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Evaluating, dividing, and distributing tangible personal property

By Brian Haggerty, Attorney at Law

Every estate includes tangible personal property. In some estates this may include art, antiques, or jewelry that has substantial monetary value. In other estates, the tangible personal property may just be tired clothing and worn furniture. In many cases, the value of such property is not measured in money: Grandma may have purchased her gravy boat with S&H Green Stamps, but that gravy boat might carry enormous sentimental value. Tangible personal property also includes vehicles and manufactured homes, but, in this article, we will focus on the "stuff": all that personal household property that is not subject to any formal title or registration.

An initial duty for the personal representative (as used in this article, that term will include an administrator of an intestate estate) is to marshal together the decedent's assets and to secure them. This will mean making sure the decedent's home and its contents are secure against fire, burglary, and other common hazards, and the property is insured against loss.

The process for handling personal property is the same for the successor trustee of a revocable living trust as for the personal representative of an estate, once it can be established that the personal property was made subject to the trust. Usually, a "general assignment of assets to the trustee" was executed by the settlor at the time that other transfers to trust were made. If this document cannot be found, the successor trustee will need to be more cautious, but probably can still convince the family that treating the personal property as part of the trust is preferable to a probate or small estate affidavit just to handle this property.

Taking control of the personal property of the estate may mean being the first heir or devisee to enter the decedent's home. If someone else gets there first, the personal representative may find upon arrival that personal property such as jewelry has mysteriously disappeared. A lawyer representing the personal representative should find out whether there are heirs or devisees who might try to carry off property that has value. If the client believes this is a possibility, there should be a discussion of changing the locks on the decedent's home, or having the personal representative take custody of personal property that has value.

In addition to the home, there may be one or more storage units that contain property of the decedent. The personal representative will need to determine whether the storage units hold property that has value (either monetary or sentimental); determine whether the property is safe at the storage unit, and whether it is insured; and make sure that the operator of the storage unit recognizes the personal representative's authority to take control of the property.

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Tangible personal property

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Brian Haggerty is a lawyer practicing in Newport, where he has lived for more than 15 years. His practice focuses primarily on estate planning and elder law. Brian volunteers as a firefighter and emergency medical technician with the Newport Fire Department, where he holds the rank of captain. In a prior life, Brian was a tax consultant and enrolled agent, and he tries to keep current on tax issues related to estate planning and administration.

Within 60 days of his appointment, the personal representative makes and files with the court an inventory of the property of the estate that shows the value of the property on the date of the decedent's death. Clients are often daunted by the prospect of making an inventory of the estate. They imagine that this means listing every plate, fork, and blanket in the decedent's home.

Our practice is to advise the personal representative to focus first on those items of personal property which have monetary value: the jewelry, art, antiques, collectables, tools, and firearms. There may also be silver and dinnerware that has value. This property should be evaluated by a dealer in property of that kind. A local jeweler can appraise the decedent's jewelry. A trusted art or antique dealer can give an opinion of the likely value of art or antiques. A dealer in stamps or coins may evaluate those collections.

The personal representative must be careful when obtaining these values. Unfortunately, a dealer in coins may have an ulterior motive when valuing a coin collection. The personal representative can tell the dealer doing the valuation that he is not authorized to sell the property until after the inventory is filed —which is not, strictly speaking, true, but it is good practice.

Where personal property is believed to have value, paying one dealer for an appraisal, and selling to another dealer may be the best practice.

Sales on eBay or Craigslist may or may not establish value. Unfortunately, these online venues are haunted by bargain hunters. The personal representative should look for a service that handles such sales, to make sure that appropriate photos and sales materials are employed. If property has been appraised, a reserve price should be set, to avoid selling at an unreasonably low level.

In addition to helping to dispose of personal property that has some value, estate sales may also establish value. An estate sale may not be the best way to get value for items, like antiques or jewelry, that have substantial value, but is well suited to converting some of the miscellaneous personal property, such as basic household items, into cash. The personal representative may choose to organize a private yard sale, but this involves a substantial amount of work and some expertise, because how items are priced and displayed will affect if and for how much they sell.

There are professional companies that conduct estate sales. These companies may operate by buying all of the personal property of the estate in one lot at a fixed price. On this basis, the estate may not receive as much for the valuable property, but will have disposed of less valuable property in the same lot. Other estate sale companies will take charge of the property of the estate and sell it at auction, on eBay and Craigslist, or in a storefront. The knowledge of the estate sale company on how to market antiques, art, jewelry, and household property may result in more money for this property. However, the estate sale company will take a commission or fixed fee.

Estate practitioners should be familiar with estate sale companies in their area, and probably should have a trusted estate sale company to which they can refer their personal-representative clients. Many estate-sale companies buy and sell "for their own account," and may take advantage of a personal representative who is overwhelmed by the job of administering the estate, and offer less value than the property is worth. However, a trusted estate sale company will take a huge load off the personal representative's mind, and represents a good way to realize value for the personal property.

Other personal property may be listed on the inventory as such, or as "miscellaneous household personal property." We usually tell the personal representative to value this property at the amount she or her estimates it would sell for at a thrift store. In many cases, this is the only entry in the inventory for tangible personal property, and the value stated may be arbitrary.

If the estate is taxable for purposes of the Oregon estate tax, the valuation of personal property may be more significant. If there is no tax consequence, then the only purpose for valuation is for purposes of dividing the property equitably among the heirs or devisees.

The testator may have left a list of specific gifts of personal property that should be given to specific devisees. In Oregon, such a separate list (not incorporated in the will) is not enforceable. However, the personal representative and the devisees may feel a moral obligation to carry out the wishes of the testator as expressed in this list, if all can be convinced that the list presented is the last such list, and was actually made by

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Tangible personal property

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the testator. A will should have a term regarding a division of the personal property as the devisees agree, "or if they do not agree, as the personal representative determines." I also include a statement in the tangible personal property section of my wills exonerating the personal representative from any liability for good-faith exercises of discretion. In this way, if the personal representative chooses to give effect to a separate list of property (or sticky notes attached to property) he or she is protected.

In many estates, the heirs or devisees decide among themselves who should take what personal property, and no particular heat is generated over these choices. However, where it is anticipated that there will be disputes over personal property in general, or over one or more particular pieces, some method of allocating the property that is perceived to be fair may be needed.

If one or a few items of personal property are desired by more than one heir or devisee, consider having the contestants draw lots. This is a simple method which is perceived to be fair, as long as it is undertaken with proper formality. Someone who is not a contestant for the property should prepare the straws (short straw wins) or lots (low number wins) and should announce the rules for the contest in advance. Playing cards may be used: high or low card wins.

Alternatively, devisees may "bid" for one or more items. This takes care of the valuation as well as determining who gets particular property. Each contestant states the amount that they would be willing to have charged to their share of the estate for the desired item. This can be structured as with any bid process: open bidding or a blind bid. This approach may have more of a tendency to cause hurt feelings than the drawing of lots, since competitiveness plays into it, rather than just luck.

If there are devisees who want numerous items of personal property, consider a "round-robin." Draw lots or playing cards to determine who goes first. That person chooses one item of personal property; then, the next contestant chooses one item; then the next person; then back to the first person; and so on. This can be done room by room, or by types of property. For example, all the jewelry is on the table; first contestant chooses one piece, then the second, then the third, etc. Then all the art is arrayed in a room, and the process continues.

I have briefly considered, in an estate where firearms were at issue, the idea of having the contestants engage in duels to determine who gets which gun. The senior partner discouraged this idea, so I don't know if it would work.

Sometimes, just describing these options will cause the devisees to realize that they should work a little harder to come to a conclusion without the need for a complicated process.

In some cases, the first heir to enter the decedent's home comes away with items of personal property. If the decedent's home has not been secure, the personal representative may want to have a camera at the ready when he or she first enters to record the condition of the home and the personal property in it. Unfortunately, where the value of personal property is primarily sentimental, it may not make economic sense to spend the money to try to recover items that the family "knows" were taken from the home. That said, note that ORS 114.225 says that the personal representative "has a right to and shall take possession and control of the estate of the decedent . . . ." There may be circumstances where the personal property has sufficient value to involve the court in an attempt to recover personal property.

I tell my estate planning clients that if it is really, really important that a particular person gets a specific item, it should be given to that person during the donor's lifetime, preferably at a family event and very publicly. That way, there is no question. We are probably all familiar with the testator who made a different statement about who should get grandmother's silver at each Thanksgiving dinner of the last five years of her life. If a gift was not completed during life (donative intent plus delivery), and it is not specifically set forth in the will, then what mom said about who should get that item is not admissible.

Sometimes the personal property that is at issue is photographs or photo albums. Technology has largely dispensed with this problem. Have a local printshop make quality copies of the photos, and each devisee can have them all. If there is some remaining cachet to having the originals, that can be solved by drawing lots.

Keep in mind that, at the end of the process, each heir or devisee will have to give the estate a receipt by which he or she acknowledges receipt of some amount of personal property (if the personal property was not all sold in estate sales or otherwise disposed of). The personal representative should be clear with any devisee who takes personal property about the amount at which it is valued in the estate. If the personal property has such substantial value that its sale might need to be reported for tax purposes, it may be advisable to remind the devisee that the amount on the receipt will constitute evidence regarding his or her tax basis in the property.

As a matter of drafting, it is important to make sure that a will specifies some method of finally determining who gets personal property. The default is probably that the personal representative will make a final decision, and my will, in the paragraph regarding personal property, says that the personal representative will have no liability as a result of good faith exercises of discretion. If your client doesn't feel that giving the personal representative the final say is appropriate, then consider including one of the methods laid out above in the will as a mandatory or optional process for deciding who gets personal property. ■

Administering a joint trust upon death of first spouse

By By Jeffrey Krebs, Attorney at Law

Jeffrey Krebs is an attorney at Schultz & Associates Law Center, P.C. in Eugene. He loves helping clients plan for their future by creating estate plans that meet their specific needs and wishes. He also enjoys working with clients during the administration of those estate plans upon the death of a loved one.

Administering a joint trust upon the death of the first spouse is not always a simple process, and care must be taken to ensure the proper steps are implemented and the correct advice given. Significant harm can result when individuals do not understand the potential pitfalls associated with administering this type of trust.

This article identifies some of the issues and dangers attorneys should be aware of in the administration of joint trusts. It does not attempt to solve all the potential pitfalls of joint trusts, nor does it address strategies for fixing a joint trust that has not been administered correctly.

Checklist

When administering a joint trust upon the death of the first spouse, an attorney should take the following steps:

- Read the trust
- Inventory the estate assets
- Value the assets
- Update trust certification
- Prepare and file tax forms OR706 and 706, if necessary
- Provide notices and reports when required by ORS 130.710
- Distribute any specific devises
- File final joint personal income tax return
- File fiduciary tax returns
- Allocate assets to separate trusts

Read the trust

The first step in this process is for the attorney to read the trust document. It is important to understand the structure of the trust and any provisions that may affect the administration of the trust upon the death of the first spouse. The trust document gives you the blueprints for the administration process.

Inventory the assets

Obtaining an inventory of the assets is critical in this process, especially when estate taxes could be an issue. It may also lead to the discovery of assets that are not in the trust but should be. It may be wise to wait three to four weeks after the death of the first spouse to inventory the assets so that an updated statement of all accounts is available.

Caution: If your clients have moved to Oregon from any community property states (AZ, CA, ID, LA, NM, NV, TX, WA, and WI), it is important to determine which assets, if any, are owned as community property. There are tax advantages to keeping the community property designation of appreciating assets.

Value the assets

A valuation of estate assets is important to determine if any estate tax may be owed. When valuing the estate assets, the value of the assets on the date of death is generally used for estate tax purposes. However, under some circumstances it may be advantageous to use an alternative valuation method; this allows the trustee to value assets six months after the date of death of the decedent if the property has not otherwise been sold, distributed, or disposed of within those six months.

Prepare a new trust certification

Upon the death of the first spouse, it is necessary to draft a new trust certification to notify banks and other financial institutions of the changes to the trust.

Prepare and file tax forms OR706 and 706, if necessary

In Oregon, it is important to file form OR706 upon the death of the first spouse if the decedent's estate is valued at more than $1,000,000. It may also be wise to file federal form 706 if federal estate taxes might be owed upon the death of the second spouse. Both the federal form 706 and OR706 must be filed within nine months after the decedent's date of death unless an extension is granted.

Provide notices and reports when required by ORS 130.710

When a trust has become irrevocable, trustees may have a duty to notify qualified beneficiaries of the existence of a trust, the identity of the settlor(s), the identity and contact information for the trustee(s), and the qualified beneficiaries' rights to request a copy of the trust instrument and a trustee report. ORS 130.710(2)(c). This notice must be provided within a reasonable time after accepting a trusteeship or acquiring knowledge that the trust has become irrevocable. It is possible to waive this requirement when the settlor is alive and financially capable or when the settlor's spouse is a qualified beneficiary and is alive and financially capable. ORS 130.020(3).

The easiest way for a settlor to waive this requirement is to include a waiver provision in

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Joint trust *Continued from page 4*

the trust document. For a more detailed analysis of the notice and reporting requirements of the Uniform Trust Code, please see the article written by Katie S. Groblewski in the October 2007 issue of the *Oregon Estate Planning and Administration Section Newsletter*, titled "Reporting Requirements of the Oregon Uniform Trust Code."

Make specific distributions

If the trust gives instructions to distribute certain items upon the death of the decedent, then it is imperative to follow those instructions.

File joint personal income tax return

It is important to remember that filing a final income tax return is required. The surviving spouse may still file a joint return for the year in which the first spouse died.

File fiduciary tax returns

Often overlooked in the tax filings is the filing of the fiduciary income tax return. A fiduciary tax return is necessary to report income earned by the trust.

Caution: Consult with an accountant to determine the best options for reducing any owed taxes. With careful planning and proper election of a fiscal year, money can be saved.

Allocate assets to the proper trust

This is the most important step in the process of administering a trust on the death of the first spouse. First, it is imperative to understand the distribution requirements of the trust. Many joint trusts split into two trusts (i.e., credit shelter trust or bypass trust, and a marital or survivor's trust) upon the death of the first trustor. Next, it is important to understand the funding formula of the trust. These separate trusts could be funded with a disclaimer, a fractional equation, a pecuniary amount, or a combination of these formulas. Within the confines of the funding formula, the attorney must skillfully decide how much should be distributed to each trust and which assets should be used to fund each trust. The attorney should then help create a separate account for the credit shelter or bypass trust and obtain a tax identification number for the trust. Finally, he or she should help prepare the proper deeds and other necessary documents to effectuate the funding of both trusts.

Caution: This process could be disastrous if not analyzed correctly. It would require a whole article to analyze the pros and cons and rights and wrongs of this step in the process, but the attorney needs to be prepared to discuss all of the options with the client.

Conclusion

Administering a trust upon the death of the first spouse is a delicate process that should be approached with caution and expertise. When done properly, there can be many benefits and savings to the trust. When done improperly, much harm can be inflicted upon the assets of the trust. ■

State provides website for unclaimed property

By Patrick Tate, Trust Property Manager, Department of State Lands

The Oregon Departmemt of State Lands (DSL) has jurisdiction over abandoned and unclaimed property and the estates of decedents when there are no known heirs or will. It also takes custody of assets for missing heirs and devisees.

Unclaimed property is any financial asset, e.g., bank accounts, securities, and uncashed checks. The assets are reported to the DSL by the organization that holds the assets when there has been no positive owner contact for a period of time, usually three years. Once reported, there is no time limit or fee to recover unclaimed property from the State of Oregon.

Attorneys and family members should search our unclaimed property list when they begin to settle an estate. We recommend they check any previous last names for the decedent. It is also a good idea to check for unclaimed property of a deceased spouse. Every state has an online owner search so check the national site at **http://unclaimed.org** if the decedent lived in multiple states. Because inactivity triggers the reporting of unclaimed property, it is a good idea to keep checking for at least five years to see if additional assets show up.

In rare cases, the personal representative of an estate may not be able to distribute a share of the estate to a missing heir. In these cases, that share of the funds is remitted to DSL and escheats to the Common School Fund. The heir has ten years to come forward and petition to recover his or her share of the estate. After the ten-year period, the funds are not recoverable.

We also would alert citizens that they may be contacted by an heir finder, heir searcher, or researcher. These individuals attempt to reunite owners with their unclaimed assets in our database for a fee. In Oregon, a finder must be licensed to locate owners of unclaimed property. Before signing an agreement or contract, be sure the finder is licensed with Department of Public Safety Standards and Training. Never pay an advance fee for asset recovery services. We recommend people search our database at **http://oregonup.us** before contracting with a finder. We often run into situation where people contract with a finder for 25 to 40 percent of the funds, only to find out their funds could have been easily recovered had they checked our website first. ■

Community property may be part of an Oregon estate

By Jennifer Fransen Gould, Attorney at Law

Jennifer Fransen Gould is a trust and estate planner and litigator in Garvey Schubert Barer's Portland office. She is a graduate of UCLA Law School, and a member of the State Bar of California since 2007 and the Oregon State Bar since 2013.

It's no surprise that many Oregon residents came from other states; in the United Van Lines 37th annual migration study, Oregon was ranked as "the state to which the most people relocated in 2013." Many of those people came from states with community property systems, such as Washington and California. What happens to property acquired by a married couple in a community property state when one spouse dies after the couple has moved to Oregon?

There are at least four questions an estate planner ought to ask clients about community property—starting with *could* this client have any community property?

The response will depend on whether the client has ever lived in or owned property in a community property state. Besides our neighbors to the north and south, six other states recognize community property: Arizona, Idaho, Louisiana, New Mexico, Nevada, and Texas. In addition, Wisconsin has a community-property-like system. If your client has ever lived in or owned property in one of these jurisdictions, you may have a community property issue.

Assuming there could be community property, the next logical question is whether the client actually acquired any such property. In general, a community property system treats property acquired during a marriage as jointly owned, although each state's system is unique. Most community property statutes do not apply to property acquired by gift or inheritance, but do apply to money and other benefits earned through employment. Additionally, the manner in which title was taken to property can create a community property interest (or raise a presumption of community property). You'll need to look closely at the law of the specific jurisdiction in question to determine if any assets were acquired as or transmuted into community property. The characterization of property can vary widely from jurisdiction to jurisdiction.[1]

In addition, the existence of community property depends on the existence of a recognized relationship— usually marriage. In states that recognize putative and/or common law marriages, those marriages will implicate the community property system. Same-sex marriages, where recognized, will also create community property issues, which have not yet been fully resolved. In addition, California and some other states apply their community property systems to registered domestic partnerships.

If there is any community property, the next step is to attempt to identify what will happen to it upon the death of one spouse if the client takes no action. In a community property jurisdiction, each spouse generally has the right to dispose of his or her half of the community property at death. That raises the question of what happens to that community property when the couple moves to Oregon, a common-law jurisdiction

The Oregon solution is simplified by the Uniform Disposition of Community Property Rights at Death Act (Uniform Act), adopted by Oregon in 1973.[2] ORS 112.705-112.775. The Uniform Act applies to:

(1) All personal property, wherever situated:
   - (a) Which was acquired as or became, and remained, community property under the laws of another jurisdiction; or
   - (b) All or the proportionate part of that property acquired with the rents, or income of, or the proceeds from, or in exchange for, that community property; or
   - (c) Traceable to that community property.

(2) All or the proportionate part of any real property situated in this state which was acquired with the rents, issues or income of, the proceeds from or in exchange for, property acquired as or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property. ORS 112.715.

Under the Uniform Act, community property, or any property traceable to community property or the proceeds of community property, is treated much the same as it would be in the community property state: "Upon death of a married person, one-half of the property to which [the Uniform Act] appl[ies] is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this state. One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this state." ORS 112.735.

If community property concepts still apply to certain property, how do you determine which property is affected by the Uniform Act? The comments to the Uniform Disposition of Community Property Rights at Death Act give an illustrative example:

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> H and W, while domiciled in California, purchased 100 shares each of A Co., B Co. and C Co. stock with community property (earnings of H). H and W were transferred to a common law state which had not enacted this Act; while domiciled there H sold the 100 shares of A stock and with the proceeds purchased 100 shares of D stock. Subsequently H and W became domiciled in Michigan which had enacted this Act; H sold the B stock and 50 shares of D Co. stock and purchased 150 shares of E stock. H died domiciled in Michigan with 100 shares of C Co., 50 shares of D Co. and 150 shares of E Co. stock; all of the stock had always been registered in H's name. All of the shares, traceable to community property or the proceeds therefrom, constitute property subject to this Act.
> *Unif. Disposition of Community Prop. Rights at Death Act § 1, comment on Subsection (1).*

In this example, even though only the C Co. stock was purchased with community property in a community property state, all of the shares are subject to the Uniform Act, because all were "traceable to community property or the proceeds therefrom[.]" *Id*.

Real estate is subject to a slightly different analysis, as in this example:

> H and W, while domiciled in California, purchased a residence in California. They retained the residence in California when they were transferred to Wisconsin. After becoming domiciled in Wisconsin they used community funds, drawn from a bank account in California, to purchase a Wisconsin cottage. H and W subsequently became domiciled in Michigan; they then purchased a condominium in Michigan for $20,000 using $15,000 of community property funds drawn from their bank account in California and $5,000 earned by H after the move to Michigan. H died domiciled in Michigan; title to all of the real property was in H's name. Assuming Michigan had enacted this Act, three-fourths of the Michigan condominium would be property subject to this Act; the Michigan statute would not, however, apply to either the Wisconsin or California real estate. If Wisconsin had enacted this Act, the Wisconsin statute would apply to the Wisconsin cottage. *Unif. Disposition of Community Prop. Rights at Death Act § 1, comment on Subsection (2).*

As the committee noted, the analysis "is confined to real property located within the enacting state (since presumably the law of the situs of the property will govern dispositive rights)." *Id*. Still, with tracing of funds and proceeds, a property purchased in a common law jurisdiction could become subject to the Uniform Act and treated as community property.

The committee on the Uniform Disposition of Community Property Rights at Death Act noted that these rules "leave[] to the courts the difficult task of working out the precise interest which will be treated as the 'proportionate part' of the property subject to the dispositive formula of Section 3 [ORS 112.735 in Oregon]."

However, in making those determinations, the Uniform Act also supplies two rebuttable presumptions:

(1) Property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as or to have become, and remained, property to which [the Uniform Act applies]; and

(2) Real property situated in this state and personal property wherever situated acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property, title to which was taken in a form which created rights of survivorship, is presumed not to be property to which [the Uniform Act applies]. ORS 112.725. These are *rebuttable* presumptions—a community property agreement between the spouses, for example, could take the property outside the purview of the Uniform Act.

The fourth question, therefore, is what can you do as a planner to deal with the community property? The client could decide to leave the property as is, in which case the estate planner must plan around the community property (remembering that each spouse can generally dispose of only his or her half of the community property at death). But if the client wants to make a change, the Uniform Act "do[es] not prevent married persons from severing or altering their interests in property to which [the Uniform Act] appl[ies]." ORS 112.775(2). The planner can consider whether the spouses should deliberately transmute or sever their community property interests (keeping in mind that such an agreement may create a conflict between joint clients, especially if one spouse is significantly more wealthy). ■

Footnotes

1. See 1 Est. Plan. & Cmty. Prop. L.J. 169, 172 (2008-2009) Selected Problems in Planning with Retirement Benefits: Community Property Issues and Creditor's Rights, Golden, Alvin J (noting differences in community property treatment of retirement accounts between California and Texas, among other differences).
2. The Uniform Act has also been adopted in Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Kentucky, Michigan, Minnesota, Montana, New York, North Carolina, Utah, Virginia, and Wyoming. *Unif. Disposition of Community Prop. Rights at Death Act Refs & Annos.*

For additional information, see *Administering Oregon Estates (2012 rev.), Chapter 4, Intestate Succession, Wills, and Community Property,* § 4.3 and Louis A. Mezzullo, "The Mobile Client: Tax, Community Property, and Other Considerations," 803-3rd Tax Mgmt. (BNA) Estates, Gifts, and Trusts.

To elect or not to elect—that is the question

By J. Glenn Null, Attorney at Law

After spending eighteen years in the retail industry, J. Glenn Null started practicing law in La Grande, Union County, Oregon in 2004. Since then he has focused on elder law: probates, protective proceedings, estate planning, and Medicaid planning.

The spousal elective share is controlled by ORS 114.600 through 114.725. The statutes provide that when a decedent's will partially or wholly disinherits a surviving spouse, the surviving spouse has the right to receive a percentage of the augmented estate. The percentage ranges from 5 percent to 33 percent, based on the length of the marriage.

This right is not automatic, but rather must be affirmatively exercised by the surviving spouse under ORS 114.610 by filing a petition and/or motion in the probate, depending on the circumstances. The motion and/or petition must be filed within nine months of the deceased spouse's date of death. ORS 114.720 provides the opportunity to petition for the elective share within nine months of the deceased spouse's date of death in the event the estate is not probated.

Public policy analysis provides the basis for the spousal election. Generally, one spouse cannot economically disadvantage the other solely through disinheritance in the will. General Medicaid policy also requires people to exhaust their own resources before being eligible to receive help from Medicaid. Medicaid applicants who have transferred assets for less than fair market value within the five years prior to applying are subject to a disqualification period based on the value of the transfer. In addition, if an applicant has declined to pursue an asset to which she or he would otherwise have been entitled, a disqualification period based on the value of the asset will be imposed.

During estate planning, spouses can probably mutually waive each other's right to elect the spousal share. Because the spouses engaged in a mutual exchange for valuable consideration, relinquishing the right to the spousal elective share is not considered a disqualifying transfer by Medicaid.

As mentioned above, the spousal elective share is a percentage of the augmented estate. ORS 114.630 defines the augmented estate as being the decedent's probate estate, decedent's non-probate estate, and the surviving spouse's estate. To state it another way, generally anything owned by either spouse individually or by both spouses together will be considered part of the augmented estate. The augmented estate is very broad and not limited to just probate assets. Essentially, the amount of the elective share is the percentage of the augmented estate minus the amount of assets the surviving spouse already has.

Because the right to and the amount of the elective share are statutorily set, determining the amount of the augmented estate is likely to be the root of elective share disputes. Accordingly, thorough file documentation regarding all assets is advised. There are two aspects of the augmented estate that need to be determined through documentation. One is the amount of assets that the surviving spouse received outside probate. The other is the amount of probate assets that need to be diverted to the surviving spouse in order to satisfy the elective share. The greater the amount the surviving spouse receives outside of probate, the lesser the amount that needs to be diverted from the deceased spouse's probate. The exact amount of the election will likely not be determinable until the final account is completed. Asserting the spousal election can be memorialized in the probate by sending written notification to the personal representative.

In the event the surviving spouse applies for Medicaid, Medicaid views the surviving spouse declining to choose the spousal election as a disqualifying transfer for five years after the election period runs. An application for Medicaid prior to the elapse of five years results in Medicaid calculating the disqualification period based on the amount of the elective share the surviving spouse would have received had the election been exercised.

In the event the surviving spouse is already receiving Medicaid, the surviving spouse is still expected to pursue the spousal election absent a legal impediment to the pursuit, e.g., a mutual waiver of the election, etc. A surviving spouse on Medicaid who declines to or is unable to pursue the spousal election risks having the Department of Human Services appoint a conservator to make the election for the surviving spouse. Alternatively, Medicaid may just declare an ineligibility period for the surviving spouse to receive benefits calculated based on the amount of the elective share.

An agent appointed under a power of attorney or fiduciary appointed under ORS chapter 125 would be able and probably obligated to pursue the elective share for a surviving spouse who is incapacitated and/or financially incapable, whether or not the surviving spouse is currently receiving Medicaid. General advice to the fiduciary should be to err on the side of making the election due to potential disqualification from receiving Medicaid benefits. ■

Administering Oregon Estates chapter 8.2–5 provides more information on the spousal elective share.

Oregon supports probate mediation

By Laura Swartz, Project Specialist, City of Beaverton Dispute Resolution Center

Mediation offers many benefits. It can help families resolve conflicts in an informal setting, preserve relationships, and craft solutions to their own problems. Additionally, mediation has the potential to save considerable court resources if parties settle disputes outside of the courtroom. Probate mediation offers an opportunity for families to engage in productive conversations when they experience conflict.

Three counties—Deschutes, Lane, and Multnomah—have developed court-connected probate mediation programs. In 2009, Judge Katherine Tennyson encouraged mediation in contested probate disputes in Multnomah County. The county trained probate mediators in 2009 and again in 2010, and parties can now choose a mediator from a roster of trained probate mediators.

On May 14 and 15, 2015, Clackamas County, Multnomah County, and Washington County will offer a probate mediation training open to people who have completed a course in basic mediation. The training will take place at Ainsworth House in Oregon City. The cost of the two-day training is $400. Space is limited.

The Elder Law and Alternative Dispute Resolution sections of the Bar are sponsoring the event. Event organizers anticipate offering both general and ethics CLE credits.

The May training will be modeled after the Multnomah County probate mediation trainings in 2010. Sessions will cover many topics:

- understanding diminished capacity
- working with people with disabilities in mediation
- family dynamics
- issues in guardianships and conservatorships
- elder abuse reporting
- issues in probate

Among the presenters are Judge Katherine Tennyson, Josh Kadish, Meg Nightingale, Steve Owen, and Lauren MacNeill.

Registration forms are available online at The Beaverton Dispute Resolution Center website: **www.beavertonoregon.gov/disputeresolution**.

For more information, conact:
Laura Swartz at lswartz BeavertonOregon.gov *or* Tsipora Dimant at tdimant@BeavertonOregon.gov. ■

Minimum income for community spouse will increase July 1

The minimum monthly maintenance needs allowance (MMMNA)—the minimum amount of monthly income the spouse of a nursing home resident receiving Medicaid benefits is entitled to receive—will increase from $1,966.25 per month to $1,991.25 on July 1, 2015.

If the community spouse's income falls below his or her MMMNA, the shortfall is made up from the nursing home spouse's income or by allocation to the community spouse of additional resources.

The newly released figure is the least that the MMMNA can be in any state. In some states, the minimum income level may be as high as $2,980.50, a figure that changes every January. The community spouse may keep any income above the minimum amount, as long as the income is in his or her name. ■

Available online:

A Fiduciary Income Tax Primer

Almost every estate— even an uncomplicated estate that involves only a residence, an investment account, and a retirement account —presents fiduciary income-tax issues that must be dealt with by the attorneys, accountants, and trust officers who administer them.

The Estate Planning and Administration Section of the Oregon State Bar in October 2014 published *A Fiduciary Income Tax Primer,* prepared by Philip N. Jones, a Portland attorney with Duffy Kekel LLP.

From the introduction:

> The purpose of this paper is to summarize the basic elements of the fiduciary income tax for the benefit of professionals (particularly attorneys and trust officers) who administer trusts and estates or who advise fiduciaries. Those professionals and their clients will regularly make administrative decisions that will impact the fiduciary income taxation of trusts and estates, and those decisions will also impact the individual income taxation of beneficiaries (including the taxation of trusts that are beneficiaries of estates, or are beneficiaries of other trusts). Because administrative decisions have a significant impact on income tax consequences, attorneys and trust officers who administer trusts and estates should familiarize themselves with the basics of fiduciary income taxation. Even if an accountant experienced with the fiduciary income tax is part of the professional team advising an estate or trust, attorneys and trust officers should be conversant on the subject of fiduciary income taxation, if only to spot issues that need to be discussed with the accountant.
>
> This paper is devoted primarily to the federal fiduciary income tax, but discussion of Oregon law and the Oregon fiduciary income tax is also included.

The publication is available for download from the Estate Planning and Administration Section's website at **http://oregonestateplanning.homestead.com/EstatePlanning_BonusOct14.pdf** ■

Eighth Circuit Court decision affects special needs planning

By Geoff Bernhardt, Attorney at Law

Geoff Bernhardt has helped individuals and families address the legal and financial consequences of aging for more than 22 years. He is an Adjunct Professor of Elder Law at Lewis and Clark Law School in Portland. He was Chair of the Oregon State Bar Elder Law Section in 2012 and has received the Multnomah County Legal Aid Senior Law Project Outstanding Volunteer Award. Geoff is a shareholder in his Portland firm, the Law Offices of Geoff Bernhardt, which specializes in elder law, estate planning, special needs planning, probate, guardianships, and conservatorships.

The Eighth Circuit Court of Appeals recently issued a decision that will require attorneys who prepare a certain type of special needs trust authorized by 42 USC 1396p(d)(4)(A) ("first-party" or "payback" special needs trusts) to reassess how they create and fund such trusts. The case is *Draper v. Colvin*, No. 12-2757 (March 3, 2015).

Stephany Draper was 18 years old when she suffered a traumatic brain injury in a car accident in June 2006. After the accident, she signed a power of attorney for financial decisions which authorized her parents to "fund, transfer assets to, and to instruct and advise the trustee of any trust wherein Draper is or may be the trustor or the beneficiary." Draper began to receive Supplemental Security Income (SSI) payments in July 2007. In February 2008, her father entered into a settlement of Draper's claims for personal injuries in exchange for payment of $429,259.41.

Since the SSI resource limit is $2,000, receipt of this settlement would ordinarily have made Draper ineligible for continuing SSI benefits. To avoid this result, on the same day they settled her personal injury claim, Draper's parents created the Stephany Ann Draper Special Needs Trust. This trust was intended to qualify as an exempt special needs trust pursuant to the terms of 42 USC 1396p(d)(4)(A). That federal statute authorizes the creation of an exempt special needs trust, defined as:

> A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(A)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian, or court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a state plan under this subchapter.

Note that a disabled person cannot establish a trust for him/herself under d(4)(A). The trust must be established by a parent, grandparent, legal guardian, or court.

In September 2008, Draper received a notice from the Social Security Administration, indicating that her trust was not exempt from being counted as a resource and that she was no longer eligible for SSI benefits. SSA took the position that the trust was not exempt because it had been created by her parents acting in their capacity as agents under her power of attorney ("agents"), rather than in their capacity as her parents. This was so even though the parents had signed the trust as individuals and had not made any reference to the power of attorney within the trust document.

Draper appealed to an administrative law judge. The judge upheld the agency's decision, finding that Draper's parents had acted as Draper's agent when they established her trust. Draper appealed to the Social Security Appeals Council, and simultaneously applied for and received a state court order, retroactively modifying the trust to list the court, rather than Draper's parents, as settlor. The Appeals Council denied this request. Draper appealed to the federal district court, which affirmed the judgment of the SSA. Draper appealed that decision to the Eighth Circuit Court of Appeals.

The court began its review by noting that it would only reverse the SSA's decision if it was not supported by substantial evidence, defined as "less than a preponderance, but enough that a reasonable mind would find it adequate to support the SSA's conclusions." The court declared that "if substantial evidence supports the SSA's decision, the court does not reverse even if it would reach a different conclusion."

Draper advanced two primary arguments on appeal. First, she argued that her parents had acted "as parents" when they established her trust, and not as agents under her power of attorney. Second, she argued that the subsequent retroactive state court order remedied any initial non-compliance with 42 USC 1396p(d)(4)(A)

The court began its analysis by examining the text of (d)(4)(A). It focused on the requirement that the trust be established by a "parent, grandparent, legal guardian, or court," and found the terms "parent" and "establish" to be ambiguous. The court concluded that the SSA had authority to interpret the statute, and had done so in POMS SI 01120.203B(1)(f) and (g). It further concluded the SSA's interpretation of the federal statute as set forth in the POMS was entitled to *Skidmore*-level deference, and that Draper was

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This case is troubling for special needs planners.

required to comply with the POMS provisions cited above. Since the federal statute does not permit the disabled individual to create his or her own special needs trust, the POMS cautions that "a trust established under a power of attorney will result in a trust we consider to be established through the actions of the disabled individual him/herself." The parent must act *as a parent*, and not as agent for the disabled child.

The court interpreted the POMS section as requiring a two-part process. First, a parent, grandparent, guardian, or court must establish the trust. The POMS states that the parent can "seed" the trust with a nominal amount of the parent's own money, or the parent can create an unfunded or "dry" trust, if allowed by State law. Second, after the "seed" trust or "dry" trust has been established, assets of the disabled person may be transferred to the trust, either by a legally competent disabled person, or by another person with legal authority to transfer the disabled person's assets, such as an agent under a power of attorney.

Draper argued that her trust, at inception, satisfied the POMS criteria. Her parents, acting as parents, established a valid unfunded or "dry" trust. Draper emphasized that her parents had not referenced her power of attorney when they created the trust. They later acted in their capacity as Draper's agent to transfer her personal injury settlement proceeds to the trust.

The court rejected Draper's contention that her parents had established a "dry" trust. The court noted that, on the same day the trust was signed, it was funded with $429,259.41 in personal injury proceeds. The trust itself made this explicit, stating that "this trust is funded with the proceeds of the settlement of a liability claim."

Draper next argued that even if her parents had not created a dry trust, it was still valid because they acted in their individual capacity as parents when creating the trust—and not as her agents under the power of attorney.

Even though Draper's parents had signed only as individuals—they did not sign "John and Krystal Draper, POA for Stephany Draper"—the court concluded that they had acted as agents for Draper when they established the trust. The court first cited "traditional trust-law principles." The court stated that creation of a funded or "non-empty" trust requires more than just execution of trust documents, and that funding plays "a key role," citing the Restatement (Third) of Trusts for this proposition. In the case of a "funded" trust, the court also interpreted POMS SI 01120.203B(1)(g) and "traditional trust law" to require that someone with a legal interest in the trust assets be involved in the trust's creation. In other words, the court considered the funding of a "funded" trust to be inextricably linked with its creation.

The court went on to find that Draper's parents had no interest in the personal injury settlement proceeds, except as Draper's agent under the power of attorney. Under the court's logic, since the settlement proceeds were the source of the initial funding, the parents could only have created the trust in their capacity as Draper's agent. The court concluded that "substantial evidence" supported the SSA's contention that Draper's parents acted as agents for Draper when they established the trust. The court affirmed the district court's holding that the trust was established by the parents as agents for their daughter; that the trust was a countable resource for SSI purposes; and that Draper was not entitled to SSI benefits.

This case is troubling for special needs planners because Draper's attorneys followed accepted practice in establishing Draper's trust. Experienced special needs planners know that 42 USC 1396p(d)(4)A) requires that an exempt trust be established by a parent, grandparent, guardian, or court, and that the disabled person may not establish his or her own special needs trust. Special needs planners are also aware that there has to be some mechanism available to fund the trust, such as a competent disabled individual, an existing power of attorney, or a legal conservator. Special needs planning attorneys did not consider that the SSA would effectively merge the establishment and initial funding of the trust into one action, but that is what the Eighth Circuit has done in *Draper*. As of April 14, 2015, Draper had not sought rehearing *en banc* by the Eighth Circuit, nor had she filed a petition for certiorari to the US Supreme Court.

While an Eighth Circuit court case is not binding precedent in Oregon, it is still the opinion of a federal circuit court of appeals that upheld a position taken by the Social Security Administration.

Meanwhile, Oregon special needs planning attorneys should consider taking the following protective measures:

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1 . In order to avoid having the SSA argue that the establishment of the trust is linked to the ultimate funding source (usually a personal injury settlement or an unplanned inheritance), the attorney should consider having the parent, grandparent, or legal guardian who establishes the trust "seed" the trust by putting a nominal amount (for example, $10) of the settlor's own money into the trust, as the initial trust funding.
2. The special needs planning attorney should consider omitting reference to the ultimate source of funding of the trust. Right now, it is common for attorneys to include a provision in the trust stating that "this trust shall be funded with proceeds of a personal injury settlement." This language caused problems for Draper, because it supported the court's holding that the parents acted as agents when creating the trust. Better to reference "seed" funds of $10 as the initial trust asset.
3. Consider adding explicit language to the special needs trust, to state that the settlor is acting in settlor's capacity as an individual parent of the beneficiary, and in no other capacity.
4. It is common to see powers of attorney prepared by experienced lawyers that give the agent authority to "establish and fund a trust with my assets pursuant to 42 USC 1396p(d)(4)(A)." Consider updating this language to eliminate the agent's authority to "establish" a (d)(4)(A) trust, while retaining authority to fund a special needs trust.
5. Court-created trusts now appear to be a safer option than parent-created trusts.

Attorneys who work in the area of special needs trusts should review the *Draper* case, and adjust their forms and procedures accordingly, to avoid costly and protracted litigation with the SSA. ■

New Multnomah County Court Visitor requirements effective May 1, 2015

IN THE CIRCUIT COURT IN THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

In the Matter of:
VISITOR QUALIFICATIONS AND STANDARDS PRESIDING JUDGE'S ORDER

The Court finds that ORS 125.165 requires that the Presiding Judge shall, by court order, establish the training, qualifications and performance standards of a person performing the duties of a Court Visitor as outlined in Chapter 125.

In addition to the requirements set forth in ORS 125.165, it is hereby ORDERED that anyone approved as a Visitor in Multnomah County shall:

1) Have a license, in good standing, as a Licensed Professional Counselor, Licensed Clinical Social Worker, Registered Nurse, and/or a post graduate degree in social work, mental health or medical fields. While on the approved Visitors list, Visitors shall maintain any professional licenses or certifications in good standing and shall immediately notify the Court of any change in status, including investigations by the authority issuing the license/certification.
2) Have at least two years of relevant experience in the range of case types which arise under Chapter 125, which may include experience in mental health, addiction identification and treatment, developmental disabilities and/or geriatrics.
3) Complete the Fiduciary Training required for non-professional fiduciaries by 9.076 and a training regarding identification and reporting of abuse of elders, vulnerable adults and children.
4) Demonstrate a working knowledge and proficiency with the Oregon statutory criteria for Protective Proceedings as outlined in Chapter 125 as well as the Uniform Trial Court Rules and Multnomah County Supplemental Local Rules governing Protective Proceedings.
5) Conduct interviews of all persons deemed by the Visitor to have relevant information; review all records relevant to the respondent to the extent such records are available; comply with ORS 125.150; provide, within the statutory timeline, a report to the Court in compliance with ORS 125.155(2) in the form prescribed by the Court, and be present at any hearing on objections to the appointment of a fiduciary as required by ORS 124.155(5).

It is further ORDERED that the Court will retain authority as follows:
1) The Chief Probate Judge shall have discretion to appoint a person or remove a person from the court approved visitor list.
2) The Chief Probate Judge shall determine whether or not a proposed visitor's qualifications are sufficient.
3) This Chief Probate Judge is authorized to limit the number of persons placed upon the approved visitor list.
4) The Chief Probate Judge shall periodically review the work of Visitors, but said review shall occur no less than once per year.
5) The Presiding Judge shall set the fee schedule for the Visitor. The existing standing order by Judge Elizabeth Welch is superseded by this Order. For cases filed on or after May 1, 2015, the fee shall be set at a flat rate of $550 per case to be tendered by petitioners at the time of filing as required by Court rule. Upon petition to the Court by the Visitor, further compensation as is just and reasonable may be allowed by the Court for any extraordinary investigation and or atypical amount of time required of the Visitor in an individual case. When petitioning for further compensation, a Visitor shall utilize the same procedural process as a petition for attorney fees in cases under Chapter 125.

Dated this 14th day of April, 2015 Nan Waller, Presiding Circuit Court Judge

Resources for elder law attorneys

Events

Elder Law Discussion Group

Noon-1:00 p.m.
Legal Aid Services Portland conference room 520 SW Sixth Ave, 11th Floor, Portland. Coffee will be provided.

- May 14, 2015: Ed Johnson, Director of Litigation at the Oregon Law Center and housing expert, will present on "The Accidental Landlord" and options for dealing with this situation.
- June 11, 2015: Tax Attorney Matthew Erdman will present on "Tips for helping low income clients with tax controversies."
- July 9, 2015: No ELDG this month.
- August 13, 2015: David Koen from Legal Aid Services of Oregon will present on "Changes in Reverse Mortgage Rules."
- September 10, 2015: "K Plan Rules and Updates." Speaker TBD.

2015 Fiduciary Litigation Update
OSB Audio Seminar
May 4, 10–11 a.m.
www.osbar.org

Legal Ethics—Best Practices
May 8, 8:30 a.m.–4:30 p.m.
Oregon State Bar Center, Tigard
or live webcast from your computer

Gain an understanding of legal ethics best practices and obtain practical advice for handling law office responsibilities. Speakers will also address responsibilities after withdrawal, handling conflicts, and conducting yourself with professionalism.
www.osbar.org

Breaches of Fiduciary Duties in Trust Administration
Lane County Bar Association CLE Seminar
May 12, 12:00–1:00 p.m.
www.lanecountybar.org

Probate Mediation Training
May 14 and May 15
Ainsworth House, Oregon City
See page 9 for details

2015 NAELA Annual Conference
Thursday, May 14, 1:00 p.m. through Saturday, May, 16, 12:45 p.m.
Orlando, FLorida
www.naela.org

Ethics for Estate Planners
OSB Audio Seminar
May 15/10–11 a.m.
www.osbar.org

National Aging and Law Conference
October 29-30
Washington, DC
"Celebrating Anniversaries with Action"
2015 marks the following:
80th anniversary of Social Security
50th anniversary of Medicare and Medicaid
50th anniversary of the Older Americans Act
25th anniversary of the Americans with Disabilities Act
www.americanbar.org/groups/law_aging.html ■

Websites

Elder Law Section website
www.osbar.org/sections/elder/elderlaw.html
The website provides useful links for elder law practitioners, past issues of *Elder Law Newsletter,* and current elder law numbers.

Nursing Home 411
www.nursinghome411.org
The Long Term Care Community Coalition (LTCCC) is a nonprofit organization dedicated to improving care for the elderly and disabled.

National Academy of Elder Law Attorneys (NAELA)
www.naela.org
A professional association of attorneys who are dedicated to improving the quality of legal services provided to people as they age and people with special needs. ■

Elder Law Discussion List

The discussion list provides a forum for sharing information and asking questions. To post to the list, enter **eldlaw@forums.osbar.org** in the *To* line of your email. ■

Publication

Nursing Home Quality Standards A Primer for Managed Care Organizations
www.nursinghome411.org/?articleid=10093 ■

Important elder law numbers

as of
January 1, 2015

Supplemental Security Income (SSI) Benefit Standards	Eligible individual........ $733/month Eligible couple........ $1,100/month
Medicaid (Oregon)	Asset limit for Medicaid recipient........ $2,000/month Long term care income cap........ $2,199/month Community spouse minimum resource standard........ $23,844 Community spouse maximum resource standard........ $119,220 Community spouse minimum and maximum monthly allowance standards........ $1,967/month; $2,980.50/month Excess shelter allowance........ Amount above $590/month SNAP (food stamp) utility allowance used to figure excess shelter allowance........ $446/month Personal needs allowance in nursing home........ $60/month Personal needs allowance in community-based care........ $163/month Room & board rate for community-based care facilities........ $570/month OSIP maintenance standard for person receiving in-home services........ $1,233 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2010........ $7,663/month
Medicare	Part B premium........ $104.90/month* Part D premium:........ Varies according to plan chosen Part B deductible........ $147/year Part A hospital deductible per spell of illness........ $1,260 Skilled nursing facility co-insurance for days 21-100........ $157.50/day * Premiums are higher if annual income is more than $85,000 (single filer) or $170,000 (married couple filing jointly).

Elder Law Section

Newsletter Committee

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