Basic Estate Planning and Administration 2016

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Friday, November 18, 2016
8:30 a.m.–4:15 p.m.

5.25 General CLE or Practical Skills credits and 1 Elder Abuse Reporting credit
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SCHEDULE

7:30  Registration

8:30  Oregon’s New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age
  ‣ Federal and state issues
  ‣ Digital assets vs. other forms of property
  ‣ Practical planning approaches
  ‣ Estate and trust administration under the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)
  Michael Walker, Samuels Yoelin Kantor LLP, Portland

9:00  Marital Trust Planning
  ‣ QTIP basics and credit shelter trust planning
  ‣ Is the credit shelter trust a good idea in the age of portability?
  ‣ Funding formulas
  ‣ Income tax implications and funding formulas
  Joshua Husbands, Holland & Knight LLP, Portland

10:00 Break

10:15 How to Prevent a Will or Trust Contest
  ‣ Incapacity or undue influence challenges
  ‣ Making a strong and defensible estate plan
  James Cartwright, Cartwright Baer Johansson PC, Portland
  Philip Jones, Duffy Kekel LLP, Portland

11:15 Trust Administration Heptathlon
  ‣ Trustee fees—how and when to charge
  ‣ Bank accounts
  ‣ What is a statement?
  ‣ Double custody
  ‣ Buying and selling assets
  Stuart Allen, Allen Trust Company, Portland

Noon  Estate Planning and Administration Section Annual Business Meeting

12:15 Lunch

1:00  Removing Occupants from Estate Property
  ‣ Options in probate court
  ‣ Eviction vs. ejectment
  ‣ FED vs. quiet title
  ‣ Dealing with remaining personal property
  Hilary Newcomb, HAN Legal, Portland
1:30  Basic Probate Administration in Oregon  
   - Administering  
   - Probate estate opening and closing  
   - Portland metro area county differences  
   Emily Clark, Samuels Yoelin Kantor LLP, Portland  
   Walker Clark, Samuels Yoelin Kantor LLP, Portland  

2:30  Break  

2:45  Small Estate Affidavit  
   - Value limits for affidavits filed many years after death  
   - When should an estate be filed as a full probate?  
   - Requirements for an attorney to be paid from a small estate  
   Warren Deras, Attorney at Law, Portland  

3:15  Mandatory Elder Abuse Reporting for Lawyers  
   - Oregon’s changing demographics  
   - Types and prevalence of elder abuse  
   - When and how to report abuse  
   Troy Wood, Oregon State Bar, Tigard  

4:15  Adjourn
Stuart Allen, Allen Trust Company, Portland. Mr. Allen is president and CEO of Allen Trust Company and Allen Capital Management. He is an attorney and Certified Trust and Financial Advisor (CTFA) with more than two decades of experience in trust services and investment management. Mr. Allen is a member of the Oregon Bankers Association Education Foundation board, the Association of Trust Organizations board, the Oregon State Bar Estate Planning and Administration Section Executive Committee, and the OSB Taxation and Elder Law sections. Mr. Allen authored HB 2379 and the Oregon Bank Act Committee Rewrite.

James Cartwright, Cartwright Baer Johansson PC, Portland. Mr. Cartwright has extensive trial experience litigating matters involving will contests and removal actions, trust litigation, elder financial abuse cases, and shareholder freeze-outs and squeeze-outs, as well as a broad range of property and tort actions. He is a member and past chair of the Oregon State Bar Estate Planning and Administration Section and a member of the Elder Law Section. Mr. Cartwright has been a contributing author to several Oregon State Bar legal publications. He has also been a featured speaker on probate and elder financial abuse litigation issues at seminars sponsored by the Oregon State Bar, the Oregon Law Institute, and the Multnomah Bar Association.

Emily Clark, Samuels Yoelin Kantor LLP, Portland. Ms. Clark’s practice focuses on domestic relations, probate, and fiduciary litigation. She is licensed to practice law in Oregon, Washington, and Alaska.

Walker Clark, Samuels Yoelin Kantor LLP, Portland. Mr. Clark’s legal practice concentrates on all aspects of estate planning, estate and trust administration, and tax planning. Mr. Clark holds an LL.M. in Taxation from the University of Washington School of Law. He is admitted to practice in Oregon and Washington.

Warren Deras, Portland. Mr. Deras was in private practice in Portland from 1971 until his retirement in 2011. He continues as a member of the Oregon State Bar Estate Planning & Administration Section and is active on the section’s listserv. Mr. Deras drafted several significant amendments to the Oregon Probate Code, including the 1989 revision of the Small Estates Law.

Joshua Husbands, Holland & Knight LLP, Portland. Mr. Husbands is the Regional Team Leader for Private Wealth Services in in Holland & Knight LLP’s Portland office, and he chairs the firm’s national life insurance practice. He represents clients in an array of business, tax, business succession, and estate planning matters, including business reorganizations, acquisitions, and divestitures. He is a Fellow of the American College of Trust and Estate Counsel and is on the board of the Estate Planning Council of Portland. Mr. Husbands often writes and speaks on a number of business, tax, life insurance, and asset protection matters concerning businesses and high–net worth individuals.

Philip Jones, Duffy Kekel LLP, Portland. Mr. Jones practices primarily in the areas of estate planning, estate and trust administration and taxation, and estate and trust litigation. He is a member of the American College of Trust and Estate Counsel and the Estate Planning Council of Portland. For 20 years, he served as an Adjunct Professor of Law at Lewis & Clark Law School, where he taught Estate and Gift Taxation and Federal Tax Procedure. He is also the author of numerous articles in the Journal of Taxation and other publications. Mr. Jones is admitted to practice in Oregon and Washington.

Hilary Newcomb, HAN Legal, Portland. Ms. Newcomb practices fiduciary litigation, probate and trust administration, estate planning, and guardianships and conservatorships. She also has experience in the areas of taxable estate planning, charitable foundations, business formation, trust and estate dispute resolution, and trial practice. Ms. Newcomb is a member of the Estate Planning Council of Portland, the Oregon State Bar Estate Planning and Administration Section Executive Committee, and the editorial review board for the OSB legal publication Administering Trusts in Oregon 2017 revision. She is licensed to practice in Oregon and an inactive member of the State Bar of California.
FACULTY (Continued)

Michael Walker, Samuels Yoelin Kantor LLP, Portland. Mr. Walker is a business, tax, and estate planning attorney who works with individuals and small to medium-sized businesses. He serves on the Estate Planning Council of Portland. Mr. Walker has authored articles, conducted seminars, and spoken for organizations and businesses on topics such as estate planning, limited liability companies, family limited partnerships, general partnerships, and 1031 exchanges. He is admitted to practice law in Oregon and Washington and before the United States Tax Court.

Troy Wood, Oregon State Bar, Tigard. Mr. Wood is an assistant general counsel at the Oregon State Bar Client Assistance Office. His legal experience has included personal injury, insurance defense and business litigation, and real estate and business transactions.
Chapter 1

Oregon’s New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age

MICHAEL WALKER
Samuels Yoelin Kantor LLP
Portland, Oregon

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I. INTRODUCTION

Not so long ago, in a world not so far way, estate planning and the administration of a decedent’s estate was typically a process that focused on the individual’s tangible belongings, financial assets, and real estate. Aside from the federal tax laws, state statutes and common law primarily controlled all aspects of the planning and administration of a decedent’s estate. However, in the Information Age where almost every aspect of our lives is in some manner affected or controlled by information that is stored in an electronic form, it is not surprising that the impact of “digital assets” has fundamentally and irrevocably changed the nature of the estate planning and administration practice.

Starting in the 1980s with the passage of the Stored Communications Act (“SCA”), 1 and the Computer Fraud and Abuse Act (“CFAA”), 2 Congress has enacted federal statutes that have a profound effect on the legal status of digital assets. However, these statutes generally do not address the impact of the death or incapacity of the owner or creator of those digital assets. In the last several years, the efforts of the Uniform Law Commission (“ULC”) have culminated in the uniform statute known as the Revised Uniform Fiduciary Access to Digital Assets Act (“RUFADAA”). 3 As of this writing, RUFADAA has now been passed by 21 states, including Oregon 4 and Washington. 5 In addition, all states have statutes that criminalize unauthorized access, or “hacking,” of computer systems and networks. 6

With such a mélange of state and federal laws, preparing effective estate planning documents for individuals, or administering the estates of incapacitated persons and decedents, presents a unique and difficult set of challenges. In approaching these challenges, the practitioner will be benefitted by having a working understanding of not only the elements of state law that impact digital assets, but also of the SCA and CFAA, particularly as those statutes are interpreted by the Internet and technology industry.

II. WHAT ARE DIGITAL ASSETS?

My favorite professor in college frequently admonished his students that the key foundational element to any cogent analysis was to carefully define the relevant terms of that analysis. Hence, as a starting point, the somewhat illusive and amorphous term “digital assets” should be thoughtfully discussed.

4 See 2016 Or. Laws 2016 Ch. 19 (2016). The effective date of the Oregon statute is January 1, 2017. A copy of the Oregon version of RUFADAA is included in these materials as Appendix A.
a. RUFADAA Definition of Digital Assets.

RUFADAA states that a “digital asset” means an “electronic record in which an individual has a right or interest,” but does not include the “underlying asset or liability unless the asset or liability is itself an electronic record.” In turn, a “record” is defined as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” Finally, “electronic” means “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.”

As an initial observation, the definition of digital assets refers to an electronic record that is owned by an “individual.” Hence, this definition would appear to exclude any digital asset that is owned by an estate or business entity, all of which are included within RUFADAA’s separate definition of “person.” The ULC’s comments do not address this nuance, and the consequences of this language are unclear.

The definition of “digital asset” includes any type of electronically-stored information, including electronic information stored on a user’s computer or any other digital device, content uploaded to the Internet, and rights in digital property. It also includes records that are either the catalogue or the content of an electronic communication.

b. Practical Scope of Digital Assets Definition.

Digital assets will include any electronically stored information, regardless of whether the location of that storage is the Internet (including social media applications and email services), a private computer network, personal computer, tablet, memory drive, or mobile phone. The definition’s proviso “unless the asset or liability is itself an electronic record” also has important consequences. For example, digital currency such as bitcoin would be an asset that is itself an electronic record. An Internet domain name would also be considered an asset that is also an electronic record. Finally, commercial loyalty points and awards, such as accrued airline miles and hotel points, would be considered digital assets, although many are subject to contractual restrictions and cannot be transferred to the heirs of a deceased customer. However, as discussed below, online digital assets are typically subject to a “term of service agreement” (“TOSA”), even following the death or incapacity of the owner of the digital asset.

7 RUFADAA, supra note 3, at § 2(10). The Oregon version of RUFADAA (Oregon Laws 2016, Ch. 19 (2016)), has not yet been codified under Oregon Revised Statutes. A conversation with Oregon Legislative Counsel’s office indicates that such codification is not expected until after the 2017 general session of the Oregon Legislature. Oregon’s RUFADAA sections under Oregon Laws, Chapter 19 (2016), generally follow the section numbers of the ULC’s version of RUFADAA, with only stylistic differences in subsection references. Hence, subsequent citations will use the section numbers of ULC version of the act.
8 Id. at § 2(22).
9 Id. at § 2(11).
10 Id. at § 2(17).
11 Id. at § 2, cmt.
12 Id.
c. Economic and Non-Economic Value of Digital Assets.

In a 2011 McAfee survey, American households valued their digital assets at nearly $55,000.\textsuperscript{14} Certainly, many digital assets, such as bitcoin, commercial domain names, and similar property, have an ascertainable value that must be included as part of the administration of the estate of an incapacitated individual or a decedent’s estate. For an estate subject to federal and/or state estate taxes, the value of such property will need to be determined and included on the pertinent estate tax returns. Likewise, such property may need to be separately listed on any required inventories of a decedent’s estate.\textsuperscript{15}

Many other forms of digital assets have no extrinsic economic value, but may have tremendous sentimental value. For example, most photographs are now created by digital cameras and stored in some digital form, often within a user’s account with an online provider such as Facebook, Instagram, Flickr, and Photobucket. However, once uploaded to these sites, these important family photos are subject to each provider’s TOSA, which in turn may limit the access to such accounts to the user’s fiduciaries upon incapacity or death.

III. FEDERAL LAW AFFECTING DIGITAL ASSETS

a. Stored Communications Act.

Congress passed the SCA in 1986 as part of the Electronic Communication Privacy Act (“ECPA”).\textsuperscript{16} Drafted early in the era of electronic communications, Congress sought to deal with the impact of Internet communications upon Fourth Amendment privacy protections. The SCA states that a provider of either an “electronic communication service” or “remote computing service” may not “knowingly divulge to any person or entity the contents of a communication which is carried or maintained on that service.”\textsuperscript{17}

However, the SCA does contain several key exceptions. First, the SCA does not prevent providers from providing non-governmental entities with a user’s non-content information, such as the name of the person connected with the account in question.\textsuperscript{18} By analogy, non-content information could be compared to the “envelope” containing a letter, with the letter inside that envelope being the “content” of the communication. Second, the statute allows the disclosure of content-based information to an “agent” of the addressee or intended recipient of an electronic communication.\textsuperscript{19} Third, and most notably, a provider “may” disclose content information with the “lawful consent” of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of a remote computing services.”\textsuperscript{20}

\textsuperscript{17} Id. at § 2701(a)(1)-(2).
\textsuperscript{18} Id. at § 2701(a)(3).
\textsuperscript{19} Id. at § 2701(b)(1).
\textsuperscript{20} Id. at § 2702(b)(3) (emphasis added).
What is “lawful consent” in the context of digital assets owned by a decedent’s estate or incapacitated person? While personal representatives and executors generally have the statutory authority under state law to take all necessary actions to administer the decedent’s estate, this state-law authority does not automatically equate to “lawful consent” under the SCA.

The only federal court that had the opportunity to address this question declined to rule on the issue. In 2008, Sahar Daftary (“Sahar”), an internationally-known model, died following a fall from her twelfth floor building in England. In the inquiry that followed, Sahar’s executor’s sought access to her Facebook account, which they believed contained critical evidence of Sahar’s state of mind at the time of her death. In the ex parte proceeding that followed, the executor’s sought a subpoena in federal court in California. Facebook responded, and requested the court quash the subpoena, arguing that the subpoena violated the SCA. The court agreed, and in declining to decide whether Sahar’s executors could provide the sufficient “lawful consent” under the SCA, the court stated it:

lacks jurisdiction to address whether the Applicants may offer consent on Sahar’s behalf so that Facebook may disclose the records voluntarily. Any such ruling would amount to nothing less than an impermissible advisory opinion. Of course, nothing prevents Facebook from concluding on its own that Applicants have standing to consent on Sahar’s behalf and providing the requested materials voluntarily.21

Even if the court had explicitly found that the executor’s fiduciary authority was sufficient to constitute “lawful consent” under the SCA, the language of the pertinent provisions of the SCA’s exceptions states that the provider “may divulge the content of the communication.”22 The reality of the situation is that, absent clear authority, the providers are reluctant to risk litigation and liability exposure in making a potentially incorrect discretionary decision.

b. Computer Fraud and Abuse Act (and Similar State Statutes).

Congress passed the CFAA in 1986.23 In relevant part, the CFAA imposes both criminal and civil liability upon anyone who “intentionally accesses a computer without authorization or exceeds authorized access,” and obtains information from any “protected computer.”24 In

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22 18 U.S.C. § 2702(b) (emphasis added).
24 18 U.S.C. § 1030(a)(1)(C). For purposes of the CFAA, a “protected computer” is defined at 18 U.S.C. § 1030(e)(2) as a computer exclusively for the use or affecting the “use of a financial institution or the United States Government”, or “which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.”
addition, all 50 states have statutes that criminalize “unauthorized access” or “hacking” of computers and computer systems.25

In analyzing whether a fiduciary possesses legal authority for purposes of the CFAA and state counterparts, at least two essential issues should be analyzed. First, either under the governing instruments and/or relevant state law, does the fiduciary have clear legal authority to access the computer or digital assets of the decedent or incapacitated individual? Second, if the computer system or digital asset is subject to the terms and conditions of a TOSA, does the fiduciary’s access violate the terms of that TOSA? Hence, a fiduciary with ostensible legal authority may still violate the CFAA if the fiduciary’s access clearly violates the terms of the TOSA. For example, the U.S. Justice Department has used the CFAA to prosecute individuals based solely upon the violation of the terms of a TOSA.26

IV. THE REVISED FIDUCIARY ACCESS TO DIGITAL ASSETS ACT: THE DIGITAL ASSETS “MULLIGAN”

a. Original UFADAA.

The ULC approved the “original” Uniform Fiduciary Access to Digital Assets Act (“UFADAA”) in 2014.27 Thereafter, UFADAA was introduced in approximately 27 states,28 including Oregon.29 A key component of the original UFADAA was that, subject to the SCA as well as any applicable TOSA, fiduciaries were legally imputed with lawful authority to administer the digital assets of a decedent or protected person in the same manner as provided under state law with respect to other, non-digital, assets.30 UFADAA even indicated that a fiduciary had “under applicable electronic privacy laws, the lawful consent of the account holder for the custodian to divulge the content of an electronic communication to the fiduciary.”31

However, the proposed legislation was met with strenuous opposition from lobbyists for the online providers. The providers raised a number of arguments. First, contrary to UFADAA’s presumptive access stance, the providers argued that the default position of a decedent or incapacitated person was that their digital assets should not be disclosed to anyone, even to their fiduciary. Second, the providers took the position that UFADAA could not create a

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29 S.B. 369, 2015 Sess. (Or. 2015).
30 See, e.g. Original UFADAA, supra note 27, at §§ 3, 7.
31 Id. at §7(a)(2) (emphasis added).
legal presumption of “lawful consent” for purposes of the SCA, and that UFADAA was preempted by federal law. Third, the providers argued that UFADAA should not override or supersede their TOSAs in any way.\textsuperscript{32} Lastly, there were indications that the providers were concerned about civil litigation liability exposure and the cost of complying with UFADAA. As a result of these lobbying efforts, UFADAA did not pass in any state except Delaware, which had actually passed a version of UFADAA from a draft 2014 version.\textsuperscript{33}

b. RUFADAA Compromise.

Following the near-complete failure of UFADAA, representatives from the ULC digital provider industry entered into a series of compromise negotiations, the result of which was RUFADAA. The ULC formally approved the final draft of RUFADAA in July 2015.\textsuperscript{34} Unlike the original UFADAA which granted fiduciaries presumptive authority to access digital assets, RUFADAA places great emphasis upon whether the deceased or incapacitated user expressly consented to the disclosure of the content of the digital assets, either through what RUFADAA refers to as an “online tool” or an express grant of authority in the user’s estate planning documents or power of attorney. Hence, RUFADAA respects the consent of “lawful consent” under the SCA, and, unlike UFADAA, does not attempt to impute such lawful consent to the fiduciary.


The following is a section-by-section summary of RUFADAA’s provisions, using the section numbers from the uniform act.

Section 2 of RUFADAA sets forth a list of definitions used in the Act. While a comprehensive discussion of each definition is beyond the scope of this article, several of the key definitions are discussed below. Many of RUFADAA’s definitions are based on those in the Uniform Probate Code.\textsuperscript{35}

A “custodian” is defined as “a person that carries, maintains, processes, receives, or stores a digital asset of a user.”\textsuperscript{36} Hence, a custodian will include most providers of online email and social media services.

The term “content of an electronic communication” is adapted from the SCA, which provides that content: “when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication.”\textsuperscript{37} The definition is designed to cover only content subject to the coverage of the ECPA (including the SCA).\textsuperscript{38} Consequently, the “content of an electronic communication”,

\textsuperscript{32} Klein & Parthemer, supra note 26, at 4.
\textsuperscript{33} Id.
\textsuperscript{34} RUFADAA, supra note 3, title page.
\textsuperscript{35} Id. at § 2, cmt.; Id. at § 2(10) (discussing the definition of “digital asset”).
\textsuperscript{36} Id. at § 2(8).
\textsuperscript{37} 18 U.S.C. §2510(8).
\textsuperscript{38} RUFADAA, supra note 3, at § 2, cmt..
as used later throughout Revised UFADAA, refers only to information in the body of an electronic message that is not readily accessible to the public; if the information were readily accessible to the public, it would not be subject to the privacy protections of federal law under ECPA. For example, a “tweet” by a Twitter user that is accessible to the public at large would not fall under this definition.

In contrast, the definition of “catalogue of electronic communications” means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person. \(^{39}\) For example, a catalogue relating to an email would be email addresses of the sender and the recipient, and the date and time the email was sent. Generally, a fiduciary will have access to a catalogue of the user’s communications, but not the content, unless (as discussed below) the user consented to the disclosure of the content. \(^{40}\)

RUFADAA defines an “online tool” as “an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.” \(^{41}\) An online tool can provide for a “designated recipient” to administer the digital assets of the user. \(^{42}\) As discussed below, an online tool will supersede directions in the user’s estate planning documents, even if those directions are contrary to the user’s preferences as expressed in an online tool.

**Section 3** of RUFADAA provides that the act applies to (1) a fiduciary acting under a will or power of attorney signed before or after the effective date of the act, (2) a personal representative of a decedent who died before or after the effective date of the act (including a decedent who died intestate), (3) a conservatorship commenced before or after the effective date of the act, and (4) a trustee of a trust created before or after the effective date of the act. \(^{43}\)

RUFADAA **Section 4** establishes a “three-tier priority system” for determining a user’s intent with respect to any digital asset. First, through an online tool, the user may direct the custodian whether to disclose the content of the digital asset. If the online tool allows the user to modify or delete the direction at any time, then any such direction “overrides a contrary direction by the user in a will, trust, power of attorney, or other record.” \(^{44}\) Second, if an online tool is not utilized, then the user’s directions in a will, trust, power of attorney, or “other record” will

\(^{39}\) *Id.* at §2(4).

\(^{40}\) *Id.* at prefatory cmt.

\(^{41}\) *Id.* at §2(16). Google’s “Inactive Account Manager” is an example of an online tool, and can be accessed at https://support.google.com/accounts/answer/3036546?hl=en&ref_topic=2382809. Facebook also provides for “Memorized Accounts” for deceased users, which allows the account to continue to be viewed, but content cannot be added to the account once it is placed into the “memorialized” status. Facebook also allows the user to appoint a “Legacy Contact.” Information on Facebook’s tools can be accessed at https://www.facebook.com/help/1506822589577997/.

\(^{42}\) RUFADAA, *supra* note 3, at § 2(9).

\(^{43}\) *Id.* at § 3; *Id.* at § 3, cmt.

\(^{44}\) *Id.* at § 4, cmt. Arguably, the act’s judicial procedure, discussed below, could be viewed as a fourth tier, albeit not a preferable choice in most instances.

\(^{45}\) *Id.* at § 4(a).
control whether the content of a digital asset may be disclosed to a fiduciary. Finally, if the user provides no direction in either an online tool or applicable documents, then the TOSA controlling the digital asset will govern the rights of the fiduciary. If, as in most instances, the TOSA is silent as to the rights of a user’s fiduciary, then RUFADAA’s default rules (discussed below) will be the fiduciary’s sole remaining option.

Section 5 of RUFADAA states that if a fiduciary obtains access to a digital asset, then the TOSA continues to apply to the fiduciary in the same manner as the original user. A custodian is not required to permit a fiduciary to assume the rights under the TOSA if the custodian can comply with Section 6.

Section 6 establishes the procedure by which a custodian may comply with RUFADAA’s disclosure procedures. In particular, when disclosing a digital asset, the custodian, at its “sole discretion,” may grant the fiduciary or designated recipient: (1) “full access” to the user’s account,” (2) “partial access to the user’s account sufficient to perform the tasks with which the fiduciary or designated recipient is charged,” or (3) an electronic or paper copy of the digital asset. This section allows the custodian to seek guidance from the court if custodian feels a request from a fiduciary would impose an “undue burden” upon the custodian.

Section 7 is the first of RUFADAA’s provisions that delineate the procedures by which fiduciaries may seek access to information from online providers regarding the digital assets of a deceased or incapacitated user. This section allows the personal representative of a decedent’s estate to obtain such access if a court directs or the personal representative gives the custodian: (1) a written request for disclosure in written or electronic form, (2) a certified copy of the user’s death certificate, (3) a certified document evidencing the authority of the personal representative (such as court-issued letter of appointment or letters testamentary), and (4) unless the user utilized an online tool, a written document showing the user’s “consent to disclosure of the content of electronic communications.”

In addition, Section 7 further provides that if the custodian requests, the personal representative can be required to provide the custodian with additional information, including evidence to show the user had an account with the custodian, which could include the account number, username, address, or other unique identifying information. In addition, the custodian can also request that the fiduciary obtain a court order finding that: (1) the user had an account with the custodian, (2) disclosure of the content of the electronic communications does not

46 Id. at § 4(b). At this tier, it is important to note that RUFADAA refers to “disclosure,” and not “access.” Those concepts are distinct under the statute.
47 Id. at § 4(e).
48 Id. at § 5.
49 Id. at § 5, cmt.
50 Id. at § 6(a).
51 Id. at § 6(d). This guidance may include an order from the court to disclose a subset limited by the date of the user’s digital assets, all or none of user’s digital assets, or all of the user’s digital assets to the court for review in camera.
52 Id. at §§ 7(1)-(4).
53 Id. at §§ 7(5)(A)-(B).
violate the SCA, (3) unless the user utilized an online tool, that the user consented to the disclosure, or (4) disclosure of the information is “reasonably necessary for administration of the estate.”

The judicial procedures contemplated by Section 7 present serious challenges to the personal representative. The introductory phrase of Section 7 allows disclosure of the content of a digital asset if a “court directs.” However, prior to such disclosure, the custodian may request a finding from the court that the disclosure would not violate the SCA and federal privacy statutes (i.e. 47. USC § 222), and/or that the “user consented to the disclosure.” This provision directly implicates the issue of whether, under federal law, a fiduciary appointed pursuant to state law has the user’s “lawful consent” under the SCA to receive the content of an electronic communication. As seen in the In Re Facebook, Inc. case discussed above, courts appear to be reluctant to imply consent solely by the fact that the personal representative is serving in a fiduciary capacity. This dilemma thus places much greater importance upon a user granting express consent for disclosure of digital assets under the user’s will, trust, and/or power of attorney.

Absent express consent in the decedent’s will, Section 8 of RUFADAA permits the personal representative to request that the custodian disclose a “catalogue of electronic communications sent or received by the user, other than the content of electronic communications of the user.” The procedure under Section 8 is similar to that described in Section 7, except that no copy of the decedent’s will is required, and a finding by the court need not include referenced to compliance with the SCA because such non-content disclosures are not prohibited by the SCA. Hence, the fiduciary may still be able to receive non-content information from the custodian even if no basis for “lawful consent” under the SCA is present.

Under Section 9 of RUFADAA, an agent under a power of attorney may request disclosure of content of a digital asset if the power of attorney “expressly grants” authority to the agent of such digital assets. The request of the agent to the custodian must include: (1) a written request for disclosure in paper or electronic form, (2) an “original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal,” and (3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect. As in Section 7, the custodian may request that the agent provide identifier information or other evidence to confirm that the use has an account with the custodian.

54 Id. at § 7(5)(C).
55 Id. at § 7.
56 Id. at § 7(5)(C).
57 See In re Facebook, 923 F. Supp. 2nd 1204; See also Negro v. the Superior Court of Santa Clara County, 230 Cal. App. 4th 879 (2014) (finding that state law can mandate disclosure of electronic communications, even if the SCA makes such disclosure discretionary when, in the facts of Negro, the user was found to have consent to such disclosure).
58 RUFADAA, supra note 3, at §8 (emphasis added).
59 Id. at § 9. The “expressly consents” language makes it clear that a simple power of attorney, without explicit consent by the principal to permit disclosure of electronic communications to the agent, will likely not satisfy Section 9’s requirement.
60 Id. at § 9(1)-(3).
Section 10 allows the agent under a power of attorney to seek a catalogue of electronic communications. The agent must submit the request to the custodian, along with a copy of the power of attorney and certification under penalty of perjury that the power of attorney remains in effect. As with Section 9, the custodian may request identifier information or other evidence to confirm an existing account.

Section 11 of RUFADAA states that, if a trustee is an “original user” of an account, then the trustee can access all digital assets of the account held in trust, together with a catalogue of all electronic communications.

If the trustee of a trust is not the original user of an account but the account is transferred into a trust by the settlor or in another manner, then Section 12 of RUFADAA sets forth a process by which the trustee may request disclosure of digital assets from the custodian. Unless ordered by the court, directed by the original user, or provided in the trust, a custodian shall disclose the digital asset information to the trustee if the trustee gives the custodian: (1) a written request for disclosure in paper or electronic form, (2) a certified copy of the trust instrument or certification of trust that includes consent to the disclosure of content of the digital asset to the trustee, and (3) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust. The custodian may also request that the trustee provide identifier information and/or “evidence linking the account to the trust.”

RUFADAA’s Section 13 addresses the disclosure of non-content information (i.e. the catalogue of electronic communications). Under this section, the trustee is entitled to submit a request to the custodian by submitting a request similar to that described in Section 12, above, except that the copy of the trust instrument or certification of trust need not include a reference to consent to disclosure of the content of the digital asset.

Section 14 of RUFADAA sets forth the process by which a conservator may receive limited information relating the protected person’s digital assets. This section is premised upon the notion that the protected person may still retain privacy rights in their personal communications. Hence, digital assets may only be accessed by an express order of the court, and not solely based on the conservator’s general authority to manage the protected person’s assets. Except as may be otherwise directed by the court of the user, the conservator may receive only the catalogue of the user’s digital assets, and not content-based information. Procedurally, the conservator is entitled to obtain this information by giving the custodian a

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61 Id. at § 10.
62 Id. at § 10(1)-(3).
63 Id. at § 11.
65 RUFADAA, supra note 3, at § 12.
66 Id. at § 12(4).
67 Id. at § 13.
68 Id. at § 14, cmt.
69 Id. at § 14(a).
70 Id. at § 14(b).
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request for such information in either paper or electronic format, along with a certified copy of the court’s order. In addition, a conservator with general authority over the protected person’s digital assets may request that the custodian terminate or suspend the protected person’s account for good cause.

Section 15 of RUFADAA is an important section that specifies the nature and extent of a fiduciary’s duties as they specifically relate to digital assets. Specifically, this section begins by confirming that the legal duties of a fiduciary that is “charged with managing tangible property” also apply to the management of digital assets. These duties include (and are presumably not limited to) the duties of care, loyalty, and confidentiality. In addition, Section 15 states that the fiduciary’s authority over a digital asset: (1) is subject to any applicable TOSA, except as supplanted by the user’s direction in an online tool or applicable documents expressing lawful consent (i.e. Section 4 of RUFADAA); (2) is subject to applicable law, including copyright law; (3) is limited by the scope of the fiduciary’s duties; and (4) may not be used to “impersonate the user.”

If a digital asset is not held by a custodian or subject to a TOSA (e.g. digital files stored on a decedent’s personal computer), then Section 15 confirms that the fiduciary has an unrestricted right to access such digital assets. For purposes of state laws relating to computer fraud or unauthorized computer access, a fiduciary acting within the scope of the fiduciary’s duties is an authorized user of the property of a decedent, protected person, principal, or settlor. Similarly, a fiduciary with authority over tangible personal property of a decedent, protected person, principal, or settlor, has the right to access such property and any digital asset stored thereon. With respect to termination of a digital assets account, Section 15 states that: (1) a custodian may disclose to a fiduciary information in an account that is required in order to close such an account; and (2) a fiduciary may terminate the user’s account by submitting a written request to the custodian, along with enumerated documentation to verify the fiduciary’s authority and a death certificate, if the user in question is deceased.

Section 16 of RUFADAA provides that, within 60 days after a custodian receives a request for disclosure from a fiduciary together with all information required by RUFADAA, the custodian shall comply with the request. If the custodian fails to comply with the request, the fiduciary may seek a court order compelling compliance, but any such order must also

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71 Id.
72 Id. at § 14(c).
73 Id. at § 15(a).
74 Id.
75 Id. at § 15(b). “Impersonate” in this context is likely limited to actions by which the fiduciary “pretends” to be the user (for example, in a social media or email account). It is unlikely that a fiduciary that lawfully obtains access to a digital asset is “impersonating” the user for purposes of this section.
76 Id. at § 15(c).
78 RUFADAA, supra note 3, at § 15(d).
79 Id. at § 15(e).
80 Id. at §§ 15(f), (g).
81 Id. at § 16(a).
containing a finding that “compliance is not in violation of 18 U.S.C. 2702.” 82 Section 16 gives the custodian the authority to notify the original user of a disclosure request by a fiduciary. 83 Section 16 further provides that if the custodian is aware of “any lawful access to the account following request of the fiduciary’s request” under RUFADAA, then the custodian may deny that a fiduciary’s disclosure request. 84

In addition, Section 16 does not limit a fiduciary’s ability to obtain, or require a fiduciary to obtain, a court order which specifies that: (1) the account belongs to a protected person or principal under a power of attorney, (2) specifies there is “sufficient consent” from the protected person or principal to support the requested disclosure, or (3) contains a finding “required by law” other than RUFADAA. 85

Finally, Section 16 states that a custodian (together with its officers, employees, and agents) are immune from liability for an “act or omission done in good faith in compliance” with RUFADAA. 86 The comments to RUFADAA further explain this section’s grant of “immunity,” in indicating that the section shields custodians from “indirect” liability (e.g. if a custodian grants access under the act). However, this immunity would not apply to instances of “direct” liability, such as a custodian’s noncompliance with a court order under RUFADAA. 87

Sections 17 through 21 of RUFADAA contain several administrative provisions, including a uniformity provision.

V. ESTATE PLANNING IN CONJUNCTION WITH RUFADAA.

a. Provide For “Lawful Consent” Under The SCA.

Under the current rubric of federal and state laws, including RUFADAA and its inherent deference to the “lawful consent” requirements of the SCA, the most important step in the entire process of planning is to include a clear expression of such “lawful consent” in the individual’s applicable estate planning documents. These include the individual’s will, general power of attorney, and any trust (including a revocable living trust) that may at any point interact with a digital asset. As seen above in the discussion of RUFADAA’s disclosure procedures, absent a clear expression of a user’s consent, the fiduciary will not be able to access the content within the digital asset, and may be limited to a “catalogue” of electronic communications.

While such catalogue information may in fact be helpful to the work of the personal representative in administering the estate, without corresponding content, such a catalogue could potentially raise more questions than answers. For the personal representative, this is the

82 Id. at §§ 16(a)-(b).
83 Id. at § 16(c).
84 Id. at § 16(d).
85 Id. at § 16(d).
86 Id. at § 16(e).
87 Id. at § 16, cmt.
equivalent of reviewing the outside of an envelope without any ability to access the contents of that envelope.

Appendix B to these materials sets forth an illustrative provision to be adapted to an individual’s will. However, with appropriate adjustments, this provision could be easily adapted to grant digital assets authority to a trustee of a trust, or an agent under a power of attorney. While there is certainly no “magic language” to be used in the such a provision, there are several important elements to consider.

First, the individual should clearly express that they consent to the disclosure of the content of any digital asset to the fiduciary. This provision invokes the “lawful consent” provision of the SCA. In order to provide a custodian with a high degree of “comfort” that the user intended the provision to be an “SCA consent,” it is certainly helpful to cite the SCA and the CFAA directly in the provision. Second, the provision should give the fiduciary the authority to access a digital asset in any location, whether it is stored on a tangible digital device (such as a personal computer or memory drive) or at an Internet location. Third, the provision should give the fiduciary the authority to hire a “technical” expert or consultant to help the fiduciary access the content of a digital asset or possibly secure the integrity and security of an electronic device or online account. Lastly, the provision should clearly state that the fiduciary is an “authorized user” for purposes of applicable computer-fraud and unauthorized-computer-access laws, such as the CFAA.

b. Create a Virtual Assets Instruction Letter (or VAIL).

In 2011, the author and his law partner, Victoria Blachly, created the concept of a Virtual Asset Instruction Letter, or “VAIL.” The VAIL is not a form, but an attempt to delineate an intentional process for dealing with a client’s digital assets. Here are the steps of the VAIL process:

- Identify each digital asset and determine how the custodian of that asset treats the account of the user upon death or incapacity.
- Determine the digital assets that the fiduciary should maintain and/or have access, and prepare a written or electronic list of those assets, together with their passwords.
- Determine the digital assets that the fiduciary should terminate, and provide the necessary instructions to do so.
- Consider saving the list of digital assets or instructions to a memory drive, then store that drive in a very secure location, such as safe deposit box. Give your fiduciary instructions as to how to access this list. Remember to update the list frequently to reflect new and updated passwords.

- Make sure that all relevant documents, including the will, trusts, powers of attorney, or other estate planning documents are updated to provide “lawful consent” under the SCA and RUFADAA.

- If someone other than your personal representative is designated to handle your digital assets, make sure that such individuals are granted adequate authority and consent to access digital assets under state law, the SCA, and RUFADAA.

VI. FIDUCIARY ADMINISTRATION OF DIGITAL ASSETS

In an estate or trust administration, the fiduciary should adhere to the common practices required by law in dealing with digital assets. These practices are now supplemented by the provisions of RUFADAA. However, while this area of the law is still developing, careful application of existing fiduciary standards will likely be helpful. This discussion would also be relevant in a similar context if a person loses mental capacity and a conservator or successor trustee is faced with similar dilemmas with respect to the incompetent person’s assets.

a. Digital Assets and a Fiduciary’s “Prudent Person” Standard.

In a general sense, a fiduciary’s duty is often expressed as a “prudent person” standard. For example, Section 804 of the Uniform Trust Code states that a trustee “shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust.” However, how do these standards apply to a fiduciary’s duties in dealing with digital assets held by an estate or a trust? First, comment “a” to Section 174 of Restatement (Second) of Trusts is helpful in stating that the standard of care and skill required of a trustee is an “external standard.” Hence, the proliferation of digital assets in modern world necessarily leads to the conclusion that a trustee’s duties must evolve to meet that changing manner in which individuals own and manage their assets. In 1960, it would have been unlikely for a court to conclude that the “ordinary prudence” of a trustee would include a working knowledge of computer technologies. However, a court in the “information age” would likely reach a much different conclusion. The following discussion may provide the fiduciary with at least a starting point in evaluating the appropriate steps to meeting the “prudent” standard in the context of an estate or trust which owns a substantial number of digital assets.

89 In this section, the use of the term “fiduciary” generally refers to any person charged with administering a decedent’s estate or trust (i.e. an executor or personal representative of an estate, and a trustee of a trust). Most of the principles discussed in this section apply in the same manner to each type of fiduciary.

90 See, also Restatement (Second) of Trusts, § 174 (the trustee “is under duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property . . .”); Unif. Probate Code § 7-302 (the trustee “shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another . . .”); Or. Rev. Stat. § 130.665 (2015) (statute is identical to Section 804 of the Uniform Trust Code); Del. Code Ann. Tit. 12, § 3302(a) (West 2016) (“a fiduciary shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account”).
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b. Locating a Decedent’s Digital Assets.

Consider the possibility of a decedent with substantial assets and a strong tendency to manage those assets electronically so as to leave only a limited “paper trail” in the traditional sense. If the decedent managed his or her assets online, received “paperless” account statements via email, maintained information about those assets on a “cloud” server, and generally communicated about those assets by email, unless the decedent undertook careful planning during his or her lifetime to grant proper “lawful consent” to his or her fiduciary, simple finding the decedent’s digital assets may present a serious challenge.

If such a decedent had not planned adequately, what constitutes “prudent” action by the fiduciary may be difficult to ascertain. First, the fiduciary should consider whether it may be necessary to hire a forensic expert in information technologies to advise the fiduciary on a prudent process for locating a decedent’s digital assets. After analyzing the applicable TOSAs, the fiduciary should attempt to determine whether it is possible to gain working access to important “portals” into the decedent’s digital existence. This may include the decedent’s personal computer(s), smartphone, or other digital storage devices. If the decedent utilized financial software (e.g. Quicken or Microsoft Money), entries found in such programs might lead to digital assets. Finally, sources such as tax returns and Forms 1099 could reflect assets that might not otherwise be found in traditional “paper records” such as account statements.

c. Administering an Estate with Digital Assets.

Presuming the decedent’s digital assets can be located, there are a number of steps that the personal representative and/or trustee should consider.\footnote{See also, Dennis Kennedy, Estate Planning for Your Digital Assets, LAW PRACTICE TODAY, March 2010, http://apps.americanbar.org/lpm/lpt/articles/pdf/lfr03103.pdf .}

1. The fiduciary should use the procedures under RUFADAA to obtain disclosure of the digital assets from the relevant custodians.\footnote{See infra Part III.c.} A sample RUFADAA disclosure request letter is set forth in Appendix C. If the relevant documents (i.e. a decedent’s will or the principal’s power of attorney) contain sufficient consent under the SCA, the fiduciary should attempt to obtain the full access to the content of the relevant digital assets.\footnote{However, note that Section 6 of RUFADAA allows the custodian to utilize options that are short of full access to the digital assets in question.} If such documents are silent as to the user’s consent, the fiduciary should carefully review the relevant TOSAs in question and possibly request a “catalogue” of the digital assets under RUFADAA, as even the catalogue could potentially lead the fiduciary to the existence of unknown assets.

2. If the fiduciary obtains lawful access to digital assets,\footnote{Apart of RUFADAA’s disclosure procedures, if a fiduciary lawfully obtains the means to access digital assets, and such assets are subject to the fiduciary’s control, Section 15(d) of RUFADAA likely shield the fiduciary from liability under state computer-fraud and unauthorized-computer-access laws. While RUFADAA is subject to federal preemption, the fiduciary’s inherent authority under state law combined with RUFADAA Section 15(d) likely gives} the fiduciary should attempt to “marshal” such assets by making certain that the fiduciary is the only party that has
access to the assets. For example, the fiduciary should consider changing the password that is used to access the asset. If the decedent had shared such a password with a family member or other individual who is not the fiduciary, then such a “digital interloper” could interfere with the fiduciary’s ability to accomplish the proper administration of the estate or trust. The fiduciary should remove all private and/or personal data from online shopping accounts (or close them as soon as reasonably possible).

3. If the decedent had established any form of “automatic” means to pay bills, make loan payments, or other debts, the fiduciary should determine the exact nature of these arrangements, then evaluate whether they should be continued, or (more likely) converted to a payment method that is consistent with the fiduciary’s administrative and accounting procedures.

4. If possible, the fiduciary should endeavor to remove personal or sensitive data (such as credit card information) from online sites. This is yet another means to try to prevent identity theft or other unforeseen consequences.

5. While undertaking such control, the fiduciary should also take steps to archive important electronic data for the full duration of the relevant statutes of limitation. In this way, if data is updated during the course of administration, the fiduciary will have a “baseline” of data if beneficiaries or other parties raise questions or complaints in the future.

6. Along with all other assets under the fiduciary’s control, the fiduciary should prepare a written inventory of the decedent’s digital assets. If a digital asset has its own extrinsic value (such as a commercial website or online publication), then the value of such asset should be separately listed on the estate or trust’s asset inventory. While placing a value on such assets may be difficult, it is certainly not beyond the professional expertise of a qualified valuation professional. This step may also be relevant to the extent that the estate may be subject to federal estate tax or state-level transfer taxes.

7. The fiduciary should consider consolidating digital assets to as few “platforms” as possible (e.g. have multiple email accounts set to forward to a single email account). This may ease the fiduciary’s administrative burden.

8. If appropriate, the fiduciary should consider notifying the individuals in the decedent’s email contact list and other social media contacts. As these contacts may be very sensitive and personal in nature, the fiduciary may wish to consult with any appropriate family members before undertaking such communications.

9. The fiduciary should keep all accounts open for at least a period of time to make sure all relevant or valuable information has been saved and all vendors or other business contacts have been appropriately notified, and so all payables can be paid and accounts receivable have been collected.

the fiduciary a good argument that such access is not “without authorization” or exceeds authorization under the CFAA, 18. U.S.C. 1030(a).
10. When the fiduciary’s administration reaches its conclusion, the fiduciary should analyze if certain digital accounts should be terminated, and any relevant content (or copies thereof) which have been obtained by the fiduciary should either be deleted or (in an estate administration) or distributed to the appropriate beneficiaries. The fiduciary should use care at this juncture to minimize the potential exposure of theft of the user’s identity.

VII. CONCLUSION.

In the last several decades, the “Information Age” has dramatically changed all aspects of our lives. With these changes, we have witnessed serious debates relating to individual privacy, and issues relating to the manner in which both civil and criminal laws should be administered. In a world in which information vital to modern society is created, communicated, and stored on the Internet, it is inevitable that the traditional manner in which individuals undertake their estate planning must change and adapt.

RUFADAA is an example of this societal evolution. However, the act is an imperfect solution to many typical dilemmas that estate planners must solve. In the coming years, attorneys and other professional advisors will need to grapple with the manner in which federal statutes such as the SCA significantly impact the both the interpretation of state statutes such as RUFADAA as well as a fiduciary’s administration of digital assets. The courts, future state legislatures, and ultimately, Congress, will all need to continue to deal with the evolution of the law relating to digital assets.
CHAPTER 19
OREGON LAWS 2016 Chap. 19

AN ACT SB 1554

Relating to access to digital assets.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2 to 18 of this 2016 Act may be cited as the Revised Uniform Fiduciary Access to Digital Assets Act (2015).

SECTION 2. As used in sections 2 to 18 of this 2016 Act:

(1) “Account” means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives or stores a digital asset of the user or provides goods or services to the user.

(2) “Agent” means a person designated as an agent under a power of attorney in accordance with ORS 127.005 to 127.045.

(3) “Carries” means engages in the transmission of an electronic communication.

(4) “Catalogue of electronic communications” means information that identifies each person with which a user has had an electronic communication, the time and date of the communication and the electronic address of the person.

(5) “Conservator” has the meaning given that term in ORS 125.005.

(6) “Content of an electronic communication” means information concerning the substance or meaning of the communication that:

(a) Has been sent or received by a user;
(b) Is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and
(c) Is not readily accessible to the public.

(7) “Court” means a circuit court in this state.

(8) “Custodian” means a person that carries, maintains, processes, receives or stores a digital asset of a user.

(9) “Designated recipient” means a person chosen by a user using an online tool to administer digital assets of the user.

(10) “Digital asset” means an electronic record in which an individual has a right or interest. “Digital asset” does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

(11) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

(12) “Electronic communication” has the meaning set forth in 18 U.S.C. 2510(12).

(13) “Electronic communication service” means a custodian that provides to a user the ability to send or receive an electronic communication.

(14) “Fiduciary” means a person that is an original, additional or successor personal representative, conservator, agent or trustee.

(15) “Information” means data, text, images, videos, sounds, codes, computer programs, software, databases and similar intelligence of any nature.

(16) “Online tool” means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and the user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(17) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency or instrumentality or other legal entity.

(18) “Personal representative” means an executor, administrator or special administrator, or a person legally authorized to perform substantially the same functions.

(19) “Power of attorney” means a record that grants an agent authority to act in the place of a principal.

(20) “Principal” means an individual who grants authority to an agent in a power of attorney.

(21) “Protected person” means an individual for whom a conservator has been appointed. “Protected person” includes an individual for whom an application for the appointment of a conservator is pending.

(22) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(23) “Remote computing service” means a custodian that provides to a user computer processing services or the storage of digital assets by means of an electronic communications system as defined in 18 U.S.C. 2510(14).

(24) “Terms-of-service agreement” means an agreement that controls the relationship between a user and a custodian.

(25) “Trustee” means a fiduciary with legal title to property under an agreement or declaration that creates a beneficial interest in another person. “Trustee” includes a successor trustee.

(26) “User” means a person that has an account with a custodian.

(27) “Will” includes a codicil, testamentary instrument that only appoints an executor and instrument that revokes or revises a testamentary instrument.

SECTION 3. Sections 2 to 18 of this 2016 Act apply to:

(a) A fiduciary acting under a will or power of attorney executed before, on or after the effective date of this 2016 Act;
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(b) A personal representative acting for a decedent who died before, on or after the effective date of this 2016 Act;  
(c) A conservatorship proceeding commenced before, on or after the effective date of this 2016 Act; and  
(d) A trustee acting under a trust created before, on or after the effective date of this 2016 Act.

(2) Sections 2 to 18 of this 2016 Act apply to a custodian if the user resides in this state or resided in this state at the time of the user’s death.

(3) Sections 2 to 18 of this 2016 Act do not apply to a digital asset of an employer used by an employee in the ordinary course of the employer’s business.

SECTION 4. (1) A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user’s digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney or other record.

(2) If a user has not used an online tool to give direction under subsection (1) of this section, or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney or other record disclosure to a fiduciary of some or all of the user’s digital assets, including the content of electronic communications sent or received by the user.

(3) A user’s direction under subsection (1) or (2) of this section overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user’s assent to the terms of service.

SECTION 5. (1) Sections 2 to 18 of this 2016 Act do not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

(2) Sections 2 to 18 of this 2016 Act do not give a fiduciary or a designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

(3) A fiduciary’s or designated recipient’s access to digital assets may be modified or eliminated by a user, by federal law or by a terms-of-service agreement if the user has not provided direction under section 4 of this 2016 Act.

SECTION 6. (1) When disclosing digital assets of a user under sections 2 to 18 of this 2016 Act, the custodian may, in the custodian’s sole discretion:

(a) Grant a fiduciary or designated recipient full access to the user’s account;  
(b) Grant a fiduciary or designated recipient partial access to the user’s account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or  
(c) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

(2) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under sections 2 to 18 of this 2016 Act.

(3) A custodian need not disclose under sections 2 to 18 of this 2016 Act a digital asset deleted by a user.

(4) If a user directs, or a fiduciary requests, a custodian to disclose some, but not all, of the user’s digital assets under sections 2 to 18 of this 2016 Act, the custodian need not disclose the digital assets if segregation of the digital assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:

(a) A subset limited by date of the user’s digital assets;  
(b) All of the user’s digital assets to the fiduciary or designated recipient;  
(c) None of the user’s digital assets; or  
(d) All of the user’s digital assets to the court for review in camera.

SECTION 7. If a deceased user consented to, or a court directs, disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the personal representative gives the custodian:

(1) A written request for disclosure in physical or electronic form;  
(2) A certified copy of the death certificate of the user;  
(3) A certified copy of the letter of appointment of the personal representative or a small estate affidavit or court order;  
(4) Unless the user provided direction using an online tool, a copy of the user’s will, trust, power of attorney or other record evidencing the user’s consent to disclosure of the content of electronic communications; and  
(5) If requested by the custodian:
(a) A number, user name, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account; or
(b) Evidence linking the account to the user; or
(c) A finding by the court that:
(A) The user had a specific account with the custodian, identifiable by the information specified in paragraph (a) of this subsection;
(B) Disclosure of the content of electronic communications of the user would not violate 18 U.S.C. 2701 et seq., 47 U.S.C. 222 or other applicable law;
(C) Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or
(D) Disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

SECTION 8. Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of digital communications sent or received by the user and digital assets, other than the content of electronic communications, of the user if the personal representative gives the custodian:
(1) A written request for disclosure in physical or electronic form;
(2) A certified copy of the death certificate of the user;
(3) A certified copy of the letter of appointment of the personal representative or a small estate affidavit or court order; and
(4) If requested by the custodian:
(a) A number, user name, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
(b) Evidence linking the account to the user;
(c) A finding by the court that:
(A) The user had a specific account with the custodian, identifiable by the information specified in paragraph (a) of this subsection; or
(B) Disclosure of the user's digital assets is reasonably necessary for administration of the estate.

SECTION 9. To the extent a power of attorney expressly grants an agent authority over the content of electronic communications of a principal:
(3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and
(4) If requested by the custodian:
(a) A number, user name, address or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or
(b) Evidence linking the account to the principal.

SECTION 10. Unless otherwise ordered by the court, directed by the principal or provided in a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:
(1) A written request for disclosure in physical or electronic form;
(2) An original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;
(3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and
(4) If requested by the custodian:
(a) A number, user name, address or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or
(b) Evidence linking the account to the principal.

SECTION 11. Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

SECTION 12. Unless otherwise ordered by the court, directed by the user or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received or stored by the custodian in the account of the trust if the trustee gives the custodian:
(1) A written request for disclosure in physical or electronic form;
(2) A certified copy of the trust instrument or a certification of the trust under ORS 130.860 that includes consent to disclosure of the con-
SECTION 13. Unless otherwise ordered by the court, directed by the user or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account a catalogue of electronic communications sent or received by an original or successor user and stored, carried or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

(1) A written request for disclosure in physical or electronic form;
(2) A certified copy of the trust instrument or a certification of the trust under ORS 130.860;
(3) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and
(4) If requested by the custodian:
   (a) A number, user name, address or other unique subscriber or account identifier assigned by the custodian to identify the trust’s account; or
   (b) Evidence linking the account to the trust.

SECTION 14. (1) After an opportunity for a hearing, the court may grant a conservator access to the digital assets of a protected person.

(2) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to the conservator the catalogue of electronic communications sent or received by an authorized user for the purpose of accessing digital assets stored in an account of a protected person.

(3) A conservator with general authority to manage the assets of a protected person may request a custodian of the digital assets of the protected person to suspend or terminate the account of the protected person for good cause. A request made under this subsection must be accompanied by a certified copy of the court order giving the conservator authority over the protected person's property.

SECTION 15. (1) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

(a) The duty of care;
(b) The duty of loyalty; and
(c) The duty of confidentiality.

(2) A fiduciary with authority over the property of a decedent, protected person, principal or settlor has the right to access any digital asset in which the decedent, protected person, principal or settlor has a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(4) A fiduciary acting within the scope of the fiduciary’s duties is an authorized user of the property of the decedent, protected person, principal or settlor for the purpose of applicable computer fraud and unauthorized computer access laws, including this state’s laws on unauthorized computer access.

(5) A fiduciary with authority over the tangible, personal property of a decedent, protected person, principal or settlor:

(a) Has the right to access the property and any digital asset stored in the property; and
(b) Is an authorized user for the purpose of computer fraud and unauthorized computer access laws, including this state’s laws on unauthorized computer access.

(6) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(7) A fiduciary of a user may request a custodian to terminate the user’s account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:

(a) If the user is deceased, a certified copy of the death certificate of the user;
(b) A certified copy of the letter of appointment of the personal representative, a small estate affidavit or court order, a court order, a power of attorney or a trust giving the fiduciary authority over the account; and

(c) If requested by the custodian:
   (A) A number, user name, address or other unique subscriber or account identifier assigned by the custodian to identify the user’s account;
   (B) Evidence linking the account to the user; or
   (C) A finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A) of this paragraph.

SECTION 16. (1) Not later than 60 days after receipt of the information required under sections 7 to 15 of this 2016 Act, a custodian shall comply with a request from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(2) An order under subsection (1) of this section directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. 2702.

(3) A custodian may notify the user that a request for disclosure or to terminate an account was made under sections 2 to 18 of this 2016 Act.

(4) A custodian may deny a request under sections 2 to 18 of this 2016 Act from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary’s request.

(5) Sections 2 to 18 of this 2016 Act do not limit a custodian’s ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination to obtain a court order that:
   (a) Specifies that an account belongs to the protected person or principal;
   (b) Specifies that there is sufficient consent from the protected person or principal to support the requested disclosure; and
   (c) Contains a finding required by law other than under sections 2 to 18 of this 2016 Act.

(6) A custodian and the custodian’s officers, employees and agents are immune from liability for an act or omission done in good faith in compliance with sections 2 to 18 of this 2016 Act.

SECTION 17. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the enacting states.


Approved by the Governor March 3, 2016
Filed in the office of Secretary of State March 3, 2016
Effective date January 1, 2017
APPENDIX B

Sample Will Provisions

(a) My Personal Representative may take any action (including, without limitation, assuming or amending a terms-of-service agreement or other governing instrument) with respect to my Digital Assets, Digital Devices, or Digital Accounts as my Personal Representative shall deem appropriate, and as shall be permitted under applicable state and Federal law. My Personal Representative may engage experts or consultants or any other third party, and may delegate authority to such experts, consultants or third party, as necessary or appropriate to effectuate such actions with respect to my Digital Assets Digital Devices, or Digital Accounts, including, but not limited to, such authority as may be necessary or appropriate to decrypt electronically stored information, or to bypass, reset or recover any password or other kind of authentication or authorization. This authority is intended to constitute “lawful consent” to any service provider to divulge the contents of any communication or record under The Stored Communications Act (currently codified as 18 U.S.C. §§ 2701 et seq.), the Computer Fraud and Abuse Act (currently codified as 18 U.S.C. § 1030), and any other state or federal law relating to Digital Assets, data privacy, or computer fraud, to the extent such lawful consent may be required. My Personal Representative shall be an authorized user for purposes of applicable computer-fraud and unauthorized-computer-access laws. The authority granted under this paragraph is intended to provide my Personal Representative with full authority to access and manage my Digital Assets Digital Devices, or Digital Accounts, to the maximum extent permitted under applicable state and Federal law and shall not limit any authority granted to my Personal Representative under such laws.

(b) The following definitions and descriptions shall apply under this will to the authority of the Personal Representative with respect to my Digital Assets and Accounts:

(1) “Digital Assets” shall any electronic record that is defined as a “Digital Asset” under the Oregon Revised Uniform Fiduciary Access to Digital Assets Act, together with any and all files created, generated, sent, communicated, shared, received, or stored on the Internet or on a Digital Device, regardless of the ownership of the physical device upon which the digital item was created, generated, sent, communicated, shared, received or stored (which underlying physical device shall not be a “Digital Asset” for purposes of this Will).

(2) A “Digital Device” is an electronic device that can create, generate, send, share, communicate, receive, store, display, or process information, including, without limitation, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smart phones, cameras, electronic reading devices and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops.

(3) “Digital Account” means an electronic system for creating, generating, sending, sharing, communicating, receiving, storing, displaying, or processing information which provides access to a Digital Asset stored on a Digital Device, regardless of the ownership of such Digital Device.

(4) For the purpose of illustration, and without limitation, Digital Assets and Digital Accounts shall include email and email accounts, social network content and accounts, social media content and accounts, text, documents, digital photographs, digital videos, software,
software licenses, computer programs, computer source codes, databases file sharing accounts, financial accounts, health insurance records and accounts, health care records and accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online store accounts and affiliate programs and other online accounts which currently exist or may exist as technology develops, or such comparable items and accounts as technology develops, including any words, characters, codes, or contractual rights necessary to access such items and accounts.
APPENDIX C

JANE CORDELIA, PERSONAL REPRESENTATIVE
ESTATE OF JOSEPH CORDELIA, DECEASED
565 N. EDGAR DRIVE
PORTLAND, OR 97203
(503) 555-0122

November 18, 2017

Via Certified Mail 3419 9866 0430 0011 4755 38
Return Receipt Requested
Ingens Electronics
5656 Silicone Drive
Mionloch Acres, CA 94010

Re: Email Account of Joseph Cordelia, Deceased (jcordelia@ingens.com)

Dear Sirs:

I am the duly appointed personal representative of Joseph Cordelia (the “Decedent”). The Decedent died on September 14, 2017.

Pursuant to the Oregon Revised Uniform Fiduciary Access to Digital Assets Act, Section 7, Chapter 19, Oregon Laws 2016 (hereafter, “RUFADAA”), I hereby request full access to the email account maintained by Ingens Electronics. In connection with this request, I am enclosing the following:

1. A certified copy of the death certificate of the Decedent.

2. A certified copy of the Letters Testamentary issued by the Multnomah County, Oregon, Circuit Court on October 25, 2017, which appoints me as the Personal Representative of the Decedent’s estate.

3. A copy of the Will of Joseph Cordelia dated July 27, 2014. Please note that pursuant to Section G. of Article 7 of the Decedent’s Will, the Decedent expressly provided his full consent to the disclosure of all his digital assets to his personal representative, and further authorized his personal representative to take any and all actions relating to his digital assets as his personal representative shall deem appropriate.

4. A copy of an email dated March 3, 2017, which was sent to me by the Decedent. This email contains the Decedent’s ingens.com email address referenced above, together with other information identifying the Decedent’s account with Ingens Electronics.

I look forward to your prompt response in accordance with RUFADAA. Please contact me if you have any questions.

Very truly yours,

Jane Cordelia, Personal Representative
Estate of Joseph Cordelia, Deceased
Chapter 2
Marital Trust Planning

JOSHUA HUSBANDS
Holland & Knight LLP
Portland, Oregon

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Chart of Pecuniary and Fractional Funding Formulas and Their Consequences

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The information contained in these materials is for the general education and knowledge of the persons attending this program. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal or tax problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel.

Holland & Knight lawyers are available to make presentations and represent clients on a wide variety of private wealth services matters. Our lawyers are experienced in all areas of asset protection and wealth preservation. They also represent clients in tax controversies, will contests, and trust litigation.
I. Credit Shelter Trust Planning. When representing a married couple, a thorough understanding of the planning opportunities afforded by the marital deduction rules and the applicable exclusion amount is essential.

A. Applicable Exclusion Amount. The "applicable exclusion amount" is the amount a person may transfer at death without any transfer tax being payable. The applicable exclusion amount is $5,450,000 in 2016. With a married couple, there are various trust techniques to take advantage of the applicable exclusion amount to essentially double the amount that they can pass to their heirs estate tax free. This presentation does not address the use of portability as a strategy to utilize both spouses' applicable exclusion amounts.

1. Disclaimer Trust. One available alternative, if the combined estates of the spouses are potentially less than one applicable exclusion amount, is the disclaimer trust. Under this plan, the deceased spouse gives all of his or her assets to the surviving spouse, with the option to disclaim a portion of the inherited assets. The disclaimed assets will pass automatically to a separate trust that will utilize the deceased spouse's applicable exclusion amount. The surviving spouse can be a beneficiary of the disclaimer trust, but cannot have a testamentary power of appointment over the trust assets. If the disclaimer trust is properly drafted, the trust assets will not be included in the surviving spouse's taxable estate at his or her death. The benefit of this plan is that the surviving spouse can make a decision about funding the trust as late as nine months after the death of his or her spouse.

2. Partial QTIP Election. Another alternative available if the combined estates of the spouses are less than one applicable exclusion amount is the use of a partial QTIP election as discussed in Section 4(c) below.

3. Credit Shelter Trust. If the combined estates of the spouses are greater than the applicable exclusion amount, a common estate planning technique is to allocate a portion of the deceased spouse's trust equal to the applicable exclusion amount to a separate trust often referred to as the Credit Shelter or bypass trust. If the applicable exclusion amount were given directly to the surviving spouse, there will be no estate tax at the first spouse's death, but this merely serves to increase the size of the surviving spouse's estate and his or her potential estate tax liability. By funding a separate bypass (or credit shelter) trust with the applicable exclusion amount, that trust will not be included in the estate of the surviving spouse upon his or her death, thereby saving estate tax on the entire balance of the trust.

4. Marital Gift. After fully utilizing the applicable exclusion amount, the balance of the deceased spouse's estate will often pass to the surviving spouse in a transfer that qualifies for the marital deduction under Code Section 2056. This transfer can be outright or by a trust that qualifies for the marital deduction (a "Marital Trust"). To qualify for the marital deduction, the surviving spouse, and no one else, must have the right to all income from the trust for his or her lifetime.  

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1 I.R.C. §2010
2 I.R.C. §§ 2056(b)(5), 2056(b)(7).
a. GPA Trust. One trust that qualifies for the marital deduction is a general power of appointment (GPA) trust, which allows the surviving spouse to appoint the trust assets to himself or herself or to his or her estate.³

b. QTIP Trust. Another Marital Trust concept—which has become by far the most popular—is the qualified terminable interest property (QTIP) trust.⁴ The primary reason for the popularity of the QTIP trust is that the first spouse to die can direct the disposition of the remaining trust estate upon the death of the surviving spouse, and the surviving spouse may not have any power or control over the disposition of the remaining trust estate upon the surviving spouse's death. For that reason, the QTIP trust is used often in situations in which there are multiple marriages and families.

i. Partial QTIP Election. Even if a trust meets all of the statutory requirements necessary to qualify as a QTIP trust, it will not qualify for the marital deduction unless the executor so elects on the estate tax return.⁵ Accordingly, to maximize flexibility, a QTIP trust should be structured to allow the personal representative to make a partial QTIP election. As mentioned above, if the combined estates of the spouses appear that they may end up less than one applicable exclusion amount, the trust can provide that at the death of the spouse everything funds a QTIP trust for the benefit of the surviving spouse. If the estate of the first spouse to die turns out to be greater than expected, the executor can make a partial QTIP election to take advantage of the applicable exclusion amount. This technique would give the trustee fifteen months to decide because the QTIP election is made on IRS Form 706, which can be filed on extension 15 months after the death of the grantor.⁶

ii. Reverse QTIP Election. A reverse QTIP election is a technique that enables the trustee to take advantage of the full GST exemption ($5,450,000 in 2016) in the estate of the first spouse to die if that spouse has used a portion of his or her estate tax exemption without reducing his or her GST exemption (such as large gifts to children).⁷ The reverse QTIP election allows the first spouse to die to remain the "transferor" for GST tax purposes of a portion of the trust property; the surviving spouse is the "transferor" for the other (i.e., non-reverse QTIP) portion of the trust property. For example (to make the math simpler, assume the full estate and GST exemption is $5,250,000), if the first spouse to die had assets of $5,750,000 in 2016, but had used $1,000,000 of the applicable exclusion amount with non-GST lifetime gifts, the trustee could fund the bypass (or credit shelter) trust with $4,250,000 and fund the reverse QTIP Trust with $1,000,000 (the difference between the deceased spouse's GST exemption and remaining applicable exclusion amount). The decedent's $5,250,000 GST exemption would be allocated to those trusts. The

³ I.R.C. §2056(b)(5).
⁴ I.R.C. §2056(b)(7).
⁵ Treas. Reg. § 20.2056(b)-7(b)(2).
⁷ I.R.C. §2631(a).
decendent's remaining $500,000 of assets would fund a separate QTIP trust without a reverse QTIP election.

iii. **Clayton QTIP.** A "Clayton Clause" allows any part of the marital gift not elected to qualify for the marital deduction to pass to another trust or to other beneficiaries without jeopardizing the entire marital deduction. This provision stems from a case in which the IRS argued that if the amount of property passing to a QTIP Trust was dependent upon the executor's making a QTIP election, then none of the property would qualify for the marital deduction.\(^8\) In the case, the Fifth Circuit rejected this argument and allowed the deduction.\(^9\) Other circuits have followed the Fifth Circuit's ruling.\(^10\) The IRS has also conceded the issue in the regulations.\(^11\)

**B. Trust Funding Formulas.** Most trusts that employ provisions addressing the use of the applicable exclusion amount contain a detailed formula for dividing the trust into the credit shelter trust and the Marital Trust at the death of the grantor. In general, there are two types of formulas, so that require one of the trusts to be funded with a pecuniary amount, and those that divide the assets on a fractional basis.\(^12\)

1. **Pecuniary Formulas.** There are two types of pecuniary formulas: "fixed sum" and "fairly representative." In addition, the estate planning practitioner can choose to fund either the Marital Trust or the Credit Shelter Trust with the pecuniary amount, with the residue of the trust passing into the other trust.

a. **Pre-residuary pecuniary marital share.** As noted above, if the trust employs a pecuniary formula, the grantor has the choice to fund the marital share or the credit shelter share with the pecuniary amount. The pre-residuary pecuniary marital share fixes the value of the marital share at the date of death, and funds the credit shelter trust with the residue of the grantor's estate. This approach can be beneficial from a transfer tax perspective because if the trust assets appreciate between the grantor's date of death and the funding date, the grantor will achieve some leverage of his or her applicable exclusion amount, which may result in a bypass (or credit shelter) trust funded with significantly more than the applicable exclusion amount.\(^13\) However, some practitioners do not like to use this approach, particularly in large estates, because if the assets depreciate after death but before funding, the bypass (or credit shelter) trust that bears all of the depreciation could be entirely wiped out.

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9 *Id.*

10 See *e.g.*, Estate of Robertson v. Comm., 15 F3d 779 (CA 8 1994), and Estate of Spencer v. Comm., 43 F3d 226 (CA 6 1995).


12 The attached Exhibit contains a chart of pecuniary and fractional funding formulas and their consequences reproduced with permission from worksheet 21 of Jeffrey N. Pennell, 843 T.M. Estate Tax Marital Deduction (BNA, Inc.)

b. **Pre-residuary Pecuniary Non-Marital Gift.** This approach uses the applicable exclusion amount to fund the bypass (or credit shelter) trust or other non-marital deduction bequest with a pecuniary amount, with the residue passing to the marital share.

c. **Fixed sum pecuniary formula.** With the "fixed sum" pecuniary formula, the appreciation or depreciation of assets between the date of death and the date of funding shifts to the trust that does not receive the pecuniary amount. If the assets used to fund the pecuniary share increase in value after the deceased spouse's date of death and before funding, the trust will realize a taxable gain on the amount of the increase.\(^\text{14}\) In addition, the full amount of any IRA account (to the full extent of its value) or other income in respect of decedent (IRD) used to fund the pecuniary amount will be subject to income tax as of the date of funding. Accordingly, it is generally not advisable to use this formula if the trust contains a large percentage of IRD assets.

d. **Fairly representative pecuniary formula.** With the "fairly representative" pecuniary formula, the pecuniary share need not necessarily be funded with a pro rata portion of each asset. The pecuniary share may instead be funded on a non-pro rata basis provided the funding is based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of all the assets measured from the valuation date to the date of funding.\(^\text{15}\) If a fairly representative basis is used, and the assets appreciate after the date of valuation, then the funding of the marital and credit shelter shares will include the pro rata share of net appreciation. If the values decline, then this basis of funding will include the pro rata share of net depreciation. One of the benefits of the "fairly representative" pecuniary formula is that there is no gain (and no tax liability) upon funding the marital and credit shelter trust.

2. **Fractional Share Formula.** If a fractional share formula is selected, the trust property is allocated on a percentage basis between the marital share and the credit shelter trust.

   a. The use of a fractional share formula eliminates the need to choose between the pre-residuary and residuary marital clauses. The formula allocates an undivided interest in each asset to each trust. All growth will be allocated proportionately under the fractional formula, and no growth shifting will be available. In addition, because no pecuniary amount is to be funded, gain will not be realized upon the funding of the separate trusts.

   b. The funding of the fractional share generally is considered to be more difficult than funding a pecuniary amount because of the need to revalue and recalculate the fraction whenever a distribution that is not on a pro rata basis is made to one beneficiary.\(^\text{16}\) If no distributions are ever made except on a pro rata basis to all residuary beneficiaries, then no recalculation is necessary, but funding a fractional share can create

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\(^{14}\) Treas. Reg. §1.1014-4(a)(3); Kenan v. Comm., 114 F2d 217 (CA 2 1940); Rev Rul 86-105, 1986-2 CB 82.

\(^{15}\) Rev. Proc. 64-19, 1964-1 CB 682.

an additional problem if one adopts the view that there is a need to "fractionalize" each asset. This problem may be avoided by a specific authorization in the trust for non-fractional distributions (often called "pick and choose" funding).\textsuperscript{17} However, if the "pick and choose" method is not authorized by the trust instrument, non-fractional distributions run the risk of being considered taxable exchanges.\textsuperscript{18}

3. \textbf{Other Options}. If the grantor does not want to run the risk of disinheriting his or her spouse by overfunding the bypass (or credit shelter trust), the grantor could provide that the marital share will be no less than the difference between one-half of his or her adjusted gross estate and the aggregate value of all assets that qualify for the marital deduction and that pass under the trust or outside the trust. This option assures that the surviving spouse receives at least one-half of the client's adjusted gross estate and is often used for smaller estates. In effect, it assures there is a marital share rather than having everything fund the bypass (or credit shelter trust). It may not be the best alternative from an estate tax perspective, but the grantor may prefer it anyway.

\textbf{II. Sample Provisions}

- \textbf{Pecuniary Funding of CST}

Option 1.

\textit{Gift to Credit Shelter Trust}. My Personal Representative shall set aside as a separate trust (the "Credit Shelter Trust") all assets of my estate that cannot qualify for the federal estate tax marital deduction, plus the largest pecuniary amount (if any) that can be added to this gift without incurring or increasing the federal estate tax liability of my estate. This amount will be calculated by taking into account my applicable exclusion amount and all other tax credits, deductions, and other preferences allowed to my estate. In determining that amount, my Personal Representative shall consider all other transfers of assets included in my gross estate for federal estate tax purposes and all my adjusted taxable gifts. This amount, however, will not be reduced if my spouse disclaims any part of the Residuary Estate. Values finally determined for federal estate tax purposes are to be used in determining the amount of the Credit Shelter Trust.

Option 2.

\textit{Credit Shelter Trust}. The following provisions shall apply to the Credit Shelter Trust.

1. \textit{Determination of Funding Amount}. If my spouse survives me, I give to my Trustee named herein, to hold in a separate trust known as the Credit Shelter Trust, an amount equal to the largest amount that can pass under this Article free of federal estate tax on my gross estate, excepting those taxes, if any, which cannot be reduced by the unified credit, marital deduction, or any other credits or deductions. In computing this amount, the Personal Representative shall take into account:

\footnote{\textsuperscript{17} Such an authorization for non-fractional distributions should meet the standards announced by the Service in Rev. Proc. 64-19, 1964-1 CB 682.}

a. **Credits.** The unified credit and all other credits available for federal estate tax purposes including credit for state death taxes to the extent the use of any such credit does not increase the death tax payable to any state.
b. **Deductions.** All deductions allowable (but not taken) for estate tax purposes. All transfers by will or otherwise for which a marital deduction would have been allowed but for disclaimer or non-election of a trust established under this Article intended to qualify for election under Section 2056(b)(7) of the Internal Revenue Code of 1986, as amended ("IRC"), shall be treated for this purpose as if that deduction had been taken;c. **Charges to Principal.** Charges (including those taxes, if any, which cannot be reduced by the unified credit or the marital deduction) to principal that are not allowed as deductions in computing my federal estate tax for my estate; and
d. **Value of Other Interests.** Dispositions under other Articles of this instrument and property passing or having passed outside of this instrument which do not qualify for the marital or charitable deduction.
e. **Prior Taxable Gifts.** Prior taxable gifts that I have made during my lifetime.

2. **Impact of Elections on Funding.** I recognize that it is possible that no amount may pass to this Credit Shelter Trust or that any amount that may pass may be affected by the action of my Personal Representative in exercising certain tax elections.

3. **Selection of Assets.** In computing the pecuniary amount of the credit shelter gift, the values, amounts and credits as finally determined for federal estate tax purposes shall control. Except as limited herein, the Personal Representative shall have sole discretion to satisfy this gift in cash or in kind or partly in each. All assets so selected to satisfy this gift shall be at their fair market value as determined on the date or dates of distribution.

### Pecuniary Funding of Marital Share

**Marital Gift.** The Trustee shall set aside, as a separate trust (the "Marital Trust"), the smallest pecuniary amount necessary to eliminate or reduce to the lowest possible sum the aggregate state and federal estate tax liability of my estate. This amount will be calculated by taking into account my applicable exclusion amount and all other tax credits, deductions, and other preferences allowed to my estate, based on the assumption that an election is made to qualify all of the property in the Marital Trust for the marital deduction. In addition, the allocation to the Marital Trust shall include all of the income from the assets distributed thereto. The amount of this gift, however, is not conditioned upon such an election being made, and will not be readjusted because of a disclaimer by my wife. Values finally determined for federal estate tax purposes are to be used in determining the amount of the Marital Trust. The Trustee shall administer the Marital Trust as provided in Article ____.

### Fractional Share

**Funding of Marital Trust.** If my husband survives me, the Trustee shall set aside, as a separate trust (the "Marital Trust"), a fraction of the remaining Trust Estate determined as follows. The numerator of the fraction will be the smallest pecuniary amount that, if given outright to my husband, would eliminate or reduce to the lowest possible sum the federal estate tax liability of my estate. This amount will be calculated by taking into account my applicable exclusion amount and all other tax credits, deductions, and other preferences allowed to my estate, based
on the assumption that an election is made to qualify all of the property in the Marital Trust for the marital deduction. The denominator of the fraction will be the balance of the Trust Estate available for distribution. The fraction is to be determined after the payment of estate taxes, expenses of administration, and other charges against the principal of the Trust Estate under Article ___. The Trustee shall hold the Marital Trust as provided in Article ___ and shall hold the remaining Trust Estate as a separate trust (the "Family Trust") for administration as provided in Article ___. 
## Chart of Pecuniary and Fractional Funding Formulas and Their Consequences

<table>
<thead>
<tr>
<th>Funding value</th>
<th>True-Worth Pecuniary Funding Formula</th>
<th>Fairly Representative Pecuniary Funding Formula</th>
<th>Minimum-Worth Funding Formula</th>
<th>Fractional Funding Formula</th>
</tr>
</thead>
<tbody>
<tr>
<td>Funding value</td>
<td>Property distributed to fund the pecuniary bequest is valued at its date of distribution value.</td>
<td>Property distributed to fund the pecuniary bequest is valued at its federal income tax basis (usually federal estate tax value)</td>
<td>Property distributed to fund the pecuniary bequest under the individual asset style formula is valued at the lesser of its date of distribution value or its federal income tax basis value (usually federal estate tax value). Property distributed to fund the pecuniary bequest under the collective style is valued at its income tax basis.</td>
<td>Property distributed under a pro rata funding formula is valued at its federal estate tax value. Property distributed under a pick-and-choose funding formula is (generally) valued at its date of distribution value.</td>
</tr>
<tr>
<td>Which trust share is frozen in value?</td>
<td>The marital share is frozen in value under an upfront pecuniary formula. The credit shelter share is frozen in value under a reverse pecuniary formula.</td>
<td>Neither share is frozen in value. Both shares fluctuate in value during the administration of the grantor’s estate.</td>
<td>Neither share is frozen in value. Both shares fluctuate in value during the administration of the grantor’s estate.</td>
<td>Neither share is frozen in value. Both shares fluctuate in value during the administration of the grantor’s estate.</td>
</tr>
<tr>
<td>Does the grantor’s estate realize gain or loss on funding the bequest/trust with noncash property?</td>
<td>Yes.</td>
<td>No.</td>
<td>No gain is realized. Loss can be realized but is not recognized due to Code § 267(b)(6).</td>
<td>No.</td>
</tr>
<tr>
<td>Is the Code § 643(e)(3) election available to recognize gain or loss on funding with noncash property?</td>
<td>No.</td>
<td>Yes.</td>
<td>Yes.</td>
<td>Yes.</td>
</tr>
<tr>
<td>Does funding with the right to receive IRD accelerate its recognition by the grantor’s estate?</td>
<td>Yes.</td>
<td>Yes.</td>
<td>Yes.</td>
<td>No.</td>
</tr>
<tr>
<td>Are the marital and credit shelter trusts separate shares under Code § 663(c) for income tax and DNI carryout purposes?</td>
<td>Yes, but DNI may be $0 for a marital trust established under an upfront pecuniary formula if it does not receive income from the grantor’s estate. (Note: The same rule applies for a credit shelter trust established under a reverse pecuniary formula.)</td>
<td>Yes.</td>
<td>Yes, but DNI may be $0 for the marital trust if it does not receive income from the grantor’s estate.</td>
<td>Yes.</td>
</tr>
<tr>
<td>How much DNI is carried out from the grantor’s estate on funding?</td>
<td>If DNI is carried out (see immediately above), the amount of DNI will be the FMV of the distributed assets.</td>
<td>DNI will be the lesser of the distributed asset’s income tax basis or FMV of the distributed assets.</td>
<td>If DNI is carried out (see immediately above), the amount of DNI will be the lesser of the distributed asset’s income tax basis or FMV of the distributed assets.</td>
<td>DNI will be the lesser of the distributed asset’s income tax basis or FMV of the distributed assets.</td>
</tr>
<tr>
<td>Do assets in the grantor’s estate have to be revalued at the time of funding?</td>
<td>Yes, but only assets that are distributed in satisfaction of the pecuniary amount have to be revalued.</td>
<td>All assets in the grantor’s estate must be revalued.</td>
<td>Only assets that have decreased in value have to be revalued.</td>
<td>No revaluation is required for pro rata funding. All assets in the grantor’s estate must be revalued for pick-and-choose funding.</td>
</tr>
<tr>
<td><strong>Does the grantor’s fiduciary have flexibility in selecting assets to fund the bequest/trust?</strong></td>
<td><strong>True-Worth Pecuniary Funding Formula</strong></td>
<td><strong>Fairly Representative Pecuniary Funding Formula</strong></td>
<td><strong>Minimum-Worth Funding Formula</strong></td>
<td><strong>Fractional Funding Formula</strong></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Yes. The fiduciary can favor the marital or credit shelter trust in its selection of assets.</td>
<td>Yes, but the fiduciary’s flexibility is limited to choosing assets that fairly represent the overall appreciation and depreciation of all the assets in the grantor’s estate.</td>
<td>Yes. The fiduciary can favor the marital or credit shelter trust in its selection of assets.</td>
<td>The fiduciary has no flexibility in pro rata funding. But the fiduciary has more flexibility in selecting assets under a pick-and-choose funding formula.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Does the funding formula work well for GST tax exemption allocation purposes?</strong></th>
<th>Yes.</th>
<th>Yes.</th>
<th>No.</th>
<th>Yes.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th><strong>Does the funding formula work well for Code § 2032A special use valuation property?</strong></th>
<th>Yes.</th>
<th>No.</th>
<th>No.</th>
<th>No.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th><strong>Does the formula generally require quick funding?</strong></th>
<th>YES.</th>
<th>No.</th>
<th>Yes.</th>
<th>No.</th>
</tr>
</thead>
</table>


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Chapter 3

How to Avoid a Will or Trust Contest

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Chapter 3—How to Avoid a Will or Trust Contest

The following is a list of techniques that might minimize the risk of a successful contest of a will or trust, or might even prevent a contest from being brought. Not every practitioner will agree that all of these techniques are effective, nor will they agree on the degree to which these techniques might be effective. Instead, this list is intended as a list of discussion points to facilitate the oral discussion you will hear today.

Some of these techniques are intended to protect against a contest based on undue influence, while others are intended to protect against a contest based on lack of capacity. Most are intended to protect against both. Some of these techniques should be employed in every estate plan, but many are not necessary for routine estate plans for clearly-competent testators who are leaving their estates to the obvious beneficiaries. For example, a widow who is leaving her estate equally to her three children poses a relatively low risk of a contest.

In Oregon, the legal capacity to execute a will or a revocable trust is the same. ORS 130.500.

A cautionary note: Everyone dealing with an elderly client (over the age of 65) should be aware of the Oregon statute on elder financial abuse. ORS 124.100 et seq. That statute provides that a person who “wrongfully takes or appropriates money or property of a vulnerable person,” which includes an elderly person, is liable for treble damages plus attorney fees. The statute includes those who “have caused” the elder financial abuse or who have “permitted another person to engage” in elder financial abuse. ORS 124.100(2). Some plaintiffs see that statute as a technique that can be used to sue attorneys who have allegedly engaged or assisted in inappropriate estate planning. For example, an attorney who aids a caregiver in receiving gifts from an elderly person (or assists the elderly person in making such gifts) might become liable for elder financial abuse, with its treble damages and attorney fees. Even if the suit is unsuccessful, the costs of defense can be significant. The statute is extremely broad, and little case law is available for guidance. In a non-elder abuse case, the Oregon Supreme Court has held that an attorney will not be liable for assisting his client in committing a breach of fiduciary duty, because the attorney was acting within his scope of employment as an attorney. *Reynolds v. Schrock*, 341 OR 338 (2006). The court commented that public policy supports allowing attorneys to advise their clients fully, and thus a privilege is present, even if the attorney’s advice had been incorrect. However, the court commented that that result might change if the attorney aids or abets in the commission of a crime or a fraud. For a similar holding in a conservatorship settling, see *Fuentes v. Tillett*, 263 Or. App. 9 (2014). But see *Granewich v. Harding*, 329 OR 47 (1999), which held that a lawyer acting outside of the scope of his employment as an attorney could be held liable for assisting in the breach of a fiduciary duty. In *Cruze v. Hudler*, 246 Or. App. 649 (2011), the court found evidence of fraud by an attorney, and held that an elder abuse case should proceed to trial. The facts of that case involved a business that was engaged
in real estate investment, and the investors were elderly. Where alleged wrongful estate planning (elder abuse) falls on that spectrum is not known, but the elder financial abuse statute specifically applies regardless of whether a fiduciary relationship is present. ORS 124.110. One hopes that the preparation of a will for a client who appears to be competent and free of undue influence will not trigger attorney liability for elder financial abuse, even if incompetence or undue influence is later found to have been present, but the courts have not yet so held. Moreover, the aiding or abetting of gifts from an elderly person (or placing property of an elderly person in joint name) might trigger attorney liability, if the gifts are later held to have been wrongful. Proceed with caution.

The following techniques for preventing a will or trust contest are listed roughly in the order of their importance and effectiveness. The techniques discussed first are of paramount importance in almost any estate planning. The techniques discussed last are of limited usefulness, and might actually have negative consequences.

1. Carefully Document Your Interaction with the Testator.

An estate plan that carefully documents the testator’s intentions is very difficult to contest. Take notes and prepare memos every time you meet with the testator or talk to the testator. Explain the estate plan to the testator, and carefully document that explanation. Preserve all letters and emails. Ask the testator if anyone has discussed her estate plan with her, and ask her to describe those conversations. Such a question is superior to asking if anyone has tried to influence her, because most testators will deny that any influence has taken place.

It helps to explain to the testator that your questions are not designed to question her judgment or her motivation, or to pry into her private affairs, but instead are designed to preserve evidence to make the will stronger, in the event that the will is ever questioned.

Keep in mind that after the testator dies, the attorney-client privilege and the medical records privilege both disappear in a will contest or a trust contest. OEC 503(4)(b) and 504-1(4)(b)(B). As a result, your complete file will be available to a contestant, both the good parts of the file and the bad parts of the file. Document your interactions with the testator carefully and thoroughly, but try to be as factual and accurate as possible. Consider omitting your own impressions and opinions of the testator’s mental abilities.

Documenting your file also helps defend against claims of malpractice.

If you are doing estate planning for a married couple, be sure to discuss the estate plan in detail with both spouses, and make sure that both spouses respond
appropriately to your questions. Don’t let one spouse be in control of the estate plan, to the exclusion of the other spouse. Document your interactions with both spouses, not just one. See *Frakes v. Nay*, 254 Or. App. 236, 295 P.3d 94 (Or. App., 2012). Don’t let one spouse come into your office to sign the documents, and then take the documents home for the other spouse to sign.

By the way, if your client is disinheriting a family member, or making other significant changes to their will, be sure to ask your client about trusts, life insurance, and retirement accounts that might also need to be changed. Disinheriting a family member in a will does not affect other dispositions. For example, prior to 2016, if an asset fell into intestacy for some reason, the intestacy statutes operated without regard to the terms of a will or trust. In *McClain v. Hardy*, 184 Or. App 448 (2002), a disinheritance clause (e.g., “I specifically direct that none of my estate pass to my daughter”) applied only to prevent the disinherited heir from taking under the will, and that clause did not prevent the disinherited heir from taking by intestacy. That result was reversed by 2015 SB 379, which amended ORS 112.015 to permit a disinheritance in a will to also govern intestacy. Under the new statute, a will may disinherit person for purposes of intestacy, in which case the person will be treated as if they had disclaimed the inheritance. But the will must specifically state that its language of disinheritance applies not only to the will, but also to intestacy.

Similarly, the heir disinherited in a will would be able to take under a trust, a life insurance beneficiary designation, a retirement plan beneficiary designation, or (more importantly) a life insurance or retirement plan default clause in the policy or custodial agreement. (When planning an estate, always review the client’s beneficiary designations to make certain that the designations are consistent with the estate plan.) Also carefully check the drafting of your document: a will might expressly state that a daughter is being disinherited, but other “boilerplate” language in the same will might leave assets to that daughter. For example, contingency language might include the phrase “my children,” which would include the daughter. In that example, the definition of the word “children” would need to be modified.

2. **Ask the Four Questions.**

At the execution of the document, a competent testator must:

1. **Know the natural objects of his/her bounty.** The testator should be able to provide the names and relationships of family members, *without prompting*. 
2. **Know the nature and extent of his/her property.** A precise statement of net worth is not necessary, but a general idea of the nature and extent of the estate is needed.

3. **Understand the nature of the act being performed.** The testator must understand that he is signing a will or trust, and should understand that the document disposes of the testator’s assets at death.

4. **Know the scope and contents of the will or trust.** The testator need not know the detailed dispositive plan or be able to recite the technical boilerplate of the will or trust, but he/she should be able to generally describe who inherits the estate.


All of these topics should be discussed with the testator at your initial meeting and at the execution of the document. Although capacity is judged at the moment of execution (as discussed below), other evidence of capacity near the date of execution is also very helpful.

If you are doing estate planning for a married couple, these questions should be asked of both parties, not just one.

If your client is vision-impaired, consider producing the will in a very large font. Or ask whether anyone has assisted the client to read and understand the will. Determine who that assistant was, and whether the assistant is a beneficiary under the will. Then have a lengthier, more detailed discussion with your client (with a witness present) about the contents of the will. The conversation should be more detailed than you would normally have with other clients, in order to establish that the client understands the provisions of the document.

As further evidence of satisfaction of the four tests, at the moment immediately before execution consider routinely asking your client two additional questions:

A. Is this your will?

B. Would you like us to witness it for you?
Chapter 3—How to Avoid a Will or Trust Contest

3. **Avoid the Seven Factors.**

The Oregon Supreme Court has described seven factors that indicate the possible presence of undue influence. In particular, the court has held that the presence of a close confidential relationship together with one of seven factors gives rise to an inference of undue influence. *Reddaway’s Estate*, 214 Or. 410, 421-427, 329 P.2d 886, 891-893 (Or. 1958); *Troyer v. Plackett*, 48 Or. App. 497, 617 P.2d 305 (Or. App. 1980); *McNeely v. Hiatt*, 138 Or. App. 434 (1996).

In particular, the Oregon Court of Appeals has held:

The burden of proving that a will is the product of undue influence is on the contestant. . . . However, under certain circumstances, there may arise a "suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference." Specifically, a suspicion of undue influence arises where (1) the contestant first proves that a confidential relationship existed between the testator and the beneficiary, such that the beneficiary held a position of dominance over the testator; and (2) the contestant establishes the existence of "suspicious circumstances" surrounding the procurement or execution of the will. *Harris v. Jourdan*, 218 Or. App. 470, 491 (2008) (citations omitted).

The Court of Appeals also noted:

A finding of dominance does not require evidence that an authoritative, controlling person bullied or directed the actions of a subservient one. Dominance can be expressed more subtly, such as by suggestion or persuasion or by fostering a sense of need and dependence. . . . Dominance is found where the testator is guided by the beneficiary's judgment and advice in the period leading up to execution or destruction of a will. *Harris v. Jourdan*, 218 Or. App. 470, 492 (2008) (citations omitted).

Not all of the seven factors can be eliminated in every case, but they should be minimized to the greatest extent possible. The seven factors are:

1. **Procurement.** If possible, try to have the testator initiate the estate planning, arrange his or her own transportation to your office, and meet with you without other family members present. This is not always possible, because many elderly clients do not drive, are not ambulatory, etc. And it is impossible to turn back the clock and erase the fact that the favored beneficiary initiated the estate planning process, arranged for an
attorney to be hired, and provided transportation to the attorney’s office. In those cases, meet with the testator without other family members present, at an absolute minimum.

2. **Lack of independent advice.** Make sure that your advice is independent; avoid any conflict of interest or appearance of conflict. Meet with the testator alone, not with other family members or beneficiaries present. If you have previously represented one of the beneficiaries, refer the testator to a different law firm, in order to eliminate this factor. See *Caba v. Barker*, 341 Or. 534, 145 P.3d 174 (2006).

Even if the conflict of interest is waivable, and thus the representation of the testator is ethically permitted, the presence of the conflict (waived or otherwise) still damages or destroys the independence of the representation for purposes of this factor.

In some cases, a will might be easier to defend if it was prepared by the testator’s long-time attorney, rather than by a new attorney who is unfamiliar with the testator and his history.

3. **Secrecy and haste.** When a testator is terminally ill, haste is occasionally necessary, and confidentiality is the norm in attorney-client relationships. But if a beneficiary is trying to keep the estate plan a secret from other family members, the plan will be more difficult to defend. In some cases, the secrecy is requested by the testator for reasons of privacy, but in other situations the secrecy is sought by an influencing beneficiary (or even the testator) in order to conceal from family members evidence of the influence and the results of that influence.

4. **Change in attitude following close association with new beneficiary.** The classic example is a new caregiver (or a new romantic interest) who suddenly appears in the estate plan, to the exclusion of the testator’s children, or resulting in a reduction of their shares.

5. **Change in dispositive plan.** A testator with a long history of treating her children equally should be questioned carefully if one child is suddenly favored or disfavored. In some cases, legitimate reasons are present (and should be carefully documented in the attorney’s file). In other cases, one child may have unduly influenced the testator to turn against another child. But not all influence is undue: Children are permitted to express their opinions, and reasonable opinions might not constitute undue influence.
6. **Unnatural or unjust bequest.** A natural disposition favors the natural objects of the testator’s bounty, such as his immediate family (spouse, children, etc.). An unnatural disposition favors a caregiver or a distant relative over closer relatives. Query: Is a will or trust unnatural or unjust if it favors one offspring over another offspring? A natural disposition does not necessarily eliminate undue influence, but it greatly reduces the risk. The disinherition of a spouse is not necessarily unnatural if the testator has children from a prior marriage and the second spouse has adequate resources of her own. In every case, ask the testator to explain the reasons for any inequalities.

7. **Susceptibility to influence.** An ill or elderly testator is more dependent on those who provide care or assistance, and thus is more susceptible to influence. Capacity issues are almost always present (to one degree or another) in undue influence cases.

4. **Meet Privately with the Client.**

In every estate plan where undue influence might be a possibility, the attorney should meet privately with the client, without any family members present, particularly family members who might benefit from the proposed estate plan. The presence of other attorneys or staff is acceptable, but at the initial meeting the client might be more forthcoming if the attorney is the only other person in the room.

5. **Use High-Quality Witnesses.**

In a sensitive situation, use attorneys as witnesses, rather than clerical staff. Consider using two non-drafting attorneys to witness the execution, with the drafting attorney also present. In effect, three attorneys will have witnessed the execution.

In most cases, the testimony of the witnesses will be given great weight by the trial court, but that weight will not always be given. Consider the following from the Oregon Court of Appeals:

The testimony of the subscribing witnesses, aided by the presumption of competency which accompanies a will that has been duly executed, carries great weight in the determination of decedent's testamentary capacity. The reason for this is that the determination of testamentary capacity must focus on the moment the will is executed and subscribing witnesses are in a position to observe the decedent at the time of the execution. Nevertheless,
this heavy reliance on the subscribing witnesses' testimony is not always appropriate.

Based on the facts and circumstances peculiar to this case, we conclude that other testimony must be given greater weight than that of the subscribing witnesses, whose exchange with testatrix was minimal and who were afforded little opportunity to observe testatrix. *Estate of Unger (Hurd v. Mosby)*, 47 Or. App. 951 (1980) (citations omitted).


Moral of story: Make sure that the witnesses actually have a conversation with the testator, or at least listen to the attorney’s conversation with the testator.

Some clients occasionally ask that their wills be mailed to them so that they can sign their wills at home, using friends or neighbors as witnesses. Other clients may wish to sign their wills in a care facility, using staff members as witnesses. Because the testimony of the witnesses is given great weight, and because the attorney often needs to make sure that certain subjects are discussed by the testator in the presence of the witnesses, the testator needs to be advised that signing a will at home or in a care facility is not a good idea, particularly in sensitive situations. In those situations, if the client cannot come to the attorney’s office, the attorney and the witnesses should travel to the client’s home or care facility.

If the document being signed is a revocable trust, the signature of the client is normally not witnessed. In that situation, witnesses should nevertheless be present, and the witnesses should prepare memos to document the fact that they were present. In sensitive situations, clients should not be allowed to sign their trusts at home (or in a care facility) with no witnesses present. On the other hand, a pourover will is typically signed at the same time as a revocable trust, and the witnesses to the will should document the fact that the testator also signed a trust in their presence.

6. **Have Your Witnesses Prepare Memos.**

Have your witnesses discuss the estate plan with the testator, or at least listen to your conversation with the testator. The witnesses should take careful notes about the sensitive aspects of the plan and the motivations for those aspects. Do not allow the witnesses to witness a will without having had any quality interaction with the testator. (See *Unger*, above, in which the court discounted the testimony of attesting witnesses who had little interaction with the testator.) Ask the witnesses to prepare memos based on their notes. Both the memos and notes should be preserved. The memos should describe the facts of what happened at
the execution, how the testator behaved, and how the testator responded to questions; the memos should avoid opinions and conclusions unless the notes contain facts to support those conclusions.

In general, the witnesses will not be asked (during the meeting with the testator, in their memos, or at trial) whether the testator is competent. That would require psychiatric expertise on the part of the witnesses. Instead, the witnesses will merely be recording the conversations they had with the testator, or the conversation the attorney had with the testator. The content of those conversations will permit the court to determine competency; the witnesses will not be determining competency. (However, it is interesting to note that the affidavit signed by the witnesses typically states that the testator is believed by the witnesses to be competent.)

For example, the memos should not recite that “The testator was competent.” Instead, the memos should contain statements such as “Mr. Smith recited the names of his four children as Amy, Billy, Casper, and Donald,” or “Mr. Smith answered each of the questions without hesitation.”

Ideally, the memos prepared by the witnesses should describe the fact that the testator was asked the four questions and answered them appropriately, and the memos should recite what the testator said in response to each of the four questions. Consider giving the witnesses a checklist to complete during the will signing. If one particular heir is being disinherited, that subject should be discussed in the presence of the witnesses, along with the reasons for the disinheritance.

Important: Prior to the meeting with the testator, explain to the witnesses that they will be asked to witness a will and also to sign an affidavit that they believe the testator to be competent. The importance of the affidavit should be emphasized to the witnesses. That explanation is likely to cause the witnesses to take their jobs seriously, which is exactly what you want them to do.

7. **State Clearly What the Testator is Doing.**

If the testator is intentionally disinheriting a person, the will or trust should so state. “I intentionally make no provision in this will for my daughter, Sally Smith.” By making that statement, the disinherited family member will not likely be able to argue that she was inadvertently omitted.

And then after stating that the person is being disinherited, carefully review the will to make certain that that is exactly what is being done. Review the
“boilerplate” and the “stock language” in each and every article. For example, don’t disinherit a daughter, and then elsewhere in the document leave a bequest to “my children.” In many cases, it will be important to define (for all purposes, at the beginning of the document) the word “children” as excluding the disinherited daughter.

Stating a reason for disinheriting a family member is usually not a good idea. A stated reason might be viewed as an invitation for the family member to refute that one reason, and if she is successful in refuting that reason, then the odds increase that she might be able to successfully argue that the testator was incompetent or subject to undue influence, as evidenced by the false statement in the will or trust.

8. **Have the Testator Prepare a Letter or a Memorandum.**

Consider asking your client to prepare a letter or a memorandum explaining her wishes and explaining why she has decided to craft her estate plan in the manner that she has. The letter or memo should be signed and dated, preferably close in time to the execution of the will or trust. A letter or a memorandum in her own handwriting is most effective, because a letter or memo prepared on a computer or a typewriter might have been prepared by a beneficiary, and thus might be the product of (and evidence of) undue influence. If need be, have your client dictate a letter to a member of your staff, rather than to a family member. A memo prepared by a beneficiary, and then signed by the testator, might backfire and be used as further evidence of undue influence.

Keep in mind that computer-generated documents can be traced via electronic discovery during a will contest.

If you are representing a married couple, each of the couple might consider preparing separate letters or memoranda.

9. **Send an Explanatory Letter with Your Draft Document.**

The cover letter to your client should carefully explain any unusual provisions that might motivate a contest. For example, if one child is to receive a reduced share, discuss that fact in the cover letter, in order to minimize any argument by the contestant that the testator was unaware of the provision.

Also explain any technical parts of the will that significantly affect the distributive shares that the testator might not understand. For example, if one share bears estate taxes and another share does not, explain that provision in the cover letter. If the will contains lapse provisions (who takes if one of the primary beneficiaries
predeceases the testator), explain those provisions in the cover letter. If a beneficiary’s share is to be held in trust during the lifetime of the beneficiary, explain the terms of the trust in the cover letter, particularly if the terms of the trust are restrictive or extend long into the lifetime of the beneficiary.

Of course, the explanatory letter should be sent directly to the testator, not in care of the procuring beneficiary, nor should it be sent to the testator at the address of the procuring beneficiary.

Oftentimes, the testator will not bother to read the cover letter, and oftentimes it will be difficult to prove whether the testator read the letter or not. But sending such a letter might help, and probably will not hurt, particularly if the letter discusses the unusual or technical aspects of the will that might be subject to contest. Because the testator might not read the letter, always discuss those unusual or technical aspects of the will with the testator again when the document is signed, along with a discussion of the testator’s motivations for those provisions, and make notes of that conversation.

The practice of sending detailed cover letters with draft documents also helps avoid malpractice claims.

To summarize, a client usually has four opportunities to understand the estate plan:
1. At the initial meeting with the attorney when the plan is formulated.
2. When the client reads the cover letter that explains the estate plan,
3. When the client reads the draft documents enclosed with the cover letter.
4. When the client and the attorney meet to review and sign the documents.

In an ideal situation, your file should document the conversations at both meetings, and it would also be helpful to determine whether the client actually read the cover letter and actually read the documents (or at least the major dispositive provisions of the documents). If the client indicates having read the cover letter and the documents (or having read one of them), document that fact in your file.

10. **Avoid Conflicts of Interest.**

This is one of the seven factors (lack of independent advice). If you represent one of the beneficiaries (or have represented one of them in the past), particularly the one being favored in the estate plan, refer the testator to a different law firm that has no prior contact with the family. You will be doing your client a service by declining to serve as her attorney, because a will prepared by a neutral attorney
will be easier to defend. For that same reason, you will also be avoiding a malpractice claim. See *Caba v. Barker*, 341 Or. 534, 145 P.3d 174 (2006).

11. **Consider Re-Executing the Will or Trust.**

Consider asking your client to re-execute her will a few months after her will was first executed. A long history of wills and/or trusts that consistently adopt the same (or similar) estate plan can be a powerful defense to a will contest. The prospective contestant will have to set aside a series of documents, rather than just one. And the contestant will have to prove incapacity on several different dates, or undue influence over a longer period of time. Those are often difficult tasks for the contestant. (If this technique is employed, do not destroy or mark the prior documents. Such actions might raise questions concerning dependent relative revocation.)

On the other hand, the repetitive re-execution of a will or trust might simply be more and more evidence of procurement.

Codicils to wills and amendments to revocable trusts should clearly state that the prior documents are being reaffirmed. Even better, prepare a new will (rather than a codicil) or an entirely restated trust (rather than an amendment).

Avoid using exhibits and attachments to wills and trusts for dispositive provisions. For example, some wills and trusts (rarely) use an Exhibit A to describe the dispositive provisions for children after both spouses have died. Such provisions should be in the body of the will or trust, in order to avoid any argument that the attachment was not present at signing, or was subsequently altered.

12. **Preserve Copies of Prior Wills and Trusts.**

See previous item. Being able to document a long history of a consistent estate plan is very helpful to demonstrate the testator’s state of mind over a period of time.

After the death of the testator, when you receive a phone call from an attorney for a potential contestant, nothing is quite so powerful as noting that the prior version of the will left the entire estate to the same beneficiaries (or, even better, to charity). And even better if the prior will is actually a long series of prior wills. Disclosure of such prior wills upon inquiry from a potential contestant will often prevent a will contest from being filed.
After death, the decision whether to disclose copies of prior wills lies with the personal representative, not the attorney, because the attorney-client privilege belongs to the personal representative. Keep in mind that after the testator dies, the attorney-client privilege and the medical records privilege both disappear in a will contest or a trust contest. OEC 503(4)(b) and 504-1(4)(b)(B).

13. **Keep Original Wills and Trusts in Your Office.**

This is a somewhat controversial subject, because many attorneys do not want to be responsible for original documents, partly because the responsibility may continue for decades. However, an original document in an attorney’s office is less likely to be misplaced than in the hands of the client. And the Oregon Supreme Court has held many times that a missing will that can be shown to have been in the possession of the decedent, but was missing at the time of death, is presumed to have been revoked. *Flanders v. White*, 142 Or. 375 (1933); *Carlson’s Estate*, 153 Or. 327 (1936); *Johnston v. Goakey*, 202 Or. 4 (1954); *Estate of Salter*, 209 Or. 536 (1957).

That presumption can be overcome by competent evidence, but that evidence is often missing. After all, it is difficult to prove a negative, that the testator did not destroy his will. And a contestant might be able to offer contrary evidence that the testator did revoke the document. But if the attorney produces the original, then the presumption never even arises. Or if the attorney misplaces the original, very little harm is done, because the presumption does not apply to documents lost by the attorney. A photocopy (or an electronic scan) of the signed will can easily be probated when accompanied by an affidavit from the attorney that the will was misplaced by the attorney, not by the testator.

In short, holding the original documents at the attorney’s office eliminates the possibility that the presumption might ever arise, and eliminates the need to produce evidence of non-revocation.

The client should be provided with a copy (or several copies) of the signed document, with a rubber stamp on the copies to the effect that the original is on file at the offices of the drafting attorney.

If the drafting attorney does not retain the original document, then the drafting attorney should, at an absolute minimum, retain a photocopy of the executed document, showing the signatures on the document. To do less is very poor practice. The client should also receive copies of the executed document, along with the original, if the decision is made to give the original to the client.
If you do keep original wills, see ORS 112.800 et seq., which governs the custody and disposition of original wills.

Do not ask your client to sign duplicate original wills. Under Oregon law, the existence of duplicate wills, one of which was in the possession of the testator, and one of which was in the possession of the attorney, raises a serious question of revocation if the testator’s original cannot be found after the testator dies. In other words, what is the effect of the testator destroying one original will without destroying the other? See the discussion, above, about deemed revocation if the original will cannot be found.

14. **Draw a Family Tree.**

Try to get sufficient information from the testator to prepare a family tree, including nieces and nephews. If in doubt, ask others to supply names of relatives.

Consider including the relatives of both the testator’s father and mother (paternal and maternal aunts, uncles, nieces, and nephews). Obtain names and relationships not only of the testator’s own blood relatives, but also the testator’s spouse’s relatives (relatives by marriage).

This serves two goals: it helps to establish capacity if the testator supplies the information correctly, and it helps to ensure that the testator has not forgotten any of her relatives whom she might like to benefit. Although the relatives by marriage are not heirs, the testator might wish to leave them a bequest, or not. Either way, the identification of all family members, followed by a discussion of who your client would like to include in her will or trust, will rule out the possibility that your client simply forgot a family member that she intended to benefit.

Even better than drawing a family tree yourself, ask your client to draw the family tree. The ability of the client to draw a family tree goes a long way to establish capacity and to answer the first of the four questions (who is the natural object of the testator’s bounty?).

Drawing a family tree is also immensely helpful after your client dies, when a notice to heirs and devisees must be mailed, as required by the probate statutes. ORS 113.145. (This is particularly important if your client has no close relatives. Do not accept the statement of a client who claims to have “no family.” Everyone has some family, somewhere.)
15. Include a No-Contest Clause.

No-contest clauses (also known as *in terrorem* clauses) are somewhat controversial. Some attorneys routinely include them in every will or trust, while others view them as punitive and use them more sparingly. Some attorneys use no-contest clauses only when specifically requested by the client. Some attorneys use them only if the estate plan involves an unnatural disposition. There is usually little point in including a no-contest clause in an estate plan that leaves the estate in equal shares to all of the children of a widow or widower.

No-contest clauses are permitted by Oregon statutes (ORS 112.272 regarding wills and ORS 130.235 regarding trusts). The two statutes are worded slightly differently, but the statutes generally provide that such clauses are enforceable, with some exceptions. However, the Oregon courts construe no-contest clauses narrowly; the forfeiture of an inheritance is not favored. *Frakes v. Nay*, 254 Or. App. 236, 295 P.3d 94 (Or. App., 2012).

The terms of no-contest clauses vary widely; each no-contest clause should be drafted carefully. For example, some no-contest clauses prohibit the children of the unsuccessful contestant from inheriting (which increases the impact of the clause), while others do not. After all, some beneficiaries will freely violate the no-contest clause if the only downside is that their own children will receive their share. Other no-contest clauses result in the contestant’s share passing to the residue, which often results in the siblings of the contestant receiving the share forfeited by the contestant.

[On a related subject, never initiate a will or trust contest (or a proceeding that somewhat resembles a will or trust contest) without first doing two things: (1) examine the document carefully to determine whether it contains a no-contest clause, and (2) read the no-contest clause carefully to determine what actions it pertains to and what the consequences are for violating the clause.]

In most cases, a *successful* contestant need not worry about the consequences of a no-contest clause. After all, if a will or trust is held to be the product of undue influence or lack of capacity, then the entire document will generally be held to be invalid, including the no-contest clause. However, in rare cases only one part of the will was the product of undue influence, and only that one part will be held to be void. *Estate of Allen*, 116 Or. 467, 499 (1925); *U.S. National Bank v. First Nat. Bank*, 172 Or. 683, 689-90 (1943). In *U.S. National Bank*, for example, the court invalidated one provision of a will, when that one provision had been induced by a misrepresentation. The court stated:
It is a rule of general application that if a will is valid as to some of its provisions and invalid as to others, and the valid provisions can be separated from the invalid, and upheld without doing injustice to any of the beneficiaries under the will or defeating the general intent of the testator, the will must be sustained insofar only as it is valid. *U.S. National Bank v. First Nat. Bank*, 172 Or. 683, 689 (1943).

Some no-contest clauses (rarely) attempt to prohibit a beneficiary from challenging any aspect of the administration of the estate or trust, as opposed to merely prohibiting a challenge to the validity of the document. Such a provision appears to raise two issues. First, ORS 112.272 and ORS 130.235 define a no-contest clause as one which penalizes a beneficiary who “contests a will” or “challenges a trust,” thus implying that the validity of all or part of the will or trust must be in question, and a challenge to the management or administration of the estate or trust was not included in the statutory language until 2015, when the legislature amended ORS 112.272 to provide that a court will not enforce a no-contest clause if the contestant is objecting only to acts of the personal representative in the administration of the estate. That same amendment provides that the common law of no-contest clauses remains applicable in Oregon, to the extent the common law is not inconsistent with the provisions of ORS 112.272. 2015 SB 379 §13.

Second, such a provision might violate public policy. In the case of a trust, one could argue that such a provision violates ORS 130.020(2)(m), which provides that the trust document may not restrict the ability of a court to take action necessary in the interests of justice. In addition, ORS 130.165, states that “A trust may be created only to the extent the purposes of the trust are lawful, not contrary to public policy and possible to achieve. A trust and its terms must be for the benefit of the trust’s beneficiaries.” The official comments to that section state that “Purposes violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious. *See* Restatement (Third) of Trusts Section 29 cmt. D-h (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts Section 62 (1959).”

In the case of an estate, such a provision would appear to improperly circumvent the rights of beneficiaries to object to accountings, to file petitions for instructions, etc.

If a no-contest clause is included, it should be specifically discussed with the testator to make sure that it reflects the wishes of the testator, not merely the
wishes of the attorney. And the discussion should be documented in the attorney’s file.

Because a no-contest clause usually eliminates the contestant’s inheritance, a no-contest clause is generally ineffective unless the contestant is actually left something. As a result, a no-contest clause will not deter a family member who has been entirely disinherited by the will or trust.

A less-harsh alternative to a no-contest clause is a provision that states that the attorneys fees incurred by both sides in a will contest or a trust contest will be paid out of the contestant’s share of the estate (in the form of a reduced bequest), if the contest is unsuccessful. This alternative provides a significant disincentive to contest the estate plan, without entirely disinheriting the contestant. However, like a regular no-contest clause, this clause is ineffective if the contestant has been entirely disinherited. Also, there is no Oregon case law on the effectiveness of this technique.

A similar attorney-fee clause could be drafted that would apply to beneficiaries who unsuccessfully object to an aspect of the administration of the estate. Such a provision has not been addressed by the Oregon appellate courts.

Another less-harsh alternative would be to reduce, but not eliminate, a bequest to an unsuccessful contestant. For example, such a no-contest clause might decrease a bequest by half.

A no-contest clause should be contrasted with a conditional bequest. A bequest of “$100,000 to my daughter conditioned on her continuing to live in Portland during the remainder of my lifetime” is most likely enforceable as a conditional bequest. In Oregon, conditional bequests are enforceable. *U.S. Nat. Bank v. Snodgrass*, 202 Or. 530, 555-556, 275 P.2d 860 (1954); *Larson v. Naslund*, 73 Or. 699, 706, 700 P.2d 276 (1985). According to that case law, the only exceptions to the enforceability of a conditional bequest are if it violates public policy or if it is unenforceably vague. But a bequest conditioned on not contesting the validity of the document will most likely be judged as a no-contest clause, rather than as a conditional bequest.

It is interesting to note that *Snodgrass* held in 1954 that a clause in a will could be enforced to cause a forfeiture of an inheritance if the beneficiary married a Catholic before her 32nd birthday. One assumes that that clause would not be enforced today. If the clause were contained in a trust, it would most likely be unenforceable under ORS 130.165, discussed above.
A trust can include an arbitration clause or a mediation clause, and often such clauses state that they operate in the same manner as a no-contest clause: a beneficiary who tries to avoid arbitration but nevertheless litigates in court some aspect of the document or some aspect of the administration will forfeit their inheritance. Courts in some states have held that such clauses are not binding on a beneficiary because the beneficiary did not sign the agreement. For example, see Schoneberger v. Oelze, 208 Ariz. 591, 96 P.3d 1078, 1082 (2004); In re Mary Calomiris, 894 A.2d 408 (D.C. 2006)(involving a will); and Diaz v. Bukey, 195 Cal. App. 4th 315, 125 Cal. Rptr. 3d 610, 611–13, 615 (2011); McArthur v. McArthur, 224 Cal.App.4th 651 (2014); Schmitz v. Merrill Lynch, 939 N.E.2d 40, 45 (Ill. App. Ct. 2010). Some states have enacted statutes that make such clauses binding on the beneficiaries, or binding in some circumstances. For example, the Schoneberger case in Arizona was subsequently legislatively overruled by Ariz. Rev. Stat. Ann. § 14–10205, and Florida and Missouri have similar statutes. Fla. Stat. Ann. § 731.401 (2010); Missouri Revised Statutes §456.2-205.1. The Texas Supreme Court has upheld an arbitration clause in a trust, reasoning that the beneficiary who attempted to circumvent the arbitration process had accepted the benefits of the trust and had sued to enforce its terms, and thus the beneficiary had accepted the trust and its terms. Rachal v. Reitz, 408 SW3d 840 (Tex. 2013). See also Syncora Guarantee v. HSBC Mexico, 861 F.Supp.2d 252, 260 (S.D.N.Y. 2012).

Oregon has no such case law or statutes. In the absence of case law or statutes, an arbitration clause or a mediation clause might be unenforceable.

If an arbitration clause is placed in a will or trust, it should possibly include the following provisions: (a) specify the arbitration rules that will be applicable, such as the American Arbitration Association or the Arbitration Service of Portland, (b) indicate the law that is applicable, such as Oregon law, (c) indicate that the result of the arbitration will be binding on all parties and their successors (and all other persons who might have an interest in the trust) and not be appealable, and (d) require that the arbitrator be a practicing lawyer or retired judge, with a minimum of ten (or some other number) of years of experience in the field of wills and trusts. The provision might also specify that experience in estate planning is more important that experience as an arbitrator. An arbitration clause might also include an attorney fee clause, as discussed above.

16. **Waive Information Reporting.**

If a trust is being created (either intervivos or testamentary), consider waiving the information reporting to the greatest extent permitted by ORS 130.020 and ORS 130.710, and by appointing a representative to receive information reports on
behalf of the beneficiaries under ORS 130.020(3)(b). Although the ability to waive the information reporting for periods after the death of the trustor is somewhat limited under ORS 130.020(2)(h) and (I), some of the reports may be supplied to a designated representative under ORS 130.020(3)(b). If such a representative is designated, then those reports need not be furnished to the beneficiaries, with some exceptions.

17. **Obtain a Physician’s Opinion.**

A physician (preferably the testator’s treating physician, or possibly a psychiatrist) can be asked to examine the testator and write an opinion of capacity prior to the execution of the will. This is not commonly done, but it might be effective in some cases. The testimony of a doctor might be given great weight by a judge. It can also backfire if the doctor has qualms about the testator’s capacity. Many doctors will decline to sign a document if they are told that the document will have legal significance; they don’t want to get involved in the legal affairs of their patients, or they don’t want to get involved in the trial of a will contest.

If a doctor’s opinion is obtained, it should be based on an examination conducted as close as possible to the execution of the will, even the same day. A letter from a doctor who has not seen his patient in months will be of little use.

In the alternative, other family members might be consulted and asked if the testator is having any cognitive issues or might be subject to undue influence, but most testators are reluctant to authorize their attorney to make inquiries with family members.

18. **Videotape the Execution.**

Many practitioners immediately think of a videotaped execution as one of the first lines of defense against a will contest. Yet very few practitioners have ever videotaped an execution, for the simple reason that it is very dangerous. One estate litigator has suggested that videotaping a will signing is “almost always a bad idea.” William W. Sleeth, “Implement Strategies at Will Signing to Avoid Later Contests,” *Estate Planning Journal*, July 2015. It could easily backfire if the testator does not come across well. If the testator pauses for long periods of time before answering questions, or needs prompting to answer questions, those flaws will all appear on the videotape. Gaps in the video record (where the camera was stopped and later restarted) will also raise negative inferences. Even slight hesitations or minor misstatements will be used negatively by a contestant. In contrast to a video camera, a live witness will usually overlook (or forget) such minor errors.
If the testator does poorly in front of the camera, and a retake is necessary, that fact will often come out in discovery or at trial, thus providing the contestant with valuable evidence of incompetency.

For all of these reasons, a videotape produced as the best evidence of competency might become the best evidence of incompetency.

19. **Conduct a Pre-Contest.**

Some states, notably New York, Alaska, Nevada, and Delaware, permit residents and nonresidents to conduct pre-death trust contests, if certain conditions are met. If none of the beneficiaries respond to a notice of such a proceeding, then they will be barred from contesting the document at a later date, such as after death. Because those states are attempting to lure business to their resident trust companies, they usually impose the condition that nonresidents must hire a resident trustee. Ohio, Arkansas, New Hampshire, and North Dakota permit such contests for residents’ wills. Alaska also permits nonresident will pre-contests, under certain conditions.

Such statutes are far from perfect. First, they require the disclosure of the contents of estate planning documents, and some clients might not want to disclose the contents of their documents to their beneficiaries prior to death. Second, subsequent changes in the documents might require a subsequent proceeding. Third, the effect of a ruling in a foreign state might be questioned in the decedent’s resident state after death. Fourth, what happens next if the testator loses the pre-contest? Fifth, what harm will such a proceeding have on familial relationships while the testator is still living? Proceed with caution.

Oregon has not adopted such statutes, although it might be possible to conduct a similar trust hearing under ORS 130.050, particularly since that statute permits a petition for instructions or a declaratory judgment action with respect to “any matter involving a trust’s administration.” The official comments to that statute indicate that an actual dispute need not exist.
Chapter 4

Trust Administration Heptathlon

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New Administrative Rule Clarifies Laws Relative to Individuals Serving as Professional Fiduciaries

There has long been a cottage industry of individuals in the business of serving as professional fiduciaries. The laws have evolved in the last several years to clarify the instances in which an unlicensed individual may serve as a professional fiduciary. In 1997 the Oregon legislature amended existing banking statutes to define who is authorized to serve as a fiduciary. ORS 709.005(1) provides that no company shall transact any “trust business” until the company has obtained a certificate of authority from the Department of Consumer and Business Services. ORS 709.030(1) provides that no “person” other than a trust company shall transact a trust business. Trust business is defined as (a) acting as trustee as defined in ORS 128.005(2), (b) acting as a fiduciary as defined in ORS 125.005(2), and (c) acting as a personal representative as defined in ORS 111.005(26). “Trust company” means a company authorized to transact trust business. ORS 706.008(37). The term “person” includes individuals and entities. ORS 706.005(27).

ORS 709.030(4) exempts certain classes of persons from the licensing requirement. These include a person who (a) does not and will not regularly transact trust business in the ordinary course of the person’s business, (b) acts in a manner authorized by law and in the scope of authority as an agent of a trust company, or (c) is an attorney rendering a service customarily performed by an attorney. Other limited classes are also exempt, including those exempt by rule of the director.

In 1999, the legislature enacted ORS 125.240 and 125.221, setting forth disclosure requirements for professional fiduciaries. The law defines “professional fiduciary” as a fiduciary “who is acting at the same time as a fiduciary for three or more protected persons who are not related to the fiduciary.” ORS 125.240(5). With few exceptions, unlicensed individuals were still prohibited by the banking statutes from serving as a fiduciary without complying with the licensing requirements of a trust company. In an effort to remedy this, the Division of Finance and Corporate Securities sought input from interested groups such as the Oregon Bankers Association, the Guardian/Conservators Association and the Elder Law and Estate Planning & Administration Sections of the Oregon State Bar. After a notice and comment period, the Division of Finance and Corporate Securities adopted the following administrative rule on October 25, 2002:

“OAR 441-505-4030

“Trust Company Exemption; Court Appointed Fiduciaries

“(1) As authorized by ORS 709.030(4) (g), an exemption from trust company licensing as required by ORS 709.005(1) is hereby created for any person appointed as a Fiduciary by a court of competent jurisdiction.

“(2) As authorized by ORS 709.030(4) (g), an exemption from trust company licensing as required by ORS 709.005(1) is hereby created by any individual appointed as
a Personal Representative, as defined in ORS 111.005, or as a Special Administrator as defined in ORS 113.005, by a court of competent jurisdiction.”

The adoption of this rule specifically authorizes individual professional fiduciaries to conduct business, under certain circumstances, without the licensing requirement. This is the first time authority to act as a professional fiduciary has been granted to individuals. Section (1) of OAR 441-505-4030 addresses service as a “fiduciary.” It does not, however, specifically define the word “fiduciary.” The definition applicable in the relevant statutes is a “guardian or conservator appointed*** with respect to a protected person.” ORS 125.005(2). It should be mentioned here that even trust companies must have court appointment to serve as a conservator, personal representative, or special administrator. The administrative rules have not specifically addressed who may serve as a trustee. One interpretation is that except as provided in ORS 709.030, licensed trust companies are still the only entities allowed to serve as trustees.

The legislative intent behind the current rules is presumably to protect the public. Banks and trust companies under court appointment are subject to court oversight of their actions and must submit to state or federal ongoing audits and reviews. In contrast, the court is able to monitor and supervise private professional fiduciaries under court appointments, but is not able automatically to gain jurisdiction over fiduciary appointments through a trusteeship or power of attorney. Furthermore, unless specifically required by the trust document, private professional trustees may also lack the protection provided to beneficiaries by the requirements for state and national charters. These rules and procedures have been developed over many years and thus were not codified simultaneously.

**Differences Between Private Individual Fiduciaries and Corporate Trust Companies**

There are significant differences between private professional fiduciaries and trust companies that may explain the difference in treatment in the statutes. Trust companies are strictly regulated in their respective states under a state charter or by the Office of the Comptroller of the Currency (OCC) under a national charter. Trust companies are continually subject to the oversight of internal, federal, and state auditors. Other differences include:

- **Bonding** – Under most circumstances, courts cannot require trust companies to post a bond for any fiduciary appointment. ORS 709.240. To obtain and maintain their charters, trust companies are already bonded, insured, capitalized, etc. Although private fiduciaries are bonded for each appointment they still have not been able to obtain insurance for their general practice. There simply is not a market for insurance companies to underwrite insurance for this narrow class.

- **Court Accountings** – For those counties that by their SLRs have adopted it, UTCR 9.160(2)(f) and 3(h) exempts trust companies from certain requirements of court accountings. Trust companies must submit an account receipt and disbursement report along with an account holdings list. The attorney then adds a narrative portion explaining the report. There is no need to reenter the data to another report explaining all exhibits. The court may request further information as it requires.

- **Fee Approval** – In most circumstances trust companies do not need prior court approval of fees. ORS 125.095(3). Trust companies are strictly regulated by the federal government and have a stated fee schedule that the court can review and approve before appointment. Fee schedules are generally based upon the market value of the protected person’s assets and, therefore, the fees are usually predictable. In contrast, private fiduciaries must obtain prior court approval for their fees. Most private fiduciaries charge by the hour, so their fees are generally unpredictable.

- **Disclosure** – Trust companies are exempt from the disclosure requirements of ORS 125.221 and 125.240. Trust officers must demonstrate as part of the ongoing internal and external audit that they have addressed any conflict of interest issues.

- **Investment Management** – Trust companies are authorized to perform investment management and can conduct both trust administration and investment management internally. In contrast, private fiduciaries may need to use an outside bank or broker to write checks and to invest the assets.

- **Corporate Succession** – Corporate officers have successive and ongoing authority to complete account administrative tasks, pursuant to a ratified corporate resolution. Except as provided in the trust agreement, an individual trustee may not transfer the office of the trustee to another or delegate the entire administration to a cotrustee or to another. ORS 128.015. Unlike specifically named individuals, any authorized trust officer may conduct business on behalf of the company.

- **Vouchers** – Conservators pursuant to ORS 125.475(3) and personal representatives pursuant to ORS 116.083(2)(d) are required to submit vouchers (cancelled checks) for all disbursements made during the period covered by the accounting, unless otherwise provided by order or rule of the court or unless the personal representative is a trust company that has complied with ORS 709.030. Trust companies, however, shall “[A] Maintain the vouchers for a period of not less than one year following the date on which the order approving the final account is entered; (B) Permit interested persons to inspect the vouchers and receive copies thereof at their own expense at the place of business of the personal representative during the personal representative’s normal business hours at any time prior to the end of the one-year period following the date on which the order approving the final account is entered; and (C) Include in each annual account and in the final account a statement that the vouchers are not filed with the account but are maintained by the personal representative and may be inspected and copied***.” ORS 116.083(2)(d).
Conclusion

Until the legislature plays catch-up and reconciles ambiguities within the ORS and the OAR, the rules are what they are. With few exceptions, private professional fiduciaries must satisfy the licensing requirements of a trust company in order to serve in Oregon as trustee. Individuals serving as professional fiduciaries, personal representatives, or special administrators appointed by the court are exempt from the licensing requirement.

Finally, attorneys and other professionals should take note of the statutes and rules as they interrelate when choosing or recommending fiduciaries. Attorneys drafting trusts in which unauthorized fiduciaries are named may expose themselves to claims of malpractice, as well as to liability for fiduciary malfeasance.

Stuart B. Allen
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Portland, Oregon

New FinCEN Rules: Customer Due Diligence to Prevent “Criminals, Kleptocrats, and Others” from Hiding “Ill-Gotten Proceeds”

As part of the Obama Administration’s continuing efforts to curb money laundering and other international corruption, on July 11, 2016 the final rules on Customer Due Diligence Requirements for Financial Institutions issued by the Financial Crimes Enforcement Network (“FinCEN”) became effective.1 The rules were issued in final form in early May of 2016, and are required to be fully implemented by covered financial institutions by May 11, 2018. FinCEN has published answers to frequently asked questions regarding the Final Rule.

The rules are intended to close a significant hole in the existing regulatory scheme by requiring banks, securities broker-dealers, mutual funds, and futures commission merchants and introducing brokers in commodities (collectively, “covered financial institutions”) to obtain, verify and record the identity of the beneficial owners of their legal entity customers. The desire is to eliminate the ability of “criminals, kleptocrats, and others looking to hide ill-gotten proceeds” from accessing the financial system anonymously by means of creating legal entities to hide their individual identities.

The stated purpose of the new regulations is to assist law enforcement in financial investigations, prevent evasion of the existing anti-money laundering sanctions, assist covered financial institutions in better assessing risk, facilitate tax compliance and advance the compliance of the U.S. with international efforts to curb money laundering and other wrongdoing.

CORE ELEMENTS OF DUE DILIGENCE

In promulgating these new rules, FinCEN identifies four core elements that should be explicitly required as components of proper anti-money laundering due diligence. They include (1) customer identification and verification; (2) beneficial ownership identification and verification; (3) understanding the nature and purpose of customer relationships to develop a customer risk profile, and (4) ongoing monitoring for reporting suspicious transactions and, on a risk-basis, maintaining and updating customer information. Promulgation of these final rules is intended to make these requirements explicit to the extent they were not in the past.

FinCEN has the legal authority to promulgate these rules under the Bank Secrecy Act to guard against money laundering. They require that all covered financial institutions establish and maintain written procedures that are reasonably designed to identify the beneficial owners of their legal entity customers. Of course, essential to the development of these procedures is an understanding of how the terms “legal entity customers” and “beneficial owners” are defined in the new rules.

BENEFICIAL OWNERSHIP REQUIREMENTS

There is a two-prong test for the definition of “beneficial owner” that covers both ownership and control. Any individual that owns at least 25 percent of the equity interests in a legal entity customer will qualify as a beneficial owner who must be identified under the new regulations. If no person owns at least 25 percent of the equity interests in a legal entity customer, then no person would be required to be identified under the ownership prong. Thus, the greatest possible number of persons to be identified under this prong would be four.

The second prong of the “beneficial owner” definition covers control and requires that, for each legal entity customer, a single individual be identified who has “significant responsibility to control, manage, or direct a legal entity customer, including an executive officer or senior manager or any other individual who regularly performs similar functions.” This controlling manager or officer would be subject to identification and appropriate diligence regardless of the number of persons who qualified for scrutiny under the ownership prong. The regulation also allows for some flexibility, permitting financial institutions discretion to identify additional beneficial owners under the control prong, as appropriate, “based on risk.”

The final rule indicates that a covered financial institution may rely on the information supplied by the legal entity customer regarding the identity of its beneficial owner or owners “provided it has no knowledge of facts that would reasonably call into question the reliability of such information.” The covered financial institution would be expected to undertake diligence in the event that it had knowledge that made it believe the information provided was inaccurate or incomplete. In providing this standard, FinCEN acknowledges that the customer may be the only source of this information available to the covered financial institution.
LEGAL ENTITY CUSTOMER DEFINED

The term “legal entity customer” is defined in the new regulations to mean a corporation, limited liability company, or other entity that is created by the filing of a public document with a Secretary of State or similar office, a general partnership, and any similar entity formed under the laws of a foreign jurisdiction, that opens an account. Accordingly, this definition would include limited partnerships and business trusts that are created by a filing with a state office. It would not, however, include sole proprietorship or unincorporated associations since, as the analysis in the Federal Register indicates, “neither is an entity with legal existence separate from the associated individual or individuals that in effect creates a shield permitting an individual to obscure his or her identity.”

There are, however, a myriad of exceptions to the definition of “legal entity customer” — many based on the fact that such entities already require the type of beneficial owner disclosure that is being required under the new regulatory scheme. These include, but are not limited to: (1) financial institutions regulated by a Federal or State bank regulator; (2) entities that have their common stock listed on the New York or American Stock Exchange or NASDAQ; (3) issuers of any class of securities registered under the Securities Exchange Act of 1934 or that are required to file reports thereunder; (4) investment companies registered with the SEC under The Investment Company Act of 1940; (5) investment advisers registered with the SEC under the Investment Advisers Act of 1940; (6) exchanges or clearing agencies or any other entities registered with the SEC under the Securities Exchange Act of 1934; (7) any entity, commodity pool operator, commodity trading advisor, retail foreign exchange dealer, swap dealer or major swap participant registered with the CFTC; (8) public accounting firms registered under Sarbanes-Oxley; (9) bank holding companies or savings and loan holding companies; (9) insurance companies regulated by a state; (10) financial market utilities designated under Dodd-Frank; and (11) certain foreign entities, including, without limitation, foreign financial institutions established in a jurisdiction where the applicable regulator maintains beneficial ownership information regarding such institution.

“ACCOUNT” DEFINITION EXCLUDES ERISA ACCOUNTS

In defining the term “account” for purposes of the rules, FinCEN tied the definition to the existing definition of “account” provided for in the CIP rules, and expressly made it clear that accounts opened for the purpose of participating in an employee benefit plan under ERISA would be specifically excluded, “inasmuch as accounts established to enable employees to participate in retirement plans under ERISA are of extremely low money laundering risk.”

MODEL COMPLIANCE CERTIFICATION

The final rule requires that a covered financial institution promulgate and maintain appropriate procedures to identify and verify beneficial owners of legal entity customers at the time of account opening. While no specific documentation is required, FinCEN has created a model certification form that complies with the necessary requirements and has been attached to the Rules as Appendix A to 31 CFR Part 1010.230. View the full text of the final rules, including the model compliance certification.

RISK-BASED DUE DILIGENCE

The rules also require that each covered financial institution develop a customer risk profile based upon the information obtained from its customer during the account opening process. This risk profile, which will include, but not be limited to, the beneficial ownership information now required under the rules, must be used by the institution on an ongoing basis to assess the activities of the customer and to determine when suspicious activity is occurring that would require the financial institution to prepare a suspicious activity report.

These new rules were initially proposed by FinCEN in 2014 and have been part of an arduous approval process. In establishing these rules, FinCEN states that it has been cognizant of the considerable legal, clerical and operational requirements that will be necessary to implement these rules, and accordingly has provided for a two-year implementation period. Full compliance will be required on May 11, 2018. In the interim, covered financial institutions may wish to confer with counsel knowledgeable about the new regulations to insure proper and timely compliance.

For more information please contact one of the lawyers below:

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APPENDIX A to § 1010.230 -- CERTIFICATION REGARDING BENEFICIAL OWNERS OF LEGAL ENTITY CUSTOMERS

I. GENERAL INSTRUCTIONS

What is this form?

To help the government fight financial crime, Federal regulation requires certain financial institutions to obtain, verify, and record information about the beneficial owners of legal entity customers. Legal entities can be abused to disguise involvement in terrorist financing, money laundering, tax evasion, corruption, fraud, and other financial crimes. Requiring the disclosure of key individuals who own or control a legal entity (i.e., the beneficial owners) helps law enforcement investigate and prosecute these crimes.

Who has to complete this form?

This form must be completed by the person opening a new account on behalf of a legal entity with any of the following U.S. financial institutions: (i) a bank or credit union; (ii) a broker or dealer in securities; (iii) a mutual fund; (iv) a futures commission merchant; or (v) an introducing broker in commodities.

For the purposes of this form, a legal entity includes a corporation, limited liability company, or other entity that is created by a filing of a public document with a Secretary of State or similar office, a general partnership, and any similar business entity formed in the United States or a foreign country. Legal entity does not include sole proprietorships, unincorporated associations, or natural persons opening accounts on their own behalf.

What information do I have to provide?

This form requires you to provide the name, address, date of birth and Social Security number (or passport number or other similar information, in the case of foreign persons) for the following individuals (i.e., the beneficial owners):

(i) Each individual, if any, who owns, directly or indirectly, 25 percent or more of the equity interests of the legal entity customer (e.g., each natural person that owns 25 percent or more of the shares of a corporation); and

(ii) An individual with significant responsibility for managing the legal entity customer (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer).

The number of individuals that satisfy this definition of “beneficial owner” may vary. Under section (i), depending on the factual circumstances, up to four individuals (but as
few as zero) may need to be identified. Regardless of the number of individuals identified under section (i), you must provide the identifying information of one individual under section (ii). It is possible that in some circumstances the same individual might be identified under both sections (e.g., the President of Acme, Inc. who also holds a 30% equity interest). Thus, a completed form will contain the identifying information of at least one individual (under section (ii)), and up to five individuals (i.e., one individual under section (ii) and four 25 percent equity holders under section (i)).

The financial institution may also ask to see a copy of a driver’s license or other identifying document for each beneficial owner listed on this form.

II. CERTIFICATION OF BENEFICIAL OWNER(S)

Persons opening an account on behalf of a legal entity must provide the following information:

a. Name and Title of Natural Person Opening Account:

b. Name and Address of Legal Entity for Which the Account is Being Opened:

c. The following information for each individual, if any, who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25 percent or more of the equity interests of the legal entity listed above:

<table>
<thead>
<tr>
<th>Name</th>
<th>Date of Birth</th>
<th>Address (Residential or Business Street)</th>
<th>For U.S. Persons: Social Security</th>
<th>For Foreign Persons: Passport Number and</th>
</tr>
</thead>
</table>
d. The following information for one individual with significant responsibility for managing the legal entity listed above, such as:

- An executive officer or senior manager (e.g., Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, Treasurer); or

- Any other individual who regularly performs similar functions.

(If appropriate, an individual listed under section (c) above may also be listed in this section (d)).

| Name/Title | Date of Birth | Address (Residential or Business Street Address) | For U.S. Persons: Social Security Number | For Foreign Persons: Passport Number and Country of Issuance, or other similar identification number

I, ______________________________ (name of natural person opening account), hereby certify, to the best of my knowledge, that the information provided above is complete and correct.
1 In lieu of a passport number, foreign persons may also provide an alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

Legal Entity Identifier ________________ (Optional)
CAMELS Ratings: What They Mean and Why They Matter

In the context of regulation, there is no single number more important to a bank than its composite CAMELS rating. All bank directors should have a firm understanding of the meaning of CAMELS ratings and the profound impact these ratings have on the bank. This article will describe the elements of a CAMELS rating and the potential consequences of a low composite score.

As opposed to other regulatory measures (such as, for example, the OCC's risk assessment system, which focuses on the categories, quality, and direction of prospective risk to an institution), CAMELS ratings are primarily a point-in-time assessment of its component factors.

Banks deemed to be “problem” banks are generally those with composite CAMELS ratings of 4 or 5, and those with composite ratings of 3, 4, or 5 may be subject to regulatory enforcement actions. As of June 30, 2016, the Federal Deposit Insurance Corp. (FDIC) noted 147 banking institutions—a fraction of the 884 listed in 2010—on its list of “problem” institutions out of more than 6,000 banks and thrifts. The future of these institutions continues to be uncertain at best.

In the post-Dodd-Frank environment, many banks continue to be relatively large and complex institutions tasked with an increasingly complex web of regulation at the federal and state level. Given such an environment, each bank necessarily has its own unique relationship with its prudential regulators. However, whether your bank’s primary federal regulator is the Office of the Comptroller of the Currency, the FDIC, or the Federal Reserve Board, your regulator’s overall view of the safety and soundness of your institution, regardless of its size, complexity, or scope, is summarized in your bank’s composite CAMELS rating.
Meaning of the CAMELS Score

CAMELS ratings are the result of the Uniform Financial Institutions Rating System, the internal rating system used by regulators for assessing financial institutions on a uniform basis and identifying those institutions requiring special supervisory attention.

Regulators assign CAMELS ratings both on a component and composite basis, resulting in a single CAMELS overall composite rating. When introduced in 1979, the system had five components. A sixth component—sensitivity to market risk—was added in 1996. The regulators that year also added an increased emphasis on an organization’s management of risk.

The six component areas are:

C—Capital adequacy
A—Asset quality
M—Management
E—Earnings
L—Liquidity
S—Sensitivity to market risk

The ratings range from 1 to 5, with 1 being the highest rating (representing the least amount of regulatory concern) and 5 being the lowest.

CAMELS ratings are strictly confidential, and may not be disclosed to any party.
Component #1: Capital Adequacy

The capital adequacy component focuses upon:

- Level and quality of capital
- Overall financial condition
- Ability of management to address emerging needs for additional capital
- Nature, trend, and volume of problem assets, and the adequacy of allowances for loan and lease losses and other valuation reserves
- Balance sheet composition
- Risk exposure represented by off-balance sheet activities
- Quality and strength of earnings
- Reasonableness of dividend
- Prospects and plans for growth, as well as past experience in managing growth
- Access to capital markets and other sources of capital, including support provided by a parent holding company

Component #2: Asset Quality

The rating of the asset quality of a financial institution is based upon:

- Adequacy of underwriting standards, soundness of credit administration practices, and appropriateness of risk identification practices
- Level, distribution, severity, and trend of problem, classified, nonaccrual, restructured, delinquent, and nonperforming assets for both on- and off-balance sheet transactions
- Adequacy of the allowance for loan and lease losses and other asset valuation reserves
- Credit risk arising from or reduced by off-balance sheet transactions
- Diversification and quality of the loan and investment portfolios
- Extent of securities underwriting activities and exposure to counterparties in trading activities
- Existence of asset concentrations
- Adequacy of loan and investment policies, procedures, and practices
- Ability of management to properly administer its assets, including the timely identification and collection of problem assets
- Adequacy of internal controls and management information systems
- Volume and nature of credit documentation exceptions
Component #3: Management

The component rating regarding the capability and performance of management and the board of directors is rated upon:

- Level and quality of oversight and support by the board and management
- Ability of the board and management to plan for, and respond to, risks
- Adequacy and conformance with appropriate internal policies and controls
- Accuracy, timeliness, and effectiveness of management information and risk monitoring systems
- Adequacy of audits and internal controls
- Compliance with laws and regulations
- Responsiveness to recommendations from auditors and supervisory authorities
- Management depth and succession
- Extent of dominant influence or concentration of authority
- Reasonableness of compensation policies and avoidance of self-dealing
- Demonstrated willingness to serve the legitimate banking needs of the community
- Overall performance of the institution and its risk profile

Component #4: Earnings

The rating of an institution’s earnings focuses upon:

- Level of earnings, including trends and stability
- Ability to provide for adequate capital through retained earnings
- Quality and sources of earnings
- Level of expenses in relation to operations
- Adequacy of the budgeting systems, forecasting processes, and management information systems
- Adequacy of provisions to maintain the allowance for loan and lease losses and other valuation allowance accounts
- Earnings exposure to market risk such as interest rate, foreign exchange, and price risks
Component #5: Liquidity

The liquidity component rating is based upon:

- Availability of assets readily convertible to cash without undue loss
- Adequacy of liquidity sources compared to present and future needs and the ability of the institution to meet liquidity needs without adversely affecting its operations or condition
- Access to money markets and other sources of funding
- Level of diversification of funding sources, both on- and off-balance-sheet
- Degree of reliance on short-term, volatile sources of funds, including borrowings and brokered deposits, to fund longer term assets
- Trend and stability of deposits
- Ability to securitize and sell certain pools of assets
- Capability of management to properly identify, measure, monitor, and control the institution’s liquidity position, including the effectiveness of funds management strategies, liquidity policies, management information systems, and contingency funding plans

Component #6: Sensitivity to Market Risk

The sensitivity to market risk component is based upon:

- Sensitivity of the financial institution’s earnings to adverse changes in interest rates, foreign exchange rates, commodity prices, or equity prices
- Ability of management to identify, measure, monitor, and control exposure to market risk
- Nature and complexity of interest rate risk exposure arising from non-trading positions
- Where appropriate, the nature and complexity of market risk exposure arising from trading and foreign operations
Potential Consequences of Low CAMELS Scores

An overall CAMELS score of 3, 4, or 5 can expose a financial institution to any of the informal and formal enforcement actions available to federal regulators. These regulatory tools include a menu of memorandums of understanding, consent orders, cease and desist orders, written agreements, and prompt directive action directives, imposed in an escalating manner if an institution’s CAMELS scores do not improve or continue to degrade.

Enforcement actions, in turn, will affect the bank in a variety of ways, including influencing access to capital, insurance costs, and the ability to recruit and maintain talent in your organization.

To avoid being potentially subject to enforcement measures, monitoring CAMELS scores—and fully understanding the factors that can influence their composition—should be a primary concern for every bank director.

About Schiff Hardin

Schiff Hardin LLP is a dynamic general practice law firm representing clients across the United States and around the world. We have offices located in Ann Arbor, Atlanta, Chicago, Dallas, Lake Forest, New York, San Francisco, and Washington, D.C. Our attorneys are strong advocates and trusted advisers—roles that contribute to lasting client relationships.

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HB 2349 addresses fiduciary fee disclosure

By Stuart B. Allen, JD, CTFA

There has long been a cottage industry of individuals who have served as professional fiduciaries and trustees as part of their business. These individuals have provided a much-needed service in accepting small and/or difficult accounts that wouldn’t typically be managed by a bank trust department or a trust company.

Previous rules adopted by the legislature regarding private fiduciaries led to cross referencing with the Oregon Revised Statutes (ORS), which authorized and defined private fiduciaries, and the Oregon Administrative Rules (OAR), which stated when they may serve as trustee.

I helped to author House Bill 2349 to address some of the ambiguities. It’s a disclosure bill that provides additional information to courts when a court is petitioned to appoint a “professional fiduciary” for a protected person. The bill passed unanimously in both the House and the Senate, was signed by Governor Brown on June 11, 2015, and goes into effect January 1, 2016.

Specifically, HB 2349 requires a professional fiduciary to include in the petition that is submitted to the court the following additional information:

• The investment credentials and licensing (under ORS chapter 59 – dealing with Oregon securities law) of the individual who will be responsible for handling the affairs of the protected person

• Disclosure of whether there is any revenue sharing arrangement between the fiduciary and any other person

This provision addresses potential conflicts of interest.

• The method that will be used to establish the fees paid to the fiduciary, such as commissions or monthly charges

If the professional fiduciary is using a non-fiduciary to invest the assets, appropriate disclosure and monitoring are paramount.

• A requirement that the professional fiduciary filing the petition with the court include an acknowledgment that the fiduciary will make all investments of the protected person’s assets in accordance with the “prudent investor rule” (as set out in ORS 130.750 – 130.775)

A simple declaration in the petition or an Investment Policy Statement (IPS) should satisfy.

• A requirement that if the conservator is a professional fiduciary, the accounting of assets (which is filed with the court periodically) must include the total compensation that investment advisors or brokers other than the professional fiduciary charged or received

When this bill was vetted with Oregon judges, they made it very clear they want a simple total number in the annual accounting that may be backed up by additional documentation.

Among the potential fees received by a broker or investment manager are:

o Investment management fees

o Commissions on equity and mutual fund trades

o Spreads on individual bonds

If a security-licensed person begins working as a private fiduciary, past licensing violations may be uncovered.

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Fiduciary fee disclosure

Continued from page 1

- 12b-1 fees (sales and marketing fees paid from the fund manager back to the broker)
- Soft dollars (compensation when an equity trade is placed that inures back to the trading broker)

In addition to assessing prudent investment management, it also require assets be invested when appropriate. If a beneficiary or protected person has a long time horizon, assets need to be invested accordingly. If it's clear the person has nominal assets or a short time horizon, it may justify keeping a large cash position. An appropriately crafted IPS can address both scenarios.

How does this new bill benefit protected persons and their beneficiaries?

HB2349 creates more accurate fee disclosure, so it is easier to compare fees and abilities of corporate trustees and private fiduciaries. Trust companies have stated fee schedules that the court is able to review and approve prior to appointment. These are generally based upon the market value of the protected person's assets, and therefore the fees are usually predictable. Most private fiduciaries charge by the hour, so their fees are generally unpredictable. Perhaps future legislation can address that issue.

In addition, trust companies are authorized to perform investment management, whereas private fiduciaries may need to use an outside bank and/or broker to write checks and invest the assets. Previously, private fiduciaries were not required to disclose investment management or brokerage fees to the courts, or those fees were simply unknown by other interested persons.

Practice tip

Perhaps the greatest value in this bill is that it can serve as a tool private fiduciaries can use to know and better negotiate fees to help clients with finite assets. The private fiduciary can send an email or letter to his or her contact at the investment firm, asking for a total fee for the reporting period. If a reply is vague or unsatisfactory, the fiduciary may be required to change institutions. If the total fee is not clearly disclosed or reported succinctly, the annual report may be rejected.

In conclusion

House Bill 2349 will assist our courts in making fully informed decisions regarding the qualifications and costs of professional fiduciaries who seek appointment to represent protected persons. It also gives the private fiduciary a tool to assist in appropriating cost management when helping vulnerable Oregonians.

Investment Policy Statement

The purpose of this Investment Policy Statement (herein, “IPS”) is to provide guidelines that will be utilized by Allen Trust Company (herein, “ATC”) to manage account investments. The IPS is not a contract, but rather a written document that establishes the investment goals and constraints that will guide investment decisions and actions.

Date: [redacted]

Account: [redacted]

Description: Revocable Trust

ATC Capacity: Portfolio manager with full investment authority and power to delegate that authority

Interested Parties: Trustor and current beneficiary

Financial Goals: Primary goal is to help sustain [redacted] independence and security in retirement with income and principal at [redacted] discretion, and to grow undistributed corpus to enable future such distributions in inflation-adjusted terms and ultimately benefit [redacted] estate.

Time Horizon: Given [redacted] age, this portfolio will be managed to an intermediate horizon (10+ years).

Investment Objective: Income with Growth. This will entail a target strategic allocation of 40% equities and 60% cash and fixed income, with allowable tactical deviation within the following ranges: 30-50% equities and 50-70% cash and fixed income.

Risk Tolerance: Asset value volatility: average tolerance. [redacted] desire to avoid invading principal enables [redacted] to tolerate normal levels of market fluctuation, moreover, the portfolio’s goal of preserving inflation-adjusted distributive capacity demands that a moderate level of asset value volatility be tolerated. That said, given [redacted] stage of life (retirement), it is understood that the portfolio should avoid risks which could reasonably be expected to result in a significant and permanent impairment of aggregate portfolio capital.

Investment cash flow volatility: average tolerance. The bulk of [redacted] income derives from other trusts and other assets (real estate).
Allowable Assets: The portfolio will invest in marketable securities (which are by their nature considered risky assets), and pursuit of the investment objective exposes the portfolio to market risk. The risk of capital loss, due to events outside Allen Trust Company’s control, does exist and the actual rate of return will vary with market conditions. No rate of return is guaranteed.

Asset classes deemed appropriate for the portfolio include: Individual stocks and equity mutual funds, closed-end funds and exchange-traded funds; individual corporate, government, and municipal bonds and bond mutual funds, closed-end funds and exchange-traded funds; commodity-linked mutual funds, closed-end funds and exchange-traded funds; money market funds; certificates of deposit; real estate investment trusts and publicly traded master limited partnerships. The risk associated with each investment will be analyzed on an individual basis, keeping in mind the associated effect of the potential inclusion of any asset on the portfolio’s overall risk.

Note: The term “fixed income” will apply to bonds in general, including those whose cash distributions vary with changes in an underlying index, e.g. TIPS and LIBOR-, T-Bill- or CPI-linked floaters, etc.

Constraints:
- Liquidity needs: Target minimum 6 months’ fees, expenses, and expected distributions or a minimum $ balance as may from time to time request.
- Additions/Withdrawals: It is expected that will withdraw throughout the year an amount approximating annual net income, though she may elect to receive more or less; she will notify ATC in advance of substantial withdrawal requests. No additional assets are expected to transfer into the Trust.
- Tax considerations: Manage to maximize investment performance on an aftertax basis. Assume high marginal rates at both Federal and state (OR) levels.
- Legal/regulatory: ATC must act in accordance with the Uniform Prudent Investor Act, and abide by all laws of the State of Oregon and regulation by the Oregon Division of Finance and Corporate Securities.
- Unique issues: is current beneficiary of the trusts. ATC is Trustee of these
IPS Modifications: Review and modification of this IPS is possible - and encouraged - should client goals, objectives, risk tolerance, or needs change. This is a service provided by ATC that is included in the fee we charge.

Duties and Responsibilities: ATC is responsible for making an appropriate asset allocation decision based on the aforementioned goals and parameters. [REDACTED] is responsible for updating ATC when new situations arise that have a material impact on the objectives, constraints, and guidelines established in this IPS.

ATC will direct or delegate proxy voting on portfolio investments.

Rebalancing: Portfolio will be rebalanced to within ±10% of target allocations at least annually unless decision to do otherwise is documented.

Schedule of Review: Review this investment policy statement at least annually.

_________________________________________________
Client/Client’s representative    Date

_________________________________________________
ATC Portfolio Manager    Date
Chapter 5

Removing Occupants from Estate Property

HILARY NEWCOMB
HAN Legal
Portland, Oregon

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1 © 2016 Hilary A. Newcomb.
Landlord tenant law is complex, detailed and separate from estate and trust law. For example, most of the landlord tenant laws are found in chapters 90 and 105 of the Oregon Revised Statutes (ORS). Yet in estate proceedings we regularly encounter problems with evicting occupants. This article will address the laws surrounding evictions with an emphasis on estate and trust proceedings, including the relevant laws impacting an evicted tenant’s (or decedent’s) personal property.

I. Statutory Authority to Support Eviction

All fiduciaries have legal authority to remove an occupant from estate property. The question becomes what their statutory authority is to accomplish an eviction. This answer depends on the client’s specific fiduciary role, which are categorized below:

Trustees of trusts: ORS 130.055 addresses the probate court’s jurisdiction over a trustee and beneficiaries having its principal place of business in Oregon; ORS 130.690 requires a trustee to take reasonable steps to take control of and protect trust property; ORS 130.505(6) allows the court supervising a conservatorship to hear a conservator’s action involving the distribution of trust property.

Personal Representatives of estates: ORS 114.225 demands that a personal representative (“PR”) shall take possession and control of the estate (with the exception of assets held by an heir/devisee, unless the PR believes possession by the PR is “reasonable required” for “purposes of administration”); ORS 114.265 requires a PR to “preserve, settle and distribute” the estate; ORS 114.305(13) charges the PR with insuring assets against damage and loss, and ORS 114.305(19) allows the PR to prosecute actions for the protection of the estate.

Conservators of conservatorships: ORS 125.420 requires a conservator to take possession of all the property of substantial value of the protected person; ORS 125.445(26) authorizes the conservator to prosecute actions for the protection of the estate assets and in performance of the conservator’s duties; ORS 125.025(3)(a) authorizes the court to compel the attendance of any person who may have knowledge about the estate of the protected person. See also ORS 130.505(6) allowing the conservator to pursue an action regarding trust assets.

An action may be initiated in probate court to evict unlawful occupants from estate property, using the above-mentioned authority. That action is commonly initiated with a motion for an order to show cause to demand the occupant inform the court why they should not be required to vacate the property. At the show cause hearing, either the occupants appear and an evidentiary hearing is scheduled or they fail to appear and a default order on the motion to show cause is granted. Depending on the next steps of whether or not a hearing is conducted, ultimately a writ of assistance can be requested and granted that allows the Sherriff to assist the fiduciary with a forceful (or more peaceful) eviction. Several example forms are attached.
II. Spouse and Dependents in the Family Home

Before a fiduciary makes a demand for someone to vacate estate property, they must evaluate who the occupants are. It matters if the occupants are the decedent’s surviving spouse, dependents, heirs or devisees. See ORS 114.005. The surviving spouse and children (more broadly “dependents”) of the decedent can occupy the family residence for one year after the decedent’s death, or until the earlier termination of a lease or life estate pursuant to ORS 114.005. The term “dependent” means a qualifying child or a qualifying relative of the decedent. See IRC §152 for more detail on the definition of dependent.

This right to occupy is automatic and does not require any action by the family, any party or the court to make it effective. This right to occupy is also superior to the personal representative’s duty to take possession of estate assets. But see ORS 114.225, which requires the PR to evaluate whether allowing an heir of the estate to remain in an estate real property is feasible, in contrast to them vacating if their removal “is reasonably required for purposes of administration.” So a PR in this case could allow the decedent’s surviving spouse and dependents to remain in the family abode until final distribution, but the PR would need to coordinate charging the occupants reasonable rent after the one-year term.

The occupants under ORS 114.005 also have duties to the real estate, such as the duty not to allow waste of the property, to maintain homeowner’s insurance, and to pay the property taxes. See ORS 114.005 for more details.

III. FED (think landlord-tenant relationship and possession)

Introduction. Forcible entry and detainer (FED) are separate and distinct actions derived wholly from the statute. Under ORS 105.105 to 105.168, the issue to be decided in FED cases is entitlement to possession, and that issue alone. The forcible entry and detainer action was created by the legislature to provide a speedy and inexpensive remedy for the determination of who is entitled to possession of property in a landlord-tenant situation.

An FED proceeding is a court action that requires a complaint to be filed to remove a residential tenant from property owned or managed by the person filing the complaint. If an FED action goes to trial, the typical civil rules must be followed, such as the Oregon Evidence Code, the Uniform Trial Court Rules, and the Oregon Rules of Civil Procedure. At trial, the burden of proof is on the plaintiff/landlord to prove their case.

Commonly in probate and trust estates, the occupants we seek to evict are family members and do not have any type of written or oral rental agreement, they did not pay rent, and are moreso defined as temporary occupants or guests, not truly or statutorily defined “tenants.” So FED proceedings are commonly unavailable in estate cases, and instead unlawful estate occupants are evicted in probate court pursuant to other applicable estate or trust law.
Chapter 5—Removing Occupants from Estate Property

A. Requirements:

1. **Unlawful holding by force.** For an FED action to be cognizable, there must be either a forcible entry or an unlawful holding by force by the occupant. The statutory definition of an “unlawful holding by force” requires a landlord-tenant relationship. *See Aldich v. Forbes, 237 Or. 559, 391 P.2d 748 (1964).* When an occupant enter a property as an equitable owner under a purchase agreement, for example, their entry is not by force or unlawful, so an FED action would not be applicable. Additionally, there is no landlord-tenant relationship between parties after an executed land sale contract. *See Schroeder v. Woody, 166 Or. 93 (1941).* An FED action is also not applicable to an action for trespass or ejectment.

2. **Landlord-tenant relationship.** The second requirement is that a landlord-tenant relationship must exist between the parties. A “tenant” must be occupying the property and that tenant must have a rental agreement. The definition of “tenant” is a driving force in what warrants an FED proceeding versus an alternate “removal” proceeding. ORS 90.100(45) defines tenant to mean:

   a person, including a roomer, entitled under a rental agreement to occupy a dwelling unit to the exclusion of others, including a dwelling unit owned, operated or controlled by a public housing authority…a minor, as defined and provided for in ORS 109.697. (emphasis added).

And a tenant does not mean, “a guest or temporary occupant.” ORS 90.100(45)(c).

Without a rental agreement, there is no true “tenant,” and a landlord cannot proceed with an FED proceeding. Typically a fiduciary on behalf of an estate is dealing with an occupant who does not have any type of written or oral lease agreement. So commonly a fiduciary does not have an FED as an option for removing an occupant.

3. **Possession dispute only.** Third, FED proceedings are limited to the determination of the right to possession of a premises in the context of a landlord-tenant relationship, and only the right to possession. See *Class v. Carter, 293 Or. 147, 150, 645 P.2d 536 (1982).* For example, no controversy can be raised as to the merits of the property’s title in an FED action. *See Schroeder v. Woody, 166 Or. 93 (1941).*

4. **Residential disputes only.** Fourth, FED proceedings are only permitted for residential evictions, so they cannot be used for commercial property, vacation homes, group homes, farm land, or to evict a squatter (discussed later).

B. Examples. A valid FED cause of action would include:

1. When a tenant or person in possession of the real estate fails or refuses to pay rent within the time period that it is due on the lease or agreement under which they hold, or fails to deliver possession of the premises after being in default on payment of rent for the statutory period of time;
2. When a lease’s terms have expired and the lease has not been renewed, or when the tenant or person in possession is holding from month to month, or year to year, and remains in possession after proper notice to quit, or is holding contrary to any condition or covenant in the lease, or is holding without any written lease or agreement. See Schroeder v. Woody, 166 Or. 93 (1941); and

3. If a trust beneficiary is granted a tenancy for life in real property owned by the trust, but this interest terminates if the beneficiary no longer resides in the property, an FED action is appropriate to determine occupancy. The Trustee and this beneficiary also signed a lease agreement consistent with the trust terms, and an FED proceeding determined the beneficiary was no longer residing there and therefore was no longer a beneficiary of the trust. So the court had authority in an FED proceeding to interpret the provisions of the trust for purposes of determining whether the beneficiary had a right to possession, following the court’s determination that she no longer resided on the property. See Schmidt v. Hart, 237 Or. App 412, 241 P.3d 329 (2010).

   C. Notice. Notice is both unique and critical in FED proceedings, and it must comply with both the statutes and the rental agreement, so both must be thoroughly reviewed in advance of giving notice. See ORS 105.105 to 105.168.

IV. Ejectment (think ownership and title)

With title comes possession, and when one has title they have a right to the property. With the right of title comes the right to possession. This is in contrast to an FED action which is only about possession, not title. Ejectment is often more so about ownership and title, whereas an eviction is about possession and occupancy. If an occupant in possession is also an owner, however, ejectment could apply.

The statutory foundation for an ejectment action is, “a legal estate in real property and a present right to the possession of the property.” ORS 105.005. Ejectment is a civil action to recover possession and title to land, so property ownership is a necessary component in seeking possession and title.

A trustee, PR, or conservator of an estate may file a motion for an order of ejectment in the probate court to recover title (and probably possession too) on behalf of the decedent’s estate. Any ownership interest of the decedent typically vests upon the death of the decedent. The probate court has jurisdiction to hear an ejectment issue under ORS 111.085(4) for PRs, guardians, and conservators, and under ORS 130.050 for trustees. Proper notice is critical as due process applies. The notice provisions in ORS 111.215 are likely sufficient to satisfy the due process rules and establish personal jurisdiction over the occupant of the property.

The case of Bunch v. Pearson, 186 Or App 138 (2003) illustrates when an ejectment action instead of an FED action applies. Plaintiff son initially brought an FED action against his mother (occupant) and succeeded at the trial court level, but the defendant mother won on appeal. The
Chapter 5—Removing Occupants from Estate Property

_Bunch_ Court found that because the defendant entered the property as an equitable owner under the land sale contract, her entry was neither unlawful or by force. There was also no landlord-tenant relationship between the parties; both are requirements for an FED action (see above). Although plaintiff argues that defendant should be considered either a tenant at sufferance under ORS 91.040 or a tenant at will under ORS 91.050, neither statutory definition was applicable based on the facts. The _Bunch_ Court determined this action was more appropriate under ORS 105.005 as an action for ejectment, because title and possession were at issue.

V. Squatters

A squatter is defined as, “a person occupying a dwelling unit who is not so entitled under a rental agreement or who is not authorized by the tenant to occupy that dwelling unit. Squatter does not include a tenant who holds over as described in ORS 90.427 (Termination of periodic tenancies) (7).” ORS 90.100 (43).

To clarify, a holdover tenant pursuant to ORS 90.427(7) is a tenant who, “remains in possession without the landlord’s consent after expiration of the term of the rental agreement or its termination…”

Before squatters have a chance to gain legal ownership rights, they must first meet strict conditions, including a 10 year consecutive stay. The adverse possession rules are in ORS 105.620.

VI. Personal Property Issues

After an occupant vacates property, they often leave behind personal belongings. ORS 90.425 provides that the landlord/owner cannot consider the tenant's property abandoned and dispose of it until the tenancy is terminated (generally termination or expiration of rental agreement) and detailed notice is given. In the estate and trust arena, where we are commonly without a lease, advance written notice is the most critical factor here. ORS 90.425 is a very long and very detailed statute, so please take a careful look if this is relevant for your client.

While a fiduciary is fulfilling the statutory notice and time requirements, they are responsible for the abandoned personal property and it must be safely stored. Below are some of the fundamental written notice and time periods applicable to a fiduciary dealing with a tenant’s remaining personal property.

Prior to storing, selling or disposing of the tenant’s personal property, ORS 90.425(3) requires the landlord/owner give written notice to the tenant that must be:

1. Personally delivered to the tenant; or

2. Sent by first class mail addressed and mailed to the tenant at:
Chapter 5—Removing Occupants from Estate Property

(a) The premises;
(b) Any post-office box held by the tenant and actually known to the landlord; and
(c) The most recent forwarding address if provided by the tenant or actually known to the landlord.

Please note the extra 3 days added to a notice due to mailing is applicable. ORS 90.155(2).

The written notice to the prior tenant must state several statutory factors, pursuant to ORS 90.425(5), summarized below. Please note that the treatment of personal property remaining in a recreational vehicle, manufactured home or floating home are treated differently in ORS 90.425 than a single family residence.

Required details to include in the written notice to the prior tenant regarding abandoned personal property are:

1. The remaining property is considered abandoned;
2. The tenant must contact the landlord by a specified date, as further detailed in subsection (6), to arrange for the removal of the personal property;
3. The property is stored in safekeeping;
4. The tenant can arrange for removal of the property by contacting the landlord at a described telephone number or address on or before a specified date;
5. Storage payments may need to be made by the landlord or the tenant (prior to release), depending on the circumstances (see ORS 90.425); and
6. If the tenant fails to contact the landlord by the specified date, or fails to remove the property within the statutory period of time after contacting the landlord, then the landlord must state in this letter that they intend to dispose of the property if it is not timely claimed.

If the landlord fails to permit the prior tenant to recover possession of their personal property under ORS 105.165(1), then the tenant may recover from the landlord, in addition to any other amount provided by law, twice the actual damages or twice the monthly rent, whichever is greater. ORS 105.165(4).

The time requirements following the notice to arrange for the disposition of abandoned personal property (excluding recreational vehicles, manufactured dwelling or floating home) are:

1. Following personal delivery or mailing of the notice, the tenant must contact a landlord not less than five (5) days after personal delivery or eight (8) days after mailing of the notice; and

2. If contact is not made in that time frame, or, if after that contact, the personal property is not removed within 15 days, the landlord may sell or dispose of the personal property.
After the requisite notice and time periods have elapsed, the owner may “dispose” of the personal property, which by statute means:

…if reasonably appropriate, the landlord may throw away the property or may give it without consideration to a nonprofit organization or to a person unrelated to the landlord. The landlord may not retain the property for personal use or benefit. ORS 90.425(1)(b).

What if the estate’s decedent owns personal property that remains in their rented dwelling? ORS 90.425(21) provides that heirs, devisees and the personal representative have the same rights as the deceased tenant with respect to the decedent’s remaining personal property. So the estate representative can deal with the landlord/owner consistent with ORS 90.425, as summarized above. If the decedent was renting property and left behind personal property, ORS 90.425 should be reviewed in detail.

VII. Conclusion

Although a fiduciary has legal authority to forcefully remove an unlawful occupant, be sure to give the occupant an opportunity to voluntarily vacate the property before initiating a court proceeding. First, send a written request for the unlawful occupant to vacate the property, otherwise a court proceeding will ensue and the court may also award the related costs against the occupant or their share of the estate, if applicable. If a court action to accomplish an eviction can be avoided, the estate is saving the time, hassle and expense to do so.

Example Forms Attached

Example forms used in separate eviction proceedings in probate court are itemized and attached in the order they were filed or used below. Please note not all pleadings are attached, such as the more basic notices or affidavits of notice.

Conservatorship Estate (occupants moved out following Order After Hearing)
1. Motion for Order to Show Cause
2. Order to Show Cause
3. Order After Hearing on Motion to Show Cause
4. Draft Motion for Writ of Assistance (can be combined with the initial Motion)
5. Draft Affidavit of Attorney regarding Writ of Assistance
6. Draft Writ of Assistance
7. Draft Order for Writ of Assistance

Probate Estate
8. Sheriff’s Return of Writ of Assistance
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
Probate Department

In the Matter of the Guardianship and Conservatorship of:

MAXINE E. LOOSE,
A Protected Person.

Beagle, Burke and Associates, Inc. as Guardian and Conservator of the Protected Person,

Ms. Maxine E. Loose, moves for an Order of this Court to exercise their authority as fiduciary to Ms. Loose and for the occupants of her real property to appear and show cause why they should not vacate the property and deliver the Protected Person’s vehicles. This Motion is also based on the Affidavit of the Guardian and Conservator, filed contemporaneously with this Motion.

POINTS AND AUTHORITIES

Based on ORS 125.420 regarding the possession and control of the Protected Person’s real and personal property, and ORS 125.445 regarding an authorized transaction for a Guardian and Conservator, the Guardian and Conservator has authority to remove the current and any future occupant from the Protected Person’s real property and retrieve her vehicles in order to protect and preserve the Protected Person’s assets.

Therefore, the Guardian and Conservator respectfully request an Order of this Court for Adam Loose and Merilee Bunker to appear and Show Cause why:
1. Adam Loose and Merilee Bunker should not be required to immediately vacate the real property located at 3404 N. Terry Street, in the City of Portland, Multnomah County, State of Oregon;

2. Adam Loose and Merilee Bunker should not be required to immediately relinquish the Protected Person’s vehicles, known as a 1999 Dodge Van 1500 and possibly a 1990 Chevy Truck C2; and

3. The cost of the within action to have Adam Loose and Merilee Bunker removed from the Protected Person’s property and the retrieval of any vehicle should not be paid exclusively by Adam Loose and Merilee Bunker, jointly and severally.

Dated: September _____, 2015

___________________________________
Hilary A. Newcomb
Attorney for Guardian and Conservator

Guardian and Conservator:
Beagle, Burke & Associates, Inc.
Gary Beagle, NMG, CPG, OCPF
Joey Yourchek, NCG, CPG, PG #12935
Nicole Svoboda, Financial Fiduciary
P.O. Box 40348
Portland, Oregon 97240
Telephone: (503) 248-9580

Attorney for Guardian and Conservator:
Hilary Newcomb, OSB #060288
HAN Legal
5100 SW Macadam Ave., Ste. 120
Portland, Oregon 97239
Telephone: (503) 224-0499
Fax: (503) 244-5899
Email: hnewcomb@HANLegal.com
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

Probate Department

In the Matter of the Guardianship and Conservatorship of:

MAXINE E. LOOSE,
A Protected Person.

ORDER TO SHOW CAUSE
REGARDING VACATING ADAM LOOSE AND MERILEE BUNKER FROM THE PROTECTED PERSON’S PROPERTY AND DELIVERING VEHICLES

Based on the Motion and Affidavit of Beagle, Burke and Associates, Inc., Guardian and Conservator of the Protected Person, Ms. Maxine E. Loose, this Court ORDERS Adam Loose and Merilee Bunker to appear in Room 324 of the Multnomah County Courthouse located at 1021 SW 4th Ave., in Portland, Oregon, on the 13th day of October, 2015 at 8:45 o’clock a.m. to SHOW CAUSE why:

1. Adam Loose and Merilee Bunker should not be required to immediately vacate the real property located at 3404 N. Terry Street, in the City of Portland, Multnomah County, State of Oregon;

2. Adam Loose and Merilee Bunker should not be required to immediately relinquish the Protected Person’s vehicles, known as a 1999 Dodge Van 1500 and possibly a 1990 Chevy Truck C2; and
3. The costs of the within action to have Adam Loose and Merilee Bunker removed from the Protected Person’s property and the retrieval of any vehicle should not be paid exclusively by Adam Loose and Merilee Bunker, jointly and severally.

Dated: ______________, 2015.

______________________________
Circuit Court Judge

Submitted By:
Attorney for Guardian and Conservator:
Hilary Newcomb, OSB #060288
HAN Legal
5100 SW Macadam Ave., Ste. 120
Portland, Oregon 97239
Telephone: (503) 224-0499
Fax: (503) 244-5899
Email: hnewcomb@HANLegal.com

Guardian and Conservator:
Beagle, Burke & Associates, Inc.
Gary Beagle, NMG, CPG, OCPF
Joey Yourchek, NCG, CPG, PG #12935
Nicole Svoboda, Financial Fiduciary
P.O. Box 40348
Portland, Oregon 97240
Telephone: (503) 248-9580
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

Probate Department

In the Matter of the Guardianship and Conservatorship of:

MAXINE E. LOOSE,

A Protected Person.

) Case No. 15PR00159
) ORDER AFTER HEARING ON MOTION
) TO SHOW CAUSE REGARDING
) VACATING ADAM LOOSE AND MERILEE BUNKER FROM THE PROTECTED PERSON’S PROPERTY AND DELIVERING VEHICLES

THIS MATTER came before the Court for hearing on October 13, 2015, on the Motion to Show Cause filed by Beagle and Associates, Inc., formerly Beagle, Burke & Associates, Inc., Guardian and Conservator of the Protected Person, Ms. Maxine E. Loose, regarding vacating Adam Loose and Merilee Bunker from the Protected Person’s property and delivering vehicles. Present for the hearing was Beagle & Associates, Inc. as Guardian and Conservator of the Protected Person with their attorney, Hilary A. Newcomb. Adam Loose and Merilee Bunker did not appear. The Court, having read the pleadings in this matter and being fully advised in the premises,

IT IS HEREBY ORDERED that:

1. The Motion to Show Cause Regarding Vacating Adam Loose and Merilee Bunker from Protected Person’s Property and Delivering Vehicles, filed by Beagle, Burke and Associates, Inc. on September 18, 2015, is granted by default;

2. Adam Loose and Merilee Bunker shall vacate the Protected Person’s real property

HAN Legal
5100 SW Macadam Ave.
Suite 120
Portland, Oregon 97239
Tel: 503.224.0499
Fax: 503.224.5899
hnewcomb@hanlegal.com
located at 3404 N. Terry Street, in the City of Portland, Multnomah County, State of Oregon by
October 30, 2015 at 5:00 p.m.:

3. Adam Loose and Merilee Bunker shall be required to immediately relinquish the
Protected Person’s vehicles, known as a 1999 Dodge Van 1500 and possibly a 1990 Chevy
Truck C2 to Beagle & Associates at the above-mentioned Terry Street address, by October 30,
2015 at 5:00 p.m.;

4. A writ of assistance will be issued if Adam Loose and Merilee Bunker do not
vacate the above-mentioned Protected Person’s real property and relinquish the above-mentioned
Protected Person’s vehicles pursuant to this Order; and

5. The costs of the within action to have Adam Loose and Merilee Bunker removed
from the Protected Person’s property and the retrieval of any vehicle shall be paid exclusively by
Adam Loose and Merilee Bunker, jointly and severally.

DATED: ________________________, 2015.

__________________________________________
Circuit Court Judge

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Submitted By:

Attorney for Guardian and Conservator:
Hilary Newcomb, OSB #060288
HAN Legal
5100 SW Macadam Ave., Ste. 120
Portland, Oregon 97239
Telephone: (503) 224-0499
Fax: (503) 244-5899
Email: hnewcomb@HANLegal.com

Guardian and Conservator:
Beagle & Associates, Inc.
Gary Beagle, NMG, CPG, OCPF
Joey Yourchek, NCG, CPG, PG
Nicole Svoboda, Financial Fiduciary
P.O. Box 40348
Portland, Oregon 97240
Telephone: (503) 248-9580
IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH  

Probate Department

In the Matter of the Guardianship and Conservatorship of:  

MAXINE E. LOOSE,  

A Protected Person.  

The Guardian and Conservator of the Protected Person, Beagle and Associates, Inc., moves for an Order granting a Writ of Assistance for the purpose of removing Adam Loose and Merilee Bunker from the real property located at: 3404 N. Terry Street, in the City of Portland, Multnomah County, State of Oregon and placing Beagle and Associates, Inc. in full, peaceable, and quiet possession thereof.

This motion is supported by the Affidavit of Attorney for Guardian and Conservator Regarding Writ of Assistance dated _____________ 2015.

POINTS AND AUTHORITIES:


DATED: ________________, 2015.  

Hilary A. Newcomb, OSB #060288  
Attorney for Guardian and Conservator
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16 **Guardian and Conservator:**
17 Beagle & Associates, Inc.
18 Gary Beagle, NMG, CPG, OCPF
19 Joey Yourchek, NCG, CPG, PG #12935
20 Nicole Svoboda, Financial Fiduciary
21 P.O. Box 40348
22 Portland, Oregon 97240
23 Telephone: (503) 248-9580

24 **Attorney for Guardian and Conservator:**
25 Hilary Newcomb, OSB #060288
26 HAN Legal
27 5100 SW Macadam Ave., Ste. 120
28 Portland, Oregon 97239
29 Telephone: (503) 224-0499
30 Fax: (503) 244-5899
31 Email: hnewcomb@HANLegal.com
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

Probate Department

In the Matter of the Guardianship and Conservatorship of:

MAXINE E. LOOSE, A Protected Person.

Case No. 15PR00159

AFFIDAVIT OF HILARY A. NEWCOMB REGARDING WRIT OF ASSISTANCE

STATE OF OREGON
County of Multnomah

I, Hilary A. Newcomb, being first duly sworn, depose and say the following:

1. I am the attorney for the Guardian and Conservator of the above-captioned Protected Person.

2. On ______________, 2015, this court ordered that:
   a. Adam Loose and Merilee Bunker vacate the Protected Person’s property located at 3404 N. Terry Street, in the City of Portland, Multnomah County, State of Oregon, by <day>, <date> at <time>; and
   b. A writ of assistance to remove Adam Loose and Merilee Bunker from the property would be issued if they did not vacate the property pursuant to the order.

3. I served a copy of the order referred to herein on Adam Loose and Merilee Bunker on ______________, 2015, by placing a full, true and correct copy thereof in a sealed, first-class, postage prepaid envelope, addressed to Mr. Loose and Ms. Bunker at their last known address.
place of residence, 3404 N. Terry Street, Portland, OR, and depositing it with the United States Post Office at Portland, Oregon.

4. The deadline has passed for Adam Loose and Merilee Bunker to vacate the property and they have not done so, but continue to reside at the property in violation of this court’s order.

5. Adam Loose and Merilee Bunker are not tenants under an unexpired lease and this action is not being appealed.

6. This affidavit is made for the purpose of securing a writ of assistance to remove Adam Loose and Merilee Bunker from the premises and to place the Guardian and Conservator, Beagle, Burke and Associates, Inc., in full, peaceable, and quiet possession thereof.

DATED: __________________, 2015.

____________________________________
Hilary A. Newcomb, OSB #060288
Attorney for Guardian and Conservator

SUBSCRIBED AND SWORN to before me this _______ day of ______________, 2015.

____________________________________
Notary Public for Oregon
My Commission Expires: __________________

**Guardian and Conservator:**
Beagle, Burke & Associates, Inc.
Gary Beagle, NMG, CPG, OCPF
Joey Yourchek, NCG, CPG, PG #12935
P.O. Box 40348
Portland, Oregon 97240
Telephone: (503) 248-9580

**Attorney for Guardian and Conservator:**
Hilary Newcomb, OSB #060288
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5100 SW Macadam Ave., Ste. 120
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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH  
Probate Department  

In the Matter of the Guardianship and Conservatorship of:  

MAXINE E. LOOSE,  
A Protected Person.  

Case No. 15PR00159  
WRIT OF ASSISTANCE  

TO THE SHERIFF OF MULTNOMAH COUNTY, GREETINGS:  

In this cause, by order of the Court dated __________, 2015, the Court ordered that Adam Loose and Merilee Bunker vacate the real property located at 3404 N. Terry Street, Portland, Oregon and relinquish the ___________ Van by ____________, 2015 at _______ a.m./p.m. and that the Guardian and Conservator of the above-captioned Protected Person, Beagle and Associates, Inc., shall thereafter have the right to immediate possession of the real property and personal property described, and a Writ of Assistance will be issued if Adam Loose and Merilee Bunker do not vacate the above-mentioned real property pursuant to that Order.  

The Guardian and Conservator demanded possession of the property from Adam Loose and Merilee Bunker and delivered to them a true copy of the Order After Hearing on Motion to Show Cause Re Removal of Adam Loose and Merilee Bunker from Protected Person’s Property; Adam Loose and Merilee Bunker have refused to surrender the property or any part of the property, and are now in possession of the premises contrary to Court Order.  

By an Order of this court dated _____, 2015, it was ordered that this Writ of Assistance
be issued to you.

THEREFORE, IN THE NAME OF THE STATE OF OREGON: You are commanded that immediately upon receiving this Writ you shall enter the premises or parcel of land and eject, forcibly if necessary, Adam Loose and Merilee Bunker holding any part of the property against the Guardian and Conservator of the Protected Person, Beagle and Associates, Inc., and that you place Beagle and Associates, Inc. in full, peaceable, and quiet possession of the property, from time to time maintaining and defending such possession according to the intent of the judgment of this court.

DATED: ______________, 2015.

______________________________
Circuit Court Judge

Guardian and Conservator:
Beagle & Associates, Inc.
Gary Beagle, NMG, CPG, OCPF
Joey Yourchek, NCG, CPG, PG #12935
Nicole Svoboda, Financial Fiduciary
P.O. Box 40348
Portland, Oregon 97240
Telephone: (503) 248-9580

Attorney for Guardian and Conservator:
Hilary Newcomb, OSB #060288
HAN Legal
5100 SW Macadam Ave., Ste. 120
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Email: hnewcomb@HANLegal.com
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

Probate Department

In the Matter of the Guardianship and Conservatorship of:
MAXINE E. LOOSE,
A Protected Person.

Case No. 15PR00159
ORDER FOR WRIT OF ASSISTANCE

This matter comes before the Court on the Motion of the Guardian and Conservator for a writ of assistance to remove Adam Loose and Merilee Bunker from the Protected Person’s property located at 3404 N. Terry Street, in the City of Portland, Multnomah County, State of Oregon, and to place the Guardian and Conservator, Beagle and Associates, Inc., in possession thereof.

It appears to the court from the Affidavit of the attorney for the Guardian and Conservator that the Guardian and Conservator has demanded possession of the premises, has delivered to Adam Loose and Merilee Bunker a true copy of the Order After Hearing on Motion to Show Cause Regarding Vacating Adam Loose and Merilee Bunker from the Protected Person’s Property and Delivering Vehicles, and that Adam Loose and Merilee Bunker have failed and refused to deliver possession of the premises to the Guardian and Conservator.

It also appears that Adam Loose and Merilee Bunker are not entitled to remain in possession of the above-mentioned property and the Guardian and Conservator are entitled to immediate possession of such property.
THEREFORE, IT IS HEREBY ORDERED that the Sheriff of Multnomah County, Oregon, remove Adam Loose and Merilee Bunker from the Protected Person’s property located at 3404 N. Terry Street, in the City of Portland, Multnomah County, Oregon, and put Beagle and Associates, Inc., Guardian and Conservator of the above-captioned Protected Person, in possession of the premises, forcibly if necessary, and maintain and defend their possession of the premises, and that a Writ of Assistance be issued to the Sheriff of Multnomah County, Oregon, enabling him to carry out the Order above.

DATED: ______________, 2015.

______________________________
Circuit Court Judge

Submitted By:
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Beagle & Associates, Inc.
Gary Beagle, NMG, CPG, OCPF
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Nicole Svoboda, Financial Fiduciary
P.O. Box 40348
Portland, Oregon 97240
Telephone: (503) 248-9580
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY
Probate Department

IN THE MATTER OF THE ESTATE OF:

DOROTHY B. JOHNSON,
Deceased.

NO. 0604-90509
SHERIFF'S
RETURN OF
WRIT OF ASSISTANCE

I HEREBY CERTIFY, that I received the within Writ of Assistance on the 6th day of December, 2010 and executed the same on the 9th day of December 2010, by removing Dorothy "Nell" Johnson and all other persons from the property at 625 NE Webster St, Portland, OR and placing the personal representative of this estate into possession of the premises.

DANIEL STATON,
Sheriff

By

Marshall Ross, Sr. Deputy #21635
Civil Unit

MULTNOMAH COUNTY SHERIFF'S OFFICE
DAN STATION.
Sheriff

PS 1002
Chapter 6

Basic Estate Administration

EMILY CLARK
Samuels Yoelin Kantor LLP
Portland, Oregon

WALKER CLARK
Samuels Yoelin Kantor LLP
Portland, Oregon

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Chapter 6—Basic Estate Administration

BASIC ESTATE ADMINISTRATION

1. **Always read the instrument**
   
   a. **Is it signed?**
      
      i. Pursuant to ORS 112.235, one requirement of a validly executed will is that it must be signed by or at the direction of the testator.

   b. **Is it properly witnessed?**
      
      i. At least two witnesses must see the testator sign the will, hear the testator acknowledge the signature on the will, or hear or observe the testator direct someone else to sign the testator’s name on the will.
      
      ii. Those same witnesses must also attest the will by signing it prior to the testator’s death.
          1. The signature of a witness on an affidavit executed contemporaneously with the will is considered a signature by the witness on the will.

   c. **Are there Affidavits of Attesting Witnesses?**
      
      i. In order to probate the will, at least one attesting witness must give evidence of the execution of the will.
      
      ii. In lieu of a witness personally testifying in court, evidence of a will’s execution may be given by filing at least one affidavit of attesting witness with the will.
      
      iii. The affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter. If neither witness completed an affidavit contemporaneously with the will, at least one of the witnesses needs to be located in order to complete the affidavit.
          1. If neither witness is available to testify or sign an affidavit, there is a rebuttable presumption that the will is not valid.

   d. **If the formalities are not enough to be valid for Oregon, were they enough for the state where it was executed?**
      
      i. A will is lawfully executed if it is in writing, signed by or at the direction of the testator and executed in accordance with:
          1. Oregon law at the time of execution or at the time of death of the testator;
          2. The laws of the domicile of the testator at the time of execution or at the time of death of the testator;
          3. The laws of the place of execution at the time of execution; or

   e. **Who is the named personal representative(s)?**
      
      i. If the testator executed a will, he or she most likely nominated at least one personal representative in the will.
      
      ii. Is bond required?
1. The testator can waive the statutory requirement that the personal representative obtain a bond.
   a. Waiving the bond requirement is common practice when a will is prepared by an attorney, but you should always read the document to make sure bond is waived.

iii. Can the person nominated as Personal Representative serve or be bonded?
   1. ORS 113.092 provides guidance as to when a convicted felon may serve as personal representative, and ORS 113.095 lists persons who are not qualified to serve as personal representative.
   2. Even if a nominated personal representative is qualified to serve, it is within the bonding agency’s discretion whether to issue bond.
      a. For example, an otherwise qualified nominee for personal representative could be denied bond if he or she has bad credit.
   3. If bond is required, but cannot be obtained, look to ORS 113.085 for guidance on who is next in line to be appointed personal representative or to nominate a personal representative.

f. Who should be appointed Personal Representative? What if there is not a will?
   i. ORS 113.085 establishes the preferential order of who the court should appoint as Personal Representative. The order is as follows:
      1. The person named in the will (if there is a will);
      2. The surviving spouse of the decedent, or nominee of the surviving spouse;
      3. The decedent’s next of kin, or the nominee of the next of kin;
      4. In certain instances, the Director of Human Services or the Director of the Oregon Health Authority, or an attorney approved under ORS 113.086;
      5. In certain instances, the Department of Veterans Affairs;
      6. Any other person.
   ii. If the decedent died without a will and without known heirs, the court will appoint the Department of State Lands as personal representative unless the person petitioning the court files written authorization from the Department of State Lands approving the petitioner’s appointment.

2. Representing the Personal Representative

   a. Ethical obligations
      i. The attorney represents the personal representative, not the estate or any other heir or beneficiary of the estate. Clearly communicate with the PR, heirs, beneficiaries, and any other interested parties exactly who you represent and who you do not represent.
      ii. Be clear with your client about the scope of your representation and what tasks you will and will not be performing.
      iii. Communication with heirs, beneficiaries, and other interested parties is important. Besides keeping them apprised of the status of the estate, you
need to be sure that you advise them to seek independent counsel when requesting that they take action that could affect their legal rights (e.g. signing a waiver or receipt of property).

b. Engagement letter/tracking time
   i. Besides detailing the limits of your representation, your fee letter should clearly explain how fees and costs will be incurred.
   ii. Attorney fees for assisting the Personal Representative in administering a decedent’s estate must be approved by the court, and the request for attorney fees must be supported by accompanied by an affidavit. See ORS 116.183(1) and UTCR 9.060(2). The estate attorney should keep put particular emphasis on itemizing the work performed and the time spent on the representation so as to present a clear explanation to the court of how the requested fees were incurred.

c. Distributions
   i. Whether making a partial or final distribution, each beneficiary receiving a distribution should sign a Receipt and Release acknowledging the distribution and insulating the personal representative from future claims of beneficiaries or creditors related to the distributed property.
   ii. When transmitting the Receipt and Release to a beneficiary, it is important to emphasize that you do not represent the beneficiary, signing the document will affect the beneficiary’s legal right, and the beneficiary should seek the advice of independent counsel with any questions about how their rights are affected.

d. Issues when representing multiple personal representatives.

3. Filing the Petition and Opening the Estate

a. Petition must be filed by an “interested person.” ORS 111.005(19)
   i. Heirs
   ii. Devisees
   iii. Children
   iv. Spouses
   v. Creditors
   vi. Others having a property right or claim against the estate

b. The contents of the petition are governed by ORS 113.035
   i. Forms provided in these materials
   ii. What do you do with social security numbers?
      1. Either use the last 4 digits, or Confidential Information Form pursuant to UTCR 2.100.
      2. Note county differences.
   iii. What are the differences between testate and intestate petitions?
      1. Testate
a. Petition must list the names and addressees of all devisees. ORS 113.035(7)

b. Must attach the original will and the original affidavits of attesting witnesses.

2. Intestate
   a. Petitioner must request that the court appoint the appropriate personal representative under ORS 113.085(1).
   b. Bond is normally required, will not be waived unless you meet exceptions in ORS 113.105.

c. Attachments
   i. Original will
   ii. Original Affidavits of Attesting Witnesses
   iii. Copy of Death Certificate

d. Small estates
   i. ORS 114.505–114.560
   ii. You can only file an Affidavit of Claiming Successor if:
       1. The FMV of the estate is less than $275,000 or less;
       2. Not more than $75,000 of the FMV is attributable to personal property; and
       3. Not more than $200,000 of the FMV is attributable to real property. ORS 114.515(2).
   iii. Small estate process is much cheaper and simpler—can always open a conventional probate later if necessary.

4. Notices (ORS 113.145, 113.155)
   a. Who receives notice?
      i. Under ORS 113.145, a personal representative must deliver or mail notices to heirs, devisees, and claimants under ORS 113.035(8) and (9) to the extent they exist, as well as to the Oregon Health Authority and Department of Human Services
      ii. Under ORS 113.155, a personal representative must publish notice for three consecutive weeks in a newspaper in the county in which the estate proceeding is pending.

   b. Identifying heirs and devisees
      i. “Heir” means any person, including the surviving spouse, who is entitled under intestate succession to the property of a decedent who died wholly or partially intestate. ORS 111.005(18).
      ii. “Devisee” includes “legatee” and “beneficiary.” ORS 111.005(12) (Helpful!)
          1. “Legatee” means “one who is named in a will to take personal property; one who has received a legacy or bequest.” Black’s Law Dictionary.
2. “Beneficiary” means “a person for whose benefit property is held in trust; esp., one designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy, etc.).”

c. Contents of the Notice
i. Under ORS 113.145
   1. The title of the court in which the estate proceeding is pending and the clerk’s file number;
   2. The name of the decedent and the place and date of death of the decedent;
   3. Whether or not a will for the decedent has been admitted to probate;
   4. The name and address of the personal representative and the attorney of the personal representative;
   5. The date of the appointment of the personal representative; and
   6. A statement advising the person receiving the notice of their rights.
   7. Further requirements are needed if giving notice to someone who is a claimant under ORS 113.035(8) or (9).

ii. Under ORS 113.155
   1. The title of the court in which the estate proceeding is pending and the clerk’s file number;
   2. The name of the decedent and the place and date of death of the decedent;
   3. The name and address of the personal representative and the attorney of the personal representative;
   4. A statement requiring all persons with claims to present them within 4 months;
   5. The date of the first publication of the notice; and
   6. A statement advising interested persons that additional information may be obtained from the court.

5. Creditor claims
   a. ORS 115.003(1) requires that within three months after appointment (or longer period if permitted by the court), the Personal Representative must “make reasonably diligent efforts” to investigate the financial records and affairs of the decedent and take other actions as necessary to determine the identity and address of each person who has or asserts a claim against the estate. Following request by the Personal Representative and court approval, a longer time may be allowed if the Personal Representative cannot complete reasonably diligent efforts to identify claimants during the three-month period.
   
   b. Types of creditors
      i. Known creditors
         1. Within thirty days after expiration of the search period, the Personal Representative must mail to each person known to have a
claim a prescribed form of notice. ORS 115.003(2). There is no

duty to give direct notice if, (a) the claim has already been

presented, accepted, or paid in full, or (b) the claim is merely

conjunctural. The notice must include:

a. Title of the court in which the estate is proceeding;

b. Name of the decedent;

c. Name of the Personal Representative and address at which

claims are to be presented (preferably the attorney’s

address, but this could also be the Personal

Representative’s address);

d. A statement indicating that claims against the estate may be

barred if not presented within 30 days of the notice; and

e. Date on which the notice is delivered or mailed

2. If a creditor does not present their claim within thirty days of

receiving direct notice, the claim is barred. ORS 115.005(2)(b).

ii. Unknown creditors

1. Claims from creditors who were not discovered by the Personal

Representative’s diligent efforts and who did not receive direct

notice must be presented to the Personal Representative within

four months after the date of first publication.

2. If such a creditor does not present their claim within four months

after the date of first publication, the claim is barred. ORS

115.005(2)(a).

c. Late Claims

i. Late claims may be paid if; (a) presented before expiration of the

otherwise applicable statute of limitations and before the Personal

Representative files the final account; (b) presented by a person who did

not receive direct notice, and who is not an assignee of a creditor who

received such notice; and (c) the claim would have been allowable but for

the time at which it was presented. ORS 115.005(3). Such late claims then

may only be paid after payment of all priority expenses listed under ORS

115.125 and after payment of all previously presented claims. ORS

115.005(4).

d. Allowance and disallowance of creditor’s claims

i. Properly filed claims are allowed automatically unless within 60 days the

Personal Representative mails or delivers a notice of disallowance to the

claimant and the claimant’s attorney, if any.

ii. Claims can be disallowed in whole or in part. The claim and the notice of

disallowance must be filed with the court. ORS 115.135(1).

iii. The notice of disallowance must inform the claimant that the claim has

been disallowed and that the claim will be barred if the claimant does not

take further action to prosecute the claim. ORS 115.135(2).
1. Examples of bases for disallowance include the creditor’s failure to sell UCC collateral in a commercially reasonable manner and evidence that the claim has been paid or is false or fraudulent.

iv. The claimant has thirty days after the Personal Representative mails the notice of disallowance to either; (a) file a request for summary determination of the claim by the probate court, with proof of service to the Personal Representative or the attorney for the Personal Representative, or (b) commence a separate action on the claim. ORS 115.145(1). Failure to take these steps results in a barred claim. ORS 115.145(2).

6. Support for spouse and dependents

a. ORS 114.005–114.085 allows a spouse or dependents to occupy the family abode, even if part of the estate, and to petition for support from the estate during the pendency of the proceeding.

i. Be aware that a prenuptial agreement may affect these rights!

b. Occupancy of the family abode

i. The spouse and dependent children may continue to occupy the principle place of residence until one year after the date of death of the decedent.

ii. During the occupancy, the spouse and dependents have the following responsibilities:
   1. Cannot commit waste or encumber with any liens;
   2. Must keep the property insured; and
   3. Must pay taxes and payments on existing liens.

c. Support of spouse and children

i. The court may order support for the spouse and dependents of the decedent on a petition by or on behalf of them, including by the personal representative.

ii. Provision for support may consist of:
   1. Transfer of title to personal property;
   2. Transfer of title to real property; and
   3. Periodic payment of money, for up to two years after date of death.

iii. Support is treated as an administrative expense in priority.

7. Inventory

a. Under ORS 113.165, within 60 days after the date of appointment of the personal representative, you must file an inventory of all the property of the estate that is in the knowledge or possession of the personal representative.

i. Inventory should list the true cash values as of the date of death.

ii. The inventory should be in a form that sufficiently describes the decedent’s assets, so that a stock transfer agent or title officer can quickly and accurately identify the property to be transferred.
iii. An appraisal is necessary to assess an item of personal property with significant artistic or intrinsic value if the value is in excess of $3,000, or if the value of a collection of items is in excess of $7,500. See Treas. Reg. §20.2031-6(b).

b. ORS 113.175 allows the personal representative to file a supplemental inventory if he or she comes into possession or control of property of the estate after filing the initial inventory.
   i. Supplemental inventory must be filed within 30 days after receipt of the new item of property.
   ii. A careful lawyer will distinguish between an “amended inventory,” which corrects the information in the inventory filed, and a supplemental inventory, which adds omitted property to the inventory.

8. Tax returns

a. As part of the Personal Representative’s reasonably diligent efforts to locate creditors, it is best practice for the Personal Representative to review the decedent’s income tax returns for the last three years with an accountant or the estate attorney, who will obtain appropriate tax releases.
   i. If necessary, the Personal Representative should also work with an accountant to ensure that the decedent’s final income tax returns are filed.

b. Treasury Regulations require the Personal Representative to file Form 56 with the IRS to inform the IRS of the decedent’s death, the appointment of the Personal Representative, and the Personal Representative’s address and contact information. See Treas. Reg. § 301.6903-1(a).

c. On the day of the decedent’s death, the estate becomes a taxable entity. Within a reasonable amount of time following the decedent’s death, the Personal Representative should work with an accountant or the estate attorney to complete Form SS-4 and apply for a Tax Identification Number (EIN) for the estate.

d. In order to work directly with the taxing authorities, the estate attorney and/or an accountant should also consider filing Form 2848 with the IRS and a Tax Information Authorization and Power of Attorney with the Oregon Department of Revenue.

e. The estate is a taxable entity that computes its income just like an individual: gross income minus deductions. The estate must pay taxes on its income, and the Personal Representative is responsible for filing the estate’s income tax return, Form 1041.
   i. The Personal Representative should work with the estate attorney or an accountant to prepare and file Form 1041.
f. The 2016 federal exemption from gift and estate tax is $5.45 million, and the Oregon exemption is $1 million. If the decedent’s estate combined with any taxable gifts made during his or her life exceeds $5.45 million, the Personal Representative will be responsible for ensuring that a federal estate tax return (Form 706) is filed.
   i. Since Oregon does not have a gift tax, an Oregon estate tax return (Form OR 706) will only be due if the decedent’s taxable estate exceeds $1 million.

9. Closing the estate

   a. After the period of time has run for claimants to submit claims against the estate, all claims and taxes have been paid, and all other estate matters have been settled, the personal representative may file a Final Account or a Verified Statement in Lieu of Final Account and petition the court for a General Judgment Approving the Final Account (or Verified Statement), Personal Representative and Attorneys’ Fees, and Authorizing Final Distributions.
      i. The estate attorney should file their Fee Declaration with the Final Account.

   b. Once the General Judgment is signed, the Personal Representative may distribute the remaining assets of the estates.
      i. Each beneficiary receiving a distribution should sign a Receipt and Release acknowledging the distribution and insulating the personal representative from future claims of beneficiaries or creditors related to the estate.

   c. Once all distributions have been made, the estate is ready to be closed. The Personal Representative should then file a Supplemental Judgment Closing the Estate and Discharging the Personal Representative, along with the Final Distribution Receipts and Releases.

   d. Accounting v. Verified Statement
      i. Final Accounting
         1. ORS 116.083 governs the filing of an accounting. The Final Accounting must be filed when the estate is ready for final settlement and distribution.
         2. Must include the following (ORS 116.083(2)–(3)):
            a. The period of time covered by the account.
            b. The total value of the property with which the personal representative is chargeable according to the inventory, or, if there was a prior account, the amount of the balance of the prior account.
            c. All money and property received during the period covered by the account.
d. All disbursements made during the period covered by the account. Vouchers for disbursements must accompany the account.

e. The money and property of the estate on hand.

f. Such other information as the personal representative considers necessary to show the condition of the affairs of the estate or as the court may require.

g. A declaration under penalty of perjury in the form required by ORCP 1 E.

h. A statement that all Oregon income taxes, inheritance or estate taxes and personal property taxes, if any, have been paid, or if not so paid, that payment of those taxes has been secured by bond, deposit or otherwise, and that all required tax returns have been filed.

i. A petition for a judgment authorizing the personal representative to distribute the estate to the persons and in the portions specified therein.

3. Personal representative must give notice of the final accounting to all heirs, devisees, creditors, and any other known claimants. These persons have 20 days to object to the final accounting. If there are objections a hearing will be held.

ii. The “Verified Statement in Lieu of Accounting” is a statement prepared by the personal representative and filed with written consents signed by all of the distributees.

1. No notice is required.

2. This type of accounting must comply with relatively limited statutory requirements. ORS 116.083(4) provides that the statement must include the following:

   a. The period of time covered by the statement;

   b. A statement that “all creditors have been paid in full other than creditors owed administrative expenses that require court approval”;

   c. A statement that all Oregon income taxes, estate taxes, and personal property taxes have been paid or that other provisions have been made, and that all required tax returns have been filed; and

   d. A petition for a general judgment authorizing distribution to the proper persons and in the proper proportions.

3. The Verified Statement is easier, faster, and cheaper and is the best option if the distributees are willing to sign a written consent.

10. County differences

11. Questions/Discussion
IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF ______________________

Probate Department

In the Matter of the Estate

of

________________, Deceased

Date of Death: _______________________

NO. _________________

PETITION FOR PROBATE OF WILL AND APPOINTMENT OF PERSONAL REPRESENTATIVE

Filing fee: $______

Citation: ORS 21.170 (1) (a-d)

Estate: More than $__________, but less than $____________________

Comes now ____________________, Petitioner, and shows unto the Court as follows:

1. The following information is given with regard to the decedent:

a. Name:

b. Age:

c. Domicile:

d. Post Office Address:

e. Date and Place of Death:

f. Social Security No.: xxx-xx-

2. The decedent died testate. The Will [as ratified and modified by the # codicil] of the decedent and the proof of its due execution are presented to the Court herewith. There is no just
reason for delay in entering a limited judgment

3.

Venue is established in the County of ______________, State of Oregon, in that (insert a, b, c, d or e below)

a. at the time of the decedent's death, the decedent's domicile was in that county.

b. at the time of the decedent's death, the decedent's place of residence was in that county.

c. at the time of the decedent's death, property of the decedent was located in that county.

d. at the time this proceeding is commenced, property of the decedent is located in that county.

e. the decedent died in that county.

4.

The Petitioner is the __________________ of the decedent and is nominated to serve as Personal Representative under the decedent's Last Will and Testament. Request is made in said Last Will and Testament that the Petitioner be permitted to serve as Personal Representative without bond. The Petitioner is over the age of 18, and a resident of the State of Oregon and is not disqualified to serve under the provisions of ORS Section 113.095.

5.

The names, relationships and post office addresses of the heirs at law and next of kin of the decedent are as follows:

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<th>Name</th>
<th>Relationship</th>
<th>Age (if minor)</th>
<th>Post Office Address</th>
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</table>
Reasonable efforts have been made to identify and locate all heirs of the decedent.

6.
The names, relationships and post office addresses of the devisees of the decedent are as follows:

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<thead>
<tr>
<th>Name</th>
<th>Relationship</th>
<th>Age (if minor)</th>
<th>Post Office Address</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

7.
So far as is known to the Petitioner, the nature, extent, liquidity and apparent value of the estate is over $________________, consisting of (real/personal/real and personal) property. The exact amount thereof and the description of said assets will be determined at the time of filing of the Inventory.

8.
At this time the Petitioner has not made an estimate of the costs of administration or the outstanding indebtedness of the decedent, but the same will be fully reported in the First Accounting of the Petitioner. It is estimated that there will be [no] federal estate tax.

9.
Petitioner does not know of any person, nor anyone on behalf of that person, who asserts an interest in the estate under subsection (8) or (9) of ORS 113.035.
Chapter 6—Basic Estate Administration

10.

The Petitioner has employed __________________ of the law firm of __________________, Oregon State Bar No. __________, whose address is noted below, as attorney to represent the Personal Representative in the administration of this estate.

WHEREFORE, the Petitioner prays for an Order of this Court:

a. Declaring said Will dated _____________ to be the Last Will and Testament of the decedent and admitting the same to probate;

b. Appointing ________________ to serve as Personal Representative of the within-entitled estate (without bond) or (and fixing the amount of the bond) and issuing Letters Testamentary.

DATED this ___ day of ________, 20__.

____________________________
___________________ , Petitioner

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

____________________________
____________________, Petitioner

PETITIONER:

ATTORNEY FOR PETITIONER:

Page 4 - PETITION FOR PROBATE OF WILL AND APPOINTMENT OF PERSONAL REPRESENTATIVE
IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _____________________

Probate Department

In the Matter of the Estate of

____________________, Deceased.

Date of Death: ________________

NO. _________________

AFFIDAVIT OF CLAIMING SUCCESSOR OF SMALL ESTATE OF TESTATE ESTATE

Filing Fee: $111
Citation: 21.145(4), 114.515(6)

STATE OF OREGON )
County of ________________ )ss:

I, ________________, being first duly sworn, say:

I am a claiming successor, as defined in ORS 114.505(2), to a portion of the decedent’s estate. I am hereinafter referred to as “Affiant.” This Affidavit is hereinafter referred to as “Affidavit.” This Affidavit is made pursuant to ORS 114.505–114.560.

The following information is given with respect to the decedent:

a. Name:
b. Age:
c. Domicile:
d. Post office address:
e. Social Security No.: XXX-XX-
Decedent died on _____________ at _________________ County, Oregon. A certified copy of the death certificate is attached hereto.

Decedent died testate. The decedent's Will is attached to this Affidavit.

The decedent's property subject to administration in Oregon consists of the following:

(a) Real property and value thereof:

<table>
<thead>
<tr>
<th>PROPERTY</th>
<th>VALUE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(b) Personal property and market value thereof:

<table>
<thead>
<tr>
<th>ITEM</th>
<th>VALUE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

No application or petition for the appointment of a Personal Representative has been granted in Oregon.

The Decedent's heirs and the heirs’ last address known to the Affiant are:

<table>
<thead>
<tr>
<th>NAME</th>
<th>ADDRESS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
A copy of the Will, and this Affidavit showing the date of filing, will be delivered or mailed to
the heir at the last known address stated above.

7.

The Decedent's devisees and the last address of each as known to the Affiant are:

<table>
<thead>
<tr>
<th>NAME</th>
<th>ADDRESS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

A copy of the Will and a copy of this Affidavit showing the date of filing, will be delivered or
mailed to the devisee at the last known address stated above.

8.

The interest in the decedent's property described in this Affidavit to which each devisee is
entitled is:

<table>
<thead>
<tr>
<th>NAME</th>
<th>INTEREST</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

9.

Reasonable efforts have been made by the Affiant to ascertain each creditor of the estate.
The expenses of and claims against the estate remaining unpaid or on account of which the
Affiant or any other person is entitled to reimbursement from the estate, including any known or
estimated amount thereof, and the name and address of each creditor, as known to the Affiant
are:

<table>
<thead>
<tr>
<th>NAME</th>
<th>ADDRESS</th>
<th>DESCRIPTION</th>
<th>VALUE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Samuels Yoelin</td>
<td>111 SW 5th Ave., Ste 3800 Portland, OR 97204</td>
<td>Attorney fees</td>
<td></td>
</tr>
</tbody>
</table>
A copy of this Affidavit showing the date of filing will be delivered to each creditor who has not been paid in full or mailed to the creditor at the last known address of the creditor.

[If the creditor has already been paid, it is not required that they be listed here!]

10.

The name and address of each person known to the Affiant to assert a claim against the estate which the Affiant disputes and the last known of estimated amount thereof:

<table>
<thead>
<tr>
<th>NAME</th>
<th>ADDRESS</th>
<th>DESCRIPTION</th>
<th>VALUE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

A copy of this Affidavit showing the date of filing will be delivered to each of the above or mailed to each person at his or her last known address.

11.

Claims against the estate not listed in this Affidavit, or in amounts larger than those listed in this Affidavit may be barred unless (a) claim is presented to the Affiant within four months of the filing of the Affidavit at the address set forth in paragraph ____ or (b) a Personal Representative of the estate is appointed within the time allowed under ORS 114.555.

12.

If there is listed one or more claims that the Affiant disputes, any such claim may be barred unless (a) a petition for summary determination is filed within four months of the filing of this Affidavit; or (b) a Personal Representative of the estate is appointed within the time allowed under ORS 114.555.

13.

The address for the purposes of presenting a claim to the Affiant is:

Estate of ____________________________

____________________
AFFIDAVIT OF CLAIMING SUCCESSOR OF SMALL ESTATE OF TESTATE ESTATE

14. A copy of this Affidavit showing the date of filing will be mailed to the Oregon Department of Human Services, Estate Administration Unit, PO Box 14021, Salem, OR 97309-5024.

15. A copy of this Affidavit showing the date of filing will be mailed to the Oregon Health Authority, 500 Summer St. NE, Box E-20, Salem, OR 97301-1097.

DATED this ___ day of ______________, 2016.

______________________, Affiant

SUBSCRIBED AND SWORN TO before me this ___ day of ______________, 2016, by ______________________.

Notary Public for Oregon

DATE OF FILING: ______________

CLAIMING SUCCESSOR:

ATTORNEY FOR CLAIMING SUCCESSOR:
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF _________________
Probate Department

In the Matter of the Estate

of

_______________, Deceased

Date of Death: ________________

___________, Petitioner, alleges:

1.

The following information is given with regard to the decedent:

a. Name:

b. Age:

c. Domicile:

d. Post Office Address:

e. Date and Place of Death:

f. Social Security No.: XXX-XX-

PETITION FOR ADMINISTRATION OF INTESTATE ESTATE AND APPOINTMENT OF PERSONAL REPRESENTATIVE

Filing fee: $_______

Citation: ORS 21.170 (1) (a-d)

Estate: More than $_________ but less than $__________

Page 1 - PETITION FOR ADMINISTRATION OF INTESTATE ESTATE AND APPOINTMENT OF PERSONAL REPRESENTATIVE
Chapter 6—Basic Estate Administration

2.

Decedent died intestate. There is no just reason for delay in entering a limited judgment.

3.

Venue is established in _____________ County, Oregon, in that at the time of the
decedent's death, [CHOOSE 1:] decedent's place of residence was in that county, at the time of
the decedent's death, property of decedent was located in that county, and at the time this
proceeding is commenced, property of decedent is located in that county OR decedent died in
that county.

4.

Petitioner nominates ____________, whose post office address is _________________,
and whose telephone number is ________________as Personal Representative, and who is not
disqualified to serve as Personal Representative under the provisions of ORS Section 113.095.

[OPT] The heirs listed below waive their right to serve as Personal Representative and request
that _____________ serve as Personal Representative, in waivers filed concurrently with this
Petition. [OPT] Personal Representative is the sole heir of the Estate and pursuant to ORS
113.105, the Petitioner hereby requests that bond be waived. [OPT] That the bond be set at
$____________by a surety company authorized to transact surety business in the state of Oregon
to minimize costs of administration.

5.

Petitioner has made reasonable efforts to identify and locate all the decedent’s heirs and
the following are their names, relationships, and post office addresses:

<table>
<thead>
<tr>
<th>Name</th>
<th>Relationship</th>
<th>Age (if minor)</th>
<th>Address</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>/ /</td>
<td></td>
<td>/ /</td>
<td></td>
</tr>
<tr>
<td>/ /</td>
<td></td>
<td>/ /</td>
<td></td>
</tr>
</tbody>
</table>

Page 2 - PETITION FOR ADMINISTRATION OF INTESTATE
ESTATE AND APPOINTMENT OF PERSONAL REPRESENTATIVE
6. So far as is known to the Petitioner, the nature, extent, liquidity and apparent value of assets of this estate subject to probate is [OPT] real and personal property with an aggregate value of approximately $__________.

7. The Personal Representative has employed __________ of the law firm of ______________, Oregon, State Bar No. ______, whose address is noted below, as attorney to represent the Personal Representative in the administration of this estate.

8. Petitioner does not know the name of any person, nor anyone on behalf of that person, who asserts an interest in the estate under subsection (8) or (9) of ORS 113.035.

WHEREFORE, the Petitioner prays for a limited judgment:

a. Admitting this estate to administration.

b. Appointing ____________ as Personal Representative of the within-entitled estate [OPT] to serve without bond, and issuing Letters of Administration.

c. [OPT] Fixing the amount of the bond issued by a surety company authorized to transact business in the state of Oregon.

DATED: ________________, 20__.

__________________ (Petitioner)

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

__________________ (Petitioner)
PETITIONER:

ATTORNEY FOR PETITIONER:
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF __________________________

Probate Department

In the Matter of the Estate of

___________________, Deceased.

Date of Death: _______________

NO. _____________________

AFFIDAVIT OF CLAIMING SUCCESSOR OF SMALL ESTATE OF INTESTATE ESTATE

Filing Fee: $________
Citation: ORS 114.515(6); 21.145

STATE OF OREGON  )
County of ________________ ) ss:

I, ________________, being first duly sworn, say:

I am a claiming successor, as defined in ORS 114.505(2), to a portion of the decedent’s estate. I am hereinafter referred to as “Affiant.” This Affidavit is hereinafter referred to as “Affidavit.” This Affidavit is made pursuant to ORS 114.505–114.560.

1.

The following information is given with respect to the decedent:

a. Name:

b. Age:

c. Domicile:

d. Post office address:

e. Social Security No.: XXX-XX-
Decedent died on ______________ at ______________ County, Oregon. A certified copy of the death certificate is attached hereto.

Decedent died intestate.

The decedent's property subject to administration in Oregon consists of the following:

(a) Real property and value thereof:

<table>
<thead>
<tr>
<th>PROPERTY</th>
<th>VALUE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
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<td></td>
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(b) Personal property and market value thereof:

<table>
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<tr>
<th>ITEM</th>
<th>VALUE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

No application or petition for the appointment of a Personal Representative has been granted in Oregon.

The Decedent's heirs and the heirs’ last address known to the Affiant are:

<table>
<thead>
<tr>
<th>NAME</th>
<th>ADDRESS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
A copy of this Affidavit showing the date of filing, will be delivered or mailed to the heir at the last known address stated above.

The interest in the decedent's property described in this Affidavit to which each heir is entitled is:

<table>
<thead>
<tr>
<th>NAME</th>
<th>INTEREST</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Reasonable efforts have been made by the Affiant to ascertain each creditor of the estate. The expenses of and claims against the estate remaining unpaid or on account of which the Affiant or any other person is entitled to reimbursement from the estate, including any known or estimated amount thereof, and the name and address of each creditor, as known to the Affiant are:

<table>
<thead>
<tr>
<th>NAME</th>
<th>ADDRESS</th>
<th>DESCRIPTION</th>
<th>VALUE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Samuels</td>
<td>111 SW 5th Ave., Ste 3800</td>
<td>Attorney fees</td>
<td></td>
</tr>
<tr>
<td>Yoelin</td>
<td>Portland, OR 97204</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

A copy of this Affidavit showing the date of filing will be delivered to each creditor who has not been paid in full or mailed to the creditor at the last known address of the creditor. [If the creditor has already been paid, it is not required that they be listed here!]

The name and address of each person known to the Affiant to assert a claim against the estate which the Affiant disputes and the last known of estimated amount thereof:

///
Chapter 6—Basic Estate Administration

A copy of this Affidavit showing the date of filing will be delivered to each of the above or mailed to each person at his or her last known address.

Claims against the estate not listed in this Affidavit, or in amounts larger than those listed in this Affidavit may be barred unless (a) claim is presented to the Affiant within four months of the filing of the Affidavit at the address set forth in paragraph ____ or (b) a Personal Representative of the estate is appointed within the time allowed under ORS 114.555.

If there is listed one or more claims that the Affiant disputes, any such claim may be barred unless (a) a petition for summary determination is filed within four months of the filing of this Affidavit; or (b) a Personal Representative of the estate is appointed within the time allowed under ORS 114.555.

The address for the purposes of presenting a claim to the Affiant is:

Estate of ____________________

A copy of this Affidavit showing the date of filing will be mailed to the Oregon Department of Human Services, Estate Administration Unit, PO Box 14021, Salem, OR 97309-5024.

Page 4 - AFFIDAVIT OF CLAIMING SUCCESSOR OF SMALL ESTATE OF INTESTATE ESTATE
Chapter 6—Basic Estate Administration

14.

A copy of this Affidavit showing the date of filing will be mailed to the Oregon Health Authority, 500 Summer St. NE, Box E-20, Salem, OR 97301-1097.

DATED this ___ day of ________________, 2016.

_____________________, Affiant

SUBSCRIBED AND SWORN TO before me this ___ day of ________________, 2016, by _____________________.

Notary Public for Oregon

DATE OF FILING: ________________

CLAIMING SUCCESSOR:

ATTORNEY FOR CLAIMING SUCCESSOR:
IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _________________

In the Matter of the Estate

of

______________ , Deceased

NO.

INFORMATION TO HEIRS AND DEVISEES

TO: HEIRS AND DEVISEES of the above-named decedent:

(names and addresses)

The following information is given to you as an heir or devisee of the above-named decedent who died at ______________ on __________________20__.

Estate proceedings in the decedent’s estate, bearing the clerk’s file number ________, have been commenced and are now pending in the above-entitled court wherein the decedent’s will has been admitted to probate. On ____________, 20__, the undersigned was duly appointed and is now serving as Personal Representative of the estate. Your rights may be affected by this proceeding; additional information may be obtained from the records of the court, the undersigned Personal Representative, or the attorney for the Personal Representative. The names and addresses of the Personal Representative and the attorney for the Personal Representative are as follows:

Personal Representative

Attorney for Personal Representative

Page 1 - INFORMATION TO HEIRS AND DEVISEES
ORS 113.075 provides that, when a will has been admitted to probate, any interested person may, at any time within four months after the date of delivery or mailing of the information described in ORS 113.145 or four months after the first publication of notice to interested persons, whichever is the later, contest the probate of the will or the validity of the will.

Respectfully,

[Signature]

Personal Representative

PERSONAL REPRESENTATIVE:

ATTORNEY FOR PERSONAL REPRESENTATIVE:
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF __________________________

Probate Department

In the Matter of the Estate of:
____________________, Deceased.

Date of Death: __________

NO. __________________

VERIFIED STATEMENT IN LIEU
OF FINAL ACCOUNTING AND
PETITION FOR GENERAL
JUDGMENT OF DISTRIBUTION

The Personal Representative, _________________ (the “Fiduciary”), presents this final
accounting, Verified Statement pursuant to ORS 116.083(4), covering the period from
_________ through __________ (the “accounting period”).

1. Bonding. [choose one]

☐ No bond is required in this estate because the decedent’s will waives bond.

☐ The current amount of the total bond, including riders, is $_________. The Fiduciary
requests that the Court exonerate the bond after the entry of the Supplemental Judgment
Discharging Fiduciary and Closing Estate.

2. Creditors. Except for creditors owed administrative expenses as outlined below,
all creditors of the decedent and of this estate have been paid in full.

3. Taxes. The Fiduciary has diligently addressed the decedent’s individual,
fiduciary, and estate tax obligations. All Oregon income, inheritance, and personal property taxes
due have been paid and all required tax returns have been filed. A Fiduciary income tax return
for the estate is not due and will be filed within the period required by law. The Fiduciary
represents that there has been no final formal determination regarding the decedent’s income tax liability and the Oregon Department of Revenue and the Internal Revenue Service have three years to recover any tax due from the residuary beneficiaries.

4. **Fiduciary’s Fee.** [choose one]

   - The Fiduciary is entitled to Statutory compensation in the sum of $_________.
   - The Fiduciary hereby waives his/her right to receive a Fiduciary’s fee, as evidenced by his/her signature set forth below.

5. **Attorney Fees and Costs.** The Fiduciary represents that the attorneys for the estate have performed numerous services on behalf of the estate since commencement of the probate. Attached hereto and incorporated herein by this reference is an Affidavit of Attorney's Fees which has been prepared by ______________________, who was the attorney charged with primary responsibility for this estate. The total amount payable to the attorneys for the estate for services represented by the Affidavit is $_________, and reimbursement for all costs equals the sum of $_________, which together total $_________.

6. **Remaining Assets.** The following assets are ready for distribution:

   - [List remaining estate assets. List should balance with current value reflected on asset schedule]

7. **Distribution.** The remaining assets of the Estate are to be distributed in accordance with the [decedent’s Will to the following beneficiaries] [laws of intestacy]:

   - Decedent’s Will provides ________________

   - The residue of the estate is to be distributed in accordance with Article ___ of the decedent’s Will, which provides that the residue be divided equally among the decedent’s surviving children, named below:

   // /

   // /
8. **Notice.** No notice is required because the beneficiaries and devisees entitled to notice have waived the requirement that they be served with notice and have signed a Waiver of Notice and Consent to Immediate Entry of Judgment. The Waiver[s] [is/are] filed concurrently with this accounting.

[ALT] 8. **Notice.** No notice is required because the undersigned Personal Representative as sole distributee, hereby consents in writing as evidenced by his signature below, to file this Verified Statement in lieu of the Final Account pursuant to ORS 116.083(4).

All distributions to the other heirs and devisees have been completed as authorized by the court, and therefore, no notice to these beneficiaries is required.

9. **Closing.** This estate is ready for final settlement and distribution.

WHEREFORE, the Personal Representative prays for a General Judgment as follows:

(1) Approving this verified statement;

(2) Directing payment of $________ as the statutory Fiduciary’s fee;

(3) Authorizing payment to the law firm of Samuels Yoelin Kantor in the sum of $________, representing $________ as reasonable attorney's fees and $________ as reimbursement for actual costs;

(4) Authorizing distribution of the remaining assets of the estate to the devisees and beneficiaries entitled to them as follows:

(5) Upon the filing of a Receipt and Release to the effect that all the assets of this estate have been transferred to the beneficiary in accordance with this Order, providing that this / / /
estate be closed without further notice or accounting, exonerating the bond, in any, and the
Personal Representative discharged with no further duty.

DATED this ____ day of __________, 2016.

__________________________, Personal Representative

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

__________________________

PERSONAL REPRESENTATIVE:

__________________________

Address
City State Zip

ATTORNEY FOR PERSONAL REPRESENTATIVE:
Chapter 7

Small Estates

Warren Deras
Portland, Oregon

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  Form of Notarial Certificate for Affidavits ............................................. 7–4
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Chapter 7—Small Estates

Small Estates
by Warren C. Deras

Oregon’s small estates law, ORS 114.505 to 114.560, was enacted in 1973, four years after the complete revision of the Probate Code in 1969. The statute was intended for the simplest of situations, as indicated by the original $10,000 limit on the size of estates eligible for the procedure. (Adjusted for inflation, that limit would now be about $53,000.)

The dollar limits on qualifying estates have been increased repeatedly over the years, and the law currently is available for estates with a total value of as much as $275,000, of which not more than $75,000 can be personal property and not more than $200,000 can be real property. The history of the changes made to the small estate limits is summarized in this chart:

<table>
<thead>
<tr>
<th>Statute</th>
<th>Effective Date</th>
<th>Value Limits by Type of Property</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Personal</td>
</tr>
<tr>
<td>1973 c.710 §§3, 8</td>
<td>Oct. 5, 1973</td>
<td>$5,000</td>
</tr>
<tr>
<td>1977 c.239 §2</td>
<td>Oct. 4, 1977</td>
<td>$10,000</td>
</tr>
<tr>
<td>1979 c.467 §1</td>
<td>Oct. 3, 1979*</td>
<td>$10,000</td>
</tr>
<tr>
<td>1985 c.368 §1</td>
<td>Sep. 20, 1985*</td>
<td>$15,000</td>
</tr>
<tr>
<td>1989 c.856 §1</td>
<td>Oct. 3, 1989**</td>
<td>$25,000</td>
</tr>
<tr>
<td>1995 c.682 §1</td>
<td>Sep. 9, 1995***</td>
<td>$50,000</td>
</tr>
<tr>
<td>2005 c.273 §§1,2</td>
<td>June 21, 2005**</td>
<td>$50,000</td>
</tr>
<tr>
<td>2009 c.413 §1</td>
<td>Jan. 1, 2010**</td>
<td>$75,000</td>
</tr>
</tbody>
</table>

* Amendment applies only to affidavits filed on or after the effective date
** Amendment applies only to decedents who die on or after the effective date
*** Amendment applies to decedents who die on or after the effective date and to decedents who died before effective date if no probate petition has been filed before effective date

Note that the 1995 amendment applies not only to decedents who die after its effective date, but also to those who died before the effective date if no probate petition had been filed before that date. You cannot use a small estate affidavit if a petition to appoint a personal representative in Oregon has been granted, so that makes those 1995 limits effectively applicable to all decedents who died before June 21, 2005, when the next change was effective.

There have been some other significant amendments to the small estates law over the years. In 1989 an Oregon State Bar project to conform the small estates law to the due process requirements of Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988) turned into a comprehensive revision. The many issues addressed by that amendment are described in the legislative history materials published as Deras, Warren C, “1989 Oregon Probate Practice Legislation: Claims and Small Estates”, 26 Willamette Law Review 275 (1990). 2003 amendments generally revised procedures applicable to escheat estates. 2011 amendments attacked the problem of gaining access to the contents of safe deposit boxes. 2015 amendments were designed to allow an affiant to open bank deposit accounts in the name of the estate.
Relationship of Small estates law to other Probate Code provisions

A fundamental point about affidavits filed under the small estates law is this: Not all provisions of the Probate Code apply to small estate affidavits. Some do, but many do not. If all provisions of the Probate Code were applicable in small estates, obviously we would not have a separate small estate process. The statutes include three types of incorporation by reference making Probate Code provisions outside the small estates law applicable to it:

- A few provisions of the Probate Code outside the small estates law apply to small estates, because they say they do. The definitions in ORS 111.005 for example expressly apply to each chapter of the Probate Code, including ORS Chapter 114.

- Some provisions of the Probate Code are expressly incorporated by reference into the small estates law. For example, ORS 114.545 incorporates by reference the priorities in ORS 115.125 concerning who gets paid when the estate is insolvent. There are many such specific incorporations by reference in the small estates law.

- The small estates law also contains several more general cross references. For example it requires that an affidavit identify the heirs and that copies of the affidavit be delivered to the heirs. The term “heirs” is defined in ORS 111.005 by reference to ORS Chapter 112, so all the heirship provisions of ORS Chapter 112 are applicable to small estates.

Except for these general and specific cross references, Probate Code provisions outside the small estates law do not apply to it. There are two particular Probate Code provisions not incorporated into the small estates law that frequently give rise to disagreements among attorneys as to whether they apply. The author’s views on these disagreements follow.

On what date are assets valued for purpose of applying the dollar limit on small estate affidavits, and what value is shown in the affidavit?

ORS 113.165 establishes the valuation date for assets listed in the inventory filed in a full probate proceeding:

113.165 Filing inventory and evaluation. Within 60 days after the date of appointment, unless a longer time is granted by the court, a personal representative shall file in the estate proceeding an inventory of all the property of the estate that has come into the possession or knowledge of the personal representative. The inventory shall show the estimates by the personal representative of the respective true cash values as of the date of the death of the decedent of the properties described in the inventory.

This provision does not apply to affidavits filed under the small estates law, because you don’t file an inventory in a small estate. This provision is not incorporated either implicitly or explicitly into the small estates law.

Furthermore the small estates law has its own provision governing when you value assets for purposes of the law. ORS 114.515(2) provides:

(2) An affidavit under this section may be filed only if:

(a) The fair market value of the estate is $275,000 or less;

(b) Not more than $75,000 of the fair market value of the estate is
attributable to personal property; and

(c) Not more than $200,000 of the fair market value of the estate is attributable to real property.

The value limits are identified in the present tense — meaning now when the affidavit is being signed and filed — not in the past tense — as the date of death.

The use of current value really makes sense in the context of a procedure to probate estates not needing the protections provided by a full probate because they are small. What difference does it make what they were worth in the past? Either they should be treated differently because they are small when the probate is filed, or they should not. It is not consistent with the purpose of the law to file a small estate affidavit to belatedly probate the estate of a decedent who died in 2005 owning 5,000 shares of Apple stock that were then worth $26,000 if that stock is now worth $570,000.

Can you use a small estate affidavit for a testate estate when the original will is not available?

The requirements for a small estate affidavit include:

114.525 Content of affidavit; rules. An affidavit filed under ORS 114.515 shall:

* * * * *

(5) State whether the decedent died testate or intestate, and if the decedent died testate, the will shall be attached to the affidavit;

Two provisions of the Probate Code deal with circumstances under which an original will is not available for filing with the probate court, but can still be used:

111.245 Proof of documents; certification. (1) Proof of documents pursuant to ORS chapters 111, 112, 113, 114, 115, 116 and 117 may be made as follows:

(a) Of a will, by a certified copy thereof.

(b) That a will has been probated or established in a foreign jurisdiction, by a certified copy of the order admitting the will to probate or evidencing its establishment.

* * * * *

(2) A document or order filed or entered in a foreign jurisdiction may be proved by a copy thereof, certified by a clerk of the court in which the document or order was filed or entered or by any other official having legal custody of the original document or order.

113.035 Petition for appointment of personal representative and probate of will. Any interested person or executor named in the will may petition for the appointment of a personal representative and for the probate of a will. The petition shall include the following information, so far as known:
(10) Whether the original of the last will of the decedent is in the possession of the court or accompanies the petition. If the original will is not in the possession of the court or accompanying the petition and an authenticated copy of the will probated in another jurisdiction does not accompany the petition, the petition shall also state the contents of the will and indicate that it is lost, destroyed or otherwise unavailable and that it was not revoked.

In a small estate affidavit you are not proving the will, and you are certainly not filing a petition for appointment of a personal representative. These provisions excusing the need for an original will are not incorporated in any provision of the small estates law, which expressly requires that in a testate estate “the will” shall be attached to the affidavit. The definition of “will” in ORS 111.005(32) does not extend to a copy:

“Will” includes codicil; it also includes a testamentary instrument that merely appoints an executor or that merely revokes or revives another will.

Many circuit courts in Oregon have websites that include guidance on the filing of small estate affidavits. Those websites uniformly state that you cannot file a small estate for a testate estate without the original will.

However, a practice exception — without any particular statutory basis — has developed over the years. Some counties, including Multnomah County, will accept a certified copy of a will being probated in another state to allow ancillary administration in Oregon by way of a small estate affidavit. Before filing such a small estate affidavit you should check with the probate department in the county to verify that it will be accepted.

Form of Notarial Certificate for Affidavits

It has been common practice in Oregon to start an affidavit with:

State of Oregon )
 ) s.s.
County of ________________ )

The affidavit form would then proceed with the substance of the affidavit, followed by the signature line for the affiant and a statement and signature line for the notary.

The Secretary of State’s office, which is responsible for supervision of notaries, now says that is wrong, and all affidavits — including small estate affidavits and will affidavits — should conform to the new rules.

In 2013 Oregon adopted the Revised Uniform Law on Notarial Acts, found in ORS Chapter 194. ORS 194.280(1) provides:

194.280 Certificate of notarial act. (1) A notarial act must be evidenced by a certificate. The certificate must:

(a) Be signed and dated by the notarial officer and, if the notarial officer is a notary public, be signed in the same manner as on file with the Secretary of State;
(b) Identify the jurisdiction in which the notarial act is performed;
(c) Contain the title of office of the notarial officer;
(d) Contain the name of the person for whom the notarial act is performed; and
(e) If the notarial officer is a notary public, indicate the date of expiration, if any, of the officer’s commission.

Failure to include all elements of the certificate is an act of misconduct subjecting a notary to discipline. See OAR 160-100-0610(39). The 2016 Notary Public Guide published by the Secretary of State states on page 34 that all components of the notarial certificate, including the identification of the jurisdiction, must be on a single page. Therefore it is no longer proper to have the state and county information at the beginning of an affidavit separated from the rest of the notarial certificate.

Another change is that the 2016 Notary Public Guide now indicates that it is not necessary to include a blank line below the notary signature for the commission expiration date, since that information is included on the notary stamp, which satisfies the requirements for a notarial certificate.

A less notable matter indicated in the 2016 Notary Public Guide, page 66:

S.S. or SCT: Usually found in the venue portion of the notary certificate. It stands for the Latin term Scilicet; meaning “in particular” or “namely.” Used to specify the location of the notarization in very old-fashioned language. Not required for Oregon certificates.

Finally it is worth mentioning that affidavit forms should be inclusive. Many individuals for various reasons associated with different religious beliefs will not take an oath in a civil matter. To protect the rights of those with such beliefs the Constitution of Oregon provides in its Bill of Rights in Article I:

Section 7. Manner of administering oath or affirmation. The mode of administering an oath, or affirmation shall be such as may be most consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered.

A notarial certificate should therefore provide for either an oath (sworn) or an affirmation.

The small estate affidavit forms that follow conform to the current requirements for notarial certificates, as illustrated in the 2016 Notary Public Guide.

Requirements for Payment of Attorney Fees from a Small Estate

As is well known in the probate bar, but sometimes trips up attorneys who venture into probate less frequently, attorney fees can be paid from a probate estate only after payment has been approved by the probate court. ORS 116.183, as interpreted in In re Altstatt, 321 Or 324, 333 (1995), where the court held:

“Any such attorney fee that is collected without approval is unlawful and, hence, an ‘illegal’ fee.”

In Formal Opinion 2005-171 the Oregon State Bar gave its opinion that this rule only applies to payment of fees from the estate, not to payment of fees from the personal funds of the personal
ORS 116.183 does not apply to small estates. Attorney fees may be an issue in those rare cases in which an interested person seeks summary review of administration under ORS 114.550, but ordinarily no court reviews and approves fees charged by an attorney in a small estate.

Does that mean you don’t have to worry about *Alstatt* when you have a small estate? It does not. The small estates law has a provision the effect of which is comparable to ORS 116.183 governing the attorney fees than can be paid from a small estate. That provision is:

114.545 Duties of person filing affidavit; accounts in financial institutions; payment of claims; conveyance of real property; liability of person to whom property transferred or payment made. (1) The affiant:

* * * * *

(d) From and to the extent of the property of the estate, shall pay or reimburse any person who has paid:

(A) Expenses described in ORS 115.125(1)(b) and (c) and listed in the affidavit; ORS 115.125(1)(b) refers to administration expenses, which include attorney fees. Those can only be paid from the property of the estate if they are listed in the affidavit.

For that reason it is important in the section of the affidavit listing creditors that the attorney be included both for attorney fees and for court fees advanced.
IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF COUNTY OF PROBATE

[if applicable] Department of Probate

In the Matter of the Estate of

DECEDED'S NAME,

Deceased.

Small Estate no.__________________

AFFIDAVIT OF CLAIMING SUCCESSOR OF INTESTATE ESTATE

Filing Fee: $111 (ORS 21.145(4); ORS 114.515(6))

I, Affiant, being first duly sworn or affirmed, say that I am an heir [alternatively indicate creditor, if appropriate] and a "claiming successor" of the above-named decedent and that I make this affidavit pursuant to ORS 114.515.

1. The following information is given with respect to the decedent:

(a) Name: Decedent's Name.
(b) Age: Age at Death.
(c) Domicile: Decedent's Domicile.
(d) Post-office address: Decedent's Address Street, Decedent's Address Line 2.
(e) Social security number: Soc. Sec. No.

2. Decedent died on Date of Decedent's Death, at Place of Decedent's Death. A certified copy of the death record is attached hereto as Exhibit 1.

3. The property in the estate (including a legal description of any real property) and its fair market value are as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>[List]</td>
<td></td>
</tr>
</tbody>
</table>

4. No application or petition for the appointment of a personal representative has been granted in Oregon.

5. Decedent died intestate.

* * * * *

* * * * *

* * * * *

AFFIDAVIT OF CLAIMING SUCCESSOR OF INTESTATE ESTATE

[SHOW ATTORNEY INFORMATION REQUIRED BY UTCR 2.010(7)]
6. Decedent's heirs and their respective last addresses as known to affiant are as follows:

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
</tr>
</thead>
</table>

**Heirs**

A copy of this affidavit showing the date of filing will be delivered to each heir or mailed to the heir at the last-known address.

7. The interest in the property described in this affidavit to which each heir is entitled is as follows:

<table>
<thead>
<tr>
<th>Heir</th>
<th>Interest</th>
</tr>
</thead>
</table>

**Heirs**

No interest in the estate will escheat.

8. Reasonable efforts have been made to ascertain creditors of the estate. Expenses of and claims against the estate remaining unpaid or on account of which the affiant or any other person is entitled to reimbursement from the estate, as known to the affiant, are as follows:

<table>
<thead>
<tr>
<th>Name and Address of Creditor</th>
<th>Amount</th>
</tr>
</thead>
</table>

Administration expenses:

[Include attorney name and list both fees and costs advanced]

Funeral expenses:

[Show "none" or list]

Claims:

[Show "none" or list in order of priority under ORS 114.545 and 115.125]

A copy of this affidavit showing the date of filing will be delivered to each creditor who has not been paid in full or mailed to the creditor at the last-known address.

9. Persons asserting claims against the estate which the affiant disputes, as known to the affiant, are as follows:

<table>
<thead>
<tr>
<th>Name and Address</th>
<th>Amount</th>
</tr>
</thead>
</table>

[Show "none" or list]

A copy of this affidavit showing the date of filing will be delivered to each such person or mailed to the person at the last-known address.

10. A copy of this affidavit showing the date of filing will be mailed to the Estate Administration Unit & Oregon Health Authority, Department of Human Services, P.O. Box

**AFFIDAVIT OF CLAIMING SUCCESSOR OF INTESTATE ESTATE**

[SHOW ATTORNEY INFORMATION REQUIRED BY UTCR 2.010(7)]
14021, Salem, OR 97309-5024.

11. Claims against the estate not listed in this affidavit or in amounts larger than those listed in this affidavit may be barred unless:

(a) A claim is presented to the affiant within four months of the filing of the affidavit at the following address: **Affiant's Address Street, Affiant's Address Line 2**; or

(b) A personal representative of the estate is appointed within four months after the filing of this affidavit.

12. [Delete this paragraph if no disputed claims] Claims listed in this affidavit as disputed may be barred unless:

(a) A petition for summary determination is filed with the above-entitled court within four months of the filing of this affidavit; or

(b) A personal representative of the estate is appointed within four months after the filing of this affidavit.

Dated ________________________.

______________________________

**Affiant**

[Block protect the following notarial certificate so that it will not be split between two pages. See ORS 194.280(1) and 2016 Oregon Notary Public Guide, page 34]

**STATE OF OREGON**

County of Multnomah

Signed and sworn to or affirmed before me on ________________, 20____ by **Affiant**.

______________________________

Notary Public — Oregon

**AFFIDAVIT OF CLAIMING SUCCESSOR OF INTESTATE ESTATE**

[**SHOW ATTORNEY INFORMATION REQUIRED BY UTCR 2.010(7)**]
[ATTACH COPY OF CERTIFIED COPY OF THE DEATH RECORD AND COMPLY WITH UTCR 21.070(3)(h) REGARDING SUBMISSION OF ORIGINAL AND COMPLETION OF FILING COMMENTS.]
IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF COUNTY OF PROBATE

[if applicable] Department of Probate

In the Matter of the Estate of

) )

) Case no._______________

DECEDENT'S NAME,

) )

) AFFIDAVIT OF CLAIMING

Deceased. ) SUCCESSOR OF TESTATE ESTATE

) Filing Fee: $111 (ORS 21.145(4); ORS 114.515(6))

1. Affiant, being first duly sworn or affirmed, say that I am a devisee [alternatively indicate person named in will as personal representative or creditor, if appropriate] and a "claiming successor" [delete reference to "claiming successor and correct title for affiant filing as personal representative named in will] of the above-named decedent and that I make this affidavit pursuant to ORS 114.515.

1. The following information is given with respect to the decedent:

(a) Name: Decedent's Name.
(b) Age: Age at Death.
(c) Domicile: Decedent's Domicile.
(d) Post-office address: Decedent's Address Line 1, Decedent's Address Line 2.
(e) Social Security number: Soc. Sec. No.

2. Decedent died on Date of Decedent's Death, at Place of Decedent's Death. A certified copy of the death record is attached hereto as Exhibit 1.

3. The property in the estate (including a legal description of any real property) and its fair market value are as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>[List]</td>
<td></td>
</tr>
</tbody>
</table>

4. No application or petition for the appointment of a personal representative has been granted in Oregon.

5. Decedent died testate. The will is attached hereto as Exhibit 2.

* * * * *

* * * * *

AFFIDAVIT OF CLAIMING SUCCESSOR OF TESTATE ESTATE

[SHOW ATTORNEY INFORMATION REQUIRED BY UTCR 2.010(7)]
6. Decedent's heirs and their respective last addresses as known to affiant are as follows:

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
</tr>
</thead>
</table>

**Heirs**

A copy of the will and a copy of this affidavit showing the date of filing will be delivered to each heir or mailed to the heir at the last-known address.

7. The devisees of decedent and their respective last addresses as known to affiant are as follows:

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
</tr>
</thead>
</table>

**Devisees**

A copy of the will and a copy of this affidavit showing the date of filing will be delivered to each devisee or mailed to the devisee at the last-known address.

8. The interest in the property described in this affidavit to which each heir or devisee is entitled is as follows:

<table>
<thead>
<tr>
<th>Heir or Devisee</th>
<th>Interest</th>
</tr>
</thead>
</table>

[List]

No interest in the estate will escheat.

9. Reasonable efforts have been made to ascertain creditors of the estate. Expenses of and claims against the estate remaining unpaid or on account of which the affiant or any other person is entitled to reimbursement from the estate, as known to the affiant, are as follows:

<table>
<thead>
<tr>
<th>Name and Address of Creditor</th>
<th>Amount</th>
</tr>
</thead>
</table>

Administration expenses:

[Include attorney name and list both fees and costs advanced]

Funeral expenses:

[Show "none" or list]

Claims:

[Show "none" or list in order of priority under ORS 114.545 and 115.125]

A copy of this affidavit showing the date of filing will be delivered to each creditor who has not been paid in full or mailed to the creditor at the last-known address.

* * * * *

AFFIDAVIT OF CLAIMING SUCCESSOR OF TESTATE ESTATE

[SHOW ATTORNEY INFORMATION REQUIRED BY UTCR 2.010(7)]
10. Persons asserting claims against the estate which the affiant disputes, as known to the affiant, are as follows:

<table>
<thead>
<tr>
<th>Name and Address</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>[Show &quot;none&quot; or list]</td>
<td></td>
</tr>
</tbody>
</table>

A copy of this affidavit showing the date of filing will be delivered to each such person or mailed to the person at the last-known address.

11. A copy of this affidavit showing the date of filing will be mailed to the Estate Administration Unit & Oregon Health Authority, Department of Human Services, P.O. Box 14021, Salem, OR 97309-5024.

12. Claims against the estate not listed in this affidavit or in amounts larger than those listed in this affidavit may be barred unless:

(a) A claim is presented to the affiant within four months of the filing of the affidavit at the following address: 

Affiant's Address Street, Affiant's Address Line 2; or

(b) A personal representative of the estate is appointed within four months after the filing of this affidavit.

13. [Delete this paragraph if no disputed claims] Claims listed in this affidavit as disputed may be barred unless:

(a) A petition for summary determination is filed with the above-entitled court within four months of the filing of this affidavit; or

(b) A personal representative of the estate is appointed within four months after the filing of this affidavit.

Dated ________________________.

Affiant

[Block protect the following notarial certificate so that it will not be split between two pages. See ORS 194.280(1) and 2016 Oregon Notary Public Guide, page 34]

STATE OF OREGON
County of Multnomah

Signed and sworn to or affirmed before me on ________________, 20___ by Affiant.

________________________________________
Notary Public — Oregon

AFFIDAVIT OF CLAIMING SUCCESSOR OF TESTATE ESTATE

[SHOW ATTORNEY INFORMATION REQUIRED BY UTCR 2.010(7)]
[ATTACH COPY OF WILL AND CERTIFIED COPY OF THE DEATH RECORD AND COMPLY WITH UTCR 21.070(3)(h) REGARDING SUBMISSION OF ORIGINALS AND COMPLETION OF FILING COMMENTS.]
Probate Questionnaire

Information concerning the decedent:

Full name: ________________________________________________
Date of birth: ____________________________________________
Last regular address: _______________________________________
State of domicile, if not Oregon ______________________________
Social Security number ____________________ Occupation __________________
Date of death: ____________________
Place of death ______________________________________________

Information concerning the will:

Did the decedent execute a will? ☐ yes ☐ no
If there is a will:

Do you have the original? ☐ yes ☐ no
If you do not have it, where is it?

Do you have a notarized witness affidavit? ☐ yes ☐ no
(This is usually attached to the back of the will.)

If you do not have a witness affidavit, show the names, addresses and phone numbers of the two witnesses to the will, if known:

__________________________________________
Phone: ____________________________

__________________________________________
Phone: ____________________________

Information concerning the proposed personal representative:

Legal Name: ___________________________ Soc. Sec. no. _____________
Address: [street] [city] [state] [ZIP] ____________________________
[home] [work] [cell] E-mail ____________________________

Relationship to decedent _______________________________________

Various categories of individuals may be disqualified or limited in their ability to serve as personal representative of a decedent's estate in Oregon. These include convicted felons, minors (persons under 18), disbarred or suspended attorneys, and funeral service practitioners. Is the proposed personal representative in any of those categories? ☐ yes ☐ no

If there is no will you will probably be required to file a bond (purchased at the expense of the estate from an insurance company) with the probate court in order to serve as personal representative. Insurance companies will only issue bonds to individuals with good credit. If there is no will, do you have credit problems (past failures to pay debt, lack of employment and assets) which could prevent you from qualifying for a bond? ☐ yes ☐ no ☐ will waives bond
### Information concerning heirs and devisees:

Who are the heirs (closest relatives) who survived the decedent (even if they have died after the decedent), and what are their addresses? List the current spouse and all children, if any, and children of any deceased children. If no spouse or descendants (including grandchildren), then show surviving parents. If none, then show brothers and sisters. If none, or in place of any siblings who have died, show nieces and nephews. If there is no spouse and no living descendant of the decedent's parents, show descendants of the decedent's grandparents. Show the age of anyone under 18. Attach an additional sheet (and family tree) if necessary.

<table>
<thead>
<tr>
<th>Name</th>
<th>Age</th>
<th>Relationship</th>
<th>Address</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If the decedent left a will, list the names and addresses of everyone named to receive anything under the will. For persons who died before the decedent, show "deceased" and the date of death under address. Show the age of anyone under 18. Attach an additional sheet if necessary.

<table>
<thead>
<tr>
<th>Name</th>
<th>Age</th>
<th>Address</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Information concerning assets of the probate estate:

The probate estate consists of assets owned by the decedent on the date of his or her death which do not pass to someone else by some system other than probate. Joint bank accounts, jointly owned property, life insurance benefits, retirement plans and IRA accounts are usually not probate assets. Two months after probate is commenced a detailed inventory of probate assets must be filed with the probate court. At this time you only need to provide a general idea of what the assets are and what they are worth.

<table>
<thead>
<tr>
<th>Description</th>
<th>Estimated Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Real property:</td>
<td></td>
</tr>
<tr>
<td>Bank accounts:</td>
<td></td>
</tr>
<tr>
<td>Automobiles:</td>
<td></td>
</tr>
<tr>
<td>Personal property:</td>
<td></td>
</tr>
<tr>
<td>Business assets:</td>
<td></td>
</tr>
<tr>
<td>Other assets:</td>
<td></td>
</tr>
</tbody>
</table>
**Information to establish the place of probate:**

In what county did the decedent reside?  
______________________________

In what county did the decedent die?  
______________________________

If property of the decedent is located in any other county, what is that county?  
______________________________

If real property of the decedent (land) is located in a state other than Oregon, what is that state?  
______________________________

**Information concerning potential disputes:**

Are there any questions concerning the validity of a will, whether the decedent promised to leave assets to someone other than as provided in the decedent's will, the relationships of persons to the decedent (for example, children born outside of marriage or the validity of a marriage), or ownership of assets by the decedent?

- yes  no  

Did the decedent ever sign a "living trust", that is, a document transferring his or her assets to a trust of which he or she was trustee?

- yes  no  

Did the decedent sign an "antenuptial agreement", that is, an agreement prior to marriage with the new spouse regarding inheritance rights?

- yes  no  

Are you considering a wrongful death claim (a legal action to recover damages from someone responsible for the death of the decedent)?

- yes  no  

Has the Internal Revenue Service or Oregon Department of Revenue audited the decedent's tax returns in recent years?

- yes  no  

**Other information that may be required in a probate proceeding:**

If the decedent was married to someone who died while they were married, identify the former spouse. Name ___________________________ Social Security no. ____________ Date of Death ________________________.

What was the last year for which the decedent filed income tax returns, if known? ________

Did the decedent have sufficient income (or any withholding) in this year to require an income tax return?

- yes  no  

- don't know

**Documents to bring to the initial meeting with the probate attorney, if possible:**

Original will and affidavit of witnesses.

Original or copy of trust document, if the decedent ever created or was beneficiary of a trust

Death certificate (available about one week after death, usually provided by funeral home)
Chapter 8

Mandatory Elder Abuse Reporting for Lawyers

TROY WOOD
Oregon State Bar
Tigard, Oregon

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Question 1: What is Mandatory Elder Abuse Reporting?

The Oregon elder abuse reporting law is found at ORS 124.050 to ORS 124.095. It imposes a legal obligation on certain “public and private officials” to report elder abuse. Lawyers are included in the definition of “public or private officials” having a duty to report. ORS 124.050(9). Physicians; dentists; optometrists; chiropractors; nurses; police officers; firefighters; Department of Human Services (DHS) and Oregon Health Authority workers; owners and employees of adult foster care facilities; clergy; social workers; psychologists, counselors, and psychotherapists; physical, speech and occupational therapists; audiologists; speech pathologists; senior center workers; information and referral or outreach workers and members of the Legislative Assembly are among the other mandatory reporters.

Oregon is in the midst of a demographic shift: As baby boomers age, our population as a whole is aging. Each year, over 50,000 Oregonians turn 65 years old. The median age of Oregon’s population was 30.3 in 1980, but is forecast to rise to 39.7 by 2020. With advancing age come declining health and greater reliance on family members and caregivers. And elder abuse is a significant problem. In 2014, DHS investigated and substantiated over 2,500 instances of elder abuse in Oregon. Nationally, one in ten elders living at home is subject to abuse, neglect, or exploitation.

Question 2: What Are Lawyers Required To Do?

Elder abuse reporting is a 24-hour-a-day, 7-day-a-week responsibility. Reporting is required whenever a lawyer has “reasonable cause to believe that any person 65 years of age or older with whom the [lawyer] comes in contact has suffered abuse, or that any person with
ORS 124.060. The administrative rules encourage voluntary reporting in situations where reporting is not mandated. OAR 411-020-0020(2). Failure to report as required by the statute is a Class A violation. ORS 124.990. The penalty for a Class A violation is a maximum fine of $2,000. ORS 153.018(2)(a).

Oregon Rule of Professional Conduct (RPC) 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client.\(^1\) RPC 1.6(b)(5) permits, but does not require, a lawyer to disclose information relating to the representation of a client when required by law. A lawyer may report elder abuse as required by law without violating the lawyer’s ethical duty of confidentiality to a client.

Note that when one of the exceptions to reporting applies (Question 6, below), the law does not require reporting, and therefore would not permit a lawyer to disclose information protected by RPC 1.6. In addition, RPC 1.6(b)(5) permits disclosure only to the extent required by law; it does not give a lawyer permission to reveal information about elder abuse that the law does not require be reported. A lawyer cannot use the permission in the disciplinary rule to justify disclosing information about elder abuse that is not required to be reported by the exceptions in ORS 419B.010.

**Question 3: What Is “Reasonable Cause?”**

There are no reported cases applying or interpreting this term specifically in connection with the abuse reporting statutes. The Department of Human Services interprets “reasonable cause” in related statutes as being equivalent to “reasonable suspicion.” *A.F. v. Dep’t of Human Res. ex rel. Child Protective Servs. Div.*, 251 Or App 576, 590, 98 P3d 1127 (2012); *Berger v. State Office for Services to Children and Families*, 195 Or App 587, 590, 98 P3d 1127 (2004). In that context, “‘[r]easonable suspicion’ means a reasonable belief given all of the circumstances, based upon specific and describable facts, that the suspicious physical injury may be the result of abuse.” The rule further explains:

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\(^1\) Lawyers similarly are required by ORS 9.460 to “maintain the confidences and secrets of ... clients consistent with the rules of professional conduct ... .” ORS 9.460 uses the terminology of former DR 4-101, which has been replaced by RPC 1.6.
“The belief must be subjectively and objectively reasonable. In other words, the person subjectively believes that the injury may be the result of abuse, and the belief is objectively reasonable considering all of the circumstances. The circumstances that may give rise to a reasonable belief may include, but not be limited to, observations, interviews, experience, and training. The fact that there are possible non-abuse explanations for the injury does not negate reasonable suspicion.”

OAR 413-015-0115(37). Similarly, “reasonable suspicion” for an officer to stop an individual in the criminal law context is defined as “a belief that is reasonable under the totality of the circumstances existing at the time and place the peace officer acts.” ORS 131.605(5). The standard is an “objective test of observable facts” and requires the officer “to point to specific articulable facts that give rise to a reasonable inference that a person has committed a crime.” State v. Ehly, 317 Or 66, 80, 854 P2d 421 (1993).

By contrast, the standard of “probable cause” for arrest in the criminal law context is generally thought of as a higher standard than that of “reasonable suspicion.” “Probable cause” is defined by ORS 131.005(11) as a “substantial objective basis for believing that more likely than not an offense has been committed and a person to be arrested has committed it.” In State v. Childers, 13 Or App 622, 511 P2d 447 (1973), the court held that a police officer did not have probable cause to make a warrantless search for marijuana since he was uncertain whether he had smelled it. The court cited the probable cause standard as the existence of circumstances that would lead a reasonably prudent person to believe that an event had occurred, and distinguished it from “mere suspicion or belief ... .” Id. at 629.

Interpreting “reasonable cause” in the context of obtaining a subpoena for bank records under ORS 192.565(6), the court in State v. McKee, 89 Or App 94, 99, 747 P3d 395 (1987), held that a showing of reasonable cause required a recital of known facts, not mere conclusory statements. In another case, a merchant was found to have reasonable cause to detain a suspected shoplifter when the merchant saw the person leaving the store with unpaid-for

A potential “floor” for “reasonable cause” is found in ORS 124.075, which provides immunity to reporters for criminal and civil liability. In order to qualify for immunity, the reporter must “participat[e] in good faith” in the reporting process, and have “reasonable grounds” for the making of the report. Outside the client representation context, attorneys are well advised to use this standard for determining when to make a report of potential elder abuse.

**Question 4: What Is “ Comes In Contact?”**

“Comes in contact” is a more unfamiliar phrase that is also not defined in the statute or case law. A dictionary definition of “contact” includes “a touching or meeting” and “association or relationship (as in physical or mental or business or social meeting or communication).” *Webster’s Third New International Dictionary* 490 (unabridged ed 1993). That definition, and common usage, suggest that a lawyer is required to report elder abuse only when the lawyer has had some kind of physical or associational contact with a person who has abused an elder or with an elder who has been abused. This does not necessarily mean “in person” contact; telephone or even email or written contact would likely suffice.

The “comes in contact” requirement does not appear to modify the “reasonable cause” requirement. In other words, the statute does not appear to require reporting only when the lawyer learns of the abuse directly from the victim or the abuser. Reliable second- or third-hand information may provide reasonable cause to believe that abuse has occurred; reporting would then be required if the lawyer had come in contact with either the abuser or the victim. For example, if a neighbor tells a lawyer that she heard from another neighbor that an elder living down the street (with whom the lawyer has occasional contact) appears to have been abused,

² The statute applied in *Delp*, which allows merchants to detain suspected shoplifters, has since been amended to require “probable cause” as opposed to “reasonable cause.” See ORS 131.655(1).
the lawyer may have reasonable cause to believe that abuse occurred if the lawyer believes the neighbors are reliable sources of information.

It is sometimes suggested, under a broad reading of the statute and its purpose, that “contact” includes knowledge of abuse even without any physical or associational contact with the victim or the abuser. The Attorney General does not interpret the statute so broadly, opining in another context that “physicians, psychologists and social workers who serve as members of the board of directors of a self-help child abuse prevention organization, but who do not provide direct services, are not required to report suspected child abuse when they acquire that information indirectly in their official capacities as board members.” Attorney General Letter of Advice to Sen Margie Hendriksen (OP-5543) (June 12, 1984). The basis for the opinion lies primarily in the fact that the list of mandatory reporters in Oregon consists of professionals and service providers who are most likely to come into direct contact with victims or perpetrators of child abuse. “We believe that if the drafter of [the statute] had intended to impose a mandatory reporting duty, violation of which is punishable by a substantial fine ... , upon persons who merely have knowledge about child abuse, from whatever source, they would have said so clearly.” Id.

**Question 5: What Is Elder Abuse?**

The elder abuse reporting statute identifies the types of conduct that constitute elder abuse:

- **Infliction of Pain or Physical Injury:** Pain or injury caused by other than accidental means or apparently inconsistent with the explanation given for it. According to regulation, this includes force-feeding and all physical punishments. OAR 411-020-0002(a)(B)(ii). Physical abuse is presumed to injure and inflict pain upon someone who is non-responsive. See OAR 411-020-0002(a)(C).

- **Abandonment or Neglect:** This includes desertion as well as withholding caretaking responsibilities.
• Financial Exploitation: Defined in ORS 124.050(4). Wrongful taking of an elder’s property; a threat of taking that causes alarm to an elder; stealing or transferring account funds without authorization (even if jointly held); failing to use the elder’s resources effectively for their support.

• Sex Abuse: Commission of a crime enumerated in the statute, including both public and private indecency.

• Involuntary Seclusion: For convenience or discipline.

• Wrongful Use of Physical or Chemical Restraints: Authorized medical or legal uses are excluded.

ORS 124.050(1).

Lawyers, like many mandatory reporters, may not be experts in identifying abuse and are not expected to be. The law does not require lawyers to conduct investigations into suspected abuse, but lawyers should make reasonable inquiries where possible to follow up on initial observations or information that appears to involve elder abuse, to ensure that they have “reasonable cause” to believe that abuse has occurred. The intent of the statute is to get at-risk seniors into a regulatory system where the circumstances will be evaluated and, as necessary, addressed by qualified professionals. Hence, the standard for reporting is only “reasonable cause,” not “certainty.”

Question 6:  Are There Any Exceptions To The Reporting Requirement?

There are three exceptions to the statutory reporting requirement:

• Lawyers, together with clergy, psychiatrists, and psychologists, are not required to report information “communicated by a person if the communication is privileged under ORS 40.225 to 40.295 [OEC 503 – OEC 295].” ORS 124.060.

• A lawyer is also not required to report elder abuse based on information communicated to the lawyer “in the course of representing a client if disclosure of the information would be detrimental to the client.” Id.
• “An elderly person who in good faith is voluntarily under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for this reason alone, not be considered subjected to abuse by reason of neglect ... .”
ORS 124.095.

The effect of these statutory exceptions to the duty to report is that most of the information a lawyer will be required to report will be that learned outside the lawyer’s “official capacity.” For instance, witnessing an act of abuse in a public place will trigger the reporting obligation, despite the fact that the lawyer may not have a lot of information to report. Similarly, information that a non-client friend or neighbor is abusing an elder, or is a victim of abuse, must be reported.

A. Privileged Communications.

The first exception relates to statutory privileges. Lawyers are not required to report information that is “privileged under ORS 40.225 to 40.295.” ORS 40.225 is OEC 503, the lawyer-client privilege. The reference, however, encompasses thirteen other privileges: psychotherapist-patient (OEC 504), physician-patient (OEC 504-1), nurse-patient (OEC 504-2), school employee-student (OEC 504-3), clinical social worker-client (OEC 504-4), husband-wife (OEC 505), clergy-penitent (OEC 506), counselor-client (OEC 507), stenographer-employer

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3 A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. A “confidential communication” is one that is “not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” Confidential communications include those (1) between the client or the client’s representative and the client’s lawyer or a representative of the lawyer, (2) between the client’s lawyer and the lawyer’s representative, (3) by the client or the client’s lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of a client, or (5) between lawyers representing the client. OEC 503.
(508A), public officer (OEC 509), disabled person-sign language interpreter (OEC 509-1), non-
English speaking person-interpreter (OEC 509-2), and informer (OEC 510).\footnote{Also included is OEC 512, “privileged matter disclosed under compulsion or without
opportunity to claim privilege.”}

Clearly, if a lawyer learns in a privileged communication with a client that the client has
abused an elder, the lawyer is not required to report. What, however, of information protected
by one of the other privileges contained in ORS 40.225 to 40.295? Can ORS 419B.010(1) be read
to also exempt a lawyer from reporting information that is protected by any one of the other
thirteen privileges even if it was not, for some reason, covered by the attorney-client privilege?
For instance, what if the lawyer receives a report containing the client’s disclosure to a
psychotherapist that the client committed abuse, but the client has never made the disclosure
directly to the lawyer. Is the lawyer exempted from reporting the information because it is
protected by the psychotherapist-patient privilege? Or is the psychotherapist-patient privilege
lost when the report is delivered to the lawyer? The first question to ask in a situation such as
the foregoing is whether the information continues to be privileged; if so, there remains the
unanswered question of whether a lawyer is excepted from reporting information protected by
the other privileges.

Although the plain language of the statute suggests that lawyers, psychiatrists,
psychologists and clergy are excused from reporting information protected by all the statutory
privileges, there is no authority interpreting the scope of the privilege exception. Given that
absence of authority and the broad protective purpose behind the statute, prudence may
dictate a less expansive reading.

B. \textbf{Information Detrimental to Client if Disclosed.}

The second exception to mandatory reporting applies only to lawyers, and tracks to
some extent a lawyer’s ethical obligation to protect confidential client information. Lawyers are
prohibited by RPC 1.6(a) from revealing “information relating to the representation of a client.”
“Information relating to the representation of a client” is defined in RPC 1.0(f) as both

“information protected by the lawyer-client privilege under applicable law” and “other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”

Clearly then, “information relating to the representation” is not limited to information that is privileged because communicated by the client. Information protected under Oregon RPC 1.6 includes information learned from witnesses and other third parties as well as information imparted by the client that is, for some reason, not covered by the privilege. All that is required is that it be gained during the course of the professional relationship between the lawyer and the client, and either that the client has requested it be “held inviolate” or that it would be embarrassing or detrimental to the client if revealed.

In creating a statutory exception for only some of the information that would be protected by RPC 1.6, the legislature limited the reporting exception to information that would be detrimental (not merely embarrassing) to the client if disclosed. This appears to be the legislature’s way of reconciling the sanctity of the lawyer-client relationship with the interest of protecting elders from abuse. The legislature appears to have concluded that mere embarrassment to a client is not sufficient justification for the lawyer to ignore elder abuse.

C. Treatment by Spiritual Means Through Prayer.

This exception is not elaborated in case law or in regulation. Practitioners should note that it is very narrow. The treatment must be “voluntary”; beliefs of the caregiver are irrelevant to the determination of whether reporting is required. The treatment must be “through prayer.” It must be “in accordance with the tenets and practices of a recognized church or religious denomination” and conducted “by a duly accredited practitioner” of the church. Here as elsewhere, attorneys should err on the side of reporting and letting DHS evaluate the situation.

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5 These are the definitions, respectively, of “confidences” and “secrets” from former DR 4-101.
Question 7:  What If Someone Expresses The Intent To Commit An Act Of Elder Abuse?

ORS 124.060 mandates reporting only when there is reasonable cause to believe that an elder “has suffered abuse” or that a person “has abused a person 65 years of age or older.” It does not require advance reporting of possible future abuse, except where the future abuse constitutes “verbal abuse” under ORS 124.050(1)(f). “Verbal abuse” is defined in regulation to include “threatening significant physical harm or threatening or causing significant emotional harm to an adult ... .” OAR 411-020-0002(1)(d)(A).

If the situation does not involve “verbal abuse” within the meaning of ORS 124.050(1)(f), reporting may still be possible. RPC 1.6(b)(1) permits a lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary “to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime.” There is also no lawyer-client privilege under OEC 503(4)(a) “if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.” RPC 1.6(b)(2) permits a lawyer to reveal information otherwise protected to the extent the lawyer reasonably believes necessary “to prevent reasonably certain death or substantial bodily harm,” whether or not a crime is involved. When used in reference to degree or extent, “substantial” denotes “a material matter of clear and weighty importance.” RPC 1.0(o).

It is not clear that all incidents of elder abuse identified in the statute constitute crimes. A lawyer whose client has expressed a clear intention to commit elder abuse in the future should ascertain first whether the intended conduct is a crime or if it puts a person at risk of reasonably certain death or substantial bodily harm. If so, the lawyer may disclose information necessary to prevent the intended conduct.

A voluntary report of suspected future abuse that is not required under ORS 124.060 is subject to the same statutory confidentiality and immunity as a mandatory report. See ORS 124.075; ORS 124.085; ORS 124.090.
Chapter 8—Mandatory Elder Abuse Reporting for Lawyers

Question 8: Are Lawyers Obligated to Report Elder Abuse Occurring Outside Of Oregon?

While all states have adopted some form of elder abuse prevention laws, the laws are not uniform and lawyers are not mandatory reporters in all jurisdictions. Lawyers who are licensed in multiple jurisdictions should be attentive to the statutory requirements of each jurisdiction as well as to the interplay between those statutory requirements and the disciplinary rules to which the lawyer is subject.

The scope of Oregon’s mandatory elder abuse reporting law is not clear with respect to incidents occurring outside of Oregon or involving abusers and victims who are not residents of Oregon. Nothing in the statute can be read to limit reporting only to incidents occurring within the state. The language of the statute sweeps broadly to include “any person 65 years of age or older” who has been abused and “any person” who has abused an elder.

A lawyer who wishes to act most cautiously should make a report to DHS of the out-of-state incident and allow DHS to determine whether and how to deal with the information. Reporting in that circumstance does not violate any ethical responsibility of the lawyer or violate any right of the persons involved; moreover, it is consistent with the policy behind the DHS regulation that encourages encourage voluntary reporting. See OAR 411-020-0020(2).

Question 9: What Type Of Report Is Required And To Whom Must It Be Made?

The statute requires that “an oral report be made immediately by telephone or otherwise ... .” ORS 124.065(1). Reports must be made to the local office of the Department of Human Services or a law enforcement agency within the county where the person making the report is located at the time of the contact. ORS 124.050(6) defines “law enforcement agency” to mean:

- a city or municipal police department,
- a county sheriff’s office,
- the Oregon State Police,
- a police department established by a university, or

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6 The statewide telephone number for reporting suspected abuse is 1-855-503-SAFE (7233).
• any district attorney.

The report must contain, if known:

• the names and addresses of the elderly person and any persons responsible for care of the elderly person,
• the nature and extent of the abuse, including any evidence of previous abuse,
• the explanation given for the abuse, and
• any other information that might be helpful in establishing the cause of the abuse and the identity of the perpetrator.

ORS 124.065(1).

When a report of a potential crime is received by DHS, it is required to notify law enforcement. ORS 124.065(2); see also ORS 124.065(3). When law enforcement receives a report of elder abuse, it is required to notify both DHS and the law enforcement agency having jurisdiction. ORS 124.065(4).

**Question 10: Are Elder Abuse Reports Confidential?**

Notwithstanding Oregon’s public records law, “the names of the public or private official or any other person who made the complaint, the witnesses and the elderly persons, and the reports and records compiled under the [elder abuse reporting law], are confidential and are not accessible for public inspection. ORS 124.090(1). DHS is required to make the reports available in some circumstances and permitted to do so in other circumstances. ORS 124.090(2). Recipients of records under DHS’s mandatory or permissive disclosure authority are also required to maintain the confidentiality of the records. ORS 124.090(3).

The confidentiality is not absolute, as a reporter may be required to testify in juvenile or criminal court proceedings relating to the report. In criminal proceedings, the alleged abuser’s constitutional right to confront witnesses would override the statutory confidentiality.

Confidentiality may be enhanced by reporting anonymously. While there is no requirement in the statute that the reporter identify him- or herself, it is also clear that the statute does not contemplate anonymous reporting, and it is likely not preferred by DHS. Law enforcement and DHS will accept anonymous reports. Because of the liability that can result
from not reporting, lawyers should weigh the desire for confidentiality with the possible need for proof that a report was in fact made as required.

**Question 11: What If I Am Wrong, And There Really Was No Abuse?**

A person who acts in good faith in making a report of elder abuse, and who has reasonable grounds for doing so, is immune from civil or criminal liability for making the report and for the content of the report. Reporters have the same immunity with respect to their participation in any judicial proceeding resulting from the report. ORS 124.075(1); see also **McDonald v. State of Oregon**, 71 Or App 751, 694 P2d 569 (1984) (negligence claim against teacher dismissed because plaintiffs failed to assert any facts to negate teacher’s good faith and reasonable grounds to report child abuse, notwithstanding the fact that the report was later determined to be unfounded).

The efficacy of the foregoing immunity provision may be open to question, based on the Oregon Supreme Court’s decision in **Smothers v. Gresham Transfer, Inc.**, 332 Or 83, 23 P3d 333 (2001). That case held that the exclusive remedy of the workers’ compensation statutes violated Article I, Section 10, of the Oregon Constitution, to the extent that it left the plaintiff without a remedy for an injury not compensable under the workers’ compensation system. Similarly, the immunity granted by ORS 124.075(1) may conflict with the arguable common-law right of an alleged abuser to sue the abuse reporter for defamation.

**Question 12: Are Lawyers Liable For Not Reporting Elder Abuse?**

As mentioned above, failure to report elder abuse when required under the statute is a Class A violation, punishable by a fine. The bar is aware of at least two cases in which a mandatory reporter (not a lawyer) was prosecuted for failing to report child abuse. In one case, the official informed the parents of the victim, who took immediate and apparently successful steps to protect her. The official also informed her supervisor. She was prosecuted for not reporting to DHS exactly as the statute required; she was eventually acquitted. In another case, a mother who was also a mandatory reporter was found to have violated her duty when she failed to immediately report the abuse of her own daughter. **See Dep’t of Human Servs. v. F.L.B.**, 255 Or App 709, 711–12, ___ P3d ___ (2013).
Civil liability is also a possibility. There are no reported cases in Oregon imposing liability on mandatory reporters for failure to report elder abuse, but at least one jury has rendered a verdict in favor of a plaintiff based in part on the defendant’s failure to report child abuse. See Shin v. Sunriver Prep. School, 199 Or App 352, 111 P3d 352 (2005). A statutory tort theory may provide the basis for liability because the mandatory reporting statute “imposes a duty to protect a specified group of persons.” Scovill v. City of Astoria, 324 Or 159, 172, 921 P2d 1312 (1996) (setting forth the statutory tort analysis in the context of the protective custody statute, ORS 430.399). In addition, the Court of Appeals has held that a child who had been sexually abused could state a claim for negligence against the Children’s Services Division (CSD) by alleging that CSD breached its statutory duty to investigate abuse allegations. Blachly v. Portland Police Dept., 135 Or App 109, 898 P2d 784 (1995).

**Question 13: What Does the Law Require the Oregon State Bar to Do in Connection with Elder Abuse Reporting?**

The bar is required to ensure that attorneys complete one hour of training every three years regarding their obligations under the mandatory elder abuse reporting law. ORS 9.114.

**Question 14: Are Lawyers also Mandatory Reporters of Child Abuse?**

Yes. The parameters are similar to the elder abuse reporting requirement. A lawyer must report child abuse when he or she has reasonable cause to believe child abuse has occurred, and the lawyer has had contact with the potential victim or the alleged abuser. ORS 419B.010(1). The threshold for reporting is low, and the scope of abuse encompassed within the law is broad. Additional information may be found in a separate Q&A sheet on child abuse reporting. An exception is provided for information acquired in a privileged context. See id.

**Question 15: Are Lawyers Mandatory Reporters of Abuse in Other Contexts?**

Yes. First, in certain contexts, lawyers must report suspected abuse of people with developmental disabilities or mental illness. ORS 430.765(1) provides, “Any public or private official who has reasonable cause to believe that any adult with whom the official comes in contact while acting in an official capacity, has suffered abuse, or that any person with whom
or cause a report to be made in the manner required in ORS 430.743.” The legislature has defined “public or private official” to include attorneys. ORS 430.735(12)(i). Under the statute, “Adult” means any person 18 years of age or older with “(a) A developmental disability who is currently receiving services from a community program or facility or was previously determined eligible for services as an adult by a community program or facility; or (b) A mental illness who is receiving services from a community program or facility.” ORS 430.735(2).

In addition, ORS 441.640 requires any public or private official to report abuse of a resident of a long-term care facility. The definition of “public or private official” in this section includes legal counsel for the resident, guardian or family member of the resident. ORS 441.630(6)(h). Long-term care facility means “a facility with permanent facilities that include inpatient beds, providing medical services, including nursing services but excluding surgical procedures except as may be permitted by the rules of the director, to provide treatment for two or more unrelated patients.” ORS 442.015(2).
Chapter 8—Mandatory Elder Abuse Reporting for Lawyers

APPENDIX A
OREGON REVISED STATUTES 2015
REPORTING OF ELDER ABUSE

124.050 Definitions for ORS 124.050 to 124.095. As used in ORS 124.050 to 124.095:
(1) “Abuse” means one or more of the following:
(a) Any physical injury to an elderly person caused by other than accidental means, or which appears to be at variance with the explanation given of the injury.
(b) Neglect.
(c) Abandonment, including desertion or willful forsaking of an elderly person or the withdrawal or neglect of duties and obligations owed an elderly person by a caretaker or other person.
(d) Willful infliction of physical pain or injury upon an elderly person.
(e) An act that constitutes a crime under ORS 163.375, 163.405, 163.411, 163.415, 163.425, 163.427, 163.465, 163.467 or 163.525.
(f) Verbal abuse.
(g) Financial exploitation.
(h) Sexual abuse.
(i) Involuntary seclusion of an elderly person for the convenience of a caregiver or to discipline the person.
(j) A wrongful use of a physical or chemical restraint of an elderly person, excluding an act of restraint prescribed by a physician licensed under ORS chapter 677 and any treatment activities that are consistent with an approved treatment plan or in connection with a court order.
(2) “Elderly person” means any person 65 years of age or older who is not subject to the provisions of ORS 441.640 to 441.665.
(3) “Facility” means:
(a) A long term care facility as that term is defined in ORS 442.015.
(b) A residential facility as that term is defined in ORS 443.400, including but not limited to an assisted living facility.
(c) An adult foster home as that term is defined in ORS 443.705.
(4) “Financial exploitation” means:
(a) Wrongfully taking the assets, funds or property belonging to or intended for the use of an elderly person or a person with a disability.
(b) Alarming an elderly person or a person with a disability by conveying a threat to wrongfully take or appropriate money or property of the person if the person would reasonably believe that the threat conveyed would be carried out.
(c) Misappropriating, misusing or transferring without authorization any money from any account held jointly or singly by an elderly person or a person with a disability.
(d) Failing to use the income or assets of an elderly person or a person with a disability effectively for the support and maintenance of the person.
(5) “Intimidation” means compelling or deterring conduct by threat.
(6) “Law enforcement agency” means:
(a) Any city or municipal police department.
(b) Any county sheriff’s office.
(c) The Oregon State Police.
(d) Any district attorney.
(e) A police department established by a university under ORS 352.121 or 353.125.
(7) “Neglect” means failure to provide basic care or services that are necessary to maintain the health or safety of an elderly person.
(8) “Person with a disability” means a person described in:
(a) ORS 410.040 (7); or
(b) ORS 410.715.

(9) “Public or private official” means:
   (a) Physician or physician assistant
       licensed under ORS chapter 677,
       naturopathic physician or chiropractor,
       including any intern or resident.
   (b) Licensed practical nurse, registered
       nurse, nurse practitioner, nurse’s aide,
       home health aide or employee of an in-
       home health service.
   (c) Employee of the Department of
       Human Services or community
       developmental disabilities program.
   (d) Employee of the Oregon Health
       Authority, local health department or
       community mental health program.
   (e) Peace officer.
   (f) Member of the clergy.
   (g) Regulated social worker.
   (h) Physical, speech or occupational
       therapist.
   (i) Senior center employee.
   (j) Information and referral or outreach
       worker.
   (k) Licensed professional counselor or
       licensed marriage and family therapist.
   (L) Member of the Legislative Assembly.
   (m) Firefighter or emergency medical
       services provider.
   (n) Psychologist.
   (o) Provider of adult foster care or an
       employee of the provider.
   (p) Audiologist.
   (q) Speech-language pathologist.
   (r) Attorney.
   (s) Dentist.
   (t) Optometrist.
   (u) Chiropractor.
   (v) Personal support worker, as defined
       by rule adopted by the Home Care
       Commission.
   (w) Home care worker, as defined in ORS
       410.600.

(10) “Services” includes but is not
     limited to the provision of food, clothing,
     medicine, housing, medical services,
     assistance with bathing or personal hygiene
     or any other service essential to the well-
     being of an elderly person.

(11)(a) “Sexual abuse” means:
   (A) Sexual contact with an elderly person
       who does not consent or is considered
       incapable of consenting to a sexual act
       under ORS 163.315;
   (B) Verbal or physical harassment of a
       sexual nature, including but not limited to
       severe or pervasive exposure to sexually
       explicit material or language;
   (C) Sexual exploitation;
   (D) Any sexual contact between an
       employee of a facility or paid caregiver and
       an elderly person served by the facility or
       caregiver; or
   (E) Any sexual contact that is achieved
       through force, trickery, threat or coercion.
   (b) “Sexual abuse” does not mean
       consensual sexual contact between an
       elderly person and:
       (A) An employee of a facility who is also
           the spouse of the elderly person; or
       (B) A paid caregiver.

(12) “Sexual contact” has the meaning
     given that term in ORS 163.305.

(13) “Verbal abuse” means to threaten
     significant physical or emotional harm to an
     elderly person or a person with a disability
     through the use of:
     (a) Derogatory or inappropriate names,
         insults, verbal assaults, profanity or ridicule;
     (b) Harassment, coercion, threats,
         intimidation, humiliation, mental cruelty or
         inappropriate sexual comments.

124.055 Policy. The Legislative Assembly
finds that for the purpose of preventing
abuse, safeguarding and enhancing the
welfare of elderly persons, it is necessary
and in the public interest to require
mandatory reports and investigations of allegedly abused elderly persons.

124.060 Duty of officials to report; exception. Any public or private official having reasonable cause to believe that any person 65 years of age or older with whom the official comes in contact has suffered abuse, or that any person with whom the official comes in contact has abused a person 65 years of age or older, shall report or cause a report to be made in the manner required in ORS 124.065. Nothing contained in ORS 40.225 to 40.295 affects the duty to report imposed by this section, except that a psychiatrist, psychologist, member of the clergy or attorney is not required to report such information communicated by a person if the communication is privileged under ORS 40.225 to 40.295. An attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client.

124.065 Method of reporting; content; notice to law enforcement agency and to department. (1) When a report is required under ORS 124.060, an oral report shall be made immediately by telephone or otherwise to the local office of the Department of Human Services or to a law enforcement agency within the county where the person making the report is at the time of contact. If known, such reports shall contain the names and addresses of the elderly person and any persons responsible for the care of the elderly person, the nature and the extent of the abuse (including any evidence of previous abuse), the explanation given for the abuse and any other information which the person making the report believes might be helpful in establishing the cause of the abuse and the identity of the perpetrator.

(2) When a report of a possible crime is received by the department under ORS 124.060, the department or the designee of the department shall notify the law enforcement agency having jurisdiction within the county where the report was made. If the department or the designee of the department is unable to gain access to the allegedly abused elderly person, the department or the designee of the department may contact the law enforcement agency for assistance and the agency shall provide assistance.

(3) If the department or the designee of the department determines that there is reason to believe a crime has been committed, the department or the designee of the department shall immediately notify the law enforcement agency having jurisdiction within the county where the report was made. The law enforcement agency shall confirm to the department or the designee of the department its receipt of the notification.

(4) When a report is received by a law enforcement agency, the agency shall immediately notify the law enforcement agency having jurisdiction if the receiving agency does not. The receiving agency shall also immediately notify the local office of the department in the county where the report was made.

124.070 Duty to investigate; notice to law enforcement agency and department; written findings; review by district attorney. (1) Upon receipt of the report required under ORS 124.060, the Department of Human Services or the law enforcement agency shall cause an investigation to be commenced promptly to determine the nature and cause of the abuse. The investigation shall include a visit
to the named elderly person and communication with those individuals having knowledge of the facts of the particular case. If the alleged abuse occurs in a residential facility, the department shall conduct an investigation regardless of whether the suspected abuser continues to be employed by the facility.

(2) If the department finds reasonable cause to believe that a crime has occurred, the department shall notify in writing the appropriate law enforcement agency. If the law enforcement agency conducting the investigation finds reasonable cause to believe that abuse has occurred, the agency shall notify the department in writing. Upon completion of the evaluation of each case, the department shall prepare written findings that include recommended action and a determination of whether protective services are needed.

(3) After receiving notification from the department that there is reasonable cause to believe that a crime has occurred, a law enforcement agency shall notify the department:

(a) That there will be no criminal investigation, including an explanation of why there will be no criminal investigation;
(b) That the investigative findings have been given to the district attorney for review; or
(c) That a criminal investigation will take place.

(4) If a law enforcement agency gives the findings of the department to the district attorney for review, the district attorney shall notify the department that the district attorney has received the findings and shall inform the department whether the findings have been received for review or for filing charges. A district attorney shall make the determination of whether to file charges within six months of receiving the findings of the department.

(5) If a district attorney files charges stemming from the findings of the department and the district attorney makes a determination not to proceed to trial, the district attorney shall notify the department of the determination and shall include information explaining the basis for the determination.

124.071 Deadline to complete abuse investigation; exception; written report required. (1) Investigations commenced by the Department of Human Services pursuant to ORS 124.070 must be completed by the department on or before 120 days after receipt of the report of abuse made under ORS 124.060, unless there is an ongoing concurrent criminal investigation, in which case the department may take a reasonable amount of additional time in which to complete the investigation.

(2) Upon completion of an investigation in accordance with subsection (1) of this section, a written report shall be prepared that includes information as required by rule adopted by the department, including but not limited to the following:

(a) The date and location of the report of abuse and of the incident of abuse that was reported;
(b) The dates that the investigation was commenced and completed and by what entity;
(c) A description of documents and records reviewed during the investigation;
(d) An identification of any witness statements that were obtained during the investigation; and
(e) A statement of the factual basis for any findings and a summary of the findings made as a result of the investigation.
124.072 Required disclosure of protected health information to law enforcement agency; liability for disclosure. (1) Upon notice by a law enforcement agency that an investigation into abuse is being conducted under ORS 124.070, and without the consent of the named elderly person or of the named elderly person’s caretaker, fiduciary or other legal representative, a health care provider must:

(a) Permit the law enforcement agency to inspect and copy, or otherwise obtain, protected health information of the named elderly person; and

(b) Upon request of the law enforcement agency, consult with the agency about the protected health information.

(2) A health care provider who in good faith discloses protected health information under this section is not civilly or criminally liable under state law for the disclosure.

(3) For purposes of this section:

(a) “Health care provider” has the meaning given that term in ORS 192.556.

(b) “Protected health information” has the meaning given that term in ORS 192.556.

124.073 Training for abuse investigators. (1) The Department of Human Services shall:

(a) Using new or existing materials, develop and implement a training and continuing education curriculum for persons other than law enforcement officers required by law to investigate allegations of abuse under ORS 124.070 or 441.650. The curriculum shall address the areas of training and education necessary to facilitate the skills required to investigate reports of abuse, including, but not limited to, risk assessment, investigatory technique, evidence gathering and report writing.

(b) Using new or existing materials, develop and implement training for persons that provide care to vulnerable persons to facilitate awareness of the dynamics of abuse, abuse prevention strategies and early detection of abuse.

(2) For purposes of this section, “vulnerable person” means a person 65 years of age or older.

124.075 Immunity of person making report in good faith; identity confidential. (1) Anyone participating in good faith in the making of a report of elder abuse and who has reasonable grounds for making the report shall have immunity from any criminal or civil liability that might otherwise be incurred or imposed with respect to the making or content of such report. Any such participant shall have the same immunity with respect to participating in any judicial proceeding resulting from such report.

(2) The identity of the person making the report shall be treated as confidential information and shall be disclosed only with the consent of that person or by judicial process, or as required to perform the functions under ORS 124.070.

124.077 Immunity for disclosure to prospective employer. A person who has personal knowledge that an employee or former employee of the person was found by the Department of Human Services, a law enforcement agency or a court to have committed abuse under ORS 124.005 to 124.040, 124.050 to 124.095 or 124.100 to 124.140, is immune from civil liability for the disclosure to a prospective employer of the employee or former employee of known facts concerning the abuse.
124.080 Photographing of victim; photograph as record. (1) In carrying out its duties under ORS 124.070 a law enforcement agency or the Department of Human Services may photograph or cause to have photographed any victim who is the subject of the investigation for purposes of preserving evidence of the condition of the victim at the time of the investigation.

(2) For purposes of ORS 124.090, photographs taken under authority of subsection (1) of this section shall be considered records.

124.085 Catalog of abuse records; confidentiality. A proper record of complaints made under ORS 124.060 and 124.065 shall be maintained by the Department of Human Services. The department shall prepare reports in writing when investigation has shown that the condition of the elderly person was the result of abuse even if the cause remains unknown. The complaints and investigative reports shall be cataloged under the name of the victim but shall be treated as confidential information subject to ORS 124.090, and shall be disclosed only with the consent of that person or by judicial process.

124.087 Policies and guidelines to plan for development and standardization of certain resources and technologies. The Department of Human Services shall adopt policies and guidelines to plan for the development and standardization of resources and technologies to:

(1) Create a database, registry or other electronic record of reports of abuse made under ORS 124.060 and 441.640 and investigations of abuse conducted pursuant to ORS 124.070 and 441.650 with information including, but not limited to:

(a) The date and location of the report of abuse and the incident of abuse that was reported;

(b) If applicable, the date that the initial status report required under ORS 441.650 was completed and a summary of the information required to be contained in the initial status report as set forth in ORS 441.650;

(c) The date that the investigation was commenced and by what entity;

(d) Any actions taken during the course of the investigation, including but not limited to the actions required under ORS 441.650 (6);

(e) The date that a written report, including but not limited to the written report required under ORS 124.071 and 441.650 (6), was completed and a summary of the information contained in the written report; and

(f) The disposition of the report of abuse or the investigation of the report, including but not limited to the date and time that the investigation, if applicable, was completed and the date that a letter of determination under ORS 441.677 was prepared;

(2) Standardize procedures and protocols for making and responding to reports of abuse made under ORS 124.060 and 441.640;

(3) Standardize procedures and protocols for investigations of reports of abuse conducted pursuant to ORS 124.070 and 441.650; and

(4) Promote and coordinate communication and information sharing with law enforcement agencies regarding reports and investigations of abuse under ORS 124.060, 124.070, 441.640 and 441.650.
124.090 Confidentiality of records; exceptions. (1) Notwithstanding the provisions of ORS 192.410 to 192.505, the names of the public or private official or any other person who made the complaint, the witnesses and the elderly persons, and the reports and records compiled under the provisions of ORS 124.050 to 124.095, are confidential and are not accessible for public inspection.

(2) Notwithstanding subsection (1) of this section, the Department of Human Services or the department’s designee may, if appropriate, make the names of the witnesses and the elderly persons, and the reports and records compiled under ORS 124.050 to 124.095, available to:

(a) A law enforcement agency;

(b) A public agency that licenses or certifies residential facilities or licenses or certifies the persons practicing in the facilities;

(c) A public agency or private nonprofit agency or organization providing protective services for the elderly person;

(d) The Long Term Care Ombudsman;

(e) A public agency that licenses or certifies a person that has abused or is alleged to have abused an elderly person;

(f) A court pursuant to a court order or as provided in ORS 125.012; and

(g) An administrative law judge in an administrative proceeding when necessary to provide protective services as defined in ORS 410.040 to an elderly person, when in the best interests of the elderly person or when necessary to investigate, prevent or treat abuse of an elderly person.

(3) Information made available under subsection (2) of this section, and the recipient of the information, are otherwise subject to the confidentiality provisions of ORS 124.050 to 124.095.

124.095 Spiritual treatment not abuse. An elderly person who in good faith is voluntarily under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for this reason alone, not be considered subjected to abuse by reason of neglect under ORS 124.050 to 124.095.
APPENDIX B
OREGON REVISED STATUTES 2015
PRIVILEGES

40.225 Rule 503. Lawyer-client privilege. (1) As used in this section, unless the context requires otherwise:
   (a) “Client” means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.
   (b) “Confidential communication” means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
   (c) “Lawyer” means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
   (d) “Representative of the client” means:
       (A) A principal, an officer or a director of the client; or
       (B) A person who has authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client, or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the person’s scope of employment for the client.
   (e) “Representative of the lawyer” means one employed to assist the lawyer in the rendition of professional legal services, but does not include a physician making a physical or mental examination under ORCP 44.

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
   (a) Between the client or the client’s representative and the client’s lawyer or a representative of the lawyer;
   (b) Between the client’s lawyer and the lawyer’s representative;
   (c) By the client or the client’s lawyer to a lawyer representing another in a matter of common interest;
   (d) Between representatives of the client or between the client and a representative of the client; or
   (e) Between lawyers representing the client.

(3) The privilege created by this section may be claimed by the client, a guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer’s representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(4) There is no privilege under this section:
   (a) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
   (b) As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;
(c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;
(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
(e) As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(5) Notwithstanding ORS 40.280, a privilege is maintained under this section for a communication made to the office of public defense services established under ORS 151.216 for the purpose of seeking preauthorization for or payment of nonroutine fees or expenses under ORS 135.055.

(6) Notwithstanding subsection (4)(c) of this section and ORS 40.280, a privilege is maintained under this section for a communication that is made to the office of public defense services established under ORS 151.216 for the purpose of making, or providing information regarding, a complaint against a lawyer providing public defense services.

(7) Notwithstanding ORS 40.280, a privilege is maintained under this section for a communication ordered to be disclosed under ORS 192.410 to 192.505.

40.252 Rule 504-5. Communications revealing intent to commit certain crimes.
(1) In addition to any other limitations on privilege that may be imposed by law, there is no privilege under ORS 40.225, 40.230, 40.250 or 40.264 for communications if:
   (a) In the professional judgment of the person receiving the communications, the communications reveal that the declarant has a clear and serious intent at the time the communications are made to subsequently commit a crime involving physical injury, a threat to the physical safety of any person, sexual abuse or death or involving an act described in ORS 167.322;
   (b) In the professional judgment of the person receiving the communications, the declarant poses a danger of committing the crime; and
   (c) The person receiving the communications makes a report to another person based on the communications.
(2) The provisions of this section do not create a duty to report any communication to any person.
(3) A person who discloses a communication described in subsection (1) of this section, or fails to disclose a communication described in subsection (1) of this section, is not liable to any other person in a civil action for any damage or injury arising out of the disclosure or failure to disclose.
APPENDIX C
Selected Oregon Rules of Professional Conduct
(As amended, effective February 19, 2015)

Rule 1.0 Terminology
(f) “Information relating to the representation of a client” denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Rule 1.6 Confidentiality of Information
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
(2) to prevent reasonably certain death or substantial bodily harm;
(3) to secure legal advice about the lawyer's compliance with these Rules;
(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(5) to comply with other law, court order, or as permitted by these Rules; or
(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity. the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer’s clients, except to the extent reasonably necessary to carry out the monitoring lawyer’s responsibilities under the terms of the diversion, probation, conditional
reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
### Changes Due to Normal Aging and Potential for Abuse/Neglect

<table>
<thead>
<tr>
<th>Aging Process Changes</th>
<th>Normal Aging Outcomes</th>
<th>Implications For Potential Abuse</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Skin:</strong></td>
<td></td>
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<tr>
<td>Loss of skin thickness</td>
<td>Skin becomes paper thin</td>
<td>Immobilization and neglect may cause bedsores, skin infection, bruises, skin laceration (potential for physical abuse)</td>
</tr>
<tr>
<td>Atrophy of sweat glands and decreased blood flow</td>
<td>Decreased sweating, loss of skin water, dry skin</td>
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<tr>
<td>Increased wrinkles and laxity of skin</td>
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<td><strong>Lung:</strong></td>
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<tr>
<td>Decreased lung tissue elasticity</td>
<td>Reduced overall efficiency of gases exchanged</td>
<td>Immobilization and neglect may cause lung infection</td>
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<tr>
<td>Decreased respiratory muscle strength</td>
<td>Reduced ability to handle secretions and foreign particles</td>
<td>Decreased stamina may result in dependence and isolation</td>
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<tr>
<td><strong>Heart changes:</strong></td>
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<tr>
<td>Heart valves thicken</td>
<td>Increased fatty deposits in artery wall</td>
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<tr>
<td>Increased hardening, stiffening of blood vessels</td>
<td>Increased hardening, stiffening of blood vessels</td>
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<tr>
<td>Decreased sensitivity to change in blood pressure</td>
<td>Decreased responsiveness to stress, confusion, and disorientation</td>
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<tr>
<td><strong>Gastric and intestinal:</strong></td>
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<tr>
<td>Atrophy and decreased number of taste buds Decreased gastric secretion Decreased gastric muscle tone</td>
<td>Altered ability to taste sweet, sour, salt and bitter Possible delay in vitamin and drug absorption Altered motility Decreased peristalsis Decreased hunger sensations and emptying time</td>
<td>Mal/under nutrition Fecal impaction (potential physical abuse) Change in how medications are absorbed, resulting in possible over-medicating, resulting in falls, confusion, etc.</td>
</tr>
</tbody>
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**National Clearinghouse on Abuse in Later Life (NCALL)**
A Project of Wisconsin Coalition Against Domestic Violence
307 S. Paterson St., Suite 1, Madison, Wisconsin 53703-3517
Phone: 608-255-0539 • Fax/TTY: 608-255-5360 • [www.ncall.us](http://www.ncall.us) • [www.wcadv.org](http://www.wcadv.org)
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<th>Aging Process Changes</th>
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<tr>
<td><strong>Bladder:</strong></td>
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<tr>
<td>Decreased bladder muscle tone and bladder capacity</td>
<td>Increased residual urine Sensation of urge to urinate may not occur until bladder is full Increased risk of infection, stress incontinence Urination at night may increase Enlarged prostate gland in male</td>
<td>Incontinence along with immobilization and neglect may cause skin breakdown and/or bedsores Potential for falls and injuries when having to get up more at night Incontinence is the single most predictive factor for abuse</td>
</tr>
<tr>
<td><strong>Muscles, joint, and bone:</strong></td>
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<tr>
<td>Decreased muscle mass Deterioration of joint cartilage Decreased bone mass Decreased processing speed and vibration sense Decreased nerve fibers</td>
<td>Decreased muscle strength and increased muscle clamping Greater risk of fractures; limitation of movement; Potential for pain</td>
<td>Immobilization and neglect may cause contracture deformities (potential for physical and psychological abuse) Increased potential for falls More likely to fracture under less impact than a bone of a younger person Less strength resulting in increased isolation and dependence on caregiver</td>
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<tr>
<td><strong>Sensory:</strong></td>
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<tr>
<td>Changes in sleep-wake cycle Slower stimulus identification and registration Decreased visual acuity Slower light and dark adaptation Difficulty in adapting to lighting changes Distorted depth perception Impaired color vision Changes in lens Diminished tear secretion Decreased tone discrimination Decreased sensitivity to odors Reduced tactile sensation</td>
<td>Increased or decreased time spent sleeping Increased nighttime awakenings Delayed reaction time Prone to falls Increased possibility of disorientation Glare may pose an environmental hazard Incorrect assessment of height of curbs and steps Presbyopia (diminished ability to focus on near objects) Presbycusis (high frequency sounds lost) Less able to differentiate lower color tones e.g. blues, greens Dullness and dryness of the eyes Decreased ability to sense pressure, pain, temperature</td>
<td>Neglect and social isolation (potential for financial abuse) Falls, fractures, and injuries (potential for physical and psychological abuse)</td>
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<tr>
<td><strong>Immune system:</strong></td>
<td></td>
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<tr>
<td>Decline in secretion of hormones Impaired temperature regulation Impaired immune reactivity Decreased basal metabolic rate</td>
<td>Decreased resistance to certain stresses (burns, surgery, etc.) Increased susceptibility and incidence of infection Increased incidence of obesity</td>
<td>Bedsores Infections Fractures Isolation Dependence</td>
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<tr>
<td>Mental and cognitive:</td>
<td>Short-term memory declines but long-term recall is usually maintained. Difficulty understanding abstract content. Learning abilities change—older adults are more cautious in their responses; are capable of learning new things but their speed of processing information is slower.</td>
<td>Potential for financial abuse and exploitation. Increased risk for self-neglect.</td>
</tr>
</tbody>
</table>

**Source:** California State University, Los Angeles, School of Social (2003). Adult Protective Services Worker Training for the California State University Department of Social Services
Changing Demographics

- 50,000 Oregonians turn 65 each year.
- In 2030, an estimated 20 percent of Oregonians will be 65 or older.
- CDC estimates Oregonians have 15 expected “healthy” years beyond age 65.
- Average Oregonian’s life expectancy is 84.3 years.
Adult Abuse in Oregon

- 28,449 reports of potential abuse in 2013
- 14,250 allegations of abuse were investigated
- 4,221 **substantiated** findings of abuse and neglect
- Unsubstantiated claims are maintained by DHA, and can result in a substantiated claim later on.

Where does abuse occur?

- 66% of abuse occurred in own homes
- 34% of abuse occurred in licensed care settings
“Public or Private Official”

- Police Officers and Firefighters
- Department of Human Services and Oregon Health Authority Workers
- Members of the Legislative Assembly
- Owners and Employees of Adult Foster Care Facilities
- Senior Center Workers and Information and Referral or Outreach Workers
- Physicians, Dentists, Optometrists, Chiropractors, and Nurses
- Audiologists and Speech Pathologists
- Physical, Speech and Occupational Therapists
- Clergy, Social Workers, Psychologists, Counselors, and Psychotherapists
- Attorneys

ORS 124.050(9)

Your Elder Abuse Reporting Duty

If you have:

1. **Reasonable Cause** to Believe;
2. **Elder* Abuse** Has Occurred; and
3. **Contact** with Elder or Abuser

Then You **MUST** Report
**UNLESS** an Exception Applies.

*Person 65 or older

ORS 124.060
Abuse Has Occurred

Note: 66% of Abuse Occurs in Home Settings vs. 34% in Licensed Care Settings

Types of Abuse Reported

2014
Financial Exploitation

- **Wrongfully taking** the property of an elderly person
- **Alarming** an elderly person by a threat to take property
- **Misappropriating** money from any account *(EVEN JOINT)*
- **Failing to use income or assets effectively** for support and maintenance of person

ORS 124.050(4)

*“including, but not limited to, deceit, trickery, subterfuge, coercion, harassment, duress, fraud, or undue influence” (OAR 411-020-0002(1)(e)).*

Financial Exploitation Indicators

- Unusual bank, credit card activities.
- Use of ATM when there has been no prior use of ATM by account holder or account holder does not have access to ATM machines.
- Utilities being shut off.
- Evictions.
- Substandard care or housing when money should be available
- Extraordinary interest by perpetrator in control over financial affairs.
- Request for surrender value on life insurance.
- New power of attorney signed by a confused person. Changes in property titles, wills, etc.
- Mail redirected to another address and/or opened by RP.
- Home filled with sweepstake notices, junk mail, magazines, and unopened ‘gifts’.
- Funds or personal property missing from room at care facility or residence.
- Bills at care facility not getting paid.
Neglect

Neglect, ORS 124.050(7)
- “Failure to provide basic care or services that are necessary to maintain the health or safety of an elderly person.”
- “…assumed responsibility or a legal or contractual agreement...” OAR 411-020-0002 (1)(b)(A)(iii)
- Religious exception, ORS 124.095

Neglect Indicators

Physical Indicators:
- Poor hygiene, soiled clothing, dirty hair or nails, matted or lice infested hair, odors of feces or urine
- Glasses, teeth, hearing aids missing or in poor condition
- Unclothed or improperly clothed for weather
- Skin breakdown or rashes
- Dehydration
- Absence of assistive devices
- Exacerbation of chronic disease despite a plan of care; Worsening dementia.
- Untreated medical or mental conditions;

Behavioral Indicators:
- Emotional distress
- Nightmares or difficulty sleeping
- Sudden loss of appetite
- Confused and disoriented
- Self-destructive behavior.

Abuser Indicators:
- Isolates AV
- Lacks skills to provide care
- Refuses to apply for additional services

Environmental Indicators:
- Absence of necessities;
- Inadequate living environment;
- Signs of medication mismanagement
- Unsafe housing when there are resources to pay for upkeep.

See also: [http://www.ncall.us/](http://www.ncall.us/)
Verbal Abuse

- **Threat of significant harm through:**
  - Derogatory or inappropriate names, insults, verbal assaults, profanity, ridicule
  - Harassment, coercion, threats, intimidation, humiliation, mental cruelty, inappropriate sexual comments
  - Victim’s comprehension immaterial (OAR 411-020-0002(1)(d)(B)(i))

- 124.050(13)

Verbal Abuse Indicators

- **Perpetrator indicators:**
  - Isolation of RV
  - Unreasonably critical, dissatisfied with social and health care providers
  - Shuns and ignores victim
  - Disrespectful to RV, even when APS present

- **Victim Indicators:**
  - Emotional distress
  - Withdrawn
  - Confused and disoriented
  - Will not answer questions.
  - Defers to RP for answers.
  - Minimizes RP’s behaviors.
  - Fear of reported perpetrator

See also: [http://www.ncall.us/](http://www.ncall.us/)
Physical Abuse

- Physical injury or pain
  - “Any physical injury to an elderly person caused by other than accidental means, or which appears to be at variance with the explanation given of the injury.” ORS 124.050(1)(a).
  - Willful infliction of physical pain or injury upon an elderly person. ORS 124.050(1)(d)

- Indicators of physical abuse
  - Unexplained Injuries
  - Multiple Injuries
  - Burns
  - Abrasions
  - Hair and Tooth loss
  - Bruising
  - Pain
  - Bleeding
  - Dislocations, fractures, or sprains
  - Difficulty with normal bodily functions

Abandonment

- Abandonment
  - “… including desertion or willful forsaking of an elderly person or the withdrawal or neglect of duties and obligations owed an elderly person by a caretaker or other person.” ORS 124.050(1)(c).

- Indicators of abandonment:
  - Self report of abandonment.
  - Unexplained and/or unaccompanied presence at a location not frequently attended
  - Unexplained absence from places frequently attended.
  - Unanswered phone calls to residence.
  - Failure to pick individual up from community setting.
  - Caregiver leaves person and premises without arranging for substitute caregiver.
  - See also: http://www.ncall.us/
Sexual Abuse

- Enumerated sex crimes
- Sexual contact without consent
- Sexual harassment
- Sexual exploitation
- Sexual contact with (non-spouse) employee of a paid facility or caregiver

124.050 (11)(a), (1)(h)

Consent not valid if achieved through force, trickery, threat or coercion.

Exception for consensual sexual contact with paid caregiver. ORS 124.050 (11)(b).

Sex Abuse Indicators

- Physical indicators:
  - Difficulties walking or sitting;
  - Torn, stained or bloody underclothing;
  - Pain or itching in genital areas;
  - Unexplained somatic complaints: stomach aches, headaches, loss of appetite;
  - Change in eating patterns to under or over eating;
  - Decline in productivity, concentration, ability to do tasks;
  - Clinging behaviors, fear of being alone; Reclusive or withdrawn behaviors;
  - Unusual or new sexual behavior exhibited;
  - Genital harm or excessive genital touching that is new;
  - Sexual comments

- Mood indicators:
  - Irritability; Withdrawal; Crying, moodiness;
  - Anxiety; Agitation, hyperactivity;
  - Suicidal ideation or behavior

See also: [http://www.ncall.us/](http://www.ncall.us/)
Seclusion & Restraint

- Wrongful use of a physical or chemical restraint
  - “excluding an act of restraint prescribed by a physician licensed under ORS chapter 677 and any treatment activities that are consistent with an approved treatment plan or in connection with a court order.” ORS 124.050(1)(j)

- Involuntary seclusion
  - “…for the convenience of a caregiver or to discipline the person.” ORS 124.050 (1)(i)

Indicators of Seclusion

- Reports from family members or friends regarding inability to see or visit with victim.
- Unexplained absence from places commonly or frequently attended.
- Statements regarding missing certain people or other comments indicating lack of contact with people important to the individual.
- Broken nails, bruising or cuts on hands, or other injury associated with attempting to open a locked door.
- Victim prohibited from using telephone.
- Residence or facility enforcing rules to keep victim in a certain area. See also: http://www.ncall.us/
Reasonable Cause to Believe

What is Reasonable Cause?

- According to DHS it is “reasonable suspicion of abuse.”
- Reasonable suspicion is more than a hunch – ability to point to articulable facts based on totality of the circumstances.
- A report can still be mandated even though no actual abuse has occurred.
Contact with Elder or Abuser

What is Contact?

- Contact need not be linked to abuse
- Can have contact before or after learning of abuse
- Direct vs. Indirect Contact?
  - Oregon Attorney General interpreted “contact” element of child abuse reporting requirement to require more than board members’ receipt of information about abuse through board because acquisition of information was too indirect.
    - AG Op. No. 5543
  - Email or phone?
- No statutory definition or case law interpreting
Then, Must Report If No Exception Applies

Confidentiality of mediation communications and agreements

- ORS 36.220:
  - (1) Except as provided in ORS 36.220 to 36.238:
    - (a) Mediation communications are confidential and may not be disclosed to any other person.
  - ......
  - (5) Any mediation communication relating to elder abuse that is made to a person who is required to report elder abuse under the provisions of ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under the provisions of ORS 124.050 to 124.095.
Chapter 8—Mandatory Elder Abuse Reporting for Lawyers

Exception
Certain Client Confidences

- **Attorney-Client Privileged** under ORS 40.225 (OEC 503) AND/OR
- **Information communicated during representation that is detrimental to client** if disclosed (reconciles RPC 1.6 duty)

Your Ethical Duty

<table>
<thead>
<tr>
<th>RPC 1.6(A) REQUIRES LAWYERS TO PRESERVE CONFIDENCES</th>
<th>RPC 1.6(A),(B) ALLOW LAWYERS TO REVEAL CONFIDENCES IF</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ Attorney-client privileged information AND</td>
<td>✓ Client consents;</td>
</tr>
<tr>
<td>✓ Other information gained during course of</td>
<td>✓ Required by law (including ORS 124.050 et seq.);</td>
</tr>
<tr>
<td>representation IF</td>
<td>✓ Client intends to commit future crime; or</td>
</tr>
<tr>
<td>✓ Client requests to keep secret;</td>
<td>✓ Necessary to prevent reasonably certain death or</td>
</tr>
<tr>
<td>✓ Embarrassing if disclosed; or</td>
<td>substantial body harm.</td>
</tr>
<tr>
<td>✓ Likely detrimental to client if disclosed.</td>
<td></td>
</tr>
</tbody>
</table>

Basic Estate Planning and Administration 2016 8–46
**Elder Abuse Reporting Exceptions vs. RPC 1.6**

MUST NOT REPORT
- if confidential and detrimental
- if A/C Privileged
- ORS 40.225

RPC 1.6
Ethical duty to keep information relating to representation confidential, including information that is (1) a/c privileged, (2) secret, (3) embarrassing, or (4) likely detrimental to client if disclosed.

There is no definition of the term “Detriment” or “Detrimental”

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**To Report or Not to Report?**

<table>
<thead>
<tr>
<th>MUST REPORT</th>
<th>MUST NOT REPORT</th>
<th>MAY REPORT</th>
</tr>
</thead>
<tbody>
<tr>
<td>If you have reasonable cause to believe that elder abuse has occurred and you have had contact with elder or abuser <strong>AND</strong> the information on which you would base your report is (1) not attorney-client privileged or (2) if confidential under RPC 1.6, would not be detrimental to client if disclosed.</td>
<td>If you have reasonable cause to believe that elder abuse has occurred and you have had contact with elder or abuser <strong>BUT</strong> the information on which you would base your report is either (1) attorney-client privileged (ORS 40.225), or (2) is confidential and would be detrimental to your client if disclosed.</td>
<td>If you have reasonable grounds to believe that elder abuse has occurred, you report in good faith, <strong>AND</strong> the information is confidential under RPC 1.6 <strong>BUT</strong> your client consents, or reporting is necessary to prevent reasonably certain death or substantial bodily harm or future crime.</td>
</tr>
</tbody>
</table>
If No Exception Applies........

Then, Must Report

Nuts & Bolts of Reporting

- **Immediately = without delay** to DHS or law enforcement
  - Oral report required
  - Give as much as information as possible
  - Explain allegation of abuse

**Reporting Hotline:**

1-855-503-SAFE

Or DHS Branch Offices:

Report Should Include …

► Names and addresses
► Nature and extent of abuse
► Explanation given for the abuse
► Cause of abuse and identity of perpetrator.

ORS 124.065(1)

Behind the Scenes

- DHS
  - Screening
  - Investigation and Evaluation (Substantiated, Unsubstantiated, Inconclusive)
  - Follow-up with Reporter
- Possible Law Enforcement Involvement
2013 Complaint Outcomes in the Community

<table>
<thead>
<tr>
<th>Outcomes</th>
<th>Incidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Risk reduced</td>
<td>673</td>
</tr>
<tr>
<td>Victim declined intervention</td>
<td>442</td>
</tr>
<tr>
<td>Issue resolved</td>
<td>429</td>
</tr>
<tr>
<td>Referred to District Attorney</td>
<td>369</td>
</tr>
<tr>
<td>Accepted services</td>
<td>235</td>
</tr>
<tr>
<td>Entered care setting</td>
<td>223</td>
</tr>
<tr>
<td>Guardian / Conservator appointed</td>
<td>112</td>
</tr>
<tr>
<td>Victim deceased</td>
<td>56</td>
</tr>
<tr>
<td>Moved out of the area</td>
<td>42</td>
</tr>
<tr>
<td>Services not available</td>
<td>35</td>
</tr>
</tbody>
</table>

Immunity & Confidentiality

- **Civil immunity if**
  - Report made in good faith and
  - Reasonable grounds for report
- **Confidentiality of Reporter** - see ORS 124.075, 124.085, 124.090
- Anonymity would only apply to non-mandatory reports
Consequences

- Class A violation (fine)
- Failure to perform duties of office
- Tort liability
  - Failure to protect from foreseeable harm? Negligence per se?
  - ORS 124.110?
- Ethics violation – not in most cases

Other States:

- Misdemeanor
- Tort liability
  - Statutory Liability
  - Damages from time of discovery and not reported
- Some states have mandatory reporting to the Bar of failure to report

Hypothetical No. 1

You are representing Pat, a 69 year old woman, in a dissolution. You notice that there are large withdrawals from Pat’s savings account. Pat explains that her niece Jane has been taking care of her for the past year, and that she writes Jane regular checks to help pay for groceries for the two of them. The checks total $30,000. You share this information with Pat and she is shocked that the number is so high.

You know that Pat has been experiencing some mild dementia and is under the care of a doctor.

Pat is adamant that she loves Jane and doesn’t want to do anything about it.

Do you have a duty to report elder abuse?
Hypothetical No. 2

At a hot yoga class, your yoga buddy Sam mentions that she is worried about her 71-year-old mother, Sally. Sam explains that Sally is at home recovering from a knee replacement. Sam visited Sally yesterday and she had not bathed for two weeks and complained she had missed several doctor’s appointments.

Sam’s sister, Amanda, is being paid about $1250 a month by the State to take care of Sally, but Sam thinks Amanda may be using the money to improve her shoe collection.

You remember meeting Sally at a yin yoga class a few months ago, prior to her surgery. Do you have a duty to report?

Hypothetical No. 3

Your new neighbor Jack approaches you while you are raking leaves on a beautiful fall day. Jack is concerned that his brothers are bilking his 85 year old father, John, for free vacations and new cars. Jack explains that his father has been despondent after the death of his wife of 50 years, and seems to have lost all of his zest for life.

Jack says his sister, Jill, is really upset with John over the wasteful spending and has threatened to take the rest of his money if he does not stop giving it away. She has threatened to lock him away in a nursing home if he does not stop. Jack says John is still competent to handle his finances.

Do you have a duty to report elder abuse?
Questions?

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