 639-6911 or (800) 452-1639.
- June 23, 1995 (Sponsored by the Oregon State Bar Professional Liability Fund) **Malpractice for Lawyers Handling Living Trusts for Estates Under $600,000**, [site to be announced], Ontario, Oregon. Telephone: (503) 639-6911 or (800) 452-1639.
- June 30, 1995 (Sponsored by the Oregon State Bar Continuing Legal Education) **Administering Trusts in Oregon**, Oregon Convention Center, Portland, Oregon. Telephone: 620-0222 or (800) 452-8260 ext. 326.
- July 17-21, 1995 (Sponsored by New York University, School of Continuing Education) **Partnerships and Other Pass-Through Entities**, New York, New York. Telephone: (212) 998-7171.
- July 17-21, 1995 (Sponsored by New York University, School of Continuing Education) **Introduction to Taxation**, New York, New York. Telephone: (212) 998-7171.
- July 20-22, 1995 (Co-sponsored by American Bar Association and ALI-ABA) **Estate Planning for the Family Business Owner**, Copley Plaza, Boston, Massachusetts. Telephone: (215) 243-1360.
- July 24-28, 1995 (Sponsored by New York University, School of Continuing Education) **Introduction to Trusts and Estates**, New York, New York. Telephone: (212) 998-7171.
- August 10, 1995 (Sponsored by the Oregon State Bar Professional Liability Fund) **Malpractice for Lawyers Handling Living Trusts for Estates Under $600,000**, [site to be announced] Redmond, Oregon. Telephone: (5(639-6911 or (800) 452-1639.
- October 26-27, 1995 (Sponsored by Washington State Bar, Seattle Estate Planning Council) **40th Annual Estate Planning Seminar**, Seattle, Washington. Telephone (206) 727-8200.

Questions, Comments or Suggestions About This Newsletter?
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Oregon Estate Planning and
Administration Section Newsletter

Jennifer B. Todd
Editor-in-Chief

newsletter

Oregon Estate Planning and Administration Section Newsletter

Volume XII, No. 3
July 1995

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

Selecting the Right Fiduciary

1. Introduction.

Selecting the trustee or other fiduciary is probably the least of concerns facing a person in the estate planning process. In most instances, such issues as marital deduction formulas, ages for distribution, and discretionary distribution standards occupy the thoughts of both the estate planning lawyer and client.

Most revocable trust provisions call for the trust creator ("trustor") to be the initial trustee or co-trustee. The logic of this approach is that the trustor generally desires to continue managing his or her assets while capable to do so. If the trustor wants professional asset management for a part of the assets comprising the trust, collateral agreements are easily drafted to confer upon a corporate trustee or other investment advisor specific responsibilities with respect to trust assets. For example, the trustor, as trustee, can enter into an investment agency relationship with a corporate fiduciary or other investment advisor, which agency relationship can become an asset of the trust similar to a brokerage account.

2. Family Members as Fiduciaries.

Many revocable trusts provide that, upon the death of the trustor-trustee, the successor trustee is to be the surviving spouse, and ultimately a child or children. Aside from potential tax issues (discussed later), appointing family members as fiduciaries can create problems, such as possible preferential treatment of certain beneficiaries, or potential conflicts of interest. These issues may arise in second or multiple marriage situations in which relationships between the surviving spouse and issue of previous marriages are not harmonious. Conflict between step-siblings may be exacerbated if not all of the children are selected to wind up or continue the trust after the death of one or both parents and the other remainder beneficiaries.

3. Potential Liability of the Fiduciary.

Another non-tax consideration in selecting a fiduciary involves potential liability of fiduciaries to beneficiaries of trusts and estates and to third parties.

a. Torts.

Under common law, trustees are personally liable for torts committed during trust administration to the same extent as if acting on their own behalf. The

In This Issue

fact that a trustee acts as fiduciary does not provide any defense against third parties. See, e.g., *Restatement (Second) of Trusts* § 264 (1959).

Practical solutions exist in most of the states that have adopted the Uniform Probate Code or substantially similar provisions. Oregon statutes define the personal liability of the fiduciary as that of an agent for a disclosed principal. ORS 114.405 (personal representatives), ORS 128.102 (trustees). This relationship protects the fiduciary from personal liability unless there is personal fault. Although the statutes give fiduciaries some personal protection, fiduciaries may have to defend themselves from lawsuits for unfortunate events that may have occurred on their watch.

b. Taxes.

Despite the provisions of ORS 114.405 and ORS 128.102, fiduciary can become personally liable without fault in at least two situations. A fiduciary who pays subordinate debt due from the person or estate for whom the fiduciary acts before paying taxes due to the United States is personally liable for those taxes. 31 USC § 3713. Similarly, if the fiduciary distributes assets from a trust or estate before paying taxes due, the Internal Revenue Service will look to the fiduciary personally for the payment of those taxes. Rev Rul 79-310. The discharge of the fiduciary from his or her office by a local probate court does not relieve the fiduciary from individual liability. *New, Leroy v. Comm.*, 48 TC 671 (1967). *See also* IRC § 7701(a)(6).

c. Hazardous Substances.

A more alarming source of potential personal liability for a fiduciary arises from the strict liability provisions of the Comprehensive Environmental Response and Liability Act of 1980 ("CERCLA"), 42 USC § 9601 et seq. If a fiduciary has the responsibility to continue a business interest held in a trust or estate or to actively manage a piece of property contaminated by a "hazardous substance" (as defined in CERCLA), the fiduciary runs the risk of personal liability. This exposure occurs even though the fiduciary did nothing to create or exacerbate the problem.

Despite informal comments by the EPA that fiduciaries ought to have defenses similar to lenders regarding CERCLA's strict liability provisions, the EPA has not issued rules addressing those concerns. Oregon has similar environmental protection laws that impose strict liability for remedial action costs. ORS 465.255(1). Unlike the EPA, however, Oregon's Department of Environmental Quality, which has the responsibility for promulgating enforcement rules, limits fiduciary liability in certain cases. OAR 340-122-117. The issue of environmental liability has caused great concern for professional fiduciaries, many of whom are reluctant to accept fiduciary accounts containing real property without exhaustive (and often expensive) review and "due diligence." *See* Thede, *Inventory and Managing Estate Assets* in *Administering Oregon Estates* (Or St Bar CLE 1991).

d. Improper Delegation of Responsibility.

A major concern in selecting an individual fiduciary who is inexperienced in managing and administering fiduciary accounts is the personal liability that can result by the improper delegation of responsibility to others. Unless the trust instrument provides otherwise, a trustee must not transfer the office of trustee to another, or delegate the entire administration of the trust to a co-trustee or another. ORS 128.015. This limitation does not mean, however, that the fiduciary must personally perform all of the functions of the office. See, for example, *Restatement (Third) of Trusts* section 171 (1990) regarding delegation.

The facts of *Shriners Hospitals v. Gardiner,* 733 P2d 1110 (Ariz 1987) illustrate inappropriate delegation by a trustee. In this lead case, a trustee delegated to her son the investment responsibility for the trust. The trustor had also named the trustee's son as successor trustee. The fact that she was inexperienced in investment matters and that the son was a registered investment counselor was not an adequate defense; the trustee was held ultimately responsible for loss to the trust. Accordingly, if investment management is a primary function of the trust, the trustor should consider selecting a corporate fiduciary as the primary or co-fiduciary, particularly if the family member or other person being considered is inexperienced.

4. Conflicts of Interest.

Conflict-of-interest concerns should be addressed when considering the use of any fiduciary. For example, if a client is contemplating using "ABC Bank & Trust Company" as the trustee in an estate plan, the client and lawyer should consider any credit relationship that exists between the commercial side of the bank and a business or other asset owned by the client. Often the fiduciary obligations of the bank as trustee conflict with the regulatory or policy requirements of the bank as a lender. The lawyer should raise such issues and draft appropriate language to address potential problems. The client should consider selecting an alternate fiduciary, or a co-fiduciary empowered to manage the business or other problem asset. Similar conflict-of-interest issues

arise when a business partner or co-owner of a trust or estate asset is selected as a fiduciary.

5. Corporate Trustees.

People who oppose the use of professional or corporate trustees often cite concerns such as mediocre investment performance or high turnover in management and personnel. The performance mediocrity myth has been significantly dispelled over the last 10 to 20 years. Compared with many mutual funds and investment advisors, bank trust departments have compiled good, if not excellent, performance records. SEC regulations prohibit banks and trust companies from publishing comparative performance data with mutual funds. They may, however, provide comparisons against standard indexes, such as Standard & Poors, and so on. While there may be some truth to the observation that trust departments of banks and trust companies experience high turnover of personnel, it is important to remember that the trustor is appointing the institution (not an individual within it) to act as fiduciary.

The ability of beneficiaries or a successor fiduciary to collect when things go wrong is an important advantage to a corporate trustee. A major disadvantage in using a family member, friend, or business associate as a fiduciary (particularly where a bond is not required) is that the individual may have insufficient resources to make the trust whole or to compensate the trust for wrongdoing, errors, or omissions by the fiduciary. Banks and trust companies not only have sufficient resources for such purposes, they also have permanence. In addition, institutions do not die or become legally incapacitated.

6. Tax Considerations.

Tax considerations also play a role in the selection of a fiduciary. If the trustee's distribution powers are fairly narrowly defined, a surviving spouse or other beneficiary can be trustee of a trust established for his or her benefit and avoid estate taxation upon his or her subsequent death. To avoid being treated as possessing a general power of appointment, the trustee-beneficiary may not have the power to distribute funds to himself or herself or to discharge a legal obligation to support another except under an "ascertainable standard" (i.e., health, education, maintenance, and support). Treas Reg 20.2041-1(c)(1)(ii). This is particularly important if an underlying objective of the trust is to provide for distribution to a number of possible beneficiaries based on need. Such intent is usually expressed by using "spinkling" distribution provisions in the trust. If a trustee-beneficiary has a legal obligation to support another beneficiary (e.g. his or her child or children) and this support obligation may be satisfied by a distribution from the trust in the trustee's discretion, the power of the trustee-beneficiary to make the distribution decision, even if measured by an ascertainable standard, is a general power of appointment, and as such will bring the trust into the trustee-beneficiary's estate for tax purposes. *Id.*

If a bequest to a non-U.S. citizen surviving spouse is to qualify for the marital deduction, the bequest must be transferred or assigned to a Qualified Domestic Trust ("QDOT") under the requirements of Internal Revenue Code section 2056A(a). Under that section, a QDOT trust must require (among other things) that (1) at least one trustee be a citizen of the United States or a domestic corporation and (2) no distribution, other than income, can be made unless the U.S. trustee has the right to withhold from the distribution the tax imposed upon distribution by IRC section 2056A.

7. One Solution: Powers to Remove.

One solution to the uncertainty, advantages, and disadvantages of selecting one fiduciary over another for a trust that may be in existence for an extended period is to give a beneficiary or other person the power to replace trustees. Even this solution must be used cautiously.

As discussed above, in a tax-advantaged trust in which the beneficiary has unlimited discretion as trustee to appoint trust income and corpus to himself or herself the trust will be pulled into the beneficiary's estate for transfer tax purposes. Treas Reg 20.2038-1(a)(3). In Revenue Ruling 79-353, the IRS created additional estate inclusion problems by taking the position that a trustor who could remove an independent trustee and replace it with another trustee held the same powers as the independent trustee; accordingly, the trustor was treated as having a discretionary power to allocate income and principal among trust beneficiaries without an ascertainable standard—equivalent to a general power of appointment requiring inclusion in the trustor's estate. After a long and arduous struggle, the taxpayer won a victory in a recent Tax Court case, *Estate of Wall,* 101 TC No. 21 (1993). The *Wall* case rejects the position of the IRS that a power to remove a trustee and replace it with an independent trustee confers upon the power-holder all powers held by the removed trustee. It is unclear whether the IRS will seek to try this issue again elsewhere; however, *Wall* sets strong precedent in favor of the taxpayer on this issue.

Regardless of future challenges to *Wall*, if a removal power is granted to a trustor or beneficiary, a good practice would be to limit trustee distribution powers to an ascertainable standard, and to prevent an individual trustee from using any funds to support a dependent or

relieve any other legal obligation. For an excellent discussion of Rev Rul 79-353 and *Wall*, see Berrall, *TC Okays Grantor's Power to Replace Independent Trustee*, 21 Est Plan 67 (Mar/Apr 1994).

8. Conclusion

Fiduciary selection should be considered cautiously. Lawyers should discuss with their clients the inherent hazards in appointing family members or friends, including potential personal liability, conflicts of interest, and tax complications. Careful drafting and including a provision granting a person power to remove the fiduciary can address some of the pitfalls. In some situations, a corporate or professional trustee may be the best choice.

James A. Perry

Minimum Capacity To Consent or Act: What's the Standard?

1. Introduction.

A client's legal competency to perform a particular act is a threshold question that must be one of the lawyer's first considerations. Lawyers who work in the growing fields of elder law and estate planning frequently face the question whether a client has capacity to make legal choices. The lawyer should understand the standards for the capacity required to perform certain legal acts and what steps can be taken to maximize a client's independence.

This article addresses three areas:

1. Determining a person's capacity to perform enforceable legal acts;

2. Capacity issues in informed consent to health care decisions; and

3. The lawyer's role in assessing capacity and promoting client autonomy.

The question of a client's capacity may arise in a variety of contexts. An understanding of the legal requirements for capacity is crucial for a lawyer to effectively represent elderly clients.

2. Determining Capacity for Performing Legal Acts.

The attorney must personally form an opinion about the client's capacity, separate from a clinical diagnosis or statements from family members about the client's mental capacity. This determination should be based on personal observations as well as contacts with friends, family, and clinical examinations by other professionals, if appropriate. Mezzullo & Woolpert, *Advising the Elderly Client* § 3.9 (1992 & Supp 1994).

To start with, a lawyer should presume that the elder client has the necessary mental competency to make legal choices. *See* ORS 126.098; *First Christian Church v. McReynolds*, 194 Or 68, 73-74 (1952). The lawyer must avoid the temptation to simply ask whether the client is competent. Such a question overlooks the complexity of the competency issue. For example, a clinical diagnosis of Alzheimer's disease or other form of dementia-causing condition suggests diminished capacity, but a lawyer should not assume that a person is not competent to participate in or consent to a transaction because of that diagnosis. Capacity is a flexible concept. The lawyer must view competency in terms of the client's ability to perform a specific task. A person may be competent for certain tasks, but lack capacity for others. *Draft Restatement (Third) of the Law Governing Lawyers* § 35 cmt c (1992).

Whether a person has the capacity to perform a particular act is examined as of the time of the act.[1] Even if several signs point to mental incompetence, it is possible for a person to have "lucid intervals" during which he or she has requisite capacity to enter into a contract or make a testamentary disposition of property. *Uribe v. Olson*, 42 Or App 647, 651 (1979); *Gentry v. Briggs*, 32 Or App 45, 50 (1978).[2] However, clear and convincing proof is required to show that a legal act is performed during a lucid interval. *Gentry v. Briggs*, 32 Or App at 50. If a client has questionable capacity, the lawyer should consider suggesting a geriatric evaluation to assess the client's competence and to establish that the client possessed the requisite capacity to consent or perform an act at that time.[3]

a. Contracts, Deeds, Lifetime Gifts, and Trusts.

A person can enter into a valid contract if the person's reasoning ability enables the person to understand the nature and effect of the act. *Kruse v. Coos Head Timber Co.*, 248 Or 294, 306 (1967). Lack of capacity is not proved simply because a person is easily influenced and is a dependent person or because the person states that he or she does not understand a contract. *Id.* A person of below average intelligence can enter into a binding legal contract. The relevant question is whether the person is capable of understanding the act. *Id.* Conveying an inter vivos gift requires the same degree of capacity as making a contract. *Kugel v. Pletz*, 22 Or App 249, 251 (1975).

A person must possess greater competency to execute a deed than to execute a will. *First Christian Church v. McReynolds*, 194 Or at 72. The grantor must have the ability to understand the nature and effect of the act and the business the grantor is transacting. *Id.* The higher competency level is required for two reasons: (1) a deed is irrevocable and a will is not and (2) the grantor must deal with another party to the transaction, unlike a testator executing a will. *Ryan v. Colombo*, 77 Or App 71, 76 (1985). The same is true with respect to bank accounts when a person conveys a joint or survivorship interest, or both. *Bigej v. Boyer*, 108 Or App 663, 671 (1991).

ORS Chapter 128, which deals with powers and duties of trustees and rights of beneficiaries, is silent regarding the requisite legal capacity to create a trust. The common law requires as a prerequisite to the establishment of a trust that a person have the legal capacity to execute the conveyance or the contract. Bogert, *Trusts and Trustees* § 44 at 447 (Rev 2d ed 1984 & Supp 1994). A trust will be invalidated if a person does not, in a reasonable manner, understand the nature and effect of the act of executing the trust. 89 CJS *Trusts* § 73 at 864-65 (1955 & Supp 1994). But a person's inability to entirely understand a long and complicated trust does not invalidate the trust, so long as the person has the mental ability to understand the transaction in which he or she is engaged. *Id.*

b. Testamentary Capacity.

At the time of signing, a person with capacity to make a valid will must:

1. Be able to understand the nature of the act;
2. Know the nature and extent of the person's property;
3. Know, without prompting, the claims of people who are or might be the natural objects of the person's bounty; and
4. Be aware of the scope and reach of the provisions of the document.

Kastner v. Husband, 231 Or 133, 135-36 (1962). The same degree of mental capacity is necessary to revoke a will as to execute one. *In re Dougan's Estate*, 152 Or 235, 253 (1936).

Whether the client understands the nature of the act of making a will is the easiest legal element to satisfy. The lawyer must simply inquire whether the client understands the purpose of the will. Whether the client understands the nature and extent of his or her property is more problematic. The lawyer's determination of capacity may depend on the nature and complexity of the client's assets. Many courts have held that the degree of mental acumen required of a testator varies based on the size of the estate or type of assets involved. *See* 21 Est Plan 323, 324-26 (1994).

The following facts each alone are not enough to prove that a person lacks testamentary capacity:

- The testamentary disposition appears to be arbitrary, capricious, or eccentric. *In re Estate of Hill*, 198 Or 307, 332 (1953).
- The testator is filthy, forgetful, miserly, or in extreme distress. *Trombly v. McKenney,* 191 Or 90, 106-07 (1951).
- The testator has difficulty talking or may otherwise be physically debilitated. *Mowrey v. Jarvy*, 228 Or 96, 104 (1961).
- The testator suffers from old age, debility and sickness. *McGreal v. Culhane*, 172 Or 337, 343 (1943).

c. Powers of Attorney.

A power of attorney is a written creation of an agency relationship. *Scott v. Hall*, 177 Or 403 (1945). An attorney-in-fact has those powers that are expressly given and those that are necessary, essential, and proper to carry out the expressly given powers. *United States Nat'l Bank v. Herron*, 73 Or 391, 399 (1914).

No Oregon cases have yet ruled on the issue of a person's capacity to appoint an attorney-in-fact. There is a split of authority in other jurisdictions concerning the capacity required to delegate authority to another person through a power of attorney or otherwise. The *Restatement (Second) of Agency* adopts the position that the delegation of authority is valid if a grantor has the capacity to do the act which he or she has delegated. § 20 cmt c (1994). This apparently recognizes that the degree of capacity required may vary with the complexity of the delegable act and essentially equates the capacity to grant a power of attorney with capacity to contract. *Golleher v. Horton*, 715 P2d 1225, 1228 (Ariz App 1985).

Some courts have applied this principle in evaluating the validity of a power of attorney. S*ee Beaucar v. Bristol Fed. Sav. & Loan Ass'n*, 268 A2d 679, 687 (Conn 1969); *In re Dean*, 74 A2d 538, 541 (Pa 1950). This is a cumbersome test. It requires the determination of whether the grantor of the power met different competency tests to perform the various transactions authorized by the general power of attorney, from a simple sale of an item of personal property to conducting an intricate business transaction.

Courts in other jurisdictions have created a better test: is the grantor capable of understanding, in a reason-

able manner, the nature and effect of his or her act? *See Golleher v. Horton,* 715 P2d at 1228; *Roybal v. Morris,* 669 P2d 1000, 1104 (NM App 1983); *Umsheid v. Simnacher,* 482 NYS2d 295, 298 (2 Dept 1984); *Tomlinson v. Jones,* 677 SW2d 490, 492 (Tex 1984). This position focuses on the grantor's ability to understand the general nature of the document executed rather than the grantor's competency to perform the acts included in the power of attorney. *Golleher v. Horton,* 715 P2d at 1228.

Although no Oregon cases address the capacity required to create a valid power of attorney, Oregon courts might follow the reasoning in *Golleher,* which interpreted a statute similar to ORS 127.005. The Oregon Legislature has expressly authorized the use of durable powers of attorney, which by their own terms survive the disability of the principal. ORS 127.005(1) and (2).

d. Capacity of Persons Subject to Guardianships and Conservatorships.

A lawyer must be cognizant of the statutes defining an "incapacitated person" and the case law interpreting these statutes when assisting a person of diminished capacity or when dealing with issues pertaining to guardianships and conservatorships. The statues and case law, when taken in their entirety, are somewhat confusing, ambiguous and contradictory. As a result, they create potential problems for the unwary lawyer and his or her client.

The term "guardian" applies only to the guardianship of the person of a minor or incapacitated person.[4] ORS 126.003(4); *Guardianships, Conservatorships, and Transfers to Minors* § 2.3. (Or St Bar CLE 1993). The term "conservator" embraces the functions of the traditional "guardian of the estate" and is defined as a person appointed to administer the estate of the protected person.[5] ORS 126.003(1).

A comparison of the statutory definitions of these terms indicates a broader basis under Oregon law for the appointment of a conservator than for the appointment of a guardian. *Guardianships, Conservatorships, and Transfers to Minors* § 2.4 (Or St Bar CLE 1993). There is no apparent requirement that a person meet the statutory definition of "incapacitated person" before being subject to the appointment of a conservator. *Id.*

A guardianship for an incapacitated person is to be used only to promote and protect the well-being of the person. It must be designed to encourage the development of maximum self-reliance and independence. ORS 126.098(1). An incapacitated person for whom a guardian has been appointed is *not* presumed to be incompetent and retains all legal and civil rights except those expressly limited by court order or expressly granted to the guardian by the court. ORS 126.098(2).

A person, under the protection of a conservatorship, if mentally competent, may make wills, change beneficiaries of life insurance and annuity policies, and exercise a power of appointment or a right to share in a deceased spouse's estate. ORS 126.223(1). However, when a guardian or conservator has been appointed because of a person's lack of mental capacity, a rebuttable presumption of a lack of testamentary capacity arises. *Wood v. Bettis,* 130 Or App 140, 143 (1994). Evidence about the mental condition of the testator before and after the execution of a will is admissible to determine mental state at the time of execution of the will. *Id.* A lawyer assisting a client under the protection of a guardianship or conservatorship should carefully document facts that show the client has the requisite capacity.

A conservator may permit the protected person to possess and control property and funds for living requirements as appropriate to the needs and capacities of the protected person. ORS 126.293. However, a person for whom a conservator has been appointed cannot convey or encumber the person's estate or make any contract or election affecting the person's estate, other than as provided in ORS 126.223(2) and ORS 126.293.

3. Capacity to Consent to or Refuse Medical Treatment.

The term "consent" is used extensively in most discussions of health care law, but is not expressly defined in Oregon in the health care context. Generally, "consent" means voluntary agreement by a person with sufficient mentality to make an intelligent choice to do something proposed by another. *Oregon Health Law Manual* § 11.2 (Or St Bar & Northwestern School of Law 1992); *see generally* Rozovsky, *Consent to Treatment: A Practical Guide* (2d ed 1990 & Supp 1994.)

In Oregon, capable adults may make their own health care decisions. ORS 127.507. ORS 127.505(13) defines "capable" in the converse, by defining "incapable." A person (principal) is incapable to make health care decisions:

> [if] in the opinion of the court in a proceeding to appoint or confirm authority of a health care representative, or in the opinion of the principal's attending physician, a principal lacks the ability to make and communicate health care decisions to health care providers, including communication through persons familiar with the principal's manner of communication if those persons are available.

ORS 127.505(13).

The right of a person to accept or refuse recommended treatment requires careful assessment when the person's decision-making capacities are questioned. One article in a medical journal suggests the legal standards for competence include four related skills: (1) the ability to communicate a choice; (2) the ability to understand relevant information; (3) the ability to appreciate the current situation and its consequences; and (4) the ability to manipulate information rationally. Appelbaum & Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 319 New Eng J Med 1635 (1988).

In 1982, a President's Commission held a similar view that a determination of a patient's capacity to decide on a course of treatment must encompass the abilities of the patient, the requirements of the task at hand, and the consequences likely to flow from the decision. The Commission concluded that decision-making capacity requires: (1) possession of a set of values and goals; (2) the ability to communicate and to understand information; and (3) the ability to reason and to deliberate about one's choices. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions* 57 (Oct 1982).

4. Ethical Considerations.

A lawyer's professional responsibility as it relates to assessing a client's capacity is a very troubling area.[6] One commentator aptly describes capacity as "the black hole of legal ethics," and observed that "[m]any questions find their way into the capacity category, but few answers emerge." Margulies, *Access, Connection and Voice: A contextual Approach to Representing Senior Citizens of Questionable Capacity*, 8 Nat'l Ass'n of Elder L Atty's Q 8 (1995).

Oregon and ABA ethical rules and guidelines provide some limited guidance for the lawyer in determining the competency of a client. Stevens, *Representing the Impaired Client*, 55 Or St Bar Bull 31 (1995); Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J Contemp L 61 (1988). The Oregon Code of Professional Responsibility provides:

> A lawyer may seek the appointment of a guardian or take other protective action which is least restrictive with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest, whether because of minority, mental disability, or for some other reason.

DR 7-101(c); *see also* Stevens, *supra.*

Under Oregon rules, to the extent practicable, a lawyer must endeavor to maintain a normal attorney-client relationship. The Ethical Oregon Lawyer (Or St Bar CLE 1991).[7] DR 7-101(c) provides an exception to the lawyer's duty to preserve client confidences and secrets. OSB Legal Ethics Op No 1991-41. A lawyer may seek the appointment of a guardian or take other protective action which is least restrictive with respect to a client when the lawyer reasonably believes that the client cannot adequately act in the client's own interest due to mental disability. *Id.*

The *Draft Restatement (Third) of the Law Governing Lawyers* (1992) proposes that when a client's ability to make adequately considered decisions in connection with the representation is impaired, the lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interest of the client. § 35(1) (1992). The draft restatement also proposes that if the lawyer reasonably believes the client to be impaired, and no guardian or conservator has been appointed, the lawyer, with respect to a question within the scope of his or her representation, should pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to exercise rational judgment on the question, even if the client expresses no wishes or gives *contrary* instructions. *Id.* § 35(2).

In making a substitute judgment on a client's behalf, the lawyer must carefully consider the client's circumstances, problems, needs, character, and values, to the extent the lawyer can determine them. *Draft Restatement (Third) of the Law Governing Lawyers* § 35 cmt d. If the client, when able to decide, had expressed views relevant to the decision in question, the lawyer should follow them, unless there is reason to believe that changed circumstances would change the client's views. *Id.*

5. The Lawyer's Role in Assessing Capacity.

The lawyer can take steps to maximize the chances of finding requisite capacity of elderly or infirm clients. One step is for the lawyer to use a functional approach to determine capacity. In this approach, the lawyer assesses capacity by observing the client's decision-making process as it relates to the substance of the act to be taken.[8] This approach contrasts with the conventional objective tests of capacity that are unrelated to the act. One commentator identifies six factors that can be applied in using the functional approach:

- The client's ability to articulate reasoning behind the decision;
- The variability of the client's state of mind;

- The client's ability to understand the consequences of the decision;
- The irreversibility of the decision;
- The substantive fairness of the transaction;
- Consistency of the act or transaction with the client's lifetime commitments.

Margulies, *supra* at 9.

Examples of other ways to empower the elderly client are:

- Meet privately with the client, possibly after an introduction by a family member or trusted friend if that person set up the initial meeting.
- Create a relaxing and comfortable interview environment; converse about a topic that interests the client.
- Conduct the interview at the client's best time of day.
- Encourage questions.
- Reassure the client that one purpose of the meeting is for the attorney and the client to become acquainted. Remind the client that the client's decisions, and not those of a family member, will control the outcome of the meeting.
- Use indirect questions to assess capacity. Asking questions such as the identity of the President of the United States can be intimidating and put the client on the spot. Asking other equally topical questions in the course of seemingly casual conversation can be just as helpful without unsettling an already defensive or uncomfortable older client.
- Take verbatim notes.

When preparing written materials for elderly clients, the lawyer should:

- Use short words, sentences, and paragraphs.
- Use active verbs; avoid passive voice.
- Avoid technical legal terms as much as possible; where unavoidable, define terms in nontechnical language when they first appear.
- In a contract or other document, use the names of the parties. Do not use legal role names such as "trustee" or "settlor" to identify parties.
- Avoid double negatives.
- Use various type sizes and spacing, paragraphs, numbering, and bold facing or underlining to break the letter or document into easily readable sections.

Gorn, *A Guide to Representing Older Clients, cited in* 1 *Serving Elderly Clients* 5 (LRP Publications 1995).

The lawyer should be familiar with the community resources available to the elder client. If a lawyer concludes that a client may lack the capacity required to take the desired action, the lawyer should talk to the client about enlisting the help of a professional such as a social worker, gerontologist nurse, family therapist, or similar practitioner with expertise and experience with the elderly. This course of action would promote the autonomy and safety of the client. By identifying any disorders and possible treatments, the attorney can promote the achievement of the client's goals to the greatest extent possible.

6. Conclusion.

To prepare to deal with questions of client competency, a lawyer can take several steps:

- Know the legal standards governing competency and incapacity and the legal distinction between the two;
- Know the standards for appointment of a guardian or conservator;
- Consult the applicable rules of professional conduct when confronted with a questionably competent client;
- Understand the lawyer's role in assessing a questionably competent client; and
- Develop and use techniques designed to empower the elder client.

The estate planning lawyer will always be required to employ his or her traditional estate planning analytical skills. However, with the aging of America's population and the significant transfer of wealth that will occur in the near future, the lawyer will be required to acquire a completely different set of skills to deal with the elderly client on a personal level.

Michael D. Levelle

Endnotes

1. *See Uribe v. Olson*, 42 Or App 647, 651 (1979)(the test of contractual capacity is measured as of the time of execution of the contract); *Legler v. Legler*, 187 Or 273, 308 (1949)(the time of determining mental capacity of a person to execute a deed is to be measured as of the date of execution and delivery of deed); *Gentry v. Briggs*, 32 Or App 45, 49 (1978)(testamentary capacity is determined at "the precise moment" that the will is executed).
2. The Oregon Court of Appeals defined a "lucid interval" as "[a] temporary restoration of testamentary capacity." *Gentry v. Briggs*, 32 Or App 45, 50 n 1 (1978).
3. Consulting a mental health professional gives rise to other issues the lawyer should consider and address. For example, a client must have capacity to consent to such an evaluation, or any treatment recommended if the client is determined to lack capacity. For an in

depth analysis of this issue, see Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J Contemp L 61 (1988); Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 Utah L Rev 515 (1987).

4. "Incapacitated person" is defined as a person whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety or to mange the person's financial resources. ORS 126.003(5). "Meeting the essential requirements for physical health and safety" is defined as those actions necessary to provide the health care, food, shelter, clothing, personal hygiene, and other care for one's self without which serious physical injury or illness is likely to occur. *Id.* "Manage financial resources" is defined as those actions necessary to obtain, administrator, and dispose of real and personal property, intangible property, business property, benefits and income. *Id.* These definitions basically remain unchanged by SB 61, a rewrite of current chapter 126 of the ORS that was recently enacted by the Oregon Legislature and which becomes effective January 1, 1996.
5. Oregon law provides for the appointment of a conservator under ORS 126.157(2). This statute provides that a conservator may be appointed for a person who is unable to manage his or her property and affairs effectively for reasons including, but not limited to, mental illness, mental deficiency, physical illness or disability, age, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power, or disappearance; and secondly: (1) the person has property which will be wasted or dissipated unless proper management is provided; or (2) funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and protection is necessary or desirable to obtain or provide funds. ORS 126.157(2). The basis for appointment of a conservator basically remain unchanged by SB 61, a rewrite of current chapter 126 of the ORS that was recently enacted by the Oregon Legislature and which becomes effective January 1, 1996.
6. For an in-depth discussion see Margulies, *Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 8 Nat'l Ass'n of Elder L Atty's Q (1995). A version of this article also appears at 62 Fordham L Rev 1073 (1994).
7. *The Ethical Oregon Lawyer* cites Hazard, Jr. & Hodes, 1 *The Law of Lawyering* 437-51 (2d ed 1990) as providing a good analysis of the appropriate frame of reference for the lawyer dealing with a disabled client.
8. An in-depth discussion of this model is beyond the scope of this article. For an extensive discussion, see Margulies, *supra* n6.

What's New

Amundson v. Brookshire, 133 Or App 450 (1995)

In this case, the Court of Appeals found that an order removing a personal representative is appealable.

Joy Brookshire filed a petition to admit to probate the estate of James Amundson and, based on her status as surviving spouse, to be appointed as personal representative. Five days later she was appointed personal representative.

A short time later, Steven Amundson filed a petition to remove Brookshire on the grounds that she did not qualify as a surviving spouse under ORS 112.017(2). The probate court allowed the petition and entered an order removing Brookshire. Brookshire appealed.

Amundson filed a motion to dismiss the appeal on the grounds that the order removing the personal representative is not appealable. The Court of Appeals denied the motion, finding that the order was appealable. In support of this decision, the Court cited ORS 19.010(2), which provides, in part:

"For the purpose of being reviewed on appeal the following shall be deemed a judgment or decree:

"(a) An order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein."

The Court found that a motion to remove and replace a personal representative affects the substantial rights of both the person serving as personal representative and the person who seeks to have the personal representative replaced. The Court observed that whether the motion is granted or denied, the person who loses the motion is thereafter excluded as a party, at least in his or her capacity as personal representative. Therefore, an order removing a personal representative in effect determines the proceeding as to that person and prevents entry of a judgment or decree as to that person in his or her capacity as personal representative.

Timothy R. Strader

Questions, Comments or Suggestions About This Newsletter?

Contact: Susan Gary • University of Oregon School of Law • Eugene, OR 97403 • (503) 346-3856

Legislative Update

One of the shortest legislative sessions in recent Oregon history passed some significant bills in the areas of estate planning, trusts, and probate. The new legislation will be discussed in depth at the Estate Planning and Administration Section CLE at the 1995 Oregon State Bar Annual Meeting at Seaside. Unless stated otherwise, all legislation becomes effective September 9, 1995.

Guardianship and Conservatorship Law. SB 61 completely revises the sections of ORS chapter 126 pertaining to guardianship and conservatorship law. The revisions were produced by a task force that worked on the legislation for two years. The effective date of the Act is January 1, 1996. The Estate Planning and Administration Section will be presenting a seminar on the changes brought about by the Act.

Revisions of "Common Law Marriage for Intestacy" Statute. ORS 112.017 (enacted in 1993) created a new category of "spouse" for purposes of intestate succession. The statute was amended in 1995 by SB 72 to apply only to a decedent and a person who:

1. Although not married, were capable of entering into a valid contract of marriage and cohabitated for a period of at least 10 years before the death of the decedent; and

2. During the 10-year period mutually assumed marital rights, duties, and obligations; and

3. Held themselves out as husband and wife and acquired a uniform and general reputation as husband and wife; and

4. During at least the last two years of the 10-year period were domiciled in Oregon; and

5. Were not legally married to another person at the time of decedent's death.

The amendments to ORS 112.017 apply to decedents who die after September 9, 1995.

Increase in Small Estates Limit. SB 324 increases the limits allowed for filing a small estates affidavit to a total of $140,000, if not more than $50,000 of fair market value is attributable to personal property and not more than $90,000 of fair market value is attributable to real property. The increased limits apply to estates of decedents who die after September 9, 1995, and to estates of decedents who died before that date if no petition for appointment of a personal representative was filed before September 9, 1995.

Elimination of Requirement to Provide Income Tax Releases for Probated Estates. HB 2197 eliminates the requirement that the Department of Revenue provide income tax clearances in probated estates before distribution of the estate may be authorized by the court. It also eliminates the requirement that a copy of a small estates affidavit be mailed or delivered to the Department of Revenue. In probated estates it requires that the final account include a statement "that all required tax returns have been filed." The Act permits personal representatives to apply for a discharge from personal liability for tax on the decedent's income. The Act applies to estates for which a release has not been requested as of September 9, 1995.

Certificate of Trusts. SB 268 creates a form for certification of trusts. Its purpose is to provide uniformity in providing information about the trust to third parties without disclosing the complete trust agreement or requiring the third party to examine the entire trust agreement. SB 68 should do the following:

1. Assure that third parties can safely rely on certifications, both for revocable and irrevocable trusts, and thus encourage more banks, stock brokers, title insurers, and other to accept certifications in lieu copies of the entire trust agreement.

2. Encourage uniformity among certification forms.

3. Relieve people and entities from liability for acting in reliance on certifications.

Uniform Prudent Investor Act. HB 2650 establishes rules and guidelines for trustees in investing and managing trust assets and directs trustees to act as prudent investors. It enacts in Oregon the Uniform Prudent Investor Act and replaces the so-called prudent person rule under ORS 128.057.

Increase in Authorized State Payments to Survivors of Decedents and to Trustees. SB 86 amends ORS 293.490 to increase the amount of money that a state agency may pay directly to survivors of decedents from $1,000 to $10,000. It also allows payment to the trustee of a revocable inter vivos trust created by the decedent unless the decedent's will requires distribution of the amount to a different person and is admitted to probate within six months after the decedent dies.

Creation of a New Cause of Action for Physical or Fiduciary Abuse of Elderly or Fiduciary Abuse of Elderly or Incapacitated Persons. SB 943 creates a civil cause of action for physical or fiduciary abuse of elderly or incapacitated persons. It limits availability of the action to persons who are 65 or more years of age or who are incapacitated. It allows the court to award: (1) economic damages resulting from physical or fiduciary abuse, or $500, whichever amount is greater; (2) non-economic damages; (3) reasonable attorney's fees; and

(4) reasonable attorney's fees for the services of a conservator or guardian ad litem incurred by reason of the litigation. Fiduciary abuse includes taking or withholding money or property of an elderly or incapacitated person.

The Section is now working on proposed legislation for the 1997 legislative session. Topics include:

- Application of Law of Wills to Trusts
- Uniform Probate Accounting
- "In Terrorem" Clauses
- Slayer Statute
- Uniform Multiple Persons Account Act
- Uniform Power of Attorney Act
- Apportionment of Estate Taxes

Anyone with comments or who would like to serve on any legislative committees should contact Ron D. Bailey at 232-3171 in Portland.

Ron D. Bailey

Income Cap Trust Rule Change

Oregon Medicaid rules regarding income cap trusts changed April 1, 1995, following amendments by the Senior and Disabled Services Division ("SDSD").

A client with gross monthly income over $1,374 (1995 figure) will fail to qualify for Medicaid under the income test unless an income cap trust is created. Under the prior rules, only the income exceeding $1,374 was transferred into the trust. Under the new rules, all of the client's income is transferred into the income cap trust. The income cap trust is no longer a supplemental needs trust for the benefit of the client; each month the trustee must make specific distributions from the trust.

The new rules require that the following distributions be made in the order listed: personal needs allowance, administrative costs of the trust, community spouse monthly maintenance needs allowance, medical insurance premiums, other medical costs, and reserves for certain personal liabilities, a burial plan, and home maintenance. The balance remaining after these distributions, if any, is the monthly patient liability that must be paid to SDSD or the care provider. *See* OAR 461-145-540(10)(c).

The prior rules apply to income cap trusts created before April 1, 1995, which do not have to be amended. The new trust form, however, may be more beneficial to a community spouse. Therefore, it may be advisable to amend trusts created under the old rules, if the trust allows amendments, even though amendment is not required.

SDSD has approved a form for the new income cap trust. Copies of the trust form are available from local SDSD offices or from Penny Davis, (503)224-4094, Multnomah County Legal Aid, 700 SW Taylor, Suite 300, Portland, OR 97205. Penny Davis will also send a copy of the form on disk to anyone who sends her a 5.25 inch floppy disk.

Cinda M. Conroyd

Research Therapist Seeks Help with Family Conflict Research

Chuck Rahe, LCSW, is a child and family therapist in Portland who wishes to research family conflicts in probate, guardianship, and conservatorship proceedings. He is interested in conflicts that lead to sustained disagreements among siblings and that may prevent siblings from being resources to each other during the grieving or adjustment process in dealing with the mental incapacity or death of a parent.

Mr. Rahe would like to talk with attorneys who have handled contested probate, guardianship, or conservatorship proceedings. Initially, he would like to define the types of conflicts lawyers have observed and to gather information about what might be relevant in these conflicts. No specific identifying information about clients would be needed. Interviews would be an hour or less and could be done in person or by telephone.

If the preliminary information suggests that this area justifies further research, Mr. Rahe would ask for help reaching families that might be willing to be interviewed about their views and experiences. Again, this would be done in a way to protect client confidences. Mr. Rahe would sign confidentiality agreements with families that are willing to participate in the study.

Under no circumstances would Mr. Rahe solicit attorneys or families as clients. If, during an interview, a family identifies a need for counseling, Mr. Rahe would make a referral to local resources.

Mr. Rahe hopes this research could help families resolve these conflicts more productively. If he completes the study, he has agreed to publish a summary of his results in this newsletter.

Attorneys who are interested in helping Mr. Rahe can call him at (503)283-3508.

Calendar of Seminars and Events

- July 29, 1995 (Sponsored by the Southern California Tax & Estate Planning Forum) **Family Business Succession Planning,** Sheraton Hotel, at LAX, Los Angeles, California. Telephone (800) 332-3755.
- August 5, 1995 (Sponsored by the Southern California Tax & Estate Planning Forum) **Integrating the Retirement Plan into the Estate Plan: A Necessity, not a Choice (Practical Planning Solutions and Forms)** Sheraton Hotel, at LAX, Los Angeles, California. Telephone (800) 332-3755.
- August 12, 1995 (Sponsored by the Southern California Tax & Estate Planning Forum) **The 2nd Annual National Conference on Asset Protection Planning and Asset Protection Trusts,** Holiday Inn, Van Ness Avenue, San Francisco, California. Telephone (800) 332-3755.
- August 19, 1995 (Sponsored by the Southern California Tax & Estate Planning Forum) **Family Business Succession Planning,** Holiday Inn, Van Ness Avenue, San Francisco, California. Telephone (800) 332-3755.
- October 18-21, 1995 (Sponsored by the Southern California Tax & Estate Planning Forum) **The 15th Annual Southern California Tax and Estate Planning Forum & Workshops,** Sheraton Harbor Island Hotel, San Diego, California. Telephone (800) 332-3755.
- October 26-27, 1995 (Sponsored by Washington State Bar, Seattle Estate Planning Council) **40th Annual Estate Planning Seminar**, Seattle, Washington. Telephone (206) 727-8200.
- October 26-27, 1995 (Sponsored by Practicing Law Institute) **26th Annual Estate Planning Seminar**, Tampa, Florida. Telephone (212) 765-5700, ext. 271.
- October 29-November 3, 1995 (Sponsored by Hawaii Tax Institute, Chaminade University Tax Foundation) **32nd Annual Hawaii Tax Institute,** Hawaiian Regent Hotel, Honolulu, Hawaii. Telephone (808) 946-2966.
- November 17, 1995 (Sponsored by the Oregon State Bar Continuing Legal Education) **Basic Estate Administration**, Oregon Convention Center, Portland, Oregon. Telephone 620-0222, ext. 326.

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Oregon Estate Planning and
Administration Section Newsletter

Jennifer B. Todd
Editor-in-Chief

newsletter

Oregon Estate Planning and Administration Section Newsletter

Volume XII, No. 4
October 1995

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

Practical Comments on the Advance Declaration for Mental Health Treatment

In 1993, a little-noticed piece of legislation broadened advance directive law to permit nomination of an attorney-in-fact for mental health treatment.

The **Declarations for Mental Health Treatment Act**, ORS 127.700 *et seq,* permits a declarant to nominate an attorney-in-fact who can commit the principal against his will for short-term (up to 17 days) mental health treatment.

The statutory form of declaration has two parts: a statement of treatment preferences and an appointment of an attorney-in-fact. The declaration continues in effect for three years, and **may not be revoked while a court in a guardianship proceeding *or* two physicians deem the principal incapable of making mental health treatment decisions. ORS 127.722.**

Use in Client Planning

The Advance Declaration for Mental Health Treatment will be useful in planning to reduce the emotional stress and financial cost of intervention when mental illness causes incapacity. Execution of an Advance Declaration should be considered either if a client has a history of mental health treatment and wants to plan for a recurrence or if a client has a diagnosis which may produce cognitive and memory deficits, behavioral changes, self-neglect, or vulnerability. An Advance Declaration allows the client to designate who can act for the client and to state what care setting and form of treatment he or she prefers.

Former mental patients who oppose electro-convulsive treatment recommend executing the declaration and expressly denying the right to use that disfavored form of treatment. That is, the document is being used by patient advocates to **limit** forms of treatment, not permit treatment. The mental health declaration's limits may be overcome only if the principal is formally committed, or if the principal's life and health are endangered. ORS 127.720.

Value of Advance Declaration to Family Members

The mental health treatment declaration is valued by family members who want to reduce the chaos resulting when a family member is actively psychotic and to gain the right to insist on treatment for a loved one. The family members

In This Issue

may seek to commit a mentally ill relative. When a citizen is committed, the state may take him or her into custody for treatment in a health care facility. ORS 426.005-426.390.

Where the primary treating doctor recommends hospitalization, but the mentally ill person refuses to go to the facility and be admitted, the family members may seek guardianship to gain the rights to (a) determine where treatment occurs and (b) give informed consent to the recommended treatment. Mental health treatment protocols will still govern the hospital workers; that is, the guardian may not force mental health treatment which the providers determine is unneeded or not medically indicated.

The mentally ill client can plan to limit intervention by court-appointed guardians, and to determine priority of appointment for a guardian by nominating a favored friend or relative. ORS 126.035(2). When a client executes an Advance Declaration for Mental Health Treatment, his attorney should consider execution of a Nomination of Guardian and Conservator document as well.

Who Will Pay for the Mental Health Treatment?

Both mental health providers and patients are learning to deal with this new form of Advance Directive. The new form gives surrogate decisionmaking power to the person chosen by the patient, but does not guarantee access to treatment. Most providers want to know who will pay for the treatment before agreeing to take on a patient.

In a formal commitment process, the public process authorizes holding the patient in a state institution where treatment is available, and the public will pay for the treatment if no private insurance covers the cost. The person in the state institution is responsible for reimbursing the state, to the extent of the patient's ability to pay. *See* ORS 179.610-179.740.

The attorney-in-fact appointed in the Mental Health Treatment Declaration is not personally liable for the cost of treatment but must persuade the provider that a payment source exists before admission is likely (as a practical matter) to occur. ORS 127.712(2). The common use of a "responsible party" line on medical facility admission forms will dissuade some attorneys-in-fact from acting; if the form is signed in the agency capacity, the attorney-in-fact should be able to avoid personal liability for the treatment costs.

A discussion of the public benefits available for mental health treatment is beyond the scope of this article. However, access to those public benefits is difficult.

Private health insurance policies should always be reviewed for coverage limitations. Many policies cover no more than the minimum mandated in-patient mental health services described in ORS 743.556(6): $10,500 for adults and $12,500 for children or adolescents in each two-year period. I found one ancient policy that covered the mental health in-patient treatment as part of catastrophic health coverage, with a lifetime benefit limit of $500,000.00. The patient had used $77,000 of potential coverage at the time I became involved in the case.

The cost of treatment is high, and quickly exhausts most insurance plans and private savings. One of my clients was recently billed $12,665 for a protected person's twenty-day stay at OHSU on a county hold. Dammasch Hospital treatment costs $6,710 per month.

Patricia Backlar, Senior Scholar, Center for Ethics, OHSU, and Adjunct Instructor of Philosophy at Portland State University, is conducting research on the use of the Advance Declaration for Mental Health Treatment. She has reported that Oregon is the only state to have enacted this form of Advance Declaration.

If you wish to obtain *A Guide to Oregon's Declaration for Mental Health Treatment*, a pamphlet describing the Declaration, contact the Oregon Mental Health and Developmental Services Division at 503-945-9700, or the Oregon Alliance for the Mentally Ill at 800-343-OAMI.

Cynthia L. Barrett

1995 Changes to Guardianship and Conservatorship Statutes

The 1995 Oregon Legislature enacted SB 61, which reorganizes the guardianship and conservatorship statutes. All the sections relating to guardianship and conservatorship in Chapter 126 have been repealed. ORS Chapter 126 now contains only the section allowing receipt for the benefit of a minor, the public guardian provisions, and the Oregon Uniform Transfers to Minors Act. SB 61 will go into effect on January 1, 1996. This article highlights the most significant changes from existing law.

SB 61 provides for one basic procedure for petitions for both guardianships and conservatorships. The bill is divided into four basic parts. Sections 1-26 are the general procedural provisions. Sections 27-33 contain provisions applicable specifically to a guardianship proceeding. Sections 33-63 contain provisions specific to a conservatorship proceeding. Sections 63-66 apply to temporary fiduciaries. Section 67 and the sections through the end of the bill contain the conforming technical amendments.

Procedures

Many of the substantive changes in SB 61 created one uniform procedure for all guardianships and conservatorships. New definitions have been enacted which include: "fiduciary", which refers to any guardian or conservator; "financially incapable", which relates to a conservatorship; "incapacitated", which relates to guardianship; and "respondent", which is a person for whom the entry of a protective proceeding is sought. The term "ward" has been replaced by the term "protected person," which applies once the order appointing a fiduciary has been signed by the court.

A petition for the appointment of a guardian or conservator must include:

(1) a statement of the nature of the protective order requested;

(2) the name and address of any fiduciary, trustee, health care representative, or attorney-in-fact that has been appointed for the respondent;

(3) specific factual information that would support a finding that the proposed protected person is incapacitated or financially incapable;

(4) whether there is the intention to place the respondent in a mental health treatment facility, a nursing home or other residential facility;

(5) a general description of the estate of the respondent, sources of income and amount of income; and

(6) when a petition seeks appointment of a guardian only, a statement of whether the guardian will exercise any control over the estate of the respondent, and if so, an explanation of the source and amount of monthly income.

The Oregon Evidence Code and Oregon Rules of Civil Procedure apply in all protective proceedings. The bill specifically allows for joinder of parties as provided by ORCP 28.

The Bill broadens the notice requirements of those persons who are initially entitled to notice of the proceeding to include: cohabitants, persons most closely related to the respondent, trustees, and persons appointed as health care representatives. Those who receive notice of the protective proceeding may file a request with the court which would entitle them to continue to receive subsequent notice in the proceeding. Notice must be personally served on any respondent fourteen years or older. The respondent cannot waive notice.

Objections to a petition may be either written or oral. The court must designate a place for oral objections and provide a means of reducing any oral objections to a signed writing for purposes of filing the objection. The respondent or protected person cannot be charged a fee for filing an objection.

When a petition has been filed for termination of the protective proceeding, the fiduciary has the burden of proving by clear and convincing evidence that the protected person remains incapacitated or financially incapable.

Fiduciaries Generally

As to preferences in appointment, both guardian and conservator provisions now direct the court to the most suitable person after giving consideration to the specific circumstances of the respondent. The court visitor must appear at a hearing on objections to the appointment of a fiduciary. The visitor is allowed reasonable compensation for attendance at the hearing.

The bill authorizes the court to remove a fiduciary if the court finds that removal is in the best interests of the protected person. A person nominated as fiduciary must disclose not only criminal convictions and bankruptcy, but also cancellation or revocation of a professional license.

A fiduciary must receive specific court approval before entering into any transactions in which the fiduciary has a pecuniary interest.

Rules Specific To Guardians

A copy of the order appointing the guardian must be attached to the letters of guardianship.

The protected person must be given written notice if the guardian intends to place the person in a mental health treatment facility, a nursing home or other residential facility. The guardian must file a statement with the court informing the court of the intent to make the placement. The notice must indicate how the protected person can object to the proposed placement. If the protected

person objects to the placement, an expedited hearing must be scheduled by the court. Note that this notice requirement applies to placement that occurs anytime during the guardianship. Failure to give notice can be grounds for removal of the guardian.

The guardian must file an annual report, which includes disclosure of: crimes of which the guardian has been convicted in the preceeding year; bankruptcy filed by the guardian; suspension or revocation of professional or occupational licenses; revocation or suspension of driver's license; and the specifics of any delegation of powers over the protected person which the guardian has made in the past year. The guardian's report must be notarized.

Upon the death of the protected person, the guardian has authority to dispose of the remains of the deceased if there has been no contact from any person who would have priority to control the disposition under ORS 97.130.

The bill now specifically provides that the federal Indian Child Welfare Act applies in a guardianship for a minor.

Rules Specific To Conservators

The conservator is required to file a bond set at the court's discretion. The annual accounting of the conservator must disclose the amount of bond posted by the conservator during the period covered by the accounting. Upon a surety's cancellation of the bond, the conservator must file a new bond before the expiration date set out by the surety. If the conservator fails to file a new bond, the letters of conservatorship are void as of the date of cancellation. The surety remains liable for the time covered by the bond until an accounting is approved by the court.

The court may now apply a higher standard of care to a conservator who claims to have greater skill or expertise. The Bill imposes as an additional ground for removal a finding that there was a failure to use good business judgment and diligence in management of the conservatorship.

The conservator is allowed to make gifts without prior court approval in amounts up to $250 to any one person in a calendar year. The aggregate value of the gifts made by the conservator may not exceed $1,000 in a calendar year. All other gifts by the conservator require court approval.

The bill specifically lists acts which require court approval and those which the conservator can perform without court approval.

The court may order any person to appear for deposition if it is probable that the person has property or information regarding the property of the protected person. Failure to appear as ordered by the court may result in the person being held in contempt of court.

Any protected person over the age of fourteen must be served with a copy of the inventory.

The final account can be waived either if the protected person was a minor and consents to the waiver upon attaining the age of majority, or if the protected person is no longer financially incapable and the protected person gives a receipt to the conservator for property delivered to the protected person.

Temporary Fiduciaries

A temporary conservator may be appointed upon a finding by clear and convincing evidence that there is an immediate and serious danger to the estate of the respondent and the welfare of the respondent requires immediate action.

The temporary fiduciary must file a final report with the court setting out all activities of the temporary fiduciary during the pendency of the appointment. If a permanent fiduciary is appointed in the proceeding, the report can be postponed until the annual report/account of the fiduciary.

Rita Cobb

Collecting Fees In Probate Matters: Remember to Be Reasonable

A recent case involving a dispute over legal fees should serve as a helpful reminder to those of us who handle probate matters. The case points out that exercising good professional judgment in deciding what legal services to provide is imperative. The facts of the case, and the opinion of the court, speak for themselves.

Background

In Estate of N.R. Palanuk, Polk County Case No. 92P4037, attorneys for the personal representative submitted a petition for attorneys' fees along with the estate's final accounting. The total fee requested was $165,427. The law firm had previously received $75,000

pursuant to an earlier order of the court upon the firm's request for partial payment of fees.

The Supplemental and Amended Inventory indicated an estate value totaling $701,467. Thus, the total fee requested by counsel for the personal representative amounted to approximately 23% of the inventory value of the estate.

Not surprisingly, the devisees under the decedent's will challenged this petition for fees. After a lengthy trial involving numerous experts testifying on the reasonableness of the proposed fee, the trial court ruled that the requested fee was excessive. Presiding Judge Charles E. Luukinen evaluated the claim under ORS 116.183, which reads as follows:

> 116.183 Expenses of personal representative; determination of attorney fees...(1)...An award of reasonable attorney fees under this section shall be made after consideration of the customary fees in the community for similar services, the time spent by counsel, counsel's experience in such matters, the skill displayed by counsel, the excellence of the result obtained, any agreement as to fees which may exist between the personal representative and the counsel of the personal representative, the amount of responsibility assumed by counsel considering the total value of the estate, and such other factors as may be relevant. No single factor shall be controlling.

The objectors submitted evidence from Marion, Polk, and Yamhill Counties regarding fee awards in estates with inventory values in excess of $100,000. The objectors also presented testimony of expert witnesses, each of whom had "substantial experience in probate matters as part of their practice," according to Judge Luukinen's opinion. The court gave great weight to the experts' testimony. The judge's opinion letter summarized the testimony in this way:

> The attorneys broke down different facets of the case to differing degrees. There was, however, one constant. Simply put, the requested fee was not reasonable. The charges were variously referred to as "excessive," "shocking," "inefficient," and "outrageous." It is the Court's opinion that each description was to a great extent accurate.

The experts testified that an appropriate fee for this matter would have been within the range of $20,000 to $50,000, at the most. Based upon the statutory factors and the evidence presented at trial, Judge Luukinen determined that an appropriate fee in this case would have been $50,000.

In his ruling, Judge Luukinen determined that the court could have ordered restitution of the fees paid out in excess of $50,000, despite the court's earlier order allowing a "partial" payment of $75,000 to the law firm. Although the judge's opinion cited no specific case or statutory authority, the court clearly was not troubled by the existence of the interim order and found that, procedurally, the court was not bound by that interim order in making a final determination about fees. (In this case, Judge Luukinen evaluated various factors surrounding the interim petition for and partial payment of legal fees and concluded that it would be inequitable, in this specific instance, to require the law firm to have to return a portion of the fee previously received.)

Specific Areas Of Concern

The court's opinion examined in great detail some specific legal tasks undertaken in the administration of the estate. The judge expressly did not challenge the accuracy of the time recorded by the law firm, stating that he did "not question that every minute charged to the estate account for fees by the claiming attorneys was actually spent by the law firm in activity somehow related to this estate." Judge Luukinen's opinion then went right to the heart of the matter: "Although it may seem overly simplistic, the basic answer to this case is very succinctly described in the testimony of attorney Ned Clark, who testified as an expert on behalf of the objecting devisees. 'When you hire a lawyer, you don't hire his time only. You hire his judgment.'"

Among the tasks performed by the law firm examined by the judge were:

- A collection matter described as "complicated" in which the law firm achieved a gross recovery of approximately $13,400. Upon examination of the firm's billing statements, the court found that well over $14,000 of legal fees was attributable to this collection matter, for a net loss for the estate.
- A dispute arose over one of the devisees paying or not paying for the decedent's funeral expenses. The firm billed approximately $6,900 on this issue, with the devisees ultimately settling the matter amongst themselves.
- The firm prepared a Form 706 Federal Estate Tax Return and handled an IRS audit of the return. The court indicated that an accounting firm could have handled this portion of the estate at far less expense—implying that better judgment on the

part of the law firm would have caused them to suggest employing an accounting firm, instead.

- The firm assisted the personal representative in various matters related to a bull business and to note collections. Apparently, however, the complicated portion of this work was performed by the personal representative himself. The law firm's assistance was, for the most part, probably unnecessary.
- An FED matter in Tillamook County was resolved without litigation in a contested hearing. The firm billed approximately $2,000 on this matter, which the court stated "can only be described as excessive."
- As a part of the collection efforts on behalf of the estate, the firm managed to structure a complex arrangement for recovery of funds owed to the estate. During the period of administration, approximately $74,000 was actually received. Another $82,000 was subject to a payment plan "that may or may not ultimately be paid in full." The court pointed out that the firm's charges related to these collection efforts amounted to over $53,000, as compared to the $74,000 actually received during the estate administration.
- The firm assisted in and charged fees related to the sale of real property and timber by the personal representative ostensibly necessary to pay expenses of administration. The court's review of the record, however, revealed that the single greatest need for cash in the estate was for the payment of legal fees. In light of all of the other factors, the court questioned the reasonableness of these transactions and their attendant costs.

In summary, Judge Luukinen wrote: "It is tempting to continue to point out areas of concern or, perhaps, taken from the perspective of the grander scheme of things, to nit-pick about issues on the attorney fee claim. I do not feel that is necessary. I simply note that the evidence on expenditure of time is voluminous and convincing. **The evidence on the reasonable exercise of professional attorney judgment on the expenditure of attorney resources is sorely lacking.**" (Emphasis added)

Steven W. Moulton

From the Bench

Parents As Conservators

When a minor receives a monetary settlement, typically a parent is appointed conservator for the minor. It is important to be sure the parent is informed of all obligations and restrictions regarding use of the minor's settlement. Over the past year in Deschutes County, we have seen disbursements for all-terrain vehicles, veterinarian bills, and trips to Disneyland for the entire family. Conservator parents have also borrowed against the minor's monies, as well as simply used the monies as a supplemental source of income. If you have concerns about a parent's willingness to use the funds solely for the minor, you may want to consider an order which requires the monies to be invested in a restricted account.

Often the first clue that money is being misused by a parent is when the attorney has difficulty obtaining financial documents to prepare the annual accounting. Give the parent a deadline for providing the financial information. If the information is not forthcoming, you can seek the assistance of the court in issuing a court ordered deadline to the parent. This can be done informally through a letter of explanation regarding why the annual accounting has not been filed. If the parent ignores the deadline, then the court can cite the parent in on a motion to show cause.

If you have reason to believe a parent is misusing the minor's funds, get the court involved. The easiest method to provide protection for the minor is to include a provision in the order approving the annual accounting that no further disbursements shall be made without court approval. The order can also require all monies to be moved to a restricted account which cannot be accessed without a court order. A writing signed by the depository, showing the dollar amount of the monies held, and that they are subject to withdrawal only upon court order, should then be filed with the court.

Alta J. Brady
Deschutes County Circuit Court Judge
Mary Fagan
Deschutes County Probate Commissioner

What's New

Bowers v. Bowers
136 OR App 112 (1995)

This appeal from a dissolution judgment involves the effect of a premarital agreement on corporate assets. The trial court ruled that the assets of one of Husband's corporations were not subject to a premarital agreement, and should be divided between the parties. Husband appealed.

The parties had entered into a premarital agreement defining Separate Property as all income earned by a party and all property owned by the party prior to the marriage. Separate Property was to be awarded to the party if the parties divorced. Marital Property was defined as any funds earned jointly and any funds deposited voluntarily by their original owner into a joint account. The premarital agreement did not purport to govern the division of marital property if the parties divorced.

During most of the four-year marriage, Wife held a full-time job. In addition, she worked 10-30 hours a week as a bookkeeper for one of Husband's corporations. She held one share of stock of the corporation and was a signatory on the corporate bank accounts.

Each month the parties made transfers of cash averaging $4,000 to $5,000 from the corporate bank accounts to their joint personal accounts. The parties also paid some personal expenses directly from corporate accounts.

Wife argued that her close involvement in the corporation, the fact that she was not paid for her services, and the fact that she was given one share of stock and made a signatory on the corporate accounts, demonstrated that the parties intended the corporation to be marital property.

The Court of Appeals disagreed: Wife was adequately compensated for her efforts by the monthly transfers of corporate funds to the parties' joint bank accounts. Wife's contribution to the corporation did not approach the degree necessary to establish that the parties agreed to modify the premarital agreement as to the corporation, especially since Husband had not added Wife's name to more than one share of the corporate stock.

The Court also held that the parties' practice of paying personal expenses from the corporate accounts demonstrated that not all items purchased with corporate funds were for business use. One automobile purchased with corporate funds and titled to the corporation, but driven almost exclusively by Wife, was found to be marital property and subject to division between the parties.

Donna M. Muehleck

Questions, Comments or Suggestions About This Newsletter?

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CALENDAR OF SEMINARS AND EVENTS

- October 10-11, 1995 (Sponsored by Practicing Law Institute) **26th Annual Estate Planning Institute**, Crowne Plaza Manhattan, New York, New York. Telephone (800) 260-4754.
- October 12, 1995 (Sponsored by Professional Education Systems) **The Trust Course: a Comprehensive Course on Drafting Trusts**, Red Lion Lloyd Center, Portland, Oregon. Telephone (800) 843-7763.
- October 13, 1995 (Sponsored by Professional Education Systems) **The Trust Course: a Comprehensive Course on Drafting Trusts**, North Red Lion Bend, Bend, Oregon. Telephone (800) 843-7763.
- October 18-21, 1995 (Sponsored by the Southern California Tax & Estate Planning Forum) **The 15th Annual Southern California Tax and Estate Planning Forum & Workshops,** Sheraton Harbor Island Hotel, San Diego, California. Telephone (800) 332-3755.
- October 19-21, 1995 (Sponsored by ALI-ABA) **Creative Tax Planning for Real Estate Transactions: A Focus on an Improved World**, Hotel del Coronado, Coronado, California. Telephone (800) CLE-NEWS.
- October 25-27, 1995 (Sponsored by ALI-ABA) **Uses of Insurance in Estate and Tax Planning**, Embassy Row Hotel, Washington, D.C. Telephone (800) CLE-NEWS.
- October 26-27, 1995 (Sponsored by Washington State Bar, Seattle Estate Planning Council) **40th Annual Estate Planning Seminar**, Seattle, Washington. Telephone (206) 727-8200.
- October 26-27, 1995 (Sponsored by Practicing Law Institute) **26th Annual Estate Planning Institute**, Safety Harbor, Tampa, Florida. Telephone (800) 260-4754.
- October 29-November 3, 1995 (Sponsored by Hawaii Tax Institute, Chaminade University Tax Foundation) **32nd Annual Hawaii Tax Institute,** Hawaiian Regent Hotel, Honolulu, Hawaii. Telephone (808) 946-2966.
- November 13-17, 1995 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, Ritz-Carlton, San Francisco, California. Telephone (800) CLE-NEWS.
- November 17, 1995 (Sponsored by the Oregon State Bar Continuing Legal Education) **Basic Estate Administration**, Oregon Convention Center, Portland, Oregon. Telephone 620-0222, ext. 326.
- November 30-31, 1995 (Sponsored by ALI-ABA) **Tax Exempt Charitable Organizations**, Embassy Row Hotel, Washington, D.C. Telephone (800) CLE-NEWS.

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Oregon Estate Planning and
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