

# Newsletter

Oregon Estate Planning  
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## Questions and Answers About the Final Disposition of Human Remains in Oregon

This article will serve as a guide for lawyers who might find the “non-tax” questions concerning final dispositions a bit uncomfortable. The article will provide a basic legal and historical framework to assist those attorneys in guiding their clients toward solutions in this very personal and financially substantial area.

### Why Should an Estate Planning Attorney Care About Disposition of Remains?

Clients may wish to direct the disposition of their remains for any number of reasons, including financial, religious, or emotional reasons. A number of attorneys already include a Directive Regarding Disposition of Remains as part of their basic estate-planning package.

Funerals are expensive. According to a 2006 survey conducted by the National Funeral Directors Association, the average funeral costs about \$7,000, not including costs for the cemetery. *NFDA Releases Results of General Price List Survey*, <http://www.nfda.org/index.php/all-press-releases/1219>. The other expense that has been highlighted in recent years is the environmental cost of the “traditional” American funeral. In 2009, Green, Inc., a blog published by the *New York Times*, reported that each year, Americans bury 30 million board feet of hardwoods, 1.6 million tons of concrete, 90,000 tons of steel, and an estimated 827,000 gallons of embalming chemicals. The article noted that this equals enough wood to make close to 2,000 houses, enough concrete to lay a 200-mile-long double-lane road, and enough steel to “rebuild the Golden Gate Bridge.” Nick Chambers, *Greening the Trip to the Great Beyond*, NY Times (Mar. 19, 2009), <http://greeninc.blogs.nytimes.com/2009/03/19/>.

Another reason for planning the disposition ahead of time is to avoid conflicts between family members after the client’s death. If the client does not direct disposition of his or her body, Oregon imposes an order of preference, which could transfer the authority to someone the client does not trust.

### Does Oregon Allow a Person to Direct the Disposition of His or Her Body?

Oregon specifically allows a person to either prepare a written declaration of his or her wishes regarding final disposition or delegate the authority to do so to another person.

Under ORS 97.130(1), “[a]ny individual of sound mind who is 18 years of age or older, by completion of a written signed instrument or by preparing or prearranging with any funeral service practitioner licensed under ORS chapter 692, may direct any lawful manner of disposition of the individual’s remains.” ORS 97.130(1) further mandates that such dispositions “shall not be subject to cancellation or substantial revision.” However, ORS 97.130(6) excepts dispositions that are unlawful or cannot be afforded by the estate or the person financially responsible for the disposition. In these cases the direction is void and becomes subject to the direction of a person identified in a prioritized list.

Alternatively, ORS 97.130(3) allows the decedent or any person authorized by law to direct disposition to delegate that authority by completing a form “substantially similar”

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to the one found in ORS 97.130(7). The appointment of an agent (unlike the written direction afforded by ORS 97.130(1)) requires two witnesses.

### **If My Client Does Not Complete a Written Order, Who Directs the Disposition of the Body?**

In the absence of a written direction or prearranged disposition from the deceased, ORS 97.130(2) establishes a prioritized list of classes from which a person may direct the disposition of the remains by written instrument. ORS 97.130(8) also provides that if disposition has not been directed within 10 days after the date of death, a public health officer may direct and authorize disposition of the remains.

### **What Is a “Green Funeral”?**

A green funeral describes the application of environmentally conscious practices and materials to final disposition practices. There is no set definition of what constitutes a green funeral, and the practices employed in a green funeral can range along a wide spectrum. Thus a discussion about green burial might involve anything from simply forgoing embalming to choosing caskets made from environmentally sustainable materials and interring the remains in a “natural cemetery.”

To some, cremation is seen as a “green” alternative to burial because cremation requires no ongoing maintenance, saving resources that might be spent on grounds upkeep. Additionally, cremation avoids the use and burial of wood, metal and concrete as well as the interment of potentially environmentally hazardous embalming fluids. However, the process of cremating a body requires quite a bite of energy. One article recently reported that according to a leading cremation equipment manufacturer, “a typical [cremation] machine requires about 2,000 cubic feet of natural gas and 4 kilowatt-hours of electricity per body.” Nina Shen Rastogi, *The Green Hereafter: How to Leave an Environmentally Friendly Corpse*, Slate (Feb. 17, 2009), <http://www.slate.com/id/221139i/.html?viewAll=y>. The article pointed out that this energy consumption “produces about 250 pounds of CO<sub>2</sub> equivalent, or about as much as a typical American home generates in six days.” *Id.*

### **My Client Would Like to Provide Home Death Care for Her Loved One. Is This Legal?**

Currently no statutes or case law restrict a person from caring for dead family members at home. The person who chooses to do so is defined by ORS 432.005(11) as a “[p]erson acting as a funeral service practitioner,” and as such is subject to a number of statutes and rules. ORS 432.317(1) requires the person acting as a funeral service practitioner to file a written report with the county registrar within 24 hours of assuming possession of the dead body. Under ORS 432.307(c)(2), the person acting as a funeral service practitioner must get a medical professional to sign a death certificate within 48 hours. This certificate will state the cause of death. ORS 432.307(1) then requires the person acting as

funeral service practitioner to complete the death certificate, using information from the next of kin or best-qualified person, and file it with the county registrar within five days of taking custody of the body. ORS 432.312 mandates a \$20 filing fee.

As for the actual care of the remains, the state provides administrative rules for funeral service practitioners. However, unlike the statutes, these rules do not address persons acting as a funeral service practitioner. This creates some doubt about whether or not these rules are applicable to a family caring for their own dead at home. OAR 830-030-0010(1) states that all human remains that are not going to be embalmed must be wrapped in a sheet. Further, it requires remains that are to be held longer than 24 hours to be embalmed or refrigerated at 36° F or less until final disposition.

According to these rules, unembalmed remains may be removed from refrigeration for two purposes: transportation or funeral services/viewing. OAR 830-030-0060 allows unembalmed remains to be removed from refrigeration for transportation if the remains can reach its destination within six hours. If the trip will take over six hours, the rule requires the remains to be embalmed or placed in a sealed casket. If the cause of death was a communicable disease (defined by OAR 830-030-0070(2) as AIDS, Diphtheria, Hemorrhagic fevers, Hepatitis (B, C, or Delta), HIV, Plague, Rabies, Tularemia, or Tuberculosis), this casket must be a sealed metal casket enclosed in a strong transportation case or a sound casket enclosed in a sealed metal or metal-lined transportation case. OAR 830-030-0080 allows unembalmed remains to forgo refrigeration for up to six hours to allow for a funeral service or public or private viewing.

According to OAR 830-030-0080(1), no public or private viewing is allowed over unwashed human remains. According to OAR 830-011-0000(42), “washed” means “the entire surface of the human remains has been bathed with a disinfectant solution and the mouth, nose, and other body orifices have been washed and when necessary packed with cotton saturated with a disinfectant solution.” However, OAR 830-030-0080(3) explains that this prohibition is not meant to limit private viewings by family members, nor interfere with religious customs.

ORS 432.317(4) allows the person acting as a funeral service practitioner to move the body from the place of death for the purpose of preparing it for final disposition, with the consent of the medical professional who certified the cause of death. Before the final disposition of the body, ORS 432.317(2) requires the person acting as a funeral service practitioner to obtain written authorization for final disposition (a burial permit) from the medical professional via a form supplied by the county registrar. ORS 692.405 requires that the funeral service practitioner obtain and attach a metal identification disc to the body receptacle and see that the identity tag remains with the body throughout the disposition. OAR 830-030-0000(3)-(6) forbids cemeteries or crematoriums from accepting remains that are not accompanied by this identification disc. According to ORS 432.317(7), the person in charge of the final disposition must sign the disposition

authorization form and within 10 days of the disposition return it to the registrar of the county where the decedent died. Lisa Carlson provides directions and practical insights for the practical issues involved in home death care in her book, *Caring for the Dead: Your Final Act of Love*.

### **Can a Hospital/Nursing Home Refuse to Release a Body to My Client?**

No. Oregon law does not require a body to be released to a funeral service provider. ORS 97.160 requires that the hospital notify the next of kin before releasing a body. ORS 432.317(4) requires that the medical professional who certifies the cause of death must consent before remains may be removed from the place of death in order to prepare them for final disposition. However, ORS 432.317(2) allows a person acting as a funeral service provider to obtain written authorization for final disposition from the medical professional.

### **Does Oregon Mandate That a Body Be Embalmed?**

No. Quite to the contrary, OAR 830-030-0010(3) requires that the person who is authorized under ORS 97.130 to direct disposition of the remains request and authorize embalming before the procedure may be applied. Written documentation of this permission is required and must be accompanied by a signature specifically authorizing embalming. This documentation must be included in a permanent record that the practitioner is required under OAR 830-040-0000(6) to maintain for each decedent.

The exception to the rule applies to the remains of persons who died of communicable diseases. However, even this exception requires embalming only under limited circumstances relating to public viewing and transportation. OAR 830-030-0080(2) prohibits any public viewing of the non-embalmed remains of a person who died from a communicable disease. However, OAR 830-030-0080(3) cautions that this prohibition is not meant to “limit or discourage” private viewings by family members. OAR 830-030-0070 requires the remains of a person who died from communicable disease to be embalmed before being transported. However, OAR 830-030-0070(3) allows for an exception if religious custom or the condition of the remains prohibits embalming. In those two cases, the remains may be transported if placed in a sealed metal casket enclosed in a strong transportation case or in a sound casket enclosed in a sealed metal or metal-lined transportation case.

### **Can My Client Be Buried in His or Her Backyard?**

Oregon law does not specifically preclude backyard burials, and ORS 97.040 specifically exempts “private family burial grounds where lots are not offered for sale” from the laws regulating cemeteries. However, ORS 97.460 does set out a number of requirements with which a backyard burial must comply. The person burying the deceased must own the property, have written consent of any mortgage or lien holders, have the

written consent of the planning commission or governing body of the county or city, agree to maintain and provide records of the disposition on the property as required and requested by the State Mortuary and Cemetery Board, and agree to disclose the disposition of human remains upon sale of the property as provided in ORS 105.464.

### **Can My Client Be Buried at Sea?**

The EPA provides a general permit for burial at sea in 40 C.F.R. § 229.1. In order to comply with this permit, 40 C.F.R. § 229.1(a)(2) mandates uncremated remains must be buried no closer than three nautical miles from land in water at least 600 feet deep. Furthermore, the rule requires that “[a]ll necessary measures shall be taken to ensure that the remains sink to the bottom rapidly and permanently.” *Id.* Finally, information about the burial, including the time, place, name of the deceased, and person scattering the remains, must be reported to the EPA Regional Administrator within 30 days of the burial.

### **My Client Bought a Casket Online. Can the Funeral Home Refuse to Use it?**

No. 16 C.F.R. § 453.4(b)(1)(i) prohibits a funeral provider from “[c]ondition[ing] the furnishing of any funeral good or funeral service to a person arranging a funeral upon the purchase of any other funeral good or funeral service, except as required by law or as otherwise permitted by this part.” Furthermore, 16 C.F.R. § 453.4(b)(1)(ii) prohibits a funeral provider from charging a fee for using a third-party casket.

### **My Client Wants to Scatter Cremated Remains at a Favorite Lookout Point. Is this Legal?**

The only rule of law regulating the scattering of cremated remains in Oregon is OAR 830-030-0000(6). This administrative rule requires a commercial funeral provider who scatters cremated remains to retain the identification tag as part of its permanent record. Due to this lack of legal prohibitions, the Oregon Mortuary and Cemetery Board has released a memo reflecting its position that cremated remains may be legally scattered in Oregon. [http://www.oregon.gov/MortCem/Consumer\\_Information/Scattering.pdf](http://www.oregon.gov/MortCem/Consumer_Information/Scattering.pdf).

While Oregon provides no state regulation of the disposition of cremated remains, under 40 C.F.R. § 229.1(a)(3), the EPA mandates that cremated remains may only be buried in the ocean if the burial takes place no closer than three nautical miles from land. Furthermore, information about the burial, including the time, place, name of the deceased, and person scattering the remains, must be reported to the EPA Regional Administrator. Cremated remains scattered on inland waters are subject to regulation by the Clean Water Act. However, the Oregon Department of Environmental Quality, which is responsible for administering the Clean Water Act within the state, has issued no regulations regarding the scattering of cremated remains.

Regulations exist regarding scattering cremated remains in one of the four National Parks located in Oregon. 36 C.F.R. §

2.62(b) prohibits the scattering of human ashes in a National Park unless the park superintendent has issued a permit or has designated an area of the park available for scattering. Each National Park has its own superintendent, and the superintendent in a particular park must authorize the scattering of the cremated remains in that park.

Besides scattering or burying, an individual might employ any of several novel means of disposing of cremated remains. Since the turn of the century, several companies have marketed a process that creates diamonds from the cremated remains of a loved one. Two examples are LifeGem and GemSmart. Alternatively, Atlanta-based Eternal Reefs offers to mix the cremated remains into an environmentally friendly concrete reef that is sunk into the ocean to act as the backbone of a reconstructed coral reef. Susan Kay Asher, *Sunset in the Islands of the Blessed: The Modern Burial at Sea*, Cremation Association of North America (Oct. 18, 2005), <http://www.cremationassociation.org/html/article-sunset.html>. Space Services, Inc. is a company that will blast cremated remains into space. The remains will orbit the Earth for a set period of time before reentering the atmosphere and burning up. <http://www.memorialspaceflights.com/faq.asp>.

### Besides Burial or Cremation, What Options Are Available?

Besides cremation or burial, two new techniques have recently begun to garner attention. The first is alkaline hydrolysis, which disposes of the body by dissolving it in a vat of highly

pressurized lye. Associate Press, *A Rival to Burial: Dissolving Bodies with Lye*, MSNBC (May 8, 2008), <http://www.msnbc.msn.com/id/24526431/>. While the procedure is not being used by the funeral industry yet, it is used by two medical centers to dispose of cadavers that had been donated for research. *Id.* The process liquefies the remains, leaving a dry bone residue similar to cremated remains. *Id.* The second new technique, which has been developed by the Swedish company Promessa Organic, involves flash freezing the body and then using sound vibrations to break it into tiny pieces that are, again, reduced to something similar to cremated remains. *Swedes Offer Freeze-Dry Burials*, BBC News (Feb. 9, 2004), <http://news.bbc.co.uk/2/hi/europe/3473103.stm>. While these techniques may seem far removed from today's sensibilities, the Oregon Legislative Assembly recently redefined "final disposition" to specifically include the "dissolution" of human remains. SB 796 (2009, effective Jan. 1, 2010). The revised statute also grants the Oregon Mortuary and Cemetery Board the latitude to authorize any "other disposition," at least legally opening the door for the Board to give Promessa Organic's technique the green light. Whether either of these techniques will be embraced in the United States, where the typical final disposition is not too far removed from burials scientists have unearthed from over a quarter of a millennia ago, is another question.

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## Attorney General's Role in Supervising Charitable Trusts

For estate planning practitioners, determining whether the Attorney General must be involved with a charitable trust generally arises in three areas: (1) registration and reporting under the Charitable Trust and Corporation Act, (2) compliance with the Uniform Trust Code, and (3) filing of probate- or estate-related petitions or declaratory judgment actions. This article will discuss the authority of the Attorney General and proper inclusion of the Attorney General in charitable trust-related matters.

The Attorney General is responsible for the supervision and protection of charitable assets in this state. *Wemme v. First Church of Christ*, 110 Or 179, 217, 219 P 618 (1924). This authority stems from the common law doctrine of *parens patriae* in which the state had the duty to protect the public's interest in public charities and trusts by and through its attorney general. Historically, the state had the exclusive authority to enforce charitable trusts. *Dartmouth College v. Woodward*, 17 US (4 Wheat) 518 (1819). Although the state retains that power, most jurisdictions now extend that power to other interested parties. For example, the Restatement (3d) of Trusts § 94(2) (tentative draft no. 5, 2009) provides: "A suit for the enforcement of a charitable trust may be maintained only by the Attorney General or other appropriate

public office or by a co-trustee or successor trustee, by a settlor, or by another person who has a special interest in the enforcement of the trust." It is important to note that even though another party may be authorized to bring an action to protect a charitable interest, in most instances the Attorney General should still be notified and given the opportunity to intervene.

Oregon law defines a "charitable trust" as a trust, *or a portion of a trust*, described in ORS 130.170(1). Thus, a trust containing specific charitable bequests would qualify as a charitable trust. According to ORS 130.170(1), a charitable trust is a trust created for various described charitable purposes that are beneficial to the community; however a trust is not a charitable trust if the trust contains contingencies that make the charitable trust negligible. There are no firm guidelines of when a charitable interest is negligible, which precludes the involvement of the Attorney General with that particular noncharitable trust. When in doubt, a practitioner should contact the Charitable Activities Section to confer about whether a charitable interest is negligible. If a practitioner determines that he or she is working with a charitable trust, the practitioner should be aware of the various areas of Oregon law that may apply to the charitable trust.

## Charitable Trust and Corporation Act, ORS 128.610, *et seq.*

The Charitable Trust and Corporation Act provides oversight powers for the Attorney General. Under the Charitable Trust and Corporation Act, charitable trusts “doing business or holding property” in Oregon, ORS 128.620, must register with the Attorney General’s Charitable Activities Section. ORS 128.650. Registration is required even if the trustee or situs is located outside Oregon, as long as the trust is doing business or holding property in Oregon. Registration is a one-time event, but the charitable trust must file financial reports and pay the appropriate fees on an annual basis. ORS 128.670. Certain charitable trusts are exempt from registration, including those for religious organizations or those for which the charitable beneficiary is also the sole trustee. ORS 128.640. The duty to register encompasses charitable remainder trusts. OAR 137-010-0005(1). However, the Attorney General has adopted a policy that split-interest trusts need only register if the donor receives a charitable contribution tax deduction for the value of the income or remainder trust or if the trustee is obligated to pay a portion of the annual income to charitable beneficiaries.

Under the Charitable Trust and Corporation Act, the Attorney General may investigate charitable trusts or their fiduciaries, ORS 128.680, and can order any person to appear and provide sworn testimony and produce materials as part of an investigation. ORS 128.690. The Attorney General may initiate court proceedings stemming from such investigations or orders, and such rights supplement any statutory or common law rights of the Attorney General. ORS 128.710(1). Importantly, no court may modify or terminate a charitable trust unless the Attorney General is a party to the proceeding. ORS 128.710(2).

The registration and reporting requirements of the Charitable Trust and Corporation Act are separate and distinct from the various duties and rights under the UTC, although there is some overlap.

## Uniform Trust Code

The Uniform Trust Code (“UTC”) deems the Attorney General a qualified beneficiary for charitable trusts, often in addition to the charitable beneficiary of a charitable trust. ORS 130.040(3). The UTC specifies that the Attorney General’s rights as a qualified beneficiary are limited to those charitable trusts that have their principal place of business in Oregon and where the charitable interest is not negligible. ORS 130.040(3). However, because the supervisory rights and responsibilities of the Attorney General under common law and the Charitable Trust and Corporation Act extend to any charitable trust “doing business or holding property” in Oregon, the Attorney General may seek to intervene in matters even though he or she may not be deemed a qualified beneficiary under the UTC.

Consistent with the common law and the Charitable Trust and Corporation Act, the UTC provides that the Attorney General must be made a party to any proceeding in which one seeks to modify or terminate a “trust of property for charitable purposes.” ORS 130.170(4). Under the UTC an irrevocable trust may be modified or terminated without a court proceeding with the consent of all interested parties, including the settlor, if living, and the beneficiaries.

ORS 130.200(1). The consent of the Attorney General is required for any such nonjudicial modification or termination involving a charitable trust. The UTC also permits the modification or termination of an irrevocable charitable trust with the consent of the settlor, if living, and the beneficiaries. ORS 130.200. The Attorney General must be made a party to the proceedings if the trust includes a charitable interest. ORS 130.200, 128.710(2).

## Estate Proceedings

If a will submitted to probate seeks to establish a testamentary charitable trust, the party petitioning for probate must provide the Attorney General a copy of the will. ORS 128.720. The personal representative must also provide the Attorney General with a copy of the final account and petition for judgment of distribution, with notice of time for filing objections, which can be no less than 20 days. *Id.* All such wills and notices should be directed to the Charitable Activities Section, Oregon Department of Justice, 1515 SW Fifth Avenue, Suite 410, Portland, Oregon 97201.

Additionally, based on his or her common law duties to protect charitable interests, the Attorney General is an interested party under ORS 111.005(19) whenever a charitable interest may be affected by an action in an estate proceeding. As such, the Attorney General should receive notice pursuant to ORS 111.215 of any such petitions or hearings. The Attorney General may also participate in a will contest under ORS 113.075 as an interested person. These notices and rights to intervene exist whether or not specific charitable organizations are named in the will. Thus, the personal representative and other parties should provide notice to any named charitable organizations in addition to the Attorney General. The Attorney General will make a case-by-case determination with respect to his or her participation in any such proceeding.

Estate litigation is sometimes framed as a declaratory judgment action. As a jurisdictional matter, all parties who have any interest that would be affected by the litigation must be named parties. ORS 28.110; *State ex rel Dewberry v. Kulongoski*, 220 Or App 345, 358, 187 P3d 220 (2008). The standard is stricter than that set forth in ORCP 29 A (Joinder of Persons Needed for Just Adjudication). In those declaratory judgment actions in which a charitable devise or trust will be affected, the Attorney General should be named a party.

## Conclusion

The Attorney General’s powers and responsibilities regarding charitable assets are extensive. It is the role of the Attorney General to protect the public’s interest in charitable assets, donor intent, and the integrity of charitable institutions. It is a role that the Oregon Department of Justice takes seriously. Practitioners should contact the Charitable Activities Section, Oregon Department of Justice, 1515 SW Fifth Avenue, Suite 410, Portland, Oregon 97201, telephone (971) 673-1880, for further information or assistance with any questions regarding charities regulation.

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## Estate Planning Acronyms

Trust and estate lawyers are famous for using acronyms for various estate planning tools and concepts. Those who do not regularly practice in this area (and even some who do) may feel like they are swimming in alphabet soup! To remind us of the differences between GRITs, GRATs, and GRUTs and for a refresher on such terms as ETIP, here is a glossary of some EPAs (estate planning acronyms):

**CLT:** Charitable lead trust. A charitable lead trust is a trust that provides for income, annuity, or unitrust payments to be made to one or more qualifying charitable organizations during the trust term, with assets remaining at the end of the term reverting to the grantor or passing to one or more noncharitable beneficiaries.

**CLAT:** Charitable lead annuity trust. A charitable lead trust providing for payments to the charitable beneficiary(ies) to consist of a fixed dollar (annuity) amount.

**CLUT:** Charitable lead unitrust. A charitable lead trust providing for payments to the charitable beneficiary(ies) to consist of a fixed percentage of the fair market value of the trust assets, determined annually (unitrust amount).

**CRT:** Charitable remainder trust. A charitable trust that qualifies under IRC § 664 and related Treasury Regulations, with provisions requiring that unitrust or fixed (annuity) distributions be made to one or more noncharitable beneficiaries during the term of the trust, and that the trust assets at the end of the term pass to one or more qualified charitable organizations.

**CRAT:** Charitable remainder annuity trust. Charitable remainder trust providing that during the trust term distributions made to the noncharitable beneficiary(ies) will consist of a fixed dollar (annuity) amount.

**CRUT:** Charitable remainder unitrust. Charitable remainder trust providing that during the trust term, distributions made to the noncharitable beneficiary(ies) will consist of a stated percentage (unitrust percentage) of the fair market value of the trust's assets.

**ESBT:** Electing small business trust. Only certain trusts, including ESBTs, are permitted to be shareholders of an S corporation. In contrast to a QSST, an ESBT can have multiple beneficiaries and is not required to distribute all of its income. However, the ESBT's income is taxed at the highest individual tax rate for ordinary income and at 20 percent on long-term capital gains.

**ETIP:** Estate tax inclusion period. With respect to a trust, the period of time during which, if the grantor dies during such period, the trust assets will be included in the grantor's estate. The term is used in generation-skipping transfer tax planning. Generation-skipping transfer tax cannot be allocated until the ETIP ends.

**Flip CRUT:** A NICRUT or NIMCRUT that converts to a CRUT upon the happening of an event or on a date specified in the trust instrument.

**GRAT:** Grantor retained annuity trust. To establish a GRAT, the grantor transfers assets into a trust for a fixed term. The trust provides that annuity payments will be made to the grantor each year during the term of the trust. At the expiration of the term, any remaining assets in the trust are passed on to the trust's remainder beneficiaries. The transfer of assets to a GRAT constitutes a taxable gift equal to the present value of the remainder interest. A "zeroed-out" GRAT is a GRAT where the annuity amount is calculated to result in zero value of assets remaining at the end of the term, using the IRC § 7520 rate as the measuring rate.

**GRIT:** Grantor retained income trust. A GRIT is an irrevocable trust created during lifetime, in which the grantor retains the right to trust income for the trust term, which typically ends at the earlier of the grantor's death or the expiration of a fixed term of years, with the trust property reverting to the grantor's estate if he or she dies prior to expiration of the fixed term of years, and if the grantor survives the term, distributing the property to (or holding the property in further trust for) children or other remainder beneficiaries. GRITs with family members as remainder beneficiaries are no longer effective for estate tax purposes since the enactment of IRC § 2702, but remain useful for those wanting to provide benefits for nonfamily members.

**GRUT:** Grantor retained unitrust. A GRUT is created by transferring assets to a trust and retaining a unitrust interest during the trust term. At the end of the term, the assets remaining in the trust pass to the remainder beneficiaries. A transfer to a GRUT constitutes a taxable gift on the date of transfer in an amount equal to the present value of the remainder interest. Compare with GRAT.

**IDGT:** Intentionally defective grantor trust. An IDGT typically has a combination of features that result in the assets of the trust being excluded from the estate of the grantor, and the trust being treated for income tax purposes as a grantor trust. As a result, transactions between the grantor and the trust should have no income tax consequences. An IDGT is often used as an alternative to a GRAT, as a device for making tax-discounted or tax-free gifts of appreciation on assets.

**ILIT:** Irrevocable life insurance trust. An irrevocable trust designed to hold life insurance and to ensure that the proceeds of the life insurance policy, and the cash value of the policy, if any, are excluded from the estate of the grantor. The ILIT is often used as a tool to ensure that sufficient liquid assets will be available to pay estate tax liability, by means of permitting the trustee of the ILIT to loan funds to the grantor's estate, or to purchase assets out of such estate.

**NICRUT:** Net income charitable remainder unitrust. This is a charitable remainder unitrust that pays to the noncharitable beneficiary an annual amount equal to the lesser of the trust's net income, or a stated "unitrust percentage" of the fair market value of the trust's assets. *See also* CRT.

**NIMCRUT:** Net income charitable remainder unitrust (*see* NICRUT) with make-up provision. This is a charitable remainder unitrust that pays to the noncharitable beneficiary an annual amount equal to the lesser of the trust's net income, or a stated "unitrust percentage" of the fair market value of the trust's assets, but includes a "make-up provision" that provides that if, in any year, the amount of net income exceeds the unitrust percentage, the excess can be distributed to the extent that the amount of net income distributed in prior years was less than the amount calculated to be the unitrust percentage for those years. *See also* CRT.

**OSMP:** Oregon special marital property. Under ORS 118.013, Oregon special marital property is not subject to Oregon inheritance tax in the estate of the first spouse to die. Oregon special marital property consists of any trust or other property interest (1) in which principal or income may be accumulated or distributed to or for the benefit of only the surviving spouse of the decedent during the lifetime of the surviving spouse, (2) in which a person may not transfer or exercise a power to appoint any part of the trust or other property interest to a person other than the surviving spouse during the surviving spouse's lifetime, and (3) for which the executor of the decedent's estate has made an Oregon special marital property election pursuant to ORS 118.016.

**QDOT:** Qualified domestic trust. A QDOT is a trust in which property is held for a non-U.S. citizen to qualify the property for a marital deduction. Non-U.S. citizens who are residents of the United States ("resident aliens") cannot use the unlimited gift and estate tax marital deductions available under federal tax law. If, however, assets pass from one spouse into a qualified domestic trust for the benefit of the surviving spouse who is a resident alien, a deduction is allowed for estate or gift tax purposes. The QDOT must meet certain requirements, and distributions (except for certain hardship distributions) from the QDOT will be subject to transfer tax.

**QPRT:** Qualified personal residence trust. A QPRT is a trust which holds a personal residence for a fixed term of years. After the fixed term, the property passes to named remainder beneficiaries. Funding a QPRT results in a taxable gift in the amount of the present value of the remainder interest on the date of transfer.

**QSST:** Qualified Subchapter S trust. Only certain trusts, including QSSTs, are permitted to be shareholders of an S corporation. In contrast to an ESBT, a QSST can only have one beneficiary and is required to distribute all of its income.

**QTIP:** Qualified terminable interest property. Under IRC §§ 2056(b) and 2523(b), transfers for the benefit of a spouse do not qualify for the gift or estate tax marital deduction where, on

the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, the interest passing to the surviving spouse will terminate or fail and where someone other than the spouse acquires an interest in such property, unless the transfer of the property is in qualifying form. Terminable interest property which meets the requirements under IRC §§ 2056(b)(7)(B)(i) or 2523(f) will qualify for the marital deduction. A QTIP trust is a marital trust designed to meet such requirements.

*Erik S. Schimmelbusch  
Davis Wright Tremaine  
Portland, Oregon*

## New 2010 Section Officers

Please contact any of the officers or board members with questions or suggestions for Section activities. Get involved by volunteering to help with legislative projects and CLEs.

<b>Chair</b>	Susan N. Gary
<b>Chair-Elect</b>	Eric H. Vetterlein
<b>Past Chair</b>	Penny H. Serrurier
<b>Treasurer</b>	Susan A. Miller
<b>Secretary</b>	D. Charles Mauritz

### Members at Large (Terms Ending 12/31/11)

William D. Brewer	Erik S. Schimmelbusch
Jeffrey M. Cheyne	Kenneth Sherman
Jeffrey G. Moore	Matthew Whitman
Marsha Murray-Lusby	
Timothy O'Rourke	

### Members at Large Continuing (Terms Ending 12/31/10)

Karen C. Allan	Hon.
Ian T. Richardson	Katherine E. Tennyson
Thomas J. Sayeg	

Bernard F. Vail (Advisory Member)  
Michael E. Haglund (BOG Contact)  
Scott A. Morrill (Bar Liaison)

## DOR to Provide Applications for Discharge of Liability for Inheritance Tax on January 1, 2010

The 2009 Legislative Assembly enacted House Bill 2308, which allows a personal representative or trustee to apply to the Oregon Department of Revenue (“DOR”) for an early determination of inheritance tax. In general, the determination must be made “as soon as possible,” but in any event within 18 months from the date of the application or, if the application precedes the filing of the return, within 18 months from the date the return is filed. The DOR will send a notice of the amount due, and, after payment of the amount in the notice, the executor or trustee is discharged from personal liability for any tax deficiency.

The DOR indicated informally that it will not accept any applications for discharge related to inheritance tax before January 1, 2010. While applications for discharge will be accepted January 1, 2010 and after, the taxpayer may request discharge for inheritance tax returns filed prior to that date. The application will be posted on the DOR website on January 1, 2010.

The current discharge application, “Election for Final Tax Determination for Income Taxes and Application for Discharge from Personal Liability for Tax of a Decedent’s Estate,” may not be used for discharge related to Oregon inheritance tax; the existing form applies only to individual income tax and fiduciary income tax.

The DOR will expand its processes to include an inheritance tax closing letter similar to the IRS estate tax closing letter. The DOR will continue to provide the Inheritance Tax Receipt.

*Stephen J. Klarquist  
Zalutsky, Klarquist & Reinhart, P.C.  
Portland, Oregon*

